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Investigation
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December 4, 2020

MEMORANDUM TO: Jeffrey I. Kessler
Assistant Secretary
for Enforcement and Compliance

FROM: James Maeder
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Final Affirmative Determination in the Less-Than-Fair-Value Investigation of 4th Tier Cigarettes from the Republic of Korea

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I. SUMMARY

The Department of Commerce (Commerce) finds that 4th tier cigarettes from the Republic of Korea (Korea) are, or are likely to be, sold in the United States at less than fair value (LTFV), as provided in section 735 of the Tariff Act of 1930, as amended (the Act). The petitioner is the Coalition Against Korean Cigarettes (the petitioner).[1] The mandatory respondent subject to this investigation is KT&G Corporation (KT&G). The period of investigation (POI) is October 1, 2018 through September 30, 2019.

Below is the complete list of issues in this investigation for which we received comments from interested parties:

General Issues

Comment 1: Whether 4th Tier Cigarettes are a Distinct Domestic Like Product
Comment 2: Whether the Petition Established Industry Support to Initiate the Investigation
Comment 3: Whether Commerce Clarified the Scope of the Investigation for Proper Product Comparisons
Comment 4: Whether Commerce Correctly Determined Negative Critical Circumstances

KT&G Calculation Issues

Comment 5: Whether Commerce Should Deduct Korean Taxes in the Normal Value (NV) Calculation

[1] The members of the Coalition Against Korean Cigarettes are Xcaliber International and Cheyenne International.

Comment 6: Whether Commerce should include KT&G's sales to Non-Korean Military Forces in Home Market sales
Comment 7: Whether Commerce's level of trade (LOT) adjustment in place of a constructed export price (CEP) Offset was in accordance with law
Comment 8: Whether KT&G unlawfully deducted U.S. Taxes from KT&G's U.S. Price
Comment 9: Whether Commerce Erred in the Rate It Selected to Compute KT&G USA's Imputed Credit Expenses and Inventory Carrying Costs
Comment 10: Whether Commerce Erred in its Treatment of REBATE4U, REBATE5U, and REBATE6U
Comment 11: Whether Commerce Improperly Assumed Certain Returns Were Billing Adjustments in the U.S. Market
Comment 12: Whether Commerce Improperly Classified KT&G's Repacking Costs as a Selling Expense

II. BACKGROUND

On July 22, 2020, Commerce published the *Preliminary Determination* in this investigation, and invited parties to comment on the decision.[2] On, August 13, 2020, at the request of KT&G, Commerce postponed the final determination until December 4, 2020.[3] On August 20 and 21, 2020, both the petitioner and KT&G, respectively, requested a hearing to discuss the issues raised in this investigation.[4] The hearing was held on October 28, 2020.[5]

On October 21, 2020, Commerce published a memorandum stating that, due to the Global Level 4 travel advisory, Commerce personnel are prevented from traveling to conduct verification.[6] Accordingly, Commerce did not conduct a verification of KT&G's responses in this investigation. Parties submitted case briefs on August 26, 2020,[7] and rebuttal briefs on September 2, 2020.[8]

[2] *See 4th Tier Cigarettes from the Republic of Korea: Preliminary Affirmative Determination of Sales at Less Than Fair Value, and Preliminary Negative Determination of Critical Circumstances*, 85 FR 44281 (July 22, 2020) (*Preliminary Determination*), and the accompanying Preliminary Decision Memorandum (PDM).
[3] *See 4th Tier Cigarettes from the Republic of Korea: Postponement of Final Determination of Sales at Less-Than-Fair-Value Investigation*, 85 FR 51011 (August 19, 2020).
[4] *See* Petitioner's Letter, "4th Tier Cigarettes from the Republic of Korea: Petitioner's Request for Hearing," dated August 20, 2020; *see also* KT&G's Letter, "4th Tier Cigarettes from the Republic of Korea: Request for a Hearing," dated August 21, 2020.
[5] *See* Public Hearing Transcript, "The Less-Than-Fair-Value: Case No. Investigation of 4th Tier Cigarettes from the Republic of Korea," dated November 4, 2020.
[6] *See* Memorandum, "Cancellation of Verification," dated October 21, 2020.
[7] *See* Petitioner's Letter, "4th Tier Cigarettes from the Republic of Korea: Case Brief," dated August 26, 2020 (Petitioner Case Brief); *see also* KT&G's Letter, "4th Tier Cigarettes from the Republic of Korea: KT&G Case Brief & Request for a Closed Hearing," dated August 26, 2020 (KT&G Case Brief).
[8] *See* Petitioner's Letter, "4th Tier Cigarettes from the Republic of Korea: Rebuttal Brief," dated September 2, 2020 (Petitioner Rebuttal Brief), *see also* KT&G's Letter, "4th Tier Cigarettes from the Republic of Korea: KT&G's Rebuttal Brief," dated September 2, 2020 (KT&G Rebuttal Brief).

III. SCOPE OF THE INVESTIGATION

The product covered by this investigation are 4th tier cigarettes. For a complete description of the scope of this investigation, *see* this memorandum's accompanying *Federal Register* notice at Appendix I.

IV. CHANGES SINCE THE PRELIMINARY DETERMINATION

We calculated the CEP and NV using the same methodology as the *Preliminary Determination*, with the following exception:

- We have reassigned certain selling expenses from indirect selling expenses to direct selling expenses. *See* Comment 10.

V. DISCUSSION OF THE ISSUES

General Issues

Comment 1: Whether 4th Tier Cigarettes are a Distinct Domestic Like Product

KT&G's Comment

- Commerce's finding that 4th tier cigarettes are a distinct like product from all other cigarettes is not supported by the record.[9]
    - Substantial record evidence demonstrates that there is a single domestic industry consisting of all cigarette producers in the United States.[10]
    - Commerce relies on domestic like product factors analyzed by the U.S. International Trade Commission (ITC), including physical characteristics and uses; interchangeability; channels of distribution; customer and producer perceptions; common manufacturing facilities, production processes, and production employees; and price.[11]
    - KT&G presented evidence that the physical characteristics described in the Petition can apply to cigarettes other than "4th tier" cigarettes.[12]
    - KT&G submitted evidence that some 4th tier cigarette producers have integrated production facilities, contrary to the petitioner's claims.[13]
    - The Petition contains evidence of product switching between premium and budget cigarettes.[14]
    - The Petition failed to establish a clear dividing line between 4th tier cigarettes and other cigarettes on price.[15]

[9] *See* KT&G Case Brief at 5.
[10] *Id*.
[11] *Id*. at 6.
[12] *Id*. at 6-7.
[13] *Id*. at 7.
[14] *Id*.
[15] *Id*. at 7-8.

- Commerce's initiation checklist relied exclusively on evidence provided by the petitioner and did not weigh all the evidence.[16]
- Therefore, Commerce's industry support determination is legally and factually unsupported and did not justify initiation of the investigation.[17]

Petitioner's Rebuttal Comment

- Section 732(c)(4)(E) of the Act restricts Commerce from reconsidering industry support after Commerce initiates an investigation.[18]
- The Court of International Trade (CIT) has stated that Commerce has broad discretion in determining standing and industry support.[19]
- Commerce properly found 4th tier cigarettes to be a separate like product.[20]
  - Commerce previously found that the petitioner's definition of like product was reasonable and substantiated by record evidence.[21]
  - KT&G erroneously claims that Commerce relied exclusively on the petitioner's information.[22]

Commerce's Position: We disagree with KT&G. Commerce's domestic like product determination ultimately affects its industry support determination and, therefore, the basis of the antidumping duty investigation. We agree with the petitioner that Commerce does not revisit industry support determinations after initiating an investigation. Section 732(c)(4)(E) of the Act states, "{a}fter the administering authority makes a determination with respect to initiating an investigation, the determination regarding industry support shall not be reconsidered." Accordingly, Commerce cannot, and will not, reconsider its industry support determination at this point in the proceeding. However, we will respond to the arguments made by KT&G regarding industry support and the basis of the investigation.

First, KT&G argues that Commerce's domestic like product determination is not supported by record evidence. KT&G also asserts that Commerce did not consider evidence submitted by KT&G and that Commerce "exclusively" relied on the submissions of the petitioner.[23] KT&G's characterizations are not accurate. In Attachment II of the Initiation Checklist, we made it clear that our domestic like product determination was based on the "totality of evidence on the record."[24] In the determination, we specifically referenced and acknowledged KT&G's arguments and the evidence presented by KT&G.[25] However, KT&G's arguments were unavailing, and we found the petitioner's arguments to be persuasive.[26]

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[16] *Id*. at 8.
[17] *Id*.
[18] *See* Petitioner Rebuttal Brief at 54-55.
[19] *Id*. at 55.
[20] *Id*. at 58.
[21] *Id*.
[22] *Id*. at 58-59.
[23] *See* KT&G Case Brief at 8.
[24] *See* Antidumping Duty Initiation Checklist: 4th Tier Cigarettes from the Republic of Korea (Initiation Checklist), at Attachment II, Analysis of Industry Support for the Antidumping Duty Petition Covering 4th Tier Cigarettes from the Republic of Korea (Attachment II).
[25] *Id.* at 4-5; *see also Fujitsu Ltd. v. United States*, 36 F. Supp. 2d 394, 398 n.5 (CIT 1999) (*Fujitsu*).
[26] *See* Initiation Checklist, Attachment II at 6.

Regarding the physical characteristic factor in Commerce's domestic like product determination, KT&G argues that some of the physical characteristics of the domestic like product that are described in the Petition apply to non-4th tier cigarettes. In our domestic like product determination, we cited to the petitioner's evidence from a professional with considerable experience in the 4th tier cigarette industry, which outlined several distinct characteristics of the domestic like product.[27] These characteristics include, for example, stem content, packaging, and the use of single component filters.[28] Although KT&G challenged the petitioner's evidence with its own, we did not find KT&G's evidence or arguments to be persuasive.[29] KT&G makes similar arguments concerning the product characteristics in its comments on the scope of the investigation, and we have addressed KT&G's arguments in that context, as well.[30]

Concerning the interchangeability factor in the domestic like product determination, KT&G submits that the Petition's evidence is contradictory and there is evidence of product switching between premium and budget cigarettes.[31] In our determination, we stated that there was a lack of interchangeability between 4th tier cigarettes and non-4th tier cigarettes.[32] Specifically, we noted the "high level of brand loyalty by consumers of non-4th tier cigarettes compared to the lack of brand loyalty by consumers of 4th tier cigarettes" and that customers perceive the products as distinct.[33] Among the evidence cited is a study regarding cigarette purchase patterns, a study regarding the use of premium and discount cigarette brands, an article regarding cigarette quality and price, and a report on the status of the convenience store industry.[34] These articles and reports show that consumers do not treat 4th tier cigarettes as interchangeable with non-4th tier cigarettes. For example, generally non-4th tier cigarettes have more brand loyal customers that do not tend to switch to 4th tier products. However, as KT&G points out, Exhibit I-12 of Volume I of the Petition contains evidence of product switching.[35] Product switching can demonstrate that the products are interchangeable. But Exhibit I-12 as a whole is consistent with the petitioner's characterization that brand-switching is limited and that actual interchangeability is limited.[36] As we stated in our determination, we considered a "totality of evidence on the record" and the evidence as a whole supports the petitioner's assertions that brand switching and actual interchangeability are limited.[37]

[27] *Id*. (citing Petitioner's Letter, "Petitions for the Imposition of Antidumping Duties Pursuant to Section 731 of the Tariff Act of 1930, As Amended (Vol. I: Common Issues and Injury Petition)," dated December 18, 2019 (the Petition) at Volume I, 10-11).
[28] *See* Volume I of the Petition at Exhibit I-10.
[29] *Id*. at 5-6.
[30] *See, e.g.*, Memorandum, "4th Tier Cigarettes from the Republic of Korea: Preliminary Scope Decision Memorandum," dated July 15, 2020 at 5 (Preliminary Scope Memorandum).
[31] *See* KT&G Case Brief at 7.
[32] *See* Initiation Checklist, Attachment II at 6.
[33] *Id*. (citing Volume I of the Petition, Exhibit I-11–I-14).
[34] *Id*.
[35] *See* Volume I of the Petition at Exhibit I-12 ("Observed switching patterns included switching from one discount brand to another discount brand (348/838; 41.5%), switching from a premium brand to a discount brand (269/838; 32.1%), switching from a premium brand to another premium brand (269/838; 26.0%), and switching from a discount to a premium (131/838; 15.6%).")
[36] *Id*. at 3, 5.
[37] *See* Initiation Checklist, Attachment II at 3, 5, and 7.

With respect to channels of distribution, KT&G argues that it provided an affidavit stating that 4th tier cigarettes and non-4th tier cigarettes are sold in the same national retail chains and are sold alongside one another.[38] In our domestic like product determination, we summarized KT&G's argument and the petitioner's responses to KT&G.[39] The evidence in the petition indicated that non-4th tier cigarette producers had limited channels of distribution for 4th tier cigarettes and that 4th tier cigarettes utilize unique methods of advertising.[40] This evidence is further supported by an affidavit submitted by the petitioner.[41] Thus, based on the totality of record evidence, the record continues to support finding that 4th tier cigarettes have limited channels of distribution[42]

The fifth factor we addressed in our domestic like product determination is "common manufacturing facilities, processes, and employees."[43] The Petition states that non-4th tier cigarettes in the United States are "overwhelming{ly} produced by integrated producers," *i.e.*, companies that have "primary tobacco blending operations."[44] KT&G asserts that Commerce disregarded KT&G's evidence that KT&G has integrated production facilities.[45] KT&G's assertion is incorrect. In our determination, we mentioned KT&G's argument on this point and the petitioner's response to KT&G.[46] Specifically, we cited to evidence from the Petition indicating that "no facility in the United States" manufactures both 4th tier cigarettes and non-4th tier cigarettes.[47] We also cited evidence from the Petition indicating that no 4th tier cigarette producer "in the United States" has integrated production operations.[48] Additionally, KT&G's evidence was less persuasive because it was non-responsive to the assertions in the Petition regarding characteristics of U.S. production.

Lastly, the sixth factor we addressed in our domestic like product determination was price. KT&G argues that the differences between 4th tier cigarettes and non-4th tier cigarettes in terms of price can be minimal, considering promotional contracts that a producer may have in place with a given retailer for non-4th tier cigarettes.[49] KT&G also argues that a like product analysis should focus on "clear dividing lines" rather than "minor differences."[50] In our determination, we acknowledged KT&G's arguments and the petitioner's response.[51] However, the Petition is replete with evidence demonstrating clear differences between 4th tier cigarettes and non-4th tier cigarettes in terms of price.[52] For example, Exhibit I-8 indicates that "Cigarettes are divided into four different price categories or tiers"[53] and Exhibit I-13 shows that " Fourth-tier import brands

[38] *See* KT&G Case Brief at 7.
[39] *See* Initiation Checklist, Attachment II at 5.
[40] *Id*. at 6 (citing Volume I of the Petition at 11-12).
[41] *Id*.; *see also* Petitioner's Letter, "4th Tier Cigarettes from the Republic of Korea: Response to KT&G's Comments on Petitioner's Standing," dated January 6, 2020 at Attachment 1 (Petitioner's Response on Standing).
[42] *See* Initiation Checklist, Attachment II at 6-7.
[43] *Id*. at 5-6.
[44] *See* Volume I of the Petition at 12-13.
[45] *See* KT&G Case Brief at 7.
[46] *See* Initiation Checklist, Attachment II at 5.
[47] *Id*. at 6.
[48] *Id*.
[49] *See* KT&G Case Brief at 7-8.
[50] *Id*. at 7 n.21 (citing *Cleo, Inc. v. United States*, 501 F.3d 1291, 1295 (Fed. Cir. 2007)).
[51] *See* Initiation Checklist, Attachment II at 5.
[52] *See*, *e.g.*, Volume I of the Petition at Exhibit I-8, Exhibit I-13, and Exhibit I-14.
[53] *Id*. at Exhibit I-8, 40 n.11.

have a marked price difference, on average 30 percent lower than other brands.[54] Although KT&G presented information to the contrary, the totality of the evidence supported the assertions in the Petition.[55] While promotional contracts and discounts for non-4th tier cigarettes may reduce prices in some cases, the evidence shows that 4th tier cigarette prices are consistently much lower than non-4th tier cigarettes.[56]

The CIT has recognized Commerce's "broad discretion" in the area of like product and industry support determinations, and in the instant case, we have exercised that discretion in defining the domestic like product.[57] As we explained in our initiation of this investigation, "Commerce's discretion permits interpreting the Petition in such a way as to best effectuate not only the intent of the Petition, but the overall purpose of the antidumping duty laws as well."[58] Furthermore, the CIT has stated that "for the purpose of standing, it is within Commerce's discretion to weigh the priority of the relevant like product factors and determine each factor's significance."[59] Therefore, as we explained in our initiation, the totality of the evidence supported the petitioner's like product definition such that there was "no reason to depart from the like product definition provided in the Petition and supplement thereto."[60]

Comment 2: Whether the Petition Established Industry Support to Initiate the Investigation

KT&G's Comment

- Even under Commerce's incorrect definition of the domestic industry, the Petition did not establish sufficient industry support to initiate the investigation.[61]
    - The Petition alleges that there are only four known domestic producers of 4th tier cigarettes – Cheyenne International, Dosal Tobacco Corporation, Native Trading Associates LLC, and Xcaliber International.[62]
    - The cigarette industry is much larger than these four companies and the Petition does not support the proposition that only these four companies produce 4th tier cigarettes.[63]
    - The Petition provides evidence in Exhibit I-9 that Liggett-Vector Brands (Liggett) and Commonwealth Brands (Commonwealth) manufacture 4th tier cigarettes along with smaller manufacturers.[64]
    - Vector Group's 2018 Annual Report identifies its "deep discount" brands that compete with other "deep discount" cigarettes; this indicates that Liggett-Vector Brands is part of the domestic industry.[65]

[54] *Id*. at Exhibit I-13, 40.
[55] *See* Initiation Checklist, Attachment II, at 7.
[56] *See* Volume I of the Petition at Exhibit I-13, 40.
[57] *See Fujitsu*, 36 F. Supp. 2d at 397 (citing *Kern-Liebers USA, Inc. v. United States,* 881 F. Supp. 618, 621 (1995) (citation omitted)).
[58] *See* Initiation Checklist, Attachment II at 7.
[59] *See Fujitsu*, 36 F. Supp. 2d 398 n.5.
[60] *See* Initiation Checklist, Attachment II at 7.
[61] *See* KT&G Case Brief at 4.
[62] *Id*.
[63] *Id*.
[64] *Id*.
[65] *Id.* at 4-5.

    - KT&G submitted an affidavit confirming that Liggett and Commonwealth produce cigarettes consistent with the description of the domestic like product contained in the Petition.[66]
    - Commerce ignored this evidence and relied on self-serving declarations filed by the petitioner.[67]
- Commerce did not account for significant evidence of domestic opposition to the Petition.[68]
    - When two parties accounting for the same unit of domestic production voice support and opposition to a petition, Commerce should consider that unit of production as neither supporting nor opposing the petition.[69]
    - Wholesalers are legally considered domestic producers.[70]
    - Commerce must make an adjustment to the industry support calculation because wholesalers voiced opposition to the Petition.[71]
    - Where the support for a petition does not meet the 50 percent threshold, Commerce must poll the industry or rely on other information to determine if there is support for the petition.[72] If polling does not resolve the issue of industry support, Commerce must dismiss the petition, terminate the proceeding, and notify the petitioner in writing of the reasons for the determination.[73]
    - Commerce lacked the evidence to conclude that the industry support threshold was met.[74]
- Commerce erroneously rejected KT&G's opposition letters of January 6 and 7, 2020, from 14 wholesalers of the domestic like product.[75]
    - Commerce stated that KT&G failed to explain why bracketed items were entitled to proprietary treatment and KT&G failed to include factual certifications from the wholesalers that generated the letters appended to the submissions.[76]
    - The reason for claiming proprietary treatment was obvious; Commerce's regulations make clear that the position of a domestic producer or workers regarding a petition is entitled to proprietary treatment.[77]

[66] *Id*. at 5.
[67] *Id*.
[68] *Id*.
[69] *Id*. at 9.
[70] *Id*.
[71] *Id*. at 8-9.
[72] *Id*. at 9.
[73] *Id*. at 9-10.
[74] *Id*. at 9.
[75] *Id*. at 10.
[76] *Id*.
[77] *Id*. at 11.

Petitioner's Rebuttal Comment

- Commerce correctly found there to be sufficient industry support among U.S. 4th tier cigarette producers.[78]
    - KT&G reiterates its arguments regarding industry support, although it recognizes that Commerce is not permitted to reconsider its industry support determination at this stage of the proceeding.[79]
    - KT&G fails to point to record evidence that would warrant any change in Commerce's industry support determination.[80]
- Commerce correctly rejected improperly filed submissions from the record.[81]
    - Even if KT&G's submissions regarding certain wholesalers were properly filed, KT&G's argument that the opposition of wholesalers would have been sufficient to defeat industry support of the petition is incorrect.[82]
    - Commerce has broad discretion to reject submissions that do not comply with Commerce's procedural filing requirements and Commerce properly exercised its discretion.[83]
    - Without citation to authority, KT&G claims that a U.S. wholesaler of the domestic like product is considered an interested party, making it eligible to file an antidumping duty petition.[84]
    - Section 771(4)(a) of the Act defines "industry" as "the producers as a whole of a domestic like product."[85]
    - Wholesalers are not part of the "industry" and are not considered when examining support of the petition.[86]
    - It is not Commerce's practice to consider whether domestic wholesalers support a petition.[87]

Commerce's Position: We disagree with KT&G. As indicated above, we do not revisit industry support determinations after initiating an investigation.[88] However, we will address the arguments made by KT&G concerning our industry support determination.

KT&G challenges Commerce's industry support determination by arguing that Commerce made two errors in analyzing the industry's support. First, KT&G argues that Commerce disregarded two manufacturers of discount or 4th tier cigarettes, *i.e.*, Liggett and Commonwealth.[89] Second, KT&G asserts that Commerce improperly rejected opposition to the Petition from wholesalers, and that wholesaler opposition should "cancel out" the industry support of manufacturers.[90]

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[78] *See* Petitioner Rebuttal Brief at 56.
[79] *Id*. at 55-56.
[80] *Id*. at 57.
[81] *Id*. at 59.
[82] *Id*. at 59-60.
[83] *Id*. at 60-61.
[84] *Id*. at 62.
[85] *Id*.
[86] *Id*. at 63.
[87] *Id*.
[88] *See* section 732(c)(4)(E) of the Act.
[89] *See* KT&G Case Brief at 4.
[90] *Id*. at 9-10.

KT&G argues that this would require Commerce to make an "appropriate adjustment" to the industry support calculation.[91] For the reasons discussed below, we disagree with KT&G.

In our industry support determination, we found that information on the record supported the contention that Liggett and Commonwealth do not produce 4th tier cigarettes.[92] KT&G claims that Commerce "ignored" certain evidence, and relied on "self-serving" evidence submitted by the petitioner.[93] Contrary to KT&G's claims, we acknowledged the evidence and arguments submitted by KT&G in our industry support determination.[94] We noted that the petitioner submitted information from numerous sources in support of its contentions.[95]

Furthermore, the arguments KT&G highlighted in its case brief are not persuasive. KT&G argues that Exhibit I-9 of the Petition identifies Liggett and Commonwealth as producers of 4th tier cigarettes.[96] The petitioner responded to this with a detailed explanation outlining why the statements in Exhibit I-9, *i.e.*, excerpts from a Sixth Circuit Court of Appeal opinion, are not accurate.[97] The petitioner's affidavit explains that the court mistakenly identified Liggett and Commonwealth as "smaller manufacturers" that produce 4th tier cigarettes when Liggett and Commonwealth are among the largest cigarette manufacturers in the United States.[98] Furthermore, the affidavit explained that Commonwealth's and Liggett's web pages do not offer 4th tier cigarettes for sale.[99]

KT&G further claims that Liggett's annual report indicates that Liggett produces 4th tier cigarettes.[100] However, KT&G fails to acknowledge that Liggett itself draws a distinction based on price between its products and the "deep discount" products of importers and other U.S. manufacturers—Liggett identifies its products as "discount" products that compete with "deep discount" imports.[101] Liggett's report supports the petitioner's argument that Liggett sells 3rd-tier cigarettes because Liggett itself distinguishes its products from 4th tier products based on price.[102] KT&G also submitted an affidavit with supporting documentation regarding certain products of Liggett and Commonwealth that are "are consistent with the description of the domestic like product."[103] To some extent, cigarettes across different tiers may have certain similar characteristics. For example, cigarettes across different tiers contain a tobacco blend of some kind.[104] However, considering all of the factors of the domestic like product analysis,

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[91] *Id*. at 9.
[92] *See* Initiation Checklist, Attachment II at 11.
[93] *See* KT&G Case Brief at 5.
[94] *See* Initiation Checklist, Attachment II at 9.
[95] *Id*. at 11 ("{T}he petitioner provided academic articles, company website information, and distributor marketing information that further support its contentions.")
[96] *See* KT&G Case Brief at 4.
[97] *See* Petitioner's Response on Standing at Attachment 1.
[98] *Id.*
[99] *Id*.
[100] *See* KT&G Case Brief at 4.
[101] *See* KT&G's Letter, "Fourth Tier Cigarettes from the Republic of Korea: Pre-Initiation Comments on Industry Support," dated January 3, 2020 at Exhibit 2 ("Vector Tobacco is a *discount* cigarette manufacturer selling product in the *deep discount* category") (emphasis added); *id*. ("Liggett's *discount brands* must also compete in the marketplace with the smaller manufacturers' and importers' *deep discount brands*.") (emphasis added)
[102] *See* Petitioner's Response on Standing at 5.
[103] *See* KT&G Case Brief at 5.
[104] *Id*. at 18-19.

detailed above, record evidence indicates that Liggett and Commonwealth do not produce 4th tier cigarettes. Accordingly, we continue to find that Liggett and Commonwealth were properly excluded from the industry support calculation.

Next, KT&G argues that Commerce improperly rejected certain letters of opposition to the Petition from wholesalers.[105] On January 6, 2020, KT&G electronically filed copies of hand-delivered letters of opposition from wholesalers. On January 7, 2020, Commerce rejected "14 letters from individual wholesalers that were not filed in accordance with the agency's regulations" because the hand-delivered letters, among other deficiencies, "did not include a cover sheet, certificate of factual accuracy, or certificate of service."[106] On January 7, 2020, Commerce notified KT&G of filing deficiencies in KT&G's electronically-filed submissions and that Commerce rejected the documents.[107]

In its case brief, KT&G does not dispute that certain submissions did not meet Commerce's filing requirements. For example, regarding the hand-delivered letters, KT&G simply argues that Commerce's rejection was "arbitrary" because Commerce "routinely accepts submissions from non-parties that do not comply with these requirements."[108] KT&G makes this claim without citation and offers an example that Commerce placed on the record a letter that it received from members of Congress.[109] KT&G's example is inapposite and its argument is otherwise unsupported. Specifically, based on sections 516A(b)(2)(A)(i) and 777(a)(3) of the Act, Commerce routinely places on the record of administrative proceedings *ex-parte* correspondence received from members of Congress. In KT&G's example, the members of Congress are not "parties" filing a "submission" – rather, the letter was placed on the record by Commerce to memorialize the *ex-parte* correspondence. In contrast, Commerce "will reject" nonconforming submissions, such as instant hand-delivered letters, per our regulations.[110]

KT&G also does not dispute that its January 6 and 7, 2020 letters failed to explain why bracketed items were entitled to business proprietary treatment.[111] Rather, KT&G argues that the reason why the items were bracketed was obvious.[112] Commerce's regulations, however, do not contain an exception for "obviousness"[113] and Commerce "will reject" submissions that do not conform with Commerce's regulations.[114] Commerce's regulations stipulate that interested parties must

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[105] *Id*. at 10.
[106] *See* Commerce's Letter, "4th Tier Cigarettes from the Republic of Korea: Filing Deficiencies in with respect to the 14 Wholesaler Letter," dated January 7, 2020 (Rejection of Hand-Delivered Documents). The document was filed at 1:35 p.m. ET.
[107] *See* Commerce's Letter, "4th Tier Cigarettes from the Republic of Korea: January 6 Letter," dated January 7, 2020. The document was filed at 3:52 p.m. ET.
[108] *See* KT&G Case Brief at 12.
[109] *Id*.
[110] *See* 19 CFR 351.304(d).
[111] *See* KT&G Case Brief at 10-11.
[112] *Id*.
[113] *See* 19 CFR 351.304(b)(1)(i) ("A person submitting information must identify the information for which it claims business proprietary treatment by enclosing the information within single brackets. The submitting person must provide with the information an explanation of why each item of bracketed information is entitled to business proprietary treatment.") (emphasis added).
[114] *See* 19 CFR 351.304(d).

identify what information is proprietary and why that information is proprietary.[115] Doing so allows Commerce to assess whether the information is properly designated as business proprietary and to protect the business proprietary information.

Lastly, KT&G argues that Commerce improperly required KT&G to obtain certifications of factual accuracy from each wholesaler.[116] However, section 782(b) of the Act provides that persons submitting factual information to Commerce in connection with an antidumping or countervailing duty investigation "shall certify that such information is accurate and complete to the best of that person's knowledge." Various wholesalers attempted to submit letters containing factual information to Commerce, but these submissions did not meet Commerce's filing requirements (including a failure to include certifications of factual accuracy).[117] The wholesalers cannot circumvent the filing requirements and cure the defects in these submissions by having their letters submitted under KT&G's letterhead on behalf of KT&G. Certifications of factual accuracy are required by the Act and help ensure that information submitted to Commerce, information upon which Commerce relies in its determinations, is accurate and complete to the best of the submitter's knowledge. Accordingly, KT&G's submissions and the wholesalers' letters were properly rejected.

Furthermore, even with wholesaler opposition, KT&G's argument regarding industry support is not persuasive. KT&G argues that the SAA accompanying the Uruguay Round Agreements Act (URAA) indicates that when two parties accounting for the same unit of domestic production voice support and opposition to a petition, the conflicting views "cancel each other out."[118] Wholesalers, KT&G argues, are included in the definition of "domestic producers or workers."[119] Therefore, KT&G asserts, wholesaler opposition would "cancel out" the industry support of the petitioner and require Commerce to make adjustments to the industry support calculation.[120] KT&G's arguments are flawed for two reasons.

First, KT&G misinterprets the SAA. The SAA specifically states that it is intended that "labor have equal voice with management in supporting or opposing the initiation of an investigation."[121] When labor and management directly disagree, "Commerce will treat the production of that firm as representing neither support for nor opposition to the petition."[122] This principle is specific to particular firms that account for domestic production and it is specific to direct disagreements between management and labor. From these statements, KT&G attempts to create a broad principle or rule that governs "the same unit of domestic production."[123] The section that KT&G cites does not contain any broad language referring to units of domestic production—the section specifically mentions disagreements between labor and management.[124]

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[115] *See* 19 CFR 351.304(b)(1)(i).
[116] *See* KT&G Case Brief at 10.
[117] *See* Rejection of Hand-Delivered Documents.
[118] *See* KT&G Case Brief at 9; *see also* H.R. Rep. No. 103-316, at 862 (1994) *reprinted in* 1994 U.S.C.C.A.N. 4040, 4193 (SAA).
[119] *Id*.; *see also* section 732(c)(5) of the Act.
[120] *See* KT&G Case Brief at 9.
[121] *See* SAA at 4193.
[122] *Id*.
[123] *See* KT&G Case Brief at 10.
[124] *See* SAA at 4193.

This specific rule is memorialized in Commerce's regulations and nothing in the SAA or the applicable regulation suggests that it applies broadly when considering the same unit of domestic production.[125] Accordingly, KT&G's argument is unsupported by the authority it cites.

Second, it is not clear that wholesaler opposition would warrant changes to the industry support calculation. Section 732(c)(4)(A)(ii) of the Act is concerned with "domestic producers or workers who support the petition" that account for more than "50 percent of the *production of the domestic like product*" (emphasis added). Wholesalers are included in the definition of "domestic producers or workers" in section 732(c)(5) of the Act because this section references the types of interested parties that may file a petition.[126] However, there is not sufficient evidence on the record in this case to show that the wholesalers in question represent any amount of domestic production. Thus, we did not make an adjustment to the industry support calculation because no record evidence justified changes to the industry support calculation.

Comment 3: Whether Commerce Clarified the Scope of the Investigation for Proper Product Comparisons

KT&G's Comment

- Commerce's determination not to clarify the scope of the investigation is not supported by record evidence and is not in accordance with law.[127]
- Commerce incorrectly determined that the scope contained sufficient physical characteristics delineating 4th tier cigarettes from other cigarettes.[128]
    - The only three concrete physical characteristics in the scope – length, diameter, and tobacco rolled in paper – are not sufficiently limiting.[129]
    - Other characteristics in the scope are ambiguous and rely on phrases like "typically" or "frequently."[130] Such descriptions do not provide a basis to distinguish in-scope and out-of-scope cigarettes.[131]
- Commerce misunderstood KT&G's interpretation of the scope as focusing on the lowest-priced cigarettes rather than cigarettes in the lowest price band.[132]
    - KT&G submitted evidence regarding a pre-existing price band in the cigarette industry.[133]
    - "4th tier" is the only characteristic that delineates in-scope cigarettes from other cigarettes.[134]
    - Commerce should clarify the scope so that there is a proper comparison between KT&G's U.S. market sales in the lowest price band and KT&G's home market (HM) sales of cigarettes in the lowest price band.[135]

[125] *Id.*; *see also* 19 CFR 351.203(e)(3).
[126] *See* section 771(9)(C) of the Act.
[127] *See* KT&G Case Brief at 18.
[128] *Id*.
[129] *Id*. at 18-19.
[130] *Id*. at 19.
[131] *Id*.
[132] *Id*.
[133] *Id*. at 20.
[134] *Id*.
[135] *Id*.

- Commerce failed to consider the Petition's intent in its preliminary scope determination when Commerce concluded that relying on price as a delineating characteristic would employ circular reasoning.[136]
    - Commerce should have declined to initiate the investigation because there is no discrete product on which a dumping investigation may be based.[137]
    - Commerce improperly initiated the investigation and as a result is investigating a product whose only delineating characteristic is the price band in which it falls.[138]
    - The petitioner's comments before the ITC confirm the Petition's intent to target only cigarettes in the lowest price band.[139]
    - Evidence on the record demonstrates that the intent of the Petition was to include the cigarettes in the lowest price band—expanding the scope to cover other cigarettes would be clearly contrary to the intent of the Petition.[140]
- Commerce recognizes that it may be appropriate to define a scope by a quintessential characteristic.[141] In this case, the price band is the only characteristic that distinguishes 4th tier cigarettes from other cigarettes.[142]
    - Commerce's citation to *Sugar from Mexico* does not establish that Commerce will only use a physical characteristic as a quintessential characteristic for the scope.[143]
    - Commerce has an established practice of incorporating non-physical characteristics when defining the scope.[144]
- Commerce's failure to properly define the scope has improperly created dumping margins in the investigation.[145]
- Commerce incorrectly found that the scope without clarification is administrable by U.S. Customs and Border Protection (CBP).[146]
    - The ambiguous language in the scope, *e.g.*, that in-scope cigarettes "typically" have a "tobacco blend that consists of 10% or more tobacco stems," does not provide a workable framework for CBP.[147]
    - The prospect of circumvention does not allow Commerce to define the scope in broad terms.[148]
    - Commerce fails to explain why non-physical characteristics, such as a price band, would be more susceptible to manipulation than physical characteristics.[149]

[136] *Id*. at 20-21.
[137] *Id*. at 21.
[138] *Id*.
[139] *Id*. at 21-22.
[140] *Id*.
[141] *Id*. at 23.
[142] *Id*. at 23-24.
[143] *See* KT&G Case Brief at 24 (citing *Sugar from Mexico: Final Affirmative Countervailing Duty Determination*, 80 FR 57337, 57339 (September 23, 2015) (*Sugar from Mexico*)).
[144] *Id*.
[145] *Id*.
[146] *Id*. at 25.
[147] *Id*.
[148] *Id*. at 26.
[149] *Id*.

Petitioner's Rebuttal Comment

- Commerce correctly determined that the scope of the investigation is clear.[150]
    - Commerce has broad discretion in clarifying the scope of the investigation.[151]
    - In giving deference to the Petition, Commerce gives deference to the petitioner seeking relief from unfairly traded imports.[152]
- Commerce preliminarily rejected many of the arguments that KT&G reiterates in its brief and Commerce should continue to reject these arguments.[153]
- In-scope cigarettes are not defined solely on the basis of price.[154]
    - KT&G ignores the numerous physical characteristics specified in the scope, including the requirement that the merchandise be "4th tier" cigarettes.[155]
    - The physical characteristics of the merchandise taken together define the cigarettes commonly known as 4th tier cigarettes.[156]
    - The commonly defined tier in the industry is a reasonable and effective way to define cigarettes covered by the scope of the investigation.[157]
- Commerce's decision not to alter the scope is supported by the record and is in accordance with law.[158]
    - Commerce should continue to define the scope as it did in the *Preliminary Determination*.[159]
    - Qualifiers in scope language, such as "typically," are often necessary in drafting scope language.[160]
    - Further consideration of price as a defining characteristic is unnecessary and unwarranted.[161]
    - Commerce should defer to the petitioner's intent in this case, which comports with a scope based on the physical characteristics already listed in the scope rather than price.[162]
    - KT&G misapplies statements that the petitioner made before the ITC.[163]
    - KT&G's argument that the scope impermissibly created dumping margins in this investigation is flawed.[164] The current scope allows for fair comparisons between comparable products in Korea and the United States.[165]
- The scope will not be difficult for CBP to administer.[166]

[150] *See* Petitioner Rebuttal Brief at 64.
[151] *Id*.
[152] *Id*. at 65.
[153] *Id*. at 65-66.
[154] *Id*. at 67.
[155] *Id*.
[156] *Id*. at 68.
[157] *Id*.
[158] *Id*.
[159] *Id*.
[160] *Id*. at 69.
[161] *Id*. at 70.
[162] *Id*.
[163] *Id*.
[164] *Id*. at 71.
[165] *Id*.
[166] *Id*. at 72.

- The scope is both narrow enough to be administrable and broad enough to cover the merchandise intended by the Petition.[167]
- The use of terms like "typically" reflect the balance that the petitioner must strike in crafting scope language.[168]
- The scope is plainly defined and clearly administrable.[169]

Commerce's Position: KT&G continues to object to the scope of this investigation. Primarily, KT&G asserts that the physical characteristics in the scope are insufficient to distinguish between in-scope and out-of-scope merchandise.[170] Rather than using physical characteristics to distinguish the merchandise under investigation from the merchandise outside the scope of the investigation, KT&G proposes using a "price band" characteristic to draw the critical distinctions. In doing so, KT&G seeks to compare the "lowest price band" sales in the U.S. market with the "lowest price band" sales in the HM. For the reasons discussed below, we continue to disagree with KT&G's proposed revisions to the scope of the investigation.

As we outlined in the Preliminary Scope Memorandum, there are several defining physical characteristics in the scope, *i.e.*, length; diameter; physical description (a tobacco blend rolled in paper); tobacco stem content; and packaging.[171] We also noted other limiting aspects of the scope, such as that the products are "commonly referred to as '4th tier cigarettes.'"[172] KT&G asserts that the length, diameter, and physical description of merchandise in the scope cover "virtually all" cigarettes.[173] Further, KT&G argues that qualifying language, *e.g.*, that the merchandise "typically" has a tobacco blend that consists of 10% or more tobacco stems, and the fact that products are in-scope "regardless of the marketing description of the size of the cigarettes" and "regardless of packaging," renders many characteristics in the scope ineffective for distinguishing in-scope merchandise from out-of-scope merchandise.[174]

The physical characteristics in the scope, examined together, provide a clear picture of the products under investigation. Investigation scopes frequently are written in general terms,[175] and the scope of this investigation is no exception. We acknowledge that, to some extent, all cigarettes function as cigarettes. However, each characteristic in this scope, *e.g.*, stem content and packaging, further narrows the subject merchandise, 4th tier cigarettes, by noting the merchandise's characteristics. Qualifying language is not uncommon in scopes of investigations or antidumping duty or countervailing duty orders[176] and is necessary because scopes must be written in terms which are understandable.

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[167] *Id*.
[168] *Id*.
[169] *Id*.
[170] *See* KT&G Case Brief at 19.
[171] *See* Preliminary Scope Memorandum at 4.
[172] *Id*. at 4.
[173] *See* KT&G Case Brief at 15.
[174] *Id.* at 15.
[175] See 19 CFR 351.225(a) ("{T}he descriptions of subject merchandise contained in the Department's determinations must be written in general terms."); *see also Diamond Sawblades Manufacturers' Coalition v. United States*, 405 F. Supp. 3d 1345, 1351 (CIT 2019).
[176] *See, e.g.*, *Certain Plastic Decorative Ribbon From the People's Republic of China: Amended Final Affirmative Antidumping Duty Determination and Antidumping Duty Order; and Countervailing Duty Order*, 84 FR 10786

Importantly, the scope notes that subject merchandise is "commonly referred to as '4th tier cigarettes.'" The record reflects that both the petitioner and KT&G identify their products as 4th tier cigarettes.[177] Industry reports identify 4th tier cigarettes as distinct from other cigarettes.[178] Academic reports cited by the petitioner divide cigarettes into separate tiers, including 4th tier cigarettes.[179] KT&G's arguments regarding lack of clarity in the scope are unconvincing considering the weight of the record and also considering that KT&G advertises its U.S. market products as 4th tier cigarettes.[180]

We also disagree with KT&G's suggestion to add a "price band" characteristic to the scope. Based on a report from Euromonitor, KT&G argues for three price bands – premium, mid-priced, and economy—that should serve as the most important distinguishing characteristics in the scope.[181] Using "price band" as a primary distinguishing characteristic is problematic for numerous reasons. First, including or excluding different price bands in the scope could have an unduly influential effect on the outcome of the investigation by dictating which sales are to be compared with one another based on price.[182] As we explained in the Preliminary Scope Memorandum, a "price band" or "lowest-price" characteristic is nonsensical because the issue of price is central to the determination of dumping.[183]

Second, KT&G seeks to include the "price band" characteristic in an effort to exclude HM cigarette sales that KT&G considers outside the "economy" price band.[184] However, evidence on the record indicates that KT&G only manufactures 4th tier cigarettes.[185] Rather than relying on ambiguous non-physical characteristics such as the "price band" of the merchandise, Commerce relied on distinct product characteristics in making comparisons.[186] These product characteristics, which are physical characteristics, allow Commerce to make reliable comparisons between merchandise sold in the Korean market and merchandise sold in the U.S. market. Relying primarily on an easily changed characteristic such as the "price band" invites inconsistent and inapt comparisons – the price band of the merchandise can vary at any time for a number of different reasons (*e.g.*, discounts, coupons, and customer perception) while physical characteristics are much more consistent and fixed by the time of sale. Furthermore, while scopes may include non-physical characteristics, it is at the very least highly unusual, and

(March 22, 2019) ("The subject merchandise is *typically* made of substrates of polypropylene…") (emphasis added); *see also Ripe Olives from Spain: Antidumping Duty Order*, 83 FR 37465 (August 1, 2018) ("The products covered by this order are certain processed olives, *usually* referred to as 'ripe olives.'") (emphasis added).

[177] *See* Petitioner's Letter, "4th Tier Cigarettes from the Republic of Korea: Response to KT &G's Comments on Scope," dated February 6, 2020 at Attachment I (Petitioner's Scope Comments).

[178] *See* the Petition at Exhibit I-14.

[179] *Id*. at Exhibit 8.

[180] *See* Petitioner's Scope Comments at Attachment I.

[181] *See* KT&G Case Brief at 20.

[182] For example, KT&G would have Commerce compare KT&G's U.S. sales to KT&G's "lowest price band" or "economy price band" sales in Korea. It is obvious that such comparisons have the potential to be distortive.

[183] *See* Preliminary Scope Memorandum at 3.

[184] *See* KT&G Case Brief at 20.

[185] *See* Petitioner's Letter, "4th Tier Cigarettes from the Republic of Korea: Rebuttal Comments on Product Characteristics," dated February 13. 2020 at Exhibit 1 and Exhibit 2 (Petitioner Rebuttal Product Characteristic Comments).

[186] *See* KT&G's Letter, "Product Characteristics - Less than Fair Value Investigation of 4th Tier Cigarettes from the Republic of Korea," dated February 28, 2020 at Attachment.

unwarranted in this case, for the defining characteristic of a scope to be a non-physical characteristic like "price band." For these reasons we continue to decline to grant KT&G's request for a "price band" characteristic.

Third, KT&G argues that omitting the "price band" characteristic is contrary to the intent of the Petition. However, we do not find KT&G's claim regarding the intent of the Petition to be credible. Specifically, the scope in the Petition is intended to define the foreign merchandise under investigation that is possibly being sold for less than normal value and from which the domestic industry seeks relief.[187] The petitioner, who filed the Petition, and who is uniquely positioned to speak to the intent of the Petition, indicated that the scope, as written, effectuates the intent of the Petition.[188] The petitioner's statements regarding the intent of the Petition are more credible than KT&G's characterizations of the petitioner's statements.[189] Although KT&G argues that the scope covers products outside of the intent of the Petition, KT&G seems to ignore the evidence on the record demonstrating that KT&G is a 4th tier cigarette manufacturer that sells only 4th tier cigarettes.[190] It is Commerce's practice to afford deference to the petitioner with respect to the definition of products from which it seeks relief and we continue to do so in this case.[191]

KT&G also continues to object on administrability grounds, arguing that the scope without clarification is not administrable by CBP. In its case brief, KT&G raises a number of hypothetical scenarios and questions regarding products covered or not covered by the scope.[192] As we explained above, and in the Preliminary Scope Memorandum, there are several characteristics identified in the scope that distinguish subject merchandise.[193] The scope, as written, covers all of KT&G's products currently sold in the United States.[194] At the moment, KT&G's concerns are hypothetical; if an antidumping duty order is imposed, the proper procedure is to request a scope ruling if there is a question as to whether a particular product is included within the scope of an antidumping duty order.[195] The record currently does not reflect any administrability concerns, and such concerns certainly would not warrant introducing the ambiguous "price band" characteristic proposed by KT&G.

Lastly, KT&G also argues that concerns regarding circumvention do not allow Commerce to define the scope in broad terms. Commerce's concerns regarding circumvention are best understood as concerns regarding the administrability of the scope should Commerce issue an antidumping duty order. Commerce agrees that it has a "statutory duty to issue an effective and

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[187] *See* 4*th Tier Cigarettes from the Republic of Korea: Initiation of Less-Than-Fair-Value Investigation*, 85 FR 2390, 2391 (January 15, 2020).
[188] *See* Petitioner Rebuttal Brief at 65-66.
[189] *See* KT&G Case Brief at 21-23.
[190] *See* Petitioner Rebuttal Product Characteristic Comments at Exhibit 1 and Exhibit 2.
[191] *See Large Residential Washers from the Republic of Korea*, 77 FR 75988 (December 26, 2012), and the accompanying Issues and Decision Memorandum (IDM) at Comment 1 ("{T}he Department's practice is to provide ample deference to the petitioner with respect to the definition of the product(s) for which it seeks relief during the investigation phase of an AD or CVD proceeding"); *see also* Petitioner Rebuttal Brief at 65 n.268.
[192] *See* KT&G Case Brief at 25.
[193] *See* Preliminary Scope Memorandum at 4.
[194] *See* Petitioner's Scope Comments at 3.
[195] *See generally* 19 CFR 302.225(a).

administrable antidumping duty order."[196] Part of ensuring that an order is administrable is to ensure that it covers the products from which the petitioner seeks relief. In this case, the scope is written in terms that narrow the scope without unnecessarily restricting it. The "bright lines" or clarifications advocated by KT&G (*e.g.*, price bands) may lead to significant concerns regarding administrability – the strictness of such terms could improperly exclude from the scope products from which the petitioner seeks relief.

Comment 4: Whether Commerce Correctly Determined Negative Critical Circumstances

KT&G's Comment

- Commerce should find that there is no basis to impute knowledge of material injury and Commerce should reverse its preliminary finding of "massive" imports.[197]
    - In investigations where the ITC makes a present material injury determination, Commerce normally treats that as sufficient to impute knowledge of likely material injury.[198]
    - When the ITC makes a preliminary determination based on threat of material injury, as here, Commerce must rely on other information to impute knowledge of actual material injury.[199]
    - The petitioner merely focuses on the extent of the dumping margins in the petition and the existence of "massive" imports over the comparison period.[200]
    - The petitioner has failed to provide public sources of information that demonstrates that importers had some reason to know dumped imports were causing material injury to the domestic industry.[201]
    - Commerce lacks the proper evidentiary basis to make an affirmative critical circumstances determination.[202]
- Commerce incorrectly determined there to be "massive" imports over the comparison period.[203]
    - Commerce "summarily dismissed" significant evidence of "pantry loading" and down-trading that affected demand for less expensive cigarette brands.[204]
    - The preamble to Commerce's critical circumstances regulation expressly contemplates that changing demand patterns will be relevant to a finding on massive imports.[205]
    - To prevail on a massive imports analysis, KT&G need not show that alternative demand factors account for the entirety of any import surge.[206]
    - Based on the evidence submitted by KT&G, Commerce should find that imports have not been "massive" over the comparison period in the investigation.[207]

[196] *See Mitsubishi Heavy Indus. v. United States*, 986 F. Supp. 1428, 1434 (CIT 1997).
[197] *See* KT&G Case Brief at 85.
[198] *Id*. at 86.
[199] *Id*.
[200] *Id*. at 87.
[201] *Id*.
[202] *Id*.
[203] *Id*. at 88.
[204] *Id*.
[205] *Id*.
[206] *Id*.
[207] *Id*.

Petitioner's Rebuttal Comment

- Commerce should make an affirmative finding of critical circumstances.[208]
    - Regarding the knowledge factors, Commerce does not require that information beyond anticipated dumping margins and import volumes be submitted.[209]
    - Even where Commerce relies on additional information, it has not required the petitioner to provide such information.[210]
    - The petitioner anticipates very high margins if Commerce corrects the *Preliminary Determination* to be consistent with the record and Commerce's practice.[211]
    - The petitioner has already provided sufficient information to impute knowledge of dumping and knowledge of injury.[212] The Petition detailed substantial injury through significant lost sales and Commerce relied on similar information in *Rubber Bands from China*.[213]
- Regarding whether there were "massive" imports during the comparison period, the petitioner previously demonstrated why the information provided by KT&G cannot explain the massive surge in imports.[214]
    - KT&G's evidence does not mention increased demand for 4th tier cigarettes.[215]
    - Downtrading does not necessarily refer to an increased demand for subject imports.[216]
    - KT&G's evidence shows only a small increase in the "all others" category, which would include KT&G.[217]
    - When comparing the information submitted by KT&G to KT&G's actual shipment data, KT&G has failed to show that it did not have massive imports.[218]

Commerce's Position: As we outlined in the *Preliminary Determination*, there are several elements that are required to determine that critical circumstances exist.[219] We preliminarily determined that there has been no history of dumping and material injury, and that the criteria of section 733(e)(1)(A)(ii) of the Act had not been met.[220] However, we preliminarily found there to be "massive" imports over a relatively short period of time.[221]

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[208] *See* Petitioner Rebuttal Brief at 72.
[209] *Id*. at 73.
[210] *Id*.
[211] *Id*. at 74.
[212] *Id*.
[213] *Id*. (citing *Less-Than-Fair-Value Investigation of Rubber Bands from the People's Republic of China: Preliminary Affirmative Determination of Sales at Less Than Fair Value and Preliminary Affirmative Determination of Critical Circumstances*, 83 FR 45213 (September 6, 2018)).
[214] *Id*. at 74-75.
[215] *Id*. at 75.
[216] *Id*.
[217] *Id*.
[218] *Id*.
[219] *See Preliminary Determination* PDM at 5; *see also* Memorandum, "'Massive Imports' Analysis," dated July 15, 2020.
[220] *See Preliminary Determination* PDM at 6.
[221] *Id*. at 7.

Since the *Preliminary Determination*, there has not been any additional information or argument submitted that warrants a change to our analysis of the criterion of knowledge of dumping and material injury, *i.e.*, section 733(e)(1)(A)(ii) of the Act. The dumping margin remains far below the threshold that Commerce usually considers sufficient to impute knowledge of dumping, which is 15 percent for CEP sales.[222] Additionally, while there is some information that indicates KT&G knew that it was selling subject merchandise at increasingly *low prices*, there is not a reasonable basis to believe or suspect that KT&G knew, or should have known, that it was selling subject merchandise at *less than its fair value*.[223]

Section 733(e)(1)(A)(ii) of the Act requires that there be a reasonable basis to believe or suspect that there was knowledge, or imputed knowledge, or dumping *and* that there was likely to be injury by reason of such sales. There is not a reasonable basis to determine that there was knowledge or imputed knowledge of dumping because the rate of dumping remains below 15 percent and because the evidence in the Petition, *i.e.*, average unit value import data and statements from KT&G, did not demonstrate KT&G's knowledge that it was selling 4th tier cigarettes at LTFV.[224] Therefore the criterion is not satisfied, and the analysis ends there. Although KT&G and the petitioner submitted numerous arguments regarding other aspects of the critical circumstances analysis, Commerce need not address these because failure to meet the criterion of section 733(e)(1)(A)(ii) of the Act forecloses the possibility of an affirmative determination of critical circumstances.

KT&G Calculation Issues

Comment 5: Whether Commerce Should Deduct Korean Taxes in the NV Calculation

Petitioner's Comment[225]

- Commerce's classification of KT&G's HM taxes is not "tax-neutral" in accordance with the SAA[226] and renders distorted dumping margin calculations. Commerce should either not deduct these taxes or use the price that KT&G reported to be net of Korean taxes. The statute requires that HM prices be reduced by "the amount of any taxes imposed directly upon the foreign like product… but only to the extent that such taxes are added to or included in the price of the foreign like product."[227]
- The HM taxes that Commerce deducted are indirect taxes that are normally included in sales prices, and the SAA states that this is to ensure "that such taxes actually have been charged and paid on the HM sales used to calculate NV, rather than charged on sales of such merchandise in the HM generally."[228]
- KT&G failed to show that the reported HM taxes are imposed directly on sales of cigarettes. KT&G offered very little information about its HM taxes, and there is no

[222] *Id*. at 6 (citing *Notice of Final Determination of Sales at Less Than Fair Value and Negative Critical Circumstances Determination: Bottom Mount Combination Refrigerator-Freezers from the Republic of Korea*, 77 FR 17413, 17416 (March 26, 2012)). All sales in this case are CEP sales.
[223] *Id*.
[224] *Id*.
[225] *See* Petitioner Case Brief at 3-13.
[226] *See* SAA at 827.
[227] *See* section 773(a)(6)(B)(iii) of the Act.
[228] *See* SAA at 827-828.

indication in the record that KT&G passed the taxes along to its customers. The respondent possesses the necessary information to demonstrate whether its HM taxes are paid directly by the HM buyer as part of the sales price. KT&G bears the burden of providing that information and justifying a deduction from its HM prices.

- Should Commerce continue to classify all of KT&G's HM taxes as direct selling expenses, then it should similarly treat all of KT&G's U.S. taxes as direct selling expenses. Comparable treatment is necessary for an apples-to-apples comparison of KT&G's HM and U.S. prices and to ensure that dumping margins are calculated on a tax-neutral basis.

KT&G's Rebuttal Comment[229]

- KT&G provided overwhelming record evidence demonstrating that all of its HM taxes are imposed directly on cigarettes and are included in HM prices. Having made this demonstration, the only methodology authorized by the statute is to deduct taxes from NV in the manner described in section 773(a)(6)(B)(iii) of the Act.
- Indirect (or consumption) taxes are deducted from NV when they are "added to or included in the price of the foreign like product." The Court of Appeals for the Federal Circuit (CAFC) has ruled that this requirement is satisfied where taxes are shown to be "either a separate 'add on' to the domestic price or, although not separately stated, {are}, in fact, included in the price."[230]
- Each of the reported taxes was imposed on cigarettes, and not on producer income property, and thus these taxes were not a direct tax. The cigarette consumption tax (TAX1H variable) and individual consumption tax (TAX6H variable) are clearly "home-market consumption taxes" and, thus, fall squarely within the scope of an indirect tax as described in the SAA. Value-added tax (VAT) (VATH variable) is one of the enumerated types of indirect taxes specified in Commerce's regulations. The local education tax (TAX2H variable) is similarly imposed on the sale of cigarettes, because payment of the tax is triggered by payment of the tobacco consumption tax. Sales of cigarettes in Korea incur a waste treatment tax (TAX3H variable) at a base rate of KRW 24.4 per 20 cigarettes. Taxes under the National Health Promotion Fund (TAX4H variable) are collected on tobacco "sold by a manufacturer or importer" at specified rates. Finally, the Tobacco Production Stabilization Fund tax (TAX5H variable) is charged on all cigarettes "manufactured and sold" by KT&G that are not otherwise exempt from the tobacco consumption tax. All seven of KT&G's reported HM taxes are identified in reports that KT&G files with the Korean Financial Supervisory Service on a quarterly basis as "{t}axes and charges on manufactured tobacco" and not general company taxes.
- KT&G submitted an HM price list which demonstrates how VAT and the six other HM taxes are built into the sales price.
- An official report by the Government of Korea's Ministry of Health and Welfare confirms that domestic taxes are part of the HM price. The report, entitled, "Comprehensive Anti-Smoking Measures to Eradicate the Environment that Promotes Smoking (Proposal)," dated May 2019, has a section headed "Tobacco pricing policy," that specifically identifies each tax as a component of the retail price.

[229] *See* KT&G Rebuttal Brief at 2-20.
[230] *See* KT&G Rebuttal Brief at 5 (citing *Daewoo Elecs. Co. v. Int'l Union*, 6 F.3d 1511, 1516-17 (Fed. Cir. 1993)).

- KT&G disagrees that respondents' burden of proof trumps Commerce's obligations to deduct HM indirect taxes pursuant to section 773(a)(6)(B)(iii) of the Act, or its obligation to notify KT&G regarding any perceived deficiencies. Because Commerce issued a deficiency questionnaire to KT&G on U.S. taxes, Commerce cannot now fault KT&G for failing to provide similar information on HM taxes that it never requested.
- Commerce correctly based its margin calculations in the *Preliminary Determination* on KT&G's invoice prices and properly deducted HM taxes in accordance with section 773(a)(6)(B)(iii) of the Act. The petitioner has provided no basis for Commerce to bypass its obligations under the statute.
- Congress contemplated tax neutrality with respect to HM taxes only.[231]
- The petitioner has not argued that Commerce's preliminary finding that federal excise taxes constituted movement expenses, while the remaining taxes constituted CEP selling expenses, was erroneous, and even argue in their case brief that "KT&G's United States taxes have been sufficiently examined and properly classified." The petitioner's arguments to include all of these taxes as CEP selling expenses are driven by a transparent desire to inflate KT&G's margin using a distorted CEP profit calculation. Should Commerce continue to deduct U.S taxes as expenses, then Commerce should treat all of the taxes as movement expenses, because they are not a component of the CEP reseller's U.S. commercial activity for imputing profit.

Commerce's Position: We disagree with the petitioner that the record lacks support for KT&G's claim that the reported six HM taxes, as well as VAT, are taxes included in KT&G's reported invoice price. Pursuant to section 773(a)(6)(B)(iii) of the Act, Commerce adjusts for the amount of any taxes imposed directly upon the foreign like product, which have been rebated or not collected on subject merchandise, to the extent that such taxes are added to or included in the price of the foreign like product.[232] Additionally, 19 CFR 351.102(b)(28) defines an "indirect tax" as a tax on "sales, excise, turnover, value added, franchise, stamp, transfer, inventory, or equipment tax, a border tax, or any other tax other than a direct tax or an import charge."

In its response to Section A of the antidumping questionnaire, KT&G submitted its annual financial disclosure reports to the Government of Korea (GOK), Korean Financial Supervisory Service (a regulatory agency of the GOK) for the two most recently completed fiscal years that were available at the time of filing (2017 and 2018) and the most recent interim report that KT&G had available at the time of filing (2019).[233] Among the financial disclosures that KT&G made to this agency, KT&G disclosed in each of these annual reports the miscellaneous "other matters required for investment decisions."[234] These included an overview of key laws and regulations governing the tobacco industry in Korea, which included an overview of Korean

[231] *See* Comment 8, below.
[232] *See, e.g.*, *Certain Uncoated Paper from Brazil: Final Determination of Sales at Less Than Fair Value*, 81 FR 3115 (January 20, 2016), and the accompanying IDM at Comment 5; *see also Certain Lined Paper Products from India: Notice of Final Results of Antidumping Duty Administrative Review*, 77 FR 14729 (March 13, 2012), and the accompanying IDM at Comment 6.
[233] *See* KT&G's Letter, "4th Tier Cigarettes from the Republic of Korea: KT&G Section A Questionnaire Response," dated February 18, 2020 (KT&G A) at Appendix A-6-1(5)(a)-(e).
[234] *Id.* at Appendix A-6-1(5)(b) at 62.

taxes of tobacco products.[235] The overview included citations to the underlying Korean legal authorities for each of the seven taxes at issue.[236] Specifically, the overview included a table listing these provisions of law, a summary of the relevant portion of each law, and a pinpoint citation supporting each summary.[237] The disclosed information states that KT&G is liable for each of these taxes as the manufacturer and explains the rate at which the taxes are assessed on its tobacco products.[238] The information supports that each tax applies specifically to KT&G's tobacco sales, and that KT&G is liable for these taxes.[239]

Additionally, KT&G submitted to the record a GOK, Ministry of Health and Welfare public health plan, entitled "Comprehensive Anti-Smoking Measures to Eradicate the Environment that Promotes Smoking (Proposal)," dated May 2019.[240] The document is directed at the tobacco industry generally, which was intended to curb smoking.[241] The document supports that the GOK considers all seven taxes to be directly part of the price of cigarettes in Korea, specifically 73.6 percent of the price in total.[242]

Finally, the petitioner's foreign market researcher obtained price quotes from KT&G,[243] which the petitioner included in its calculation of NV,[244] and which were the basis for the initiation of this LTFV investigation.[245] The petitioner's foreign market researcher explicitly stated in its declaration that wholesale cigarette prices in Korea include each of the above-mentioned taxes.[246] It is noteworthy that the foreign market researcher's declaration specifically pertained to a price quote from KT&G for a sale in the home market.[247]

Regarding the petitioner's argument that Commerce must treat equally KT&G's HM taxes and U.S. taxes as direct selling expenses to ensure that dumping margins are calculated on a tax-neutral basis, Commerce agrees. For further discussion, *see* Comment 8, below.

Based on the foregoing factual information on the record of this proceeding, the seven HM taxes reported in KT&G's HM data must be deducted from the invoice price in the calculation of NV in order to provide a tax-neutral fair value comparison to CEP, in accordance with sections

[235] *Id.* at 71, "Tax and Charges on manufactured tobacco."
[236] *Id.*
[237] *Id.*
[238] *Id.*
[239] *Id.*
[240] *See* KT&G's Letter, "4th Tier Cigarettes from the Republic of Korea: KT&G Section A Supplemental Questionnaire Response," dated April 20, 2020 at Exhibit SA-7.
[241] *Id.* at 7.
[242] *Id.* at Exhibit SA-7, pages 3 and 24.
[243] *See* Petitioner's Letter, "Supplement to the Petition for the Imposition of Antidumping Duties on 4th Tier Cigarettes from the Republic of Korea - Foreign Market Research Declarations," dated December 18, 2019 (Foreign Market Researcher Declaration) at Attachment.
[244] *See* Petitioner's Letter, "Petitions for the Imposition of Antidumping Duties Pursuant to Section 731 of the Tariff Act of 1930, As Amended (Vol. II: Korea AD Petition)," dated December 18, 2019 at 7-9 and Exhibit II-11.
[245] *See* Initiation Checklist at 7.
[246] *See* Foreign Market Researcher Declaration at Attachment.
[247] *Id.*

773(a)(6)(B)(iii) and 777A(d)(1)(A) of the Act.[248] Therefore, for the final determination, we have continued to deduct the seven HM taxes reported in KT&G's HM data from the invoice price in the calculation of NV.[249]

Comment 6: Whether Commerce should include KT&G's sales to Non-Korean Military Forces in HM sales

Petitioner's Comment[250]

- Commerce should include sales to Non-Korean military forces in HM sales, because they are legitimate HM sales, and KT&G has provided no compelling reason to exclude them. Commerce requested that KT&G support its claims that such sales are outside of Korean customs territory under Korean law, and KT&G could only base its claim on the fact that the sales are not assessed VAT and other HM taxes. Because Commerce calculated its dumping margins on a tax-neutral basis, this is not a reason to exclude these sales.
- Commerce should determine that these sales are sold at the same LOT as U.S. sales, as they appear to have similar selling functions as other HM sales which Commerce preliminarily determined were at the same LOT as U.S. sales. KT&G made no claim that these sales were made at a different LOT and provided no information regarding selling activities for these sales. Thus, no LOT adjustment is warranted.

KT&G's Rebuttal Comment[251]

- Sales to foreign armed forces on foreign military bases are not HM sales. KT&G has maintained this throughout this investigation. Commerce agreed with KT&G in the *Preliminary Determination* by not including these sales among KT&G's HM sales.
- If the sales were included among KT&G's HM sales, they would represent a very small percentage of KT&G's HM sales. At the beginning of this investigation, Commerce excluded two other sales channels with small quantity, and even if the sales at issue were aggregated with those two other channels, all of these sales would still be less than five percent of KT&G's HM sales quantity.
- Under Korean law, the cigarettes sold to foreign armed forces on foreign military bases enter the foreign military base as duty-free special use cigarettes. Sales of these special use cigarettes on foreign military bases are considered by Korean law to be exports outside of the Korean customs territory, such that Korean law authorizes duty drawback on these sales. Further, the sales are not subject to VAT or the consumption taxes to which sales in Korea are subject. This demonstrates that these sales are export sales outside of the Korean customs territory and not properly considered HM sales.
- If Commerce should include these sales among KT&G's HM sales, KT&G maintains that all of its sales in the HM are at one LOT, and that the LOT is at a higher LOT than its U.S. sales, warranting a CEP offset. The differences in selling activities between sales to

[248] *See Antidumping Duties; Countervailing Duties,* 62 FR 27296, 27369 (May 19, 1997) (*Preamble*); *see also* SAA at 827 (Commerce adjusts for taxes only where such taxes are included in the price of the foreign like product. Congress has established conclusively that dumping comparisons are to be tax-neutral in all cases.)
[249] *See* Memorandum, "Preliminary Analysis Memorandum for KT&G Corporation," dated July 15, 2020 (Prelim Analysis Memo) at 2-4.
[250] *See* Petitioner Case Brief at 13-19.
[251] *See* KT&G Rebuttal at 20-33.

foreign armed forces in Korea, and sales to KT&G USA Corporation (KT&G USA), are not minor differences, and the selling activities for foreign armed forces in Korea are at a more advanced LOT. KT&G sold significantly more brands to foreign armed forces than it did to KT&G USA, which requires a higher intensity of selling functions like market research and strategic planning. Regarding logistical services and packing, KT&G reported that its average shipment quantity by invoice for foreign armed forces was much smaller than for its sales to KT&G USA.

Commerce's Position: We agree with KT&G that its sales of cigarettes within the jurisdictional zones of foreign military forces in Korea should not be considered HM sales and, therefore, should be excluded from its HM sales database. Commerce broadly possesses the "discretion to determine what sales are outside the ordinary course of trade."[252] Commerce's regulations at 19 CFR 351.102(b)(35) define sales outside the ordinary course of trade as sales that "have characteristics that are extraordinary for the market in question." Under Korean law, sales "within the jurisdictional zone of foreign military forces" to military personnel, as well as "civilians who hold foreign nationality and work for foreign military forces" and their family members, are tax exempt.[253] Korean law places sales within the jurisdictional zones of foreign military forces in Korea alongside sales in bonded areas, or sales to individuals that work outside of Korean territory, which would otherwise be regarded as sales outside of Korea.[254] Also, Korean law treats sales to foreign armed forces as if they were exports for the purposes of duty drawback for the raw materials.[255] Due to the legal status of these sales in Korea, we find that such sales are not sales made in the "ordinary course of trade" as defined in 19 CFR 351.102(b)(35). Thus, Commerce has continued to exclude these sales from HM sales in the final determination.

Comment 7: Whether Commerce's LOT adjustment in place of a CEP Offset was in accordance with Law

KT&G's Comment

Similarity of HM Sales Channel 1 to HM Sales Channel 3[256]

- In Commerce's *Preliminary Determination*, Commerce should not have found two LOTS in the HM, and Commerce should not have found KT&G's channel 1 sales to be at the same LOT as KT&G's CEP sales. Commerce failed to appreciate that KT&G's corporate customers in Channel 1 are simply a chain of retailers operating under one corporate brand, not distributors or wholesalers. From the consumer's perspective, there is no difference between purchasing cigarettes from a chain retailer in Channel 1 and a small retailer in Channel 3, and these are not different marketing stages.

[252] *See United States Steel Corp. v. United States*, 953 F. Supp. 2d 1332, 1341 (CIT 2013) (citing *e.g.*, *Torrington Co. v. United States*, 146 F. Supp. 2d 845, 861 (CIT 2001)).
[253] *See* KT&G's Letter, "4th Tier Cigarettes from the Republic of Korea: KT&G Sections A, B, and C Second Supplemental Questionnaire Response," dated July 1, 2020 at Appendix SB2-l(a).
[254] *Id.*
[255] *See* KT&G's Letter, "4th Tier Cigarettes from the Republic of Korea: KT&G Section B and C Supplemental Questionnaire Response," dated May 26, 2020 (KT&G BC1) at Exhibit SB-1(d) ("ENFORCEMENT RULE OF THE ACT ON SPECIAL CASES CONCERNING THE REFUND OF CUSTOMS DUTIES, ETC. LEVIED ON RAW MATERIALS FOR EXPORT").
[256] *See* KT&G Case Brief at 28-43.

- Commerce downgraded the reported intensity levels of KT&G's provision of sales support for Channel 3 based upon the high number of customers in the channel. Commerce's analysis lacks any meaningful discussion of the two HM sales channels. Sales support activities are typically organized by geographic markets or product brands, rather than by sales channel, meaning that intensity of sales support is similar across all channels in the same market. In its narrative response, KT&G grouped together its discussion of its HM sale channels in stating that it ships to many individual retail customers located throughout Korea, and in calculating the typical shipment size of its HM sales. KT&G's Sales Headquarters (HQ) and its local branches engage in considerable strategic/economic planning and market research for both Channel 1 and Channel 3 retailers. KT&G sold a similar number of brands to each sales channel. KT&G pays Channel 1 corporate customers for one selling activity performed by these customers, indicating that KT&G does not perform less of this sale support activity than it does for Channel 3. KT&G's Marketing HQ performs marketing research and intelligence gathering, forecasting, sales and branding strategies, and advertising generally in both Channels 1 and 3. Because KT&G's retail customers in Channels 1 and 3 both sell directly to end users, KT&G's marketing efforts would apply equally to both channels of distribution; KT&G submitted two contracts to support the marketing activity that KT&G performs for each channel. Commerce's finding that the sample market research report appeared to be for KT&G's own management does not justify treating the intensity of market research between Channel 1 and Channel 3 differently, since the same report was submitted to substantiate the intensities in both channels.
- Commerce mischaracterized the record when it stated that KT&G reported that it provides no training support for Channel 1 corporate customers. KT&G reported that its sales staff visit end-retail stores in both Channel 1 and Channel 3 to promote new products and educate retail store operators, at the same level of intensity. KT&G's statement that it "does not provide any particular training support to corporate customers" means that it provides the same training services to both HM sale channels.
- Commerce's reassignment of the intensity level for logistical services is not supported by the record evidence. KT&G performs the same types of selling functions at similar levels of intensity for both Channel 1 and Channel 3 customers, including maintaining regional and local warehousing centers in Korea, maintaining inventory at those warehouses, packing, and delivering the merchandise directly to customers. Commerce underestimated the intensity level required to perform logistical services to Channel 1 corporate customers. Moreover, KT&G reported similar packing, warehousing and inventory carrying costs for both sales channels.
- KT&G submitted sample sales documentation showing that sales-related administrative activities between Channel 1 and Channel 3 are similar, and these reported levels of intensity were not dependent on the number of HM customers in each channel as Commerce preliminarily determined. Moreover, for Channel 1 sales, KT&G had to process a tax invoice that it did not have to do for Channel 3 customers.

Similarity of HM Sales Channel 1 and 3 to CEP Sales Channel[257]

- Commerce concluded in the *Preliminary Determination* that since the total intensity level it assigned for HM Channel 1 corporate customers and the total intensity level of CEP sales to the affiliate KT&G USA were similar, that the two LOTs themselves were at a similar level. Commerce made no attempt to compare or contrast the LOTs in each market. When a meaningful comparison is conducted of HM Channel 1 and CEP sales to KT&G USA that accounts for record evidence, it is clear that the HM is at a more advanced LOT than the U.S. market and therefore cannot form the basis of an LOT adjustment.
- A super wholesaler in the U.S. market that sells almost exclusively to wholesalers is obviously at a different marketing stage than the customers in HM Channel 1 that sell directly to consumers. KT&G USA, not KT&G, is responsible for performing almost all selling functions in the U.S. market, while KT&G performs the selling functions for its HM Channel 1 (and Channel 3) customers.
    - KT&G performed sales support functions at a high level for HM Channel 1 sales to corporate retailers, through its Sales HQ and Marketing HQ, by providing market research reports for the Korean market, and through advertising installations at the end retail stores. This is supported by the contracts and sales documents KT&G has submitted to the record. For CEP sales to KT&G USA, KT&G only provides resource and strategy support to KT&G USA upon request and as needed. KT&G affords substantial discretion to KT&G USA with regard to preparation of market research, promotional materials, etc., for the U.S. market, and KT&G USA incurs the related expenses. Moreover, KT&G sells more brands in Korea than in the United States.
    - KT&G send sales staff to retail stores across Korea to train the customers and promote new products for both HM sales channels, and KT&G does not do this for KT&G USA.
    - KT&G performs several logistics services for HM Channel 1 customers, such as packing the merchandise at production facilities, maintaining regional and local warehousing centers in Korea, maintaining inventory at those warehouses, and delivering the merchandise directly to customers. KT&G does not perform these services for KT&G USA, as it only ships product to the United States in large bulk ocean freight shipments.
    - KT&G performs several sales-related administrative activities in HM Channel 1 on a more frequent basis which it only performs on a monthly basis for sales to KT&G USA.
- Once Commerce correctly finds that HM Channels 1 and 3 are at the same LOT, it is clear that these channels of distribution are more advanced than CEP sales because Commerce already concluded that HM Channel 3 is more advanced than CEP sales. Sales in the home and U.S. market are made at different marketing stages, with the HM at a more advanced LOT than CEP sales. Because there is only one LOT each in the home and U.S. markets, there is no data for Commerce to determine whether the differences in LOTs affect price comparability. Further, even if Commerce finds HM Channel 1 to be a

[257] *See* KT&G Case Brief at 43-50.

separate LOT, it is still more advanced, and not comparable to, the CEP sales LOT. Accordingly, Commerce should grant KT&G a CEP offset.[258]

Petitioner's Rebuttal Comment

Similarity of HM Sales Channel 1 to HM Sales Channel 3[259]

- There is no statutory requirement for Commerce to make an LOT or offset adjustment in every case, and Commerce does not do so unless the difference is shown to affect price comparability. Commerce makes its determinations regarding LOT and CEP adjustments based on a review of the entire record and consideration of the respondent's whole marketing scheme.[260] KT&G bore the burden of providing sufficient evidence to support its claimed LOTs and eligibility for a CEP offset, and it has failed to do so. While KT&G asserts that the selling activities undertaken for Channel 1 sales are at a similar level of intensity as those undertaken for Channel 3, KT&G relies on oversimplifications, facial similarities, and unsupported claims.
    - Regarding provision of sales support, KT&G recognized that it grouped these two channels of trade together when discussing LOT and did not distinguish the two sales channels. KT&G cannot now argue that the record demonstrates that all activities are performed equally for Channel 1 and Channel 3 sales. Commerce reasonably found that the activities discussed by KT&G were focused on Channel 3 sales, based on the significant number of customers reported in that sales channel, and the distribution structure required for these customers. KT&G contends that other information cited by Commerce does not support Commerce's determination, but Commerce only noted that the information cannot be used as a basis for identifying the relative level of activity in different channels of distribution. Commerce correctly found that KT&G had not demonstrated that there was a high level of intensity of these activities for Channel 1 sales.
    - Regarding provision of training services, KT&G stated in its response that it provides no training materials to customers in Sales Channel 1. If no training materials are specific to any sales channel, KT&G would have said that. Thus, Commerce correctly understood KT&G's statement to mean that these customers either do not receive training or receive limited training.
    - Regarding the provision of logistical support, KT&G reported that shipping and delivery activities are limited for Channel 1 sales compared to Channel 3 sales, but KT&G now does not acknowledge this. KT&G claims that sample contracts on the record reflect greater intensity with respect Sales Channel 1 than Sales Channel 3 with regard to delivery, but the contracts reflect either greater or equal intensity for Sales Channel 3. KT&G attempts to dismiss differences in inventory maintenance, warehousing and packing services, but these reflect greater intensity with respect to Sales Channel 3, and similarity with the CEP sales.
    - Regarding provision of sales-related administrative activities, KT&G itself relies on the high-number of customers in Sales Channel 3 to support higher intensity of these services in the HM. KT&G fails to show that the performance of these

[258] *Id.* at 51-54.

[259] *See* Petitioner Rebuttal Brief at 4-18.

[260] *Id.* at 5 (citing *Emulsion Styrene-Butadiene Rubber from Brazil: Final Results of Antidumping Duty Administrative Review; 2017-2018*, 85 FR 38847 (June 29, 2020), and the accompanying IDM at Comment 1).

sales-related administrative activities is the same for Channel 1 and Channel 3 sales. Regarding payment terms and VAT invoices, the record does not contain any type of comprehensive information that could permit Commerce to determine the relative level of sales-related administrative activity between the two HM sales channels.

Similarity of HM Sales Channels 1 and 3 to CEP Sales Channel[261]

- That KT&G can point to some differences between HM Sales Channel 1 and sales to KT&G USA does not undermine the conclusion that they are at the same LOT, and the extent of differences alleged by KT&G is simply not supported.
    - With respect to the provision of sales support, the customer contracts on the record do not support the higher reported level of intensity of marketing for Channel 1 sales than for U.S. sales.
    - In support of its claim that there are differences in the level of intensity of training services provided for Channel 1 versus U.S. sales, KT&G relies on its unsupported claim that it demonstrated meaningful activities with respect to Channel 1 sales.
    - With respect to logistics services, KT&G claims that the activities undertaken for Channel 1 sales are "significantly more intense" than for U.S. sales. However, KT&G dismisses, without explanation, the activities undertaken for U.S. sales with respect to packing and frequency of delivery. KT&G has provided no reason why movement from the production facility to a central warehouse and then to the customer requires substantially more logistics services compared to movement from the production facility to a port and then to KT&G USA's warehouse.
    - For sales-related administrative activities, for both Channel 1 sales and sales to KT&G USA, KT&G enters yearly master supply agreements and describes a similar sales process for each. KT&G has failed to demonstrate how the sales activities for Channel 1 and sales to KT&G USA rise to the level of a significant difference in intensity, and Commerce correctly found no meaningful difference.
- Because KT&G's claims that its Channel 1 sales are more advanced than its U.S. sales to KT&G USA have failed, there is no basis for a CEP offset to be granted.[262]

Commerce's Position: Commerce disagrees with KT&G. As Commerce stated in the *Preliminary Determination*, to the extent practicable, we will calculate NV based on sales at the same LOT as the U.S. sales, pursuant to section 773(a)(1)(B)(i) of the Act. Commerce's regulations state that sales are made at different LOTs if they are made at different marketing stages (or their equivalent).[263] Substantial differences in selling activities are a necessary, but not sufficient, condition for determining that there is a difference in the stages of marketing.[264] In order to determine whether the comparison market sales are at different stages in the marketing process than the U.S. sales, we examine the distribution system in each market *i.e.*, the chain of distribution, including selling functions and class of customer (customer category), and the level

[261] *Id.* at 18-24.
[262] Id. at 25.
[263] *See* 19 CFR 351.412 (c)(2).
[264] *Id.*; *see also Certain Orange Juice from Brazil: Final Results of Antidumping Duty Administrative Review and Notice of Intent Not to Revoke Antidumping Duty Order in Part*, 75 FR 50999 (August 18, 2010), and the accompanying IDM at Comment 7.

of selling expenses for each type of sale. In the *Preliminary Determination*, Commerce found that KT&G's reported selling functions for retailers and expressway service stations were performed at a higher level of intensity than the sales to corporate customers.[265] We then compared the selling activities at the U.S. LOT with the selling activities at the HM LOT and found that the LOT in the United States, and HM sales to corporate customers, were substantially similar, but that the HM LOT for sales to retailers and expressway service stations was at a more advanced LOT than the U.S. LOT. Next, we compared KT&G's reported CEP sales to KT&G's HM sales to corporate customers. Where we were unable to match sales of the foreign like product in the comparison market at the same LOT as the CEP, we made an LOT adjustment, in accordance with section 773(a)(7)(A) of the Act.[266]

While KT&G claims that the sales channel to retailers and expressway service stations and the sales channel to corporate customers are the same, these customer categories are fundamentally different. This difference is reflected in the factual information submitted in KT&G's questionnaire responses. Generally, the facts presented in KT&G's responses support that KT&G provides selling functions to its corporate customers in its Sales Channel 1 at a lower level of intensity than that required for the individually-owned small retailers located throughout Korea in the reported Sales Channel 3.[267] Generally, KT&G reported that the selling functions that KT&G requires for sales to small retailers do not have to be performed at the retail level for its corporate customers in Sales Channel 1, since they are "headquarters of franchise convenience stores, large-sized market chains, and supermarket chains,"[268] which service their own retail locations throughout Korea. This is generally similar to the manner in which KT&G transacts with KT&G USA, which KT&G established for the purpose of importing, selling and marketing KT&G's cigarettes in the United States.[269] Although we have responded to KT&G's comments by revising the assigned intensity levels of certain selling functions from the *Preliminary Determination*, which is business proprietary information,[270] Commerce continues to find that KT&G's HM Sales Channel 3 to small retail customers is at a more advanced LOT than HM Sales Channel 1 corporate customers, and that the HM Sales Channel 1 corporate customers are at a similar LOT to KT&G's transactions with KT&G USA in the U.S. market.

We first note that Commerce's analysis with regard to the intensity of selling activities is not driven by expenses reported in the HM and U.S. market sales databases (such as the indirect selling expense ratio), but rather the analysis is purely an evaluation of the amount of activity that each sales channel requires for any given selling function.[271] Regarding the "Provision of Sales Support," for instance, KT&G argues that because it pays its corporate customers for a certain selling activity, it does not perform less of this selling activity than it does for the small

[265] *See Preliminary Determination* PDM at 14.
[266] *Id.*
[267] *See* Prelim Analysis Memo at 2-4.
[268] *See* KT&G A at 26.
[269] *Id.* at 12-13.
[270] *See* Memorandum, "Final Analysis Memorandum for KT&G Corporation," dated concurrently with this memorandum (Final Analysis Memo) at 2-3.
[271] *See* Commerce's Letter, "Antidumping Questionnaire," dated January 16, 2020 (Antidumping Questionnaire) at A-8 ("For example, if you arranged freight services for sales of subject merchandise, you may consider in that analysis the expenses incurred for arranging freight services in your level of trade analysis, but should not consider the per-unit inland freight expenses reported to Commerce in your sales databases.")

retailers. However, under Commerce's analysis, paying the customer to perform a selling activity means that the customer, and not KT&G, performs the activity.

Further, regarding "Provision of Sales Support," KT&G may be correct that the geographic area and number of brands sold may be similar components in determining the required sales support for both large corporate headquarters customers and small retailers. Nevertheless, the vast difference in the sheer number of customers in each category is a key component in the equation that distinguishes the two customer categories, in evaluating the amount of the activity that KT&G must provide. While the amount of sales staff dedicated to each sales channel is also indicative of the amount of required sales support activity (corporate customers require two sales teams at KT&G's "Corporate Sales Office" headquarters, while the small retailers require a separate sales office with 14 regional sales headquarters that are further divided into 123 branches throughout Korea),[272] the number of customers is the key component that leads to the different result. In other words, for example, for a respondent that has one corporate customer and 2,000 small retail customers, the fact that they may all be located in the same country, and that they may all buy some combination of the same 10 or 15 cigarette brands, is not as significant as the fact that 2,000 customers are more difficult to service with sales support than one. KT&G reported a very limited amount of sales support to KT&G USA.[273] However, because KT&G USA is a single "customer," the sales support that KT&G provides to KT&G USA proportionally corresponds to the amount of sales support that it provides to its corporate customers.[274] This is reflected in the reported breakdown of the number of sales support employees assigned to corporate customers compared to those assigned to retail customers, and the number assigned to international sales.[275] Thus, KT&G's U.S. sales channel is at a substantially similar LOT to that of KT&G's HM sales channel to corporate customers because there is just one "customer" in the United States for KT&G for whom to provide sales support for the purposes of this analysis, *i.e.*, KT&G USA.

Regarding KT&G's claim that Sales Channel 1 large corporate customers and Sales Channel 3 small retailers all require the same or similar sales documentation, Commerce finds that the sample sales documentation that KT&G cites only highlights the difference between the two channels, specifically with regard to the contracts that KT&G has with its corporate customers.[276] It is precisely these agreements (which are business proprietary information in their entirety) that support Commerce's determination that Sales Channel 1 is at a less advanced LOT than KT&G's Sales Channel 3 small retailers, by providing insight into the nature of KT&G's corporate customers, and KT&G's business with them. K&G transacts with corporate headquarters operations that, in turn, provide the required services to their franchise locations throughout Korea.[277]

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[272] *See* KT&G A at 11.
[273] *Id.* at 12.
[274] *See* KT&G's Letter, "4th Tier Cigarettes from the Republic of Korea: KT&G Section B Questionnaire Response," dated March 30, 2020 (KT&G B) at Appendix B-7 (information regarding the number of corporate customers).
[275] *See* KT&G's Letter, "4th Tier Cigarettes from the Republic of Korea: KT&G Partial Sections A, B, and C Second Supplemental Questionnaire Response," dated July 6, 2020 (KT&G 2ABC2) at Appendix SA2-2(a).
[276] *See* KT&G A at App. A-4-3(a); *see also* KT&G BC1 at App. SB-5 (contracts with corporate customers).
[277] *Id.*

Additionally, we stated in the *Preliminary Determination* that the sample market research report that KT&G submitted did not support that the intensity of sales support is equal in both HM channels.[278] We stated that the sample market research report[279] appears to be for KT&G's own management rather than that of any customer.[280] KT&G states that this finding does not support Commerce's determination to treat its two HM sales channels differently. However, the petitioner is correct that Commerce's evaluation of the document was that it had indeterminate significance to the matter at hand, and it was, therefore, null with respect to Commerce's analysis of KT&G's relationship with its HM customers or, by way of comparison, its relationship with KT&G USA.

Regarding "Provision of Training Services," after KT&G's clarification, we agree that KT&G's statement that it provides "no training" to corporate customers means that KT&G provided any such training to the corporate customer's franchises. The sample training materials that KT&G submitted are plainly documents intended for distribution to retail locations, which could potentially include the franchises of corporate customers.[281] Further, the sample training materials that KT&G submitted contain visual materials for its customers to prepare advertisements and promotional materials, and the materials relate as much to the provision of sales support as they do to the provision of training.[282] KT&G also reported that it provided this kind of material to KT&G USA on an infrequent basis.[283] Because there is no contractual language in the sample sales agreement that KT&G submitted regarding the significance of this training to KT&G's Sales Channel 1 corporate customers, such training may also have been infrequent for HM corporate customers.[284] Moreover, since the number of such corporate franchises in relation to the number of small retail customers is not on the record, it is unclear how meaningful the amount of training that KT&G provides to these franchises is to the LOT analysis (*i.e.*, the level of intensity). Thus, we have determined that KT&G's claim that it provided the same training to its corporate customer's franchises as it does for its small retail customers to be unsubstantiated by record evidence.

Regarding logistical services, KT&G's submitted information that clearly distinguishes the level of intensity of the logistical services that KT&G provides Sale Channel 1 corporate customers and those provided to small retail customers throughout Korea. KT&G reported that it shipped the merchandise to the headquarters logistics centers of corporate customers pursuant to its supply agreements,[285] while for Sales Channel 3 customers, KT&G relied on a network of local branches to deliver smaller shipments to its many small retail customers throughout Korea.[286] The inventory maintenance and packing services required from KT&G by corporate customers is much less than that required by retailers and expressway service station customers.[287] KT&G's

[278] *See* Prelim Analysis Memo at 2-3.
[279] *See* KT&G A at Appendix A-3-3.
[280] *See* Prelim Analysis Memo at 2-3.
[281] *See* KT&G A at App. A-3-5.
[282] *Id.*
[283] *Id.* at 30 ("KT&G may, from time to time, provide… market information/data, marketing guidelines, and visual materials for KT&G USA to prepare advertisements and promotional materials.").
[284] *Id.* at App. A-4-3(a).
[285] *Id.* at 26 and App. A-4-3(a) (containing agreement that includes provisions defining KT&G logistical services to corporate customer).
[286] *Id.* at 27, 39; *see also* KT&G 2ABC2 at 2-3, 6.
[287] *See* KT&G's SA1 at 12-13.

small retail customers have very little storage capacity other than retail shelf space, and cannot maintain any items in inventory as corporate customers can, requiring more frequent shipments.[288] It is clear to us that the logistical requirements for shipping merchandise to numerous small retailers located throughout Korea are much greater than the logistical requirements for shipping merchandise to the centralized logistics centers of large corporate customers that have their own distribution networks.[289] Thus, the information on the record reflects that much lower intensity is required for logistical services to corporate customers compared to the sales channel to small retailers. Likewise, KT&G's U.S. sales channel is at a substantially similar LOT as that of KT&G's HM sales channel to corporate customers because there is just one "customer" in the United States for KT&G to ship to, for the purposes of this analysis, *i.e.*, KT&G USA. Similar to KT&G's corporate customers, KT&G USA maintains its own inventory, and performs its own warehousing and distribution in the United States.[290]

Finally, contrary to the claims in its case brief, KT&G relied on the "large number" of HM customers, and the corresponding high number of accounts receivable, to describe the intensity of sales-related administrative activities in the HM.[291] Because the high number is primarily made up of small retailers, the reported intensity is attributable to that sales channel (*i.e.*, small retail and expressway service station customers). The sales-related administrative activity required for large corporate customers, which are fewer in number, is apparently less, noting that KT&G has supply agreements that control sales-related administrative activities with these "headquarters of franchise convenience stores, large-sized market chains, and supermarket chains" (*i.e.*, not with their franchises).[292] Likewise, KT&G's U.S. sales channel is at a substantially similar LOT as that of KT&G's HM sales channel to corporate customers, because there is just one "customer" in the United States that requires sales-related administrative activities from KT&G for the purposes of this analysis, *i.e.*, KT&G USA.

Regarding KT&G's contention that Commerce made no attempt to compare or contrast the LOTs in the HM Channel 1 and U.S. markets, we note that such comparison is the very purpose of the selling function chart at the heart of Commerce's analysis. Commerce's methodology requires a quantitative analysis showing how the expenses in each sales channel impacts price comparability, and then requests that the respondent assign a level of intensity based on this quantitative analysis in a selling functions chart.[293] Each selling function must be assigned level of intensity using "a scale of zero to ten in which five represents a sale with average associated selling expenses, and level of intensity information is reported in relation to this baseline of five."[294] In other words, the intensity level of each selling function in each sales channel is evaluated based on the very same scale. Thus, if a selling function in the HM LOT (*i.e.*, "Provision of Sales Support") is assigned "5," and the same selling function in the U.S. LOT is also assigned "5," Commerce has determined the intensity level of "Provision of Sales Support" to be equal in both markets.

[288] *See* KT&G 2ABC2 at 6.
[289] *See* KT&G A at App. A-4-3(a).
[290] *Id.* at 35.
[291] *Id.* at 32.
[292] *Id.* at App. A-4-3(a).
[293] *See* Antidumping Questionnaire at A-7 and A-8.
[294] *Id.* at A-15.

Thus, we continue to find that there are two LOTs in KT&G's HM sales. We also continue to find that there is one LOT for KT&G's U.S. sales. Because KT&G performed a higher level of selling functions in one of two HM sales channels as compared with the U.S. market (*i.e.*, HM small retail customers), we find that this HM LOT is more advanced than the U.S. LOT, pursuant to section 773(a)(7)(A) of the Act. While the other HM LOT (*i.e.*, HM corporate customers) may differ from the U.S. LOT to KT&G USA, the differences are not substantial, and are not significant enough to assign the two sales channels to different LOTs.

Accordingly, for the final determination, we continue to compare KT&G's reported CEP sales to its HM sales to Sales Channel 1 corporate customers. Based on our analysis, where we were unable to match U.S. sales of the foreign like product in the HM at the same LOT as the CEP, we have made an LOT adjustment in accordance with section 773(a)(7)(A) of the Act. Because we have made an LOT adjustment, a CEP offset pursuant to section 773(a)(7)(B) of the Act is not warranted.

Comment 8: Whether KT&G unlawfully deducted U.S. Taxes from KT&G's U.S. Price

KT&G's Comment[295]

- Commerce unlawfully deducted from U.S. price federal excise taxes as movement expenses under section 772(c)(2)(A) of the Act, and all other U.S. taxes (namely, state excise and consumption taxes, non-participating manufacturer (NPM) fees, and Food and Drug Administration (FDA) fees) as CEP selling expenses under section 772(d)(1) of the Act. In *FSS from Canada*,[296] Commerce found that there is "no basis" under U.S. law to deduct U.S. taxes from CEP. Commerce did not determine that the taxes related to installation rather than subject merchandise and did not premise its determination not to deduct the taxes on that fact. Commerce made an unambiguous and unequivocal legal determination that neither section 772(c)(2) of the Act nor section 772(d)(1) of the Act provides a basis for deducting taxes other than export taxes from U.S. price.
- Sections 772(c) and (d)(1) of the Act contain a comprehensive list of the permissible adjustments to EP and CEP, including "any export tax, duty, or other charge imposed by the exporting country on the exportation of the subject merchandise to the United States." U.S. taxes are not among this list of permissible adjustments. Section 772(d)(1) of the Act permits an adjustment for selling "expenses" and not taxes. Taxes cannot reasonably be considered a subset of "expenses," given that Congress clearly differentiates these two terms in section 772 of the Act. To avoid rendering portions of the statute superfluous, each of these words must be construed as having independent and non-overlapping meaning. Expenses relate to commercial activity, while taxes relate to government activity that KT&G must pay regardless of whether it sells the merchandise.
- Likewise, Congress did not intend for U.S. taxes to fall within the scope of "costs, charges, or expenses, and U.S. import duties" that are "incident to bringing merchandise from the HM to the place of U.S. delivery" pursuant to section 772(c)(2)(A) of the Act. This is because in the immediately following provision (section 772(c)(2)(B) of the Act), Congress explicitly provided for the deduction of export taxes imposed in the HM.

[295] *See* KT&G Case Brief at 54-70.
[296] *Id.* at 57 (citing *Certain Fabricated Structural Steel from Canada: Final Determination of Sales at Less Than Fair Value,* 85 FR 5373 (January 30, 2020) and the accompanying IDM (*FSS from Canada*) at Comment 4).

- Section 773(a)(6)(B)(iii) of the Act explicitly requires the deduction of HM taxes from NV that are "imposed directly upon the foreign like product or components thereof" and "which have been rebated, or which have not been collected, on the subject merchandise" to the extent that "such taxes are added to or included in the price of the foreign like product." Because Congress was silent on U.S. taxes but specific regarding HM taxes, it is clear that Congress considered what taxes should be deducted from U.S. price and intentionally did not authorize the deduction of U.S. taxes. While legislative history indicates that dumping comparisons should be "tax neutral," when this legislative history is considered in the context of the statutory provisions described above, it is clear that Congress was referring to tax neutrality with respect to HM taxes only. The CAFC has ruled that Commerce cannot interpret the law to deduct taxes in a manner that is not explicitly provided for in the law.[297]
- Section 772(d)(1) of the Act is limited to deductions for expenses incurred in "selling the subject merchandise" and at least state excise taxes and FDA fees do not meet this standard as a factual matter. The record reflects that states collect their excise taxes upon purchase of a cigarette tax stamp. As such, these taxes are not incurred in "selling the subject merchandise" because KT&G USA pays the taxes regardless of whether a sale takes place. Similarly, the FDA fee is calculated based on a quarterly review of KT&G USA's imports over the last quarter. KT&G USA is responsible for paying the FDA fee regardless of whether those imports are subsequently sold or held in inventory.
- Commerce's treatment of these taxes as CEP selling expenses meant that the taxes were included in the CEP profit calculation, resulting in large profit deductions from U.S. price that bear little relationship to economic reality. Commerce's methodology in effect penalizes KT&G for state fiscal policies that are beyond its control. Differing levels of state taxation will result in different imputations of profit and, as a result, dumping margins are driven by state fiscal policies rather than by company-specific pricing behavior.

Petitioner's Rebuttal Comment[298]

- Commerce's preliminary methodology of deducting KT&G's U.S. taxes is both consistent with the statute and is not contradicted by the agency's previous practice. Further, deducting U.S. taxes is necessary to ensure a fair comparison between KT&G's HM and U.S. prices. Also, Commerce must ensure that its dumping calculations be done on a tax-neutral basis so that the margins derived are not driven solely by differences in the tax rates between the HM and the United States, which for cigarettes can be very high and which can vary significantly between countries.
- In *FSS from Canada*, Commerce determined that the taxes in question were "use taxes" related to the installation of fabricated structural steel, and not to the merchandise under investigation. Such taxes are clearly distinguishable from the United States taxes paid by KT&G, which bear a direct relationship to its U.S. sales. Further, KT&G misreads Commerce's determination in *FSS from Canada* to mean that no U.S. taxes may ever be deducted from U.S. price, which is an overly broad interpretation of the Commerce's reasoning in that case. It would be entirely consistent with Commerce's analysis in *FSS from Canada* for the agency to deduct U.S. taxes when such taxes are directly related to

[297] *Id.* at 63 (citing *Zenith Elecs. Corp. v. United States*, 988 F.2d 1573, 1580-82 (Fed. Cir. 1993) (*Zenith*)).
[298] *See* Petitioner Rebuttal Brief at 25-42.

the price of the merchandise in question —as is the case in this investigation. Additionally, a single case such as *FSS from Canada* cannot establish a binding practice, which requires a uniform and established procedure.

- The legislative history surrounding section 772 of the Act instructs Commerce to calculate dumping margins on a tax-neutral basis. Further, the statute requires the deduction of U.S. movement expenses and CEP selling expenses. As Commerce correctly classified KT&G's U.S. taxes as these types of expenses, it was required to deduct them.
- Commerce's regulations specify that "{i}n calculating export price, constructed export price, and normal value…, the Secretary normally will use a price that is net of adjustments…, that are reasonably attributable to the subject merchandise or the foreign like product (whichever is applicable)."[299] Deducting U.S. taxes from U.S. prices is consistent with the statute, which requires that taxes be deducted when they are classified as movement expenses or CEP selling expenses under sections 772(c) and (d) of the Act.
- KT&G notes that the U.S. price section of the statute lacks clear directions on how Commerce should treat U.S. taxes. However, KT&G mistakenly views this silence as a clear indication that Congress intended for Commerce not to deduct any U.S. taxes from U.S. prices. Commerce has broad authority to adjust HM and U.S. prices to ensure an apples-to-apples comparison.
- The NV section of the statute (section 773 of the Act) delineates a limited number of specific deductions that are required, which includes certain taxes.[300] For CEP, the statute (section 772 of the Act) is clear that "any selling expenses" incurred by or for the account of the producer, exporter, or affiliated seller must be deducted from CEP.[301]
- Article 2.4 of World Trade Organization (WTO) Antidumping Agreement instructs national authorities to adjust for differences that affect price comparability, such as differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and other differences that are also demonstrated to affect price comparability. Because United States law does not explicitly specify how U.S. taxes should be treated with respect to U.S. prices, it is notable that the WTO agreements indicate that they should be deducted, and that the SAA likewise points to this language. Congress would have explicitly proscribed the deduction of taxes from CEP if that was its intent.
- The CAFC case *Zenith* cited by KT&G relates to a prior version of the Act which did not require tax neutrality, as the current version of the Act does.
- Regardless of how U.S. taxes are classified, they should be deducted from U.S. price when they are linked to U.S. sales and, thus, reflected in the price of KT&G's U.S. sales. Although KT&G claims that U.S. federal and state taxes do not directly relate to commercial activity, the only reason why KT&G pays these taxes is to sell cigarettes. There is no rational basis to separate these taxes from cigarette sales.

Commerce's Position: We disagree with KT&G that deducting U.S. taxes from U.S. price was contrary to law. Specifically, Commerce deducted federal excise taxes pursuant to section 772(c)(2)(A) of the Act; the taxes deducted pursuant to section 772(d)(1) of the Act were state

[299] *Id.* at 31 (citing 19 CFR 351.401(c)).
[300] *See* section 773 of the Act.
[301] *See* section 772(d) of the Act.

stamp fees, "non-participating manufacturer fees" (for manufacturers that are not signatories to the Master Settlement Agreement of November 1998), and FDA user fees.[302]

Regarding Commerce's determination in *FSS from Canada,* any reading of the passage that KT&G relies upon full clearly shows that the case is inapposite to the matter at hand:

> Thus, while the petitioner contends that use taxes should be deducted from either EP or CEP sales price, we find no basis to do so in the language of sections 772(c)(2) or 772(d)(1) of the Act, which enumerates the specific types of expenses to be deducted. The only mention of taxes in these sections of the Act relates to export taxes imposed by the exporting country. Moreover, there is no evidence to support that these taxes are "incident to bringing merchandise...to the place of delivery in the United States" such that they would be covered by section 772(c)(2) of the Act. Canatal stated that these taxes related to the "use or consumption of tangible personal property in {a} given state." In any event, to the extent that these taxes relate to installation of fabricated structural steel, as the petitioner claims, our use of the FSS ratio to determine the portion of the project price related to fabricated structural steel (exclusive of installation and additional materials), renders this deduction unnecessary.

In this passage, Commerce noted first (accurately) that sections 772(c)(2) or 772(d)(1) of the Act only specifically mention export taxes imposed by the exporting country. Next, Commerce notes that the "use taxes" at issue in *FSS from Canada* are not movement expenses, which is analysis that has no bearing on this investigation. Finally, Commerce notes that the "use taxes" relate to the installation of fabricated structural steel, [303] which is also analysis that has no bearing on the taxes in this investigation.[304] In *FSS from Canada*, Commerce determined the U.S. price of fabricated structural steel by extracting it from a contract price that included the installation of the steel structure. In this investigation, we followed our normal methodology of starting prices that applied only to the merchandise under investigation (*i.e.*, 4th tier cigarettes) to calculate CEP.[305] Thus, the methodological basis of Commerce's determination in *FSS from Canada* is completely distinct from the methodology employed in this investigation.

KT&G pays federal excise taxes on 4th tier cigarettes, which are collected by CBP upon entry along with U.S. duties.[306] Duties are specifically set forth in section 772(c)(2)(A) of the Act as movement expenses to be subtracted in the calculation of the U.S. price. The statute further defines movement expenses as expenses that are "incident to bringing the subject merchandise

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[302] *See*, *e.g.*, KT&G's Letter, "4th Tier Cigarettes from the Republic of Korea: KT&G Section C Questionnaire Response," dated March 24, 2020 (KT&G C) at 60-61; *see also* Prelim Analysis Memo at 6.
[303] *See FSS from Canada* IDM at Comment 2 ("Commerce must ensure that, in making comparisons to normal value, the net U.S. price is not artificially inflated due to the profit on goods and services which are not subject to the investigation.")
[304] *Id.* at Comment 4 ("In any event, to the extent that these taxes relate to installation of fabricated structural steel, as the petitioner claims, our use of the FSS ratio to determine the portion of the project price related to fabricated structural steel (exclusive of installation and additional materials), renders this deduction unnecessary.")
[305] *See Preliminary Determination* PDM at 11.
[306] *See, e.g.*, KT&G C at Appendix C-17 (entry summary documentation supporting KT&G's payment of federal excise taxes upon entry into the United States).

from the original place of shipment in the exporting country to the place of delivery in the United States."[307] Regarding KT&G's contention that Congress did not intend for U.S. excise taxes to fall within the scope of section 772(c)(2)(A) of the Act, we determine that Congress did have such an intention based primarily on the fact that U.S. excise taxes are collected by CBP, aggregated on the same form (*i.e.*, CF 7501), and paid along with duties, which are specifically set forth as movement expenses in the statute.[308] At a minimum, duties and excise taxes are sufficiently analogous that Commerce must classify them as the same type of expense, to be consistent. Because both taxes are paid together, the payment of U.S. excise taxes on tobacco is indistinguishable from the payment of duties, and for practical purposes, U.S. excise taxes are U.S. duties, at least in the context of importation into the United States. Moreover, making physical entry of merchandise into the United States requires the payment of duties, along with U.S. excise taxes.[309] Thus, cigarettes cannot be released into U.S. customs territory unless the importer pays U.S. excise taxes. Record evidence indicates that KT&G paid U.S. excise taxes.[310] Accordingly, Commerce deducted federal excise taxes in calculating CEP.

Furthermore, sections 772(d)(1)(B) through (D) of the Act cover: (1) expenses that bear a direct relationship to the sale;[311] (2) expenses that the seller pays on behalf of the purchaser;[312] and (3) any other selling expense.[313] We agree with KT&G that the overall statutory scheme and the legislative history of the URAA, including the SAA, guide the interpretation of this provision. The SAA describes how Congress intended for Commerce to treat these expenses, stating that, in calculating the CEP, Commerce is to deduct from the starting price only expenses "associated with economic activities occurring in the United States."[314] Section 773(a) of the Act directs that "a fair comparison shall be made between export price or constructed export price and normal value."[315] Additionally, "to achieve that end, the statute and {Commerce's} regulations call for adjustments to the base value of both {NV} and United States price to permit comparison of the two prices at a similar point in the chain of commerce,"[316] which, for U.S. price, Commerce has viewed as the point where the subject merchandise is ready to leave the producer's or exporter's premises[317] ready for exportation to the United States.

On this basis, Commerce finds that Congress did not intend that Commerce should retain U.S. taxes while eliminating foreign export taxes in its U.S. price calculation under section 772(c)(2)(B) of the Act. With regard to section 773(a)(6)(B)(iii) of the Act, KT&G's claim that the intent of Congress was to ensure that only HM prices are tax-neutral, rather than the price comparison itself, is irrational. KT&G's interpretation would render section 773(a) of the Act, and the term "tax-neutral," to be meaningless. KT&G's statutory interpretation would eliminate the equilibrium embodied in the statute by increasing the U.S. price (to include taxes) without a

[307] *See* section 772(c)(2)(A) of the Act.
[308] *Id.*
[309] *See* 19 CFR 141.111(b)(2) ("Form of release. The release order may be executed on any of the following documents … The official entry form").
[310] *See* KT&G C at Appendix C-17.
[311] *See* section 772(d)(1)(B) of the Act.
[312] *See* section 772(d)(1)(C) of the Act.
[313] *See* section 772(d)(1)(D) of the Act.
[314] *See* SAA at 823.
[315] *Id.* at 820.
[316] *See Torrington Co. v. United States*, 68 F. 3d 1347, 1352 (Fed. Cir. 1995).
[317] *See* SAA at 809 ("...comparisons be made ... at the ex-factory level...").

comparable increase to the HM price.[318] To include taxes in either U.S. price or HM price would result in a comparison of the effect of taxes on the merchandise rather than a comparison of the price of the merchandise itself. With section 773(a) of the Act, Congress could not have intended this outcome. Rather, section 772(c)(2)(B) of the Act calls for reducing the gross U.S. price charged to the customer to a net price received. Removing taxes from both HM and CEP is consistent with our longstanding policy that dumping margin calculations be tax-neutral.[319] Congress's clear intent with section 773(a) of the Act was to ensure a balanced comparison.

Thus, to fulfill the statute and the intent of Congress that U.S. price and NV be compared on a net basis, Commerce must deduct state stamp fees, "non-participating manufacture fees," and FDA user fees from KT&G's gross price. These taxes all bear a direct relationship to KT&G's U.S. sales,[320] are paid on behalf of the purchaser unless the purchaser pays the taxes,[321] and are mandatory taxes for any company selling tobacco products in the United States.[322] Record evidence indicates that KT&G paid state stamp fees, "non-participating manufacture fees," and FDA user fees, for all transactions in which it had liability for these taxes.[323] Accordingly, we deducted state stamp fees, "non-participating manufacture fees," and FDA user fees in calculating CEP.[324]

Regarding the calculation of CEP profit, section 772(f)(1) of the Act directs Commerce to calculate CEP profit by multiplying the total actual profit of a respondent by the "applicable percentage," which is defined under section 772(f)(2)(A) of the Act as the "percentage determined by dividing the total United States expenses by the total expenses." KT&G's claim that it bears "little relationship to economic reality" to include taxes imposed in the United States on cigarettes as "United States expenses," fails to acknowledge that compulsory taxes are an economic reality. Specifically, state stamp fees, "non-participating manufacture fees," and FDA user fees relate to commercial activity for anyone selling cigarettes in the United States. That they are imposed by federal and state governments, and are unavoidable expenses for KT&G, does not make the expenses "not commercial" or not within the meaning of "United States expenses" under section 772(f)(2)(A) of the Act. Because state stamp fees, "non-participating manufacture fees," and FDA user fees are not movement expenses,[325] for the final determination, Commerce will continue to include these expenses in KT&G's CEP profit calculation.[326]

[318] *See Preamble*, 62 FR at 27351–27352 (preamble to 19 CFR 351.402).
[319] *See Preamble*, 62 FR at 27369 ("Congress has now established conclusively that dumping comparisons are to be tax-neutral in all cases.") (citing SAA at 827).
[320] *See* KT&G 2ABC2 at 21-24 (supporting that the state governments and the FDA impose these taxes on all producers and sellers of tobacco products).
[321] *Id.* at 26 (supporting that KT&G only pays the taxes when its customers do not).
[322] *See*, *e.g.*, KT&G C at 60-61.
[323] *Id.*
[324] *See* Prelim Analysis Memo at 6.
[325] *See* Policy Bulletin, Number 97.1, Calculation of Profit for Constructed Export Price Transactions, September 4, 1997, at footnote 7 ("The total U.S. expenses used to compute CEP profit excludes all movement charges.").
[326] *See* Prelim Analysis Memo at Attachment 3, page 33 (146).

Comment 9: Whether Commerce Erred in the Rate It Selected to Compute KT&G USA's Imputed Credit Expenses and Inventory Carrying Costs

KT&G's Comment[327]

- The Federal Reserve's Series 30 Day AA Nonfinancial Commercial Paper Interest Rate more appropriately reflects KT&G USA's economic reality than the Federal Reserve's Small Business Lending Survey (SBLS) interest rate, which Commerce used in the *Preliminary Determination*. Unlike the now discontinued "E.2 -Survey of Terms of Business Lending" Survey of Terms of Business Lending (STBL) formerly used by Commerce, the SBLS rate applies to small businesses with $5 million or less in annual gross revenue, which does not reflect KT&G USA's reality.
- Although KT&G USA does not have short-term lending and has not received a credit rating, it is a wholly-owned subsidiary of KT&G, which has the highest credit rating available in Korea. The fact that KT&G USA does not even have any short-term borrowings further indicates that the company has sufficient cash flow through its transactions with its parent, KT&G, and therefore consideration of KT&G's credit rating and financial size is relevant in this proceeding.

Petitioner's Rebuttal Comment[328]

- Commerce correctly used the average of the interest rates from the current Federal Reserve source consistent with the Policy Bulletin 98.2[329] for calculating credit and inventory carrying costs in the United States. The interest rate also represents the average rate from all borrowers and does not rely on credit ratings, which are completely unsubstantiated in this investigation.
- KT&G's claimed interest rate is based on the highest credit rating category. Commerce cannot assume that KT&G USA has the same credit rating today that its parent company did in the past, prior to the POI. KT&G's claimed interest rate only covers 30-day loans. Commerce's Policy Bulletin 98.2 states that it uses "loans maturing between one month and one year.

Commerce's Position: We disagree with KT&G that that the short-term interest rate derived from the SBLS is not appropriate for calculating KT&G's U.S. credit expenses, and we continue to use the rate of 5.74 percent for the final determination. Policy Bulletin 98.2, which describes our practice, states:

> In cases where a respondent has no short-term borrowings in the currency of the transaction, we will use publicly available information to establish a short-term interest rate applicable to the currency of the transaction ... For dollar transactions, we will generally use the average short-term lending rates calculated by the Federal Reserve to impute credit expenses. Specifically, we will use the Federal Reserve's weighted average data for commercial and industrial loans

[327] *See* KT&G Case Brief at 70-72.
[328] *See* Petitioner Rebuttal Brief at 42-46.
[329] *See* Commerce Policy Bulletin No. 98.2 "Imputed Credit Expenses and Interest Rates," dated February 23, 1998 (Policy Bulletin 98.2), available on Commerce's website at https://enforcement.trade.gov/policy/bull98-2.htm.

> maturing between one month and one year from the time the loan is made.[330]

Further, as stated in Policy Bulletin 98.2,

> In developing a consistent, predictable policy establishing a preferred surrogate U.S. dollar interest rate in all cases where respondents have no U.S. dollar short-term loans, we have employed three criteria: 1) the surrogate rate should be reasonable; 2) it should be readily obtainable and predictable; and 3) it should be a short-term interest rate actually realized by borrowers in the course of "usual commercial behavior" in the United States.[331]

As noted by both KT&G and the petitioner, Policy Bulletin 98.2 states that Commerce's preferred source for surrogate short-term interest rates was line item "31 to 365 days" in the STBL for commercial and industrial loans made by all commercial banks because this survey satisfied the criteria outlined in Policy Bulletin 98.2.[332] However, the STBL was discontinued in 2017; thus, we have considered the remaining two sources of short-term interest rate information on the record provided by KT&G and the petitioner for use to impute KT&G's U.S. credit expenses.

First, the SBLS is a survey issued by the Federal Reserve Bank of Kansas, in which small, midsize, and large banks provided information concerning their issuance of commercial and industrial (C&I) loans to small businesses on a quarterly basis. While the survey does not explicitly describe the duration or terms of the loans provided in the data or provide a specific methodology, we find that the survey does satisfy the criteria laid out in Policy Bulletin 98.2 that the surrogate short-term interest rate: (1) should be reasonable; (2) be readily obtainable and predictable; and (3) should be a short-term interest rate actually realized by borrowers in the course of "usual commercial behavior" in the United States.[333] The SBLS satisfies these criteria as the study is published quarterly by the Federal Reserve Bank of Kansas City and surveyed between 121 and 133 responding banks of various sizes that provided new C&I loans to small businesses during the POI.[334] The specific charts from where the average interest rates are derived are for new lines of credit with fixed and variable rates, offered by small, midsize, and large banks during the POI.[335] Thus, we find that these are short-term interest rates realized by borrowers (small businesses with C&I loans) in the course of "usual commercial behavior" in the United States.

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[330] *Id.*
[331] *Id.*
[332] *See, e.g.*, *Notice of Final Determination of Sales at Less Than Fair Value: Polyethylene Terephthalate Film, Sheet, and Strip from India*, 67 FR 34899 (May 16, 2002), and the accompanying IDM at Comment 16 ("we have calculated imputed U.S. credit expense using the prevailing average short-term interest rate, as published by the Federal Reserve, in effect during the POI; Federal Reserve Statistical Release E.2; Survey of Terms of Business Lending, dated May 1-5, 2000, August 7-11, 2000, November 6-10, 2000, and February 5-9, 2001..."); *see also Certain Oil Country Tubular Goods from the Republic of the Philippines: Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances*, 79 FR 41976 (July 18, 2014), and the accompanying IDM at Comment 3 (supporting the use of this lending rate).
[333] *Id.*
[334] *See* Petitioner's Letter, "4th Tier Cigarettes from South Korea: Rebuttal New Factual Information and Deficiency Comments on KT&G's Sections B-C Questionnaire Responses," dated April 13, 2020 at Exhibit 1.
[335] *Id*.

While KT&G argues that we should use the Federal Reserve's AA Nonfinancial Commercial Paper Rate, we have determined that it is not an appropriate source as a surrogate short-term interest rate used to impute KT&G's credit expenses. First, this rate is applicable to large corporations with excellent credit ratings and high-quality debt ratings.[336] There is no information on the record indicating that KT&G would be eligible for this commercial paper rate. Second, record evidence demonstrates that commercial paper is issued in large denominations ("usually $100,000 or more").[337] As stated in *Mitsubishi*,

> The imputed credit expense represents the producer's opportunity cost of extending credit to its customers. By allowing the purchaser to make payment after the shipment date, the producer forgoes the opportunity to earn interest on an immediate payment. Thus, the imputed credit expense reflects the loss attributable to the time value of money. Commerce's usual imputed credit calculation is based only on the cost of financing receivables between shipment date and payment date.[338]

Because the conditions for issuing commercial paper do not mirror KT&G's experience, we also find the commercial paper rate inapplicable. Finally, because commercial paper is issued by large corporations, not banks, and is sold on the money market,[339] we find that this rate does not reflect a short-term interest rate actually realized by borrowers in the course of "usual commercial behavior" in the United States.

Therefore, for the final determination, Commerce will continue to apply an interest rate based on the SBLS survey in the calculation of KT&G USA's imputed credit expenses and inventory carrying costs.[340]

Comment 10: Whether Commerce Erred in its Treatment of REBATE4U, REBATE5U, and REBATE6U

KT&G's Comment[341]

- KT&G reported three rebate programs directed to KT&G USA's customers' customers, and Commerce classified these rebates as indirect selling expenses because "they are not clearly linked to 'particular sales.'" Commerce erred because they are properly classified as price adjustments, which are defined as "a change in the price charged for subject merchandise or the foreign like product, such as a discount, rebate, or other adjustment."[342] Further, "a respondent can demonstrate "entitlement to a rebate adjustment" by showing "the terms and conditions of the adjustment were established and/or known to the customer at the time of sale, and whether this can be demonstrated

[336] *See Polyethylene Terephthalate Sheet from the Republic of Korea: Final Determination of Sales at Less Than Fair Value*, 85 FR 44276 (July 22, 2020), and the accompanying IDM at Comment 3 (*PET Sheet from Korea*).
[337] *Id*.
[338] *See Mitsubishi Heavy Indus. v. United States*, 54 F. Supp. 2d 1183, 1188 (CIT 1999) (*Mitsubishi*).
[339] *See PET Sheet from Korea.*
[340] *See* KT&G BC1 at 42-43.
[341] *See* KT&G Case Brief at 73-76.
[342] *Id.* at 73 (citing 19 CFR 351.102(b)(38)).

through documentation."[343] REBATE4U, REBATE5U, and REBATE6U are set up like typical rebates because they are a refund of monies paid. All three rebate programs generally are paid by brand, and KT&G USA's own documentation treats these programs as rebates. KT&G USA establishes up front the terms of a rebate program in effect for a certain period of time; a company then can fulfill the terms of the rebate program by, for example, purchasing a certain quantity of KT&G USA's products; and finally KT&G USA refunds money to that company.

- Because these three rebates are price adjustments and not selling expenses, it was not appropriate to include the rebates in the calculation of CEP profit. Rebates are price adjustments, meaning they are a pricing decision by KT&G USA and not an expense. In the 1997 preamble to the regulations, Commerce stated that "price adjustments are not expenses, either direct or indirect" and instead "include such things as… rebates that do not constitute part of the net price actually paid by a customer."[344] There is no logical basis for Commerce to classify REBATE4U, REBATE5U, and REBATE6U in a manner that would ascribe a CEP profit to them because rebates are simply a reduction in price.

Petitioner's Rebuttal Comment[345]

- KT&G admits that it cannot tie these three categories of payments to any U.S. sales because they are paid to third parties. Thus, they do not meet the definition of a rebate that KT&G cites because these payments "do not constitute part of the net price actually paid by a customer" as they had no effect on the amount paid by KT&G's customer. Rather, the payments meet the definition of indirect selling expenses in that they are expenses that do not bear a direct relationship to any particular sales.

Commerce's Position: We disagree with KT&G. Although the term "rebate" is not specifically defined in regulations, Commerce has developed a practice to adjust prices only to account for rebates when the terms and conditions of the rebate are known to the customer prior to the sale and the claimed rebates are customer-specific.[346] Among the types of transactions that Commerce normally considers to be rebates are payments or some conveyance of an item of value by the seller to the buyer after the buyer has paid for the merchandise.[347] However, for the three rebates at issue, KT&G could not link the payments to any of its own sales to its first unaffiliated customers. For this reason, Commerce considered the payments at issue to be indirect selling expenses for the *Preliminary Determination.* However, the payments cannot be considered to indirect selling expenses because indirect selling expenses are fixed expenses, and

[343] *Id*. (citing *Modification of Regulations Regarding Price Adjustments in Antidumping Duty Proceedings*, 81 FR 15641, 15644-45 (March 24, 2016).
[344] *See Preamble,* 62 FR at 27344.
[345] *See* Petitioner Rebuttal Brief at 45-46.
[346] *See Canned Pineapple Fruit from Thailand: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 71 FR 70948 (December 7, 2006), and the accompanying IDM at Comment 1; *see also* 19 CFR 351.401(b)(1); and *Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, and the United Kingdom: Final Results Of Antidumping Duty Administrative Reviews*, 71 FR 40064 (July 14, 2006), and the accompanying IDM at Comment 19 (explaining that "{i}t is the Department's practice to adjust normal value to account for rebates when the terms and conditions are known to the customer prior to the sale and the claimed rebates are customer-specific").
[347] *See Notice of Final Results of the Seventh Administrative Review of the Antidumping Duty Order on Certain Pasta from Italy and Determination to Revoke in Part*, 70 FR 6832 (February 9, 2005), and the accompanying IDM at Comment 6; *see also* Antidumping Questionnaire at Appendix I (Glossary of Terms, "price adjustments").

direct selling expenses are variable expenses.[348] KT&G's customers' customers could not receive the payments from KT&G unless KT&G had made the original sales to its own customers. If the sale to KT&G's direct customer had never occurred, the customer's customer would never have been able to collect the rebate, which makes the expense variable and not fixed. Thus, we find that these payments are a variable expense and not a fixed expense. Therefore, for the final determination, we have reassigned the three reported payments at issue to other direct selling expenses and have deducted these expenses from U.S. gross unit price.[349]

Comment 11: Whether Commerce Improperly Assumed Certain Returns Were Billing Adjustments in the U.S. Market

KT&G's Comment[350]

- KT&G allocated returned merchandise in both the HM and U.S. markets on a customer, product, and price-specific basis using a Last In, First Out (LIFO) methodology. Commerce requested that KT&G allocate returns that KT&G attributed to sales prior to the POI to POI sales on a customer- and product-specific basis. KT&G performed the allocation. Commerce then made an additional request for KT&G to allocate any unmatched price credits associated with the returns by summing the remaining credits and applying them to all sales by customer of the same product as a billing adjustment, but only for the U.S. market. KT&G performed the allocation.
- Commerce cannot simply assume that all unmatched credit memos that do not match to a POI sale by customer, product, and price are billing adjustments. Returns and billing adjustments are distinct concepts because returns alter the quantity actually sold, while billing adjustments, which affect price, do not. If a credit memo does not match to a POI sale based on customer, product, and price, the only logical explanation is that the particular customer did not purchase that particular product during the POI; it purchased it prior to the POI. Situations where credit memos cannot be matched to POI sales represent a small fraction of KT&G's overall POI U.S. sales.
- If Commerce rejects KT&G's original LIFO methodology, it should accept the initial revision assigning the unmatched credit memos on a customer- and product- basis, because the revised LIFO methodology does not conflate returned quantities with billing adjustments, improperly treating quantities that ultimately were not provided to a customer as free products given out during the POI. Moreover, despite KT&G using the exact same reporting methodology for returns in the U.S. and HM, Commerce only requested KT&G convert unmatched credit memos in the U.S. market into billing adjustments. This disparate treatment of HM and U.S. credit memos artificially decreases U.S. price and drives up the dumping margin.

[348] *See, e.g.*, *Large Power Transformers From the Republic of Korea: Final Determination of Sales at Less Than Fair Value*, 77 FR 40857 (July 11, 2012), and the accompanying IDM at Comment 11 ("Direct expenses are typically variable expenses that are incurred as a direct and unavoidable consequence of the sale (*i.e.*, in the absence of the sale these expenses would not be incurred). Indirect expenses are fixed expenses that are incurred whether or not a sale is made.")
[349] *See* Final Analysis Memo at 3.
[350] *See* KT&G Case Brief at 76-82.

Petitioner's Rebuttal Comment[351]

- KT&G did not make an effort to link credit memos to the sales to which they pertained. Rather, KT&G applied a methodology that excluded a portion of these credit memos, which netted out the quantity, and left the sales price unaffected. KT&G claims without evidence that the excluded credit memos pertained to merchandise sold before the POI. Moreover, KT&G used a revised methodology that included all sales during the POI, even if the sale occurred after the credit memo, but again ignored any remaining credit memos.
- Because KT&G did not link credit memos to the sales to which they pertained, its claim that every credit memo represents returned merchandise is unsupported. KT&G reported no billing error adjustments during the POI. It is more likely that credit memos that do not match by quantity and price to a prior sale are billing adjustments, and not returns, quantity adjustments or cancelled sales.
- Given KT&G's sales process, it would be unreasonable to assume that such a large quantity of unmatched credit memos would be issued for sales occurring prior to the POI. Customers do not pay invoices and then later check to see if they are accurate.
- Because it makes no sense to only consider credit memos that were issued during the POI and which also pertained to sales during the POI (which KT&G contends is appropriate), Commerce is justified in allocating the remaining credit memos across all sales on a customer- and product-specific basis as a billing adjustment.
- With regard to KT&G's claim that Commerce's treatment of HM and U.S. sales regarding these credit memos is not consistent, KT&G has not demonstrated that the credit memos issued by KT&G in Korea should be considered to be equivalent to the credit memos issued by KT&G USA in the United States. KT&G USA may have issued credit memos for different reasons. Respondents carry the burden of demonstrating entitlements to favorable adjustments.

Commerce's Position: We disagree with KT&G. The key essential fact underlying this issue is that KT&G cannot link its credit memos with the underlying invoices to which they pertain and, thus, KT&G cannot provide an explanation detailing the exact reason for each credit memo. KT&G has asked Commerce to rely on a rule of thumb that every credit memo must pertain to returns of merchandise sold prior to, or during, the POI, but there is no factual basis to support that this is always the case. Rather, one of KT&G's "unmatched" credit memos could just as easily be a billing adjustment. For this reason, Commerce initially requested that KT&G allocate "all of the unmatched credit memos on a customer and product-specific basis" for both HM sales and U.S. sales.[352] Commerce made this request to KT&G to ensure that KT&G had reported the complete HM and U.S. sales volume and value. KT&G responded to Commerce's request by modifying the sales volume for returns that it previously could not identify as returns pertaining to POI sales, or sales outside the POI.[353] Because KT&G maintained the theory that all of its credit memos were created only for merchandise returns, it continued to use a methodology that continued to exclude all credit memos that it could not match by price (*i.e.*, that noted a price adjustment).[354] Thus, KT&G made no revisions with respect to value in either market in

[351] *See* Petitioner Rebuttal Brief at 46-50.
[352] *See* KT&G BC1 at 10-11, 35.
[353] *Id.* at Appendix SB-4, Appendix SC-3.
[354] *Id.*

response to Commerce's request.[355] In its responses, and its case brief, KT&G claims that applying credit memos connected to merchandise value is equivalent to offers of free merchandise,[356] but credit memos noting price changes are not gifts - they are billing adjustments.

Regarding KT&G's argument that Commerce's applied billing adjustment based on unallocated POI credits for U.S. market sales only is "disparate treatment," Commerce did not request a similar allocation for HM sales due to the likelihood that doing so would be highly distortive to the margin calculation. Early in this investigation, in response to a limited reporting request by KT&G, Commerce instructed KT&G to report HM sales during only twelve randomly selected weeks.[357] Commerce did this because KT&G initially reported that the full number of HM sales observations would number in the "tens of millions,"[358] and KT&G's initial assertion is fully supported by its HM sales reconciliation.[359] As an initial matter, to allocate all of KT&G's unmatched HM credit memos issued during the POI to twelve randomly selected weeks would be grossly inaccurate, and to proportionally reduce the credits only to match the size of the HM data would not result in a reliable estimate of the significance of the credits to NV.

Further, because the customer and product mix during the selected twelve weeks will inevitably be different from the customer and product mix in the POI as a whole, an allocation of some proportion of the remaining credits pertaining to the reported HM sales could potentially have a highly distortive impact on the calculation of NV. The credits would reduce NV, but the adjustments could also cause many sales to fall below cost, to the respondent's disadvantage. It is clear to Commerce that the impact of such a billing adjustment would introduce a significant element of unpredictability into an otherwise balanced sampling of KT&G's HM sales. In contrast, because all U.S. sales in the POI are included in Commerce's margin calculation, a billing adjustment with all credit memos issued during the same period is proportional and accurate.

Our original request to KT&G to apply all of the POI credit memos to POI sales in both markets was not limited to quantity adjustments. Commerce explicitly requested KT&G to allocate "all unmatched credit memos" to ensure the correct quantity and value of sales.[360] However, KT&G did not allocate all POI credit memos, instead maintaining its theory that all credit memos should only represent the complete cancelations of sales (*i.e.*, returns), or they should remain unallocated. Commerce requested that KT&G ensure that U.S. sales value, as well as volume, was duly adjusted by these outstanding POI credit memos due to the significance of U.S. sales information under 772 of the Act.[361] However, due to the likelihood of a distortive impact of applying allocated credits from the entire POI on a customer-specific basis to only a randomly

[355] *Id.*
[356] *See* KT&G 2ABC2 at 13.
[357] *See Preliminary Determination* PDM at 3 and 12; *see* also Commerce's Letter, "Less than Fair Value Investigation of 4th Tier Cigarettes from the Republic of Korea: Request to Limit Reporting of Home Market Sales and Extension of Time to File Section B Questionnaire Response," dated March 25, 2020.
[358] *Id.*
[359] *See* KT&G B at Appendix B-4(a).
[360] *See* KT&G BC1 at 10-11, 35.
[361] *See* KT&G 2ABC2 at 12.

selected subset of sales (and corresponding customers), for the final determination, we will not make a change to our methodology with respect to HM sales for unmatched credit memos.

Comment 12: Whether Commerce Improperly Classified KT&G's Repacking Costs as a Selling Expense

KT&G's Comment[362]

- Commerce reallocated a portion of KT&G's U.S. repacking costs to U.S. warehousing, assigned the remaining repacking costs as a CEP selling expense, and U.S. warehousing to movement expenses. This is contrary to the statute, controlling case law from the CAFC, and Commerce's own practice.
- The CAFC in *NSK Ltd. v. United States* reasoned that "U.S. repacking, U.S. warehousing, and U.S. shipping (from the warehouse to particular customers) are analogous" and without some reasoned basis, Commerce should classify them as the same type of expense.[363] On remand, Commerce agreed with the CAFC that the respondent's U.S. repacking expenses were classifiable as movement expenses.[364]
- KT&G explained the tasks included in its U.S. repacking includes key warehousing functions, such as palletizing, and supplies that are used in a warehouse for stocking, and not incurred in furtherance of sales to particular customers, similar to the facts of *NSK Ltd. v. United States*.

Petitioner's Rebuttal Comment[365]

- KT&G cites a few examples where U.S. packing has been treated as a movement expense by Commerce, but it omits examples where U.S. packing has been treated as a selling expense. Commerce found in *AFBs*[366] that repacking expenses should be regarded as a direct selling expense because the respondent incurred the expense on individual products in order to sell the merchandise to the unaffiliated customer in the United States.
- In *NSK Ltd. v. United States* cited by KT&G, the CAFC noted in its remand that "we caution Commerce to be mindful that repacking may have occurred for a number of different reasons." In this case, the type of packing expenses reported KT&G "results from, and bears a direct relationship to, the sale" and, therefore, should be considered a selling expense.
- At Commerce's request, KT&G removed expenses related to operating KT&G's warehouses from indirect selling expenses and reported them in the U.S. repacking costs and U.S. warehousing fields. Thus, the record could not be clearer that expenses which bear a direct relationship to the sale are included in the U.S. repacking field, and that expenses related to movement are in the U.S. warehousing field.

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[362] *See* KT&G Case Brief at 82-85.
[363] *See* KT&G Case Brief at 83 (citing *NSK Ltd. v. United States*, 390 F.3d 1352, 1357 (Fed. Cir. 2004) (*NSK Ltd. v. United States*)).
[364] *Id.* at 84 (citing Remand Redetermination, *NSK Ltd. v. United States*, Consol. Court No. 98-07-02527 (May 18, 2005)).
[365] *See* Petitioner Rebuttal Brief at 50-53.
[366] *See Id.* at 51 (citing *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from France, Germany, Italy, Japan, Romania, Sweden, and the United Kingdom*, 64 FR 35590 (July 1, 1999) at Comment 3 (*AFBs*)).

Commerce's Position: We disagree with KT&G. In *NSK Ltd. v. United States*, the CAFC found that Commerce did not adequately explain why U.S. warehousing expenses should be regarded as a movement expense, while U.S. repacking should be regarded as a selling expense.[367] The court stated that "Commerce may not treat two like situations differently without explanation."[368] As noted by the petitioner, the CAFC cautioned "Commerce to be mindful that repacking may have occurred for a number of different reasons."[369] In accordance with section 772(d)(1)(B) of the Act, Commerce normally classifies repacking as a direct selling expense when these expenses "result from, and bear a direct relationship to, the sale."[370] Here, information on the record indicates that KT&G's U.S. repacking is a direct selling expense. In its questionnaire response, KT&G reported its repacking activities relate to "inbound/pick-up order processing" (*i.e.*, ensuring that the merchandise that KT&G USA sends to the customer is exactly what KT&G USA's customer requested), and not specifically to packing the merchandise.[371] Commerce requested that KT&G assign these expenses to the U.S. repacking field only if they related to this activity rather than warehousing.[372] In contrast, the remaining expenses that KT&G assigned to U.S. warehousing are appropriately assigned among its movement expenses because a warehouse is essentially a facility where merchandise can be easily unloaded from, and loaded into, trucks. Thus, KT&G's repacking expenses are expenses specifically related to selling activities, and not to movement of the merchandise. Therefore, for the final determination, based on the above analysis, we continue to find that KT&G's repacking expenses are not expenses for transporting the subject merchandise to the United States as conceived by section 772(c)(2)(A) of the Act, but are expenses under section 772(d)(1)(B) of the Act.

[367] *See NSK Ltd. v. United States* 390 F.3d at 1357.
[368] *Id.*
[369] *Id.* at 1358.
[370] *See, e.g.*, *Diamond Sawblades and Parts Thereof From the Republic of Korea: Final Results of Antidumping Duty Administrative Review, 2010-2011*, 78 FR 36524 (June 18, 2013), and the accompanying IDM at Comment 4; *see also Diamond Sawblades and Parts Thereof From the Republic of Korea: Final Results of Antidumping Duty Administrative Review, 2009-2010*, 78 FR 11818 (February 20, 2013), and the accompanying IDM at Comment 5.
[371] *See* KT&G BC1 at 49 and Exhibit SC-9.
[372] *Id.* at 47, 48.

VI. RECOMMENDATION

Based on our analysis of the comments received, we recommend adopting all of the above positions. If this recommendation is accepted, we will publish the final results of this review in the *Federal Register*.

☒	☐
Agree	Disagree

12/4/2020

X 

Signed by: JEFFREY KESSLER

Jeffrey I. Kessler
Assistant Secretary
for Enforcement and Compliance