



A-580-908
Investigation
POI: 4/1/2019-3/31/2020
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May 21, 2021

MEMORANDUM TO: Christian Marsh
Acting Assistant Secretary
for Enforcement and Compliance

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

SUBJECT: Decision Memorandum for the Final Affirmative Determination in
the Less-Than-Fair-Value Investigation of Passenger Vehicle and
Light Truck Tires from the Republic of Korea

I. SUMMARY

The Department of Commerce (Commerce) finds that passenger vehicle and light truck tires (passenger tires) from the Republic of Korea (Korea) are being, 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 period of investigation (POI) is April 1, 2019, through March 31, 2020.

After analyzing the comments submitted by interested parties, we have made changes to the *Preliminary Determination*¹ with respect to both mandatory respondents in this investigation, Hankook Tire & Technology Co. Ltd. (Hankook) and Nexen Tire Corporation's (Nexen). We recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum. Below is the complete list of the issues for which we have received comments from the interested parties:

¹ See *Passenger Vehicle and Light Truck Tires from the Republic of Korea: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Extension of Provisional Measures*, 86 FR 501 (January 6, 2021) (*Preliminary Determination*), and accompanying Preliminary Decision Memorandum (PDM).



- Comment 1: Application of Partial Adverse Facts Available (AFA) to Certain Downstream Sales of Hankook
- Comment 2: Hankook's Revised Home and U.S. Market Sales Data
- Comment 3: Hankook's Minor Corrections
- Comment 4: Hankook's Warranty Expenses
- Comment 5: Application of Partial AFA to Nexen's Sample Sales
- Comment 6: Nexen's CEP Offset
- Comment 7: Nexen's Noise Reduction Foam and Special Wrapping Costs

II. BACKGROUND

On January 6, 2021, Commerce published in the *Federal Register* its preliminary affirmative determination in the LTFV investigation of passenger tires from Korea.² On January 11, 2021, the petitioner and Hankook each submitted ministerial error comments.³ On January 13, 2021, Hankook rebutted the petitioner's ministerial error comments.⁴ On March 5, 2021, Commerce issued a memorandum addressing these ministerial error comments.⁵

On February 5, 2021, pursuant to 19 CFR 351.310(c), the petitioner⁶ and Hankook requested that Commerce hold a public hearing.⁷

On March 8, 2021, Commerce issued supplemental questionnaires to Hankook and Nexen in lieu of performing an on-site verification required under section 782(i) of the Act (In Lieu of Verification Questionnaires), to which both Hankook and Nexen timely responded.⁸ On March 19, 2021, we invited parties to comment on the *Preliminary Determination*.⁹ On April 2, 2021, we received case briefs from the petitioner, Hankook, and Nexen.¹⁰ On April 9, 2021, we

² See *Preliminary Determination*.

³ See Petitioner's Letter, "Passenger Vehicle and Light Truck Tires from the Republic of Korea: Preliminary Ministerial Error Comment," dated January 11, 2021; and Hankook's Letter, "Passenger Vehicle and Light Truck Tires from the Republic of Korea (A-580-908): Significant Ministerial Error Comments," dated January 11, 2021.

⁴ See Hankook's Letter, "Passenger Vehicle and Light Truck Tires from the Republic of Korea (A-580-908): Request for the Department to Reject and Remove from the Record Petitioner's Preliminary Ministerial Error Comment," dated January 13, 2021.

⁵ See Memorandum, "Less-Than-Fair-Value Investigation of Certain Passenger Vehicle and Light Truck Tires from Korea: Allegations of Ministerial Errors in the Preliminary Determination," dated March 5, 2021 (Ministerial Error Memorandum).

⁶ The petitioner is the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC.

⁷ See Petitioner's Letter, "Passenger Vehicle and Light Truck Tires from the Republic of Korea: Petitioner's Hearing Request," dated February 5, 2021; and Hankook's Letter, "Passenger Vehicle and Light Truck Tires from the Republic of Korea (A-580-908): Request for Hearing," dated February 5, 2021.

⁸ See Commerce's Letter, "In Lieu of Verification Questionnaire," dated March 8, 2021 (Commerce's March 8, 2021 V-QR); see also Hankook's Letter, "Passenger Vehicle and Light Truck Tires from the Republic of Korea (A-580-908): Verification Questionnaire Response," dated March 16, 2021; Nexen's Letter, "Passenger Vehicle and Light Truck Tires from South Korea: Response to Request for Information In Lieu of Verification," dated March 17, 2021 (Nexen's March 17, 2021 VQR).

⁹ See Memorandum, "Briefing Schedule for Passenger Vehicle and Light Truck Tires from the Republic of Korea," dated March 19, 2021; "Briefing Schedule for Passenger Vehicle and Light Truck Tires from the Republic of Korea," dated March 23, 2021.

¹⁰ See Petitioner's Letter, "Passenger Vehicle and Light Truck Tires from the Republic of Korea: Petitioner's Case

received rebuttal briefs from the petitioner, Hankook, and Nexen.¹¹

Commerce held a public hearing on May 6, 2021.¹²

On April 15, 2021, Commerce rejected Nexen's case brief because it contained new factual information and invited Nexen and the petitioner to re-file their case brief and rebuttal brief, respectively. Both parties filed their revised case brief and rebuttal brief on April 19, 2021, and April 21, 2021, respectively.¹³

III. SCOPE OF THE INVESTIGATION

The products covered by this investigation are passenger vehicle and light truck tires from Korea. For a complete description of the scope of this investigation, *see* this memorandum's accompanying *Federal Register* notice at Appendix I.

IV. CHANGES FROM THE PRELIMINARY DETERMINATION

- For Hankook's final margin calculation, we used the revised home market sales and U.S. market sales data submitted by Hankook as part of its Verification Questionnaire Response for the final determination, *see* Comment 2 below.
- We incorporated the minor corrections submitted by Hankook in its Verification Questionnaire Response in the dumping calculations for the final determination, *see* Comment 3 below.
- We included the warranty expenses as part of the CEP expenses for Hankook for the final determination, *see* Comment 4 below.
- We removed Nexen's direct selling expenses for its noise reduction foam and packaging (DIREL3H) and included those expenses in Nexen's total cost of production. For more information, *see* Comment 8 below.

Brief,," dated April 2, 2021 (Petitioner's Case Brief); *see also* Hankook's Letter, "Passenger Vehicle and Light Truck Tires from the Republic of Korea," dated April 2, 2021 (Hankook's Case Brief); Nexen's Letter: "Passenger Vehicle and Light Truck Tires from South Korea: Case Brief," dated April 2, 2021, 2021 (Nexen's Case Brief).

¹¹ *See* Petitioner's Letter, "Passenger Vehicle and Light Truck Tires from the Republic of Korea: Petitioner's Rebuttal Brief," dated April 9, 2021 (Petitioner's Rebuttal Brief); Hankook's Letter, "Passenger Vehicle and Light Truck Tires from the Republic of Korea (A-580-908): Hankook rebuttal Brief," dated April 9, 2021 (Hankook's Rebuttal Brief); and Nexen's Letter, "Passenger Vehicle and Light Truck Tires from South Korea: Rebuttal Brief," dated April 9, 2021 (Nexen's Rebuttal Brief).

¹² *See* "United States of America, Department of Commerce, Enforcement and Compliance: Public Hearing in the Matter of: Antidumping Duty Investigation of Passenger Vehicle and Light Truck Tires from South Korea," dated May 6, 2021.

¹³ *See* Commerce Letters, "Antidumping Duty Investigation of Passenger Vehicle and Light truck Tires from South Korea – Rejection of New Factual Information in Case Brief and Request to Refile," dated April 15, 2021; "Antidumping Duty Investigation of Passenger Vehicle and Light Truck Tires from South Korea – Rejection of Rebuttal Brief and Request to Refile," dated April 15, 2021; Nexen's Letter, "Passenger Vehicle and Light Truck Tires from South Korea: Resubmission of Case Brief," dated April 19, 2021 (Nexen's R-Case Brief); Petitioner's Letter, "Passenger Vehicle and Light Truck Tires from Korea: Petitioner's Rebuttal Brief," dated April 21, 2021 (Petitioner's R-Rebuttal Brief).

V. APPLICATION OF FACTS AVAILABLE AND USE OF ADVERSE INFERENCE

In the *Preliminary Determination*, we applied partial AFA, pursuant to sections 776(a) and (b) of the Act to certain unreported downstream sales by Hankook's affiliated Capitalized Distributors¹⁴ in the home market which were found to not be at arm's length. To fill in the missing information on these downstream sales, we applied the highest product control number (CONNUM)-specific¹⁵ home market price to unaffiliated customers of Hankook's sales of the foreign like product to the Capitalized Distributors, and included this information in the calculation of normal value for comparison with U.S. prices. We have determined in this final determination it is appropriate to continue to apply partial AFA for the reasons explained below.

A. Statutory Framework

Application of Facts Available

Sections 776(a)(1) and 776(a)(2)(A)-(D) of the Act provide that, if necessary information is not available on the record, or if an interested party: (1) withholds information requested by Commerce; (2) fails to provide such information by the deadlines for submission of the information, or in the form and manner requested, subject to subsections (c)(1) and (e) of section 782 of the Act; (3) significantly impedes a proceeding; or (4) provides such information but the information cannot be verified as provided in section 782(i) of the Act, Commerce shall use, subject to section 782(d) of the Act, facts otherwise available in reaching the applicable determination.

Use of Adverse Inference

Section 776(b) of the Act provides that Commerce may use an adverse inference in selecting from among the facts otherwise available when a party fails to cooperate by not acting to the best of its ability to comply with a request for information.¹⁶ In addition, the Statement of Administrative Action (SAA) explains that Commerce may employ an adverse inference "to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully."¹⁷ Further, affirmative evidence of bad faith on the part of a respondent is not required before Commerce may make an adverse inference.¹⁸ It is Commerce's practice to consider, in employing AFA, the extent to which a party may benefit from its own lack of

¹⁴ Capitalized Distributors are Hankook's affiliated retail distribution stores. See Hankook's Letter, "Passenger Vehicle and Light Truck Tires from the Republic of Korea (A-580-908): Initial Section A Questionnaire Response," dated September 14, 2020, at A-3.

¹⁵ A product control number (CONNUM) is the concatenation of the codes reported for the physical characteristics used to define the merchandise subject to the investigation.

¹⁶ See 19 CFR 351.308(a).

¹⁷ See Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. 103-316, vol. 1 (1994) at 870 (SAA); see also *Certain Polyester Staple Fiber from Korea: Final Results of the 2005-2006 Antidumping Duty Administrative Review*, 72 FR 69663, 69664 (December 10, 2007).

¹⁸ See, e.g., *Notice of Final Determination of Sales at Less Than Fair Value: Circular Seamless Stainless Steel Hollow Products from Japan*, 65 FR 42985 (July 12, 2000); see also *Antidumping Duties; Countervailing Duties; Final Rule*, 62 FR 27296, 27340 (May 19, 1997) (*Preamble*); and *Nippon Steel Corp. v. United States*, 337 F. 3d 1373 (Fed. Cir. 2003) (*Nippon Steel*).

cooperation.¹⁹ Section 776(b)(2) of the Act states that an adverse inference may include reliance on information derived from the petition, the final determination from the investigation, a previous administrative review, or other information placed on the record.

When selecting an AFA rate from among the possible sources of information, Commerce's practice is to ensure that the rate is sufficient "to effectuate the statutory purposes of the adverse facts available rule to induce respondents to provide Commerce with complete and accurate information in a timely manner."²⁰ In doing so, Commerce is not required to determine, or make any adjustments to, a weighted-average dumping margin based on any assumptions about information an interested party would have provided if the interested party had complied with the request for information.²¹

B. Use of Facts Available

As discussed further below, Hankook did not provide certain requested information necessary for Commerce to calculate the normal values based on all home market sales of certain CONNUMs. Specifically, Hankook did not submit the downstream sales for its affiliated Capitalized Distributors where Hankook's sales to each of those "Capitalized Distributors" failed the arm's-length test. Consistent with 19 CFR 351.403(d), Commerce requested that Hankook report the downstream sales for these Capitalized Distributors, which Hankook failed to submit. As such, necessary information is not on the record of this review. Therefore, Commerce finds that Hankook withheld information requested by Commerce, failed to provide such information by the deadlines for submission of the information or in the form and manner requested by Commerce, and significantly impeded this proceeding. Accordingly, the use of partial facts available is warranted pursuant to sections 776(a)(1) and (2)(A), (B), and (C) of the Act.

C. Use of Adverse Inference

Because Hankook has not provided the requested downstream home market sales by its Capitalized Distributors, Commerce is unable to further assess or analyze these sales. As discussed in detail in Comment 1 below, we find that Hankook failed to cooperate by not acting to the best of its ability to comply with the request for information regarding the reporting of these affiliated companies' home market downstream sales, which prevents Commerce from having all relevant home market sale prices and, therefore, from calculating an accurate estimated weighted-average dumping margin for Hankook.

¹⁹ See SAA at 870; see also *Steel Threaded Rod from Thailand: Preliminary Determination of Sales at Less Than Fair Value and Affirmative Preliminary Determination of Critical Circumstances*, 78 FR 79670 (December 31, 2013), and accompanying IDM at 4, unchanged in *Steel Threaded Rod from Thailand: Final Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances*, 79 FR 14476, 14477 (March 14, 2014).

²⁰ See, e.g., *Drill Pipe from the People's Republic of China: Final Affirmative Countervailing Duty Determination, Final Affirmative Critical Circumstances Determination*, 76 FR 1971 (January 11, 2011); see also *Notice of Final Determination of Sales at Less Than Fair Value: Static Random Access Memory Semiconductors from Taiwan*, 63 FR 8909, 8932 (February 23, 1998).

²¹ See section 776(b)(1)(B) of the Act.

Accordingly, Commerce finds that Hankook failed to cooperate to the best of its ability to comply with a request for information by Commerce. Based on the above, in accordance with section 776(b) of the Act and 19 CFR 351.308(a), as the home market prices for these unreported affiliates' downstream sales are not on the record, Commerce finds it is appropriate to use an adverse inference when selecting from among the facts otherwise available in applying highest CONNUM-specific home market prices to unaffiliated customers to Hankook's sales to the Capitalized Distributors who failed the arm's-length test.

VI. DISCUSSION OF THE ISSUES

Comment 1: Application of Partial AFA to Certain Downstream Sales of Hankook

Hankook's Case Brief

- Commerce failed to provide Hankook with notice that the Capitalized Distributors' downstream sales information was required or with an opportunity to cure the alleged deficiency in the record.²²
- Hankook cites *Ta Chen*,²³ and *Shantou Red Garden*,²⁴ to support its argument that Commerce failed to notify the respondent of the deficiencies in the record. Hankook argues that Commerce should therefore reverse its decision in its final determination and not apply AFA with respect to the Capitalized Distributors' downstream sales.²⁵
- In making this finding without first requesting that Hankook provide the downstream sales information for its Capitalized Distributors, Commerce failed to provide Hankook with notice and the opportunity to cure the deficiency that Commerce identified.²⁶
- Hankook acted to the best of its ability to comply with Commerce's requests for downstream sales information, Commerce thus has no basis to apply an adverse inference concerning the unreported downstream sales of the Capitalized Distributors.²⁷
- Hankook did everything it reasonably could to obtain downstream sales information from the Capitalized Distributors. However, it did not have sufficient leverage to induce cooperation from these entities.²⁸
- Hankook was further constrained in its ability to induce cooperation by the Capitalized Distributors due to Korean regulations that prohibit Hankook from resorting to actions that may have otherwise influenced the Capitalized Distributors to cooperate.²⁹
- Commerce should revise its findings and use neutral facts available instead of AFA to fill in information Commerce determines is missing from the record in its final determination as per its practice. Hankook cited *Polyethylene Terephthalate Sheet from the Sultanate of*

²² See Hankook's Brief at 3.

²³ See Hankook's Brief (citing *Ta Chen Stainless Steel Pipe Ltd. v. United States*, No. 97-08-01344, 2000 WL 1225799 (Ct. Int'l Trade Aug. 25, 2000) (*Ta Chen*)).

²⁴ See Hankook's Brief (citing *Shantou Red Garden Foodstuff Co. v. United States*, 815 F. Supp. 2d 1311 (Ct. Int'l Trade 2012) (*Shantou Red Garden*)).

²⁵ *Id.* at 4-5.

²⁶ *Id.* at 10.

²⁷ *Id.* at 12.

²⁸ *Id.* at 18.

²⁹ *Id.* at 17.

Oman and Certain Cold-Rolled Steel Flat Products from the Russian Federation, to support its argument of using neutral facts available for the missing downstream sales information.³⁰

Petitioner's Rebuttal Brief

- The petitioner cited *Hot-Rolled Steel from Japan*, arguing that Commerce can, under the statute, resort to AFA when parties affiliated with the respondent refuse to provide downstream sales when the sales to the affiliates are not at arm's length.³¹
- As in *Hot-Rolled Steel from Japan*, Hankook provided insufficient explanation as to if and how the home country laws would prohibit respondent from compelling its affiliated resellers to cooperate and provide the downstream sales information.³²
- Contrary to Hankook's claim, Commerce clearly instructed Hankook to report all affiliates' downstream sales data, if Hankook cannot demonstrate that the sales to the affiliate were at arm's length prices. Commerce specifically requested the downstream sales data if Hankook could not show by a fully documented test that these sales were made at arm's length.³³
- There is no automatic excuse that a respondent can claim by simply filing a letter explaining to Commerce why it does not wish to report certain information.³⁴
- The elements required by the statute for the application of AFA have been met here, as Commerce properly found in the preliminary determination.³⁵
- Because Commerce instructed Hankook to provide the downstream sales information, Hankook decided independently not to do so, and Hankook failed meet the statutory standard of full cooperation, Commerce properly applied AFA in the preliminary determination.³⁶

Commerce's Position: We disagree with Hankook and continue to find that partial AFA is warranted with respect to Hankook's unreported affiliated Capitalized Distributors' downstream sales in the home market for the final determination. We note that we requested downstream sales for only the specific Capitalized Distributors that failed the arm's-length test; we continue to find for the final determination, as in the *Preliminary Determination*, that other Capitalized Distributors pass the arm's-length test where we have included Hankook's sale prices to these other Capitalized Distributors in our calculation of normal value. As Hankook's sales to all affiliated customers accounted for more than five percent of its total sales of foreign-like product in the home market, consistent with 19 CFR 351.403(d), Commerce requested that Hankook report downstream sales by those affiliated Capitalized Distributors, the sales to which failed the arm's-length test. Commerce gathers information in an investigation from a respondent to determine whether its U.S. sales were made at LTFV. When necessary information is not available on the record or a respondent withholds information that has been requested by Commerce, fails to provide information by deadlines in the form and manner requested,

³⁰ *Id.* at 18-19 (citing *Certain Hot-Rolled Steel Flat Products from Japan: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances*, 81 FR 53409 (August 12, 2016) (*Hot-Rolled Steel from Japan*), and accompanying IDM).

³¹ See Petitioner's Rebuttal Brief at 2.

³² *Id.* at 4.

³³ *Id.*

³⁴ *Id.* at 7.

³⁵ *Id.*

³⁶ *Id.* at 11.

significantly impedes an investigation, or provides information that cannot be verified, Commerce shall “use the facts otherwise available in reaching the applicable determination.”³⁷

On August 14, 2020, Commerce issued its initial questionnaire to Hankook.³⁸ Commerce’s questionnaire requests respondents to “report all sales of the foreign like product” in the home market.³⁹ The statute defines the foreign like product as “subject merchandise and other merchandise which is identical in physical characteristics... produced in the same country by the same person.”⁴⁰ In evaluating sales of the foreign like product in the home market, Commerce considers merchandise sold to an affiliated party to be not at arm’s length as sales outside the “ordinary course of trade.”⁴¹ Thus, Commerce’s antidumping questionnaire states, “{i}f you sold to an affiliate that resold the merchandise to an unaffiliated party in the comparison market, report the affiliate’s resales during the reporting period for comparison market sales, to unaffiliated customers rather than your sales to the affiliate.”⁴² Commerce’s antidumping questionnaire further clarifies, “In order to report sales to an affiliated comparison market customer (affiliate) rather than resales to unaffiliated customers by that affiliated comparison market customer, a respondent must demonstrate that the sales to the affiliated comparison market customer are at arm’s length.”⁴³

To determine whether sales to affiliated comparison (home) market customers are at arm’s length, Commerce conducts its arm’s-length test, which the Court of International Trade (CIT) has repeatedly upheld.⁴⁴ In its supplemental questionnaire response, Hankook stated that it was unable to obtain the downstream sales by these Capitalized Distributors.⁴⁵ Hankook also stated that it had made multiple rounds of requests to the Capitalized Distributors, and still could not obtain the downstream sales information from these Capitalized Distributors.⁴⁶ Hankook reported that these Capitalized Distributors have refused to provide the requested information necessary to respond to Commerce’s requests.⁴⁷ Hankook does not contest that these Capitalized Distributors were affiliated to Hankook and does not contest the results of Commerce’s arm’s-length test; instead, Hankook argues that Commerce did not provide Hankook with an opportunity to cure this deficiency in its reporting.⁴⁸ Commerce did not grant Hankook’s request to exclude the reporting of these Capitalized Distributors’ downstream sales, as it was clear that Hankook was required to report these affiliates’ downstream sales because Hankook’s sales to the Capitalized Distributors were not made at arm’s length.

The issue raised is whether Commerce can resort to partial AFA when parties affiliated with the respondent refuse to provide downstream sales when the sales to the affiliates are determined to

³⁷ See section 776(a)(1)-(2) of the Act.

³⁸ See Commerce’s Letter, “Antidumping Duty Questionnaire,” dated August 14, 2020 (Commerce’s August 14, 2020 IQ).

³⁹ *Id.* at B-2.

⁴⁰ See section 771(16) of the Act.

⁴¹ See *Nsk Ltd. v. United States*, 170 F. Supp. 2d 1280, 1295 (CIT 2001); see also 19 CFR 351.102(b)(35).

⁴² See Commerce’s August 14, 2020 IQ at B-4.

⁴³ See Commerce’s August 14, 2020 IQ at Appendix VI.

⁴⁴ See, e.g., *Ntn Bearing Corp. of Am. v. United States*, 186 F. Supp. 2d 1257, 1287 (CIT 2002).

⁴⁵ See Hankook’s November 20, 2020 ASQR at A-4.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ See Hankook’s Brief at 3.

be not at arm's length. If the sales by the respondent to the affiliate are not at arm's length, the price of these sales cannot be used as normal value because the prices are in the ordinary course of trade. As a result, consistent with 19 CFR 351.403(d), Commerce then requests the downstream sales made by the affiliates to unrelated customers in the home market to use as (part of) the basis for normal value. If the affiliates do not provide the requested downstream sales, then there is necessary data missing from the record and it is appropriate, under the statute, for Commerce to resort to the use of facts available.

Hankook states Korean regulations prohibit Hankook from resorting to actions to influence the Capitalized Distributors and induce cooperation.⁴⁹ Hankook has provided an insufficient explanation as to if and how these regulations would apply to the current situation. In any event, even if the regulations did apply, Commerce is not telling Hankook to violate Korean regulations. However, under U.S. antidumping law, Hankook's structuring of its home markets sales such that it sells at non-arm's length prices to affiliates who refuse to provide their downstream sales information, subsequently requires Commerce to find it necessary to resort to AFA. Without access to the appropriate home market pricing, which is a fundamental requirement for the accuracy of the dumping calculation, the entire dumping calculation is undermined.

The CIT has repeatedly upheld Commerce's application of AFA where a respondent is unable to induce an affiliated party to cooperate with Commerce's request for information.⁵⁰ Additionally, the Court of Appeals for the Federal Circuit (CAFC) has sustained Commerce's practice of attributing an unaffiliated party's failure to cooperate to the respondent and drawing an adverse inference when the respondent is in a position to induce the unaffiliated party to supply the needed information.⁵¹ As an affiliated reseller of the foreign like product, Hankook was capable of inducing its affiliated Capitalized Distributors to cooperate with Commerce's requests by leveraging its ownership interest and both parties' business interests (*e.g.*, refusing to do future business) yet, Hankook failed to do so. Thus, contrary to Hankook's claims, Commerce's determination is consistent with the CIT and the CAFC's previous decisions.

In applying AFA for these unreported sales, Hankook argues that Commerce should use neutral facts available instead of AFA to fill in information Commerce determines is missing from the record in its final determination. Commerce does not agree because, again, allowing this interpretation of the law would permit Hankook to shield higher priced sales in the home market from use in the dumping calculations. Simply requesting that Commerce use neutral facts available at issue does not compensate in any way for Hankook's non-cooperation. To ensure that the information selected to fill in for the missing prices of the downstream sales will induce

⁴⁹ See Hankook's Brief at 17-18.

⁵⁰ See, *e.g.*, *Hyundai Steel Co. v. United States*, 319 F. Supp. 3d 1327, 1343-48 (CIT 2018) (upholding Commerce's application of adverse facts available where a respondent party failed to make additional efforts compel its affiliate to comply with Commerce's request for information after affiliate rejected respondent's initial request for assistance); see also *Kawasaki Steel Corp. v. United States*, 110 F. Supp. 2d 1029, 1034-35 (CIT 2000) (upholding Commerce's application of adverse facts available where a respondent party could have compelled an affiliate to comply with Commerce's request for information, but failed to do so).

⁵¹ See *Mueller Comercial de Mexico, S. de R.L. De C.V. v. United States*, 753 F.3d 1227, 1233 (Fed. Cir. 2014); see also *Xiping Opeck Food Co. v. United States*, 222 F. Supp. 3d 1141, 1158-59 (CIT 2017) (sustaining Commerce's application of an adverse inference to a cooperating respondent who could have induced a non-cooperating sales partner to respond to Commerce's request).

cooperation, we find it appropriate to evaluate a broader pool, *i.e.*, the respondent's entire home market sales, in selecting information for the basis of AFA for these unreported sale prices. Consistent with the methodology from the *Hot-Rolled Steel from Japan*,⁵² for the final determination as a surrogate for the missing price information of the unreported downstream sales of the Capitalized Distributors, we have continued to assign the highest home market price to unaffiliated customers of the same CONNUM applied to Hankook's sales to the same Capitalized Distributors.⁵³

Comment 2: Hankook's Revised Home and U.S. Market Sales Data

Hankook's Case Brief

- In the final determination, Commerce should use the databases provided by Hankook in its Verification Questionnaire Response to ensure proper model matching in its margin program.⁵⁴

The petitioner did not comment or rebut on this issue.

Commerce Position: We agree with Hankook and will use the revised home market sales and U.S. market sales data submitted by Hankook as part of its Verification Questionnaire Response for the final determination. Following the preliminary determination, we stated in the Ministerial Error Memo that “for use in the final determination we will ask Hankook to provide updated home market and U.S. sales databases to include revised product characteristic variable names ...”⁵⁵ This will ensure proper identification of the most similar CONNUM sold in the home market as the basis of normal value (*i.e.*, model matching) in the dumping calculations for the final determination.⁵⁶

Comment 3: Hankook's Minor Corrections

Hankook's Case Brief

- It is Commerce's longstanding practice to accept minor corrections to information already on the record in a respondent's Verification Questionnaire Response.⁵⁷
- Hankook identified two minor corrections in its Verification Questionnaire Response. As the errors identified by Hankook are minor, Commerce should accept Hankook's minor corrections and incorporate these corrections into the dumping calculations for the final determination.⁵⁸

The petitioner did not comment or rebut on this issue.

⁵² See *Hot-Rolled Steel from Japan* IDM.

⁵³ See Memorandum, “Analysis for the Final Determination of the Less-Than-Fair Value Investigation of Passenger Vehicles and Light Truck Tires from Korea: Final Margin Calculation for Hankook Tire & Technology Co. Ltd.,” dated concurrently with this memorandum (Hankook Final Calculation Memorandum).

⁵⁴ See Hankook's Brief at 20.

⁵⁵ See Ministerial Error Memorandum.

⁵⁶ See Hankook's Ministerial Error Comments.

⁵⁷ See Hankook's Brief at 22.

⁵⁸ *Id.* at 23.

Commerce Position: We agree with Hankook to incorporate these minor corrections in the dumping calculations for the final determination. These corrections are minor and were identified in the course of preparing the Verification Questionnaire Response. The details and specifics of these corrections and revisions to programming are explained in the Hankook Final Analysis Memorandum.

Comment 4: Hankook's Warranty Expenses

Hankook's Case Brief

- Commerce should not revise its preliminary determination and should not include Hankook's warranty expenses as part of CEP selling expenses instead of direct selling expenses applied as a circumstance-of-sale adjustment.⁵⁹
- Commerce should revise its position in its preliminary Ministerial Error Memo and continue to include warranty expenses as a circumstance-of-sale adjustment.⁶⁰

Petitioner's Case Brief

- Commerce should correct the ministerial error with regards to Hankook's warranty expenses as Commerce stated was its intent in the ministerial error memorandum.⁶¹

Hankook's Rebuttal Brief

- Record evidence demonstrates that Commerce correctly included applied expenses as a circumstance-of-sale adjustment in the *Preliminary Determination*. Accordingly, Commerce should not revise its approach from the *Preliminary Determination* to include Hankook's warranty expenses as part of CEP selling expenses.⁶²

Petitioner's Rebuttal Brief

- Hankook's argument is directly contradicted by the governing regulation which plainly states that Commerce "will make adjustments for expenses associated with commercial activities in the United States that relate to the sale to the unaffiliated purchaser, no matter where or when paid."⁶³
- Commerce's regulatory language explicitly stated that as long as the expenses relate to economic activity in the United States, the deduction is mandatory even in cases where "the foreign parent of the affiliated U.S. importer pays those expenses."⁶⁴

⁵⁹ *Id.* at 24.

⁶⁰ *Id.* at 25.

⁶¹ See Petitioner Brief at 4 (citing Ministerial Error Memorandum).

⁶² See Hankook's Rebuttal Brief at 1.

⁶³ See Petitioner's Rebuttal Brief at 11.

⁶⁴ *Id.* at 12.

Commerce Position: We agree with the petitioner that these warranty expense should be considered to be part of the CEP expenses rather than direct selling expenses between the exporter and the importer, as these expenses provide compensation to the U.S. customers of Hankook’s affiliated importer, and reflect economic activity in the United States. We stated in the *Preliminary Determination*:

In accordance with section 772(d)(1) of the Act, we calculated the CEP by deducting selling expenses associated with economic activities occurring in the United States, which include direct selling expenses (imputed credit expenses, bank charges, and warranty expenses)...⁶⁵

Furthermore, Commerce’s regulation states that “{i}n establishing CEP under section 772(d) of the Act, the Secretary will make adjustments for expenses associated with commercial activities in the United States that relate to the sale to an unaffiliated purchaser, *no matter where or when paid*.”⁶⁶ In discussing the changes to the regulatory language, Commerce explicitly stated that the phrase “*no matter where or when paid*” is intended to indicate that if commercial activities occur in the United States and relate to the sale to an unaffiliated purchaser, expenses associated with those activities will be deducted from CEP even if, for example, the foreign parent of the affiliated U.S. importer pays those expenses.⁶⁷

Hankook reported that its U.S. affiliate, Hankook America, incurred warranty expenses on U.S. sales. Hankook reported that the process for these claims is such that “any entity or individual in the supply chain could submit a warranty claim, whether that be Hankook America’s customer (*e.g.*, distributor), their customer’s customer (*e.g.*, dealer), or the end consumer (*e.g.*, consumer).⁶⁸ It is clear that these warranty expenses were compensation to Hankook’s U.S. customers and reflects economic activity in the United States. Therefore, for the final determination, we have included these warranty expenses as part of the CEP expenses.

Comment 5: Application of Partial AFA to Nexen’s Sample Sales

Petitioner’s Case Brief

- Section 776 of the Act instructs Commerce to apply AFA “where an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information.” Pursuant to the CAFC the standard of “best ability” “requires the respondent to do the maximum it is able to do.” This standard is not met if a respondent intentionally mis-led Commerce.⁶⁹
- Although Commerce instructed Nexen to report and provide a narrative explanation of its sample sales, Nexen did not report those in its initial response, stating that it did not track its sample sales. Only after being pressed for the information, Nexen revealed the extent of the information it tracks on these sales.⁷⁰

⁶⁵ See *Preliminary Determination* PDM at 14.

⁶⁶ See 19 CFR 351.402(b) (emphasis added).

⁶⁷ See *Preamble* 62 FR at 27296.

⁶⁸ See Hankook’s Letter, “Passenger Vehicle and Light Truck Tires from the Republic of Korea (A-580-908): Initial Section B Response,” dated October 5, 2020, at C-69.

⁶⁹ See Petitioner’s Brief at 4 (citing *Nippon Steel*, 337 F.3d 1373, 1382).

⁷⁰ *Id.* at 5.

- Nexen mislead Commerce to prevent it from investigating all of Nexen's U.S. sales. Maximum effort would have required Nexen to provide the requested information after Commerce's first request, rather than have Commerce ask for it repeatedly.⁷¹
- Because Nexen actively mislead Commerce, Commerce is not bound by the statute to provide that party with the opportunity to reverse its fabrication and provide truthful information, citing *Papierfabrik Aug Koehler* and *Essar Steel*.⁷²
- The instant case shares many of the characteristics noted in the CAFC's opinions, as Nexen first intentionally mislead Commerce about what information concerning its samples sales that it could obtain, and Nexen did not put forth its maximum effort to provide the requested information. Thus, Commerce is not required to provide Nexen with opportunities to correct the record that it has intentionally distorted.⁷³
- The CAFC held in *Essar Steel* that Commerce is still justified in applying AFA, even if the respondent ultimately provides the correct information. Hence, the information Nexen provided in its Verification Questionnaire Response does not excuse its withholding the information initially.⁷⁴
- Because of the incompatibility of Nexen's original response and its response to the verification questionnaire, Commerce should apply AFA to Nexen's sample sales and apply the highest individual dumping margin calculated for any U.S. sale to all sample sales.⁷⁵

Nexen's Rebuttal Brief

- The petitioner's contention that Nexen "sought to intentionally mislead Commerce on its sample sales," and that Commerce should apply AFA to those, is contradicted by the detailed information Nexen provided on these free-of-charge sales, and the fact, that the petitioner does not, and cannot, point to any missing information on those transactions.⁷⁶
- Nexen explained in its section A response that it does not provide free samples, and that on occasion, customers will request small quantities of tires for testing or other similar purposes. Nexen charges the customer for those small quantities and recognizes those sales in the sales revenue.⁷⁷
- Nexen Tire America (NTA) occasionally provides free-of-charge samples to a U.S. customer, but does not record those as a free sample sale but as an advertising expense in the normal course of business. In its section C response, Nexen referred back to its section A response where it stated that it does not track sample sales but records those as indirect selling expenses in the normal course of business. NTA records the inventory value of the tires as an advertising expense.⁷⁸
- Free-of-charge sample sales are provided to customers and non-customers for promotional purposes. Nexen provided a detailed list identifying the recipient, the customer code, product code, a description, the quantity, amount recorded as an advertising expense, and

⁷¹ *Id.* at 5.

⁷² *Id.* at 6 (citing *Papierfabrik Aug Koehler SE v. United States*, 843 F.3d 1373, 1384 (Fed. Cir. 2016) (*Papierfabrik Aug Koehler*); *Essar Steel Ltd. v. United States*, 678 F.3d 1268, 1276 (Fed. Cir. 2012) (*Essar Steel*)).

⁷³ *Id.* at 7.

⁷⁴ *Id.* at 7 (citing *Essar Steel*, 678 F.3d at 1276).

⁷⁵ *Id.*

⁷⁶ See Nexen's Rebuttal Brief at pdf 9.

⁷⁷ *Id.*

⁷⁸ *Id.* at pdf 10.

indicated when the sample sale was cancelled and the reason for the cancellation. Notably, the petitioner has not argued that Nexen failed to provide the information requested by Commerce.⁷⁹

- Nexen fully responded to all of Commerce’s questions regarding the free sample sales, and the petitioner does not argue that Commerce should penalize Nexen with AFA because the record is incomplete, but the petitioner did not like Nexen’s initial questionnaire response.⁸⁰
- The petitioner’s argument is based on its incomplete quotations from Nexen’s responses, leaving the appearance that Nexen’s information is deficient. The petitioner’s reliance on *Steel Flat Products from India* makes no sense given Nexen’s detailed responses, including Nexen’s response to Commerce’s in-lieu-of verification questionnaire.⁸¹
- Additionally, the petitioner fails to recognize that nearly all of NTA’s free-of-charge sample sales during the POI were for sponsorships of racing teams and promotional events, rather than samples provided to customers. NTA’s sample sales provided the equivalent of 0.002 percent of tires sold to existing or prospective customers.⁸²

Commerce Position: For this final determination, Commerce made no changes to its treatment of Nexen’s free-of-charge sample sales. The petitioner is correct when stating that Commerce’s initial questionnaire instructed Nexen to report its sample sales and to provide a narrative explanation for Commerce to determine whether those sales are free-of-charge samples and not for consideration, *i.e.*, the sales price net of movement expenses cannot be greater than zero and not in commercial quantities.⁸³ We also agree with the petitioner that Nexen did not provide in its initial section A response a narrative explanation or supporting documentation that was sufficient as the basis for Commerce to determine whether Nexen’s sample sales were for consideration.⁸⁴ In the initial questionnaire response to section A, Nexen informed Commerce that it had no transactions involving merchandise samples as such in the home market (HM) or the United States market during the POI, and that Nexen charges a customer for small quantities purchased as samples for testing, *etc.*, taking into consideration the quantity and market conditions. Those sales, Nexen reported in its HM and U.S. sales data.⁸⁵ Nexen further stated that it, at times, provides “free-of-cost” sample sales to U.S. customers upon launching a new model, and that it does not record those free samples as a sale but as a marketing selling expense in the normal course of business.⁸⁶ Nexen did not provide documentation, such as the quantity and value or recipient of such free-of-charge tires, to support its narrative response at that time.

In its initial section B response, Nexen reported the total number of tires that it gave away to certain companies during the POI, and stated that it treats the expenses for those tires as selling expenses in

⁷⁹ *Id.*

⁸⁰ *Id.* at pdf 11.

⁸¹ *Id.* at pdf 12 (citing *Certain Hot-Rolled Carbon Steel Flat Products from India: Final Results and Partial Rescission of Countervailing Duty Administrative Review*, 86 FR 20923 (May 6, 2009) (*Steel Flat Products from India*), and accompanying IDM; and *Essar Steel Ltd.*, 678 F.3d at 1275).

⁸² *Id.* at pdf 12-13.

⁸³ See Commerce’s Letter, “Antidumping Duty Questionnaire,” dated August 14, 2020 (Initial AD Questionnaire) at Appendix I-14, B-26 and C-31.

⁸⁴ See Nexen’s Letter, “Passenger Vehicle and Light Truck Tires from South Korea: Section A Response,” dated September 14, 2020, 2020 (Nexen’s September 14, 2020 AQR): at A-61.

⁸⁵ *Id.*

⁸⁶ *Id.*

a different expense account than its cost-of-goods sold account in the normal course of business.⁸⁷ Nexen further explained that it does not have records that identify the individuals to whom it gifted tires. In addition, Nexen provided an analysis of domestic sample expenses, and was able to provide the detail for another category of recipients of its free-of-charge tires that it kept records for. As it stated in its narrative, it was unable to provide the identities of individuals to which it gifted tires, as well as for one other group.⁸⁸ Nexen's initial section C response was limited to, "{a}s explained in the AQR, NEXEN TIRE did not track 'sample' sales of {passenger tires}, but records {passenger tires} given for no cost as an indirect selling expense."⁸⁹

Because of those apparent deficiencies in Nexen's initial response with respect to sample sales, such as the incomplete narrative response, and pursuant to section 782(d) of the Act, Commerce issued its first supplemental questionnaire to section A, where it asked Nexen to provide more information on its sample sales. Commerce requested the following:

"Commerce's practice is to include all sample sales made in the U.S. market unless it is shown that no monetary or non-monetary compensation was received. Please provide a full explanation of all sample sales made in the U.S. market during the POI, including the customer each sample sale was made to, the circumstances of the sample sale, the volume of each model of tire involved in the sale, and whether that customer purchased that model of tire outside the sample sale. Please provide sample documentation supporting your answers."⁹⁰

In its response, Nexen stated that its U.S. affiliate, NTA, records the inventory value of the complimentary free-of-charge tires as an advertising expense and, therefore, issues no invoices or other sales documents, and that it does not treat the complimentary tires as sales.⁹¹ Furthermore, in an exhibit, Nexen provided a listing of the information requested by Commerce, as above: the date of the transaction, accounting document number, item product code, product description, brand name, quantity, amount recorded as expense in accounting, recipient, recipient-customer code (if applicable), canceled shipments, the reason for cancellation, and reservation number for the recipient of those free tires.⁹² Thus, Nexen provided the quantity and value of its free samples, as requested by Commerce, on the record of this proceeding. Nexen did not provide additional supporting documentation on its "gifted tires," as requested; however, as the expense for the free-of-charge tires was included in the indirect selling expenses reported, and Nexen's CEP sales

⁸⁷ See Nexen's Letter, "Passenger Vehicle and Light Truck Tires from South Korea: Section B Response," dated October 2, 2020 (Nexen's October 2, 2020 BQR) at B-61 and Exhibit B-41.

⁸⁸ *Id.* at B-61-62 and Exhibit B-41.

⁸⁹ See Nexen's Letter, "Passenger Vehicle and Light Truck Tires from South Korea: Section C response," dated October 5, 2020 (Nexen's October 5, 2020 CQR) at C-63-64.

⁹⁰ See Commerce's Letter, "Antidumping Duty Investigation of Passenger Vehicle and Light Truck Tires from the Republic of Korea: First Supplemental Section A Questionnaire for Nexen Tire Corporation," dated October 28, 2020 (Commerce's October 28, 2020 Letter) at Question 13.

⁹¹ See Nexen's Letter, "Passenger Vehicle and Light Truck Tires from South Korea," dated November 9, 2020 (Nexen's November 9, 2020 ASQR1) at S1-A15.

⁹² See Nexen's November 9, 2020 ASQR1 at S1-A15, as corrected in Nexen's Letter, "Passenger Vehicle and Light Truck tires from South Korea: Correction to Appendix SA-23 of the Response to the First Supplemental Questionnaire to Section A," dated November 10, 2020 (Nexen's November 10, 2020 ASQR1). Nexen explained it filed that inadvertently submitted a non-final version of the worksheet that omitted the columns for names and customer codes of the recipients and information on returned samples, rather than the final worksheet.

reconciliation to its financial statements placed on the record with its initial response reconcile with the U.S. sales data, the record demonstrates that Nexen's free sample sales were, in fact, not sales needing to be included as U.S. sales in Commerce's analysis, but included as selling expenses.⁹³

Subsequent to the preliminary determination, Commerce issued its In Lieu of Verification Questionnaire, where it asked for information common for on-site verifications, such as back-up documentation and account traces for the information provided in Nexen's responses to Commerce. Specifically, Commerce requested the information to support Nexen's information provided in its initial and first supplemental responses to section A and its initial response to sections B and C, regarding its free-of-charge tires. The requested information included questions on Nexen's relationship with certain recipients of those free-of-charge tires, and accounting traces of the transactions to confirm there was neither monetary nor other compensation from the recipient by Nexen.⁹⁴ The questions in Commerce's In Lieu of Verification Questionnaire requested detail to the information placed by Nexen on the record. Here too, Nexen was fully responsive to all of Commerce' questions in the In-Lieu-of Verification Questionnaire, as outlined above, and supported its response with documentation in the form of accounting traces and sponsorship agreements, *etc.*⁹⁵

We agree with the petitioner that Nexen's initial response to sections A, B, and C of the questionnaire were insufficient for Commerce to make a determination as to whether the free-of-charge sample sales were, in fact, not for consideration, as it lacked the extensive and descriptive narrative and limited supporting documentation.

However, in its initial response, Nexen also clearly stated that it does not treat the "gifted" free sample sales as sales in its accounting system, but captures them as indirect selling expense in both markets, and thus, is unable to trace and report them as sales.⁹⁶ Accordingly, without sales information, Nexen would not be able to demonstrate that its free sample sale price net of movement expenses is not greater than zero, as indicated in the definitions of Commerce's initial questionnaire. Further, in response to Commerce's supplemental and verification questionnaires, Nexen provided the information requested and needed by Commerce to make a determination on those sales.⁹⁷ As stated above, Nexen's first supplemental section A response addressed most parts of Commerce's requests therein. The information still not on the record was the supporting documentation, such as accounting traces, for Commerce to verify the accuracy of the detailed chart provided by Nexen in its supplemental response. That information was obtained with Nexen's V-QR, allowing Commerce to verify some of the information reported in Nexen's initial and the first supplemental responses, and based on which Commerce made its preliminary determination that those free sample sales were not for consideration.

Commerce requested additional information on Nexen's free sample sales on only two occasions: first, in one of the two supplemental questionnaires to section A, and then in the In Lieu of

⁹³ See Nexen's October 5, 2020 CQR at C-6 and C-38.

⁹⁴ See Commerce's March 8, 2021 V-QR at 3.

⁹⁵ See Nexen's March 17, 2021 VQR at V-5-14 and Exhibits V8-9, V11-V18.

⁹⁶ See Nexen's November 9, 2020 ASQR1 at 15, Nexen's October 2, 2020 BQR at B-61, and Nexen's October 5, 2020 CQR at C-64.

⁹⁷ See Nexen's November 9, 2020 ASQR1 at A-15 and Exhibit S1-A23, Nexen's November 10, 2020 ASQR1 at Exhibit 1, and Nexen's March 17, 2021 VQR at 5-11 and Exhibits V-8-9, V-11-18.

Verification Questionnaire after the preliminary determination.⁹⁸ Unlike the facts in the court case, *Papierfabrik Aug Koehler*, Nexen's responses were timely and the requested information was provided promptly, building a complete record based on which Commerce was able to confirm its preliminary determination for this final determination.⁹⁹ In addition, Nexen did not mislead Commerce in its responses. Nexen stated that it does not track those free-of-charge transactions as sales, and, therefore, is unable to report them as such as it does not have the associated sales information. With its initial response, Nexen clearly stated that the information for those free sample tires is included in its indirect selling expenses because it is considered an advertising expense.

Furthermore, unlike *Essar Steel*, Nexen was forthcoming with the information Commerce requested and did not belatedly provide the information.¹⁰⁰ In light of the completeness of the record, the petitioner's claim (that Nexen mislead Commerce to prevent it from investigating all of Nexen's home market and U.S. sales and failed to demonstrate maximum effort to provide the requested information after Commerce's first request, so that Commerce had to ask for it repeatedly), is inaccurate. The information Nexen provided on the record is responsive and demonstrates that its free-of-charge merchandise was provided without consideration and must, therefore, be excluded from Commerce's analysis of Nexen's CEP sales.¹⁰¹

Comment 6: Nexen's CEP Offset

Nexen's Case Brief

- Commerce should find that sales made to the HM level of trade (LOT) were made at a more advanced level than the LOT for Nexen's CEP sales to its affiliate, NTA, because Nexen performed more selling functions for its HM sales at higher levels of intensity, warranting a CEP offset.¹⁰²
- Section 773(a)(7)(B) of the Act directs Commerce to grant a CEP offset to normal value (NV) if the NV is established at a more advanced LOT than the CEP LOT, and a LOT adjustment under section 773(a)(7)(A) cannot be determined. The CEP LOT is determined pursuant to 772(d) of the Act.¹⁰³
- Pursuant to 19 CFR 351.412(c)(2), Commerce must find that substantial differences exist between the HM LOT and the CEP LOT. Commerce's practice is to consider the number and intensity of the selling functions performed, as well as the levels of indirect selling expenses attributable to the HM and CEP sales.¹⁰⁴

⁹⁸ See Commerce's October 28, 2020 Letter at 4, and Commerce's March 8, 2021 V-QR at 3.

⁹⁹ See *Papierfabrik Aug Koehler*, 843 F.3d 1373, 1374.

¹⁰⁰ See *Essar Steel* 678 F.3d 1268, 1375.

¹⁰¹ See *NDK Ltd. v. United States*, 115 F.3d 965 (Fed. Cir. 1997); *Certain Cold-Drawn Mechanical Tubing of Carbon and Alloy Steel from Switzerland: Final Determination of Sales at Less Than Fair Value*, 83 FR 16293 (April 16, 2018), and accompanying IDM at Comment 1.

¹⁰² See Nexen's R-Case Brief at 1-2.

¹⁰³ *Id.* at 2 (citing section 773(a)(7)(B) and 772(d) of the Act and 19 CFR 351.412(f); *Koyo Seiko Co., Ltd. v. United States*, 8 F. Supp. 2d 862, 864 (CIT 1998) (*Koyo Seiko*); *Micron Technology, Inc. v. United States*, 243 F.3d 1301, 1315 (Fed. Cir. 2001)).

¹⁰⁴ *Id.* at 2 (citing *Roller Chain, Other Than Bicycle, from Japan: Final Results of Antidumping Duty Administrative Review, and Determination Not to Revoke in Part*, 61 FR 64333 (December 4, 1996) (*Roller Chain from Japan*); *Corus Eng'g Steel Ltd. v. United States*, Slip Op. 03-110 at 10 (CIT August 27, 2003); *Mittal Steel USA, Inc. v.*

- Nexen identified all selling functions performed in the HM, but not for its CEP sales to its affiliate, NTA, and demonstrated that it incurred significantly higher indirect selling expenses on sales in the HM, and thus, met its burden to support its claim that a CEP offset is necessary to ensure a fair comparison between NV and CEP.¹⁰⁵
- Because Commerce determined in the preliminary determination that HM level of trade 1 (LOT1) was closer to the CEP LOT, Nexen extracted the selling functions for those LOTs to provide a comparison. There the record shows that Nexen provided over 20 selling functions for HM LOT1 sales than it did for CEP sales.¹⁰⁶
- The record demonstrates that Nexen performed substantially more selling functions (over 20) on HM LOT1 sales, and of the common selling functions, Nexen performed those at a higher level of intensity (more frequent or more intense, or both) in the HM LOT1 than for the CEP LOT; thus, Nexen's HM LOT1 is at a more advanced LOT than the CEP LOT.¹⁰⁷
- Nexen performed certain selling functions in HM LOT1 but not in the CEP LOT including: sales forecasting and sales planning; marketing research outside marketing activities; gifts for customers; negotiation of sales terms; approach new customer; outside training for salespersons; technical knowledge transfer to customer; maintenance of regional distribution centers; and various activities related to customer credit and payment and registration of new customers.¹⁰⁸
- For example, during the POI, Nexen had to generate over 450 percent more SAP Outbound documents for its HM LOT1 sales of lesser quantity than, and compared to, its CEP sales. This demonstrates the complexity of the documentary and administrative requirements in preparing SAP records, and other accounting activities, for Nexen's HM LOT1 sales compared to its CEP sales.¹⁰⁹
- Because of the greater number of selling functions and the higher level of intensity, Nexen requires a larger sales staff for the HM than for its CEP sales, both on an absolute basis and proportionate to sales value. There exists a 40-fold difference in staffing for domestic sales versus U.S. export sales staff.¹¹⁰
- Considering the respective sales values, the HM sales team generated less than three percent of the revenue per person compared to the U.S. export team.¹¹¹
- The larger number of salespeople in the HM was needed to handle the numerous and more intense selling functions for HM LOT1 sales, as indicated in the section A response. The response includes an annual internal plan for a sample customer, addressing certain selling activities.¹¹²

United States, Slip Op. 07-117 at 25 (CIT August 1, 2007) (*Mittal Steel*); *Notice of Final Determination of Sales at Less than Fair Value and Negative Final Determination of Critical Circumstances: Certain Frozen and Canned Warmwater Shrimp from Thailand*, 69 FR 76918 (December 23, 2004), (*Shrimp from Thailand*), and accompanying IDM at Comment 5.).

¹⁰⁵ *Id.* at 3.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 3-5.

¹⁰⁸ *Id.* at 4.

¹⁰⁹ *Id.* at 4-5.

¹¹⁰ *Id.* at 5.

¹¹¹ *Id.* at 6.

¹¹² *Id.* (citing Nexen's Letter, "Passenger Vehicle and Light Truck Tires from South Korea: question 3 of Section A Response," dated September 18, 2020 (Nexen September 18, 2020 AQ3QR).

- Nexen demonstrated that HM LOT1 includes many visits to the HM customer, whereas there were none to NTA, and no other special customer requests, because NTA is a captive customer, which handles U.S. sales. With its U.S. sales to NTA, Nexen does not need to provide the services it does provide to domestic customers at HM LOT1.¹¹³
- Commerce also considers the differences in the levels of indirect selling expenses attributable to the two types of sales. Nexen incurs a much higher indirect selling expense ratio for its HM LOT1 sales than for its CEP sales, due to the larger number of selling functions performed in the HM.¹¹⁴
- The indirect selling expenses attributable to HM sales are nearly eight times the ratio on CEP sales to NTA, demonstrating that HM sales were made at a more advanced LOT than CEP sales, as documented in Nexen's responses.¹¹⁵
- This difference cannot only be attributed to the 40-fold difference in sales headcount, but also to additional indirect selling expenses incurred in HM LOT1 for additional selling functions performed, such as maintaining a substantial number of HM sales branches and regional distribution centers, credit rating, and entertainment.¹¹⁶
- Nexen demonstrated that it performed substantially more selling functions and at a higher level of intensity for HM sales than it performed for CEP sales to NTA beyond the level that Commerce deemed adequate to warrant a CEP in a previous determination.¹¹⁷
- In *Corrosion-Resistant Steel Products from Korea 2017-2018*, Commerce applied a CEP offset based on a finding that the respondent provided two more selling functions for HM customers than for its US sales and that the overlapping selling functions were at a higher intensity level for HM sales. Nexen had over 20 selling functions for HM LOT1 sales that were not present for CEP sales, and the overlapping selling functions were performed at a higher level of intensity and frequency.¹¹⁸
- Nexen has also shown that it incurred substantially higher indirect selling expenses on sales to HM customers than on CEP sales to NTA. The HM sales were at a more advanced LOT than CEP sales, however, the data does not provide an appropriate basis for an LOT adjustment. Therefore, a CEP offset pursuant to section 773(a)(7)(B) is necessary for a fair comparison.¹¹⁹

¹¹³ *Id.* at 6-7.

¹¹⁴ *Id.* at 7-8 (citing *Shrimp from Thailand* IDM at Comment 5).

¹¹⁵ *Id.* at 8.

¹¹⁶ *Id.* at 8-9.

¹¹⁷ *Id.* at 10 (citing 19 CFR 351.412(c)(2); *Roller Chain from Japan*, 61 FR 64322, 64323 (December 4, 1996); *Stainless Steel Sheet and Strip in Coils from Germany*; *Notice of Preliminary Results of Antidumping Duty Administrative Review*, 71 FR 45024 (August 8, 2006), unchanged in *FULL CITATION TO FINAL RESULTS*, 71 FR 74897 (December 13, 2006) (*Prelim Stainless Steel from Germany*); *Certain Stainless Steel Butt-Weld Pipe Fittings from Taiwan: Final Results and Final Rescission in Part of Antidumping Duty Administrative Review*, 67 FR 78417 (December 24, 2002), and accompanying IDM at Comment 6; *Certain Carbon and Alloy Steel Cut-To-Length Plate from Belgium: Final Results of Antidumping Duty Administrative Review*; 2018-2019, 86 FR 15648 (March 24, 2021), and accompanying IDM at Comment 4).

¹¹⁸ *Id.* at 10-11 (citing *Certain Corrosion-Resistant Steel Products Preliminary Results of Antidumping Duty Administrative Review and Preliminary Determination of No Shipments*; 2017-2018, 84 FR 48118 (September 12, 2019), and accompanying PDM at 25, unchanged in *Corrosion-Resistant Steel Products from the Republic of Korea: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments*; 2017-2018, 85 FR 15114 (March 17, 2020) *FULL CITATION TO FINAL RESULTS FOR CORE 2017-2018*); *Certain Corrosion-Resistant Steel Products Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review*; 2018-2019, 85 FR 74987 (November 24, 2020), and accompanying PDM at 24).

¹¹⁹ *Id.* at 11-12.

- In prior determinations, Commerce has reasoned that the NV LOT was more advanced than the CEP LOT because the foreign producer performed selling activities in the comparison market that were handled by the US affiliate in the U.S. market. NTA's indirect selling expense rate speaks to that fact.¹²⁰
- To uphold the statutory requirement to make a fair comparison between CEP and NV, a CEP offset must be made.¹²¹

Petitioner's Rebuttal Brief

- Nexen did not challenge Commerce's determination that Channel 1 (original equipment manufacturer (OEM)) and Channel 2 (large distributors) sales were made at one level of trade, HM LOT1, in its case brief, nor Commerce's determination that Channels 3 (small resellers), 4 (business to customer (B2C)), and 5 (retail locations) sales were made at a more advanced level HM LOT2. Nexen also does not challenge the determination that its U.S. sales were made at the same US LOT1, but Nexen argues that its CEP sales should not be held to be at US LOT1.¹²²
- Nexen argues that there are significant differences in selling functions between its HM LOT1 and its U.S. CEP sales, however, the selling functions chart in its initial response, it labeled the column "HM Channel 2 and 3 B2B-RE," providing combined data for two channels at two different levels of trade.¹²³
- Nexen's Channel 2 sales are to large customers, and Channel 3 sales to small retailers, local distributors, and auto-shop customers on a spot basis, customers that Nexen reported to have limited purchase requirements supplied from inventory at the branch. Therefore, Commerce rightly determined that Channels 1 (large OEM customers) and 2 to be one LOT (HM LOT1), while Channel 3 sales are at the same level as its other small customers.¹²⁴
- Nexen does not challenge Commerce's determination on the LOTs and provides no argument or evidence on the record that Commerce should treat Channels 1, 2, and 3 at the same LOT, which Nexen *de facto* does by presenting data on channel 3 sales as applicable to HM LOT1 sales.¹²⁵
- The initial questionnaire explains that Commerce examines the difference in LOT for "each type of sale;" however, Nexen chose to provide an analysis for combined Channels 2 and 3 and combined 4 and 5 instead of a qualitative response for each "type of sale."¹²⁶
- It is apparent that Nexen frequently reported sales activities performed for Channels 2 and 3 (and Channels 4 and 5), based on activities it performed for Channel 3 and 4 only. From Nexen's record it is impossible to discern whether its reporting was based on Channel 2 or Channel 3 activities, rendering these numbers meaningless for an analysis of channel 2.¹²⁷

¹²⁰ *Id.* at 12-13 (citing *Prelim Stainless Steel from Germany; Notice of Final Results of the Tenth Administrative Review and New Shipper Review of the Antidumping Duty Order on Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea*, 70 FR 12443 (March 14, 2005), 70 FR 1244 (March 14, 2005), and accompanying IDM at Comment 4).

¹²¹ *Id.* at 13 (citing section 773(a) of the Act).

¹²² See Petitioner's R-Rebuttal Brief at 12-13.

¹²³ *Id.* at 13.

¹²⁴ *Id.* at 13-14.

¹²⁵ *Id.* at 14.

¹²⁶ *Id.* (citing Initial AD Questionnaire at A-7, I-II).

¹²⁷ *Id.* at 14-15.

- That Nexen is now arguing that the combined Channel 2 and 3 selling functions reflect Channel 2 activities only cannot be discerned from the prior record and constitutes new information.¹²⁸
- Nexen’s responses failed to indicate how the numbers reported for the combined Channel 2 and 3 reflect one or the other separately, rendering the numbers meaningless for an examination of an LOT that contains only Channel 2, and whether those sales are at the same LOT as the U.S. sales.¹²⁹
- Certain types of selling activities reported for combined Channel 2 and 3, and for which Nexen reported a high level of intensity, clearly apply to Channel 3 activities only.¹³⁰
- Nexen’s reporting of its selling functions fails to show that substantial differences exist between the HM LOT1 and CEP sales for Commerce to find that a different LOT exists, as such would lead to a multitude of LOT analyses for Commerce. That is, Commerce cautions against information that is subject to different interpretations, such as Nexen’s selling functions reporting.¹³¹
- It is apparent from the inconsistencies between diverse selling functions and activities reported by Nexen in its selling functions chart and its narrative responses, that such subjectivity exists in Nexen’s reporting.¹³²
- Commerce requested Nexen to “{p}rovide a quantitative analysis showing how the expenses assigned to POI/POR sales made at different claimed levels of trade impact price comparability.” But Nexen, instead of examining the LOT of each type of sale, provided loose quantitative analyses comparing all its HM sales to all U.S. sales.¹³³
- Nexen’s subjective analyses are reflected in its responses and continues with its arguments in its case brief. For example, Nexen continues to compare expenses for all of its domestic sales staff to its U.S. export sales staff, without considering that the domestic expenses were for multiple LOTs, despite the argument only involving one of those LOTs.¹³⁴
- Pursuant to 19 CFR 351.401(b)(1), it was incumbent upon Nexen to support and provide evidence on the differences it claimed for the different types of sales, even though Commerce informed it of its method of LOT analysis.¹³⁵
- Commerce correctly looked at the LOT-specific information and data on the record and determined that Nexen’s sales activities in the HM for large OEMs and large distributors are not substantially different from its sales to its large U.S. customer.¹³⁶

Commerce Position: Commerce disagrees with Nexen that its U.S. CEP sales were made at an LOT that is less advanced than its home market sales made at HM LOT1. Accordingly, Commerce continues to deny a CEP offset for this final determination.

¹²⁸ *Id.* at 15.

¹²⁹ *Id.* at 14-15.

¹³⁰ *Id.*

¹³¹ *Id.* at 15-16 (citing *Preamble*, 62 FR at 27371; and *Polyethylene Terephthalate Sheet from the Republic of Korea: Final Determination of Sales at Less Than Fair Value*, 85 FR 44276 (July 22, 2020), and accompanying IDM at Comment 4).

¹³² See Petitioner’s R-Rebuttal Brief at 16.

¹³³ *Id.* at 17 (citing Initial AD Questionnaire at A-7-A-8).

¹³⁴ *Id.* at 17.

¹³⁵ *Id.* at 18.

¹³⁶ *Id.*

Commerce makes an LOT adjustment when the difference in the LOT “(i) involves the performance of different selling activities; and (ii) is demonstrated to affect price comparability, based on a pattern of consistent price differences between the sales at the different levels of trade in the country in which normal value is determined.”¹³⁷ Further, when the home market LOT constitutes a more advanced stage of commerce than the LOT of the CEP, but Commerce lacks data to determine whether the difference affects price comparability, Commerce will grant a CEP offset.¹³⁸ Commerce grants a CEP offset by “{t}he amount of indirect selling expenses included in normal value NV, up to the amount of indirect selling expenses deducted in determining constructed export price.”¹³⁹ The burden of establishing that substantial differences in the selling functions performed exist are with the party seeking a CEP offset, as it “is in possession of the relevant information.”¹⁴⁰

In the *Preliminary Determination*, Commerce determined that Nexen had two LOTs in the HM (HMLOT1: Channels 1 (OEMs) and 2 (large distributors); HMLOT2: Channels 3 (small resellers), 4 (B2C), and 5 (retail locations)), and one LOT (USLOT1) in the United States (CEP: Channels 1, 2, 3, and 4, and EP).¹⁴¹ Commerce further determined that Nexen performed all selling activities in HMLOT2 at a significantly higher level of intensity than those performed at HMLOT1 and USLOT1. Accordingly, Commerce determined that the sales made through HMLOT2 were made at a more advanced LOT than Nexen’s HM sales at HMLOT1 and its U.S. sales, USLOT1. Therefore, to the extent that U.S. sales do not match to HM sales made at the corresponding HMLOT1 but at HMLOT2, Commerce determined that an LOT adjustment for HMLOT2 was warranted.¹⁴² Thus, in the *Preliminary Determination*, when CEP (or EP) is compared with a normal value based on HMLOT2 sale prices, an LOT adjustment is made based on the differences in prices between HMLOT1 and HMLOT2 sales; however, when CEP (or EP) is compared with a normal value based on HMLOT1 sale prices, no LOT adjustment is appropriate because the CEP (or EP), *i.e.*, USLOT1, is at the same LOT as HMLOT1 sale prices.¹⁴³

Based on that determination, Nexen now argues that Commerce must grant a CEP offset when CEP is compared to a normal value based on HMLOT1 sales because, it claims, its HMLOT1 is at a more advanced LOT than the CEP LOT (USLOT1), as it performs a much greater number of selling functions in HMLOT1 than in USLOT1.¹⁴⁴ Nexen further argues that those selling functions that overlap in those LOTs are performed at a higher intensity and frequency in HMLOT1 than USLOT1. Nexen believes that its higher indirect selling expense rate in the HM is indicative of its more advanced LOT than for its CEP sales. Accordingly, Nexen suggests, Commerce should follow its own determinations, where with only two or more additional selling functions performed for its HM customers than for its CEP sales, and with the overlapping selling functions performed at a higher-level of intensity for the HM sales, Commerce granted a CEP offset.

¹³⁷ See section 773(a)(7)(A) of the Act; *see also* 19 CFR 351.412(a)-(b).

¹³⁸ See section 773(a)(7)(B) of the Act; *see also* 19 CFR 351.412(f).

¹³⁹ See 19 CFR 351.412(f)(2).

¹⁴⁰ See 19 CFR 351.401(b)(1) and 19 CFR 351.412(c)(2); *see also Sucocitricon Cutrale Ltda. v. United States*, Court No. 10-00261, Slip-Op. 12-71 (CIT June 1, 2012) at 8-11.

¹⁴¹ See *Preliminary Determination* PDM at 18-20.

¹⁴² *Id.* (citing Nexen September 21, 2020 AQ3QR at Exhibit AQ3-28).

¹⁴³ *Id.*

¹⁴⁴ See Nexen’s R-Case Brief at 1-5.

We disagree with Nexen's quantitative and qualitative analysis of its selling functions chart and the selling activities performed therein. Nexen argues that there are significant differences in selling functions between its HMLOT1 sales and its U.S. CEP sales; however, Nexen fails to acknowledge that the selling functions chart in its initial response, reported combined data for channels of trade, *i.e.*, Channel 2 and Channel 3, making it impossible to discern, whether the reporting applies to Channel 2 or Channel 3.¹⁴⁵

In the *Preliminary Determination*, Commerce noted that Nexen's reporting in the chart was insufficiently differentiated and supported, failing to provide a quantitative and qualitative analysis for each type or channel of sale.¹⁴⁶ By providing combined reporting for several Channels (Channels 2 and 3 and Channels 4 and 5), Nexen failed to provide Commerce with data that would have allowed for a sales-channel-specific analysis. Nexen does not challenge Commerce's determination that Channels 2 and 3 are at two different LOTs.

Nevertheless, Nexen now wants Commerce to treat Channels 1, 2, and 3 as the same LOT, by presenting data reported for Channel 3 as applicable to Channel 2, thereby including Channel 3 in HMLOT1. As Commerce stated in the *Preliminary Determination*, "{i}nformation on the record also indicates that Nexen provided similar sales support, training services, technical services, logistical services, and sales related administrative activities with the same intensity for its customers in HM Channels 1 & 2."¹⁴⁷ In contrast, Nexen sells passenger tires to HM Channels 3, 4, and 5 customers through regional branch locations or tire shop locations. The customer base in those HM channels are small resellers, distributors, and end-users."¹⁴⁸ It is apparent that certain types of selling activities reported performed with high intensity in the combined Channel 2 and 3 solely apply to Channel 3 activities, because they serve very different customer bases. Channel 2 is to large customers with annual contracts for supply of large purchase volumes for which Nexen provides discounts and incentives, and the selling functions and the intensity at which they are performed for that customer base, is much like Nexen's other large customer base, the OEMs, in sales Channel 1.

In contrast, Nexen sells passenger tires to HM Channels 3, 4, and 5 customers through regional branch locations or tire shop locations. The customer base in those HM channels are small resellers, distributors, and end-users, needing a higher level of support functions, and at higher intensity..¹⁴⁹ Nexen, having failed to build an adequately detailed quantitative and qualitative record of the selling functions and activities performed for each type of sale for Commerce to analyze, continues to argue in its case brief on the same undifferentiated level that conflates Channel 2 and 3 information, and irrespective of LOT or Channel of distribution, by providing comparative analyses of total sales staff in each market in relation to the total sales value in each, or HM and CEP indirect selling expenses.¹⁵⁰ Therefore, we determine that Nexen's arguments are unpersuasive that its analysis in the *Preliminary Determination* is faulty, and, thus, Nexen has failed to establish that a CEP offset is warranted for Nexen's sales through HMLOT1.

¹⁴⁵ See Nexen September 21, 2020 AQ3QR at Exhibits A-28-29.

¹⁴⁶ See *Preliminary Determination* PDM at 19.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* (citing Nexen September 14, 2020 AQR at 34-39; Nexen September 21, 2020 AQ3QR at AQ3-3).

¹⁴⁹ See Nexen September 21, 2020 AQ3QR at AQ3-3-5-7; and Nexen September 14, 2020 AQR at 34-39.

¹⁵⁰ See Nexen's Case Brief at 5-7 and 11-13.

Comment 7: Nexen's Noise Reduction Foam and Special Wrapping Costs

Petitioner's Case Brief

- In the preliminary results, Commerce held that certain noise reduction foam inserts to premium AU7 brand tires and additional protective wrapping, which Nexen reported as home market direct selling expenses, should have been included in Nexen's cost of production (COP) and packaging cost. Commerce stated that it therefore did not include this adjustment in the comparison market calculations.¹⁵¹
- However, Commerce did not implement this decision in the preliminary determination and still included those expenses in its home market calculations as direct selling expenses, instead of including those in its cost calculations. Commerce should correct this error for the final determination and exclude those direct selling expenses from its calculations and make a COP adjustment.¹⁵²
- Further, rather than applying the "convoluted programming language" suggested by Nexen in its verification questionnaire response, Commerce should add the unreported production costs Nexen disclosed in the verification questionnaire response to the cost of manufacturing of the CONNUMs affected.¹⁵³
- Contrary to Nexen's claim that those noise-reduction manufacturing and packaging expenses should be treated as direct selling expenses, as the noise reduction system constitutes the basis for marketing that specific tire brand, these expenses do not meet Commerce's definition of selling expenses.¹⁵⁴
- Those expenses become part of the tire prior to sale and are therefore direct materials. They do not constitute an unavoidable consequence of the sale. As the noise reduction materials become part of the tire, their expense is properly treated as a cost of production.¹⁵⁵
- Commerce should consider the full amount, including additional packaging expenses, as part of the COP, because the packaging materials are inescapably purchased as part of the subject merchandise by the ultimate consumer.¹⁵⁶

Nexen's Case Brief

- Commerce found that the expenses related to noise reduction foam and premium wrapping, reported in direct selling expenses (DIRSEL3H), should have been included in Nexen's reported COP and packaging costs.¹⁵⁷
- Nexen provided the necessary information to reallocate those expenses included in DIRSEL3H in sufficient detail for Commerce to separate the amount that should be included in Nexen's COP from what should be included as a packing expense.¹⁵⁸

¹⁵¹ See Petitioner's Case Brief at 1.

¹⁵² *Id.* at 1-2.

¹⁵³ *Id.* at 2.

¹⁵⁴ *Id.* at 2-3.

¹⁵⁵ *Id.* at 3.

¹⁵⁶ *Id.* at 3-4.

¹⁵⁷ See Nexen's R-Case Brief at 13.

¹⁵⁸ *Id.* at 13-14.

- To implement Commerce’s intention, Nexen suggested SAS code to implement the reallocation of material expenses for the noise reduction foam to COP and the packaging costs to packing (PACKH).¹⁵⁹

Petitioner’s Rebuttal Brief

- Commerce should treat the noise reduction and premium wrapping production costs Nexen reported as direct selling expense as production costs, as it stated its intent to do.¹⁶⁰
- While Nexen no longer insists that the noise reduction and premium wrapping costs are direct selling expenses, it now argues that the premium wrapping of certain tires should be treated as packing expense.¹⁶¹
- However, Commerce distinguishes between “packing” materials and “packaging” materials, the latter of which Commerce previously found are purchased as part of subject merchandise by the consumer, and therefore are raw materials. Accordingly, Nexen’s premium packing is correctly treated as a direct material.¹⁶²

Nexen’s Rebuttal Brief

- Both, Nexen and the petitioner agree that a simple modification of the SAS programming language in the comparison market program is needed to implement Commerce’s intent in the preliminary calculation memorandum not to treat the noise reduction foam and premium wrapping expenses as direct selling expenses in DIRSEL3H, but as COP and as packing expenses, respectively.¹⁶³
- Nexen has explained its recommended programming language in its case brief.¹⁶⁴

Commerce Position: We agree with the petitioner and Nexen that Commerce stated in the preliminary determination that it considers Nexen’s expenses for materials and fabrication of its special noise reduction foam inserts and the accompanying special wrapping to be cost of production and packing expenses rather than direct selling expenses. Therefore, Commerce stated its intent to include those expenses in Nexen’s cost of production. However, Commerce inadvertently applied the expenses reported by Nexen as direct selling expenses in DIRSEL3H in Nexen’s margin calculations.¹⁶⁵ To implement Commerce’s intent, Nexen suggested SAS programming language that would add the additional material and fabrication costs of the noise reduction foam inserts to the COP of the respective CONNUMs, and the additional packing costs for wrapping those tires to the overall packing costs reported. However, as the petitioner correctly pointed out, Commerce distinguishes between “packaging” materials and “packing” materials. In *Warmwater Shrimp from India*, Commerce clearly stated that “... the Department finds that the

¹⁵⁹ *Id.* at 14.

¹⁶⁰ See Petitioner’s R-Rebuttal Brief at 19.

¹⁶¹ *Id.* at 19.

¹⁶² *Id.* at 19 (citing *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Final Results of Antidumping Duty Administrative Review, 2011-2012*, 78 FR 56211 (September 12, 2013) (*Frozen Warmwater Shrimp from Vietnam 2011-2012*), and accompanying IDM at Comment 14 (quoting *Notice of Final Determination of Sales at Less Than Fair Value: Chlorinated Isocyanurates from the People’s Republic of China*, 70 FR 24502 (May 10, 2005), and accompanying IDM at Comment 10).

¹⁶³ See (Nexen’s Rebuttal Brief at pdf 8-9.

¹⁶⁴ *Id.* at pdf 9.

¹⁶⁵ See Memorandum, “Analysis for the Preliminary Determination of the Less-Than-Fair Value Investigation of Passenger Vehicle and Light Truck Tires from Korea: Preliminary Margin Calculation for Nexen Tire Corporation,” dated December 29, 2020 at 4.

materials in question are also inescapably purchased as part of the final product by the ultimate consumer...,” and Commerce determined that those materials are direct materials, because they are part of the final product sold.¹⁶⁶ Here, the extra wrapping for those tires with the noise reduction foam inserts is necessary for those tires with the noise reduction inserts, and therefore becomes part of the final product.¹⁶⁷ Therefore, for the final determination, Commerce has not made an direct selling expense adjustment to home market price for Nexen’s noise reduction foam inserts and accompanying special wrapping, and added the per unit amount for the noise reduction foam tire inserts, inclusive of its special wrapping expenses, to the appropriate CONNUM COP.

VII. RECOMMENDATION

Based on our analysis of the comments received, we recommend adopting the above positions. If this recommendation is accepted, we will publish the final determination of the investigation and the final estimated weighted-average dumping margins in the *Federal Register*.



Agree



Disagree

5/21/2021

X



Signed by: CHRISTIAN MARSH

Christian Marsh
Acting Assistant Secretary
for Enforcement and Compliance

¹⁶⁶ See *Frozen Warmwater Shrimp from Vietnam 2011-2012* IDM at Comment 14.

¹⁶⁷ See Nexen’s October 2, 2020 BQR at B-56 and Exhibit B-35.