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RESULTS OF REDETERMINATION PURSUANT TO REMAND

Union Steel Manufacturing Co., Ltd. v. United States
Consol. Court No. 10-00106
Slip Op. 14-27 (Ct. Int'l Trade March 4, 2014)

SUMMARY

This final remand redetermination, issued in accordance with the March 4, 2014, opinion of the U.S. Court of International Trade (Court or CIT) in *Union Steel Manufacturing Co., Ltd. v. United States*, Consol. Court No. 10-00106, Slip Op. 14-27 (Ct. Int'l Trade Mar. 4, 2014) (Second Remand Order), concerns the final determination of the U.S. Department of Commerce (Department) as it relates to respondents Union Steel (Union), Hyundai HYSCO (HYSCO), and Dongbu Steel Co., Ltd. (Dongbu), in the 15th administrative review of the antidumping duty order on certain corrosion-resistant steel flat products (CORE) from the Republic of Korea (Korea) covering the period August 1, 2007, through July 31, 2008.[1]

Pursuant to the Court's Remand Order, the Department reviewed and reconsidered the following issues on second remand:

1) The application of a major input adjustment in calculating an interest expense ratio for Union.[2]

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[1] *See Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Notice of Final Results of the Fifteenth Administrative Review*, 75 FR 13490 (March 22, 2010) (*Final Results*).
[2] *See* Second Remand Order, at 17-19, 52.

2) The revised recovery-of-costs tests as applied to HYSCO.[3] The use of a quarterly-cost methodology in determining constructed value (CV) and the difference-in-merchandise (DIFMER) adjustment for Union and HYSCO.[4]

3) The departure from the method prescribed by the Department's "90/60-day window period" regulation, 19 CFR 451.414(e)(2),[5] for identifying the contemporaneous month for purposes of comparing Union's and HYSCO's respective U.S. sales to monthly average comparison-market prices pursuant to the average-to-transaction comparison method.[6]

4) The appropriate date of sale for HYSCO's U.S. sales as sold through its affiliate, Hyundai HYSCO USA, Inc. (HYSCO USA).[7]

5) The weighted-average dumping margin assigned to Dongbu as a non-examined respondent company.[8]

For the reasons set forth below, the Department finds that, upon reconsideration of the above issues, record evidence supports modifying the cost recovery test as applied to HYSCO and selecting invoice date as the date of sale for HYSCO's U.S. sales. Upon reconsideration, the Department continues to apply the major input adjustment in calculating an interest expense ratio for Union, to examine Union's and HYSCO's costs of production on a quarterly basis, and to apply the quarterly-costs methodology to the calculation of Union's and HYSCO's CVs and DIFMER adjustments. The Department likewise continues to limit comparisons between Union's and HYSCO's respective U.S. sales to monthly average comparison-market prices within the quarter in which sales were made. The Department recalculated Union's and

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[3] *Id.*, at 22-24, 52.
[4] *Id.*, at 24-26, 52.
[5] The Department revised 19 CFR 351.414 on February 14, 2012. All references to 19 CFR 351.414 in this remand redetermination are to the regulation as it existed at the time of the underlying administrative review in this case, not to the current version.
[6] *See* Second Remand Order, at 26-32, 52.
[7] *Id.*, at 36-49, 52.
[8] *Id.*, at 50-52.

HYSCO's weighted-average dumping margin consistent with the above findings and revised the rate assigned to Dongbu accordingly.

BACKGROUND

On March 22, 2010, the Department published the final results of the 15th administrative review of the antidumping duty order on CORE from Korea covering the 2007-2008 period of review (POR).[9] As part of those final results, the Department relied upon Union's 2008 fiscal year financial statements to calculate an interest expense ratio for Union.[10]

The Department also reviewed cost information on the record from Union and HYSCO, and, consistent with a recently announced refinement to its methodology, determined to use shorter cost averaging periods in calculating Union's and HYSCO's costs of production (COP), CVs and DIFMER adjustments.[11] The Department specifically found both Union and HYSCO to have experienced significant cost changes during the POR that could reasonably be linked to each respondent's sales prices during each quarter.[12] Accordingly, the Department utilized quarterly-cost averaging periods in the *Final Results* for both Union and HYSCO.[13]

To maintain consistency with its cost of manufacturing analysis and avoid distortions, the Department further concluded that it was necessary to limit the "90/60" day window period normally required by 19 CFR 351.414(e)(2) for comparing each respondent's U.S. prices with monthly normal values (NV's) based on comparison market sale prices when calculating dumping margins, and, instead, to limit the range of monthly NV's to the months within each

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[9] *See Final Results*.
[10] *Id.*, and accompanying Issues and Decision Memorandum (IDM) at 42-45.
[11] *See Antidumping Methodologies for Proceedings that Involve Significant Cost Changes Throughout the Period of Investigation (POI)/Period of Review (POR) that May Require Using Shorter Cost Averaging Periods*, 73 FR 26364 (May 9, 2008) (*Antidumping Methodologies*).
[12] *See* the Department's December 16, 2009, Post-Preliminary Analysis Memorandum for Union and December 16, 2009, Post-Preliminary Analysis Memorandum for HYSCO.
[13] *See Final Results*, and accompanying IDM at 14-19.

quarter used to report the quarterly-cost of manufacturing.[14] In addition, the Department applied an indexing methodology to conduct a recovery-of-costs test pursuant to section 773(b)(2)(D) of the Tariff Act of 1930, as amended (the Act).[15] As part of those final results, the Department also relied upon shipment date as the date of sale for HYSCO's U.S. sales.[16] Based, in part, upon these issue-specific determinations, the Department calculated weighted-average dumping margins for Union and HYSCO and, from those calculated rates, derived a weighted-average dumping margin applicable to Dongbu as a non-examined respondent.[17]

Interested parties challenged certain aspects of the Department's *Final Results* to the CIT. In an initial remand order, the Court directed the Department to reconsider several issues, including those identified above.[18] On first remand, the Department determined that record evidence supported revising the calculation of an interest expense ratio for Union using financial statements for both fiscal years 2007 and 2008.[19] The Department continued to use quarterly-costs in determining Union's and HYSCO's costs of production, but no longer relied upon indexing when calculating quarterly-costs and annual weighted-average costs of production.[20] In so doing, the Department adopted a revised approach to the recovery-of-cost test applicable to Union and HYSCO.[21] The Department continued to find on first remand that, when using its quarterly-cost methodology, it is appropriate to depart from the normal method set forth by 19 CFR 351.414(e) and limit comparisons between Union's and HYSCO's respective United States sales to monthly NV's based on comparison market prices for months within the quarter in

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[14] *Id.,* and accompanying IDM at 19-21.
[15] *Id.,* and accompanying IDM at 21-24.
[16] *Id.,* and accompanying IDM at 30.
[17] *Id.*, 75 FR at 13491.
[18] *See Union Steel Manufacturing Co., Ltd. v. United States*, 837 F. Supp. 2d 1307 (Ct. Int'l Trade 2012).
[19] *See* Results of Redetermination Pursuant to Remand, Consol. Ct. No. 10-00106 (September 24, 2012) (First Remand Results), at 7-16.
[20] *Id.*, at 16-26.
[21] *Id.*, at 16-20.

which the U.S. sales were made.[22] The Department also continued to find that shipment date constitutes the appropriate date of sale for HYSCO's U. S. sales.[23] As a result of those changes, the Department, on first remand, calculated a revised weighted-average dumping margin for Union of 9.85 percent, a revised weighted-average dumping margin for HYSCO of 1.46 percent, and a revised review-specific average rate for Dongbu, which was not selected for individual examination, of 5.66 percent.[24]

Upon considering the Department's First Remand Results, the Court again remanded certain issues for further reconsideration by the Department. Although the CIT sustained the Department's selection of financial statements on first remand to determine an interest expense ratio for Union, the Court remanded the Department's application of a major input adjustment in that calculation to address objections raised by petitioner Nucor Corporation (Nucor) that the interest expense ratio should reflect actual, not hypothetical, costs.[25] Nucor also alleged that the Department's calculation methodology may have double counted the major input adjustment.[26] With respect to the Department's revised recovery-of-costs test, the CIT sustained its application with respect to Union, but remanded its application with respect to HYSCO. The Court held that, in those instances where a specific CORE product (identified by the product control number or CONNUM) was sold but not produced by HYSCO in a particular quarter, the Department's use of surrogate cost data from a similar CONNUM for the same quarter did not comport with section 773(b)(2)(D) of the Act, which requires the Department to calculate the weighted-

[22] *Id*., at 27-32.
[23] *Id*., at 61-66.
[24] *Id*., at 67.
[25] *See* Second Remand Order at 17-18.
[26] *Id*., at 18-19.

average per unit cost of producing the good sold in the comparison market on a POR-wide basis.[27]

The Court also remanded certain aspects of the Department's quarterly-costs methodology. Although not raised specifically by any party, the CIT found the Department's explanation for the continued use of quarterly-cost averaging periods in determining CV and making DIFMER adjustments for Union and HYSCO to be insufficient and remanded for further explanation.[28] The Court also remanded for reconsideration the Department's determination to limit the standard "90/60" day window period prescribed by 19 CFR 351.414(e)(2) to compare U.S. sale prices with monthly NV's based on comparison market prices. The CIT concluded that the Department provided inadequate explanation to justify the sacrifice of potential matches of identical products for contemporaneity and the departure from the timing hierarchy established by the Department's regulations in comparing U.S. sale prices with monthly NV's based on comparison market prices.[29]

The Court additionally remanded for a second time the Department's date of sale determination for HYSCO's U.S. sales. Specifically, the CIT ruled that, based upon record evidence, the Department's use of shipment date on first remand as HYSCO's date of sale did not accord with 19 CFR 351.401(i), which directs the Department to use "normally" the date of invoice as the date of sale unless the Department "is satisfied that a different date better reflects the date on which the exporter or producer establishes the material terms of sale."[30] Lastly, the Court once again ordered the Department to recalculate the rate assigned to Dongbu to

[27] *Id*., at 22-24.
[28] *Id*., at 24-26.
[29] *Id*., at 26-32.
[30] *Id*., at 36-49.

incorporate any revisions to Union's or HYSCO's weighted-average dumping margins resulting from the Department's reconsideration of remanded issues.[31]

On June 18, 2014, the Department disclosed the Draft Remand to all parties for comment.[32] On July 1, 2014, HYSCO, Union, and Dongbu submitted their respective comments on the Draft Remand, which are addressed below.

ANALYSIS

In reconsidering the issues remanded by the Court, from the *Final Results* and the First Remand Results, the Department carefully reevaluated record evidence in light of the specific instructions of the Court and adjusted its calculations of the weighted-average dumping margins for HYSCO, Union and Dongbu accordingly.

I. Calculation of Union's Interest Expense Ratio

For the *Final Results* and in the First Remand Results, the Department increased Union's cost of manufacturing (COM) to reflect the major input adjustment to direct materials.[33] As noted by the Court, Nucor did not oppose this adjustment.[34] However, Nucor objected to the increase that the Department made to the denominator of Union's financial expense ratio for the major input adjustment. On remand, the Court directed the Department to address Nucor's objection.[35]

As explained in the *Final Results* and the First Remand Results, because the Department increased Union's direct material cost to account for the major input adjustment pursuant to section 773(f)(3) of the Act, it was necessary to include this major input adjustment in the cost of

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[31] *Id.*, at 50-52.
[32] *See* Draft Results of Redetermination Pursuant to Remand, Consol. Court No. 10-00106 (June 18, 2014) (Draft Remand).
[33] *See* section 773(f)(3) of the Act; *see also* the Department's August 23, 2012, Memorandum, regarding Adjustments to the Cost of Production and Constructed Value Information Pursuant to Court Remand – Union Steel Co. Ltd. (Union First Remand Adjustments Memorandum).
[34] *See* Second Remand Order at 17.
[35] *Id.,* at 18-19.

sales (COS) denominator that was used in the financial expense ratio because the ratio was applied to the CONNUM-specific COM that included the major input adjustment.[36] This methodology ensured that the financial expense ratio and the COM to which the ratio was applied were on the same basis.[37] If the Department had applied a financial expense ratio that did not include the major input adjustment in the denominator of the ratio to a product-specific COM that includes the major input adjustment, the per-unit financial expenses would be overstated.

To avoid the overstatement of the financial expenses on a CONNUM-specific basis, in the *Final Results* and in the First Remand Results the Department increased Union's financial expense ratio denominator by the amount of the major input adjustment which was applied to the CONNUM-specific COMs. In other words, because the COM used for COP and CV purposes included the major input adjustment, the denominator for the financial expense ratio must also include the major input adjustment. Rather than a post-hoc rationalization, this methodology reflects the straight-forward mathematical principle that increasing the base to which the rate is applied without also increasing the denominator of the rate calculation for the same adjustment results in the total of the financial expenses allocated to products being higher than those actually incurred by Union.

To demonstrate that it is imperative to adjust the COS denominator for the major input adjustment which was incorporated into the COM, the Department provided a simple illustration. The illustration below shows an example of a side-by-side comparison of the Department's methodology, Nucor's suggested methodology, and Nucor's suggested methodology if it were

[36] *See* First Remand Results at 14-15.
[37] *See* Union First Remand Adjustments Memorandum.

applied correctly.[38] As can be seen from the below illustration, Nucor's methodology results in more financial expense being allocated to products then was actually incurred.

The following are the assumptions for this example:

- Company A produced 1 widget for a COM of $100;
- Company A's total financial expenses for the fiscal year are $10;
- As a result, the COP is $110 ($100 + $10);[39]
- Company A purchased one widget handle from Company B, an affiliated supplier, for $10. Company B's COP for the widget handle was $15, thus the major input adjustment is $5.

	Department's Methodology	Nucor's Proposed Methodology	Nucor's Methodology Correctly Applied
COM	$100	$100	$100
Major Input Adjustment	$5	$5	$5
Revised COM	$105	$105	$105
Financial Expense Rate (INTEX rate)	9.524% = 10/(100+5)	10.00% = 10/100	10.00% = 10/100
Apply INTEX rate to Revised COM	**$10.00** (the same financial expense amount incurred)	**$10.50** (more financial expenses than actually incurred)	
Apply INTEX rate to COM			**$10.00** (the same financial expense incurred)
Revised COP = Revised COM + Financial Expenses	$105.00 + $10 = $115	$105.00 + $10.50 = $115.50	$105.00 + $10 = $115

As can be seen from the illustration, Nucor's calculation results in more financial expenses being allocated to products than was actually incurred by Company A ($10.50 vs. $10). Also illustrated above, if Nucor wishes to exclude the major input adjustment ($5) from the

[38] *See* Nucor Comments on Draft First Remand, dated September 5, 2012, at 7-10.
[39] Normally the COP includes general and administrative (G&A) expenses. However, for simplicity we are assuming that this widget producer does not incur any G&A expenses.

denominator of the financial expense rate calculation, then the financial expense rate must be applied to Company A's unadjusted COM ($100). This would result in the identical revised COP as the methodology the Department applied in the *Final Results* and First Remand Results.

Nucor also claims that if the Department's methodology for calculating the financial expense ratio is permissible, then the major input adjustment should not be made to each of the two fiscal years (2007 and 2008) used in the calculation. According to Nucor, the Department double counted the major input adjustment because both the 2007 and 2008 fiscal year financial expense ratios included annual amounts in the denominator of the calculation.[40] The Department disagrees that it double counted the major input adjustment when it calculated the cost-of-goods-sold (COGS) denominator for the blended financial expense rate. The blended financial expense rate is the result of a two-step calculation. The Department first calculated separate financial expense rates for 2007 and 2008. For each of these calculations, the Department used annual net financial expenses in the numerator and annual COGS in the denominator. The Department then averaged the calculated rates for two fiscal years.[41] Rather than making the adjustment only once to either 2007 or 2008 before calculating a single average rate based on the two financial ratios, both fiscal years' calculated financial expense rates must include the major input adjustment in the denominator prior to the averaging calculation. Otherwise, the result would end up averaging one rate that is calculated correctly, with another that still suffers from the problem of having the denominator not reflect all cost elements that are in the base to which the rate is applied. As the Department is calculating the financial expense rate for two separate fiscal years before averaging the results, the Department needs to make the same adjustment to each year's COGS denominator. In doing so, the Department is ensuring that its calculation

[40] *See* Nucor Comments on First Draft Remand at 7-8.
[41] *See* Union First Remand Adjustments Memorandum.

reflects Union's actual experience to the extent possible as required by the statute. As illustrated in the Union First Remand Adjustments Memorandum, its financial expense rate calculation in effect only includes 41.7 percent (5 months / 12 months) of the major input adjustment associated with fiscal year 2007 and 58.3 percent (7 months / 12 months) associated with fiscal year 2008. The Department did not double count the major input adjustment as alleged by Nucor. Instead, the Department simply applied the appropriate adjustment to both years' calculated rates before averaging them into a single rate.

No party commented on this issue in response to the Draft Remand.

II. Application of the Recovery-of-Costs Test to HYSCO

At the direction of the Court, the Department reconsidered its revised recovery-of-costs test used in the NV calculations applied to HYSCO.[42]

In its First Remand Results, the Department calculated the CONNUM-specific, weighted–average, per unit COP for the POR which was used in the recovery-of-cost test. As the Court notes, in instances where HYSCO made sales in a quarter in which HYSCO did not produce the specific CONNUM, the Department incorporated a surrogate cost for that quarter even when HSYCO reported costs for that CONNUM in other quarters.[43] After reconsidering its methodology for calculating the weighted-average POR cost for the recovery-of-cost test for HYSCO, the Department revised its calculation. For these remand results, the Department revised its methodology for the calculation of HYSCO's POR weighted–average, per unit COP for use in the recovery-of-cost test based on HYSCO's actual quantities and costs reported for the quarters in which there was production in a manner consistent with section 773(b)(2)(D) of the Act, which directs the Department to use the weighted–average, per unit COP for the POR.

[42] *See* Second Remand Order at 22-24.
[43] *Id.,* at 22.

That is, for purposes of HYSCO's recovery-of-cost test, the Department eliminated the use of surrogate costs in quarters where there were sales but no production of a CONNUM if there were reported costs for any of the other quarters of the POR. Instead, the Department relied upon HYSCO's actual costs from the quarters in which there was production during the POR to calculate HYSCO's weighted-average POR cost for each CONNUM for use in the recovery-of-cost test.[44]

No party commented on this issue in response to the Draft Remand.

III. Application of Quarterly-Costs to CV and DIFMER

As directed by the Court, the Department reconsidered its application of the quarterly-cost methodology to Union's and HYSCO's DIFMER adjustments and CV calculations.[45]

A. Using Unindexed Quarterly-Cost Data for DIFMER and CV "Ensures a More Accurate Dumping Margin"

As part of this reconsideration, the Department specifically reviewed further whether using unindexed quarterly-cost data for the DIFMER adjustment and CV "ensures a more accurate dumping margin."[46] As part of that reconsideration, it is helpful to review the framework in which the Department operates with regard to the calculation of cost and its impact on the dumping analysis. The respondent's product-specific costs are used in several different ways in the calculation of a weighted-average dumping margin. They are used to calculate the COP, CV, and DIFMER adjustment.[47] Each of these three cost based calculations – COP, CV and DIFMER adjustment – has a significant impact on the ultimate weighted-average dumping margin. COP is used to test whether the comparison market sale prices are within the ordinary

[44] *See* the Department's June 18, 2014, Cost Calculation Memorandum for HYSCO (HYSCO 2nd Remand Cost Memorandum).
[45] *See* Second Remand Order at 24-26.
[46] *Id.,* at 25.
[47] *See generally* section 773 of the Act.

course of trade based on the Department's sales-below–cost analysis.[48] CV can be used as a basis for NV, and is compared to U.S. sale prices (*i.e.*, based either on export price (EP) or constructed export price (CEP)).[49] The DIFMER adjustment is used when either EP or CEP is compared with a NV based on comparison market sale prices of similar merchandise.[50] The Department calculates the DIFMER adjustment as the difference in variable cost of production associated with the differences in the physical characteristics between the product sold in the U.S. market and the similar product sold in the comparison market. The DIFMER adjustment is a direct adjustment to NV.

In a normal situation, for the COP, the CV and the DIFMER adjustment, the Department calculates the CONNUM-specific COM for the merchandise under consideration based on the annual weighted-average cost incurred over the entire period of investigation (POI) or POR. This practice has been used by the Department in the vast majority of its investigations and reviews.[51] Factors such as erratic production levels, the extent to which and how accurately monthly accruals are made, periodic maintenance, inventory valuation methods, *etc.* all impact the timing and accuracy of per-unit costing over short periods of time. Thus, the Department reasoned that relying on an annual average cost tends to smooth out the impact of these short-term minor per-unit cost fluctuations and results in a normalized average production cost to be

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[48] *See* section 773(b) of the Act.
[49] *See* section 773(a)(4) of the Act.
[50] *See* section 773(a)(6)(C)(ii) of the Act and 19 CFR 351.411.
[51] *See Final Results*, and accompanying IDM at 14 (citing, *inter alia*, *Certain Pasta from Italy: Notice of Final Results of the Twelfth Administrative Review*, 75 FR 6352 (February 9, 2010) (*Pasta from Italy*), and accompanying IDM at Comment 18).

compared to sales prices occurring within the same extended period of time.[52] As such, the Department's standard section D questionnaire requests that all respondents report their cost of manufacturing for the merchandise under consideration on an annual average basis over the entire POI or POR.[53] This methodology is predictable, reasonable, and is generally applied consistently in all proceedings. The Department recognizes, however, that there are certain instances where it may be appropriate to deviate from its normal annual weighted-average cost methodology in order to attempt to eliminate distortions in the calculation of weighted-average dumping margins. One such instance is when the COM of the merchandise under consideration changes significantly throughout the POI or POR, combined with a reasonable correlation between cost and price changes.[54]

The Department resorted to its alternative quarterly-cost methodology in this review because the cost to manufacture the merchandise under consideration changed significantly throughout the POR, and the significantly changing costs and prices were reasonably correlated.[55] It has been well-established in previous proceedings that if the Department were not to use a shortened cost averaging period in situations where the COM changes significantly throughout the year, and simply rely on unadjusted annual weighted-average costs, then it would result in a distorted dumping analysis.[56] That is, the Department would be introducing the effect

[52] *See*, *e.g.*, *Color Television Receivers from the Republic of Korea; Final Results of Antidumping Duty Administrative Review*, 55 FR 26225, 26228 (June 27, 1990) (stating that the use of quarterly data would cause aberrations due to short-term cost fluctuations); *Grey Portland Cement and Clinker From Mexico; Final Results of Antidumping Duty Administrative Review*, 58 FR 47253, 47257 (September 8, 1993) (explaining that the annual period used for calculating costs accounts for any seasonal fluctuation which may occur as it accounts for a full operation cycle).
[53] *See* the Department's December 8, 2008, section D questionnaire.
[54] *See Final Results,* and accompanying IDM at 14-19.
[55] *Id.*
[56] *See*, *e.g.*, *Habas Sina v. Tibbi Gazlar Istihsal Endustrisi A.S. v. United States*, 625 F. Supp. 2d 1339 (Ct. Int'l Trade 2009) (*Habas Sina*) (ruling on a remand redetermination in an administrative review of the antidumping duty order on certain steel concrete reinforcing bars from Turkey); *Nucor Corp. v. United States*, Case No. 05-00616, Slip Op. 10-6 (Ct. Int'l Trade January 19, 2010) (affirming the agency's remand determination of applying the quarterly-cost methodology without comment).

of timing differences between when products are produced and when they are sold into the dumping analysis. The CV and the DIFMER adjustment are derived from the same CONNUM-specific costs as the COP.[57] Because the CV and the DIFMER adjustment are also used in price-to-cost or price-to-price comparisons, respectively, it follows that the dumping analysis would be distorted if the Department failed to calculate the CVs and the DIFMER adjustments in the same manner as the COP.

The Department defined significant cost change to be a 25 percent or greater change in quarterly average COM, from the lowest cost quarter COM to the highest cost quarter COM, as a percentage of the lowest cost quarter COM. The Department used a 25 percent change in quarterly average COM because it wanted to rely on a high threshold so as to only use the alternative quarterly-cost methodology in the clearest of circumstances. In addition, the Department set a numeric threshold for significance so that its use of the alternative quarterly-cost methodology would be predictable, transparent and consistent.[58]

The Department developed the alternative quarterly-cost methodology as an attempt to minimize the distortion that arises from using annual weighted-average costs in the dumping analysis when costs are changing significantly throughout the POI or POR.[59] When costs change significantly throughout the period, distortions arise when the Department compares sale prices that occur throughout the period to a single annual weighted-average cost. Products are often produced and sold at different times of the year and in different proportions from quarter to quarter. When cost changes exceed 25 percent of the COM for a given product during the year, comparing prices that occur throughout the POR to a single annual weighted-average cost results

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[57] *See Thai Plastic Bags Indus. Co. v. United States*, Court No. 2013-1322, at 18 (Fed. Cir. March 31, 2014) (*Thai Bags*).
[58] *See Final Results,* and accompanying IDM at 16-18.
[59] *Id.*, and accompanying IDM at 14-16.

in a distorted analysis. In such a situation, sale prices during the low cost periods will likely be below cost while sale prices during the high cost periods will likely be above cost. The timing of production throughout the year, regardless of whether a given product is produced predominantly in a high cost period or a low cost period, in relation to the timing of sales, should not influence the calculation of the weighted-average dumping margin. In an attempt to minimize the effects of significant cost changes on the price-to-cost comparisons, the Department developed its alternative quarterly-cost methodology, which relies on weighted-average costs calculated for shorter periods, and on more contemporaneous comparisons of sale prices and costs.[60] Thus, the Department reasonably addressed distortions that may be present as a result of the significant changes in a respondent's COM of the merchandise under consideration.

The same distortion of using a single annual weighted-average cost when changes in the COM are significant that applies to the COP also applies to the CV and DIFMER adjustment. All three of these cost-based calculations rely on actual costs incurred, they are used in interrelated ways in the calculation of the weighted-average dumping margin, and each are distorted in the same way when a respondent experiences significant cost changes if the Department was to rely on a single annual weighted-average cost calculation.

CV is calculated in the same way as COP, except that it includes an element of profit.[61] Both are based on the COM, selling, general and administrative (SG&A) expenses, and financial expenses. In addition, both CV and COP are compared to sales prices in the dumping analysis. For COP, the Department compares it to sale prices in the comparison market in determining which sales to disregard as being below cost and outside the ordinary course of trade.[62] For NV

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[60] *Id.,* and accompanying IDM at 14-19.
[61] *See* section 773(e) of the Act.
[62] *See* section 773(b) of the Act.

based on CV, the Department compares it to EP or CEP to determine whether there is dumping.[63] For both COP and CV, when based on a single annual weighted-average cost, the Department compares sale prices occurring throughout the year to a single annual weighted-average cost. When costs change significantly throughout the POR, calculating a single annual weighted-average cost means that the costs in all quarters, including costs incurred in the highest and lowest cost quarters, are averaged together. Similarly, the sale prices to which this cost is compared reflect sale prices throughout the year. The differences between when a given product is produced (high- versus low-cost quarters) and when it is sold (high- versus low-cost quarters) will introduce distortion in the dumping analysis. For COP, the distortion relates to the difference in timing of production versus sales to the comparison market, whereas for CV the distortion relates to the difference in timing of production versus sales to the United States. For both COP and CV, the same distortion exists, with the difference being the markets for the sales being analyzed.

The following example demonstrates the distortion that can occur when costs change significantly throughout the year and the Department does not resort to its alternative quarterly-cost methodology for CV. Product A was sold to the United States only during the first quarter of the POR, which is the lowest cost quarter. It is being compared to a NV based on CV. While product A was produced in all four quarters, it was produced predominantly during the fourth quarter of the POR, the highest cost quarter. Using the normal annual weighted-average cost methodology would result in an average cost that predominantly reflects costs at the end of the year when costs were at least 25 percent higher. Provided that the Department finds that sale prices reasonably correlate to the changes in costs, product A's sales in the first quarter would likely be dumped due to the timing of the sales in relation to the timing of production. Using the

[63] *See* section 773(a)(4) of the Act.

shorter cost period methodology would result in the comparison of the sale prices during the first quarter to a CV calculated based on the quarterly weighted-average costs incurred during the same first quarter in which the sales were made. As can be seen from this example, using the alternative shorter cost period methodology for CV results in a more contemporaneous comparison, which is important when costs change significantly throughout the POR. Whether this distortion would be beneficial or detrimental to a respondent depends on the timing of the sale in relation to the timing of the production, and the cost of producing the product in each of the various periods.

When calculating a DIFMER adjustment, the Department has an established policy of calculating the adjustment to reflect the difference in the variable costs attributable to the difference in the physical characteristics of the subject merchandise and the similar foreign like product sold in the comparison market.[64] The DIFMER Policy Bulletin states, "Therefore, it is important in any consideration of a {DIFMER } to isolate the costs attributable to the difference, not just assume that all cost of production differences are caused by the physical differences. When it is impossible to isolate the cost differences, we should at least determine that conditions unrelated to the physical differences are not the source of the cost differences, such as when different facilities are used, or the cost differences are high but the actual physical differences appear small." The DIFMER Policy Bulletin continues to provide direction that "there should always be a recognition that it is the physical difference for which the adjustment is made, that we know precisely what those differences are, and that the cost differences which form the adjustment are related to those physical differences <u>and not extraneous factors</u>" (emphasis added).

[64] *See* Policy Bulletin No. 92.2 "Difference in Merchandise; 20% Rule," dated July 29, 1992 (DIFMER Policy Bulletin).

Relying on annual weighted-average costs for calculating the DIFMER adjustment when costs change significantly during the POR clearly introduces an extraneous factor. Depending on when during the year each of the products being sold in the U.S. and comparison markets were produced will directly impact the variable costs for each product. The resulting cost differences will include amounts related to differences in the timing of production of each product, which are completely unrelated to the differences in the physical characteristics of the subject merchandise and the similar foreign like product. Relying on the alternative quarterly-cost methodology – which computes quarterly variable costs, compares U.S. sale prices with NV's within the same quarter, and calculates DIFMER adjustments based on differences in variable costs in the same quarter – will minimize the impact that cost differences due to the timing of production have on the calculation.

To highlight this point, the Department provides the following example. There are two similar products, one of which is sold to the United States and the other of which is sold in the comparison market. The sales of both products occur in the same month, while production of the two different products occurred at different times of the year. For purposes of this example, the only difference between the two products is a slight difference in the thickness of the CORE products. With only the thickness being slightly different, the expectation is that there would be a very small difference in the COM and variable costs between the products. The first product was produced mainly during the latter part of the year when the cost of the inputs was the highest, while the second product was produced predominately at the beginning of the year when cost of the inputs was significantly lower. The resulting difference in the annual weighted-average cost of the two products would be significant in a year when quarterly average costs changed by more than 25 percent throughout the year. The result would be a DIFMER

adjustment to the NV caused by factors other than the physical differences between the products. As the courts recognized, the Department's "reliance on physical characteristics, because of its ability to promote consistency, is a predictable methodology that is administrable across all investigations and administrative reviews."[65] The Court of Appeals for the Federal Circuit (Federal Circuit) in its *Thai Bags* decision also noted that, in the DIFMER Policy Bulletin, the Department explained that when reported "cost differences are high but the actual physical differences appear small" the Department should determine whether the reported difference in cost indicates "conditions unrelated to the physical difference."[66] Quoting the DIFMER Policy Bulletin, the Court recognized, "{i}f the costs of the physical difference cannot be isolated or it is not reasonably clear that the differences in production costs are related to the physical difference, no adjustment should be made."[67] The Department's intent in using quarterly-cost averages to determine the cost differences for use as the DIFMER adjustment when making comparisons of a U.S. price and NV for similar products within the same quarter is to try to limit those cost differences to differences in the physical characteristics and to avoid other factors, like timing differences in production, from affecting the dumping analysis.[68]

In applying the alternative quarterly-cost methodology to the calculation of the COP, the CV and the DIFMER adjustment, the Department minimizes the distortive effect that significant cost changes have on the dumping analysis, while promoting consistency, predictability and fairness across all investigations and administrative reviews.

No party commented on this issue in response to the Draft Remand.

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[65] *See Thai Bags*, at 18.
[66] *Id.,* at 22.
[67] *Id.* (quoting DIFMER Policy Bulletin).
[68] *See* DIFMER Policy Bulletin.

B. Using Quarterly-Costs Did Not Influence the Department's Decision to Use Surrogate Costs for the CV and DIFMER Adjustment in a Manner Similar to That Found Objectionable by the Court

Pursuant to the Court's instructions, the Department states that the method used to calculate the CV and DIFMER adjustment when there was no production of a given CONNUM in a quarter was not based on the methodology using surrogate costs that the Court found objectionable in the First Remand Results.[69] While the Department did calculate costs for certain CONNUMs that were sold but not produced in a given quarter using a surrogate-based methodology, the method used is different than that which the Court found objectionable with respect to HYSCO's recovery of costs.

The method that the Department used to calculate the CV and DIFMER adjustment is as follows. When there was no production of a CONNUM in a particular quarter for which a CV or DIFMER adjustment is needed, the Department selected the next most similar CONNUM, based on the physical characteristics, that was produced in the same quarter. The Department then added only the material cost for that surrogate CONNUM, to the actual POR weighted-average direct labor, variable overhead, and fixed overhead of the original CONNUM, to calculate the total cost of manufacturing of the CONNUM. That is, the only information the Department used from the next most similar CONNUM produced in the same quarter was the material cost, while the remainder of the costs for the CONNUM were based on the actual annual weighted-average cost incurred to produce the CONNUM.[70]

When applying the Department's alternative quarterly-cost methodology, the Department only utilizes the quarterly-costs for the elements of cost that is significantly changing during the POR. The remaining cost elements are based on the CONNUM-specific annual weighted-

[69] *See* Second Remand Order, at 25.
[70] *See* the Department's March 15, 2010, Final Cost Calculation Memorandum for Union; the Department's March 15, 2010, Final Cost Calculation Memorandum for HYSCO.

average POR costs.[71] In using the annual weighted-average for the remaining cost elements, the Department followed its normal annual weighted-average cost calculation methodology, which results in a normalized production cost. In this case, the material cost was the element of cost that was changing significantly during the POR. In keeping with the normal alternative quarterly-cost methodology, the Department calculated quarterly weighted-averages costs only for the material costs. Because the material cost is the cost element that is most sensitive to timing, the Department ensured that, for those CONNUMs sold but not produced in a given quarter, the material cost element was determined from a source within the same quarter.[72]

No party commented on this issue in response to the Draft Remand.

IV. Identification of the Contemporaneous Month for Purposes of Comparing Union's and HYSCO's Respective U.S. Sales to Monthly Normal Values Based on Weighted-Average Comparison Market Sale Prices

In its Second Remand Order, the Court explained that it could not sustain the Department's departure from the 90/60-day window in favor of a quarterly comparison window based on the rationale provided in the First Remand Results.[73] The Court, therefore, remanded this issue to the Department for a second time to reconsider its methodology for identifying reasonably corresponding contemporaneous months for Union's and HYSCO's sales of subject merchandise. The Court instructed that, in its reconsideration, the Department must address two issues which the Court identified as deficiencies in the agency's rationale to date. First, the Department must address the Court's concern that shortening the standard window period by half sacrifices identical matches for the sake of some form of contemporaneity.[74] Second, the Department must address whether it permissively shortened the comparison window by limiting

[71] *Id.*
[72] *Id.*
[73] *See* Second Remand Order, at 26-32.
[74] *Id.,* at 29.

comparisons of U.S. sale prices to monthly NV's based on comparison market sale prices occurring only in the quarter in which the U.S. sale occurred.[75]

A. Balancing Identical Matches Versus Contemporaneity

In remanding the issue to the Department, the Court stated, "The Department's method sacrifices identical matches for the sake of some form of contemporaneity."[76] While acknowledging the Department's explanation in the First Remand Results that "cost fluctuations in the price of steel substrate, which {the Department} presumed to affect price, justify shortening the comparison window," the Court found that the Department "provided no reasoning beyond this presumption nor does Commerce explain how its method produced the most accurate margin possible."[77]

In responding to the Court's concerns, the Department notes that there is a balance that it must achieve between using the normal methodology when prices and costs are reasonably stable and using the quarterly methodology when costs are changing significantly and there are reasonably correlated changes in prices. In situations where costs are changing significantly over time in conjunction with prices that are reasonably correlated to those changing costs, distortions in the dumping analysis will occur if the Department does not limit the range of the comparison period in addition to modifying the cost calculation period.[78] The outcome from the dumping analysis in a period of significantly changing costs and reasonably correlated prices should be a measurement of the amount of dumping which is occurring with the impact of timing on that analysis minimized. It has been a long-recognized phenomenon that the effects of time can distort the dumping analysis in certain situations unless the Department modifies its normal

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[75] *Id.,* at 30.
[76] *Id.,* at 29.
[77] *Id.,* at 29-30.
[78] *See Final Results,* and accompanying IDM at 14-21; *see also* Antidumping Manual, Chapter 6, page 6.

practice.[79] The need to take steps to minimize the distortion that time has on cost and price comparisons outweighs the need to find every identical match possible in cases like this one where there are significant cost changes and reasonably correlated prices. The discussion of price averaging in the Statement of Administrative Action (SAA) accompanying the Uruguay Round Agreements Act recognizes the need to eliminate timing distortions: "However, when costs are rapidly changing, it may be appropriate to use shorter periods, such as quarters or months, which may allow a more appropriate association of costs with sales prices."[80] Also the phenomenon that time can affect price comparability is reflected in the Department's regulations. The preamble to the proposed regulation for 19 CFR 351.414 states, "The SAA identifies time as a factor affecting the comparability of sales. . . . Paragraph (d)(3) provides that the Secretary 'normally' will calculate weighted-averages for the entire period of investigation or review, but that shorter periods may be used where the NV's, export prices or constructed export prices for sales included within an averaging group differ significantly over the course of the period of investigation or review. Where values or prices are significantly different over time, it is fair to assume that time has affected sales comparability."[81]

This is precisely the situation in this review. The cost of the steel substrate changed significantly and these changing material costs were reasonably correlated with changes in the finished products' sale prices. As the Department previously stated, "Comparing U.S. sales to NV's outside the quarter would result in comparisons with NV's that do not reflect market conditions at the time of the U.S. sale in that the NV's would reflect the increasing or decreasing prices due to the significant changes in costs."[82] If the Department compared U.S. prices to

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[79] *See*, *e.g.*, *id.*, and accompanying IDM at 16-18.
[80] *See* H.R. Doc. 103-316, Vol. 1 (1994) at 843.
[81] *See Antidumping Duties; Countervailing Duties*, 61 FR 7308, 7349 (February 27, 1996).
[82] *See Pasta from Italy*, and accompanying IDM at Comment 5.

monthly NV's based on comparison market sale prices from differing quarters, then it would be making comparisons of prices that did not reflect important market conditions at the time the U.S. sale was made. This would inject the effects of time into the dumping analysis. Thus, if the Department made no effort to eliminate the effects of time on the price comparisons, the dumping analysis would be distorted. That is, the Department would not simply be measuring pricing behavior, but it would also include the impact of price differences that result from differences over time.

The Department did not enter lightly into the decision to modify the normal cost calculation period and the normal comparison window period. Ever since *Habas Sina*, where the Court ruled that simply relying on unadjusted annual weighted-average costs when the COM changes significantly throughout the period would result in a distorted dumping analysis, the Department established a predictable, reasonable and consistent methodology for dealing with that situation. In developing the alternative shorter cost period methodology, the Department took into account the instructions provided in the statute, the regulations, and the SAA. In addition, the Department solicited comments from the public on how best to deal with the issue of significantly changing costs, highlighting several difficult calculation issues to consider.[83] In that request for comment, the Department explicitly asked parties to comment on the 90/60 comparison window period in administrative reviews.[84]

The Court ordered the Department to provide additional explanation justifying a deviation from the normal 90/60 day comparison window period in light of the Court's expressed concerns.[85] Given that the Department has a routine practice for addressing like situations under 19 CFR 351.414(e)(2), the Court stated that the Department must either apply that practice or

[83] *See Antidumping Methodologies*.
[84] *Id.,* 73 FR at 26367.
[85] *See* Second Remand Order, at 29-32.

provide a reasonable explanation as to why departure therefrom results in a "more accurate" weighted-average dumping margin. What the Department did in this review does follow its routine practice under 19 CFR 351.414(e)(2) for addressing a situation where a respondent's COM changes significantly throughout the POR and prices and costs are reasonably correlated during the period. In conjunction with the direction provided by the statute, the SAA, the regulations, and its past practice, the Department implemented the methodology used in this review. That is, the Department limited price-to-price comparisons to the sales made in the same quarterly periods for which it calculated the costs of production. This is the same methodology that the Department used in the *Habas Sina* remand and in the approximately 23 subsequent investigations and reviews involving significant cost changes.[86] Accordingly, the method that the Department used to find NV's based on comparison market sale prices (*i.e.*, limited to the quarter of the U.S. date of sale) is its routine practice when significant cost changes drive it to using the alternative shorter cost period methodology.

The Court ordered the Department to explain how its method produces the "most accurate" weighted-average dumping margin possible given the facts of this administrative review. This is admittedly a difficult question in that there are two competing forces at play: the preference for identical price-to-price comparisons, and the concern about the timing of price-to-price comparisons when costs are changing significantly throughout the POR and prices are reasonably correlated to the changing costs. In addressing this point, it is important to keep in mind that the respondents' costs increased significantly throughout the POR (*i.e.*, the increase exceeded the 25-percent threshold), and the sales prices were reasonable correlated to the

[86] *See*, *e.g.*, *Circular Welded Non-Alloy Steel Pipe From the Republic of Korea: Final Results of the Antidumping Duty Administrative Review*, 76 FR 36089 (June 21, 2011).

movement in costs throughout the POR.[87] In light of these record facts, it is reasonable for the Department to be concerned about straying too far from the month of each U.S. sale in trying to find a NV based on comparison market sale prices. It would be inconsistent to say, on one hand, that for the COP and CV the Department needs to compare prices to the quarterly average costs for the quarter in which the U.S. sales occurred (*i.e.*, do not compare sales prices to a COP or CV which include costs from outside of the quarter in which the sale took place), while at the same time to say it is acceptable to compare U.S. sale prices to monthly NV's based on comparison market sale prices made outside of the quarter in which the U.S. sale took place. If prices reasonably correlate to significantly changing costs, then it follows that the Department should reasonably afford price-to-price comparisons the same timing considerations given to price-to-cost comparisons. With this in mind, limiting the comparison window period from six months to the three months of a quarterly period, which are the same shorter cost averaging periods used for the calculation of the COP, CV and DIFMER adjustment, is reasonable.

Moreover, the concern that limiting the comparison window period will result in significantly fewer identical matches is not borne out by record evidence. For HYSCO, limiting the comparison window period to quarters results in approximately [ ] percent of its total U.S. sale volume changing from having NV's based on comparison market sale prices of the identical CONNUM to being based on comparison market sale prices of the most similar CONNUM.[88] That is, out of [ ] total tons of U.S. sales, only [ ] tons would change from similar matches to identical matches by expanding the comparison window period to include the normal 90/60

[87] *See Final Results*, and accompanying IDM at 16-19; *see also* the Department's December 16, 2009, Post-Preliminary Analysis Memorandum for Union and December 16, 2009, Post-Preliminary Analysis Memorandum for HYSCO.
[88] *See* HYSCO 2nd Remand Cost Memorandum.

day window period.[89] For Union these numbers are even smaller. For Union, shortening the comparison window period to quarters results in approximately [ ] percent of its total U.S. sale volume changing from having NV's based on comparison market sale prices of the identical CONNUM to being based on comparison market sale prices of the most similar CONNUM.[90] That is, out of [ ] total tons of U.S. sales, only [ ] tons would change from similar matches to identical matches by expanding the comparison window period to include the normal 90/60 day window period.[91] For the reasons articulated above, when costs are changing significantly over the period, the Department finds that neutralizing the demonstrated impact of timing is more important to the accuracy of the calculation of the weighted-average dumping margin than having an additional [ ] percent and [ ] percent of HYSCO's and Union's U.S. sales, respectively, matching to identical merchandise.

B. Departure from the 19 CFR 351.414(e)(2) Hierarchy

The Court also instructed the Department to explain whether it "permissibly shortened the comparison window period in the particular way that it did by limiting comparisons of a U.S. sale to home market sales occurring only in the quarter in which the U.S. sale occurred."[92] The Court concluded that the Department's methodology "largely dispensed with the hierarchy, reflected in 19 CFR 351.414(e)(2), of matching a U.S. sale with earlier months of home market sales before resorting to subsequent months in a situation where no match could be made in the month in which the U.S. sale occurred," and did not explain why the Department chose a

[89] *Id.*
[90] *See* the Department's June 18, 2014, Cost Calculation Memorandum for Union (Union 2nd Remand Cost Memorandum).
[91] *Id.*
[92] *See* Second Remand Order at 30.

methodology that "deviated significantly from this hierarchy by shortening the comparison window."[93]

The Department permissibly limited the comparison window period to the quarter in which the U.S. sale is made. The Department's regulations envision that situations would arise where the "normal" comparison periods set out in 19 CFR 351.414(e)(2) would not provide an appropriate reflection of the market place and that the Department must be afforded the discretion to modify the comparison methodology in such situations. As discussed in greater detail below, the drafters of the regulation contemplated that there would be times when the Department would need flexibility for abnormal cases and thus included the term "normally" when describing the contemporaneous month which is commonly referred to as being within the 90/60 day window. The Department limited the normal 90/60 day window to the quarterly window period in order to be consistent with the period used to calculate the COP, the CV and the DIFMER adjustment. The Department's reasoning is that if it considers it inappropriate to compare sale prices with quarterly COPs or CVs incurred outside of the quarter in which the sale occurred, then it is similarly inappropriate to compare U.S. sales prices occurring in a given quarter to NV's based on comparison market sale prices occurring in a quarter outside of that in which the U.S. sale occurred. The Department notes that its comparison window period method under the quarterly-cost methodology still follows the hierarchy of first trying to find a match in the month of the U.S. sale, then going back one month, then two (as long as doing so remains within the given quarter), then forward one month, then two (again as long as doing so remains within the given quarter).

The period within which to make a contemporaneous match is generally described in section 777A(d)(2) of the Act. This section of the Act states:

[93] *Id.*

> In a review under section 751, when comparing export prices (or constructed export prices) of individual transactions to the weighted average price of sales of the foreign like product, the administering authority shall limit its averaging of prices to a period not exceeding the calendar month that corresponds most closely to the calendar month of the individual export sale.

Section 777A(d)(2) of the Act is silent as to what is precisely meant by "the calendar month that corresponds most closely to the calendar month of the individual export sale." Accordingly, it is appropriate to look to the regulations, the preamble to the regulations and the SAA for clarification.

When looking for further explanation within the legal structure of the antidumping statute and regulations, the Department finds that 19 CFR 351.414(e)(2) provides direct guidance for what the contemporaneous month is. This section of the regulations states:

> *Contemporaneous month.* Normally, the Secretary will select as the contemporaneous month the first of the following which applies:
>
> > (i) The month during which the particular U.S. sale under consideration was made;
> >
> > (ii) If there are no sales of the foreign like product during this month, the most recent of the three months prior to the month of the U.S. sale in which there was a sale of the foreign like product;
> >
> > (iii) If there are no sales of the foreign like product during any of these months, the earlier of the two months following the month of the U.S. sale in which there was a sale of the foreign like product.

19 CFR 351.414(e)(2). It is important to note that the first word of this regulatory provision is the word "Normally." This implies that there are abnormal instances where another method would be appropriate and permitted under the regulation.[94] The guidance the Department seeks as to the meaning of "normally" is not contained in the regulation itself. Looking to the

[94] *See*, *e.g.*, *KYD v. United States*, 613 F. Supp. 2d 1371, 1382 (Ct. Int'l Trade 2009) (stating that when the term "normally" is used in a regulation, the implementing agency has been "afforded discretion" to determine when "the 'normal'" situation "is inapplicable").

preamble to the proposed and final regulations, the Department notes that neither document provides further guidance about what is specifically meant when the term "normally" is used in 19 CFR 351.414(e)(2).[95] The Department can, however, gain insight looking to 19 CFR 351.414(d)(3). This regulation is instructive in that it describes what the Secretary will "normally" do in situations of average-to-average comparisons and states:

> *Time period over which weighted average is calculated.* When applying the average-to-average method, the Secretary normally will calculate weighted averages for the entire period of investigation or review, as the case may be. However, when normal values, export prices, or constructed export prices differ significantly over the period of investigation or review, the Secretary may calculate weighted averages for such shorter period as the Secretary deems appropriate.[96]

The Department also finds instructive the language on the issue of the averaging periods and the contemporaneous calendar month that is contained in the SAA. This one paragraph addresses both the averaging periods and the contemporaneous month for comparisons and states as follows:

> New section 777A(d)(2) provides that, when comparing prices of individual export transactions to weighted average foreign prices, Commerce will limit its averaging of prices to a period not exceeding the calendar month that corresponds most closely to the calendar month of the individual export sale. When constructed value is used for normal value, it is normally based on yearly data. However, when costs are rapidly changing, it may be appropriate to use shorter periods, such as quarters or months, which may allow a more appropriate association of costs with sales prices.[97]

It is thus apparent that Congress intended the Department to have the flexibility needed to determine the appropriate periods for price-to-price comparisons when costs significantly change over the POR and the prices are reasonably correlated to such costs, as they are in this review.

[95] *See Antidumping Duties; Countervailing Duties*, 61 FR at 7349; *Antidumping Duties; Countervailing Duties*, 62 FR 27296, 27373-76 (May 19, 1997).
[96] 19 CFR 351.414(d)(3) (emphasis added).
[97] H.R. Doc. 103-316, Vol. 1 (1994) at 843 (emphasis added).

The most accurate and fair way to deal with a complex situation, like significant cost changes, is to have a methodology that is reasonable, consistent, and predictably applied that is deviated from only when specific distortions are identified related to a given situation. As discussed above, in this review there are no case-specific facts that would lead to the normal alternative quarterly-cost methodology (and limited comparison window period) resulting in an inherently inappropriate margin calculation. While in a normal situation the regulations prefer that the Department goes backwards first to find a NV, a significant cost change scenario is not a normal case. Automatically going back, and by as much as 90 days, is no longer preferred when record evidence establishes a significant cost-change situation where sale prices are reasonably correlated to these changes in costs. The Department must consider all salient facts in determining how it determines an appropriate NV based on either comparison market sale prices or CV. In the end, the Department needs to adopt a predictable method that is consistently applied, and, unless there are specific facts in an investigation or a review that warrant deviation from the normal alternative-quarterly-cost-method approach, the Department should follow its standard approach, which necessitates departing from the hierarchy prescribed by 19 CFR 351.414(e)(2).

Because the statute, regulations and SAA do not explicitly address the situation faced in this review, the Department exercised its discretion in determining that it was appropriate to deviate from the regulatory direction set forth in 19 CFR 351.414(e)(2) as being the "normally" applied contemporaneous window period. In exercising the discretion afforded within the regulation, the Department, as it has in all other investigations and reviews where it applied its quarterly-cost methodology, utilized the quarter in which the U.S. sale occurred as the

contemporaneous period for price-to-price comparisons. Thus the Department permissibly limited the comparison window period in the particular way that it did.

Union's and Dongbu's Comments:

- Union and Dongbu argue that there is no direct linkage between the Department using quarterly-costs and its use of quarterly comparison window periods to determine which monthly average normal values to compare to individual U.S. sales or that the use of quarterly window periods will render a more accurate weighted-average dumping margin.
- Union and Dongbu contend that, apart from the Department's finding that there is a "reasonable correlation" between the changes in costs and the changes in prices during the POR (*i.e.*, they generally trended in the same direction), the Department has provided no analysis or evidence that monthly average prices changed significantly from one month to the next such that the application of the normal 90/60-day window regulation would create distortions.
- Union and Dongbu claim that the Department's conclusion that its need to minimize price comparisons distortions outweighs the need to find every identical match possible in cases where there are significant cost changes and reasonably correlated prices is not supported by legal or factual analysis.
- Union and Dongbu argue that the Department's claim that only a small volume and proportion of Union's U.S. sales would change from similar to identical sales by using the normal 90/60-day window period misses the point because the statute contains a preference for the use of identical matches.
- Union and Dongbu contend the Department's reliance on 19 CFR 351.414(d)(3) was inappropriate because that regulation applies to the use of the average-to-average comparison

method in an investigation, which is unrelated to an administrative review where the Department normally uses the average-to-transaction comparison method and applies the 90/60-day window regulation.

- Union and Dongbu claim that the Department impermissibly shortened the comparison window period by ignoring the hierarchy enumerated in 19 CFR 351.414(e)(2).
- Union and Dongbu assert that, even though 19 CFR 351.414(e)(2) begins with the word "normally," nothing in its text or in the rulemaking proceeding leading to its proposal and adoption suggests that the regulation was intended to confer upon the Department unlimited discretion to alter the definition of the contemporaneous month on a case-by-case basis.

Department's Position:

We disagree with Union and Dongbu that the Department must find that there is "direct linkage" between using quarterly-costs and limiting the contemporaneous window periods to determine which monthly average normal values will be compared to individual U.S. sales. Consistent with the Department's quarterly-cost methodology, because we found the changes in costs to be significant, we evaluated whether there was linkage (*i.e.*, a reasonable correlation) between the changes in cost and the changes in sales prices in both the U.S. and comparison markets during the POR.[98] In order to determine whether there was a reasonable correlation between the changes in costs and sales prices, we compared the cost and price changes for the CONNUMs with the highest sales volume in both the U.S. and comparison markets. Our analysis revealed that costs and sale prices were *reasonably* correlated.[99] Union no longer

[98] *See*, *e.g.*, *Stainless Steel Sheet and Strip in Coils From Mexico: Final Results of Antidumping Duty Administrative Review,* 75 FR 6627 (February 10, 2010) (*SSSS from Mexico*), and accompanying Issues and Decision Memorandum at Comment 6, and *Stainless Steel Plate in Coils From Belgium: Final Results of Antidumping Duty Administrative Review*, 73 FR 75398 (December 11, 2008) (*SSPC from Belgium*), and accompanying Issues and Decision Memorandum at Comment 4.

[99] *See* the Department's December 16, 2009, Post-Preliminary Analysis Memorandum for Union and December 16, 2009, Post-Preliminary Analysis Memorandum for HYSCO.

disputes the Department's conclusion that its data demonstrated reasonable correlation. Instead it is claiming that there must be direct linkage between costs and sale prices to justify the Department's limiting of the comparison window period to the quarter in which the U.S. sale occurred.[100] The Department must emphasize that it has never required direct linkage in applying its quarterly-cost methodology. In determining whether to resort to our quarterly-cost methodology, we require that costs change significantly, and that there be a reasonable correlation between changes in costs and sale prices (*i.e.*, linkage). We adopted the reasonable correlation standard as opposed to direct linkage because of concerns that a standard of direct linkage is too stringent and could rarely be achieved. As a result, we would rarely resort to our quarterly-cost method, resulting in distorted calculations of weighted-average dumping margins. Because the use of our quarterly-cost methodology impacts both price-to-cost comparisons and price-to-price comparisons, we consider it unreasonable to apply different linkage tests for price-to-price comparisons versus price-to-cost comparisons. The price and cost charts accompanying the Draft Remand show that prices and costs trended very consistently together throughout the POR.[101] From reviewing these charts, it is apparent that the changes in sale prices correlate reasonably to changes in costs during the POR.

Similar to Union's and Dongbu's argument, the Court ordered the Department to explain how its method produces the "most accurate" weighted-average dumping margin given the facts of this administrative review.[102] We acknowledged above that this is a difficult determination when there are two competing forces at play: the preference for identical price-to-price comparisons versus the concern about the timing of price-to-price comparisons when costs are changing significantly throughout the POR and prices are reasonably correlated to the changing

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[100] *See* Union's July 1, 2014, Letter to the Department (Union Comments on Draft Remand) at 2.
[101] *See* HYSCO 2nd Remand Cost Memorandum and Union 2nd Remand Cost Memorandum.
[102] *See* Second Remand Order, at 30.

costs. In light of the significant changes in costs combined with the prices and costs being reasonably correlated throughout the POR, it was necessary for the Department not to deviate too far from the month of each U.S. sale in trying to find a NV based on comparison market sale prices for the same reason that the costs do not deviate too far from the month of the given sale. After all, if prices reasonably correlate to significantly changing costs for purposes of the cost test, DIFMER adjustment and CV, then it follows that the Department should reasonably afford price-to-price comparisons the same timing considerations given to price-to-cost comparisons. With this in mind, it is reasonable and logical for the Department to limit the comparison window period from six months to the three months of the quarterly period in which the U.S. sale occurred, which are the same quarterly periods used for the calculation of the COP, CV and DIFMER adjustment.

We disagree with Union's and Dongbu's assertion that the Department should have found every possible identical match while ignoring the distortions associated with significant cost changes and the timing of price-to-price comparisons. The problem with Union's and Dongbu's argument is that there is no legal guidance provided by the Act. In this situation, we have relied upon the discussion of price averaging in the SAA, which recognizes the need to eliminate timing distortions. The key language from the SAA, "However, when costs are rapidly changing, it may be appropriate to use shorter periods, such as quarters or months, which may allow a more appropriate association of costs with sales prices,"[103] is relevant to the facts in this case. The Department extends that SAA statement to its logical conclusion by reasoning that, when the prices, in correlation with the costs, are significantly changing, it stands to reason that it is also appropriate to use shorter periods for the price-to-price comparisons as is done for price-to-cost comparisons. Union's and Dongbu's basic argument hinges on the SAA statement

[103] H.R. Doc. 103-316, Vol. 1 (1994) at 843.

being specific to price-to-cost comparisons, but disregards that the SAA's reasoning with respect to limiting the contemporaneous window periods is equally applicable to price-to-price comparisons.

As noted above, the Department methodology of comparing prices within the quarterly comparison window rather than comparing prices within the 90/60 day window results in only a minor increase in similar comparisons at the expense of identical comparisons.[104] In recognition of the balance that must be achieved between using the normal 90/60 day methodology when prices and costs are reasonably stable and using the quarterly methodology when costs are changing significantly and the sale prices are reasonably correlated to the changes in costs, the Department's dumping analysis should strive to minimize the impact of timing on the dumping analysis. Because the effects of time can distort the dumping analysis in certain situations unless the Department modifies its normal practice, the need to minimize the distortion that time has on cost and price comparisons outweighs the need to identify the limited number of additional identical matches that may be possible based upon record evidence.

We disagree with Union's and Dongbu's claim that the Department's reliance on 19 CFR 351.414(d)(3) is inappropriate because that regulation applies to the use of the average-to-average comparison method in an investigation, which was not utilized in this administrative review. The facts of this case are the same as those addressed in paragraph (d)(3) of the regulation – *i.e.,* volatile changing costs and correlating sale prices. The fact is that 19 CFR 351.414(d)(3) addresses sales comparability over time in periods of rapidly changing costs. Therefore, paragraph (d)(3) of the regulation is relevant in this context. Because paragraph (d)(3) provides that the Secretary "normally" will calculate weighted-averages for the entire period of investigation or review, but that shorter periods may be used where the normal

[104] *See* HYSCO 2nd Remand Cost Memorandum and Union 2nd Remand Cost Memorandum.

values, export prices or constructed export prices for sales included within an averaging group differ significantly over the course of the period of investigation or review, one can reasonably conclude that time affects price comparability where values or prices are significantly different over time.[105] This is precisely the situation in this case. The cost of the steel substrate changed significantly and these changing material costs were reasonably correlated with changes in the finished products' sale prices. As indicated above, if the Department compared U.S. prices to monthly NV's based on comparison market sale prices from differing quarters, the result would be comparisons of prices that did not reflect important market conditions at the time the U.S. sale was made. To do this would inject the effects of time into the dumping analysis. Thus, if the Department failed to eliminate the effects of time on the price comparisons, the dumping analysis would be distorted.

In order to avoid such a distorted dumping analysis, what the Department has done in these remand results follows its established practice, which is consistent with 19 CFR 351.414(e)(2) for addressing a situation where a respondent's COM changes significantly throughout the POR, and prices and costs are reasonably correlated during the period. In conjunction with the direction provided by the statute, the SAA, the regulations, and its past practice, the Department has implemented the methodology used in this review. That is, the Department limited the price-to-price comparisons to the sales made in the same quarterly periods for which it calculated the costs of production. As noted above, this is the same methodology that the Department used in the *Habas Sina* remand and in numerous investigations and reviews involving significant cost changes.

We disagree with Union and Dongbu that the Department is exercising unlimited discretion to alter the definition of "contemporaneous month" on a case-by-case basis. The

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[105] *See Antidumping Duties; Countervailing Duties*, 61 FR at 7349.

Department's regulations, by their express terms, envision that there would be situations where the "normal" comparison periods set out in 19 CFR 351.414(e)(2) would not provide an appropriate reflection of the market place and that the Department must be afforded the discretion to modify the comparison methodology in such situations. As discussed in greater detail above, the drafters of the regulation recognized that there would be situations when the Department would need flexibility for abnormal cases and thus included the term "normally" when describing the contemporaneous month which is commonly referred to as being within the 90/60 day window. As supported by the language of 19 CFR 351.414(d)(3) and the SAA described above,[106] evidence of significantly changing costs and reasonably correlated prices constitutes one such instance when departure from the "normal" comparison periods of 19 CFR 351.414(e)(2) is warranted. A significant cost change scenario is not a normal case, and the "normal" methodology should be modified to reflect when sale prices are reasonably correlated to significant changes in costs. Even when using modified comparison periods, the Department nonetheless reiterates that its comparison window period method under the quarterly-cost methodology still follows the hierarchy of first trying to find a match in the month of the U.S. sale, then going back one month, then two (as long as doing so remains within the given quarter), then forward one month, then two (again as long as doing so remains within the given quarter).

V. HYSCO's Date of Sale

During the administrative proceeding and on first remand, the Department used the date of shipment as the date of sale for HYSCO's sales to the United States.[107] Having reconsidered the issue in accordance with the Second Remand Order, the Department is using the date of invoice as the date of sale for HYSCO's U.S. sales.

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[106] *See* H.R. Doc. 103-316, Vol. 1 (1994) at 843.
[107] *See Final Results*, and accompanying IDM at 30 and First Remand Results at 61-66.

As observed by the Court, 19 CFR 351.401(i) states that the Department "normally will use the date of invoice" as the date of sale, unless "the Secretary is satisfied that a different date better reflects the date on which the exporter or producer establishes the material terms of sale." If the Department determines that another date better reflects the date on which the exporter or producer establishes the material terms of sale, the Department may use this date.

The Department's long standing practice is to use the date of shipment as the date of sale if shipment date precedes invoice date, which informed its earlier analysis during the administrative proceeding and on first remand. The reason for Commerce's practice regarding the use of date of shipment is that when a party ships its product to a customer, it is reasonable to assume that the material terms of the sale have been established.[108] In the instant case, record evidence reconsidered in response to the Second Remand Order indicates that the terms of sale were subject to change after shipment. As noted by the Court in the Second Remand Order, HYSCO specifically reported that "{n}egotiations with customers can continue through the entire sales process" and that "{f}or U.S. sales, quantity can also change up until the merchandise is shipped from HYSCO's factory, and price can change up until {its U.S. subsidiary} HHU issues its invoice to the unaffiliated U.S. customer."[109] Thus, upon reconsideration, the Department concludes that record evidence does not support a finding that shipment date, rather than invoice date, better reflects the date on which the exporter or producer established the material terms of sale. Thus, in accordance with in 19 CFR 351.401(i), it is appropriate to use invoice date as the date of sale for HYSCO's U.S. sales.[110]

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[108] *See Mittal Steel Point Lisas Ltd. v. United States*, 31 CIT 638, 647 (2007) (*Mittal Steel*) (citing *Notice of Final Determination of Sales at Less Than Fair Value; Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Brazil*, 64 FR 38756, 38768 (July 19, 1999) (*Hot-Rolled Steel from Brazil*)).
[109] HYSCO's February 11, 2009, Questionnaire Response at A-23, A-24.
[110] *See* the Department's June 18, 2014, Memorandum regarding "Remand Results Pursuant to Slip Op. 14-27 for HYSCO."

HYSCO's Comments:

- HYSCO urges the Department to use shipment date as the date of sale for HYSCO's U.S. sales.
- HYSCO states that it shipped subject merchandise to unaffiliated U.S. customers before the U.S. subsidiary, HHU, issues a commercial invoice.
- HYSCO argues that at the time of shipment the sales quantity became fixed and could not change.
- HYSCO states that while the sales quantity was fixed, the price could theoretically change until the invoice was sent to the U.S. customer.[111]
- HYSCO argues that there is no evidence on the record that the price changed between the time of shipment from Korea and the date on which HHU issued the invoice to the final customer.
- HYSCO maintains that the Department's practice, as consistently applied to the instant and other cases, is to use the earlier of date of shipment or date of invoice as the date of sale.[112]
- HYSCO argues that the Department does not, and may not change methodology for a given respondent, unless it finds that the respondent has changed business practice.[113] Further, the agency is obligated to provide an adequate explanation for any changes to practice.[114]

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[111] *See* HYSCO's July 1, 2014, Letter to the Department (HYSCO Comments on Draft Remand) at 3.
[112] *See*, *e.g.*, *Certain Corrosion Resistant Carbon Steel Flat Products from the Republic of Korea: Notice of Final Results of the Fourteenth Administrative Review and Partial Rescission*, 74 FR 11082 (March 16, 2009), and accompanying IDM at Comment 18.
[113] *See Honey from Argentina: Final Results of Antidumping Duty Administrative Review and Determination Not to Revoke in Part*, 73 FR 24220 (May 2, 2008), and accompanying IDM at Comment 2.
[114] *See SKF USA Inc. v. United States*, 630 F. 3d 1365, 1373 (Fed. Cir 2011).

- HYSCO reasons that no reasonable producer would begin made-to-order merchandise, or ship merchandise to its customers, in the absence of a finalized commercial agreement to price and quantity.
- HYSCO maintains that the commercial invoice does not establish the material terms of sale.

Department's Position:

HYSCO reiterates in its comments that while the sales quantity was fixed, the price could theoretically change until the invoice was sent to the U.S. customer.[115] It is well-established that price is a material term of sale.[116] The Department disagrees that record evidence provides conclusive evidence that the material terms of sale were set at the time of shipment. Rather, the Department is relying on HYSCO's own statement that the price could change between the time of shipment and invoice.[117]

We are acting consistent with our practice to use shipment date if it precedes invoice date, but that practice is premised on the presumption that the material terms of sale do not change after shipment.[118] Here, record evidence establishes that those material terms were subject to change after shipment date.[119] While the Department may have relied upon shipment date as the date of sale in previous administrative reviews, that determination was based upon the specific facts of those administrative records. The Department's longstanding practice, upheld by the Court, is to treat each segment of an antidumping proceeding, including the less-than-fair-

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[115] *See* HYSCO Comments on Draft Remand at 3.
[116] *See, e.g.*, *Notice of Final Determinations of Sales at Less Than Fair Value; Certain Cold-Rolled Flat-Rolled Carbon-Quality Steel Products from Turkey*, 65 FR 15123 (March 21, 2000), and accompanying IDM at Comment 1.
[117] *See* HYSCO's February 11, 2009, Questionnaire Response at A-23, A-24; *see also* HYSCO Comments on Draft Remand at 3.
[118] *See Mittal Steel*, 31 CIT at 647 (citing *Hot-Rolled Steel from Brazil*, 64 FR at 38768).
[119] *See* HYSCO's February 11, 2009, Questionnaire Response at A-23, A-24; *see also* HYSCO Comments on Draft Remand at 3.

value investigation and the individual antidumping administrative reviews that may follow, as independent segments with separate records, which lead to independent determinations.[120] Although the record in prior segments of the proceeding may have indicated otherwise, record evidence in this administrative review establishes that the material terms of sale were subject to change after shipment date.[121] Accordingly, it was appropriate for the Department to adjust its methodology based upon the evidence and statements on the record.

VI. Recalculation of the Rate Assigned to Dongbu

In accordance with the Second Remand Order, the Department recalculated the weighted-average dumping margin assigned to Dongbu as a non-examined respondent company to reflect all changes to the weighted-average dumping margins calculated for Union and HYSCO arising from these remand results.[122] Consistent with the *Final Results*, Dongbu's assigned rate will continue to be a simple average of the revised weighted-average dumping margins calculated for the mandatory respondents, Union and HYSCO.[123]

Other than Dongbu's comments concerning the contemporaneous month for purposes of comparing U.S. sales to monthly NVs based on weighted-average comparison market sale prices already addressed above, no other party commented on this issue in response to the Draft Remand.

CONCLUSION

Based on the forgoing analysis and discussion, the Department decides pursuant to the Second Remand Order to modify the recovery-of-costs test as applied to HYSCO, and to select

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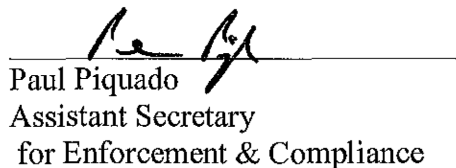
[120] *See E.I. DuPont de Nemours & Co. v. United States*, 22 CIT 19, 32 (1998); *Outokumpu Copper Rolled Prods. AB v. United States*, 17 CIT 848, 854, 829 F. Supp. 1371, 1377 (1993) (stating that it is well-established that antidumping investigations and administrative reviews are wholly independent proceedings).
[121] *See* HYSCO's February 11, 2009, Questionnaire Response at A-23, A-24; *see also* HYSCO Comments on Draft Remand at 3.
[122] *See* Second Remand Order at 50-52.
[123] *See Final Results*, 75 FR at 13491.

invoice date as the date of sale for HYSCO's U.S. sales. The Department made no changes in applying the major input adjustment as part of the interest expense ratio calculation for Union, in examining Union's and HYSCO's costs of production on a quarterly basis, in applying the quarterly-costs methodology to Union's and HYSCO's calculated CVs and DIFMER adjustments, and in limiting comparisons between Union's and HYSCO's respective U.S. sales to monthly NV's based on comparison market sale prices within the quarter in which U.S. sales were made. Accordingly, for these remand results, the Department recalculated Union's weighted-average dumping margin from 14.01 percent in the *Final Results* and 9.85 percent in the First Remand Results to 9.83 percent in these second remand results, and HYSCO's weighted-average dumping margin from 3.29 percent in the Final Results and 1.46 percent in the First Remand Results to 5.56 percent in these second remand results. Additionally, as a result of these changes to Union's and HYSCO's weighted-average dumping margins, the Department assigns a new weighted-average dumping margin to Dongbu as a non-examined respondent based upon a simple average of the weighted-average dumping margins calculated for Union and HYSCO. Accordingly, the review-specific rate applicable to Dongbu changed from 8.65 percent in the Final Results and 5.66 percent in the First Remand Results to 7.70 percent in these second remand results.



Paul Piquado
Assistant Secretary
for Enforcement & Compliance

1 August 2014
Date