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Remand (Slip Op. 17-138)
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ABB INC. v. United States
Consol. Court No. 16-00054, Slip Op. 17-138 (CIT October 10, 2017)

FINAL RESULTS OF REDETERMINATION PURSUANT TO COURT REMAND

SUMMARY

The Department of Commerce (Commerce) prepared these final results of redetermination in accordance with the opinion and remand order of the U.S. Court of International Trade (CIT or the Court) issued on October 10, 2017, in *ABB INC. v. United States*, Consol. Court No. 16-00054, Slip Op. 17-138 (CIT 2017) (*Remand Order*). These final remand results concern the final results in the antidumping duty (AD) administrative review (AR) of large power transformers from the Republic of Korea (Korea), and the period of review (POR) is February 16, 2013, through July 31, 2014.[1]

[1] *See Large Power Transformers from the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2013-2014*, 81 FR 14087 (March 16, 2016) (*Final Results*) and accompanying Memorandum, entitled "Issues and Decision Memorandum for the Final Results of the Administrative Review of the Antidumping Duty Order on Large Power Transformers from the Republic of Korea; 2013-2014" (Issues and Decision Memorandum); *see also* "Analysis of Data Submitted by Hyosung Corporation in the Final Results of the Antidumping Duty Administrative Review of Large Power Transformers from the Republic of Korea; 2013-2014" (Hyosung's Final Analysis Memorandum); and "Hyundai Heavy Industries Co., Ltd. and Hyundai Corporation, USA- Analysis Memorandum for the Final Results of the 2013/2014 Administrative Review of the Antidumping Duty Order on Large Power Transformers from the Republic of Korea," dated March 8, 2016 (Hyundai's Final Analysis Memorandum). On May 5, 2016, Commerce published amended final results upon consideration of various ministerial error allegations. *See Large Power Transformers from the Republic of Korea: Amended Final Results of Antidumping Duty Administrative Review; 2013-2014*, 81 FR 27088 (May 5, 2016) (*Amended Final Results*); *see also* "Ministerial Error Memorandum for the Amended Final Results of the 2013/2014 Administrative Review of the Antidumping Duty Order on Large Power Transformers from the Republic of Korea," dated April 29, 2016 (Ministerial Error Memorandum) and "Analysis of Data Submitted by Hyosung Corporation in the Amended Final Results of the Antidumping Duty Administrative Review of Large Power Transformers from the Republic of Korea; 2013-2014", dated April 28, 2016) (Hyosung's Amended Final Results Analysis Memorandum).

In the extant review, Commerce calculated weighted-average dumping margins of 9.40 percent and 4.07 percent for Hyosung[2] and Hyundai,[3] respectively, in the *Final Results*.[4] Upon consideration of various ministerial error allegations, Commerce issued the *Amended Final Results* and calculated a weighted-average margin of 7.89 percent for Hyosung.[5] In the *Remand Order*, the Court directed Commerce to further explain its treatment of the U.S. commissions for both Hyundai and Hyosung, particularly in light of Commerce's reconsideration of the same issue in the immediately preceding antidumping administrative review of this order.[6] Also in the *Remand Order*, the Court directed Commerce to evaluate its revenue capping practice and to ensure consistency with respect to both Hyosung and Hyundai.

In accordance with the *Remand Order*, Commerce has reconsidered its determination in the *Final Results* and *Amended Final Results* in these final results of redetermination. As discussed below, pursuant to the *Remand Order*, Commerce clarified the treatment of the respondents' U.S. commissions based on record evidence and explained the legal and factual basis for denying home market commission offsets related to such U.S. commissions. Additionally, in accordance with the *Remand Order*, Commerce re-examined whether to cap Hyundai's service-related revenues based on the amount of the associated expenses.

DISCUSSION

A. Statutory and Regulatory Background

Commerce conducts an administrative review in accordance with 19 CFR 351.221 pursuant to which Commerce sends antidumping duty questionnaires requesting company information

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[2] Hyosung Corporation and HICO America Sales and Technology (HICO America) (collectively, Hyosung).
[3] Hyundai Heavy Industries Co., Ltd. (HHI) and Hyundai Corporation, USA (Hyundai USA) (collectively, Hyundai).
[4] *See Final Results,* 81 FR 14088. Commerce also assessed margins of 6.74 percent on ILJIN Electric Co., Ltd. (ILJIN Electric), ILJIN, and LSIS Co., Ltd., based on the margins calculated for Hyosung and Hyundai.
[5] *See Amended Final Results* at 27088. Commerce also determined amended dumping margins of 5.98 percent for ILJIN Electric, ILJIN, and LSIS Co., Ltd.
[6] *See ABB, Inc. v. United States*, Slip Op. 17-137 (CIT 2017).

pertinent to the review. Commerce's regulation, 19 CFR 351.102(21)(i), defines factual information as "evidence, including statements of fact, documents, and data submitted either in response to initial and supplemental questionnaires, or, to rebut, clarify, or correct such evidence submitted by any other interested party."

In AD proceedings, sections 772(c) and (d) of the Tariff Act of 1930, as amended (the Act) requires Commerce to make adjustments to the U.S. export price and constructed export price (CEP) for price comparison purposes. When analyzing CEP transactions, sections 772(d)(1)(A) and (3) require Commerce to adjust CEP to account for U.S. commission expenses and associated profit. The Statement of Administrative Action (the SAA) further explains the treatment of commissions under the Act.[7] That is, pursuant to section 772(d) of the Act, Commerce will calculate CEP by reducing the price of the first sale to an unaffiliated customer in the United States by the amount of any commission expenses and profits associated with economic activities occurring in the United States. The SAA further states that Commerce is directed by section 772(d)(1)(A) of the Act to deduct commissions from CEP, but only to the extent that they are incurred in the United States on sales of the subject merchandise.[8]

In addition, Commerce's regulation, 19 CFR 351.410(e), provides certain rules for the treatment of commissions. 19 CFR 351.410(e) goes on to state:

> The Secretary normally will make a reasonable allowance for other selling expenses if the Secretary makes a reasonable allowance for commissions in one of the markets under consideration{}, and no commission is paid in the other market under consideration. The Secretary will limit the amount of such allowance to the amount of the other selling expenses incurred in the one market or the commissions allowed in the other market, whichever is less.

[7] SAA, H.R. Rep. No 103-316, Vol. 1 (1994), at 823-824.
[8] *Id*. at 823.

B. Factual Background

ABB, Inc. (ABB) requested an administrative review on August 29, 2014, of imports of LPTs from Korea produced by the following companies: Hyosung, Hyundai, ILJIN, ILJIN Electric, and LSIS.[9] On August 30, 2014, Commerce received requests for review from Hyosung, Hyundai, and ILJIN Electric.[10] Based on these requests, on September 30, 2014, Commerce initiated an administrative review for the period August 1, 2013, through July 31, 2014.[11] Commerce subsequently selected Hyosung and Hyundai as mandatory respondents.[12] Relying on the factual information that it gathered through questionnaire responses, on September 4, 2015, Commerce determined preliminary dumping margins of 11.01 percent and 3.96 percent for Hyosung and Hyundai, respectively, in the *Preliminary Results*.[13] On March 16, 2016, as previously noted, Commerce issued the *Final Results*, determining dumping margins of 9.40 percent and 4.07 percent for Hyosung and Hyundai, respectively.[14] Also as previously stated, on May 5, 2016, Commerce issued the *Amended Final Results*, determining a dumping margin of 7.89 percent for Hyosung.[15] On March 31, 2016, and April 12, 2016, both ABB and Hyosung, respectively, initiated this action challenging certain aspects of the *Final Results* before the

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[9] *See* Letter from Petitioner to Commerce, regarding "Large Power Transformers from the Republic of Korea - Petitioner's Request for Administrative Review," dated August 29, 2014.

[10] *See* Letter from Hyosung to Commerce, regarding "Second Administrative Review of Large Power Transformers from the Republic of Korea: Request for Administrative Review," dated August 29, 2014; Letter from Hyundai to Commerce, regarding "Large Power Transformers from Korea," dated August 29, 2014; and Letter from ILJIN Electric to Commerce, entitled "Large Power Transformers from the Republic of Korea: Request for Administrative Review," dated September 2, 2014, respectively.

[11] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 79 FR 58729 (September 30, 2014) (*Initiation Notice*).

[12] *See* Memorandum to Richard O. Weible, Office Director, regarding "Antidumping Duty ("AD") Administrative Review of Large Power Transformers ("LPTs") from the Republic of Korea ("Korea"): Respondent Selection Memorandum," dated November 18, 2014 (Respondent Selection Memorandum).

[13] *See Large Power Transformers from the Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review; 2013-2014*, 80 FR 53496 (September 4, 2015) (*Preliminary Results*). Commerce also preliminarily determined dumping margins of 7.49 percent for ILJIN Electric, ILJIN, and LSIS Co., Ltd.

[14] *See Final Results*, 81 FR at 14088.

[15] *See Amended Final Results* at 27088.

Court.[16]

In its *Remand Order*, regarding the question of Commerce's treatment of service-related revenues associated with Hyundai's U.S. sales, the Court granted Commerce's request for a voluntary remand explaining that Commerce's request to examine whether Commerce applied its revenue capping methodology consistently for both Hyundai and Hyosung, is a concern that is substantial and legitimate.[17]

In addition, in its *Remand Order*, the Court acknowledged that Commerce recently reconsidered its practice with respect to U.S. commissions in the remand redetermination in the first administrative review of this order.[18] The Court granted Commerce's additional request for a voluntary remand to "reconsider whether it is acting consistently with respect to U.S. commissions in this case."[19] The Court explained that while "each administrative review is a separate proceeding, and the records may differ between the two administrative reviews, remand is appropriate" in this instance.[20]

We have re-examined the record evidence and analyzed the legal and factual basis concerning Commerce's practice on whether to grant or deny a commission offset, as well as our revenue capping methodology. Our findings are set forth below.

[16] *See Remand Order*, Slip Op. 17-138 at 2.
[17] *See Remand Order* at 7 – 8.
[18] *Id*. at 6.
[19] *Id*.
[20] *Id*. at 6 – 7.

C. Draft Results of Redetermination Pursuant to Remand

Commerce released its Draft Remand Redetermination on January 8, 2018, and invited comments from interested parties.[21] ABB, Hyosung, and Hyundai submitted comments on January 16, 2018.[22]

D. Analysis

Capping Sales-Related Expense Revenues

Legal Basis for Commerce's Capping Methodology

To prevent U.S. price from being overstated, the statute and regulations require service-related revenues that exceed the associated expenses be capped by the amount of those service-related expenses, and thus deducted from the reported U.S. gross unit price. Section 772(c)(1) of the Act provides that Commerce shall increase the price used to establish export price and CEP (*i.e.*, U.S. price) in only the following three instances:

> (1) when not included in such price, the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the subject merchandise in a condition packed ready for shipment to the United States; (2) the amount of any import duties imposed by the country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the subject merchandise to the United States; and (3) the amount of any countervailing duty imposed on the subject merchandise under subtitle A to offset an export subsidy.[23]

Revenues received by a respondent on sales-related services are not included as an upward adjustment to U.S. price in excess of the related expenses. Commerce has previously found that

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[21] *See* Draft Results of Remand Determination: ABB INC. v. United States, Consol. Court No. 16-00054, Slip Op. 17-138 (CIT October 10, 2017) (Draft Remand Redetermination).

[22] *See* Letter from ABB to Commerce, regarding "Large Power Transformers from the Republic of Korea – Petitioner ABB Inc.'s Comments on the Draft Remand Results," dated January 16, 20186 (ABB's Comments); *see also* Letter from Hyosung to Commerce, regarding "Large Power Transformers from the Republic of Korea: Comments on Draft Remand," dated January 16, 2018 (Hyosung's Comments); *see also* Letter from Hyundai to Commerce, regarding "Large Power Transformers from South Korea: Comments on the Department's Draft Results of Redetermination Pursuant to Remand," dated January 16, 2018 (Hyundai's Comments).

[23] 19 U.S.C. § 772(c)(1)(A)-(C).

service-related revenues in excess of the service-related expenses should not be added to U.S. price under section 772(c)(1) of the Act.[24]

Similarly, section 773(a)(6) of the Act provides that Commerce shall increase the price used to establish normal value by the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the subject merchandise in condition packed ready for shipment to the United States. Again, revenues received by a respondent on sales-related services are not included as an upward adjustment to normal value.[25]

In addition, 19 CFR 351.401(c) directs Commerce to use a price that is net of any price adjustment, as defined in 19 CFR 351.102(b), that is reasonably attributable to the subject merchandise or the foreign like product (whichever is applicable). The term "price adjustment" is defined under 19 CFR 351.102(b)(38) as "any change in the price charged for subject merchandise or the foreign like product, such as discounts, rebates and post-sale price adjustments, that are reflected in the purchaser's net outlay." The definition specifies that the adjustment applies to changes in the price charged for the subject merchandise or the foreign like product. Stated differently, whether adjusting U.S. price or normal value, Commerce will increase such prices only by the adjustments stipulated in sections 772(c) and 773(a)(6).

Pursuant to the relevant statute and regulations which prevent U.S. price from being overstated by any upward adjustments other than the three instances above, Commerce's practice

[24] *See Circular Welded Carbon Steel Pipes and Tubes from Thailand: Final Results of Antidumping Duty Administrative Review; 2011-2012*, 78 FR 65272 (October 23, 2017), and accompanying Issues and Decision Memorandum at Comment 5.

[25] *See Light-Walled Rectangular Pipe and Tube from Mexico; Final Results of Antidumping Duty Administrative Review*, 76 FR9547 (February 18, 2011), and accompanying Issues and Decision Memorandum at Comment 5B.

is to cap service-related revenue by the corresponding expense when making adjustments to U.S. price.[26]

U.S. Commission Expenses

Legal Framework for Commerce's Treatment of U.S. Commissions and Granting or Denying A Home Market Commission Offset

As the Court acknowledged in its *Remand Order*, the Court recently affirmed Commerce's treatment of U.S. commissions, and accompanying analysis as to whether to grant or deny a home market commission offset. Accordingly, Commerce's practice, pursuant to the statute and regulations, is set forth below.[27]

In accordance with section 772(d)(1)(A) and (3) of the Act, Commerce deducts from the price used to establish CEP the amount of commissions generally incurred by or for the account of the producer or exporter, or the affiliated seller in the United States, as well as the profit allocated

[26] *See Circular Welded Carbon Steel Pipes and Tubes from Thailand: Final Results of Antidumping Duty Administrative Review*, 77 FR 61738 (October 11, 2012) and accompanying Memorandum, entitled "Antidumping Duty Administrative Review of Circular Welded Carbon Steel Pipes and Tubes from Thailand: Issues and Decision Memorandum," at 7 (where we stated that "{b}ased on the plain language of the law and the Department's regulations, it has been the Department's stated practice to decline to treat freight-related revenue as an addition to U.S. price under section 772(c)(1) of the Act or as a price adjustment under 19 CFR 351.102(b)(38). We further stated that "… although we will offset freight expenses with freight revenue, where freight revenue earned by a respondent exceeds the freight charge incurred for the same type of activity, the Department will cap freight revenue at the corresponding amount of freight charges incurred because it is inappropriate to increase gross unit selling price for subject merchandise as a result of profit earned on the sale of services …."); *see also Certain Orange Juice from Brazil: Final Results of Antidumping Duty Administrative Review and Final No Shipment Determination*, 77 FR 63291 (October 16, 2012) and accompanying Memorandum, entitled "Issues and Decision Memorandum for the Antidumping Duty Administrative Review on Certain Orange Juice from Brazil – March 1, 2010, through February 28, 2011," at 34 (where we stated that "we find that it would be inappropriate to increase the gross unit price for subject merchandise as a result of profits earned on the provision or sale of services…such profits should be attributable to the sale of the service, not to the subject merchandise." We further stated that "the Department has consistently applied the same capping methodology to both U.S. and home market revenues, regardless of whether it limits the increase to U.S. price or NV {normal value}."); *see also e.g., Purified Carboxymethylcellulose from the Netherlands: Preliminary Results of Antidumping Duty Administrative Review*, 75 FR 48310, 48314 (August 10, 2010) (where we stated that "{i}n accordance with our practice, we capped the amount of freight revenue permitted to offset gross unit price at no greater than the amount of corresponding inland freight expenses incurred by…"), unchanged in *Purified Carboxymethylcellulose from the Netherlands: Final Results of Antidumping Duty Administrative Review,* 75 FR 77829 (December 14, 2010).

[27] *See ABB, Inc. v. United States*, Slip Op. 17-137 (CIT 2017).

to such commissions, for selling the subject merchandise in the United States. Furthermore, 19 CFR 351.410(e) goes on to state that "the Secretary normally will make a reasonable allowance for other selling expenses[28] if the Secretary makes a reasonable allowance for commissions in one of the markets under considerations, and no commission is paid in the other market under consideration. The Secretary will limit the amount of such allowance to the amount of the other selling expenses incurred in the one market or the commissions allowed in the other market, whichever is less."[29] The SAA further clarifies the basis of the treatment of U.S. commissions. It states that CEP "will be calculated by reducing the price of the first sale to an unaffiliated customer in the United States by the amount of the following *expenses (and profit) associated with economic activities occurring in the United States*: *(1) any commissions paid in selling the subject merchandise…(6) an allowance, as explained below, for profit allocable to the selling, distribution, and further manufacturing expenses incurred in the United States*."[30] (emphasis added) It further states that Commerce "is directed by section 772(d)(1)(A) to deduct commissions from constructed export price, but only to the extent that *they are incurred in the United States on sales of the subject merchandise*."[31] (emphasis added)

In light of the statute and regulations, Commerce's practice has been to distinguish two types of commissions paid on U.S. sales: (i) commissions incurred inside the United States for which Commerce deducts the commission expenses and the related profit from the price used to establish CEP, and (ii) commissions incurred outside the United States, for which the Department adds such commission expenses to normal value and offsets differences in home market

[28] 19 CFR 351.410(b), (c), and (d) indicate that other selling expenses are indirect selling expenses excluding direct selling expenses and assumed expenses (*e.g.*, advertising expenses).
[29] *See* 19 CFR 351.410(e).
[30] *See* SAA, H.R. Rep. No 103-316, Vol. 1 (1994), at 823.
[31] *Id.*

commission expenses and such U.S. commission expenses incurred outside the United States, if any.[32] Because the latter are not only associated with economic activities occurring in the United States but also with economic activities occurring in the home market, Commerce does not treat such commissions as CEP selling expenses, which are deducted from the U.S. price used to establish CEP. Instead, Commerce first adds U.S. commissions incurred outside the United States to the normal value of the respective home market sales and then grants home market commission offsets, if applicable, to the normal value of such home market sales. In granting commission offsets, Commerce accounts for home market indirect selling expenses associated with the selling activities for such home market sales as an adjustment to normal value. We note that, as for margin calculations, adding U.S. commissions to normal value has the same effect as deducting them from CEP. We also note that such U.S. commissions incurred outside the United States are still part of the CEP profit ratio calculation, which then becomes part of the CEP profit calculation that gets deducted from CEP when respondents can make a profit from U.S. commissions, regardless of whether they are incurred inside or outside of the United States. Moreover, we note that commission expenses for those home market sales, when incurred, get deducted from normal value. By granting a home market commission offset in the form of an additional adjustment to normal value when U.S. commission expenses for U.S. sales are incurred

[32] *See*, *e.g.*, *Certain Pasta from Italy: Final Results of Antidumping Duty Administrative Review; 2012-2013*, 80 FR 8604 (February 18, 2015) and accompanying memorandum from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Paul Piquado, Assistant Secretary for Enforcement and Compliance, entitled "Issues and Decision Memorandum for the Final Results of the 17th Antidumping Duty Administrative Review: Certain Pasta from Italy; 2012-2013," dated February 10, 2015 at 8-9 (where we stated that "{t}here are two types of commissions that are possible for U.S. sales, commissions that are incurred in the United States and commissions that are not incurred in the United States." We further stated that respondent's commissions, "which are incurred in the United States, are deducted from the respective prices with profit, in accordance with the statue.") and *Certain Steel Nails from the United Arab Emirates: Final Results of Antidumping Duty Administrative Review; 2011-2013*, 79 FR 78396 (December 30, 2014) and accompanying memorandum from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Paul Piquado, Assistant Secretary for Enforcement and Compliance, entitled "Certain Steel Nails from the United Arab Emirates: Issues and Decision Memorandum for the Final Results of Antidumping Duty Administrative Review; 2011-2013," dated December 22, 2014 at 16 (where we stated that "{p}ursuant to section 772(d)(1)(A) of the Act, our normal practice is to treat commissions incurred in the United States as CEP selling expenses...").

outside the United States, a more appropriate *apples-to-apples* comparison between two markets can be achieved. Such an offset captures the corresponding economic activities and associated expenses in the home market for the matching home market sales, while the commission expenses for U.S. sales are added to normal value. In this manner, the commission offsets properly account for such economic activities performed by respondents in the home market, thereby resulting in an *equitable* comparison between normal value and U.S. price.

When commission expenses are incurred in the United States, however, Commerce treats them as CEP expenses and deducts the expenses and allocated profit from the price used to establish CEP without providing a home market commission offset because such commissions are only associated with economic activities in the United States. Commerce's practice, therefore, is to provide a home market commission offset only against U.S. commission expenses incurred outside of the United States.

In light of 19 CFR 351.410(e), which addresses the situation where commissions occur in one market but not the other, Commerce's practice concerning the treatment of U.S. commissions, and the granting or denial of a home market commission offset is further demonstrated in the standard margin calculation program. In the standard margin program, the commission expenses on U.S. sales incurred in the United States are included in field CEPOTHER, whereas the commission expenses on U.S. sales incurred outside the United States are included in field USCOMM. When the commission expenses are incurred outside the United States on U.S. sales (*i.e.*, field USCOMM), Commerce's standard margin program has three sequential conditions to determine the granting or denial of home market commission offsets. First, when home market commission expenses (*i.e.*, field COMMDOL in the standard macros program), are greater than USCOMM, a home market commission offset is granted, which will increase normal value, and is calculated as the minimum of either U.S. indirect selling expenses (*i.e.*, field USINDCOMM in the

standard macros program) or the difference in COMMDOL and USCOMM (*i.e.*, home market commission expenses and the commission expenses incurred outside the United States).[33] Second, when USCOMM is greater than the home market commission expenses (*i.e.*, COMMDOL), a home market commission offset is granted, which will decrease normal value, and is calculated as the minimum of either the home market indirect selling expenses (*i.e.*, field ICOMMDOL in the standard macros program) or the difference in USCOMM and COMMDOL (*i.e.*, the commission expenses incurred outside the United States on U.S. sales and home market commission expenses). Third, if USCOMM and COMMDOL are the same, there is no commission offset that adjusts normal value.

If: (1) USCOMM, which represents the commission expenses incurred outside the United States on U.S. sales, is not zero; and (2) there are no home market commissions incurred, then the commission offsets are granted, pursuant to 19 CFR 351.410(e). Regarding U.S. commission expenses incurred outside the United States, there are corresponding economic activities and associated expenses in the home market for the matching home market sales where respondents may be entitled to home market commission offsets to reduce normal value. Alternatively, if: (1) USCOMM is zero; and (2) no home market commissions are incurred, then there are no commission offsets granted because the U.S. commissions incurred in the United States (*i.e.*, CEPOTHER) are treated as CEP selling expenses and are only related to economic activities that occurred in the United States. Thus, there are no corresponding economic activities in the home market for the matching home market sales, which are entitled to home market commission offsets to reduce normal value, as explained above.

[33] Commerce's standard margin calculation program demonstrates that commission offsets are the lesser of a) the home market indirect selling expenses or b) the difference between U.S. commission expenses incurred outside the United States and home market commission expenses by stating "ELSE IF USCOMM GT COMMDOL THEN DO; COMOFFSET = MIN (ICOMMDOL, (USCOMM-COMMDOL)."

We find that Commerce's standard margin calculation program, discussed above, is consistent with the intent of 19 CFR 351.410(e) to grant a home market commission offset for sales where commission expenses are incurred in one market but not the other. Further, Commerce's standard margin calculation program is also consistent with the intent of 19 CFR 351.410(e) to limit the amount of the offset to the lesser of a) the amount of the other selling expenses incurred in the one market or b) the commissions allowed in the other market when commission expenses are incurred in one market but not the other. We also find that, pursuant to section B.2.b.(2) of the SAA, a home market commission offset is granted only when U.S. commission expenses are incurred outside the United States to offset the expenses related to selling activities in the home market for the matching home market sales.

DISCUSSION OF COMMENTS

Revenue Capping

Summary of Issue

ABB's January 16, 2018, Comments

- ABB supports Commerce's findings in the Draft Remand Results, but argues that sufficient grounds exist for Commerce to apply adverse facts available to Hyundai in the final remand results.
- Commerce correctly determined to apply its standard revenue capping methodology to Hyundai's service-related revenues by capping reported revenue by the corresponding expense. The Court of International Trade (CIT) recently affirmed Commerce's capping methodology as applied to Hyosung.[34]
- Commerce's approach in the Draft Remand Results is consistent with its request that the respondents separately report revenues and related expenses in the subsequent third and fourth administrative reviews.
- Commerce's application of adverse facts available to all [ ] ([ ] out of [ ]) of Hyundai's U.S. sales is supported by substantial record evidence.[35] The U.S. Court of Appeals for the Federal Circuit has interpreted the language in 19 U.S.C. § 1677e(b) to

[34] *See* ABB's Comments at 3 citing *ABB Inc. v. United States*, 2017, CIT 143, Slip Op. 17-138, LEXIS 16-00054, 2017, (October 10, 2017) at *13-*14.
[35] *Id.* at 4.

require a respondent to demonstrate that it has "put forth its maximum efforts to investigate and obtain the requested information from its records."[36]

- Commerce correctly concluded that Hyundai failed to put forth its maximum effort to cooperate during this review by withholding requested information. That Commerce did not uncover documents reflecting separately negotiated revenues and related expenses until verification is demonstrative of Hyundai's failure to cooperate to the best of its ability during the review. This behavior easily satisfies the *Nippon Steel* standard for applying adverse facts available.
- The evidence Commerce discovered at verification illustrates that Hyundai has failed to cooperate in such a way as to undermine the reliability of its U.S. sales database in its entirety.[37]
- Commerce's application of partial adverse facts available to all [ ] of Hyundai's POR sales does not fully correct what is a systemic reporting issue that renders Hyundai's entire U.S. sales database (with the exception of [ ]) unreliable and unusable.[38]
- The assumption behind Commerce's [ ] adjustment to the gross unit price of each of Hyundai's unverified U.S. sales, is that those gross unit prices are overstated by the amount by which freight and other service-related revenues exceed the associated expenses. Commerce does not know whether this unreported profit on services is higher than the [ ] percent adjustment that it has made in the Draft Remand Results.
- Commerce's treatment of Hyundai's unreported service revenues is essentially the same in administrative reviews two through four, but while Hyundai received total adverse facts available of 60.81 percent in the third and fourth administrative reviews for its refusal to provide requested information and its failure to cooperate, Commerce is employing a methodology that assigns it only a 25.50 percent margin for the second administrative review.[39]
- The purpose of the adverse facts available provision of the statute is to "ensure that {a} party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully" and to deter a respondent from future uncooperative behavior.[40] By calculating a margin that is based on the actual information that Hyundai failed to provide during the second administrative review, Hyundai benefits from its failure to cooperate.[41]
- In the third and fourth administrative reviews, Commerce applied a total adverse facts available margin to Hyundai, finding that this was an appropriate rate to ensure that Hyundai did not benefit from its failure to cooperate and to ensure future cooperation. Thus, it would be entirely appropriate for Commerce to apply adverse facts available to Hyundai in the final remand results.
- Alternatively, if Commerce elects to continue to use the information gathered at verification, it may elect to assign an adverse facts available margin to each unverified U.S.

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[36] *Id.* at 4.
[37] *Id.* at 5.
[38] *Id.* at 6.
[39] *Id.*
[40] *Id.*, at 7 (citing *PAM, S.p.A. v. United States*, 31 CIT 1008 (2007)).
[41] *Id.*, at 7 (citing *Nan Ya Plastics Corporation. Ltd. v. United States*, 810 F.3d 1333, 1348 (Fed. Cir. 2016)).

sale reported, and to continue to assign the respective calculated margin to the [ ] sales verified by Commerce for which the overstatement to gross unit price is known.[42]

Hyundai's January 16, 2018, Comments

- The term service-related revenue is not defined in the statute, the regulations, or the antidumping questionnaire.
- Hyundai's understanding of the term service-related revenue during the second administrative review was based on the test that Commerce consistently applied to it during the original investigation, and the first and second administrative review. Under that test ("Original Test"), service-related revenue existed only if Hyundai was not required to provide a service under the terms of sale. Hyundai nevertheless provided the service for a separate amount.[43]
- During the review, Hyundai made perfectly clear that it was following Commerce's Original Test for reporting service-related revenue. In the second POR Final Results, Commerce confirmed that Hyundai had correctly understood Commerce's clarification of its instructions on calculating CEP.[44]
- In the Draft Remand Results, Commerce has abandoned the Original Test. Under the test applied in the Draft Remand Results ("New Test"), service-related revenue exists if certain sales documents identified revenue for the service, regardless of whether Hyundai was required to provide the service under the terms of sale.[45]
- Commerce is completely silent as to its change in interpretation of the term service-related revenue – from the Original Test consistently applied to Hyundai through the second POR Final Results to the New Test that it now seeks to apply on remand.[46]
- Commerce cannot now find failure by Hyundai to follow Commerce's instructions, where Commerce itself, having verified Hyundai's sales documents, found that "the record did not suggest {Hyundai} should have {reported separate revenues}."[47] Commerce has overlooked the fact that it never notified Hyundai during the review of any deficiency in its reported service-related revenue, nor that Commerce expressly found that Hyundai had correctly reported such revenue.
- Rather than provide Hyundai with an opportunity to submit information relevant to the New Test, Commerce has found that Hyundai was uncooperative and applied partial adverse facts available (AFA) because the information submitted during the second administrative review is allegedly not responsive to Commerce's New Test.[48]

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[42] *Id.* at 7.
[43] *See* Hyundai's Comments at 2 citing Issues and Decision Memorandum for the Final Determination of the Antidumping Duty Investigation of Large Power Transformers from the Republic of Korea, July 2, 2012, at 29–30 (Comment 4).
[44] *Id.* at 14.
[45] *Id.* at 2 – 3.
[46] *See* Hyundai's Comments at 12
[47] *Id.* at 15.
[48] *Id.* at 3.

- Commerce cannot hold Hyundai accountable, after the fact, for failing to provide information it never requested. Nor can Commerce hold Hyundai responsible for not remedying deficiencies that Commerce never identified.[49]
- None of the statutory requirements for applying AFA have been met.
- In the Draft Remand Results, Commerce has incorrectly interpreted various documents (in particular, internal communications that it mischaracterizes as "purchase orders") and incorrectly calculated Hyundai's allegedly "overstated" gross unit prices.[50]
- Commerce should re-open the record and request more information with respect to service-related revenues.[51]

Commerce's Position:

We disagree with ABB that Commerce should resort to *total* adverse facts available in this remand. Section 776(a) of the Tariff Act of 1930, as amended (the Act) provides that Commerce, subject to section 782(d) of the Act, will apply "facts otherwise available" if necessary information is not available on the record or an interested party: 1) withholds information that has been requested by Commerce; 2) fails to provide such information within the deadlines established, or in the form or manner requested by Commerce, 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. Additionally, section 776(b) of the Act provides that if Commerce finds that an interested party failed to cooperate by not acting to the best of its ability to comply with a request for information, Commerce may use an inference adverse to the interests of that party in selecting the facts otherwise available.

ABB argues that Commerce should apply total adverse facts available to Hyundai as it did in the subsequent administrative review and has preliminarily done in the most current administrative review, stating that Hyundai's failure to report service-related revenues undermines

[49] *Id.* at 3.
[50] *Id.* at 3 – 4.
[51] *Id*. at 4

"the reliability of its U.S. sale database in its entirety."[52] ABB reasons that because Hyundai's behavior "undermines the information it provided in its entirety," partial facts available is inappropriate.[53] ABB asserts that the application of partial adverse facts available to the majority of Hyundai's sales "does not fully correct what is a systemic reporting issue that renders Hyundai's entire U.S. database (with the exception of [ ]) unreliable and unusable.[54] However, Commerce does not agree that the entire U.S. database is now unreliable and unusable. During verification, Commerce reviewed and verified Hyundai's sales process, reconciled the reported sales values to Hyundai's accounting system, and examined a number of the reported sales expenses.[55] Based on our findings at verification, we do not believe that the entire reported U.S. database is unreliable and unusable. Rather, as discussed in our draft redetermination, record evidence indicates that Hyundai did not report service-related revenues, which would be capped by the related expenses.[56]

Additionally, as ABB noted,[57] [ ] of the sales examined by Commerce during verification did not contain any service-related revenues in excess of expenses and Commerce did not find any other discrepancies.[58] Given that Commerce verified [ ] and many of the other reported expenses and sales figures for both the U.S. and home market sales, we do not believe that the entire U.S. database is unreliable and unusable, and do not find that total adverse facts available is warranted.

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[52] *See* ABB's Comments at 5.
[53] *Id*.
[54] *Id*. at 6.
[55] *See* Memorandum to the File, "Verification of the Sales and Cost Responses of Hyundai Heavy Industries Co., Ltd., in the 2013/2014 Administrative Review of the Antidumping Duty Order on Large Power Transformers from the Republic of Korea," dated August 31, 2015 (Verification Report), at 8-22.
[56] *See* Draft Remand Redetermination at 11 – 14.
[57] *See* ABB's Comments at 6.
[58] See Verification Report at 17 – 18.

ABB also argues that Commerce's treatment of the unreported service-related revenues in this remand redetermination is essentially the same as in subsequent reviews, and that Hyundai is unreasonably benefitting from documentation obtained in the administrative review period which is the subject of this remand.[59] We disagree. Commerce modified its initial antidumping duty questionnaire in order to address the issue of service-related revenues and expenses and requested information from Hyundai regarding these issues in the 2014-2015 administrative review as a result of Commerce's evolving understanding of the fact pattern in this proceeding.[60] Additionally, as noted above, Commerce conducted verification of Hyundai and verified a significant portion of Hyundai's submissions to Commerce. As the fact pattern of this segment of the proceeding differs from the fact pattern of subsequent segments of the proceeding, we do not believe that the application of total adverse facts available is warranted. Similarly, we do not believe that the fact pattern in this administrative review leads us to assign an adverse facts available margin of 60.81 percent to all unverified U.S. sales, as ABB suggests.[61] Commerce verified the total quantity and value of the reported U.S. sales, as well as numerous sales expenses, during the verification.[62] Record evidence does not suggest that the remaining sales are unreliable and unusable. Therefore, Commerce finds that the application of a rate of 60.81 percent to all of the remaining U.S. sales is not warranted.

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[59] *See* ABB's Comments at 6.

[60] *See Large Power Transformers from the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2014-2015*, 82 FR 13432 (March 13, 2017) and accompanying Issues and Decision Memorandum (2014-2015 IDM) at 18. In the 2014-2015 IDM, Commerce noted that "Although we requested that Hyundai report separately service-related revenues (*e.g.*, freight, installation, and supervision) from the associated expenses in prior segments of this proceeding, we did not require Hyundai to do so in the previous segments because Hyundai stated that such services were required under the terms of sale and that these revenues were not separately invoiced to the customers. However, record evidence in the prior review shows that Hyundai's U.S. price could be inflated by the inclusion of service-related revenues, thereby affecting Commerce's ability to calculate an accurate antidumping margin. Given these concerns, at the onset of this instant review, we requested that Hyundai separately report such revenues and related expenses so that, per our practice, we could cap such revenues by the related expenses."

[61] *See* ABB's Comments at 7 – 8.

[62] *See* Verification Report at 8 – 22.

With respect to Hyundai, it states that it reported service-related revenues consistent with the methodology used in both the original investigation and the first administrative review.[63] However, Hyundai contends that Commerce applied a new methodology where "service-related revenue exists if certain sales documents identified revenue for the service, regardless of whether Hyundai was required to provide the service under the terms of sale."[64] More specifically, Hyundai argues that the original methodology required it to report service-related revenue only if Hyundai was required to provide a service under the terms of sale, but that the new methodology assumes that service-related revenue exists if certain sales documents identified revenue for the service, regardless of whether Hyundai was required to provide the service under the terms of sale.[65] Hyundai further claims that Commerce neither explained this alleged change in methodology nor provided Hyundai with an opportunity to submit information consistent with that change.[66] Hyundai asserts that the application of facts available in the Draft Remand Redetermination is contrary to law as Commerce is holding Hyundai accountable, after the fact, for failing to provide information that Commerce supposedly never requested, and for which Commerce did not afford Hyundai the opportunity to correct any deficiencies.[67] Additionally, Hyundai argues that Commerce mischaracterizes and misinterprets certain internal company documents as "purchase orders."[68] Hyundai advocates that Commerce should re-open the record and request information with respect to the service-related revenues.[69]

[63] *See* Hyundai's Comments at 2.
[64] *Id*. at 2 – 3.
[65] *Id*. at 5 – 6.
[66] *Id*. at 3.
[67] *Id*.
[68] *Id*. at 3 – 4.
[69] *Id*. at 4.

With respect to Hyundai's statements alleging a change in methodology, Commerce requested a voluntary remand specifically to examine this issue and its previous practice in this proceeding as Commerce's understanding of the information continues to evolve.[70] Commerce found this necessary considering the requirements of the statute. In antidumping duty administrative reviews, the statute requires Commerce to determine the amount of any antidumping duty that shall be applied to a respondent's entries which entered during the period of review.[71] To determine such antidumping duty, Commerce must establish the export price or constructed export price (*i.e.*, U.S. price) and normal value (*i.e.*, home market price).[72] The amount of the antidumping duty applied to a respondent's entries will be the amount by which normal value exceeds the export price or constructed export price.[73] However, in making this price comparison, the statute requires that several adjustments be made to the export price or constructed export price and normal value.[74]

Section 1677a(c) of the Act sets forth the adjustments that, if misreported by a respondent, may lead to export price and constructed export price being overstated.[75] The price used to establish export price or constructed export price shall be *increased* by: (1) the costs associated with placing the subject merchandise in a condition packed ready for shipment to the United States; (2) the amount of any import duties rebated or not collected by the country of exportation; and (3) the amount of any countervailing duty imposed on subject merchandise to offset an export subsidy.[76]

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[70] *See Remand Order* at 3.
[71] *See* 19 U.S.C. § 1675(a).
[72] *See* 19 U.S.C. § 1675(a)(2)(A)(i).
[73] *See* 19 U.S.C. § 1677a.
[74] *See* 19 U.S.C. § 1677a(c).
[75] *See* 19 U.S.C. § 1677a(c)-(d).
[76] *See* 19 U.S.C. § 1677a(c)(1).

With respect to service-related revenues, these are not included as adjustments to increase U.S. price. Based on the plain language of the law and Commerce's regulations, it has been Commerce's stated practice to decline to treat service-related revenue as an addition to U.S. price under section 1677a(c)(1) of the Act or as a price adjustment under 19 CFR 351.102(b)(38).[77] Instead, such service-related revenues are typically treated as an offset to the associated service-related expenses such as (but not limited to) movement expenses. Commerce will offset service-related expenses by service-related revenues, but will not increase U.S. price by service-related revenues that are in excess of the associated service-related expenses. In *Thai Pipe and Tube*, Commerce articulated this methodology, stating that Commerce "is following its normal practice by treating freight revenue as an offset to freight costs rather than as an addition to U.S. price where freight revenue exceeds freight expenses" and that "although we will offset freight expenses with freight revenue, where freight revenue earned by a respondent exceeds the freight charge incurred for the same type of activity, {Commerce} will cap freight revenue at the corresponding amount of freight charges incurred because it is inappropriate to increase the gross unit selling price for subject merchandise as a result of profit earned on the sale of services (*i.e.*, freight).[78]

Commerce's capping methodology is not dependent upon whether a respondent must provide the service under the terms of sale as Hyundai contends, but whether such services were provided and whether the revenue amounts collected for the provision of such services exceed the cost of those services. Neither is Commerce's capping methodology dependent upon whether the service-related expenses and revenues are separate line-items on an invoice to the unrelated

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[77] *See Certain Orange Juice from Brazil: Final Results of Antidumping Duty Administrative Review and Notice of Intent Not to Revoke Antidumping Duty Order in Part*, 75 FR 50999 (August 18, 2010), and accompanying Issues and Decision Memorandum at Comment 2.

[78] *See Circular Welded Carbon Steel Pipes and Tubes from Thailand*, 77 FR 61738 (October 11, 2012)(*Thai Pipe and Tube*), and accompanying Issues and Decision Memorandum at Comment 3.

customer. Although in *Thai Pipe and Tube*, Commerce examined sales contracts that contained separately negotiated charges to the customer,[79] Commerce's capping methodology, generally, may nevertheless be applied notwithstanding whether the amounts are specified in sales contracts with, or invoices to, the customer. If a respondent collects, as a portion of the final price to the customer, a portion of revenue which is dedicated to covering a service-related expense, and that service-related expense is less than the revenue set aside to cover the expense, then this is service-related revenue which is part of the material terms of sale and must be capped. Hyundai cannot prevent the application of Commerce's capping methodology based on a technicality concerning whether a respondent chooses to separately itemize service-related charges in sales contracts or invoices. Commerce's determination in this remand redetermination is not a change in methodology, but is instead an appropriate application of our capping methodology pursuant to the statute and past practice.

Hyundai states that Commerce's analysis relies on internal company communications, rather than "purchase orders" or other similar documentation, as Commerce stated in the Draft Remand Redetermination.[80] Hyundai is correct that Commerce, in the Draft Remand Redetermination, identified the purchase order as the document which contains information regarding service-related revenues and that this document does not always contain such information. However, the presence of the necessary information in inter-company documentation, rather than a purchase order or other communication with the unaffiliated U.S. customer, does not invalidate the information. Hyundai cites to SEQU [ ] in its comments and states that the purchase order to the unaffiliated customer contains a lump sum price.[81] Yet, the

[79] *Id*.
[80] *See* Hyundai's Comments at 24 - 28.
[81] *Id*. at 25.

contract between Hyundai USA and Hyundai contains separate service-related revenue figures.[82] For example, Sales Verification Exhibit (SVE) 15, at page 20, included in the Verification Report, shows a contract agreement between Hyundai and Hyundai USA, which contains an amount of [ ] for the LPT unit, and amounts for [ ], respectively, for a total of [ ].[83] The figures of [ ] are service-related revenues. While these figures do not appear on the final invoice to the customer,[84] the price charged to the final customer includes revenues set aside for the provision of certain services (*e.g.*, [ ]). Regardless of whether the final unaffiliated customer was invoiced with separate line-items for the provision of these services or as a lump sum, these values represent a portion of revenues from the gross unit price that are dedicated to covering the cost of the services provided. The amount by which the service-related revenues charged to the unaffiliated U.S. customer exceeded the associated expenses represents Hyundai's profit from the provision of these services. That amount must be eliminated from the dumping calculation pursuant to Commerce's capping methodology. Whether Hyundai's receipt of service-related revenue in excess of associated expenses appeared on inter-company documentation does not prevent the application of Commerce's capping methodology.

The same fact pattern exists for the other sales in question. For SEQU [ ], the revenues charged to the unaffiliated customer, which are intended to cover service-related expenses are listed in an email exchange between staff at Hyundai.[85] The fact that these are not on the invoice to the unaffiliated customer, or part of the purchase order, does not negate the fact that these are

[82] *Id*.
[83] *See* Verification Report at SVE 15, page 20.
[84] *Id*. at page 35.
[85] *See* Hyundai's Comments at 26.

revenues, collected by Hyundai from the unaffiliated customer and dedicated to cover service expenses, and which exceed those service expenses.

Hyundai states that Commerce did not inform Hyundai of any change in methodology and did not inform Hyundai of any deficiencies.[86] As explained above and in the Draft Remand Redetermination, Commerce requested that Hyundai report the sale price, discounts, rebates and all other revenues and expenses in the currencies in which they were earned or incurred.[87] Commerce also notified Hyundai that it expected to obtain information "with regard to actual and estimated costs and expenses" through December 31, 2014.[88] Commerce's instructions indicate that Hyundai should report actual and estimated expenses. Yet, Hyundai refused to provide the necessary information for Commerce to apply its capping methodology. A respondent has a statutory obligation to prepare an accurate and complete record in response to questions plainly asked by Commerce.[89] Furthermore, as Hyundai states, the issue of service-related revenues had been raised during the review period at issue and in previous review periods.[90] Commerce finds that Hyundai failed to cooperate to the best of its ability by not providing the information requested. Therefore, partial adverse facts available is warranted.

Hyundai also states that the margin calculation program is distorted because Commerce did not make adjustments to variables which were based on the sales price.[91] We are declining to make any of Hyundai's suggested changes as we are applying facts available and partial adverse facts available according to the methodology described in the Draft Remand Redetermination.

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[86] *Id*. at 8 – 12.
[87] *See* Draft Remand Redetermination at 14.
[88] *See* Letter from Commerce to Hyundai, "Supplemental Questionnaire for Sections B and C of Hyundai Heavy Industries and Hyundai Corporation USA's Responses to the Antidumping Duty Questionnaire," dated May 22, 2015, at page 6, question 1 for Section C.
[89] *See Fujian Lianfu Forestry Co., Ltd., v. United States*, 638 F. Supp. 2d 1325, 1340 (CIT 2009) (quoting *Tung Mung Dev. Co. v. United States*, 25 CIT 752, 758 (2001)).
[90] *See* Hyundai's Comments at 14 – 20.
[91] *Id*. at 28 – 32.

Thus, because the methodology employed by Commerce is an application of Facts Available, we are not making any changes.

U.S. Commission Expenses

Hyosung's January 16, 2018, Comments

- In Commerce's *Final Results* of this review, Commerce correctly found that Hyosung incurred commission expenses on U.S. sales outside the United States, prior to importation, and granted Hyosung a commission offset pursuant to 19 C.F.R. § 351.410(e).[92]
- Commerce requested a voluntary remand in this case in order to conform its treatment of commission offsets pursuant to the CIT's decision in Petitioner's appeal of the first administrative review. Hyosung disagrees with the CIT's treatment of the commission offset issue in the first administrative review appeal, and respectfully submits that Commerce's rationale in the first administrative review appeal, and its draft decision in the remand redetermination in this review, are contrary to the facts on the record and inconsistent with 19 C.F.R. § 410(e).[93]
- As was the case in the first administrative review, Commerce's draft remand redetermination was based on an impermissibly vague "scope of economic activities" test and disregards Hyosung's commercial reality, which should be the focus of where any commissions are incurred. Even if Commerce determines that Hyosung's commissions are incurred in the United States, these commissions still qualify for a commission offset because 19 C.F.R. § 410(e) does not turn on where the expense is incurred.[94]
- Commerce relied on the following factors in reversing its finding that the commission expenses were incurred outside the United States: (1) where sales agents are located at the time of commission agreement; (2) where and by what entity the corresponding commission payments were booked or made; and (3) when the commission payments were made during the normal course of business.[95]
- Commerce's new open-ended test overlooks the commercial reality surrounding Hyosung's relationship with its wholly-owned U.S. affiliate, HICO America. Assuming, *arguendo*, that where expenses were incurred is relevant at all, the proper inquiry turns on whether the expenses were incurred prior to importation.[96]
- Commerce's decision on remand rests on an impermissible interpretation of the law. Nothing in the statute, regulations, legislative history, or other policy materials distinguishes between commissions incurred "in the United States" versus those incurred on U.S. sales in the home market for purposes of the commission offset.

[92] *See* Hyosung's Comments at 1 citing Final Results Issues and Decision Memorandum at Comment 6.
[93] *Id*. at 2.
[94] *Id*. at 2.
[95] *Id*. at 2, and Draft Remand Results at 22-23.
[96] *Id*. at 2-3, and Draft Remand Results at 22.

- Commerce's draft remand results seek to draw an artificial line between CEP expenses and commissions included in the commission offset by highlighting that 19 C.F.R. § 351.410(e) includes commission expenses among the expenses to deduct from gross unit price when calculating CEP.[97]
- 19 C.F.R. § 351.410(e) does not distinguish between commissions paid on CEP sales depending on where the commission expense is incurred. Rather, the regulation unambiguously provides that Commerce will allow for a commission offset where commissions are paid in one market, but not the other, the precise scenario present here.[98]
- With respect to the two cases Commerce cites regarding Commerce's decision to accept or deny a commission offset, *Steel Nails from the UAE* and *Certain Pasta from Italy*, in both of those cases the question Commerce addressed was whether commissions paid in the United States should be deducted from gross unit price as a CEP expense.[99] Neither of these cases articulate a practice or rationale for declining to include a commission offset in the margin calculations based on where the commission was paid. Accordingly, Commerce should reconsider its draft remand redetermination and for the final version submitted to the CIT, should apply a commission offset for Hyosung, consistent with Commerce's regulations.[100]

Hyundai's January 16, 2018, Comments

- Commerce has reached the conclusion that a home-market commission offset is not warranted by applying a new, three-pronged test ("Three-Pronged Test"), which Hyundai believes is contrary to law and has appealed to the Court of Appeals for the Federal Circuit (CAFC).[101]
- Hyundai believes that neither Commerce's selective application of home-market commission offsets based on where US commissions were "incurred," nor the criteria selected by Commerce for determining where a commission was incurred are in accordance with law.[102]
- The geographic distinction made by the Department in deciding whether to grant a commission offset is not required by Section 772(d)(1)(A) or Section 773(a)(6)(C)(iii) of the Act, Uruguay Round Statement of Administrative Action ("SAA"), or Section 351.410(e) of Commerce's regulations.[103]
- Commerce has not properly applied its criteria in the Remand Determination to Hyundai's U.S. sales. To do so, Commerce must conduct a sale-by-sale analysis of each of the three

[97] *Id*. at 3, and Draft Remand Results at 15-19.
[98] *Id*. at 4.
[99] *Id*. (citing *Certain Steel Nails from the United Arab Emirates: Final Results of Antidumping Duty Administrative Review; 2011-2013*, 79 FR 78386 (Dec. 30, 2014), accompanying Issues and Decision Memorandum, at comment 5; *Certain Pasta from Italy: Final Results of Antidumping Duty Administrative Review; 2012-2013*, 80 FR 8604 (Feb. 18, 2015), accompanying Issues and Decision Memorandum, at comment 6).
[100] *Id*. at 5.
[101] Hyundai's Comments at 4.
[102] *Id.* at 33.
[103] *Id.* at 34.

criteria, which is not possible with the evidence currently on the record. In particular, the record lacks information regarding Hyundai's commissions on each of the three prongs of the test, such as the location of the commission agent in a particular sale. This information was not requested by Commerce during the review because its Three-Pronged Test had not yet been created.

- Commerce should reopen the record and issue a supplemental questionnaire to collect information regarding the New Test for service-related revenue and Three-Pronged Test for home-market commission offsets. Given that both of these tests are new, and given that Commerce did not request the information needed to apply either of them during the second POR, the statute requires Commerce to do so.[104]

ABB's January 16, 2018, Comments

- The Draft Remand Results findings with respect to the treatment of U.S. commissions are supported by the record and are lawful. Commerce's practice regarding the treatment of U.S. commissions was recently affirmed by the CIT.[105] The Court concluded that Commerce's methodology for adjusting U.S. price for commissions incurred in the United States is in accordance with law and, second, the CIT rejected the respondents' arguments that Commerce unfairly introduced a "new test" in the remand proceeding to determine whether those commissions were incurred in the United States.[106] The CIT also affirmed Commerce's decision, pursuant to the statute and regulations, to decline to grant a home market commission offset when U.S. commissions are incurred in the United States.[107] Commerce's explanation in the Draft Remand Results are consistent with its findings affirmed by the CIT in the appeal of the first administrative review.
- Commerce's factual findings are also consistent with the facts of the first administrative review that demonstrated respondents' incurred commissions in the United States.
- The facts underlying the first administrative review are essentially the same as the facts in this second administrative review. Specifically, Commerce correctly concluded that both respondents incurred commissions in the United States, such that those commissions are deducted from U.S. price and no home market commission offset is granted.[108] Record evidence supports the conclusion that both Hyundai and Hyosung incurred commissions in the United States.
- Hyundai reported that commissions are [ ] which usually does not occur until after the LPT is delivered to the customer's site and all required on-site services (*e.g.*, installation) have been performed."[109]

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[104] *Id.* at 4.
[105] ABB's Comments at 8 citing *ABB Inc. v. United States*, 2017, CIT 143, Slip Op. 17-138, 16-00054, 2017, (October 10, 2017).
[106] *Id.* at 8.
[107] *Id.*
[108] *Id.* at 9.
[109] *Id.*

- The purchase orders for Hyosung's constructed export price sales are between [

  ] Hyosung reported that HICO America provided a "High" level of "Sales and Marketing" functions to the unaffiliated U.S. customers, thereby indicating that the extensive commercial activity associated with incurring the commissions occurred in the United States.[110]

Commerce's Position:

We disagree with Hyosung and Hyundai that the location of where the commission expenses were incurred is irrelevant, that determining where the commissions are incurred is "an artificial line between CEP expenses and commissions included in the commission offset,"[111] or that the correct analysis is to examine whether the commission expenses were incurred prior to importation. As Commerce stated in the remand redetermination in the previous review (and as noted above): "the Department's practice has been to distinguish two types of commissions paid on U.S. sales: (i) commissions incurred inside the United States, for which the Department treats as CEP expenses and deducts such commission expenses and the related profit from respective U.S. prices used to establish CEP, and (ii) commissions incurred outside the United States, for which the Department adds such commission expenses to normal value and offsets differences in home market commission expenses and such U.S. commission expenses incurred outside the United States, if any.[112] That is, when a commission expense is incurred outside the United States, for a sale to the United States, Commerce may make an adjustment (upward or downward)

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[110] *Id.* at 10.

[111] *See* Hyosung's Comments at 3.

[112] *See*, *e.g.*, Issues and Decision Memorandum for *Certain Pasta from Italy* at 8-9 (where we stated that "{t}here are two types of commissions that are possible for U.S. sales, commissions that are incurred in the United States and commissions that are not incurred in the United States." We further stated that respondent's commissions, "which are incurred in the United States, are deducted from the respective prices with profit, in accordance with the statute.") and Issues and Decision Memorandum for *Certain Steel Nails from the United Arab Emirates* at 16 (where we stated that "{p}ursuant to section 772(d)(1)(A) of the Act, our normal practice is to treat commissions incurred in the United States as CEP selling expenses..."); *see also* Commerce's macro program part 15-B where it demonstrates that for CEP sales, USCOMM (*i.e.*, the commission expenses incurred outside the United States on US sales) becomes added to normal value while COMOFFSET (*i.e.*, home market commission offset) becomes deducted from normal value by stating "NV = FUPDOL - COMOFFSET&SUFFIX + USCOMM&SUFFIX + USDIRSELL&SUFFIX - CEPOFFSET&SUFFIX."

to normal value based on the circumstance of sale provisions in 19 U.S.C. § 1677b(a)(6)(C)(iii) and 19 CFR 351.410(e). Because commissions incurred outside the United States are not associated with economic activities occurring in the United States, but with economic activities occurring in the home market, the Department does not treat them as CEP selling expenses, which are deducted from the U.S. price used to establish CEP. Instead, the Department first adds U.S. commissions incurred outside the United States to the normal value of the respective home market sales and then grants home market commission offsets, if applicable, to the normal value of such home market sales.[113] In granting commission offsets, the Department accounts for home market indirect selling expenses associated with the selling activities for such home market sales as an adjustment to normal value."[114]

As stated in the *2012 – 2013 Remand,* although 19 CFR 351.410(e) does not directly address the geographic distinction as Hyosung argued, section 773(a)(6)(C)(iii) of the Act, which is the legal basis for the regulation, requires Commerce to make adjustments to normal value based on other differences in the circumstances of sale. We find that our treatment of U.S. commissions and the granting or denial of commission offsets to normal value properly accounts for such differences in the circumstances of sale, pursuant to the intent of section 773(a)(6)(C)(iii) of the Act. In this regard, we find that our practice regarding commission offsets is consistent with section 773(a) of the Act, particularly in light of the fact that section 772 of the Act contemplates such a geographic distinction with respect to commissions incurred inside the United States. Accordingly, we find that our interpretation of the language of the Act is consistent with the intent of section 772(d) and 773(a) of the Act, 19 CFR 351.402(b), and the SAA's language regarding

[113] *See* Commerce's macro program part 15-B.
[114] *See* Final Results of Redetermination Pursuant to Court Remand, *ABB INC. v. United States,* Court No. 15-00108, Slip Op. 16-95 (CIT, October 7, 2016) (*2012 – 2013 Remand*) at 29 – 30.

section 772(d) of the Act, thereby making a fair and equitable comparison between normal value and U.S. price through the granting of home market commission offsets when commissions on U.S. sales are incurred outside the United States while denying such offsets when commissions on U.S. sales are incurred inside the United States, because such commissions incurred in the United States are treated as CEP selling expenses, pursuant to section 772(d) of the Act.[115]

We disagree with Hyosung that the proper inquiry turns on whether the expenses were incurred prior to importation. 19 CFR 351.402(b) states that Commerce, in establishing CEP under section 772(d) of the Act, 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. Thus, according to 19 CFR 351.402(b), whether the expenses were incurred prior to importation is not the controlling factor. Additionally, the SAA makes clear the distinction between commissions incurred on U.S. sales in the United States, and those incurred on the same sales but outside of the United States, by noting that Commerce will deduct direct expenses incurred in the United States in calculating CEP while direct expenses and assumptions of expenses incurred in the domestic market on sales to an affiliated importer in the United States form part of a circumstance of sale adjustment.[116] The SAA thus limits the circumstances of sale adjustments to direct expenses and assumptions of expenses incurred in the foreign country on sales to the affiliated importer, regardless of when these expenses are incurred.

Respondents argue that 19 CFR 351.410(e) states unambiguously that the Department will grant a commission offset, regardless of where the commission expense was incurred, and that Commerce's arguments pertain solely to CEP expenses that do not affect the commission offset.[117] However, 19 CFR 351.410(e) does not govern the calculation of CEP but of normal value, and as

[115] *Id*. at 36 – 37.
[116] *See* SAA at 828, *reprinted in* 1994 U.S.C.C.A.N. at 4167.
[117] *See* Hyosung's Comments at 3 – 4, Hyundai's Comments at 33 – 36.

noted above, while 19 CFR 351.410(e) does not make a geographic distinction, we believe that the practice of denying commission offsets when a U.S. commission is incurred inside of the United States is consistent with the statute with respect to the CEP calculation.

With respect to Hyundai's arguments that the Department should re-open the record, we have already explained above that Hyundai's submissions are deficient and Commerce has already afforded Hyundai numerous opportunities to provide information regarding U.S. commissions. We, therefore, do not believe that re-opening the record will provide any information that will aid in our analysis. Based on the information currently on the record, we believe it is proper to find that Hyundai is not entitled to a commission offset.

FINAL RESULTS OF REDETERMINATION

In accordance with the *Remand Order*, Commerce has reconsidered the record evidence, and recalculated the dumping margins for Hyosung and Hyundai, respectively. Based on its analysis, Commerce: 1) clarified the legal and factual basis for our capping methodology, and our legal and factual basis for facts available and adverse facts available; 2) further explained Commerce's treatment of Hyundai's failure to report service-related revenues; 3) clarified the legal and factual basis of the granting or denial of the commission offsets; 4) further explained Commerce's treatment of the respondents' U.S. commissions and denial of the commission offsets based on the record evidence; and 5) calculated the revised dumping margins for Hyosung and Hyundai. The weighted-average dumping margins for Hyosung and Hyundai for the period of

review, August 1, 2013, through July 31, 2014, for large power transformers from the Republic of Korea resulting from Commerce's modified calculations pursuant to this remand are 8.74 percent and 25.51 percent, respectively.[118]

2/7/2018

X 

Signed by: GARY TAVERMAN

Gary Taverman
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations,
performing the non-exclusive functions and duties of the
Assistant Secretary for Enforcement and Compliance

[118] *See* Hyosung's Draft Remand Analysis Memorandum; *see also* Hyundai's Draft Remand Analysis Memorandum.