



A-201-839  
Investigation  
Public Document  
AD/CVD/O2: BCS

MEMORANDUM TO: Paul Piquado  
Assistant Secretary  
for Import Administration

FROM: Gary Taverman   
Acting Deputy Assistant Secretary  
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Antidumping Duty  
Investigation of Bottom Mount Refrigerator-Freezers from Mexico

### Summary

We have analyzed the comments of the interested parties in the antidumping duty investigation of bottom mount refrigerator-freezers (bottom mount refrigerators) from Mexico. As a result of this analysis and/or based on our findings at verification, we have made changes to the margin calculations for the four respondents in this case: Electrolux Home Products, Corp. NV/Electrolux Home Products De Mexico, S.A. de C.V. (Electrolux), LG Electronics Monterrey Mexico, S.A. de C.V. (LGEMM), Controladora Mabe, S.A. de C.V./Mabe, S.A. de C.V. (Mabe), and Samsung Electronics Mexico, S.A. de C.V. (Samsung). We recommend that you approve the positions we have developed in the "Discussion of the Issues" section of this memorandum. Below is the complete list of the issues in this investigation on which we received comments from parties.

### General Issues

1. Targeted Dumping
2. Zeroing in Average-to-Transaction Comparisons

### Company-Specific Issues

#### LGEMM

3. Application of MNC Provision<sup>1</sup>

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<sup>1</sup> Based on the application of the MNC Provision to LGEMM in the Preliminary Determination, the Department relied on sales of bottom mount refrigerators produced and sold by LGEMM's Korean affiliate in Korea as the basis for calculating NV. In its case brief for this investigation, the petitioner included a summary of some of its arguments relating to Korean product control number (CONNUM) coding and Korean home market sales rebates, and LGEMM summarized its rebuttal to those comments in its rebuttal brief. These issues and others related to Korean home market sales and cost of production (COP), and the Department's position with respect to each of them, are discussed in detail in "Issues and Decision Memorandum for the Antidumping Duty Investigation of Bottom Mount Refrigerator Freezers from the Republic of Korea" (Korea Decision Memo), which is dated concurrently with this memorandum



4. Lump Sum and Sell-Out Rebates on U.S. Sales
5. Non-Product-Specific Accrual Rebates on U.S. Sales
6. Warehouse-to-Customer U.S. Inland Freight Expenses
7. Billing Adjustments on U.S. Sales
8. Interest Rate for U.S. Inventory Carrying Costs
9. Payment Dates on Certain U.S. Sales
10. Payment Dates on Certain Canadian Sales
11. Lump Sum and Sell-Out Rebates on Canadian Sales
12. Direct Advertising Expense Ratio for Canadian Sales
13. Conversion Cost Allocation Error
14. Research and Development Costs
15. Global Costs
16. Affiliated Party Input Purchases

#### Samsung

17. Corrections Presented at Start of Sales Verifications
18. U.S. Rebates
19. CEP Offset
20. The Denominator for Certain Selling Expense Ratios
21. U.S. Indirect Selling Expenses
22. Classification of Certain Costs as Packaging or Packing
23. Treatment of Payments for Defective Merchandise
24. Unreported Bank Charges
25. Comparison Market Viability
26. Calculation of CV Selling Expenses and Profit
27. Research and Development Costs
28. Certain Affiliated Party Purchases
29. Affiliated Party Compressor Purchases
30. Erroneously Reported Input Quantities
31. General and Administrative Expense Ratio
32. Interest Expense Offset
33. Understatement of Input Freight Costs
34. Critical Circumstances

#### Mabe

35. Costs Excluded from Cost of Production
36. Fees Related to Agreements Between Mabe and GEA
37. U.S. Indirect Selling Expenses
38. U.S. Rebates
39. U.S. Advertising Expenses

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and incorporated herein by reference.

- 40. Cost Verification Corrections
- 41. Home Market Rebate Identified at Verification

### Electrolux

- 42. Verification Findings

#### Background

On November 2, 2011, the Department of Commerce (the Department) published the preliminary determination in the less-than-fair-value (LTFV) investigation of refrigerators from Mexico. See Notice of Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Affirmative Critical Circumstances Determination: Bottom Mount Combination Refrigerator-Freezers from Mexico, 76 FR 67688 (Nov. 2, 2011) (Preliminary Determination). The petitioner<sup>2</sup> and the four respondents requested a hearing, which was held at the Department on February 24, 2012. The period of investigation (POI) is January 1, 2010, through December 31, 2010.

We invited parties to comment on the preliminary determination. We received comments from the petitioner and the three of the four respondents.<sup>3</sup> Based on our analysis of the comments received, as well as our findings at verification, we have changed the weighted-average margins from those presented in the preliminary determination.

#### Margin Calculations

We calculated export price (EP), constructed export price (CEP), and normal value (NV) using the same methodology stated in the preliminary determination, except as follows for each respondent below.

#### LGEMM

We revised the reported U.S. and Canadian third-country market sales data, where appropriate, to take into account our findings from the sales verifications. See revised sales databases submitted on February 15, 2012. We made additional revisions to the reported U.S. and comparison-market sales and cost data as noted below:

- We included restocking fees collected by LGEMM's U.S. sales affiliate, LG Electronics USA, Inc. (LGEUS), and reported at verification, as direct selling expenses, where appropriate.
- We adjusted LGEMM's Canadian sales prices to include freight revenue collected by LGEMM's Canadian sales affiliate, LG Electronics Canada, Inc. (LGECI), and reported at verification.

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<sup>2</sup> The petitioner in this investigation is Whirlpool Corporation.

<sup>3</sup> Electrolux did not submit a case or rebuttal brief.

- We included restocking fees collected by LGECI as direct selling expenses, where appropriate.
- We treated flooring fees incurred on LGEMM's U.S. and Canadian sales and discussed below in Comment 9 and Comment 10 as direct selling expenses, where appropriate.
- We recalculated lump sum/sell-out rebates on U.S. sales, as discussed below in Comment 4.
- We excluded non-product-specific accrual rebates on U.S. sales, as discussed below in Comment 5.
- We corrected the rebate amounts reported in error for certain U.S. OEM sales, as identified at verification.
- We recalculated U.S. warehouse-to-customer freight, as discussed below in Comment 6.
- We reclassified freight expenses incurred in both the U.S. and Canadian markets for returned merchandise as indirect selling expenses (ISEs), as discussed below in Comment 6.
- We revised the reported payment dates for U.S. and Canadian sales involving flooring fees, as discussed below in Comment 9 and Comment 10.
- We reclassified certain advertising expenses incurred in the Canadian market by LGECI as ISEs and recalculated LGECI's direct advertising and ISE ratios, as discussed below in Comment 12.
- We excluded from the direct selling expenses deducted from the calculation of NV, an amount associated with the loss on LGECI's sales of returned merchandise which was included in the reported warranty expenses for LGEMM's Canadian sales.
- We recalculated imputed credit expenses for U.S. and Canadian sales to account for revised payment dates, as noted above, and to ensure that the expense was calculated using the appropriate price base.
- As discussed in Comment 3, we applied the MNC Provision to LGEMM and, as a result, relied on Korean home market sales made by LGEMM's affiliate LG Electronics, Inc. (LGE) as the basis for comparison to LGEMM's U.S. sales. We made the same adjustments to the calculations of LGE's home market sales and COP as those discussed in the Korea Decision Memo, which is incorporated herein by reference.
- We recalculated LGEMM's inventory carrying costs incurred on U.S. and Canadian sales to reflect the revisions made to cost of manufacturing (COM), detailed below.

For further details, see Memorandum to the The File entitled "Final Determination Margin Calculation for LG Electronics Monterrey Mexico, S.A. de C.V. (LGEMM)," dated March 16,

2012 (LGEMM Calculation Memo). This memorandum also includes details of the adjustments made to LGE's Korean home market sales and COP data.

- LGEMM made an input error to standard processing times used to allocate the conversion costs for certain products. We adjusted the conversion costs for these products using the correct standard processing times. See Comment 13 below.
- LGE performed research and development (R&D) activities that benefited LGEMM during the POI. We adjusted LGEMM's reported costs to include an allocated portion of R&D expenses incurred by LGE. See Comment 14 below.
- LGE incurred global costs on behalf of LGEMM during the POI but, these costs were not recorded by LGEMM. We adjusted LGEMM's reported costs to include the global costs incurred by LGE on behalf of LGEMM. See Comment 15 below.
- Based on the review of LGEMM's transactions with affiliated parties in accordance with section 773(f)(2) of the Tariff Act of 1930, as amended (the Act) (the transactions disregarded rule), we increased LGEMM's reported COM to reflect market prices. See Comment 16 below.
- We adjusted LGEMM's reported financial expense rate calculation to include net foreign exchange gains and net losses on derivatives. We also revised the cost of goods sold (COGS) adjustment factor that LGEMM relied on to extrapolate the consolidated scrap offsets and packing expenses.

For further details, see Memorandum entitled "Cost of Production and Constructed Value Calculation Adjustments for the Final Determination--LG Electronics Monterrey Mexico, S.A. de C.V. and LG Electronics USA, Inc.", dated March 16, 2012 (LGEMM Cost Calculation Memo).

### Samsung

We revised the reported U.S. sales data, where appropriate, to take into account our findings from the sales verifications. See revised sales database submitted on February 14, 2012. We made additional revisions to the reported U.S. sales and cost data as noted below:

- We granted Samsung a CEP offset, based upon further consideration of the record and interested party comments. See Comment 19.
- We calculated both advertising and warranty expenses on a gross price basis, as opposed to a net price basis, based on verification findings. See Comment 20.
- We recalculated inventory carrying costs incurred on U.S. sales to reflect the revisions made to COM, detailed below.

For further details, see Memorandum to the The File entitled “Final Determination Margin Calculation for Samsung Electronics Mexico S.A. de C.V. (SEM),” dated March 16, 2012 (Samsung Calculation Memo).

- We increased Samsung’s reported financial expense rate calculation to disallow interest income attributable to short-term receivables. See Comment 32.
- We increased Samsung’s reported general and administrative (G&A) expense rate calculation to disallow an income offset for the reversal of a provision which was not related to the current period. See Comment 31.
- We increased Samsung’s reported costs to include materials-related freight costs. See Comment 33.
- We increased Samsung’s reported costs to reflect the portion of R&D costs incurred by Samsung’s parent company, Samsung Electronics Co., Ltd. (SEC), on Samsung’s behalf which had not been included in Samsung’s reported costs. See Comment 27.
- Based on the review of Samsung’s transactions with affiliated parties, in accordance with section 773(f)(2) of the Act (the transactions disregarded rule), we increased Samsung’s reported costs to reflect arm’s-length prices. See Comment 28 and Comment 30, Comment 32, and Comment 33.
- We calculated constructed value (CV) selling expenses and profit based on the weighted average of the selling expenses incurred and profit realized by Mabe and Electrolux in their respective comparison markets, under section 773(e)(2)(B)(iii) of the Act. See Comment 26.

For further details, see Memorandum entitled “Cost of Production and Construced Value Calculation Adjustments for the Final Detemination – Samsung Mexico Electronics S.A. de C.V.,” dated March 16, 2012.

### Mabe

We revised the reported comparison-market sales data, where appropriate, to take into account our findings from the comparison-market sales verification. See the revised home market sales database submitted on February 9, 2012. We made additional revisions to the reported U.S. and comparison-market sales and cost data as noted below:

- We used the U.S. rebate data as revised in GEA’s November 18, 2011, second supplemental questionnaire response (SQR2).<sup>4</sup> See Comment 38.

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<sup>4</sup> GEA is an operating division of General Electric Company (GE).

- We used the U.S. ISE ratio as reported in GEA's September 26, 2011, supplemental questionnaire response (SQR1), revised based on verification findings. See Comment 37.
- We removed non-U.S. sales from the U.S. sales database, based on verification findings.
- We removed returned sales from the U.S. sales database, based on verification findings.
- We revised U.S. brokerage expenses and U.S. duties, based on verification findings.
- We incorporated into the U.S. sales database the transaction-specific values for sales campaigns and promotions (SC&P) and local area advertising (LAA) costs submitted in the SQR2. We treated SC&P expenses as rebates, and LAA expenses as direct advertising expenses. See Comment 39.
- We incorporated certain employee sales into the comparison-market sales database, and conducted the arm's-length test on them.
- We added a rebate field (REBATE2H) to Mabe's comparison market sales database, based on verification findings, and included this rebate in the calculation of NV. See Comment 41.
- We recalculated home market ISEs by applying the ISE ratio, as revised at verification, to the gross unit price net of discounts.
- We recalculated home market credit expenses to reflect the correct credit period.
- We recalculated inventory carrying costs incurred in Mexico on U.S. and home market sales to reflect the revisions made to COM, detailed below.

For further details, see Memorandum to The File entitled "Final Determination Margin Calculation for Controladora Mabe S.A. de C.V., Mabe S.A. de C.V., and Leiser S. de R.L. (collectively, Mabe)," dated March 16, 2012.

- We revised Mabe's reported COM to include the depreciation and amortization expenses for GEA models included within each CONNUM, corrected the fixed overhead (FOH) variance amount, and incorporated certain corrections presented at the cost verification. See Comment 35 and Comment 40.
- We revised Mabe's G&A expense rate calculation to ensure that any reclassification adjustments between G&A and FOH costs were denominated in the proper currency between Mexican pesos and U.S. dollars. We also included in the G&A expenses the expenses incurred for cancelled projects, fees associated with the technical support and patent license agreement, and fees associated with the purchasing services agreement. See Comment 36. In addition, we increased the COGS used as the denominator in the calculation to include the increase in COM for the expenses noted in the adjustments

above.

- We revised Mabe’s financial expense rate to exclude interest income earned from long-term sources.

For further details, see Memorandum to Neal M. Halper, Director of Office of Accounting, entitled “Cost of Production and Constructed Value Calculation Adjustments for the Final Determination - Controladora Mabe S.A. de C.V., Mabe S.A. de C.V., and Leiser S. de R.L.,” dated March 16, 2012 (Mabe Cost Calculation Memo).

### Electrolux

We revised the reported U.S. and comparison-market sales data, where appropriate, to take into account our findings from the sales verification, including the items discussed in Comment 42. See revised sales databases submitted on February 13, 2012. We made additional revisions as noted below:

- We removed the canceled sales we verified were included in the U.S. and comparison-market sales databases.
- We revised the reported U.S. inventory carrying costs based on our verification findings.

We made no changes to Electrolux’s reported cost data based on our verification findings.

For further details, see Memorandum to the File entitled “Final Determination Margin Calculation for Electrolux Home Products, Corp. N.V./Electrolux Home Products De Mexico, S.A. de C.V. (collectively “Electrolux”),” dated March 16, 2012 (Electrolux Calculation Memo).

### Discussion of the Issues

#### I. General Issues

##### Comment 1: Targeted Dumping

Prior to the Preliminary Determination, the petitioner alleged that targeted dumping existed with respect to Samsung, LGEMM, and Electrolux, and asserted that the Department should apply the average-to-transaction methodology in calculating the margins for these respondents pursuant to section 777A(d)(1)(B) of the Act. In each of these allegations, the petitioner asserted that there are patterns of U.S. sales prices for comparable merchandise that differ significantly among time periods. We conducted time-period targeted dumping analyses for Samsung, LGEMM, and Electrolux using the methodology we adopted in Certain Steel Nails from the United Arab Emirates: Notice of Final Determination of Sales at Not Less Than Fair Value, 73 FR 33985 (June 16, 2008) (UAE Nails), and Certain Steel Nails from the People’s Republic of China: Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances, 73 FR 33977 (June 16, 2008) (PRC Nails) (collectively Nails), and more recently

articulated in Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From Indonesia: Final Determination of Sales at Less Than Fair Value, 75 FR 59223 (September 27, 2010) and accompanying Issues and Decision Memorandum at Comment 1 (Coated Paper), and Multilayered Wood Flooring From the People’s Republic of China: Final Determination of Sales at Less Than Fair Value, 76 FR 64318 (October 18, 2011) (Wood Flooring) and accompanying Issues and Decision Memorandum at Comment 4. Our methodology is discussed in more detail in the Preliminary Determination at 67691-92 and the Department’s memoranda entitled “Preliminary Determination Margin Calculation for Electrolux Home Products, Corp. N.V. and Electrolux Home Products De Mexico, S.A de C.V.” (Electrolux Preliminary Calculation Memo); “Preliminary Determination Margin Calculation for LG Electronics Monterrey Mexico, S.A. de C.V.” (LGEMM Preliminary Calculation Memo); and “Preliminary Determination Margin Calculation for Samsung Electronics Mexico, S.A. de C.V.” (Samsung Preliminary Calculation Memo), dated October 26, 2011.

We did not find a pattern of prices that differed significantly for certain time periods pursuant to section 777A(d)(1)(B) of the Act for Electrolux, therefore we applied the standard average-to-average methodology in the Preliminary Determination. For Samsung Mexico, although we found a pattern of prices that differed significantly for certain time periods, we found that these differences could be taken into account using the average-to-average methodology because we did not find a significant difference between the margin calculated under the average-to-transaction methodology and the margin calculated under the average-to-average methodology. Therefore, we applied the standard average-to-average methodology for Samsung. For LGEMM, we found both a pattern of prices that differed significantly for certain time periods and that these differences could not be taken into account using the average-to-average methodology. Accordingly, we applied the average-to-transaction methodology to all U.S. sales made by LGEMM in the Preliminary Determination.

Both LGEMM and Samsung objected to the bases of the petitioner’s targeted dumping allegations, and the application of the Department’s targeted dumping methodology (*i.e.*, the Nails test) in the preliminary determination. The petitioner defended its allegations and the Department’s application of the Nails methodology. Electrolux did not comment on this issue. The respective arguments are outlined below.

*a) Basis for the Targeted Dumping Allegations and the Application of Time Period Targeted Dumping Analysis*

LGEMM and Samsung assert that, when a targeted dumping allegation is made with respect to a specific time period, the domestic party has an obligation to explain whether it is appropriate to apply the targeted dumping price analysis to the specific time period alleged by the domestic party. Both parties cite the Preamble to the Department’s Regulations which states that the domestic industry has the “intimate knowledge of regional markets, types of customers, and the effect of specific time periods on pricing in the U.S. market in general. Without the assistance of the domestic industry, the Department would be unable to focus appropriately any analysis of targeted dumping. For example, the Department would not know what regions may be targeted for a particular product, or what time periods are most significant and can impact prices in the U.S.

market.”<sup>5</sup> Therefore, they contend, it is incumbent upon the domestic party to fully justify its selection of the appropriate basis for its targeted dumping allegation.

In this instance, Samsung argues that the petitioner is obliged to address specific bases for its targeted dumping allegation, such as why the alleged targeted period, the fourth quarter of 2010, constituted a targeted period, and how the pricing strategy employed during the alleged targeted period differs from the pricing strategy employed during the rest of the POI. Samsung notes that the petitioner has claimed that targeting occurred only during three holiday promotion periods - Columbus Day, Veterans Day and “Black Friday” (the day after Thanksgiving), but it has alleged targeted dumping for the entire fourth quarter of the POI. Without any other support for its time-period-based targeted dumping allegation, Samsung contends that the petitioner’s allegation for the fourth quarter must be rejected.

LGEMM notes the variety of targeted time periods alleged by the petitioner in its separate allegations against the respondents in Mexico and Korea (i.e., the last 13 weeks of the POI for LGEMM,<sup>6</sup> the fourth quarter of the POI for LGE, Samsung,<sup>7</sup> and Samsung Korea, but another period for Electrolux and for its earlier allegations against LGE and the Samsung companies). LGEMM asserts that the petitioner has failed to demonstrate a nexus between sale promotions, such as those for Black Friday, and targeted dumping. Rather, LGEMM continues, the petitioner appears to have based its time period allegations on whatever period passes the Nails test for each respondent. LGEMM concludes that such an arbitrary basis for establishing the time periods for a targeted dumping analysis fails to meet the statutory and regulatory standard.

Samsung argues that, as the petitioner has repeatedly insisted that targeted dumping has occurred during holiday promotion periods, the Department should consider the petitioner’s allegation with respect to those specific holiday periods, rather than the entire calendar quarter alleged by the petitioner. Because the petitioner has failed to make its targeted dumping allegation consistent with its arguments concerning holiday period pricing, Samsung asserts that the Department should reject the petitioner’s calendar quarter allegation as unsupported by the commercial pricing practices in the industry.

Notwithstanding the above arguments, Samsung conducted its own analysis using the Nails test as applied to the three-day holiday period covering the seven U.S. holidays during which Samsung typically promotes at least some of its bottom mount refrigerators. Samsung included its analysis in its case brief, comparing all sales made during each of these holidays as a single targeted period to sales made during the rest of the POI. According to Samsung’s analysis, the Nails test did not demonstrate targeted dumping for the holiday periods. Its pricing analysis reveals a relatively small statistical

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<sup>5</sup> See Preamble, Antidumping Duties; Countervailing Duties; Final Rule, 62 FR 27296, 29374 ( May 19, 1997) (Preamble).

<sup>6</sup> For purposes of this discussion, the alleged targeted period for LGEMM may also be referred to as the fourth quarter of 2010.

<sup>7</sup> On December 5, 2011, the petitioner revised its targeted dumping allegation with respect to Samsung to reflect the fourth quarter of the POI, after taking into account revisions made to Samsung’s reported U.S. sales data in response to the Department’s November 2011 supplemental questionnaire. The allegation analyzed in the Preliminary Determination focused on specific months during the POI, for which the petitioner had previously alleged targeted dumping.

deviation in prices, which Samsung states can be explained by factors that have nothing to do with targeting. Moreover, Samsung notes that its total sales volume during the holiday promotion period disproves the petitioner's contention that Samsung's "targeted" holiday promotions generate a disproportionate percentage of total annual sales.

Samsung also conducted its own analysis based on weekly time periods centered around holiday or weekend promotions. This analysis too, according to Samsung, did not demonstrate targeted dumping based on the Nails test. Finally, Samsung conducted an additional targeted dumping analysis using the Nails test based on the petitioner's post-preliminary determination allegation, using the fourth quarter of 2010 as the time period. Again, Samsung states, the analysis shows that Samsung did not engage in targeted dumping during the alleged time period.

Samsung adds that its average monthly U.S. sales volume data demonstrates that it did not engage in targeted dumping during the fourth quarter of 2010. According to Samsung, the only reason a company would lower its prices during a specified period would be to increase its overall sales volume in order to achieve greater overall profit. Thus, if Samsung had engaged in targeted dumping during the fourth quarter, Samsung holds that the average monthly sales volume during the fourth quarter would exceed its average monthly sales volume for the rest of the POI. However, Samsung's volume data analysis, included in its case brief, shows that its average monthly volume during the first three quarters of the POI exceeded the average monthly sales volume during the fourth quarter of the POI. This result is inconsistent with the theory of targeting, according to Samsung, and therefore provides a further basis to reject the petitioner's allegation.

In addition, LGEMM contends that the petitioner's targeted dumping allegation based on the last quarter of the POI is inappropriate because it is based on normal commercial practices in the United States. This period, centered around Black Friday and the winter holiday shopping season, is a seasonal, well-documented commercial pattern in the United States, according to LGEMM, and as such, pricing behavior during this period is not an appropriate basis for a targeted dumping finding. LGEMM refers to the regulatory criteria for a finding of critical circumstances under 19 CFR 351.206(h)(1)(ii), where the Department is required to consider "seasonal trends" before making an affirmative finding of the existence of "massive imports." Similarly, LGEMM points to the Department's discussion of the targeted dumping provision in the Preamble to the regulations where the Department stated that it would ensure that parties would have the opportunity to explain whether a particular pattern of U.S. prices constitutes targeted dumping. See Preamble at 29374. In this instance, LGEMM maintains that any price patterns observed during the alleged targeting period result from well-established commercial pricing patterns, rather than targeted dumping.

Similarly, Samsung argues that the petitioner's time period allegation based on a calendar quarter is inconsistent with industry pricing and rebate practices. In its case brief, Samsung included its quantitative analysis that it claims demonstrates that, for most of the sales included in its analysis, invoice price changed only minimally, if at all, during the POI. Samsung notes the impact of rebates on net prices and emphasizes that the time period during which net price varies is not tied to a calendar month or quarter. Samsung also provided a quantitative analysis for one product sold in the United States, which it claims demonstrates that the net price (i.e., after accounting for

rebates) varied on a daily basis. As a result, Samsung contends that it is irrational for the alleged time period or any other calendar quarter to be the subject of a time-period targeted dumping allegation because the industry practice does not reflect such time-period targeting.

Samsung points to the impact of post-sale “sell-through” rebates (or “sell-out” rebates in LGEMM’s terminology), where the customer does not receive the rebate at the time of sale or invoicing. In calculating the net price, the Department assigns a post-sale rebate according to the sale date. However, Samsung notes that it is the customer, not the seller, who controls the timing of the sell-through rebate. Samsung notes the Department’s acknowledgement in UAE Nails, accompanying Issues and Decision Memo at Comment 2, that “other factors not related to targeting, such as {level of trade} or circumstances of sale, may have an impact on price comparability in a targeted dumping analysis.” Samsung argues that, in an industry where companies offer dozens, or even hundreds, of carefully-tailored rebate programs, a time-period targeted dumping analysis based on a calendar month using the Nails test is inappropriate.

LGEMM also claims that the petitioner’s allegation based on time period is flawed because the price differences occurring during the alleged targeted period occurred due to promotional prices offered on certain models, rather than a general price reduction during the period. LGEMM cites the International Trade Commission’s (ITC’s) preliminary determination to support its contention that only certain models were discounted during the targeted time period and the majority of LGEMM models were not discounted during this period.<sup>8</sup> According to LGEMM, this “product targeting” is not covered by the statutory targeted dumping provision. Similarly, Samsung asserts that the only pattern of lower prices revealed by the Department’s targeted dumping analysis is a pattern of selling certain models at reduced prices. For holiday periods, Samsung argues that it may reduce prices for certain models, and that targeting by model is not considered “targeted dumping” under either the statute or the World Trade Organization (WTO) Antidumping Agreement (WTO AD Agreement).<sup>9</sup>

The petitioner defends its allegation of targeted dumping by LGEMM and Samsung directed at the fourth quarter of 2010 by asserting that that period of time, particularly the period around Black Friday, is when the deepest discounting and targeted dumping occurs. The petitioner states it is proper to use the fourth quarter for purposes of analyzing targeted dumping, rather than the specific days surrounding the holidays, because the dumping analysis is based on the respondents’ sales to retailers, not the retailers’ sales to their customers. Accordingly, the petitioner continues, the Department must take into account the period when the retailers are building inventory for the holiday sales, and when they are fulfilling back orders for those sales. Thus, the petitioner concludes, analyzing the fourth quarter provides the best mechanism to examine the impact of the most intense holiday promotion season.

The petitioner disputes LGEMM’s and Samsung’s contention that there can be no product-based targeting, because in this investigation, the targeting was achieved through the sale of specific

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<sup>8</sup> See Bottom Mount Combination Refrigerator-Freezers from Korea and Mexico, ITC Inv. Nos. 701-TA-477 and 731-TA-1180-1181 (Prelim.), Pub. 4232 at page 19 (May 2011) (ITC Report).

<sup>9</sup> See Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994.

products during the specific time period alleged. As section 777A(d)(1)(B) of the Act permits application of the targeted dumping methodology where the prices of “comparable merchandise” differ by periods of time, the petitioner asserts that the Nails test appropriately determined in this investigation whether a sufficient proportion of products, as defined by control numbers (CONNUMs), appeared to have been the subject of targeted dumping.

With respect to the respondents’ claim that targeted dumping cannot be found because the pricing pattern during holiday time periods reflects the normal course of business in the industry, the petitioner responds that addressing such episodic pricing behavior is the intent of the targeted dumping provision, particularly with regard to the inclusion of the “periods of time” language in section 777A(d)(1)(B) of the Act. According to the petitioner, the evidence in this investigation confirms that targeted dumping by the LG and Samsung companies did occur during the fourth quarter period and the Department correctly applied the Nails test to measure the impact of that targeting.

*b) The Targeted Dumping Methodology Applied in the Investigation*

Citing the Court of International Trade (CIT) decision in Thai I-Mei Frozen Foods Co., Ltd. V. United States, 477 F. Supp. 2d 1332, 1357 (CIT 2007), LGEMM asserts that the Department must justify the application of a targeted dumping methodology in light of the specific factual circumstances that occur in a proceeding. As the Department has publicly announced that it will determine targeted dumping on a case-by-case basis,<sup>10</sup> LGEMM also maintains that the Department must now justify its application of the Nails test to the instant investigation.

LGEMM and Samsung contend that the Nails test utilizing a standard deviation statistical analysis does not yield meaningful results when applied to their sales in this investigation. They assert that a standard deviation is only a valuable measure of distribution when a data set exhibits normal distribution, as indicated by a bell-shaped distribution curve.<sup>11</sup> However, Samsung asserts that the distribution of its sales prices shows a much wider variation than would be expected using one-standard-deviation analysis, thus rendering the Nails test unreliable in the instant application. LGEMM argues further that a statistical test to determine whether the price distribution of its sales was suitable for use with the Nails statistical methodology should have been included in the petitioner’s targeted dumping allegation. LGEMM performed its own tests, submitted to the Department on October 20, 2011, and repeated in LGEMM’s case brief, in which LGEMM claims that the resulting distribution analysis demonstrates that the Nails test statistical methodology does not provide a sufficiently high level of confidence to support its use in this investigation. Moreover, LGEMM contends that the Nails test does not identify significant pricing differences in this investigation to warrant a finding of targeted dumping. LGEMM asserts that the targeting

<sup>10</sup> See Withdrawal of the Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations, 73 FR 74930, 74931 (Dec. 10, 2008).

<sup>11</sup> LGEMM cites the following as an example to support its statistical methodological argument: Edwin Mansfield, Statistics for Business and Economics: Methods and Applications (W. W. Norton and Co., 1980), at page 47-50 (“The standard deviation is the most important summary measure of dispersion . . . If the frequency distribution of a population conforms to the so-called normal distribution . . . then we know that 68.3 percent of measurements in the population that fall between + or - 1 standard deviation. Of course, it is essential to realize that results such as these pertain only to populations that conform to the normal distribution.”).

allegations are based on very small price variations on certain relatively high-priced products. To support its assertion, LGEMM points to the results of the Nails test for a number of CONNUMs which were found to be contributing to the targeted pricing pattern. For most of these CONNUMs, the mean price that exceeded the standard deviation was very small (for example, \$5 to \$10) on products priced at hundreds of dollars. LGEMM contends that these deviations are negligible and do not establish a consistent pattern of price differences, particularly with respect to demonstrating a pattern of targeted dumping. LGEMM's case brief includes other examples that purport to show that the pricing differences among CONNUMs are small and not statistically meaningful. LGEMM claims that such examples demonstrate that the Nails test is unreasonable in this case because it fails to isolate meaningful price differences for purposes of supporting a statutory finding of targeted dumping.

Furthermore, LGEMM contends that the preliminary determination finding of targeted dumping does not consider that the pricing pattern observed may be the result of normal commercial pricing variations, rather than targeted dumping. Citing to page 19 of a remand redetermination regarding the less than fair value investigation of Certain Pasta from Italy, issued on August 28, 1998, LGEMM argues that it "would not be consistent with the purposes of Section 777A(d)(1)(B) of the Act for normal variations in customer prices to become the standard basis for targeted dumping allegations." In this case, LGEMM states that it has provided information that it granted price discounts or rebates for clearance or model closeout purposes, or for other reasons that are not considered targeted dumping. LGEMM maintains that the Department's reliance on the Nails test in the preliminary determination did not account for these or other commercial selling practices that would not be considered evidence of targeted dumping.

If the Department were to continue to apply the Nails test for the final determination, LGEMM argues that the methodology must be modified to reflect the commercial realities of this investigation. At the least, LGEMM contends that the one-standard-deviation threshold for the pattern of export price test should be increased to two or more standard deviations in order to distinguish between normal commercial activity in the bottom mount refrigerator industry and targeted dumping. At the same time, LGEMM argues that the sales volume threshold for meeting the "pattern of export prices" test should be increased from 33 percent to at least 50 percent, or at least 66 percent if the standard deviation threshold is not also modified. LGEMM contends that the inclusion of a higher ratio of sales needed in this test is required in order to reliably and fairly indicate the presence of a pattern of prices to identify the possibility of targeted dumping. Because of the negligible price differences captured by the current test, and that the fact its sales database does not conform to normal distribution patterns, LGEMM asserts that it has provided the necessary and specific reasons for the Department to modify the Nails test in this instance. Additionally, LGEMM notes that there is relatively little precedent regarding time period-based targeted dumping and therefore the Department's re-evaluation of its targeted dumping analysis methodology is warranted in light of the facts of this investigation.

The petitioner notes that the Nails test has been used in numerous previous cases and the Department has addressed many of the methodological concerns raised by LGEMM and Samsung. Specifically, the petitioner notes the following aspects of the Nails test that the Department discussed in previous proceedings:

- Use of the standard deviation test;<sup>12</sup>
- Rejection of a change in the threshold for the pattern test;<sup>13</sup>
- Support of the thresholds in the Nails test;<sup>14</sup>
- Rejection of methodology challenges based on WTO decisions;<sup>15</sup> and
- Rejection of a proposed threshold change from one to two standard deviations.<sup>16</sup>

The petitioner claims that LGEMM's proposals to increase the statistical thresholds in the Nails test for this investigation are results-oriented and lack statistical integrity. While acknowledging that aspects of the Nails test could be refined, the petitioner contends that the Nails test was reasonably applied in this investigation. The petitioner also notes that a change to the Nails test for the final determination without notice and an opportunity for comment would violate the petitioner's rights.

#### Department's Position:

Consistent with our practice and the statute, we have applied the Nails test, as updated, to determine whether the respondents at issue engaged in targeted dumping during the alleged time periods and, if so, whether or not the use of average-to-transaction comparison methodology is appropriate in the final determination. In so doing, we found that only Samsung and LGEMM engaged in targeted dumping, but that the application of average-to-transaction comparison methodology in the calculation of their final dumping margins was not warranted, as discussed below.

Section 771(35)(A) of the Act defines "dumping margin" as the "amount by which the NV exceeds the EP or CEP of the subject merchandise" (emphasis added). The definition of "dumping margin" calls for a comparison of NV and EP or CEP. Before making the comparison called for, it is necessary to determine how to make the comparison.

Section 777A(d)(1) of the Act and 19 CFR 351.414 provide the methods by which NV may be compared to EP or CEP. Specifically, the statute and regulations provide for three comparison methods: average-to-average, transaction-to-transaction, and average-to-transaction. These comparison methods are distinct from each other. When using transaction-to-transaction or average-to-transaction comparisons, a comparison is made for each export transaction to the United States. When using average-to-average comparisons, a comparison is made for each group of comparable export transactions for which the EPs or CEPs have been averaged together

<sup>12</sup> PRC Nails, Issues and Decision Memorandum at Comment 3.

<sup>13</sup> Wood Flooring, Issues and Decision Memorandum at Comment 4.

<sup>14</sup> Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from Indonesia: Final Determination of Sales at Less Than Fair Value, 75 FR 59223 (Sept. 27, 2010) (Coated Paper), and accompanying Issues and Decisions Memorandum at Comment 3.

<sup>15</sup> Coated Paper at Comment 4.

<sup>16</sup> Certain Oil Country Tubular Goods from the People's Republic of China: Final Determination of Sales at Less Than Fair Value, Affirmative Final Determination of Critical Circumstances and Final Determination of Targeted Dumping, 75 FR 20335 (April 19, 2010) (OCTG from the PRC) and accompanying Issues and Decision Memorandum at Comment 2.

(averaging group).

Section 771(35)(B) of the Act defines weighted-average dumping margin as “the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate EPs and CEPs of such exporter or producer.” The definition of “weighted average dumping margin” calls for two aggregations which are divided to obtain a percentage. The numerator aggregates the results of the comparisons. The denominator aggregates the value of all export transactions for which a comparison was made.

Section 777A(d)(1) of the Act establishes that, in a less-than-fair-value investigation, the normal comparison methodology will be either average-to-average or transaction-to-transaction. Section 777A(d)(1)(B) of the Act sets forth the exception when the Department may apply an average-to-transaction methodology:

The administering authority may determine whether the subject merchandise is being sold in the United States at less than fair value by comparing the weighted average of the NVs to the export prices (or CEPs) of individual transactions for comparable merchandise, if

- (i) there is a pattern of export prices (or CEPs) for comparable merchandise that differ significantly among purchasers, regions, or periods of time, and
- (ii) the administering authority explains why such differences cannot be taken into account using a method described in paragraph (1)(A)(i) or (ii).

We find the petitioner’s allegations regarding patterns of United States prices that differ significantly between and among time periods to be sufficient. The Act describes a difference among “periods of time,” and does not limit the Department’s analysis as to the length of time which the agency must consider. If the Department were restricted in its analysis, for example, to only analyzing “seasons,” as suggested by the respondents, then one would anticipate that Congress would have placed such a restriction in the text of the Act. Instead, the Act requires simply that the Department review United States prices on the basis of “periods of time,” and determine on the basis of that analysis if there is a pattern of prices for comparable merchandise that differs significantly “among” those periods. It is therefore sufficient for purposes of the requirements of Section 777A(d)(1)(B) of the Act that a petitioner in a less-than-fair value investigation make an allegation under this provision unique to a designated period of time within which the Department can analyze prices on the basis of the alleged periods of time, as the petitioner has done in this investigation, e.g. the time periods of the fourth quarter, and the remainder of the POI.

With respect to the respondents’ arguments about the purpose of Section 777A(d)(1)(B) of the Act, Congress explained in the SAA that this provision is meant to address “situations where an average-to-average or transaction-to-transaction methodology cannot account for a pattern of prices that different significantly among purchasers, regions, or time periods, i.e., where targeted

dumping may be occurring.”<sup>17</sup> Congress explained that “before relying on this methodology, however,” after finding a pattern among the time periods, the Department is first required to “establish and provide an explanation why it cannot account for such differences through the use of an average-to-average or transaction-to-transaction comparison.”<sup>18</sup>

Congress did not speak to the “intent” of the producers or exporters in setting prices that are significantly different as between the periods of time being examined, nor did it provide that the Department is prohibited from conducting an analysis under this provision if certain products might be seasonal in nature. Instead, Congress stated that “the Administration intends that in determining whether a pattern of significant prices differences exist, Commerce will proceed on a case-by-case basis, because small differences may be significant for one industry or one type of product, but not for another.”<sup>19</sup>

Consistent with the text of Section 777A(d)(1)(B) of the Act and the language of the SAA, the Department has analyzed whether or not a pattern existed, and whether or not differences in prices were “significant.” The Act and legislative history do not require that the Department conduct an additional analysis, as argued by the respondents, and determine the reasons that significant differences in prices exist. Accordingly, because no such analysis is mandated by the Act, where the Department has determined that there was a pattern of export prices (or CEPs) for comparable merchandise that differs significantly among or between periods of time in this case, the Department has not opined on the reasons for such price differences. Instead, the Department simply has applied a different comparison methodology, average-to-transaction, rather than average-to-average, as directed by the Act.

In order to determine whether or not a pattern existed in this case, as well as whether or not the differences in prices were “significant,” the Department relied on the Nails test, as it did in the Preliminary Determination. This test has been applied and updated in numerous cases since UAE Nails and PRC Nails. See, e.g., Wood Flooring. Further, the CIT has upheld our use of the Nails test, finding it reasonable and consistent with the statute and regulations. See Mid Continent Nail v United States, 712 F. Supp 2nd 1370 (CIT 2010) (Mid Continent Nail).

In the first stage of the test, the “standard-deviation test,” we determined the share of the alleged targeted time-period sales of subject merchandise (by sales volume) that are at prices more than one standard deviation below the weighted-average price of all sales during the POI, targeted and non-targeted. We calculated the standard deviation on a product-specific basis (i.e., CONNUM by CONNUM) using the POI-wide weighted-average prices for the alleged targeted time period and the time periods not alleged to have been targeted. If that share did not exceed 33 percent of the total volume of a respondent’s sales of subject merchandise during the alleged targeted time period, then we determined that the pattern requirement was not met and we did not conduct the second stage of the test. If that share exceeded 33 percent of the total volume of a respondent’s

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<sup>17</sup> See Statement of Administrative Action, Uruguay Round Agreements Act, H. Doc. 316, Vol. 1, 103d. Cong. (1994)(SAA) at 843.

<sup>18</sup> Id.

<sup>19</sup> Id.

sales of subject merchandise during the alleged targeted time period, on the other hand, we determined that the pattern requirement was met and we proceeded to the second stage of the test.

In the second stage, we examined all sales of identical merchandise (*i.e.*, by CONNUM) sold during the alleged targeted time period. From those sales, we determined the total volume of sales for which the difference between the weighted-average price of sales during the alleged targeted time period and the next higher weighted-average price of sales during the non-targeted time periods exceeds the average price gap (weighted by sales volume) for the non-targeted group.<sup>20</sup> We weighed each of the price gaps in the non-targeted group by the combined sales volume associated with the pair of prices during the non-targeted time period that made up the price gap. In doing this analysis, the alleged targeted time-period sales were not included in the non-targeted group; the alleged targeted time-period average price was compared only to the average prices during the non-targeted time periods. If the share of the sales that met this test exceeded five percent of the total sales volume of subject merchandise during the targeted time period, we determined that the significant-difference requirement was met and we determined that time-period targeting occurred.

Based on our final analysis, we found that LGEMM and Samsung met both of the above-described stages of the Nails test and that Electrolux did not meet that test. As a result, we determined that, with respect to sales by Samsung and LGEMM for certain time periods, there was a pattern of prices that differed significantly.

For Electrolux, because we did not find a pattern of prices that differed significantly for certain time periods pursuant to section 777A(d)(1)(B) of the Act, we applied our standard average-to-average price comparison methodology to all U.S. sales made by Electrolux pursuant to section 777A(d)(1)(A) of the Act. See Electrolux Calculation Memo.

For both Samsung and LGEMM, while we found a pattern of prices that differed significantly for certain time periods pursuant to section 777A(d)(1)(B) of the Act, our analysis shows that the alternative average-to-transaction methodology yields no difference in the margin or yields a difference in the margin that is so insignificant relative to the size of the resulting margin as to be immaterial. Accordingly, pursuant to section 777A(d)(1)(B)(ii) of the Act, we find that the differences found can be taken into account using the average-to-average methodology. Therefore, we applied our standard average-to-average price comparison methodology to all U.S. sales made by Samsung and LGEMM pursuant to section 777A(d)(1)(A) of the Act. See Samsung Calculation Memo and LGEMM Calculation Memo.

We have considered each of the arguments raised as to the validity of the Department's Nails test and have concluded that the agency's test is still an accurate test for finding a pattern of United States prices that differ among the periods of time at issue, and determining that the differences in

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<sup>20</sup> The next higher price is the weighted-average price to the non-targeted group that is above the weighted-average price to the alleged targeted group. For example, if the weighted-average price to the alleged targeted group is \$7.95 and the weighted-average prices to the non-targeted group are \$8.30, \$8.25, and \$7.50, we would calculate the difference between \$7.95 and \$8.25 because this is the next higher price in the non-targeted group above \$7.95 (the average price to the targeted group).

prices are “significant.”

With respect to LGEMM’s argument that the one-standard-deviation threshold is too low to distinguish between normal commercial activity and targeted dumping and a higher, two-standard deviation (or higher) threshold should be applied, we disagree. The Department has consistently held the one-standard-deviation threshold to be a distinct and reasonable “bright line” to quantitatively measure significant price differences. As the Department first explained in PRC Nails:

We consider the price threshold of one standard deviation below the average market price as a reasonable indicator of a price difference that may be based on targeted dumping because (1) it is a measure of “low” relative to the spread or dispersion of prices in the market in question, and (2) it strikes a balance between two extremes, the first being where any price below the average price is sufficient to distinguish the alleged target from others ..., and the second being where only prices at the very bottom of the price distribution are sufficient to distinguish the alleged target from others....

The CIT also affirmed the use of the standard deviation threshold. See Mid Continent Nail v United States, 712 F. Supp 2nd 1370, 1377-78 (CIT 2010) (Mid Continent Nail).

The Department has rejected past proposals to raise the standard deviation threshold because to do so would likely mask all but the most obvious examples of dumping, thus thwarting the purpose of conducting a price pattern analysis. In OCTG from the PRC at Comment 2, we stated:

... the number of sales with prices that are two standard deviations below the average market prices is too restrictive a standard because it would likely only identify outliers in the observed price data and not identify a pattern of targeted prices within the observed price data. Therefore, the Department believes that one standard deviation, rather than two standard deviations, is a better measurement to distinguish potentially targeted prices using this test.

LGEMM also contends that the 33 percent volume threshold for the pattern of export prices test is too low and should be raised to 50 percent or more. Here too, we believe that raising the volume threshold would not sufficiently unmask dumped sales where a pattern of price differences exist. The Department explained in PRC Nails at Comment 5 that it considers “the requirement under our targeted dumping methodology that the “low” prices constitute at least 33 percent of the sales volume to the alleged target to be a reasonable threshold for establishing a pattern indicative of targeted dumping.” The CIT concurred. See Mid Continent Nail at 1377.

#### Comment 2: Zeroing in Average-to-Transaction Comparisons

LGEMM and Samsung contend that when the Department applied average-to-transaction comparisons in the preliminary determination, it improperly “zeroed” out non-dumped transactions from its comparisons. According to LGEMM, the statute and the WTO AD Agreement are silent on zeroing when using average-to-transaction comparisons, but the WTO has ruled that the use of zeroing in administrative reviews, where average-to-transaction comparisons

are the norm, is inconsistent with the WTO AD Agreement.<sup>21</sup> LGEMM also claims that the Court of Appeals for the Federal Circuit (CAFC) has determined that the Department's interpretation of the statute to permit zeroing in administrative reviews, but not investigations, is impermissible in Dongbu Steel v. United States, 635 F. 3d 1363 (Fed. Cir. 2011) (Dongbu Steel) (“{T}here is no statutory basis for interpreting {section 771(35) of the Act} differently in investigations than in administrative reviews.”) and JTEKT Corp. v. United States, 642 F.3d 1378, 1383-85 (Fed. Cir. 2011) (JTEKT). Although these CAFC decisions involve administrative reviews rather than investigations, LGEMM maintains that the principle with respect to the use of zeroing in average-to-transaction comparisons is the same, and thus the Department has been effectively barred by the CAFC from using zeroing in average-to-transaction comparisons.

Samsung also contends that zeroing used in conjunction with the average-to-transaction comparison methodology is inconsistent with the WTO AD Agreement. Samsung cites in particular the WTO Appellate Body (AB) decision in United States - Final Dumping Determination on Softwood Lumber from Canada Recourse to Article 21.5 of the DSU by Canada, WT/DS264/AB/RW (1 September 2006), where the WTO Appellate Body concluded that zeroing under a transaction-to-transaction comparison methodology did not conform to the requirements under Article 2.4.2 of the WTO AD Agreement. Samsung points to the WTO AB decisions regarding the use of zeroing in administrative reviews<sup>22</sup> in support of the principle that zeroing is also not permitted under the WTO AD Agreement in average-to-transaction comparisons under a targeted dumping methodology.

In the Preliminary Determination, the Department applied the average-to-transaction methodology to all of LGEMM's U.S. sales. LGEMM and Samsung object to the Department's practice to apply the average-to-transaction methodology to all U.S. sales, not just to those sales where targeted dumping is found to have occurred, as first applied in Polyethylene Retail Carrier Bags from Taiwan: Final Determination of Sales at Less Than Fair Value, 75 FR 14659 (Mar. 26, 2010) (Bags from Taiwan), and accompanying Issues and Decision Memorandum at Comment 1. LGEMM states that, in accordance with section 777A(d)(1) of the Act, the Department may only apply the average-to-transaction comparison methodology in investigations when the targeted dumping criteria are met and thus, in turn, the targeted dumping criteria can only be met with respect to the target – the time period in this case. Under section 777A(d)(1)(B)(ii) of the Act, LGEMM states that the Department may only apply the average-to-transaction methodology when the Department explains why differences in the patterns of prices cannot be taken into account by the normal average-to-average methodology. Thus, LGEMM continues, because by definition, there is no pattern of price differences for the non-targeted sales, there is no basis to resort to the average-to-transaction methodology for those sales. LGEMM adds that including non-targeted sales within the average-to-transaction comparison does not unmask a pattern of significant price differences, as the alternative averaging methodology is intended to do, because these sales do not

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<sup>21</sup> See United States – Measures Relating to Zeroing and Sunset Reviews, WT/DS322/AB/R at ¶ 190(c) (Jan. 9, 2007); and United States – Continued Existence and Application of Zeroing Methodology, WT/DS350/AB/R at ¶ 395(d) (Feb. 4, 2009).

<sup>22</sup> See e.g., United States - Laws, Regulations and Methodology for Calculating Dumping Margins, WT/DS294/AB/R, adopted 9 May 2006; and United States - Continued Existence and Application of Zeroing Methodology, WT/DS350/AB/R, adopted 19 February 2009.

demonstrate such a pattern. Finally, LGEMM expresses the concern that applying the average-to-transaction methodology may find dumping on certain sales when dumping would not be found under the preferred average-to-average methodology. According to LGEMM, the targeted dumping methodology should therefore not be used to create dumping where it would otherwise not exist.

Samsung stresses that the application of the average-to-transaction methodology to the non-targeted sales is inconsistent with the WTO AD Agreement. Samsung cites the language in Article 2.4.2 of the Agreement<sup>23</sup> as limiting the use of the average-to-transaction methodology to only those comparisons involving targeted export sales. Samsung further states that its interpretation is supported by the WTO AB in United States - Measures Relating to Zeroing and Sunset Reviews, WT/DS322/AB/R, adopted 23 January 2007, which concluded that “{i}n order to unmask targeted dumping, an investigating authority may limit the application of the {average-to-transaction} comparison methodology to the prices of export transactions falling within the relevant pattern.

LGEMM disagrees with the Department’s view that the targeted dumping provision is an exception to the WTO’s decisions that have found zeroing to be inconsistent with U.S. obligations under the WTO AD Agreement. LGEMM expects that the Department’s application of zeroing in targeted dumping situations will be challenged at the WTO in the future. LGEMM asserts that the Department’s continued acceptance of the time-period targeted dumping allegation in this investigation would undermine the Department’s defense of its targeted dumping practice before the WTO because of the targeted dumping allegation deficiencies addressed above. LGEMM advises the Department to find that there is no reasonable basis for determining that targeting by time period has occurred in the instant investigation in order to avoid an adverse WTO decision that would impair the Department’s ability to apply the targeted dumping provision in more appropriate situations.

The petitioner dismisses the respondents’ objections to the Department’s use of zeroing in conjunction with its targeted dumping methodology as allegedly inconsistent with the WTO AD Agreement, stating that there is no reason to alter this methodology conducted under applicable U.S. law based on speculation about future WTO opinions.

#### Department Position:

While we have not applied average-to-transaction comparison methodology for any respondent in the final determination, as discussed in Comment 1 above, we address the merits of the parties’ arguments for the record below.

In light of the comparison methods provided for under the statute and regulations, and for the reasons set forth in detail below, the Department finds that the offsetting method is appropriate when aggregating the results of average-to-average comparisons, and is not similarly appropriate when aggregating the results of average-to-transaction comparisons.

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<sup>23</sup> “A NV established on a weighted average basis “may be compared to prices of individual export transactions if the authorities find a pattern of EPs which differ significantly among different purchases, regions, or time periods...”

The issue of “zeroing” versus “offsetting” involves how certain results of comparisons are treated in the aggregation of the numerator for the weighted average dumping margin and relates to a statutory ambiguity in the word “exceeds” as used in the definition of “dumping margin” in section 771(35)(A) of the Act. Application of “zeroing” treats comparison results where NV is less than EP or CEP as indicating an absence of dumping, and no amount (zero) is included in the aggregation of the numerator for the weighted-average dumping margin. Application of “offsetting” treats such comparison results as an offset that may reduce the amount of dumping found in connection with other comparisons, where a negative amount may be included in the aggregation of the numerator of the “weighted average dumping margin” to the extent that other comparisons result in the inclusion of dumping margins as positive amounts.

The Department interprets the application of average-to-average comparisons to contemplate a dumping analysis that examines the pricing behavior on average of an exporter or producer with respect to the subject merchandise, whereas under the average-to-transaction comparison methodology the Department undertakes a dumping analysis that examines the pricing behavior of an exporter or producer with respect to individual export transactions. The offsetting approach described in the average-to-average comparison methodology allows for an overall examination of pricing behavior on average. The Department’s interpretation of section 771(35) of the Act to permit zeroing in average-to-transaction comparisons, as in this investigation, and to permit offsetting in average-to-average comparisons reasonably accounts for differences inherent in the distinct comparison methodologies.

Whether “zeroing” or “offsetting” is applied, it is important to note that the weighted-average dumping margin will reflect the value of all export transactions, dumped and non-dumped, examined during the POI; the value of such sales is included in the aggregation of the denominator of the weighted-average dumping margin. Thus, a greater amount of non-dumped transactions results in a lower weighted-average dumping margin under either methodology.

The difference between “zeroing” and “offsetting” reflects the ambiguity the CAFC has found in the word “exceeds” as used in section 771(35)(A) of the Act. See Timken Co. v. United States, 354 F.3d 1334, 1341-45 (Fed. Cir. 2004) (Timken). The courts repeatedly have held that the statute does not speak directly to the issue of zeroing versus offsetting.<sup>24</sup> For decades, the Department interpreted the statute to apply zeroing in the calculation of the weighted-average dumping margin, regardless of the comparison method used. In view of the statutory ambiguity, on multiple occasions, both the CAFC and other courts squarely addressed the reasonableness of the Department’s zeroing methodology and unequivocally held that the Department reasonably

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<sup>24</sup> See PAM, S.p.A. v. United States, 265 F. Supp. 2d 1362, 1371 (CIT 2003) (PAM) (“{The} gap or ambiguity in the statute requires the application of the *Chevron* step-two analysis and compels this court to inquire whether Commerce’s methodology of zeroing in calculating dumping margins is a reasonable interpretation of the statute.”); Bowe Passat Reinigungs-Und Waschereitechnik GmbH v. United States, 926 F. Supp. 1138, 1150 (CIT 1996) (Bowe Passat) (“The statute is silent on the question of zeroing negative margins.”); and Serampore Indus. Pvt. Ltd. v. U.S. Dep’t of Commerce, 675 F. Supp. 1354, 1360 (CIT 1987) (Serampore) (“A plain reading of the statute discloses no provision for Commerce to offset sales made at {less than fair value} with sales made at fair value. . . . Commerce may treat sales to the United States market made at or above prices charged in the exporter’s home market as having a zero percent dumping margin.”).

interpreted the relevant statutory provision as permitting zeroing.<sup>25</sup> In so doing, the courts relied upon the rationale offered by the Department for the continued use of zeroing, *i.e.*, to address the potential for foreign companies to undermine the antidumping laws by masking dumped sales with higher priced sales: “Commerce has interpreted the statute in such a way as to prevent a foreign producer from masking its dumping with more profitable sales. Commerce’s interpretation is reasonable and is in accordance with law.”<sup>26</sup> The CAFC explained in Timken that denial of offsets is a “reasonable statutory interpretation given that it legitimately combats the problem of masked dumping, wherein certain profitable sales serve to mask sales at less than fair value.” See Timken, 354 F.3d at 1343. As reflected in that opinion, the issue of so-called masked dumping was part of the policy reason for interpreting the statute in the manner applied by the Department.

In 2005, a panel of the WTO Dispute Settlement Body found that the United States did not act consistently with its obligations under Article 2.4.2 of the WTO AD Agreement when it employed the zeroing methodology in average-to-average comparisons in certain challenged antidumping duty investigations. See Panel Report, United States – Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing), WT/DS294/R (Oct. 31, 2005) (EC-Zeroing Panel). The initial WTO Dispute Settlement Body Panel Report was limited to the Department’s use of zeroing in average-to-average comparisons in antidumping duty investigations. See EC-Zeroing Panel, WT/DS294/R. The Executive Branch determined to implement this report pursuant to the authority provided in Section 123 of the Uruguay Round Agreements Act (URAA) (19 USC § 3533(f), (g)) (Section 123). See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification, 71 FR 77722 (Dec. 27, 2006); and Antidumping Proceedings: Calculation of the Weighted – Average Dumping Margin During an Antidumping Investigation; Change in Effective Date of Final Modification, 72 FR 3783 (June 26, 2007) (together, Final Modification for Investigations). Notably, with respect to the use of zeroing, the Panel found that the United States acted inconsistently with its WTO obligations only in the context of average-to-average comparisons in antidumping duty investigations. The Panel did not find fault with the use of zeroing by the United States in any other context.

Without an affirmative inconsistency finding by the Panel, the Department did not propose to alter its zeroing practice in other contexts, such as in investigations using average-to-transaction comparisons. As the CAFC recently held, the Department reasonably may decline, when implementing an adverse WTO report, to take any action beyond that necessary for compliance. See Thyssenkrupp Acciai Speciali Terni S.p.A. v. United States, 603 F. 3d 928, 934 (Fed. Cir. 2010). The Department began to apply offsetting in the limited context of average-to-average

<sup>25</sup> See, e.g., Koyo Seiko Co. v. United States, 551 F.3d 1286, 1290-91 (Fed. Cir. 2008) (Koyo 2008); NSK Ltd. v. United States, 510 F.3d 1375, 1379-80 (Fed. Cir. 2007) (NSK); Corus Staal BV v. United States, 502 F.3d 1370, 1375 (Fed. Cir. 2007) (Corus II); Corus Staal BV v. Department of Commerce, 395 F.3d 1343, 1347 (Fed. Cir. 2005) (Corus I); Timken, 354 F.3d at 1341-45; PAM, 265 F. Supp. 2d at 1370 (“Commerce’s zeroing methodology in its calculation of dumping margins is grounded in long-standing practice.”); and Bowe Passat, 926 F. Supp. at 1149-50; Serampore, 675 F. Supp. at 1360-61.

<sup>26</sup> See Serampore, 675 F. Supp. at 1361 (citing Certain Welded Carbon Steel Standard Pipe and Tube From India; Final Determination of Sales at Less Than Fair Value, 51 FR 9089, 9092 (Mar. 17, 1986)); see also Timken, 354 F.3d at 1343; and PAM, 265 F. Supp. 2d at 1371.

comparisons in antidumping duty investigations. See Final Modification for Investigations, 71 FR at 77722. With this modification, the Department's interpretation of the statute with respect to non-dumped comparisons was changed within the limited context of investigations using average-to-average comparisons. Adoption of the modification pursuant to the procedure set forth in section 123(g) of the URAA was specifically limited to address adverse WTO findings made in the context of antidumping investigations using average-to-average comparisons. The Department did not change its practice of zeroing in other types of comparisons, including average-to-transaction comparisons in investigations. Id., 71 FR at 77724.

The CAFC subsequently upheld the Department's decision to cease zeroing in average-to-average comparisons in antidumping duty investigations while recognizing that the Department limited its change in practice to certain investigations and continued to use zeroing when making average-to-transaction comparisons in certain investigations and administrative reviews. See U.S. Steel Corp., 621 F. 3d. at 1355 n.2, 1362-63. In upholding the Department's decision to cease zeroing in average-to-average comparisons in antidumping duty investigations, the CAFC accepted that the Department likely would have different zeroing practices between average-to-average and other types of comparisons in antidumping duty investigations. Id., at 1363 (stating that the Department indicated an intention to use zeroing in average-to-transaction comparisons in investigations to address concerns about masked dumping). The CAFC's reasoning in upholding the Department's decision relied, in part, on differences between various types of comparisons in antidumping duty investigations and the Department's limited decision to cease zeroing only with respect to one comparison type. Id., at 1361-63.

The CAFC acknowledged that section 777A(d) of the Act permits different types of comparisons in antidumping duty investigations, allowing the Department to make average-to-transaction comparisons where certain patterns of significant price differences exist. Id., at 1362 (quoting sections 777A(d)(1)(A) and (B) of the Act, which enumerate various comparison methodologies that the Department may use in investigations); see also section 777A(d)(1)(B) of the Act. The CAFC also expressly recognized that the Department intended to continue to address targeted or masked dumping through continuing its use of average-to-transaction comparisons and zeroing. See U.S. Steel Corp., 621 F. 3d at 1363. In summing up its understanding of the relationship between zeroing and the various comparison methodologies that the Department may use in antidumping duty investigations, the CAFC acceded to the possibility of disparate, yet equally reasonable interpretations of section 771(35) of the Act, stating that "{b}y enacting legislation that specifically addresses such situations, Congress may just as likely have been signaling to Commerce that it need not continue its zeroing methodology in situations where such significant price differences among the export prices do not exist." Id. (emphasis added). Furthermore, we note that where average-to-transaction comparisons are used in situations of targeted dumping, the results of not applying zeroing methodology in those comparisons as well as in average-to-average comparisons would be the same. Therefore, the provision for different comparison methodologies under section 777A(d) of the Act would be meaningless. This outcome could not have been intended by Congress in providing for different comparison methodologies under section 777A(d) of the Act.

We disagree with LGEMM that the CAFC's decisions in Dongbu Steel and JTEKT require the

Department to change its methodology in this investigation with respect to application of the average-to-transaction comparison methodology. These holdings were limited to finding that the Department had not adequately explained different interpretations of section 771(35) of the Act in the context of investigations versus administrative reviews. The CAFC did not address the use of zeroing in the context of a “targeted dumping” analysis in a less-than-fair value investigation.

Unlike the determinations examined in Dongbu Steel and JTEKT, this is an original investigation using a “targeted dumping” analysis – the very circumstance the CAFC contemplated in U.S. Steel Corp. as a situation where the zeroing methodology would continue to be applicable.

The Department’s interpretation of section 771(35) of the Act reasonably resolves the ambiguity inherent in the statutory text for multiple reasons. First, outside of the context of average-to-average comparisons, the Department has maintained a long-standing, judicially-affirmed interpretation of section 771(35) of the Act in which the Department does not consider a sale to the United States as dumped if NV does not exceed EP. Pursuant to this interpretation, the Department treats such a sale as having a dumping margin of zero, which reflects that no dumping has occurred, when calculating the aggregate weighted-average dumping margin. Second, adoption of an offsetting methodology in connection with average-to-average comparisons was not an arbitrary departure from established practice because the Executive Branch adopted and implemented the approach in response to a specific international obligation pursuant to the procedures established by the Uruguay Round Agreements Act for such changes in practice with full notice, comment, consultations with the Legislative Branch, and explanation. Third, the Department’s interpretation reasonably resolves the ambiguity in section 771(35) of the Act in a way that accounts for the inherent differences between the result of an average-to-average comparison and the result of an average-to-transaction comparison.

In the Final Modification for Investigations, the Department adopted a possible construction of an ambiguous statutory provision, consistent with the Charming Betsy doctrine, to comply with certain adverse WTO dispute settlement findings.<sup>27</sup> Even where the Department maintains a separate interpretation of the statute to permit the use of zeroing in certain dumping margin calculations, the Charming Betsy doctrine bolsters the ability of the Department to apply an alternative interpretation of the statute in the context of average-to-average comparisons so that the Executive Branch may determine whether and how to comply with international obligations of the United States. Neither section 123 nor the Charming Betsy doctrine require the Department to modify its interpretation of section 771(35) of the Act for all scenarios when a more limited modification will address the adverse WTO finding that the Executive Branch has determined to implement. Furthermore, the wisdom of Commerce’s legitimate policy choices in this case – *i.e.*, to abandon zeroing only with respect to average-to-average comparisons – is not subject to judicial

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<sup>27</sup> According to Murray v. Schooner Charming Betsy, 6 U.S. 64, 118 (1804), “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country.” The principle emanating from the quoted passage, known as the Charming Betsy doctrine, supports the reasonableness of the Department’s interpretation of the statute in the limited context of average-to-average comparisons in antidumping duty investigations because the Department’s interpretation of the domestic law accords with international obligations as understood in this country.

review. Suramerica de Aleaciones Laminadas, C.A. v. United States, 966 F. 2d 660, 665 (Fed. Cir. 1992). These reasons alone sufficiently justify and explain why the Department reasonably interprets section 771(35) of the Act differently in average-to-average comparisons relative to all other contexts.

Moreover, the Department's interpretation reasonably accounts for inherent differences between the results of distinct comparison methodologies. The Department interprets section 771(35) of the Act depending upon the type of comparison methodology applied in the particular proceeding. This interpretation reasonably accounts for the inherent differences between the result of an average-to-average comparison and the result of an average-to-transaction comparison.

The Department may reasonably interpret section 771(35) of the Act differently in the context of the average-to-average comparisons to permit negative comparison results to offset or reduce positive comparison results when calculating "aggregate dumping margins" within the meaning of section 771(35)(B) of the Act. When using an average-to-average comparison methodology, see, e.g., section 777A(d)(1)(A)(i) of the Act, the Department usually divides the export transactions into groups, by model and level of trade (averaging groups), and compares an average EP or CEP of transactions within one averaging group to an average NV for the comparable merchandise of the foreign like product. In calculating the average EP or CEP, the Department averages all prices, both high and low, for each averaging group. The Department then compares the average EP or CEP for the averaging group with the average NV for the comparable merchandise. This comparison yields an average result for the particular averaging group because the high and low prices within the group have been averaged prior to the comparison. Importantly, under this comparison methodology, the Department does not calculate the extent to which an exporter or producer dumped a particular sale into the United States because the Department does not examine dumping on the basis of individual U.S. prices, but rather performs its analysis "on average" for the averaging group within which higher prices and lower prices offset each other. The Department then aggregates the comparison results from each of the averaging groups to determine the aggregate weighted-average dumping margin for a specific producer or exporter. At this aggregation stage, negative, averaging-group comparison results offset positive, averaging-group comparison results. This approach maintains consistency with the Department's average-to-average comparison methodology, which permits EPs above NV to offset EPs below NV within each individual averaging group. Thus, by permitting offsets in the aggregation stage, the Department determines an "on average" aggregate amount of dumping for the numerator of the weighted-average dumping margin ratio consistent with the manner in which the Department determined the comparison results being aggregated.

In contrast, when applying an average-to-transaction comparison methodology in a targeted dumping analysis in an investigation under 777A(d)(1)(B) of the Act, the Department determines dumping on the basis of individual U.S. sales prices. Under the average-to-transaction comparison methodology, the Department compares the EP or CEP for a particular U.S. transaction with the average NV for the comparable merchandise of the foreign like product. This comparison methodology yields results specific to the selected individual export transactions. The result of such a comparison evinces the amount, if any, by which the exporter or producer sold the merchandise at an EP or CEP less than its NV. The Department then aggregates the results of

these comparisons – i.e., the amount of dumping found for each individual sale – to calculate the weighted-average dumping margin for the period of review or investigation. To the extent the average NV does not exceed the individual EP or CEP of a particular U.S. sale, the Department does not calculate a dumping margin for that sale or include an amount of dumping for that sale in its aggregation of transaction-specific dumping margins.<sup>28</sup> Thus, when the Department focuses on transaction-specific comparisons in its targeted dumping analysis, the Department reasonably interprets the word “exceeds” in section 771(35)(A) of the Act as including only those comparisons that yield positive comparison results. Consequently, in transaction-specific comparisons, the Department reasonably does not permit negative comparison results to offset or reduce other positive comparison results when determining the “aggregate dumping margin” within the meaning of section 771(35)(B) of the Act.

Put simply, the Department interprets the application of average-to-average comparisons to contemplate a dumping analysis that examines the pricing behavior, on average, of an exporter or producer with respect to the subject merchandise, whereas under the average-to-transaction comparison methodology the Department continues to undertake a dumping analysis that examines the pricing behavior of an exporter or producer with respect to individual export transactions. The offsetting approach described in the average-to-average comparison methodology allows for a reasonable examination of pricing behavior, on average. The average-to-average comparison method inherently permits non-dumped prices to offset dumped prices before the comparison is made. This offsetting can reasonably be extended to the next stage of the calculation where average-to-average comparison results are aggregated, such that offsets are (1) implicitly granted when calculating average EPs and (2) explicitly granted when aggregating averaging-group comparison results. This rationale for granting offsets when using average-to-average comparisons does not extend to situations where the Department is using average-to-transaction comparisons because no offsetting is inherent in the average-to-transaction comparison methodology.

The CIT recently sustained the Department’s explanation for using zeroing in administrative reviews using an average-to-transaction comparison methodology, while not using zeroing in certain types of investigations. See Union Steel v. United States, Consol. Court No. 11-00083, Slip Op. 12-24 (CIT Feb. 27, 2012). Because the Department’s explanation in both situations relies, in part, on the inherent differences between average-to-transaction comparisons and average-to-average comparisons, the explanation is also relevant to the context of investigations using average-to-transaction comparisons as a result of a targeted dumping analysis.

Regarding other WTO reports cited by LGEMM and Samsung finding the denial of offsets by the United States to be inconsistent with the WTO AD Agreement, the CAFC has held that WTO reports are without effect under U.S. law, “unless and until such a {report} has been adopted pursuant to the specified statutory scheme” established in the URAA. See Corus I, 395 F.3d at 1347-49; accord Corus II, 502 F.3d at 1375; and NSK, 510 F.3d 1375. As is clear from the

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<sup>28</sup> As discussed previously, the Department does account, however, for the sale in its weighted-average dumping margin calculation. The value of any non-dumped sale is included in the denominator of the weighted-average dumping margin while no dumping amount for non-dumped transactions is included in the numerator. Therefore, any non-dumped transactions results in a lower weighted-average dumping margin.

discretionary nature of this scheme, Congress did not intend for WTO reports to trump automatically the exercise of the Department's discretion in applying the statute. See 19 USC 3538(b)(4) (implementation of WTO reports is discretionary). Moreover, as part of the URAA process, Congress has provided a procedure through which the Department may change a regulation or practice in response to WTO reports. See 19 U.S.C. 3533(g).

Accordingly, and consistent with the Department's interpretation of the Act described above, in the event that the Department employs the average-to-transaction comparison methodology for any respondent in this investigation, and any of the U.S. sales transactions examined in this investigation are found to exceed NV, the amount by which the price exceeds NV will not offset the dumping found in respect of other transactions.

Finally, with respect to the application of the average-to-transaction methodology to the non-targeted sales, the Department has previously determined that the language of section 777A(d)(1)(B) of the Act does not preclude adopting a uniform application of average-to-transaction comparisons for all transactions when satisfaction of the statutory criteria suggests that application of the alternative average-to-transaction methodology is appropriate. The only limitations the statute places on the application of the average-to-transaction method are the satisfaction of the two criteria set forth in the provision. When the criteria for application of the average-to-transaction method are satisfied, section 777A(d)(1)(B) of the Act does not limit application of the average-to-transaction comparison methodology to certain transactions. Instead, the provision expressly permits the Department to determine dumping margins by comparing weighted-average NVs to the EPs (or CEPs) of individual transactions. While the Department does not find that the language of section 777A(d)(1)(B) of the Act mandates application of the average-to-transaction method to all sales, it does find that this interpretation is a reasonable one and is more consistent with the Department's approach to selection of the appropriate comparison method under section 777A(d)(1) of the Act more generally.

With regard to LGEMM's contention that there is no pattern of price differences for the non-targeted sales, we disagree. The statute refers to a pattern of prices that differ. The differences at issue are differences between the prices of the targeted sales and other sales of comparable merchandise. The non-targeted sales are integral to the pattern of prices that differ because in their absence no pattern of prices that differ would be discernable.

Thus, if the criteria of section 777A(d)(1)(B) of the Act are satisfied, the Department will apply the alternative average-to-transaction methodology to all sales in calculating the weighted-average dumping margin. See, e.g., Bags from Taiwan at Comment 1; and OCTG from the PRC at Comment 2. However, as noted above, the criterion of section 777A(d)(1)(B)(ii) has not been met in this investigation.

## **LGEMM**

### **Comment 3: Application of MNC Provision**

Based on the petitioner's allegation that the criteria for invoking the multinational corporation

provision under section 773(d) of the Act (MNC Provision) had been satisfied with respect to LGEMM, and our analysis of these criteria based on the sales and cost data submitted by LGEMM, we applied the MNC Provision to LGEMM in the Preliminary Determination. The MNC Provision criteria are:

- (1) Subject merchandise exported to the United States is being produced in facilities which are owned or controlled, directly or indirectly, by a person, firm or corporation which also owns or controls, directly or indirectly, other facilities for the production of the foreign like product which are located in another country or countries;
- (2) Sales of the foreign like product by the company concerned in the home market of the exporting country are nonexistent or insufficient as a basis for comparison with the sales of the subject merchandise to the United States; and,
- (3) The NV of the foreign like product produced in one or more of the facilities outside the exporting country is higher than the NV of the foreign like product produced in the facilities located in the exporting country.

In this investigation, LGEMM reported that it is owned in part by LG Electronics, Inc. (LGE), which produces and sells bottom mount refrigerators in Korea. We found that LGEMM's sales to its Mexican home market were not viable for comparison to sales to the United States, and we determined that Canada was the most appropriate third country market pursuant to 19 CFR 351.404 for purposes of the comparison of LGEMM's NVs under the MNC Provision because Canada is LGEMM's largest third country market with respect to sales of bottom mount refrigerators. Accordingly, the first two criteria of the MNC Provision were met.

With respect to the third criterion, we compared the NVs of sales made by LGEMM to Canada with the NV of the sales made by LGE in Korea, as detailed in the Preliminary Determination 76 FR at 67692-93, and the LGEMM Preliminary Calculation Memo. As a result of our analysis, we determined that the NV of the foreign like product produced in Korea was higher than the NV of the foreign like product produced in Mexico. Thus, the third criterion for invoking the MNC Provision had been satisfied. Accordingly, we compared the prices of LGEMM's sales to the United States to the NVs calculated from LGE's sales to its Korean home market in the Preliminary Determination.

According to LGEMM, the purpose of the MNC Provision is to provide for comparisons, otherwise unavailable under the law, where production by one affiliate that was exporting product to the United States is being subsidized by production in another country by another affiliate, which reaped exceptional profits by selling exclusively in a protected home market. LGEMM contends that the facts of this investigation do not reveal such a situation, as exports of bottom mount refrigerators from both Korea and Mexico are subject to an antidumping investigation, LGE's export volume is substantially greater than LGEMM's export volume, and Korea should not be viewed as a protected home market. LGEMM also notes that the Department found a relatively low margin for LGE in the preliminary determination of the less-than-fair-value (LTFV) investigation of bottom mount refrigerators from Korea, a finding which does not support treatment of Korea as a protected market where LGE enjoys extraordinary profits.

LGEMM further asserts that analysis of the sales of the few Korean models used for comparison to

LGEMM's U.S. sales shows that these sales could hardly be the basis for supporting LGEMM's U.S. sales. LGEMM emphasizes Congress' intent that the MNC Provision address discriminatory pricing by multinational corporations which would subsidize U.S. exports with higher-priced sales by one or more affiliates in a third country market. See S.Rep. No. 93-1298, at 175, reprinted in 1974 U.S.C.C.A.N. 7186, 7312 (Senate Report). LGEMM notes that the Court of Appeals for the Federal Circuit (CAFC) cited the Senate Report in addressing the application of the MNC Provision in Ad Hoc Shrimp Trade Action Committee v. United States, 596 F.3d 1365, 1371 (Fed. Cir. 2010). Because LGEMM contends that the above-described circumstance is not present in LGEMM's case, LGEMM asserts that the Department should not have exercised its discretion to invoke the MNC Provision in the Preliminary Determination.

Further, LGEMM claims that the statutory standards for application of the MNC Provision in this investigation have not been met. LGEMM notes that the MNC Provision under section 773(d)(3) of the Act can only be invoked when "the NV of the foreign like product produced in one or more of the facilities outside the exporting country is higher than the NV of the foreign like product produced in the facilities located in the exporting country." For purposes of this investigation, LGEMM contends that the products produced and sold in Mexico and Korea are too dissimilar for determining that the NV of the foreign like product produced in one country exceeds the NV of the foreign like product produced in the other. According to LGEMM's analysis, the Department's preliminary determination resulted in comparing all of LGEMM's U.S. sales to three small kimchi refrigerators produced and sold in Korea – the only three products which passed the Department's difference-in-merchandise (DIFMER) test.<sup>29</sup> However, LGEMM states that, had the Department compared LGEMM's U.S. sales to its Canadian sales, more than half of the U.S. CONNUMs would have been matched to identical CONNUMs sold in the Canadian market, and the remaining U.S. CONNUMs would have been matched to very similar products based on the product-matching criteria employed in this investigation. LGEMM contends that the Department's reliance on the small number of grossly dissimilar products in the Korean market for comparison to U.S. sales does not meet the third requirement under section 773(d) of the Act.

LGEMM continues that the use of the Korean NVs for comparison to the U.S. sales effectively renders the Department's product-matching methodology moot because the Department is left with only those few models LGE produced and sold to its Korean home market customers that pass the DIFMER test. Citing as an example Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, Singapore, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews, 70 FR 54711, (September 16, 2005), and accompanying Issues and Decision Memorandum at Comment 2, LGEMM asserts that the Department has recognized that cost differences alone may not be sufficient to identify similar products and has included a test based on product characteristics as well as a DIFMER test to define NV in other cases.

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<sup>29</sup> The DIFMER test refers to the Department's practice that it generally will not consider merchandise to be similar if the DIFMER adjustment is greater than twenty percent of the total manufacturing cost of the product sold to the United States. When the variable cost difference exceeds twenty percent, we consider that the probable differences in value of the products are so large that they cannot be reasonably compared. See Import Administration Policy Bulletin 92.2, dated July 29, 1992.

As further support for its argument that the Department should not rely on the sales of the allegedly dissimilar Korean-produced merchandise for NV, LGEMM states that the definition of foreign like product under section 771(16) of the Act is contrary to the definition applied under the MNC Provision with respect to a foreign like product produced outside the exporting country. LGEMM continues that section 771(16)(C)(iii) of the Act requires that the foreign like product reflect merchandise that is produced by the same person and in the same country as the subject merchandise, and that “may reasonably be compared” to that merchandise (i.e., the U.S. product), and the Korean-produced models that constituted NV in the preliminary determination do not fulfill this statutory requirement. Given the statutory tension between the definition of foreign like product and the language of the MNC Provision, LGEMM holds that the Department must exercise substantial discretion in applying the MNC Provision, particularly with respect to the reasonableness of product matching. In this investigation, LGEMM contends that the unreasonableness of the model matching if the Korean home market is used warrants the Department’s discretion not to apply the MNC Provision.

Finally, LGEMM asserts that the application of the MNC Provision in this investigation may not withstand a challenge at the WTO. According to LGEMM, Article 2.2 of the WTO AD Agreement does not contain any provision for calculating NV on the basis of sales produced in a third country facility. LGEMM asserts that, in the event that the Department would have to defend its deviation from the generally-accepted concept of NV to address cross-country subsidization, it would argue from a weak position because LGEMM believes there is no evidence of cross-country subsidization in this investigation, and the NV comparisons would be based on a small set of radically different products. Thus, LGEMM concludes, the risk that the MNC Provision would be found to be WTO-inconsistent under these circumstances is another reason the Department should exercise its discretion not to apply the MNC Provision in the final determination.

The petitioner responds that the Department properly applied the MNC Provision in the Preliminary Determination. The petitioner disagrees with LGEMM’s contention that the Department’s application of the MNC Provision is discretionary. After determining that the three statutory criteria were met, the petitioner maintains that the Department correctly concluded that it was required to apply the MNC Provision. Furthermore, the petitioner states that the Department fulfilled the statutory requirement to compare “the foreign like product” in identifying the Korean-produced models for comparison because the comparison products are all merchandise under consideration and within the scope of the investigation. The petitioner notes that the statute states that “foreign like product” is the basis for NV, not “identical product,” as LGEMM may prefer. Thus, the petitioner concludes that the Department made reasonable comparisons in accordance with the statute in the invocation of the MNC Provision.

The petitioner adds that, if the statute were to be interpreted as LGEMM suggests, allowing for application of the MNC Provision only when the potential comparison NVs are derived from identical or very similar products to those sold in the United States, the application of the MNC Provision would be impossible in any situation where there were different product lines produced in the countries under consideration. The petitioner suggests that a respondent could circumvent the invocation of the MNC Provision by shifting a product line out of the protected home market

and escape scrutiny under the MNC Provision, allowing the other product lines in the protected home market to command higher prices that could subsidize the production elsewhere of merchandise that could be dumped in the U.S. market. Such a situation, the petitioner notes, is what the MNC Provision is intended to correct.

Finally, the petitioner contends that whether the MNC Provision may be in conflict with the WTO AD Agreement is not relevant to the issue at hand. The petitioner asserts that once the statutory criteria of the MNC Provision have been met, the Department is mandated to apply it. The petitioner maintains that the Department has no discretion to ignore a statutory mandate on the basis of speculation concerning prospective WTO action.

#### Department's Position:

We continue to apply the MNC Provision in the final determination because all three statutory criteria have been met. Using the same methodology as that employed in the Preliminary Determination, after taking into account adjustments made to LGEMM's and LGE's sales and cost data based on our analysis of other comments received and our findings at verification, we continue to find that the NV of the foreign like product produced in Korea is higher than the NV of the foreign like product produced in Mexico. See LGEMM Calculation Memo. Therefore, we compared LGEMM's U.S. prices to the prices of LGE's sales to its Korean home market, in accordance with the MNC Provision.

We agree with the petitioner that the Department's application of the MNC Provision is mandatory when all three statutory criteria have been satisfied. Under section 773(d) of the Act, if the Department determines that the three criteria (quoted above) are met, the Department "shall determine the NV of the subject merchandise by reference to the NV at which the foreign like product is sold in substantial quantities from one or more facilities outside the exporting country" (emphasis added). The plain language of the statute is clear that the Department does not have discretion whether or not to apply the MNC Provision once the criteria have been met.

Although the Senate Report cited by LGEMM includes language that suggests that the Department will have discretion when invoking the MNC provision, that language is in reference to the Senate committee's proposed text. That proposed text stated that, when the criteria for invoking the MNC provision are satisfied, the Secretary "may determine the foreign market value of such merchandise by reference to the foreign market value at which such or similar merchandise is sold in substantial quantities by one or more facilities outside the country of exportation." See Senate Report at 7313. However, when the MNC Provision was enacted, the word "may" was replaced with "shall." See Section 321 of the Tariff Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978 (1975) (amending the Antidumping Act of 1921). That is, in the final form of the statute passed by Congress, Congress removed the Department's discretion to apply the MNC Provision when the relevant criteria are satisfied. The word "shall," and the resulting lack of discretion, remains in the current law. See Section 773(d) of Act.

LGEMM suggests that the Department must affirmatively determine that the low-priced export sales are being supported by higher-priced sales of the affiliated factories in a home market that is

highly protected from outside competition before the MNC Provision may be applied. However, neither the statute nor the regulations instruct the Department to conduct any such type of economic analysis before invoking the MNC Provision. Again, the plain language of the statute specifies that, when the statutory criteria – and only the statutory criteria – are met, the MNC Provision must be invoked.

Moreover, with respect to LGEMM's arguments that the purpose of the MNC Provision has not been satisfied in that, among other things, LGEMM's exports of the subject merchandise from Mexico and LGE's exports of the subject merchandise from Korea are under investigation concurrently, we emphasize that such factors are irrelevant to the application of the MNC Provision because, as discussed above, application of the MNC Provision is mandatory under the statute when the criteria have been met. That, as in this instance, the same merchandise from the other country (*i.e.*, Korea) is also under an antidumping duty investigation, does not affect the statutory criteria for invoking the MNC Provision.

LGEMM also argues that the third statutory criterion of the MNC Provision has not been met because the "foreign like product" sold in Korea is too dissimilar to LGEMM's products sold to the United States to form a basis for NV under section 771(16)(C)(iii) of the Act. This section of the Act specifies that the foreign like product is merchandise that the Department determines "may reasonably be compared" to the U.S. product. LGEMM does not dispute that the Korean-produced merchandise used for comparison is within the scope of the investigation, nor does LGEMM contest the fact that the Korean-produced models in question pass the DIFMER test, which the Department has consistently relied upon to determine whether in-scope foreign-produced merchandise may be reasonably compared to products sold in the United States. See, e.g., Ball Bearings and Parts Thereof From France, Germany, Italy, Japan, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews and Rescission of Reviews in Part, 73 FR 52823 (September 11, 2008), and accompanying Issues and Decision Memorandum at Comment 2, where we stated that:

.. {We} normally set no limits on the comparisons between the subject merchandise and the foreign like product beyond not considering models for which the difference-in-merchandise adjustment is greater than 20 percent of the total COM of the U.S. model. In a normal market-economy case, the mere fact that a model meets the definition of "foreign like product" is enough to make it "similar" for purposes of sections 771(16)(B) and (C) of the Act as long as the difference-in-merchandise adjustment is 20 percent or less.

Furthermore, we also note that the DIFMER test has been affirmed by the CIT. See Torrington Co. v. United States, 881 F. Supp. 622, 634-35 (CIT 1995).

We acknowledge that the definition of "foreign like product" in section 771(16) of the Act refers to manufacture "in the same country...as the merchandise which is the subject of the investigation." However, the MNC Provision qualifies the term "foreign like product" by stating that the Department "shall determine the NV of the subject merchandise by reference to the NV at which the foreign like product is sold in substantial quantities from one or more facilities outside the exporting country." Thus, in the context of the MNC Provision, it is reasonable to read the term

“foreign like product” to mean merchandise as defined in section 771(16) of the Act, except produced in one or more facilities outside the exporting country instead of in the same country. Thus, we properly determined that the third criterion of the MNC Provision has been met because the Korean-produced models may reasonably be compared to the Mexican-produced models sold in the United States. The results of our final determination have not altered this finding. Consequently, we must apply the MNC Provision with respect to LGEMM in this investigation.

Finally, with respect to any potential vulnerability before the WTO in the application of the MNC Provision in this case, we agree with the petitioner that this concern is not the issue at hand because this proceeding is governed by the Act, of which the MNC Provision is a part.

Comment 4: Lump Sum and Sell-Out Rebates on U.S. Sales

LGEMM reported “lump-sum” rebates (i.e., one-time payments not tied to sales) and sell-out rebates<sup>30</sup> on an annual basis in the field REBATE10U in its U.S. sales listing. LGEMM calculated these rebates on a customer- and product-specific basis. Specifically, LGEMM used as the numerator of its calculations the amounts accrued in its sales system for each program, customer, and product during 2010, and as the denominator the corresponding POI sales of the same product/customer combination (irrespective of whether the rebate was earned on sales during this period).<sup>31</sup> In addition, LGEMM established a floor of zero and a ceiling of 30 percent of price for the REBATE10U amount calculated for each customer/model combination, and then it re-allocated the excess positive or negative rebate amounts to the remaining models sold to that customer. This methodology was first disclosed to the Department at verification.

Moreover, as with U.S. freight expenses (see below), at the start of verification LGEMM informed the Department that it had discovered that certain REBATE10U amounts had been double counted, and it offered to provide corrected data. However, due to the volume of affected transactions, we did not take the revisions as a verification exhibit. Nonetheless, we examined revised REBATE10U calculation worksheets for the majority of the reported U.S. sales.

According to the petitioner, the Department discovered at verification that LGEMM’s reporting of REBATE10U was anything but accurate. The petitioner faults LGEMM for not informing the Department of the distortion that its methodology had on its rebate experience or that it set arbitrary floors and caps to the rebate percentages reported. The petitioner asserts that, separate from these findings of non-transparency and non-cooperation, the actual, unadjusted rebate amounts themselves as set forth in the Department’s U.S. sales verification report serve as a “stunning indictment of the inherent unreasonableness and distortions of LGEMM’s U.S. rebate methodology.” The petitioner argues that, where the Department discovers at verification such failures to report information, its practice requires it to find that the respondent failed to act to the best of its ability. As support for this assertion, the petitioner cites Floor-Standing, Metal-Top Ironing Tables and Certain Parts Thereof From the People’s Republic of China: Final Results of

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<sup>30</sup> “Sell-out” rebates are determined only after resale by LGEMM’s customer.

<sup>31</sup> For example, if LGEMM recorded sell-out rebates in 2010 which related to models sold in 2009, it included these rebates in the numerator of its calculations but it did not include the corresponding sales in the denominator.

Antidumping Duty Administrative Review, 75 FR 3201 (Jan. 20, 2010). Consequently, the petitioner argues that the Department has no recourse but to apply AFA to the rebates in question, pursuant to section 776(b) of the Act. As AFA, the petitioner maintains the Department should compute the highest non-aberrational REBATE10U percentage reported for any U.S. sale and apply that percentage to all non-OEM CEP sales reported in the U.S. sales listing.

The petitioner disagrees with LGEMM's argument (see below) that its reallocation of any excess or negative amount renders its reporting methodology reasonable. According to the petitioner, this argument misses the key point – that LGEMM should have disclosed its methodology before verification, especially since it knew that this methodology was distortive and inaccurate. Thus, the petitioner contends that AFA is warranted here.

LGEMM contends that it reported lump sum and sell-out rebates on the most specific basis on which these rebates are tracked in the ordinary course of business. LGEMM asserts that the verification report accurately reflects the adjustments that LGEMM had to make to the product-specific rates calculated for certain customers, where the calculated factor “did not yield a reasonable result.” LGEMM notes that it allocated any excess amounts over the remaining purchases of those customers, and thus these rebates are reported in the U.S. sales listing. LGEMM also notes that the Department verified without discrepancy all of the underlying data upon which the allocations were based.

According to LGEMM, its adjustments reflect the difficulty in attempting to further refine data when the database is large. LGEMM asserts that its reporting methodology reasonably reflects the rebates granted to its customers.

LGEMM disagrees with the petitioner that the use of facts available is warranted because its reported amounts are consistent with the way that the U.S. affiliate does business. LGEMM asserts that LGEMM's reallocations were not done to make its rebate values “appear” reasonable (contrary to the language in the U.S. verification report<sup>32</sup>), but rather they were done in order to have the reporting comport with the normal commercial practices of LGEMM's U.S. affiliate. Finally, LGEMM maintains that its reporting methodology is consistent with the Department's questionnaire instructions, which direct respondents to report allocated amounts in cases where (as here) transaction-specific reporting is not possible.

LGEMM notes that the administrative record contains revisions covering only approximately 87 percent of the reported transactions. LGEMM argues that all of the reported values should be revised, and it offers to submit the corrected figures for the remaining 13 percent of sales. Alternatively, LGEMM argues that the Department should accept its reported values for the remaining 13 percent (even though these amounts are slightly overstated and thus conservative) for purposes of the final determination.

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<sup>32</sup> See Memorandum to the File entitled “Verification of the S.S. Sales Response of LG Electronics Monterrey Mexico, S.A. de C.V. and LG Electronics USA, Inc.”, dated February 2, 2012 (LGEMM CEP Verification Report).

Department's Position:

We agree with the petitioner, in part. The rebates in question were reported in LGEMM's U.S. sales listing in the field REBATE10U. After analyzing the facts on the record, we find that LGEMM's methodology for calculating these rebates was distortive because: 1) LGEMM's methodology (before adjustment) resulted in rebates ranging from negative amounts to rates significantly exceeding gross unit price; and 2) LGEMM's modification to this methodology via an arbitrary cap and floor did not make the results more reasonable (but instead only masked the distortion). Moreover, we find that LGEMM did not act to the best of its ability because it: 1) did not respond fully to the Department's supplemental questions; 2) stated inaccurate information in its questionnaire responses; 3) did not disclose its methodology until verification; and 4) failed to request guidance from the Department as to an acceptable methodology (but rather tried to mask what the company itself recognized as unreasonable results by spreading what it considered to be excess amounts over other, unrelated sales).

Therefore, for this final determination, pursuant to section 776(b) of the Act, we have based LGEMM's U.S. sell-out rebates on AFA. As AFA, we have determined the average rebate percentage for all U.S. non-OEM sales contained in LGEMM's U.S. sales listing for which LGEMM reported a positive rebate amount. We then used this percentage as a floor for all U.S. sales for which LGEMM reported sell-out rebates (or for which LGEMM applied a rebate floor). For further discussion, see LGEMM Calculation Memo. We find that the use of a floor as AFA ensures that LGEMM does not benefit from any underreported rebates that result from its distorted allocation methodology, but retains the rebates that may have been overreported as a result of the same methodology. We disagree that the AFA proposed by the petitioner is appropriate here because we find that the selected AFA is sufficiently adverse in that it addresses the Department's concern that LGEMM not benefit from its distorted allocation methodology.

The facts surrounding these conclusions are as follows:

LGEMM responded to the Department's antidumping duty questionnaire on July 22, 2011. In this submission, LGEMM stated that

LGEUS uses several kinds of sales promotion programs. Usually sales programs are categorized in one of two ways. One is a sell-in rebate, in which benefits are earned based on LGEUS's sales to its customers; the other is a sell-out rebate, in which benefits are earned when LGEUS's customers sell to end users. Thus the sell-in rebate relates to LGEUS's sales figures, and the sell-out rebate relates to the retailers' (LGEUS's customers') sales figures.

... The sell-out rebates include sell-out supports, mail-in rebates, price protection, and sales person incentives.

LGE usually decides the sell-in program for customers on an annual basis and accrues (recognizes) certain amounts as expenses when LGEUS sells to its customers. In the case of sell-out related programs, the ultimate payments are hard to estimate precisely, since they depend upon the customer's sales to its customers. As a result, LGEUS usually sets up payments on a lump-sum basis."

See LGEMM's July 22, 2011, questionnaire response at page C-24.

In our August 11, 2011, supplemental questionnaire, we noted that the above discussion only described the rebate programs in general terms, and we requested that LGEMM revise its response to provide the rebate information requested in the Department's questionnaire for each specific rebate program applicable to the sales reported. This information included a description of the terms and conditions of each rebate program, when those terms and conditions were established in the sales process, and whether the rebate was tracked on an accrual or actual basis in the accounting system. We also requested that LGEMM provide: 1) documentation, including sample agreements, for each type of rebate; and 2) source documentation supporting the rebates calculated for selected transactions/customers, including sales invoices, rebate eligibility worksheets, rebate payment documents, and the corresponding ledger entries recording the transactions as well as any calculation worksheets. We also requested that LGEMM report each type of rebate program under a separate computer variable, instead of the single category used in its initial response.

On September 8, 2011, LGEMM responded to the Department's supplemental questionnaire. In this submission, LGEMM provided a one-sentence description of its lump sum sell-out rebate program, as well as information concerning the terms, payment, and accounting method for tracking rebates. Because LGEMM requested proprietary treatment for this information, it cannot be disclosed here. See LGEMM's September 8, 2011, supplemental questionnaire response at page 27 and Exhibit C-28. LGEMM provided no additional information to explain its calculation methodology for reporting the lump sum sell-out rebate amounts in its U.S. sales database.

In the preliminary determination, we accepted LGEMM's rebates as reported. LGEMM did not identify how these rebates related to the specific rebate programs shown on the program documents in Exhibit C-29 of the September 8, 2011, response. However, upon review, we found no indication that LGEMM's rebates were not reported in as specific a manner as possible or appropriately linked to the original sale. Nonetheless, because these documents were not completely clear, we issued an additional supplemental questionnaire to LGEMM after the preliminary determination. See the November 1, 2011, letter to LGEMM from Irene Darzenta Tzafolias, Program Manager. In this questionnaire, we requested that LGEMM clarify its rebate reporting for lump sum and sell-out rebates by describing its methodology in more detail and providing a chart showing each rebate program/customer/product combination. We also required LGEMM to report its rebates on a customer-, product-, and time-specific basis if it had not already done so. See id. at page 1. As part of this request, we notified LGEMM that it must base its reporting on rebates paid on 2010 sales, rather than on rebates paid in 2010 regardless of when the underlying sale took place.

Our questions were as follows:

3. With respect to the description of the "Lump-sum Sell-out Rebate" (REBATE10U) at page 27 and Exhibit C-29 of the SQRBC, it is unclear whether this rebate category applies to a single

rebate program or a broad group of multiple rebate programs. Explain by providing a chart, organized by customer, which lists each rebate program that is included in this rebate field. This chart must include:

- a. Each rebate program applicable to each customer;
  - b. The specific time period to which each program applies to each customer;
  - c. The specific products to which each rebate program applies; and
  - d. A summary of the terms/rebate percentages for each program/customer combination.
4. While we note that the per-unit amount reported for REBATE10U is calculated on a customer-specific basis, we are unable to determine from the questionnaire response whether the REBATE10U amount has been calculated on the most product-, time- and customer-specific basis possible. Explain in detail how you calculated the per-unit REBATE10U amount on the most specific basis possible for sales made during the POI.
  5. If the REBATE10U amount can be reported on a more specific basis, revise your questionnaire response accordingly and include a detailed narrative description of your revised allocation and reporting methodology.
  6. In addressing items 3 – 5 above, as well as preparing any revisions to the U.S. sales listing, ensure that you include all rebates related to merchandise sold during the POI, rather than all rebates paid out during the POI (including those rebates paid on sales made prior to the POI). For example, if LGEUS sold an in-scope product in December 2009, but paid rebates (reported under REBATE10U) related to that sale in 2010, do not include these rebates in your chart and any revised sales listing. Similarly, if LGEUS sold an in-scope product in December 2010, but did not pay rebates on this sale until 2011, include these rebates in your chart and revised sales listing.

In response to the Department's directive in this questionnaire to "{e}xplain in detail how you calculated the per-unit REBATE10U amount on the most specific basis possible for sales made during the POI," LGEMM responded:

The lump-sum sell out rebate covers a broad group of rebate programs. Thousands of programs are included within this rebate. The amounts payable under these programs may be based on the payment of a single amount applicable to individual models or total sales within the Home Appliances division. In the ordinary course of business, LGEUS accrues the amounts earned under each of these programs. In all cases, LGEUS revised its reporting of REBATE10U to reflect the amount accrued for each transaction, which would be the most product-specific, time-specific, and customer-specific basis possible for reporting the lump sum rebates."

See LGEMM's November 10, 2011, submission at page 2.

In addition, in response to the Department's instruction to eliminate rebates paid on sales in 2009 and add rebates on 2010 sales paid in 2011, LGEMM stated:

Because LGEUS is reporting the amounts accrued for each transaction, these amounts include all rebates earned in 2010 related to merchandise sold during the POI. In preparing the chart

and necessary revisions to the file, LGEUS identified rebates relating to transactions that occurred in 2009 that were included in the earlier reported rebate values, as well as reversals of 2010 accruals that were not reflected in the earlier reported data. For transparency purposes, the corrections to rebates relating to transactions that occurred in 2009 that were included in the earlier reported rebate values are reflected in REBATE11U, and the corrections to rebates relating to reversals of 2010 accruals that were not reflected in the earlier reported data are reflected in REBATE12U.

See id. at page 3.

Thus, LGEMM's response, although vague and lacking any details on the actual calculation methodology, appeared to indicate that it had revised its reporting of sell-out rebates to report them on a transaction-specific basis. Moreover, this response seemed to show that LGEMM had revised its reporting to eliminate rebates paid in 2010 for 2009 sales and to include 2011 rebate payments for 2010 sales. Finally, LGEMM clearly stated that it based the reported amounts on accruals, thereby resolving the contradictory references in its September 8, 2011, response to accrued amounts and actual payments.

Because reporting rebates on an accrual basis is not consistent with the Department's practice (unless the respondent demonstrates the accruals accurately reflect actual rebate expenses) the Department normally would have instructed LG to either demonstrate that its accruals accurately reflected its actual rebate expenses or to revise its reporting methodology to use actual rebate amounts. However, we were unable to do so in this instance because LGEMM's clarification only came two business days prior to the start of the U.S. sales verification. Nonetheless, we did not view this reporting deficiency as a fatal flaw, given that LGEMM would be given the opportunity at verification to demonstrate that either: 1) its actual and accrued amounts were the same; or 2) its methodology, while not accurate, was conservative.

At verification, we discussed LGEMM's rebate reporting methodology with company officials. This methodology is set forth in the LGEMM CEP Verification Report:

LGEUS stated that it reported the lump-sum and sell-out rebates as a POI average by customer and model, which LGEUS states is the most specific basis on which it tracks these rebates in the ordinary course of business. Regarding sell-out rebates, LGEUS further explained that it could not link these rebates to LGEUS sales on a more specific basis because the event that qualified the customer for the rebate was the customer's downstream sale at the retail level. Thus, if LGEUS had a rebate program in place applicable to all of a customer's sales of model X on President's Day weekend, LGEUS indicated that LGEUS would have no way to link the rebate paid on those sales to the sales between LGEUS and its customer because: 1) the transaction between LGEUS and its customer could have taken place well before the promotional period; and 2) LGEUS does not have access to its customers' inventory and sales information. Moreover, company officials explained that they are unable to anticipate accurately exactly what sell-out rebate programs a particular sale will qualify for at the time of the customer's purchase. Therefore, LGEUS stated that it was appropriate to allocate all sell-out rebates on a model- and customer-specific basis.

Similarly, for lump-sum rebates, LGEUS explained that these rebates represented one-time payments to its customers which were not tied to any particular set of sales. Thus, LGEUS stated

that it allocated these rebates based on the sales value of the products sold that were covered by the rebate program (for example, all products, or all home appliance products).

LGEUS initially reported REBATE10U on a customer-specific basis. In the November 10, 2011 submission, LGEUS revised its REBATE10U calculation to reflect a customer-specific, product-specific rebate allocation. To report REBATE10U on a per-unit basis, LGEUS calculated a ratio in a two-step process. First, LGEUS identified the rebates attributable to each model sold to a customer, for each applicable rebate program. These amounts are the POI accrual amounts (either actual or estimated) maintained on a customer- and product-specific basis in LGEUS's Trade Management rebate system. Next, LGEUS summed the customer-, product-, and rebate program-specific accrual amounts and divided the sum by the total POI sales by model and customer.

However, LGEUS explained that in certain situations these calculations resulted in rebate ratios that were not reasonable. Specifically, LGEUS explained that in its calculations for REBATE10U, LGEUS established a 30 percent cap and a zero percent floor. LGEUS explained that it did not normally grant rebates greater than 30 percent of gross-unit price and that rebate percentage calculations of less than zero reflected instances where prior excess accruals were offset during the POI (*i.e.*, the only accruals during the POI were negative). LGEUS explained that both scenarios likely occurred due to timing issues (*e.g.*, LGEUS could accrue a substantial rebate amount during 2010, but the bulk of the sales to which it applied occurred in 2011, resulting in a rebate percentage of more than 30 percent; similarly, LGEUS could reverse 2009 accruals in 2010 resulting in a negative rebate percentage). In these instances, to ensure complete rebate reporting, LGEUS stated that it summed the excess positive and negative accruals and allocated the resulting amount equally across all models to that customer (except they did not allocate positive excess accruals to models that were capped at 30 percent or negative accruals to models that were capped at zero percent).

Nonetheless, we noted that LGEUS reported negative rebate amounts or amounts greater than 30 percent of gross unit price for certain customer/model combinations. LGEUS explained that it applied the 30 percent and zero percent caps to the primary calculation, but not to the allocation of excess rebate amounts. Thus, if a particular customer/model combination had a calculated rebate percentage of 29.99 percent, it was possible that, after allocating the remaining amounts, such a combination would have a rebate percentage of greater than 30 percent. This rebate cap and re-allocation methodology had not been disclosed by LGEUS in its submissions to the Department.

See LGEMM CEP Verification Report at pages 23-24.

Based on these facts, we identified the issue of how to treat U.S. sell-out rebates in the final determination in the LGEMM CEP Verification Report:

In summary, we found that for REBATE10U, LGEUS: 1) reported accrued, rather than actual, rebates; 2) did not link these rebates to the underlying sales on which they were earned, but instead reported all accruals made during 2010; and 3) incorporated a cap/floor in order to make the size of the rebates appear reasonable. Moreover, we do not have corrected rebate information for approximately [ ] percent of LGEUS's U.S. sales. Therefore, the issue is how the Department should treat the amounts reported in the field REBATE10U for the final determination.

See LGEMM CEP Verification Report at pages 3-4.

Based on the foregoing, we disagree with LGEMM that its reporting methodology for lump sum and sell out rebates is acceptable. We look to the Department's regulations as a starting point when analyzing this issue. The regulation governing allocations is found at 19 CFR 401(g)(2) and states:

(2) Reporting allocated expenses and price adjustments. Any party seeking to report an expense or a price adjustment on an allocated basis must demonstrate to the Secretary's satisfaction that the allocation is calculated on as specific a basis as is feasible, and must explain why the allocation methodology used does not cause inaccuracies or distortions.

In this case, LGEMM's reporting methodology is not "on as specific a basis as is feasible," and it is clearly both inaccurate and distortive. LGEMM, by its own admission, offered sell-out rebate programs for particular holiday periods, but it made no effort to account for this fact in its rebate reporting.<sup>33</sup> Because LGEMM's description of its sell-out rebate programs was limited in its questionnaire responses, the Department did not know until verification that LGEMM offered such time-specific programs. Thus, during our information gathering stage, we were unable to elicit the information necessary to assess LGEMM's verification claim that "LGEUS would have no way to link the rebate paid on those sales to the sales between LGEUS and its customer." See LGEMM CEP Verification Report at page 23. Moreover, at verification, our focus was on understanding what LGEMM did (given that much of its methodology was not disclosed prior to that point) and less on what LGEMM could have done with the information maintained in the ordinary course of business.

Similarly, LGEMM made no attempt to link its reported rebates to the sales transactions on which they were based, but instead allocated all rebates accrued in 2010 over sales during the year. Thus, LGEMM included rebates in its calculations which were earned on sales made in 2009 (and thus not subject to this investigation) and it excluded rebates granted on POI sales which were paid in 2011. In our November 1, 2011, supplemental questionnaire, we clearly instructed LGEMM to make such a linkage, and we had no indication until verification that LGEMM had failed to comply.

Finally, we find that LGEMM's rebates were not adequately specific because, instead of reporting actual rebate amounts, LGEMM used the accruals recorded in its system. As noted above, the Department requires respondents to report actual rebate amounts, rather than accruals unless the respondent demonstrates that the accruals accurately reflect actual rebate expenses. Due to the inconsistencies in LGEMM's responses on this point, we did not realize until a few days prior to verification that LGEMM had not based its calculations on actual amounts granted and paid on specific sales made during the POI. Moreover, given the other problems with LGEMM's reporting methodology, we find that the accrued amounts are not an acceptable proxy for actual amounts because use of these accruals led to distortive and inaccurate results (as discussed below).

LGEMM's allocations were not only too general, they were also inaccurate and distortive. LGEMM's chosen methodology resulted in rebate amounts which were not in line with

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<sup>33</sup> Thus, to the extent that the rebate percentages differed throughout the year, LGEMM's methodology overstated the reported rebates on some sales and understated them on others.

LGEMM's normal commercial practice, as evidenced by the fact that this methodology, before the cap/floor refinement, produced certain rebates which were far in excess of gross unit price and others which were significantly negative. See LGEMM CEP Verification Report at pages 28, 30, and 32. Moreover, we find that the necessity of applying a cap and setting a floor is in and of itself evidence that LGEMM's methodology was distortive. Had LGEMM's methodology yielded results which were in line with its actual rebate experience, the cap/floor would have been unnecessary.

Further, we find that the size of the cap was set arbitrarily, without reference to specific rebate programs in place during the POI. At verification, LGEMM offered no proof that the cap was linked to commercial reality. Rather LGEMM officials merely asserted that LGEUS "did not normally grant rebates greater than 30 percent of gross-unit price." See LGEMM CEP Verification Report at page 23. With respect to the floor, LGEMM asserted at verification that this device was necessary to offset prior excess accruals which were likely made in 2009, and thus not related to POI sales activity. See id. at pages 23-24. Both the arbitrariness of the cap and the inaccuracy of reducing the reported amounts for pre-POI activity are problematic, and LGEMM's reallocation of excess positive and negative accruals makes its reporting no better. We disagree with LGEMM that the primary goal of these reallocations was to make its reporting comport with LGEUS's normal commercial practices, rather than to make its rebate values "appear" reasonable. There is no evidence that the reported figures are in any way accurate or tied to LGEUS's normal commercial practices, despite LGEMM's assertions to the contrary. In fact, had LGEMM wanted to report figures that were tied to its U.S. affiliate's usual experience, it would have reported actual amounts paid on POI sales without resorting to the artifice of floors, caps, and reallocations.

Based on the foregoing, we find that LGEMM failed to meet its burden in this case of demonstrating that its reported allocation methodology for these rebates was "on as specific a basis as is feasible," pursuant to section 19 CFR 351.401(g)(2). In addition, we have concluded that LGEMM's reported allocation methodology creates significant inaccuracies and distortions, and therefore, the Department is unable to use that methodology in its calculations.

Section 776(a) of the Act provides that when "(1) necessary information is not available on the record" or "(2) an interested party (C) significantly impedes a proceeding under this title or (D) provides such information but the information cannot be verified as provided in section 782(i)," the Department "shall, subject to section 782(d), use the facts otherwise available in reaching the applicable determination under this title." LGEMM did not report the necessary accurate rebate amounts because the allocation methodology it applied on the record was distortive. Accordingly, the application of facts available is warranted pursuant to section 776(a)(1). Furthermore, the Department was unable to verify LGEMM's U.S. lump sum/sell-out rebate amounts and without this information, the Department was unable to use the correct rebate amounts in its final calculations. Therefore, because LGEMM's distortive allocation methodology significantly impeded the Department's ability to calculate an accurate margin for LGEMM, the application of facts available is also warranted pursuant to both sections 776(a)(2)(C) and (D).

Section 776(b) of the Act states that if the Department "finds that an interested party has failed to

cooperate by not acting to the best of its ability to comply with a request for information,” then it “may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available.” We have determined that, pursuant to section 776(b) of the Act, the application of adverse inferences is warranted with respect to LGEMM’s sell-out rebate amounts because LGEMM did not cooperate to the best of its ability with respect to this issue.

It appears in its last submission that LGEMM was aware that its methodology was problematic, yet it made no mention of this fact to the Department. Indeed, it failed to fully disclose its capping/flooring methodology until after verification began, and at that point the Department had no time to consider and analyze that methodology in detail and request different, accurate data from LGEMM. Indeed, it was not obvious to the Department that anything was amiss in LGEMM’s calculations until several days into the verification. Further, it is impossible to conclude that LGEMM itself did not recognize that its methodology was distortive because LGEMM attempted to mask the unreasonable results by capping the reported amounts at 30 percent of gross unit price, which is at best an arbitrary rate, or setting the computed amounts to zero and then reallocating the excess positive/negative amounts to other sales.

Based on the foregoing, we find that LGEMM had the necessary information within its control and did not report this information. Instead, LGEMM permitted the Department at the preliminary determination to believe that there was nothing wrong with the value of its reported sell-out rebates, and gave no explanation about the existence of its arbitrary cap amounts until Department officials were at verification at LGESUS’s offices in New Jersey. These rebates are a significant part of LGEMM’s commercial activity and business practices, and therefore the inaccurate reporting of those rebates can have a large impact on LGEMM’s antidumping calculations. Moreover, because these rebates can significantly affect net price, inaccurate reporting can also skew the Department’s targeting dumping analysis. LGEMM’s treatment of this information leads us to conclude, therefore, that LGEMM did not cooperate to the best of its ability during the investigation with respect to this issue.

Thus, for this final determination, pursuant to section 776(b) of the Act, we have based LGEMM’s U.S. sell-out/lump sum rebates on AFA. As AFA, we have determined the average rebate percentage for all U.S. non-OEM sales contained in LGEMM’s U.S. sales listing for which LGEMM reported a positive rebate amount. We then used this percentage as a floor for all U.S. sales for which LGEMM reported sell-out rebates (or for which LGEMM applied a rebate floor). This rate is sufficiently adverse to “ensure” that LGEMM “does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.” See SAA at 870.

We disagree with LGEMM that the Department should deem its methodology acceptable because its reporting methodology is consistent with the Department’s questionnaire instructions, which direct respondents to report allocated amounts in cases where (as here) transaction-specific reporting is not possible. While it is true that the Department’s questionnaire permits allocations, it does not solicit or sanction allocations which are inconsistent with 19 CFR 401(g)(2). As noted above, this regulation only permits allocations which “are calculated on as specific a basis as is feasible” and do not “cause inaccuracies or distortions.” In this case, we find that LGEMM has not met either condition.

We also disagree with LGEMM's argument that the Department should accept its methodology because LGEMM did the best that it could with the information that it had (*i.e.*, it had no better way to link its rebates to the underlying sales and its allocations were consistent with its books and records<sup>34</sup>. First, and most importantly, LGEMM could have requested guidance from the Department as to an acceptable methodology, instead of forging ahead with a distorted allocation and capping/flooring scheme that has no basis in the company's own experience or the Department's practice. Instead, the Department finds that the record supports the conclusion that LGEMM's actions and inactions ended up shielding its reporting methodology from scrutiny. LGEMM should have been forthcoming about the problems in its calculations throughout the entire investigation. Second, LGEMM should have been well aware that sell-out rebates were a significant issue for another respondent in this case, Samsung, because the Department laid out its concerns with Samsung's rebate reporting in detail in the Federal Register notice issued for the preliminary determination. Thus, knowing that its reporting methodology was problematic, and that sell-out rebates were an issue that concerned the Department for another respondent, LGEMM should have also known that its methodology, and the inaccurate results of that methodology, would raise serious concerns for the Department when discovered.

As to the arguments that: the Department verified without discrepancy all of the underlying data upon which the allocations were based, we agree that the numbers used in LGEMM's allocations tied to the numbers in LGEUS's books and records. This fact, however, is distinct from the question of whether LGEMM's methodology verified. While the rebates themselves (in terms of aggregate dollar amounts) are indeed recorded in the company's books, we find that the per-unit amounts derived from these figures were inaccurate for the reasons stated above. Moreover, this fact also does not account for the various other problems found with LGEUS's rebates, including the actual/accrual issue and the inclusion of pre-POI accrual reversals/exclusion of post-POI payments question<sup>35</sup>. For this reason, we also disagree with LGEMM that its reporting methodology reasonably reflects the rebates granted to its customers.

Therefore, for the foregoing reasons, we find that the use of AFA with respect to this issue is appropriate for the final determination.

#### Comment 5: Non-Product-Specific Accrual Rebates on U.S. Sales

LGEMM reported budgeted accruals for sell-out rebates in the variable fields REBATE9U and REBATE11U in its U.S. sales listing. At verification, LGEUS explained that these accruals do not relate to specific rebate programs and are not paid out to customers; rather, they were designed to comply with International Financial Reporting Standards (IFRS). Moreover, while LGEMM reported REBATE9U using the amounts accrued in LGEUS's books for December 2010, it

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<sup>34</sup> We also disagree with LGEMM's contention that it reported lump sum and sell-out rebates on the most specific basis on which these rebates are tracked in the ordinary course of business. As noted above, LGEUS offered rebate programs which varied by customer, product, and time period. LGEMM made no effort to develop a reporting methodology which took all of these factors into account.

<sup>35</sup> Regarding this last point, we disagree with LGEMM that it did not exclude any rebates from its reporting because of it reallocated any excess amounts. To the extent that LGEMM included negative amounts related to pre-POI sales as offsets to the reported numbers, LGEMM understated its rebates granted on POI sales.

allocated the REBATE11U accrual amounts (which relate to the January 2010 reversal of December 2009 accruals) equally over all 2010 sales. Based on these facts, we raised the following issues related to these accruals in the LGEMM CEP Verification Report: 1) whether it is appropriate to account for these “rebates” in our calculations for the final determination, given that they appear to be theoretical amounts unconnected to particular rebate programs; and 2) if so, whether it is appropriate to accept LGEUS’s different allocation methodologies for them.

LGEMM states that it reported these accruals in order to “stay within {its} POI booked values” and develop a complete rebate record and analysis. LGEMM acknowledges that it allocated these accruals over different bases, but it maintains that there is a logical reason for this: REBATE9U was allocated over the POI sales on which they were accrued, but LGEMM could not use the same methodology for REBATE11U because this accrual did not relate to POI sales. Thus, LGEMM claims that it would be impossible to report REBATE11U in any other manner. However, LGEMM argues that, if the Department disagrees, it should eliminate both REBATE9U and REBATE11U from its final analysis.

The petitioner contends that the Department should disregard both rebates for purposes of the final determination. The petitioner asserts that the Department verified that these amounts are “accounting devices,” rather than actual rebates paid by LGEMM.

#### Department’s Position:

We agree with the petitioner. The amounts in question are not rebates, *per se*. Rather, they are budgeted amounts designed to bring LGEUS’s accounting records in line with IFRS accounting standards. *See* LGEMM CEP Verification Report at pages 24-25. Effectively, these adjustments are complementary, as REBATE9U is a POI accrual that was reversed after the POI, and REBATE11U is the reversal of a pre-POI accrual. However, LGEMM acknowledges that these complementary adjustments were calculated on different time bases. Furthermore, these amounts were calculated and applied uniformly, without any attempt to adjust the amounts on a customer-, product- or program-specific basis. Therefore, we are excluding both REBATE9U and REBATE11U from the final determination calculation.

Similarly, LGEUS also reported an adjustment in the field REBATE12U for sell-in rebate accruals reported in the fields REBATE1U through REBATE8U. As with the REBATE9U and REBATE11U amounts, the REBATE12U adjustment was calculated and applied uniformly, without any attempt to reconcile it with actual rebate payments on a customer-, product-, or program-specific basis. *See id.* at page 25. In the absence of any specific link to the sell-in rebate amounts accrued, we have also disregarded this adjustment for the final determination. *See* LGEMM Calculation Memo.

#### Comment 6: Warehouse-to-Customer U.S. Inland Freight Expenses

At the start of LGEMM’s U.S. sales verification, LGEMM identified two errors with respect to its reported freight expenses from the warehouse to the customer. First, LGEMM disclosed that it had included a model-specific (and miscalculated) amount for returned freight in its calculations.

Second, LGEMM indicated that it had erroneously based a number of the reported inland freight expense amounts on an average expense (rather than the transaction-specific expenses LGEMM intended to report). LGEMM offered corrected return freight expense amounts as well as revised transaction-specific expenses. However, while we accepted the revised return freight amounts, we did not take the transaction-specific data as a verification exhibit due to the volume of the transaction-specific expense data affected. Thus, the revised data are not on the administrative record of this proceeding. See LGEMM CEP Sales Verification Report at pages 16-18.

The petitioner argues that LGEMM failed to cooperate to the best of its ability in reporting these expenses because the proposed revisions were not minor (either in the number of transactions affected or in the magnitude of the change). Therefore, the petitioner contends that the Department should base the amount of them on AFA because the necessary inland freight information is not on the record. As AFA, the petitioner proposes calculating the highest inland freight rate (as a percent of gross unit price) and then applying this rate to all sales for which LGEMM reported inland freight expenses.

LGEMM maintains that the Department should solicit the revised transaction-specific data from LGEMM for use in the final determination. LGEMM contends that it is appropriate to use these data because LGEMM provided it at the outset of verification and the Department verified it.

LGEMM asserts that the record does not support such use of AFA. First, LGEMM maintains that it has cooperated to the best of its ability. LGEMM notes that it provided the revisions at verification and the Department found that each of the figures selected for examination was fully supported. LGEMM contends that the fact that the revised information is not on the record is not because LGEMM failed to cooperate; rather, the information is not on the record because the Department did not take it at verification and has not subsequently requested it. Thus, LGEMM maintains that the Department should either permit LGEMM to submit the revised freight data offered at verification or rely on the freight data included in LGEMM's most recent U.S. sales listing for the final determination.

In addition, LGEMM notes that Department questioned whether the returned freight expense portion of its reported U.S. inland freight expense should be included as part of the inland freight expense or treated as an ISE.<sup>36</sup> LGEMM takes no position on the classification of this freight expense as a selling or movement expense. However, it argues that the Department should classify these expenses consistently in both the comparison and U.S. markets.

#### Department's Position:

We disagree with the petitioner that AFA is appropriate here. Therefore, where the corrected information is on the record, we have relied on it for the final determination. Where the corrected information is not on the record, as facts available, we have adjusted the reported expenses using the data gathered at verification.

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<sup>36</sup> The classification of returned freight expenses as movement or ISEs is discussed as a separate comment in the Korea Decision Memo, but the topic was not raised as an issue in this investigation.

As noted above, LGEMM identified errors in its freight reporting at the start of the U.S. verification at LGEUS. The LGEMM CEP Sales Verification Report states:

LGEUS stated that it intended the U.S. warehouse-to-customer inland freight expense (INLFWCU) reporting to include: 1) actual transaction-specific freight expenses; plus 2) a product-specific average amount for returned freight expenses. However, at the start of verification company officials explained that both components of this expense contained errors. Regarding the transaction-specific portion of their expense calculation, LGEUS explained that, in its most recent sales listing, it had inadvertently used an average expense amount (and not a transaction-specific amount) for certain transactions. With respect to the return freight component, LGEUS explained that it failed to include all return freight expenses in their product-specific return freight calculation. See Exhibit M-1.

LGEUS explained that, because of these two errors, and because LGEUS recalculated the return-freight component for all models, virtually all transactions were affected by the revisions to the INLFWCU calculations. LGEUS offered a “patch file” to the U.S. sales listing to revise the reported amounts. However, due to the number of transactions in the U.S. sales file, we declined to accept the patch file with the revised inland freight amounts. Regarding the return freight component of the INLFWCU calculation, LGEUS provided a model-specific list of the revised return freight amounts. See Exhibits M-1 and M-4.

See LGEMM CEP Sales Verification Report at pages 16-17 (footnote omitted).

At verification, we examined the transaction-specific and returned freight expenses for four sales. See LGEMM CEP Sales Verification Report at page 17. Based on this examination, we found that, although the errors affected a large percentage of the U.S. database, they were not in and of themselves large mistakes.<sup>37</sup> Moreover, we found no pattern of misreporting of data, as some of the submitted amounts were overstated and others understated. Finally, LGEMM identified the errors at the earliest possible moment at verification and offered a complete set of corrections. For each of these reasons, we disagree with the petitioner that LGEMM failed to cooperate to the best of its ability or that an adverse inference is appropriate here.

As to the petitioner’s point that that LGEMM’s reporting errors are methodological in nature, and thus, they are not the sort of errors the Department normally permits to be corrected as verification revisions, we disagree. LGEMM stated in its questionnaire response that its reported U.S. inland freight data were transaction specific. During its preparations for verification, however, LGEMM discovered that it in fact had reported average freight expenses for certain (but not all) transactions. Thus, in accordance with the instructions in the Department’s verification outline,

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<sup>37</sup> Moreover, we disagree that it is meaningful simply to rely on the number of changes to the database in order to assess the magnitude of the error. See *Brake Manufacturers v. U.S.*, 44 F. Supp 2d 229, 236 (CIT 1999). In this case, LG reported thousands of sales transactions (and thus a small change to thousands of sales is no more meaningful than a small change to a database containing dozens of sales). Although the petitioner points to the percentage difference between the reported and revised/verified figures, on balance the revisions do not reflect a major change to the reported inland freight expenses. See the LG Calc Memo (showing that the adjustment factor does not reflect a major revision). Additionally, we note that while the percentage differences that the petitioner cites appear to be major revisions, all of the changes to the reported U.S. inland freight expenses examined at verification are miniscule as a percentage of gross unit price.

LGEMM identified these changes on the first day of verification and explained the circumstances surrounding them. After reviewing LGEMM's corrections for the sales examined at verification, we concluded that these corrections were clerical in nature and not of a type that would warrant the wholesale rejection of LG's revised freight data. Therefore, we accepted the corrections that we examined at verification as part of the administrative record of this proceeding.

We acknowledge the fact that we did not accept the complete set of corrections for this expense offered by LGEMM at verification. However, we disagree with the petitioner that this fact signifies that the data were unverified or unverifiable. Rather, because LGEMM's U.S. sales database contained an extraordinarily large volume of transactions, we did not take the revised data as a verification exhibit. See LGEMM CEP Verification Report at pages 15-16. Nonetheless, the fact remains that, as noted above, we have deemed the errors to be minor. This fact combined with LGEMM's cooperative conduct means that the statutory conditions for the application of AFA do not exist. That said, because the record does not contain complete information for LG's U.S. inland freight expenses, we have resorted to facts available to fill in the missing data in accordance with sections 776(a)(1) of the Act.

As facts available for LGEMM's U.S. inland freight expenses, we have adjusted LGEMM's reported data using the verified information on the record for the transactions examined. Specifically, we first calculated the ratio of shipment-specific freight to the total INLFWCU amount to determine the shipment-specific portion of the reported INLFWCU, based on our verification findings at page 17 of the LGEMM CEP Verification Report. We then adjusted the shipment-specific amount by computing the average percentage difference between the reported shipment-specific freight figures and the observed actual shipment-specific figures. We applied these ratios to LGEMM's reported freight expenses for all transactions except those examined at verification, for which we used the actual expenses we verified were incurred. See LGEMM Calculation Memo for further discussion. Finally, we reclassified LGEMM's return freight amounts as ISEs, as it is the Department's general practice to include freight expenses associated with returned merchandise as part of ISEs. See Notice of Final Determination of Sales at Not Less Than Fair Value: Certain Color Television Receivers From Malaysia, 69 FR 20592 (Apr. 16, 2004) and accompanying Issues and Decision memorandum at Comment 2; and Certain Frozen Warmwater Shrimp from Thailand: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review, 72 FR 52065 (Sept. 12, 2007) and accompanying Issues and Decision memorandum at Comment 7. This practice has been upheld by the CIT. See Agro Dutch Industries, Ltd. v. United States, Slip Op - 06-96 (CIT, June 23, 2006), upheld in Agro Dutch Industries, Ltd. v. United States, Slip Op - 06-113 (CIT, July 25, 2006). As warehouse-to-customer freight expenses incurred on LGEMM's Canadian sales also included returned freight expenses, we adjusted the reported freight amount by the return freight ratio estimated by LGECI at verification to determine the returned freight portion, and we classified the returned freight portion as ISEs. See Memorandum to the File entitled "Verification of the Third Country Sales Response of LG Electronics Monterrey Mexico, S.A, de C.V, and LG Electronics Canada, Inc." dated February 1, 2012 (LGECI Verification Report) at pages 15-16, and the LGEMM Calculation Memo.

Regarding LGEMM's position that we should use the originally reported freight data in our final determination, we find that doing so would also not be appropriate. Specifically, LGEMM itself identified errors in this data. Thus, although LGEMM characterizes its original data as sufficient, that conclusion is not supported by the record, which shows that the original data included clerical errors. Accordingly, we are not relying on LGEMM's unadjusted original data.

Comment 7: Billing Adjustments on U.S. Sales

LGEMM reported U.S. billing adjustments on a customer-specific basis (rather than on a transaction- or model-specific basis) for all sales of subject merchandise during the POI. At verification, we found that LGEUS's credit memos referenced specific model numbers, and LGEMM used this information to calculate Mexico- and Korea-specific billing adjustment percentages. Because it appears that LGEMM could have calculated billing adjustments on a more specific basis, we raised the issue in our verification report of how to treat LGEUS's billing adjustments for the final determination.

LGEMM disagrees that it could have reported model-specific billing adjustments, in part because of the limitations of its recordkeeping system and in part because of a prohibitive volume of documents associated with these adjustments. LGEMM asserts that the credit notes issued by LGEUS during the POI may have referenced specific model numbers, but they did not contain details sufficient to link them to particular transactions. Moreover, LGEMM maintains that, although LGEUS attempted to compute model-specific factors, the results did not, on their face, appear to be consistently reasonable and as a consequence LGEMM did not report billing adjustments in this manner. Finally, LGEMM claims that the Department: 1) provided no guidance on how to reallocate its billing adjustments; 2) did not request at verification that LGEUS recalculate these adjustments; and 3) did "fully verify" the reported amounts.

LGEMM argues that the Department has accepted the reporting of post-sale price adjustments on a customer-specific basis in cases where a respondent's recordkeeping only permitted the reporting in that manner. As support for this assertion, LGEMM cites Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan; Final Results of Antidumping Duty Administrative Reviews, 63 FR 2558, 2566 (Jan. 15, 1998) and Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews, 62 FR 54043 (Oct. 17, 1997). Thus, LGEMM requests that the Department accept its billing adjustments as reported for the final determination.

The petitioner contends that LGEMM's position calls into question the validity of its separation of billing adjustments for Korean- and Mexican-made models, because if the data on the credit/debit memos are inadequate to calculate customer- and product-specific billing adjustments, then they should also be inadequate to assign correctly country-of-origin designations. In any event, the petitioner maintains that LGEMM failed to calculate billing adjustments in the most customer-, product-, and time-specific manner possible, and thus the Department should base these adjustments on AFA for the final determination. As AFA, the petitioner asserts that the

Department should use the highest billing adjustment amount reported for each customer and apply that amount to all sales to that customer.

Department's Position:

After considering the facts on the record, we have accepted LGEMM's billing adjustments as reported for the final determination.

As noted above, LGEMM calculated its reported billing adjustments on a customer-specific basis for all POI sales of subject merchandise. At verification, company officials explained that LGEUS was unable to report billing adjustments on a more specific basis because the company's sales and accounting systems do not contain a link between billing adjustment memos and specific invoices, and thus any closer allocation would require a manual review; however, they also noted that LGEUS could not report billing adjustments on a sale-by-sale basis (even manually) in instances where the credit memos did not include the original invoice number. See LGEMM Sales Verification Report at pages 19-20.

At verification, we confirmed LGEMM's claim that not all of the credit memos referenced specific invoices. However, we found that all of the examined credit memos did reference, at a minimum, specific model numbers. Moreover, we noted that LGEMM had calculated Mexico- and Korea-specific billing adjustment percentages (by identifying billing adjustments related to Korean or Mexican bottom mount refrigerators based on the product codes associated with each billing adjustment). See id. at page 20. Given that LG used its credit and debit memos to differentiate the products subject to each investigation for billing adjustment reporting purposes, it is unclear why these documents are not equally reliable for the purpose of reporting model-specific billing adjustments.

While we have significant questions about LGEMM's methodology, we believe the record evidence on this point is inconclusive. For example, it is possible that the credit/debit memos themselves may not completely identify all models associated with a given billing adjustment transaction. Based on this, we find that there is sufficient doubt over whether the company could have reported in a more specific manner. Thus, we find that rejecting this information, and instead basing billing adjustments on AFA, would be inappropriate. We intend to revisit this issue in subsequent segments of this proceeding involving LGEMM (in the event that an antidumping duty order is issued).

Comment 8: Interest Rate for U.S. Inventory Carrying Costs

During the POI, LGEMM held its merchandise in the United States prior to shipment to U.S. customers. We computed the opportunity cost associated with holding this inventory in the preliminary determination using the following components: the COM of the subject merchandise (in Mexican pesos), the short-term interest rate paid by LGEMM (in Mexican pesos), and the duration of time that the subject merchandise remained in inventory.

LGEMM holds that it is against Department policy and precedent to calculate U.S. inventory carrying costs using a Mexican peso short-term interest rate. LGEMM points to the Department's Policy Bulletin 98.2, Imputed Credit Expenses and Interest Rates, February 23, 1998, regarding the calculation of credit expenses for U.S. sales. According to LGEMM, this policy bulletin states that, for the purpose of calculating U.S. credit expenses, the Department will use a short-term interest rate tied to the currency in which the sales are denominated. LGEMM claims that the Department has applied this policy to not only credit expenses, but also to inventory carrying costs. Specifically, LGEMM states that the Department uses a U.S. short-term interest rate tied to the currency in which the U.S. sales were denominated for the period that the merchandise was in the U.S. affiliate's inventory. As support for its position, LGEMM cites Final Determination of Sales at Less Than Fair Value, Gray Portland Cement and Clinker from Mexico, 55 FR 29244, 29252 (Jul. 18, 1990), where LGEMM notes that the Department calculated U.S. inventory carrying costs using the respondent's verified U.S. dollar interest rate. In this instance, LGEMM states that the Department found that the respondent borrowed in two currencies. As a result, LGEMM affirms that for the period from entry into the United States until sale to the first unrelated party, the Department has used the verified U.S. interest rate to calculate U.S. inventory carrying costs.

Therefore, for the final determination LGEMM argues that the Department should revise its calculation of LGEMM's imputed U.S. inventory carrying costs using LGEMM's U.S. dollar short-term interest rate.

The petitioner did not comment on this issue.

#### Department's Position:

We have continued to calculate LGEMM's U.S. inventory carrying costs using LGEMM's Mexican peso-denominated short-term interest rate. The Department has a practice of calculating inventory carrying costs based on COM and of matching the currency of the interest rate to the currency of the cost being imputed.<sup>38</sup> In this case, given that LGEMM's COM was incurred in Mexican pesos, calculating LGEMM's U.S. inventory carrying costs required the use of the home market (*i.e.*, Mexican peso) interest rate. Contrary to LGEMM's claim that we departed from our practice in the preliminary determination, the Department has calculated U.S. inventory carrying costs in this manner in numerous other cases.<sup>39</sup>

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<sup>38</sup> See, e.g., Paul Müller Industrie GMBH Co. et al. v. United States, 502 F. Supp. 2d 1271, 1276 (CIT 2007) citing to Extruded Rubber Thread from Malaysia: Final Results of Antidumping Duty Administrative Review, 63 FR 12752, 12760 (Mar. 16, 1998) (Extruded Rubber Thread from Malaysia); Final Determination of Sales at Less than Fair Value: Canned Pineapple Fruit from Thailand, 60 FR 29553 (June 5, 1995); and Certain Corrosion-Resistant Carbon Steel Flat Products from Australia: Final Results of Antidumping Duty Administrative Reviews, 61 FR 14049 (Mar. 29, 1996).

<sup>39</sup> See, e.g., 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 (Aug. 18, 2010), and accompanying Issues and Decision Memorandum at Comment 5 (Orange Juice from Brazil); and Extruded Rubber Thread from Malaysia, 63 FR at 12760.

While we recognize that LGEMM has cited to another case where we used a different methodology, in more recent cases as noted above, we have been consistent in our practice of basing our calculation of inventory carrying costs on COM and matching the currency of the interest rate to the currency of the COM. See Orange Juice from Brazil. Given that LGEMM's COM is in Mexican pesos, we have calculated LGEMM's U.S. inventory carrying costs using LGEMM's cost of borrowing in Mexico. We find this approach reasonable because it ensures that the opportunity costs in question are calculated in the same currency as the inventory on which those costs are incurred.

Regarding LGEMM's reliance on Policy Bulletin 98.2 in support of its argument to use the U.S. short-term interest rate in the calculation of U.S. inventory carrying costs, we note that the methodology discussed in that policy bulletin is not relevant to the issue at hand because it relates to the opportunity cost of financing receivables between shipment and payment date, not the opportunity cost of financing inventory between shipment from the factory and shipment to the customer.

Comment 9: Payment Dates on Certain U.S. Sales

During the POI, LGEMM's U.S. sales affiliate LGEUS received payment for sales to certain CEP customers from a financing company, rather than from the customers themselves. In these cases, the customer had a "flooring" arrangement with the financing company (i.e., a line of credit secured by the customer's inventory); the financing company paid LGEUS the invoice amount less a fee and then it in turn collected payment from the customer. Thus, this arrangement is similar to factoring.<sup>40</sup>

As the payment date for these transactions, LGEUS reported the invoice date, which is the date that the transaction cleared the company's accounts receivable ledger. However, at verification, we found that the finance company normally deposited funds in LGEUS's bank account a set number of days after this date. Therefore, in our verification report, we questioned whether it was appropriate to use an alternative payment date for these transactions.

LGEMM argues that the Department should accept its reported payment dates because: 1) these dates are consistent with the LGEUS's internal accounting; 2) the identification of different dates would require a manual search through LGEUS's accounting records and would thus be administratively burdensome (because of the large number of transactions involved); and 3) the use of different dates would effectively double count U.S. credit expenses (once as the flooring "fee" deducted as a direct selling expense and again as imputed credit). Regarding this latter point, LGEMM maintains that the flooring fee reflects the cost to LGEUS of the "deferred third party payment," and the Department should only account for this cost once.

The petitioner maintains that the crux of this issue is when payment is actually received, and in this case it is not received until a number of days after the invoice is issued. Therefore, the petitioner argues that the Department should increase LGEUS's credit period by the number of days between

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<sup>40</sup> Factoring involves the selling of an accounts receivable at a discount, to an intermediary which then assumes the credit risk associated with the receivable.

the issuance of the invoice and payment by the flooring company, as observed at verification. The petitioner notes that this would be consistent with LGEUS's characterization of its normal practice.

Department's Position:

Consistent with our practice, discussed below, we have treated flooring fees as direct selling expenses for the final determination. In addition, because the actual payment dates are not on the record, we have adjusted LGEMM's reported payment dates used in the calculation of U.S. credit expenses by adding additional time to the reported payment date according to the payment terms identified for sales involving flooring fees (see LGEMM's September 8, 2011, supplemental questionnaire response (September 8 SQR) at Exhibit C-6, and LGEMM CEP Verification Report at page 19 and Exhibit M-17 at page 1512). While we observed that LGEUS received payment at a date later than the payment terms for the single sale involving a flooring fee examined at verification, we do not have a sufficient basis to conclude that this payment experience was representative of LGEUS's flooring fee sales, nor did we provide an opportunity for LGEMM to show additional payment examples. Accordingly, as facts available pursuant to section 776(a) of the Act, we relied on the payment terms to adjust the reported payment date for all flooring fee sales except the sale examined at verification, for which we used the date we verified that LGEUS actually received payment from the finance company.

At the start of verification, LGEUS informed the Department that it incurred "flooring fees," which it reported as part of its ISEs. See the LGEUS CEP Sales Verification Report at pages 18-19. LGEUS described these fees as expenses paid to third party finance companies which extend lines of credit to U.S. customers. LGEUS explained the process as follows:

certain customers contract with {the flooring} companies to obtain lines of credit; when LGEUS sells to them, it receives payment from the finance company for the full invoice amount minus a fee (rather than receiving payment directly from the customer).<sup>41</sup> LGEUS's customer is responsible for paying the finance company the full invoice amount. Accordingly, LGEUS's portion of this arrangement ends once it delivers the merchandise and is paid by the finance company; if the customer does not pay the finance company, LGEUS retains the payment from the finance company, and thus LGEUS's credit risk is minimized.

See *id.* at page 18.

LGEUS officials stated that, because these fees are tied to specific sales, the expenses should be reclassified as direct expenses. Accordingly, LGEUS provided a revised ISE calculation that excluded them as well as a list of the affected transactions and the associated per-unit flooring fee amounts, which company officials stated should be included in the bank charge fee field (BANKCHARU). Upon reviewing payment documentation for one of these transactions, we found that the money from the finance company was deposited in LGEUS's bank account a number of days after the reported date of payment. LGEUS officials stated that the finance

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<sup>41</sup> LGEUS stated that these fees are referred to as "flooring fees" because the finance company typically takes a security interest in the customer's inventory, which is normally held on the customer's retail floor.

company normally deposits funds in LGEUS's bank account a set number of days after the date of sale, and that they had reported the date that the transaction was cleared from the company's accounts receivable ledger as the payment date.

Given these facts, we find that LGEUS's arrangement with the flooring companies is similar to factoring, whereby a company "sells" (or "discounts") its accounts receivables to a financing company for a fee. In situations involving discounted receivables, it is the Department's normal practice to: 1) base the date of payment for sales transactions on the date that the respondent receives funds from the bank; and 2) deduct any discounting fees incurred on the sale as a direct selling expense. See Stainless Steel Bar From India; Final Results, Rescission of Antidumping Duty Administrative Review in Part, and Determination To Revoke in Part, 69 FR 55409 (Sept. 14, 2004) and accompanying Issues and Decision Memorandum at Comment 6. We find that this practice appropriately measures the opportunity cost associated with extending credit to customers because it accounts for the time between shipment and receipt of funds (as part of credit expenses) and the actual costs associated with the bank providing advance payment on the sale (as part of direct bank charges).

We disagree with LGEMM that adjusting its payment dates would effectively double count U.S. credit expenses (once as the flooring fee and again as imputed credit). As noted above, under this methodology the Department: 1) defines the credit period as the time between when the respondent ships the goods and receives payment for them in its bank account; and 2) treats the fees paid in return for receiving the funds earlier than they otherwise would have been as a direct selling expense. This methodology would only double count credit expenses were the Department to define the credit period as the time between shipment and payment by the customer (not the flooring company), which is not the case here.

Comment 10: Payment Dates on Certain Canadian Sales

During the POI, LGECI received payment for sales to certain customers from a financing company, rather than from the customers themselves in an arrangement similar to that described above on certain U.S. sales. In these instances, the customer had a "flooring" arrangement with the financing company (*i.e.*, a line of credit secured by the customer's inventory); the financing company paid LGECI the invoice amount less a fee and then, in turn, collected payment from the customer. As the payment date for these transactions, LGEMM reported the invoice date, which is the date that the transaction cleared the company's accounts receivable ledger. However, at verification, we found that the finance company normally deposited funds in LGECI's bank account a set number of days after this date.

LGEMM argues that the Department should accept its reported payment dates because: 1) these dates are consistent with the LGECI's internal accounting; 2) the identification of different dates would require a manual search through LGECI's accounting records and would thus be administratively burdensome (because of the large number of transactions involved); and 3) the use of different dates would effectively double count credit expenses (once as the flooring "fee" deducted as a direct selling expense and again as imputed credit). Regarding this latter point, LGEMM maintains that the flooring fee reflects the cost to LGECI of the "deferred third party

payment,” and the Department should only account for this cost once.

The petitioner did not comment on this issue.

Department’s Position:

The flooring fee arrangements for LGEMM’s sales to Canada, and LGEMM’s reporting of payment dates for those sales are essentially the same as the flooring fee arrangements and payment date reporting in the U.S. market. See September 8 SQR at page 9 and LGECI verification report at pages 14-15. Therefore, we are treating the flooring fees and sale payment dates in the same manner for the same reasons as discussed in Comment 9 above. At the verification of LGEMM’s Canadian market sales, we examined two sales involving flooring fees; both were paid within the period specified in the payment terms. See LGECI Verification Report at page 15 and the September 8 SQR at Exhibit B-6. Accordingly, as facts available under section 776(a) of the Act, for the flooring fee sales not examined at verification, we revised the reported payment dates based on the payment terms for these sales. For the flooring fee sales examined at verification, we used the date we verified that LGEMM actually received payment from the finance company.

Comment 11: Lump Sum and Sell-Out Rebates on Canadian Sales

LGEMM reported lump sum rebates (which include sell-out rebate programs) in the Canadian market sales database on a customer-specific basis by dividing the total lump sum rebate payments to its customers by the total refrigerator sales to those customers during the POI. During our review of selected sales at verification, we observed examples of lump sum rebates that applied to customers’ sales during specific periods, or to sales of specific models. See LGECI Verification Report at page 22. Because it appeared that LGEMM could have reported LGECI’s lump sum rebates on a more specific basis, we raised the issue in our verification report of how to treat LGECI’s lump sum rebates in the final determination. See id. at page 1.

LGEMM maintains that the Department should continue to accept this customer-specific allocation methodology for lump sum rebates in the final determination because reporting them on a product- or time-specific basis is not feasible. Specifically, LGEMM contends that it is not practical to report lump sum rebates on a product-specific basis because: (1) its rebate payment records are maintained at the product division (e.g., refrigerator) level rather than product model level, and (2) reporting its lump sum rebates at the product model level would require a strenuous manual process that, even if possible, is not reasonable within the time constraints of the investigation. Additionally, LGEMM claims that it is not possible for it to report lump sum rebates on a time-specific basis because lump sum rebates consist of one-time payments to customers that are not linked to any particular sales transactions and are based on downstream sales at the retail level. LGEMM asserts that it does not have access to the sales information that would permit it to accurately report these rebates on a time-specific basis.

Furthermore, LGEMM maintains that its lump sum rebate calculations are POI exclusive and, accordingly, do not include rebate payments made for sales outside of the POI. LGEMM notes

that the lump sum rebate line item applicable to December 2009 sales of bottom mount refrigerators referenced by the Department in the LGEMM verification report represents a reversal of a rebate accrual amount rather than a rebate payment that was included in the numerator of the lump sum rebate calculation for the selected sales transaction examined at verification. See LGECI Verification Report at page 22.

The petitioner argues that, based on the Department's verification findings, LGEMM could have allocated its lump sum rebates on a time period basis, product-specific basis, or both, as done for its sell-in and for some of its sell-out rebates. Additionally, the petitioner contends that the lack of specificity of LGEMM's allocation methodology for lump sum rebates is further intensified by the fact that its customer-specific lump sum rebate ratios include sales of subject and non-subject merchandise. Accordingly, the petitioner argues that the Department should apply partial AFA by applying a zero to all of LGEMM's Canadian sales lump sum rebates reported in the comparison-market sales database.

#### Department's Position:

Based on our analysis of LGEMM's questionnaire responses and our verification findings, we are relying on LGEMM's reporting of its lump sum rebates on Canadian sales for the final determination.

In its November 30, 2011, questionnaire response at page 3, LGEMM stated that it calculated customer-specific ratios for its lump sum rebates reported in the comparison-market sales listing based on the total REBATE10T program payments on refrigerator products to the customer during the POI divided by the customer's total POI refrigerator sales. LGEMM also stated in its questionnaire response, as well as in its case brief, that a more specific allocation methodology is not possible for most of the rebate programs included in this category, and in particular sell-out rebates, because they are based on retail sales at the product-group (*i.e.*, refrigerator) level, and its customers are not required to provide sales information linking their refrigerator purchases from LGECI to their downstream retail sales to consumers in order to be eligible to receive rebate payments from LGECI. As discussed in the verification report, we were able to tie the reported rebates to LGECI's accounting system on a customer-specific basis. See LGECI Verification Report at pages 21-22. While the rebate reporting was based on LGECI's accrual records, we observed that LGECI estimated its accruals on its customer-specific experience, and it reconciled these accruals to actual payments on a regular basis so that variances between accrual and actual amounts were minimized. See LGECI Verification Report at page 22.

Although we observed a few examples of lump sum rebate programs that appeared to apply to the customer's sales during specified periods, or to its sales of specific models, during our review of selected sales at verification, we are unable to conclude with certainty that they, in fact, represent model-specific and/or time-specific lump sum rebate programs or, rather as LGEMM asserts, accrual reversals or other adjustments. Overall, our verification findings regarding the lump sum rebates were consistent with LGEMM's questionnaire responses and we found no indication that its allocation methodology was distortive. See LGECI Verification Report at pages 11, 21-22, and 24-25. Accordingly, we find no basis to reject LGEMM's reported third-country lump sum

rebates and set the amounts to zero as partial AFA, as argued by the petitioner. While we have accepted the reported amounts for the final determination in this investigation, we intend to revisit this rebate allocation methodology in subsequent segments of this proceeding involving LGEMM (in the event that an antidumping duty order is issued) to examine more closely whether a more specific allocation methodology is appropriate.

Comment 12: Direct Advertising Expense Ratio for Canadian Sales

At verification, we observed that LGECI's direct advertising ratio, as revised in its list of verification corrections, includes promotion expenses for a broader range of merchandise than the subject merchandise. In our verification report, we identified as an issue whether the expenses included in LGECI's direct advertising ratio should be limited to only those expenses incurred to promote subject merchandise, with the remaining advertising expenses incorporated in LGECI's indirect selling expense ratio.

LGEMM contends that the Department should accept its reported direct advertising expense ratio for Canadian sales, which includes allocated expenses incurred to promote home appliances and LG products in general, rather than the alternative ratio stated in the LGECI Verification Report, which relies only on direct advertising expenses incurred on refrigerators. LGEMM asserts that multi-model direct advertising expense ratios have been accepted by the Department in prior cases. Specifically, to support its claim that when expenses are incurred for advertising multiple products, both subject and non-subject merchandise, the Department accepts direct advertising expense ratios that are allocated to the portion of the expenses incurred for advertising subject merchandise, LGEMM cites to Drycleaning Machinery From West Germany: Final Results of Administrative Review of Antidumping Finding, 50 FR 32154, 32155 (Aug. 8, 1985); Antidumping Manual, Chapter 8 at 28 (Jan. 22, 1997); and Smith-Corona Group v. U.S., 713 F.2d 1568, 1581 (Fed. Cir. 1983) (Smith-Corona).

LGEMM also cites to prior cases where the Department has accepted direct advertising expense ratios that were allocated based on the area used by subject merchandise on print and online advertisements in relation to the area used by non-subject merchandise on those advertisements. See e.g., Bicycle Tires and Tubes From Korea: Final Results of Administrative Review of Antidumping Finding, 48 FR 26492, 26494 (Jun. 8, 1983); Color Television Receivers From Korea: Final Results of Administrative Review of Antidumping Duty Order, 49 FR 50420 (Dec. 28, 1984) (Color TV's from Korea). LGEMM claims that using an "area based" allocation methodology for its direct advertising expense ratio would be overly burdensome given the vast amount of media outlet advertisements that would have to be manually inspected and allocated specifically to the amount of space used to advertise subject merchandise. In contrast, LGEMM maintains that its allocation methodology based on direct advertising expenses (both refrigerator-specific and multi-product) over total associated sales revenue represents a reasonable "value-based" allocation methodology that should be used in the final determination.

The petitioner disagrees, asserting that the Department's standard practice is to classify advertising expenses as direct advertising expenses if: (1) the advertising was directed at the customer's customer; and (2) the expenses associated with the advertising were related specifically to sales of

subject merchandise. In support of its assertion, the petitioner cites to various prior cases such as Certain Welded Carbon Steel Pipe and Tube from Turkey: Notice of Final Results of Antidumping Duty Administrative Review, 76 FR 76939 (Dec. 9, 2011) and accompanying Issues and Decision Memorandum at Comment 6 (Pipe and Tube from Turkey) (citing Notice of Final Determination of Sales at Less Than Fair Value: Live Swine from Canada, 70 FR 12181 (March 11, 2005), and accompanying Issues and Decision Memorandum at 6); Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel sheet and Strip in Coils from Japan, 64 FR 30574 (June 8, 1999) (SSSSC from Japan). The petitioner argues that LGEMM has failed to meet the second criterion, mentioned above, because similar to the respondents in Certain Welded Carbon Steel Pipe and Tube from Turkey and Frontseating Service Valves from the PRC: Final Results of the 2008-2010 Antidumping Administrative Review of the Antidumping Duty Order, 76 FR 70706 (Nov. 15, 2011) and accompanying Issues and Decision Memorandum at Comment 15 (Frontseating Service Valves from the PRC), LGEMM has failed to demonstrate that its reported direct advertising expense ratio reflects advertising expenses that are specifically related to sales of the subject merchandise. Therefore, the petitioner argues that the Department should use the alternative ratio calculated by the Department at verification. See page 26 of the LGECI Verification Report.

#### Department's Position:

We have further examined the advertising expense items included in LGEMM's direct advertising calculation ratio for its Canadian sales, which are identified as being part of one of three categories: refrigerator, home appliance, and common products. Based on our examination, we have accepted LGEMM's classification of refrigerator and home-appliance advertising expenses as direct advertising expenses because these categories include advertising expenses that are directed to the customer's customer and are specifically related to the subject merchandise. However, we are reclassifying the expenses in the common-products category as ISEs because these expenses were incurred to promote LG brand awareness generally, rather than to promote the subject merchandise specifically.

As noted by the petitioner, the Department classifies advertising expenses as direct expenses when they are: 1) directed at the customers' customers; and 2) specifically related to subject merchandise. At verification, the sample documentation reviewed for refrigerator and home-appliance advertising expense items related directly to subject merchandise. Specifically, while some of the advertisements included in the refrigerator and home-appliance expense categories were multi-product in nature (*i.e.*, the advertisements included a number of LG's home appliances), each sample reviewed included advertising for bottom mount refrigerators. See LGECI Verification Report at Exhibit 38. Thus, contrary to the petitioner's assertions, the advertisements included in these categories are specific to bottom mount refrigerators. As such, classifying these expenses as direct expenses is appropriate and in accordance with the Department's practice. Further, although the petitioner cites SSSSC from Japan, in support of its position, that case actually supports the treatment of multi-product advertisements as direct expenses. See SSSSC from Japan, 64 FR at 30581-30582 (where the Department treated advertising expenses related "to all stainless steel products, including subject and non-subject merchandise" as direct expenses). Regarding Pipe and Tube from Turkey, the petitioner's

reliance on that case is also misplaced with respect to the LG's refrigerator and home-appliance expense categories. The respondent there included general, brand-related advertising in its advertising expenses; thus, the Department concluded that the advertisements included in its expense calculation were not sufficiently specific to the merchandise under consideration. See Pipe and Tube from Turkey, 76 FR 76939 at Comment 6.

We agree with LGEMM that its allocation methodology accurately assigns the appropriate portion of advertising expenses related to bottom mount refrigerators to the sales of those bottom mount refrigerators. According to 19 CFR 351.401(g)(1), the Department may allow allocated expenses, provided that the Department is satisfied that the allocation method used does not cause inaccuracies or distortions.<sup>42</sup> Consistent with this regulation, the Department routinely accepts revenue-based allocation methodologies.<sup>43</sup> Moreover, similar advertising expense allocations have been sanctioned by the Department and the courts. See e.g., Smith-Corona, 713 F.2d 1568, 1582 (“The ITA apportioned the advertising expense on the basis of actual, verified cost data. We feel that this was entirely reasonable.”). Similarly, LGEMM's revenue-based methodology is reasonable and there is no evidence that its methodology is inaccurate or distortive. Further, Frontseating Service Valves from the PRC, the lone case cited by the petitioner for the proposition that LG has not sufficiently demonstrated the reasonableness of its allocation, is inapplicable here. In Frontseating Service Valves from the PRC, the issue was whether the respondent appropriately included or excluded advertising expenses from its calculation of ISEs, not whether a particular allocation methodology was reasonable. See Frontseating Service Valves from the PRC at Comment 15.

Regarding the remaining category at issue, while we do not disagree with LGEMM that multi-product advertising can be treated as a direct selling expense in circumstances such as those noted above, the advertising under the common-product expense category is not of the same kind. Thus, while the cases cited by LGEMM do support its position, these cases do not apply to the common-product expense category because the advertising associated with this expense category is general brand-related advertisements that are not specifically related to bottom mount refrigerators. For example, while the Department allowed allocation methodologies based on the space devoted to the merchandise under consideration in Bicycle Tires from Korea and Color TVs from Korea, the advertisements there, at a minimum, included that merchandise. See Bicycle Tires from Korea, 48 FR 26492, and Color TVs from Korea, 49 FR 50420, 50425. Similarly, in Smith-Corona, while the advertisements in question “were not exclusively directed to the relevant merchandise, a portion of each advertising effort was.” See Smith-Corona, 713 F.2d 1568, 1581. LGEMM has not demonstrated that a portion of each advertisement included in the common-product expense category was specifically directed to bottom mount refrigerators.

Accordingly, because the advertising and promotion expenses incurred in the refrigerator and

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<sup>42</sup> See e.g., Narrow Woven Ribbons With Woven Selvedge From the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 75 FR 41808 (July 19, 2010) and accompanying Issues and Decision Memorandum at Comment 3.

<sup>43</sup> For example, the Department has accepted revenue-based allocations in this case with respect to LGEMM's indirect selling expenses and U.S. advertising expenses which were not challenged by the petitioner. See e.g., Exhibits B-17 and C-16 of LGEMM's July 22, 2011, submission.

home-appliance categories were specifically related to bottom mount refrigerators and, where appropriate, were reasonably allocated to bottom mount refrigerators, we treated these expenses as direct selling expenses. However, because the expenses in the common-product category consist of general brand advertising and promotion, and are not specifically tied to bottom mount refrigerators, we reclassified these expenses as ISEs for the final determination. See LGEMM Calculation Memo for further explanation of our recalculation of the direct advertising and ISEs incurred on Canadian sales.

Comment 13: Conversion Cost Allocation Error

During the cost verification,<sup>44</sup> the Department found that for selected products LGEMM made an input error, while implementing its new cost accounting system, that was associated with its standard processing times. These standard processing times were used to allocate conversion costs to specific products.

The petitioner argues that the respondent bears the burden of creating a complete and adequate record<sup>45</sup> and LGEMM failed to maintain accurate records and meet the standard of a diligent and responsible respondent. The petitioner contends that the Department's practice is to apply an adverse inference when it discovers an error for the first time at verification.<sup>46</sup> The petitioner asserts that, as such, the Department should apply, as AFA, the highest variable and FOH costs reported in LGEMM's cost file to the CONNUMs affected by this error.

LGEMM argues that it fully complied with the Department's requests to the best of its ability and thus, the adverse inference is not warranted. LGEMM contends that by understating the standard processing time for certain products, LGEMM effectively understated the standard processing time denominator over which overhead costs were allocated, which in turn, overstated the overhead costs for products with the correct processing time. LGEMM asserts that this error is simply an uncaught error committed in the ordinary course of business, and thus, the Department should not conclude that this error was an attempt to improperly reduce LGEMM's costs. LGEMM claims that the impact of this error on the reported conversion costs is limited. According to LGEMM, nevertheless, if the Department intends to make an adjustment, it should use a non-AFA adjustment rather than the punitive adjustment suggested by the petitioner.

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<sup>44</sup> See Verification of the Cost Response of LG Electronics Monterrey Mexico, S.A. de C.V. in the Antidumping Investigation of Bottom Mount Combination Refrigerator-Freezers from Mexico, dated December 22, 2011 (LGEMM Cost Verification Report).

<sup>45</sup> The petitioner cites NSK Ltd. v. United States, 919 F. Supp.442, 449 (CIT 1996) and Tianjin Mach Imp. & Exp. Corp. v. United States, 353 F. Supp. 2d 1294, 1305 (CIT 2004) to support its position. The petitioner also cites Section 776(b) of the Act and asserts that LGEMM did not act to the best of its ability.

<sup>46</sup> The petitioner cites Certain Lined Paper Products from the People's Republic of China: Notice of Final Results of the Antidumping Duty Administrative Review and Partial Rescission, 76 FR 23288 (April 26, 2011) and accompanying Issues and Decision Memorandum at Comment 6 (Lined Paper Products from China), and Circular Welded Non-Alloy Steel Pipe from the Republic of Korea: Final Results of the Antidumping Duty Administrative Review, 75 FR 34980 (June 21, 2010) and accompanying Issues and Decision Memorandum at Comment 6 (Non-Alloy Steel Pipe from Korea) to support its position.

Department Position:

We disagree with the petitioner that in the instant case LGEMM has failed to provide and maintain accurate records, thereby warranting an AFA decision. As noted in the LGEMM Cost Verification Report, LGEMM officials explained at the verification that they implemented a new cost accounting system at the end of fiscal year 2009, during which the standard processing time input errors were made. Specifically, the input errors relate to the standard processing times for selected products where the times were expressed based on hours in the old system, while they should have been converted to minutes under the new system.<sup>47</sup> The errors resulted in the overstatement of conversion costs for some products and the understatement of conversion costs for other products. Although this error was discovered at verification, throughout the proceeding LGEMM provided all information requested by the Department regarding conversion costs in a timely manner. In fact, company officials were not even aware that the error had been made within their accounting system until it was discovered at verification. Thus, there is no basis to conclude that LGEMM did not act to the best of its ability under section 776(b) of the Act. Furthermore, at verification, LGEMM provided worksheets that showed for all models produced during the POI, the correct standard times that should have been used to allocate conversion costs to specific products. We examined the worksheets provided by LGEMM and found that the conversion costs for a small number of CONNUMs were understated.<sup>48</sup> As such, for the final determination, because LGEMM was able to provide information at verification that showed the error had a minimal impact on the reported conversion costs and we could isolate the CONNUMs for which the reported costs were understated, as facts available we increased the reported conversion costs for those affected CONNUMs to reflect the verified standard processing times.

With respect to the cases cited by the petitioner to support its claim for the application of an adverse inference when discovering errors for the first time at verification, we do not find them applicable to the facts in this case. Unlike this case, in Lined Paper Products from China, there was a fundamental question about the reliability of documents reviewed at verification, and in Non-Alloy Steel Pipe from Korea, a respondent failed to report certain information thereby impeding the proceeding by withholding information that had been requested by the Department. Thus, we find that the petitioner's reliance on Lined Paper Products from China and Non-Alloy Steel Pipe from Korea is unpersuasive and that an adverse inference is not warranted in this case.

Comment 14: Research and Development Costs

During the POI, LGEMM's affiliate LGE, performed R&D activities associated with the production of the merchandise under consideration. Although the R&D costs were incurred by LGE, LGEMM also benefited from LGE's R&D activities during the POI. Thus, in the Preliminary Determination, the Department adjusted LGEMM's reported costs to include the R&D costs incurred by the home appliance unit of LGE.

The petitioner argues that the Department properly included the R&D costs incurred by the LGE home appliance unit in LGEMM's reported costs in the preliminary determination. However,

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<sup>47</sup> See LGEMM Cost Verification Report at pages 2 and 27.

<sup>48</sup> See LGEMM cost verification exhibit ("CVE") 15, pages 6029-6040 and LGEMM Cost Verification Report at page 27.

according to the petitioner, the Department should make further adjustments in order to capture the complete R&D costs incurred by LGE in LGEMM's reported costs. The petitioner asserts that LGE's R&D activities cross-fertilize all product lines and bottom mount refrigerators are high-end appliances that rely on the R&D activity of other product lines such as, microcontrollers, various application software, Wi-Fi technology, thermodynamics, etc. The petitioner contends that there is no evidence that the cost of all R&D activities that benefited bottom mount refrigerators is shared by the LGE home appliance unit and is reflected in its account. Thus, according to the petitioner, the Department's preliminary determination understates LGEMM's R&D costs. The petitioner argues that the Department's practice is to use a "layered" approach in calculating R&D costs where there is clear evidence of cross fertilization of R&D activities.<sup>49</sup> As such, the petitioner contends that the Department should calculate the R&D cost ratio based on LGE's company-wide unconsolidated R&D expense and COGS. The petitioner further asserts that LGE did not adequately disclose all of its R&D costs and thus, the Department should make additional R&D cost adjustments for additions in the capital account,<sup>50</sup> additional R&D amortization, disposals and reclassification of assets held for sale, and subtract scrap offset and packing expenses from the denominator of the R&D cost ratio calculation.

LGEMM argues that although it agrees with the Department that LGE inadvertently understated its home appliance unit and common R&D costs, the record evidence does not support an adjustment for the difference between consolidated and unconsolidated R&D costs. LGEMM asserts that if the Department believes an adjustment is necessary for the difference between consolidated and unconsolidated R&D costs, the adjustment should be limited to the difference found at the verification and the consolidated COGS should be used to allocate the R&D costs. With respect to the petitioner's cross-fertilization R&D cost argument which refers to LGE's public press releases, LGEMM asserts that the Department spot-checked projects mentioned in the press at the verification. LGEMM contends that reconciling the public press to LGE's financial statements is not part of the Department's normal investigation methodology and any further efforts to reconcile LGE's press releases to its financial statements will not prove fruitful.<sup>51</sup> Further, LGEMM asserts that LGE properly recorded the capitalization and amortization of R&D costs<sup>52</sup> and properly removed the scrap revenue and the packing expenses from the denominator of its G&A expense ratio calculation.

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<sup>49</sup> The petitioner cites the following cases to support its position: Light-walled Rectangular Pipe and Tube from Mexico: Notice of final Determination of Sales at Less than Fair Value, 69 FR 53677 (September 2, 2004), and accompanying Issues and Decision Memorandum at Comment 25; Dynamic Random Access Memory Semiconductors of One Megabit or above from the Republic of Korea: Final Results of Antidumping Duty Administrative Review, 65 FR 68976 (November 15, 2000), and accompanying Issues and Decision memorandum at Comment 10 (DRAM from Korea I); and Dynamic Random Access Memory Semiconductors of One Megabit or above from the Republic of Korea: Final Results of Antidumping Duty Administrative Review, 66 FR 52097 (October 12, 2001), and accompanying Issues and Decision memorandum at Comment 3 ("DRAM from Korea II").

<sup>50</sup> The petitioner cites DRAM from Korea I at Comment 9 to support its position.

<sup>51</sup> LGEMM points to the cost verification report and asserts that the Department reconciled LGE's reported R&D costs to its financial statements.

<sup>52</sup> LGEMM also points out that the petitioner did not provide any explanation as to why the disposal/reclassification of assets held for sale is an expense that should be included as part of the R&D expense.

Department Position:

Consistent with the position taken in the companion antidumping duty investigation of bottom mount refrigerators from Korea (Korea Investigation) in which LGE is a respondent, we disagree with the petitioner that LGE's R&D expense rate should be calculated on a company-wide basis. While the Department has in the past calculated a more expansive R&D expense rate such as in DRAMs from Korea I and DRAMs from Korea II, the petitioner's cites are unpersuasive as the courts have subsequently struck down the Department's theory of cross-fertilization in later segments of those proceedings.<sup>53</sup> See e.g., Hyundai Electronics v. United States 395 F. Supp. 2nd 1231 (CIT 2005) ("Hyundai") and Hynix Semiconductor Inc., v. United States 424 F.3d 1363 (Fed. Cir. 2005) ("Hynix").

In Hynix, the CAFC held that the record failed to provide substantial evidence of cross-fertilization, and, as a result, affirmed the respondent's normal books and records with regard to the allocation of R&D expenses. In reaching its conclusion, the CAFC held that simply citing a list of projects without proof of the underlying activities was paltry evidence of cross-fertilization. See Hynix 424 F. 3d at 1371. A review of Hyundai provides additional guidance on the evidentiary hurdle that must be cleared to disregard a company's normal books to reallocate costs based on the theory of cross-fertilization. The CIT stipulated that specific evidence must be provided to show how non-subject merchandise R&D activities directly impacted the development of subject merchandise. See Hyundai 395 F. Supp. 2nd, at 1239. The CIT found that a mere recitation of a company's R&D projects, even R&D projects that list subject merchandise in the context of non-subject R&D, failed to provide substantial evidence of cross-fertilization. Id. at 1238-1239. Specifically, the CIT held that "simply because the word 'DRAM' is in a project does not provide substantial evidence that the R&D actually relates to DRAM development." Id. Furthermore, the CIT found that the introduction of subject merchandise technology into the design of non-subject merchandise still failed to provide "specific explanation of how these various advancements directly impact DRAM R&D." Id. Hence, while the court's decision suggests that cross-fertilization may exist in certain industries, the burden of proof is high. Upon failing to reach this burden of proof in the DRAMs cases, the Department was directed to rely on the companies' product-specific R&D expenses. See Hynix 424 F. 3d at 1371.

Consequently, the Department's subsequent practice has been to allocate R&D expenses to products consistent with the company's normal books (i.e., calculating product and/or division-specific R&D costs as they are calculated in the company's normal books and records), which in accordance with section 773(f)(1)(A) of the Act, is conditioned upon whether the company's books are in compliance with home country generally accepted accounting principles (GAAP) and reasonably reflect the costs associated with producing the merchandise under consideration.<sup>54</sup>

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<sup>53</sup> With regard to antidumping procedures, cross-fertilization refers to the theory that R&D activities related to non-subject merchandise may also benefit or stimulate the development of subject merchandise.

<sup>54</sup> See e.g., Chlorinated Isocyanurates from Spain: Final Results of Antidumping Duty Administrative Review, 74 FR 50774, (October 1, 2009), Issues and Decision Memorandum, at Comment 3, where the Department stated that the respondent "records its R&D expense specifically by division. Based on this information, we were able to verify the exact amount of R&D expense related to water treatment products (i.e., the merchandise under consideration).

Thus, contrary to the petitioner's claims, the Department does not have a long-established practice of calculating a company-wide R&D expense rate, nor do we find that this case presents clear evidence of cross-fertilization. Rather, we note that the product lines under LGE's company-wide umbrella fall under a diverse range of production and R&D activities including, for example, home entertainment and mobile communications.<sup>55</sup> While the petitioner provides evidence from the public domain supporting LGE's wide array of products and technology, there is no compelling evidence that technology advances in the mobile communications arena, for example, directly impacted the company's refrigerator developments. Thus, we do not find that the petitioner's arguments provide substantial evidence that LGE's R&D activities for its other product lines (e.g., mobile communications, etc) directly impacted LGE's product development with regard to the merchandise under consideration.

Nonetheless, in the companion Korea Investigation involving LGE, we have determined that adjustments to LGE's reported R&D expense rate calculations are warranted. As such, the adjustments to LGE's reported R&D expense rate affects LGEMM's R&D expense rate calculation. With respect to LGE, at verification we found that while LGE had correctly identified its total R&D expenses to the Department, for reporting purposes the company analyzed the underlying R&D projects and attempted to extract from the total the costs relative to refrigerators and common to all products.<sup>56</sup> These extracted figures were the home appliance and common R&D expenses used in the numerators of LGE's reported R&D expense rate calculations. However, at verification we found that although LGE normally records R&D expenses by division (e.g., home appliance division), the company did not rely on these figures for reporting to the Department. Furthermore, a simple scan of the company-wide R&D projects called into question whether LGE's reporting methodology had captured all projects relative to refrigerators.<sup>57</sup> Similar to the court's findings in Hyundai, the Department agrees that a mere review of project names cannot be determinative of whether such projects are related to the merchandise under consideration. See Hyundai at 1238-1239. Nor can the Department, in the limited time accorded to verification, perform an extensive review of every R&D project to confirm that all projects related to the merchandise under consideration have been reported. Hence, lacking evidence that such allocations are distortive, the Department's practice is to rely on the R&D expense allocations normally recorded by the company. Therefore, for the final determination in the Korea Investigation involving LGE, and likewise for LGEMM, we have relied on the R&D expenses reported in the home appliance division for the refrigerator-related R&D expenses and the unallocated R&D expenses remaining in the HQ and CTO divisions as the common R&D expenses.

Further, we note that in the companion Korea Investigation, LGE originally reported consolidated home appliance and consolidated company-wide COGS as the denominators to the home

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Accordingly, we allocated this amount to all water treatment products in accordance with our practice)."

<sup>55</sup> See the December 22, 2011, Memorandum from Heidi K. Schriefer, Senior Accountant, to Neal M. Halper, Office Director, entitled Verification of the Cost Response of LG Electronics Inc. in the Antidumping Investigation of Bottom-Mount Combination refrigerator-Freezers from the Republic of Korea ("LGE Korea Cost Verification Report") at 13.

<sup>56</sup> See LGE Korea Cost Verification Report at 34.

<sup>57</sup> Id.

appliance and common R&D expense rate calculations, respectively. LGE's rationale was that its R&D activities are related to both LGE and its subsidiaries.<sup>58</sup> In the Preliminary Determination, the Department relied on unconsolidated COGS for the R&D expense rate calculations. However, based on the Department's findings at the LGE verification, we submit that LGE's original reliance on consolidated home appliance and consolidated company-wide COGS represent the appropriate approach for allocating a portion of LGE's R&D expenses to LGEMM without also double-counting R&D expenses. Also, underlying this decision was our confirmation that the R&D functions for the LG group as a whole have been for the most part centrally positioned within LGE (i.e., the unconsolidated company). See LGE Cost Verification Report at 5-6. Hence, LGE's subsidiaries produce and sell products that are reliant on the R&D activities performed by LGE. See LGE cost verification exhibit 15 at 5034-5035. As such, the fact pattern of the current case supports LGE's contentions that its refrigerator-related R&D activities benefitted its subsidiaries that also produced and sold its refrigerator products. Thus, we have relied on the consolidated COGS denominators to allocate LGE's refrigerator-related and common R&D expenses to the beneficiaries of LGE's technological advancements. Consequently, for the final determination, we applied LGE's home appliance unit and common R&D expense ratios, which were based on the consolidated home appliance and consolidated company-wide COGS, to LGEMM's reported COM to allocate a portion of LGE's R&D expenses to LGEMM.

Relative to our decision to rely on LGE's consolidated COGS as the denominators to the R&D expense rate calculations, we disagree with LGE's contention that no adjustment should be made for the difference between the unconsolidated and consolidated R&D expenses. Although LGE provided financial statements for two of its subsidiary refrigerator producers, we were unable to examine the financial statements of LGE's other seven refrigerator-producing subsidiaries. See LGE Cost Verification Report at 34. In addition, LGE did not provide a reconciliation of the total R&D expenses from the unconsolidated to consolidated financial statements. Therefore, lacking the information to confirm that the difference between the financial statements reflected R&D expenses that would fall under the home appliance or common categories, as facts available under section 776(a) of the Act, we have adjusted the unconsolidated home appliance and common R&D expenses from LGE's normal books and records by the percentage difference between the R&D expenses reported on LGE Korea's unconsolidated and consolidated financial statements.

With regard to the additional four adjustments the petitioner asserts we should make to LGE's R&D costs, we note that the first three reference the POI activity of LGE's balance sheet accounts. Specifically, the petitioner seeks to increase LGE's R&D expenses by the net POI change in the intangible asset account for capitalized development costs, amortization, and disposals/reclassification for assets held for sale. The Department disagrees that the inclusion of these amounts in LGE's R&D expenses is appropriate. The capitalized development account was presented on LGE's December 31, 2010, balance sheet, which as a part of LGE's financial statements, was pronounced by the company's auditors to fairly reflect the financial position of the company in conformity with International Financial Reporting Standards as adopted by the Republic of Korea (Korean IFRS).<sup>59</sup> See LGE's 9/7/11 Section D Response at Exhibit 26.

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<sup>58</sup> See LGE Korea's September 7, 2011 Supplemental Section D Response (9/7/11 Section D Response) at 10-11.

<sup>59</sup> LGE Korea adopted Korean IFRS in 2010. Prior to 2010, the company prepared its financial statements in

Lacking any evidence to the contrary, the Department accepts the findings of LGE's auditors, *i.e.*, that the balance is appropriately reported in LGE's balance sheet. For the amortization costs and disposals/reclassification of assets held for sale, which affects income statement accounts, the Department verified and reconciled LGE's R&D costs and the total reported costs to its income statement to ensure that LGE appropriately captured all R&D costs in the reported costs except noted above. Further, just like the balance sheet, LGE's December 31, 2010, income statement was pronounced by the company's auditors to fairly reflect the financial position of the company in conformity with Korean IFRS. We found no evidence to suggest that any POI expenses related to LGE's balance sheet and income statement accounts were not appropriately reported, or that such reporting is distortive to the reported costs. Consequently, we have not made adjustments to LGE R&D expenses for these three items in the final determination. Finally, with regard to the petitioner's last suggested adjustments regarding the scrap offset and packing expenses, we agree. Therefore, in the final determination we have accounted for scrap offsets and packing expenses in the R&D expense rate denominators.

#### Comment 15: Global Costs

During the POI, LGE incurred global costs that included activities that benefited both LGE and its affiliates. However, the Department found at the cost verification that the global costs allocated to LGEMM were not recorded as expenses in LGEMM's normal books and records because these costs were considered to be recovered by LGE via intermediary sales transaction markups among its affiliates.

The petitioner argues that LGEMM's reported costs were understated because its normal books and records do not include the allocated global costs. As such, the petitioner contends that the Department should adjust LGEMM's reported costs to capture the unrecorded global costs for the final determination.

LGEMM argues that LGE recovered its portion of the global costs via intermediary sales transactions that were designed to cover the expenses incurred by LGE on behalf of LGEMM. LGEMM claims that charging LGEMM for these global costs without offsetting revenues earned by LGE for these activities would overstate LGEMM's costs. Thus, LGEMM maintains that the Department should not make an adjustment to LGEMM's reported costs for the final determination.

#### Department Position:

We agree with the petitioner that LGEMM's reported costs should be adjusted to include the global costs in question. The Department discovered at the cost verification in the companion Korean investigation that LGE bears certain expenses that are considered to benefit not only LGE's production activities but also the production activities of its subsidiaries. *See* LGE Korea Cost Verification Report, page 2. LGE refers to these activities as "global costs" and they are reimbursed for these expenses via intermediary sales transactions with its subsidiaries. However,

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compliance with Korean Generally Accepted Accounting Principles (K-GAAP). *See* LGE Korea Cost Verification Report at 7.

due to the nature of these intermediary sales transactions LGEMM never recognized these costs in question as expenses in their books and records. As such, LGEMM's reported costs did not include its share of global costs allocated from LGE.<sup>60</sup> At the LGE cost verification, the Department reviewed the trail of transactions between the affiliated companies when such transfers of bottom mount refrigerators occur. Specifically, the Department noted that LGEMM first invoices LGE for the bottom mount refrigerators and then LGE invoices LGEUS.<sup>61</sup> As noted in the LGE cost verification report, LGE's invoice to LGEUS includes a markup that is considered to cover costs incurred on behalf of LGEMM. See LGE Korea Cost Verification Report, page 15 and LGEMM Cost Verification Report, page 5. It is through this markup that LGE contends that LGEMM's global costs have been captured, or rather as the Department views it, that LGE has been reimbursed for these expenses. However, the Department's concern here is not whether LGE has been reimbursed for its outlay of funds on behalf of LGEMM, but rather whether the costs reported to the Department by LGEMM "reasonably reflect the costs associated with the production and sale of the merchandise under consideration." See section 773(f)(A) of the Act. Regardless of the cost reimbursement method used by LGE to recoup the portion of global costs incurred on behalf of LGEMM, the global costs attributable to LGEMM do not appear to be captured as part of the actual costs associated with producing bottom mount refrigerators. Rather, these production costs appear to be captured by LGEUS, not LGEMM. Because the global costs incurred by LGE on behalf of LGEMM are not recognized in LGEMM's books and records, the Department finds that LGEMM's production costs do not appropriately reflect the global costs associated with the bottom mount refrigerators that LGEMM produces. Consequently, in the final determination, we made an adjustment to include the global costs in LGEMM's COM. See LGEMM Cost Calculation Memorandum.

#### Comment 16: Affiliated Party Input Purchases

During the POI, LGEMM purchased an input used to produce the merchandise under consideration from an affiliated company, LG Chemical America Inc (i.e., "LG Chemical America"). In the Preliminary Determination, the Department, as directed by section 773(f)(2) of the Act, analyzed and consequently adjusted LGEMM's transactions with LG Chemical America. In performing this analysis, the Department relied only on those inputs for which LGEMM had provided a market value. Although LGEMM had submitted LG Chemical America's COP in lieu of market prices, it had not provided the supporting documentation requested by the Department, therefore, this data was not relied upon for the Preliminary Determination. At verification, the Department confirmed the cost data from LG Chemical America along with the market data submitted for comparison with LG Chemical America's transfer prices. Based on this information, the Department analyzed LGEMM's transactions with LG Chemical America using a hierarchy of preferred market values which consisted of respondent purchases from unaffiliated parties, affiliated supplier sales to unaffiliated parties, affiliated supplier COP, and last, any reasonable market data.

The petitioner argues that LGEMM purchased the input from LG Chemical America at a price that did not reflect arm's-length transactions and thus, the Department should continue to adjust

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<sup>60</sup> See LGEMM Cost Verification Report page 5.

<sup>61</sup> See LGE Korea Cost Verification Report, page 15.

LGEMM's reported costs pursuant to the transactions disregarded rule for the final determination. Supporting its position, the petitioner cites to the Notice of Final Results of Antidumping Duty Administrative Review: Low Enriched Uranium from France, 70 FR 54359 (September 14, 2005) and accompanying Issues and Decision Memorandum at Comment 3, and asserts that the Department's established preference is to use the respondent's own unaffiliated purchases as a market price unless the input purchased from unaffiliated suppliers is not comparable to the input purchased from affiliated companies or there is an unusual circumstance surrounding such unaffiliated purchases.<sup>62</sup> The petitioner contends that in this case, identical input purchases were made from affiliated and unaffiliated companies and there were no unusual circumstances surrounding LGEMM's unaffiliated purchases. The petitioner further argues that the Department should dismiss LGEMM's claim, noted below, that the unaffiliated purchase volumes were too small to be meaningful. The petitioner cites to the Notice of Final Results of Antidumping Duty Administrative Review and Notice of Final Results of Antidumping Duty Changed Circumstances Review: Certain Softwood Lumber Products from Canada, 69 FR 75921 (December 20, 2004) and accompanying Issues and Decision Memorandum at Comment 7 (Lumber from Canada I), and asserts that the substantiality of transactions in terms of volume should not be a determining factor for making a decision as to whether the transaction prices reflect market prices. According to the petitioner, LGEMM failed to demonstrate that the purchase price from unaffiliated companies does not reflect a market price and thus, the Department should continue to make an adjustment for the final determination.

LGEMM argues that the purchase quantity of the input in question from unaffiliated companies is so small that comparing the purchase price from unaffiliated companies to the purchase price from LG Chemical America is unreasonable. LGEMM cites to the Stainless Steel Sheet and Strip in Coils from Mexico; Final Results of Antidumping Duty Administrative Review, 73 FR 7710 (February 11, 2008), and accompanying Issues and Decision Memorandum at Comment 7 (Stainless Steel Sheet and Strip in Coils from Mexico), and contends that the substantial differences in purchase quantity should lead the Department to disregard these unaffiliated purchases as an indicator of true market price. LGEMM further asserts that the Department's arm's-length test is qualitative in nature, not quantitative, in that it seeks to find the market value that best represents the company's own experience in the specific markets in which it operates, based on transactions in which it received compensation for its products from unaffiliated purchasers. As such, according to LGEMM, the Department is required by section 773(f)(2) of the Act to determine whether these sales are made at prices "usually reflected" in the market.<sup>63</sup> LGEMM states that it provided LG Chemical America's production costs of this input and thus, the Department should rely on the production costs in place of market price for the final determination.

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<sup>62</sup> The petitioner also cites Silicomanganese from Brazil: Final Results of Antidumping Duty Administrative Review, 69 FR 13813 (March 24, 2004) ("Silicomanganese from Brazil") and accompanying Issues and Decision Memorandum at Comment 7 to support its position.

<sup>63</sup> LGEMM cites Notice of Final Results of Antidumping Duty Administrative Review: Certain Softwood Lumber Products from Canada, 70 FR 73437 (December 15, 2005) and accompanying Issues and Decision Memorandum at Comment 12 ("Lumber from Canada II") to support its position.

Department Position:

We agree with the petitioner. For the final determination, we have analyzed LGEMM's transactions with its affiliated supplier by specific material codes. In performing our analysis, we note that there were certain materials that LGEMM did not purchase from unaffiliated parties. This fact pattern required that the Department rely on alternative sources for establishing market value. As the petitioner pointed out, the Department's preference for establishing a market value is a respondent's own purchases of the input from unaffiliated suppliers and when no such purchases are available, the Department looks to the affiliated supplier's sales of the input to unaffiliated parties, and finally, any reasonable source for market value. See Silicomanganese from Brazil at Comment 7. The Department followed this hierarchy in analyzing LGEMM's affiliated transactions. Accordingly, where LGEMM's unaffiliated purchases or LG Chemical America's sales were not available, the Department resorted to LG Chemical America's COP data as the best available evidence of whether the transactions reflected arm's-length values.

With regard to LGEMM's argument that certain of its reported unaffiliated purchases should be rejected because they were transacted at volumes too small to be considered a fair reflection of market value, we find that the record evidence fails to support this conclusion. In Stainless Steel Sheet and Strip in Coils from Mexico, the Department stated that it is not the aggregate volume of the transactions, nor the significance of the unaffiliated purchases to the affiliated purchases that is determinative of whether the purchases are a reasonable reflection of market value. Rather, the critical question is whether the purchases are at quantities "usually reflected" in the market, *i.e.*, at commercial quantities. See Stainless Steel Sheet and Strip in Coils from Mexico at Comment 7. Further, as the Department stated in Lumber from Canada I and Lumber from Canada II, the arm's-length test is qualitative in nature, not quantitative, in that the Department seeks to find the market value that best represents the company's own experience in the specific markets in which it operates. The record evidence shows that there are several instances where LGEMM purchased comparable volumes of certain inputs to the transacted volumes in question (*i.e.*, by material code from an affiliated supplier during the POI)<sup>64</sup>, suggesting that the volume in question was at a meaningful, commercial quantity (*i.e.*, based on LGEMM's own experience in the specific market that could be used as a market price). Thus, we determined that LGEMM's transactions with an unaffiliated supplier are at quantities sufficient to serve as a reliable benchmark for market prices. Consequently, we have not excluded any of LGEMM's unaffiliated purchases in determining whether the company's affiliated transactions reflect arm's-length prices. Therefore, for the final determination, we have continued to adjust LGEMM's reported input cost to reflect the higher of the transfer price paid by LGEMM to its affiliated supplier, market price, or COP where the market price was not available.

SamsungComment 17: Corrections Presented at Start of Sales Verifications

Samsung provided a list of corrections to its sales data at the start of its sales verifications in

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<sup>64</sup> See LGEMM CVE 16, page 6302, for a summary of the POI affiliated and unaffiliated purchases of the input under discussion. Also, see LGEMM CVE 16, pages 6326-6331, for LGEMM's POI monthly purchase journal.

Mexico and the United States. The petitioner does not comment on the corrections presented at the start of the sales verification in Mexico. However, it argues that the Department should not accept Samsung's rebate changes presented at the start of the U.S. sales verification, contending that these changes amount to wholesale revisions to the U.S. sales database. To support its argument, the petitioner emphasizes the fact that the Department needed to request a revised U.S. sales database. The petitioner also points out that these changes affected a significant proportion of Samsung's reported U.S. sales, and it illustrates its argument using the data reported in the field REBATE2\_1U.

The petitioner asserts that the Department's practice at verification is not to accept new factual information, given that its function is to test the completeness and accuracy of data previously submitted. The petitioner maintains that because the Preliminary Determination determined that Samsung failed to cooperate to the best of its ability in reporting its rebates, it should not benefit from a liberal interpretation of what constitutes a minor correction.

Samsung disagrees, claiming that the Department verified that the corrections at issue were both accurate and minor. Therefore, it contends that the Department should rely on the corrected data submitted at the start of the sales verifications in both Mexico and the United States for purposes of the final determination.

Regarding the petitioner's arguments relating to U.S. rebates, Samsung notes that it corrected the reported rebate data for five of its U.S. rebate programs. However, Samsung contends that the petitioner failed to explain why the revisions to four of these programs constituted "wholesale changes," and thus the Department has no basis upon which to consider the petitioner's claim with respect to these programs. With respect to the fifth program, reported in the field REBATE2\_1U, Samsung notes that the change was limited to the denominator of the calculation, and this change was one of formula rather than of substance (*i.e.*, Samsung allocated the revised rebates over the net, rather than gross, sales).

Samsung states that the petitioner has not challenged the revised methodology, but instead claims that the number of affected transactions is too high. However, Samsung notes that the petitioner identified no case precedent in which the number of transactions determined whether the correction itself was "minor." Indeed, Samsung contends that case precedent on this point does not support the petitioner's position because the Department has consistently examined the facts surrounding any corrections before deciding whether to accept them. As support for this statement, Samsung cites Certain Frozen Warmwater Shrimp from Brazil: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 73 FR 39940 (July 11, 2008) and accompanying Issues and Decision Memorandum (Brazil Shrimp) at Comment 6; and Notice of Final Antidumping Duty Determination of Sales at Less Than Fair Value and Affirmative Critical Circumstances: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam, 68 FR 37116 (June 23, 2003) and accompanying Issues and Decision Memorandum at Comment 1. Samsung asserts that here the changes were minor, as they resulted in a minimal percentage change in the rebate amount, and the Department recognized this fact when it requested that Samsung report these corrections in a post-verification sales listing. Therefore, it argues that the Department should continue to accept these minor corrections for the final determination.

### Department's Position:

We disagree with the petitioner. It is the Department's routine practice to review the corrections presented at the start of any verification and determine whether these changes relate to minor changes to previously-submitted data or whether they reach the level of significant new factual information. Where the changes are minor, we accept the information as part of the administrative record in the form of a verification "exhibit" and we examine that information during the course of the verification. See Brazil Shrimp at Comment 6.

In this case, we followed our practice with respect to the corrections presented at the start of the U.S. and Mexican sales verifications. While the list of corrections was long, the corrections themselves were minor/generally clerical in nature. Moreover, while the number of transactions affected by the corrections is indeed high, we disagree that it is meaningful solely to total the number of changes. In this case, Samsung reported thousands of sales transactions (and thus a small change to thousands of sales may be no more meaningful than a small change to a database containing dozens of sales); similarly, where Samsung changed the calculation of a ratio (as it did with the denominator of its REBATE2\_1U amounts), the change by definition will affect all sales for which Samsung reported the associated expense.

Finally, we also disagree with the petitioner that our request for new sales databases after verification is in any way a reflection on the magnitude of the corrections themselves. The Department routinely requests new databases after verification, solely as a method of alleviating the administrative burden on the Department. Indeed, we note that in this case, we requested that all four respondents submit revised databases<sup>65</sup>. Thus, we find no basis to reject Samsung's data here.

### Comment 18: U.S. Rebates

The Department made a preliminary finding that Samsung failed to report certain U.S. rebates in the form and manner requested, and therefore we based the amount of these rebates on AFA pursuant to section 776(b) of the Act. See Preliminary Determination, 76 FR at 67695. However, we afforded Samsung an opportunity to revise its rebate reporting prior to verification, and we provided specific instructions on how to do so. In response to this questionnaire, Samsung added nine variables to its U.S. sales listing (for a total of 13 rebate fields), and it reported U.S. rebates in these fields on a product-, customer-, and time-specific basis. Where the rebate involved a "sell out" program, Samsung used a last-in-first-out (LIFO) methodology to assign these rebates to specific sales.

The petitioner argues that the Department should base the amount of four of these rebates on AFA for purposes of the final determination. Specifically, the petitioner argues that the rebates

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<sup>65</sup> See e.g., letter to White and Case LLP dated February 2, 2012, requesting a revised home market database for Controladora Mabe S.A. de C.V. and Mabe S.A. de C.V.; and letter to Crowell Moring dated February 6, 2012, requesting revised U.S. and Canadian sales databases for Electrolux Home Products, Corp. N.V. and Electrolux Home Products, Inc.

reported in the fields REBATE1U (early payment discounts), REBATE2\_2U (product-specific and/or quarterly rebates), REBATE2\_3U (sell-through chargeback rebates), and REBATE3\_2U (Sales Performance Incentive Fund (SPIFF) rebates) do not match supporting documentation on the record of this investigation. As support for this claim, the petitioner cites various examples in its case brief.<sup>[1]</sup> According to the petitioner, not only do these problems affect a significant portion of Samsung's U.S. sales database, but they also either demonstrate that Samsung has failed to comply with the Department's instructions or they underscore the general inattentiveness to detail pervasive in Samsung's responses. As AFA, the petitioner requests that the Department use the amounts set forth in its case brief.<sup>[2]</sup>

Samsung argues that it has gone to extraordinary efforts to respond fully to the Department's supplemental questionnaires. According to Samsung, irrespective of the merits of the Department's original decision to use AFA in the preliminary determination, there is no question that its revised rebate reporting now fully complies with the Department's detailed instructions. Moreover, Samsung asserts that the Department found no discrepancies in the information examined at verification.

With respect to the petitioner's arguments, Samsung maintains that it either over-reported the amounts in question (REBATE1U) or it calculated them in accordance with the Department's instructions (REBATE2\_2U, REBATE2\_3U, and REBATE3\_2U). Regarding REBATE2\_2U, Samsung contends that the petitioner's argument is based on a misunderstanding of Samsung's LIFO reporting methodology, and that it provided a detailed explanation of how each of the questioned rebates was calculated, accompanied by supporting documentation. With respect to REBATE2\_3U, because Samsung offered a wide variety of trailing credit programs to this particular customer during the POI, Samsung explains that the rebate varied from month to month. Regarding REBATE3\_2U, Samsung maintains that the petitioner confused the country of origin of one of the models cited in its case brief, and the Department verified that Samsung correctly reported rebates on the other model. Thus, Samsung contends that there is no basis to apply AFA to these rebate programs.

### Department's Position

We agree with Samsung. For all four rebates, we have determined that the application of AFA is not warranted and have accepted Samsung's rebate data as reported.

At verification, we examined the amounts reported in the fields REBATE1U, REBATE2\_2U, REBATE2\_3U, and REBATE3\_2U for certain customers and/or certain sales. We found that each of the amounts examined was supported by source documentation and consistent with the information recorded in SEA's books and records.<sup>66</sup> See Memorandum to the File, entitled "Verification of Samsung Electronics America Inc.," dated January 26, 2012 (Samsung U.S.

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<sup>[1]</sup> See the petitioner's case brief at pages 39-43.

<sup>[2]</sup> The petitioner provides no guidance regarding the amounts the Department should use for REBATE1U but rather simply requests that the Department "apply adverse inferences."

<sup>66</sup> Samsung Electronics America Inc. (SEA) is Samsung's U.S. affiliate.

Report) at pages 13 – 19. Moreover, we disagree that any of the alleged problems identified by the petitioner exist. Therefore, we are relying on Samsung's reported information for the final determination.

Specifically, regarding REBATE1U, our verification report states the following:

Regarding early payment rebates, we examined agreement documentation from SEA's sales department. We tied the total expenses shown on the calculation worksheet to SEA's general ledger in SAP and the early payment ratio shown on the worksheet to the U.S. sales listing. We noted no discrepancies.

Id. at 18.

Therefore, contrary to the petitioner's argument, we disagree that there were errors in Samsung's reporting of this rebate, much less that these errors "underscored a general inattentiveness to detail" on Samsung's part.

Regarding REBATE2\_2U, the petitioner alleged four individual errors on page 40 of its case brief. We have examined the record and find that Samsung's explanation contained in its rebuttal brief is consistent with the reported data. Regarding the first three items, we agree that the differences alleged by the petitioner are accounted for by Samsung's LIFO methodology. With respect to the fourth alleged error, we find that the record supports Samsung's explanation.

With respect to REBATE2\_3U, the petitioner claims that there is little or no correlation between the rebates reported for particular customers, products, or dates and those shown in the programs. To the contrary, we note that: 1) each separate rebate program for this customer was reported in Exhibit 4 of the November 23, 2011, supplemental questionnaire response (November 23, 2011, SQR); 2) Samsung applied this rebate type in accordance with the Department's instructions in a supplemental questionnaire issued on November 1, 2011; and 3) the calculation of this rebate was verified without discrepancy.

Regarding REBATE3\_2U, we find no basis for the petitioner's assertion that Samsung reported this rebate on ineligible models. Specifically, we note that the first model referenced on page 42 of the petitioner's case brief is identified in Exhibit 7 of the November 23, 2011, SQR (showing that SEA paid rebates on this model during the POI based on its LIFO methodology). We also find no basis for the petitioner's assertion with respect to the second model referenced on the same page of the case brief. Samsung produced this model in Korea and reported the related rebate in the companion Korea investigation.

Therefore, we find no basis to apply AFA to these rebates for the final determination.

#### Comment 19: CEP Offset

In the Preliminary Determination we stated that, because we based the selling expenses and profit for Samsung on the weighted-average selling expenses incurred and profits earned by the other

three respondents on their comparison market sales, we could not determine the level of trade (LOT) of the sales from which we derived selling expenses and profit for CV. Therefore, we were unable to determine whether there was a difference in LOT between any U.S. sales and CV. Accordingly, we did not make a LOT adjustment or CEP offset to NV with respect to Samsung. See Preliminary Determination, 76 FR at 67700-67701.

Samsung argues that, whether the Department continues to base CV selling expenses on the experience of the other respondents or bases these CV components on Samsung's own experience as Samsung suggests (see Comment 25 below), substantial record evidence demonstrates that Samsung is entitled to a CEP offset. Samsung further argues that the Department did not explain why it was not possible to determine if Samsung was entitled to a CEP offset, adding that the statute does not limit the granting of CEP offsets only to respondents that have price-to-price comparisons. Samsung cites cases where the Department granted CEP offsets to respondents whose weighted-average dumping margins were based in whole or in part on price-to-CV comparisons.<sup>67</sup> Moreover, Samsung argues that the Department's standard margin calculation program is set up to calculate a CEP offset even when a respondent's margin is based entirely on price-to-CV comparisons.

Samsung contends that the record evidence demonstrates that the comparison market LOTs of the other three respondents are all at a more advanced stage of distribution than the CEP LOT of Samsung. Samsung summarizes the Department's analysis of the selling activities reported for Electrolux, LGEMM, and Mabe, and states that the Department concluded that each company demonstrated its entitlement to a CEP offset based on this analysis.

Samsung maintains that, in this case, the Department verified that Samsung performs virtually no selling activities in selling subject merchandise to SEA at the CEP LOT. Samsung claims that a comparison of the activities performed by the other respondents in their respective comparison markets and at their CEP LOTs to those performed by Samsung at its CEP LOT demonstrates conclusively that it qualifies for a CEP offset.

In addition, Samsung protests that the Department should not have based Samsung's CV selling expenses and profit in part on LGE's Korean sales because it represents an impermissible application of the MNC Provision to Samsung. If, in the final determination, the Department decides to base Samsung's CV selling expenses and profit on LGEMM's Canadian sales, Samsung argues that the record would still demonstrate that Samsung is entitled to a CEP offset.

Finally, Samsung believes that the experience of SEC in the companion Korean investigation provides a further basis for granting a CEP offset to Samsung. According to Samsung, the Department's analysis in the preliminary determination in the companion Korea investigation

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<sup>67</sup> See Certain Frozen Warmwater Shrimp from Thailand: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review, 72 FR 52065 (September 12, 2007) and accompanying Issues and Decision Memorandum at Comment 13 (Thai Shrimp); and Stainless Steel Butt-Weld Pipe Fittings from Korea: Preliminary Results of Antidumping Duty Administrative Review, 70 FR 67444 (November 7, 2005), unchanged in Stainless Steel Butt-Weld Pipe Fittings From Korea: Notice of Final Results of Antidumping Duty Administrative Review, 71 FR 13093 (March 13, 2006).

confirmed that SEC performed few selling activities in making sales to SEA, at the CEP LOT, whereas it engaged in substantial selling activities in making sales to its home market customers.<sup>68</sup> Similarly, Samsung asserts, record evidence demonstrates that Samsung performs more selling activities in making comparison market sales than in selling to SEA at the CEP LOT. Samsung submits that, while SEA is responsible in the U.S. market for handling sales and marketing, technical services, and inventory maintenance, Samsung performs those functions itself in its home market. Accordingly, Samsung believes that the record establishes that Samsung's home market LOT is also at a more advanced stage of distribution than the CEP LOT, which entails virtually no selling functions.

The petitioner maintains that Samsung's argument is without merit and that the Department should continue to decline to apply a CEP offset to Samsung's CEP sales in the final determination. The petitioner argues that, although Samsung claims that a NV based on CV does not rule out the granting of a CEP offset, there is nothing in the Preliminary Determination to suggest that the Department, as matter of law, declined to grant a CEP offset to Samsung because its NV was based on CV.

Furthermore, the petitioner objects to Samsung's claim that, because the Department granted a CEP offset to the other three respondents, it follows that Samsung meets the eligibility criteria for a CEP offset because Samsung's CV selling expenses are an average of the three respondents' data. The petitioner argues that while comparison of the "high," "low," "moderate," "yes," and "no" designations with respect to the performance of selling functions for the same respondent in two different markets may be meaningful, comparison of one respondent's "low" and another respondent's "moderate" designation is essentially meaningless.

Finally, the petitioner submits that an examination of the ISE rates used in the calculation of the average CV selling expenses shows variation among the three rates and, presumably, commensurate variability in functions. According to the petitioner, because the average ISE ratio is based on sales in three comparison markets and LGE has two comparison-market LOTs, the Department's admission that it could not determine whether there is a difference in LOT between any U.S. sales and CV is understandable and justified. Therefore, if the Department continues to base Samsung's CV selling expense ratio on the experience of the other three respondents, the petitioner argues that the Department should continue to decline to apply a CEP offset to Samsung's CEP sales for the final determination.

#### Department's Position:

Upon further consideration of the record and the comments received from interested parties, we have granted Samsung a CEP offset to NV for CEP sales comparisons in the final determination, under section 773(a)(7)(B) of the Act and 19 CFR 351.412(f).

Because Samsung had no viable home or third country market during the POI, we based NV on

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<sup>68</sup> See Notice of Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Negative Critical Circumstances Determination: Bottom Mount Combination Refrigerator-Freezers From the Republic of Korea, 76 FR 67675 (November 2, 2011).

CV. When NV is based on CV, the NV LOT is that of the sales from which we derive selling, general, and administrative (SG&A) expenses and profit. In accordance with 19 CFR 351.412(d), the Department will make its LOT determination under paragraph (d)(2) of this section on the basis of sales of the foreign like product by the producer or exporter.

While we stated in the Preliminary Determination that we could not determine the CV LOT, upon further review of the record, and in light of our decision to exclude LGEMM from the weighted-average calculation of CV selling expenses and profit for Samsung (see Comment 25, below), we find that we are able to determine the LOT of the sales from which we derived selling expenses and profit for CV. See Thai Shrimp (“Because we based the selling expenses and profit for Thai-I-Mei on the weighted-average selling expenses incurred and profits earned by the other respondents in the administrative review, we are able to determine the LOT of the sales from which we derived selling expenses and profit for CV.”). As described below, we believe the record evidence demonstrates that the selling activities that the respondents whose selling expenses and profits we used in the weighted-average CV selling expense and profit calculation for Samsung, *i.e.*, Electrolux and Mabe, performed in their respective comparison markets are substantially greater than the selling activities that Samsung performed at its CEP LOT. As such, the combined comparison-market LOT of Electrolux and Mabe is at a more advanced stage of distribution than Samsung’s CEP LOT.

In the Preliminary Determination, we grouped the selling activities reported by the respondents into four “selling function categories” for purposes of our LOT analysis: (1) sales and marketing; (2) freight and delivery services; (3) inventory maintenance and warehousing; and (4) warranty and technical support.

Samsung reported that it made CEP sales through two channels of distribution (*i.e.*, direct sales to unaffiliated customers and sales out of inventory). We compared the selling activities Samsung performed in each channel, exclusive of the selling activities performed by its U.S. affiliate, and found that either there is no difference in the selling functions performed by Samsung between the channels (*i.e.*, freight and delivery services, order input/processing) or Samsung did not perform the selling function at all (*i.e.*, inventory maintenance and warehousing, and warranty and technical support) for each channel. As a result, we found that Samsung performed the same selling functions for both U.S. CEP distribution channels. Accordingly, we determined that all CEP sales constitute one LOT.

Both Electrolux and Mabe performed the following selling functions in their respective comparison markets: sales and marketing, freight and delivery services, inventory maintenance and warehousing, and warranty services. We found no differences in the selling activities performed by each company within each selling function category. Accordingly, we determined that all of Electrolux’s and Mabe’s comparison market sales constitute one LOT.

The Department verified that Samsung performs very limited selling activities in selling subject merchandise to SEA. See SEM Mexico Report at page 5. The only activities that Samsung performs with respect to its CEP LOT consist of order input/processing and freight and delivery services. With respect to order input/processing, this is primarily a clerical activity and is the only

activity within the sales and marketing selling function category that Samsung performs for its sales of subject merchandise to SEA. Samsung did not perform any sales forecasting, market research, strategic/economic planning, advertising, sales promotion, direct sales, or any other sales and marketing activities to support its sales to SEA. However, both Electrolux and Mabe performed these selling activities in their respective comparison markets. Furthermore, with respect to freight and delivery services, Electrolux and Mabe performed this selling function at a higher level of intensity in their respective comparison markets. Finally, SEM did not perform any “inventory maintenance and warehousing” or “warranty and technical support” at the CEP LOT. In contrast, Electrolux and Mabe performed both of these selling functions in their respective comparison markets.

With respect to the petitioner’s argument that an examination of the ISE rates used in the preliminary calculation of the weighted-average CV selling expense rate shows variation among the three rates, and therefore the Department is justified in not being able to determine whether there is a difference in LOT between U.S sales and CV, the Department will, in certain circumstances, consider selling expenses in its LOT analysis, but it does not consider them as a substitute for an analysis of the selling activities themselves.<sup>69</sup> Therefore, while the use of ISEs may be instructive in certain circumstances, it is not dispositive of the Department’s LOT analysis.

In sum, we find the record evidence demonstrates that the selling activities that Electrolux and Mabe performed in their respective comparison markets are substantially greater than the selling activities that Samsung performed at its CEP LOT and, therefore, the combined comparison-market LOT of Electrolux and Mabe is at a more advanced stage of distribution than Samsung’s CEP LOT. Accordingly, because no LOT adjustment was possible in this case, given that Mabe’s and Electrolux’s combined comparison-market sales constitute one comparison-market LOT, we granted a CEP offset in accordance with section 733(a)(7)(B) of the Act. The CEP offset was calculated as the lesser of: (1) the weighted-average ISEs incurred on Electrolux’s and Mabe’s comparison-market sales; or (2) the ISEs deducted from the starting price in calculating CEP.

#### Comment 20: The Denominator for Certain Selling Expense Ratios

Samsung calculated certain U.S. selling expenses (i.e., advertising and warranty expenses) as a percentage of SEA’s price net of rebates. At verification, Samsung provided alternate calculations for these expenses as a percentage of SEA’s POI gross sales price. Samsung contends that the Department should use these revised expense ratios for the final determination because: 1) the original sales figures used in the ratio calculations were net of rebates, many of which were calculated using the LIFO basis suggested by the Department; and as a result, 2) the aggregate net price calculated using the prices and rebates reported in the U.S. sales listing does not match the total net sales value shown on SEA’s 2010 financial statements. Therefore, in order to ensure a consistent calculation, Samsung argues that the Department should apply the expense ratios obtained at verification, calculated on a gross sales basis, to its reported gross unit prices for

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<sup>69</sup> See Certain Stainless Steel Butt-Weld Pipe Fittings from Taiwan: Final Results and Final Rescission in Part of Antidumping Duty Administrative Review, 74 FR 1174 (January 12, 2009), and accompanying Issues and Decision Memorandum at Comment 3.

purposes of the final determination.<sup>70</sup>

The petitioner disagrees, maintaining that the Department should continue to calculate the U.S. selling expenses in question using Samsung's expense ratios based on net sales. The petitioner asserts that it cannot evaluate the extent to which one expense rate denominator more closely matches the price to which the expense rate is applied without analyzing the source of the differences between the gross and net sales figures. Moreover, the petitioner argues that, to the extent that these differences relate to returns and billing adjustments, it is more accurate to base the ratios on net sales. Given that the Department examined the expense ratios based on net sales at verification found no errors with Samsung's reporting methodology, the petitioner maintains that the Department should continue to use these ratios in its calculations for the final determination.

#### Department's Position:

After considering the arguments on this issue, we have recalculated ADVERTU, and WARRU to base these expenses on the alternative ratios obtained at verification. We agree with Samsung that it is more accurate to calculate these ratios as a percentage of gross sales, given that the net sales values used in the denominators of the original ratios do not match the net sales values reported in the U.S. sales listing (because of the LIFO methodology that Samsung used to determine many of its rebates). While the difference between the net and gross sales values is not limited to rebates (because Samsung also included billing adjustments when determining net sales), we disagree that this difference alone is sufficient to render the net sales values more accurate.

Moreover, while the petitioner is correct that we found no error at verification with the expense ratios calculated on a net sales basis, we also verified these calculations on a gross sales basis. See Samsung U.S. Report at pages 20-21. Therefore, for the reasons stated above, we have recalculated these expenses using ratios stated on a gross sales basis.

#### Comment 21: U.S. Indirect Selling Expenses

Samsung included an amount for negative bad debt expenses, related to a settlement, in the U.S. ISE ratio calculated for its affiliate SEA. In the CEP sales verification report, we raised the issue of whether it was appropriate to treat this item as an offset to SEA's ISEs because it appeared to be extraordinary income.<sup>71</sup>

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<sup>70</sup> In the event the Department chooses not to apply these alternate expense ratios in its calculations, Samsung maintains that the Department should ensure that it applies a ratio based on net sales to the net price, and a ratio based on gross sales to the gross unit price.

<sup>71</sup> The Department in some instances will exclude extraordinary items, provided that they are both unusual in nature and infrequent in occurrence. See Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip in Coils From Japan, 64 FR30574, 30591 (June 8, 1999). An event is "unusual in nature" if it is highly abnormal, and unrelated or incidentally related to the ordinary and typical activities of the company, in light of the company's operational environment. An event is "infrequent in occurrence" if it is not reasonably expected to recur in the foreseeable future. See Notice of Final Determination of Sales at Less Than Fair Value: Certain Softwood Lumber from Canada, 67 FR 15539 (April 2, 2002) and accompanying Issues and Decision Memorandum at Comment 33.

Samsung argues that the Department should allow the negative bad debt expenses, consistent with its practice. According to Samsung, it is well established that a respondent is entitled to offset bad debt recovery income against bad debt expenses. As support for this assertion, Samsung cites Notice of Final Determination of Sales at Less Than Fair Value: Glycine from India, 73 FR 16640 (Mar. 28, 2008), and accompanying Issues and Decision Memorandum at Comment 2 (Glycine from India), where the Department treated both bad debt expenses and bad debt recovery income as part of ISEs. Samsung maintains that the Department should employ the same methodology here because there is no basis to determine that the settlement payment is an “extraordinary income item” rather than the recovery of a previously-recorded bad debt. Samsung argues that the fact that a particular bad debt recovery is large does not render it “extraordinary income” under U.S. GAAP. Samsung speculates how the Department would treat this amount if the issue was not a bad debt recovery as a result of a settlement, but instead an additional bad debt expense in the same amount as the settlement. Samsung contends that in its hypothetical scenario the Department would treat this amount as an expense in the year incurred, not as an “extraordinary” item to be excluded. Thus, Samsung states that consistency and fairness require that the Department treat its recovery of bad debt in the same manner.

Samsung notes that in the CEP verification report the Department discussed the reversal of a chargeback from a customer (also reported as part of U.S. ISEs). According to Samsung, at verification the Department noted no inconsistencies in Samsung’s explanation as to why both the bad debt recovery and the chargeback reversal should be included in U.S. ISEs. Therefore, Samsung contends that the Department should accept Samsung’s treatment of both of these items for purposes of the final determination.

Alternatively, Samsung contends that, because the potential upward adjustment to SEA’s U.S. ISE ratio is very small, it meets the definition of an “insignificant adjustment” under 19 CFR 351.413. Therefore, Samsung argues that the Department should disregard it on that basis.

The petitioner disagrees that it is proper to treat Samsung’s settlement as a reduction to SEA’s bad debt expenses. The petitioner notes that Samsung made the sales related to the recovery of bad debt well before the POI. According to the petitioner, the Department’s practice is to exclude prior period items, like the reversal of bad debt, from the calculation of both G&A expenses and ISEs.<sup>72</sup>

Moreover, the petitioner argues that Samsung’s reliance on Glycine from India is misplaced because the respondent in that case used a direct write-off method to recognize its bad debt. The petitioner notes that a respondent who uses a direct write-off method recognizes its bad debt expenses (and any recovery) on the income statement, unlike a company which uses the

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<sup>72</sup> As support for this assertion, the petitioner cites Notice of Final Results of Antidumping Duty Administrative Review: Small Diameter Circular Seamless Carbon and Alloy Steel Standard, Line and Pressure Pipe From Brazil, 70 FR 7243 (Feb. 11, 2005) and accompanying Issues and Decision Memorandum at Comment 6; Circular Welded Non-Alloy Steel Pipe from the Republic of Korea; Final Results of Antidumping Administrative Review, 66 FR 18747 (Apr. 11, 2001), and accompanying Issues and Decision Memorandum at Comment 11; and Notice of Final Determination of Sales at Less Than Fair Value: Carbon and Certain Alloy Steel Wire Rod From Canada, 67 FR 55782 (Aug. 30, 2002), and accompanying Issues and Decision Memorandum at Comments 12 and 29.

provision/allowance method where such expenses and recoveries are recorded in a provision/allowance account on the balance sheet. The petitioner points out that SEA uses the provision/allowance method and, thus, it would be inappropriate for the Department to treat SEA's bad debt recovery in the same manner as the debt recovery in Glycine from India. Consequently, the petitioner maintains that the Department should not offset SEA's U.S. ISEs for the settlement in the final determination.

Department's Position:

We have accepted Samsung's U.S. ISEs as reported for purposes of the final determination. Section 777A(a)(2) of the Act permits the Department, when determining U.S. price or NV to "decline to take into account adjustments which are insignificant in relation to the price or value of the merchandise." Insignificant adjustments are defined in the Department's regulations at 19 CFR 351.413 as "any individual adjustment having an *ad valorem* effect of less than 0.33 percent..."

Because the potential upward adjustment to Samsung's U.S. ISEs that would occur if we were to disallow its offset to bad debt expenses is insignificant within the meaning of the Department's regulations at 19 CFR 351.413, we have declined to take into account such an adjustment. Therefore, there is no need to address the merits of the arguments raised by either the petitioner or Samsung on this issue.

Comment 22: Classification of Certain Costs as Packaging or Packing

In the preliminary determination, the Department treated the packaging costs that Samsung reported in its COP database as packing costs. Samsung disagrees with this treatment, arguing that the costs in question are more properly classified as packaging costs and, as such, should be included in COP.

Samsung maintains that costs incurred in packaging goods for sale are part of COP, while packing costs are expenses that should be deducted to arrive at net price. Samsung cites the Department's Antidumping Manual as support for this distinction, and it asserts that Samsung's packaging operations differ from the cases referenced in this document.<sup>73</sup> Specifically, Samsung claims that, unlike the products at issue in Brazil Shrimp and Indonesian Mushrooms, refrigerators are not packed in inner containers that are subsequently packed inside a "master carton" for shipping. Rather, according to Samsung, refrigerators are packed only once after they come off the assembly line.

Samsung asserts that it sells refrigerators in cartons (not unpacked), which it claims is a situation similar to the one discussed in Seamless Refined Copper Pipe and Tube From Mexico: Final

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<sup>73</sup> See Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Certain Frozen and Canned Warmwater Shrimp from Brazil, 69 FR 47081 (Aug. 4, 2004) (Brazil Shrimp); and Certain Preserved Mushrooms from Indonesia: Final Results of Antidumping Duty Administrative Review, 66 FR 36754 (July 13, 2001), and accompanying Issues and Decision Memorandum at Comment 16 (Indonesian Mushrooms).

Determination of Sales at Less Than Fair Value, 75 FR 60723 (Oct. 20, 2010), and accompanying Issues and Decision Memorandum at Comment 10 (Pipe and Tube). Samsung submits that, in that case, the Department found that the respondent correctly included carton boxes, separators, core, reinforcements and carton lids in the “other material” field in the COP database. According to Samsung, given that nothing distinguishes the packaging materials that it used to package refrigerators from those used by the respondent in Pipe and Tube, the Department should treat these materials in the same manner.

The petitioner disagrees, arguing that the corrugated cardboard, tape, cushioning blocks and other such packing materials are not an integral part of the refrigerator. The petitioner maintains that, if cartons are an integral part of the refrigerator such that they should be treated as packaging costs (as Samsung claims), then the retailer must always sell the refrigerator with the carton. However, the petitioner contends that the record does not support this argument, citing a statement in its March 30, 2011, Antidumping and Countervailing Duty Petitions on Bottom Mount Combination Refrigerator-Freezers from the Republic of Korea and Mexico (Petition) that notes that a particular model was purchased from the store without packing.<sup>74</sup> Moreover, the petitioner asserts that the list of packing materials for a representative Samsung refrigerator includes, for example, the door spacer, PE and PP films for protection, and PP strapping (among other things), which clearly do not become an integral part of the refrigerator. Therefore, the petitioner contends that the Department should continue to treat the materials in question as packing, rather than packaging.

#### Department’s Position:

We agree with the petitioner and have continued to treat the costs at issue as packing costs.

Packaging costs refer to materials that are an integral part of the merchandise that is sold and are reported in the COP database. Packing costs refer to materials that are used only for the shipment of the merchandise and are reported in the sales listings. See Indonesian Mushrooms and Certain Frozen Warmwater Shrimp from India: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 72 FR 52055 (September 12, 2007) (Indian Shrimp) and accompanying Issues and Decision Memorandum at Comment 6.

Samsung’s statement that refrigerators are packed only once after they come off the assembly line demonstrates that the materials in question are not packaging because they are not part of the product itself. Samsung’s argument appears to be that, in order for a product to have both packaging and packing, it must have at least two layers of materials (e.g., an inner and outer carton). However, the relevant distinction is not how many layers of materials are used but rather whether the materials are part of the product itself. In Certain Orange Juice From Brazil: Preliminary Results of Antidumping Duty Administrative Review, 74 FR 15438 (April 6, 2009), unchanged in Certain Orange Juice from Brazil: Final Results of Antidumping Duty Administrative Review, 74 FR 40167 (August 11, 2009), we considered the drums containing orange juice to be packing expenses as opposed to product packaging. A drum is equivalent to an outer carton and is, in effect, a single packing layer added after the product comes off the

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<sup>74</sup> See the Petition at Exhibit 25, Attachment A, p. 10.

production line, not unlike the addition of a carton to the refrigerator once it comes off the assembly line.

With respect to Samsung's reference to the Antidumping Manual in support of its position that the costs at issue are packaging costs, as opposed to packing costs, we disagree that the cases cited therein (*i.e.*, Indonesian Mushrooms and Brazil Shrimp) are on point. We do not consider the packing materials cited by Samsung to constitute an "integral part of the merchandise," unlike the materials at issue in the two cases cited in the Antidumping Manual. Unlike bottom mount refrigerators, both shrimp and mushrooms must be placed in some sort of container prior to being packed for shipment. Finally, with respect to Samsung's argument that this case is analogous to Pipe and Tube, the issue in that case was not one of packing versus packaging, but rather whether packing costs for certain products were properly reported. Therefore, it is not relevant to the disposition of the issue at hand.

Accordingly, for purposes of the final determination, we continue to treat the materials expenses at issue as packing, as opposed to packaging, expenses.

#### Comment 23: Treatment of Payments for Defective Merchandise

During the POI, SEA made payments to two customers to keep these customers from returning defective merchandise. During the verification conducted at SEA, we found that Samsung inconsistently reported these payments in the U.S. sales listing. Specifically, we found that Samsung included the payments to one customer in the calculation of the POI average warranty expense ratio and it treated the payments to the other customer as a customer-specific rebate. See the Samsung U.S. Report at page 2.

Samsung argues that the different treatment of the two types of payments is appropriate. Samsung contends that it is proper to classify the payment to the first customer as a warranty expense because SEA refunded cash to the downstream consumer in instances where a repair was requested but warranty service was not available (due to either the repair magnitude or the consumer's location). According to Samsung, the fact that the payment was made to the downstream customer should be controlling.

In the second instance, Samsung explains that SEA established a rebate program in advance and made a payment to the customer during the POI. Therefore, according to Samsung, it was appropriate to report the amount paid to the second customer pursuant to an advance rebate program as a rebate.

The petitioner did not comment on this issue.

#### Department's Position:

We agree with Samsung. We have reexamined the documentation taken at verification. We find that this documentation confirms Samsung's explanation because the two payments at issue are treated differently in Samsung's records (*i.e.*, one payment is recorded as a rebate, while the other

is recorded as a warranty expense). In light of this, we believe that Samsung's treatment of these payments is reasonable and we have no information on the record which would point us to a different conclusion.

Comment 24: Unreported Bank Charges

During the presentation of minor corrections at the start of the sales verification in Mexico, Samsung identified bank charges for EP transactions which were not previously reported in the U.S. sales listing. See Memorandum to the File, entitled Verification of the U.S. Sales Response of Samsung Electronics Mexico, S.A. de C.V., dated January 9, 2012, at page 2. Samsung argues that, if the Department decides not to accept this information, then this adjustment is far below the 0.33 percent "insignificant adjustment" standard articulated in 19 CFR 351.413 and, as such, should be disregarded for purposes of the final determination.

The petitioner did not comment on this issue.

Department's Position:

As discussed in Comment 21, above, section 777A(a)(2) of the Act permits the Department, when determining U.S. price or NV to "decline to take into account adjustments which are insignificant in relation to the price or value of the merchandise." Insignificant adjustments are defined in the Department's regulations at 19 CFR 351.413 as "any individual adjustment having an *ad valorem* effect of less than 0.33 percent..."

Because Samsung's unreported bank charges are insignificant within the meaning of the Department's regulations at 19 CFR 351.413, we have exercised our discretion and have disregarded them.

Comment 25: Comparison Market Viability

In the Preliminary Determination we used CV as the basis for calculating Samsung's NV, in accordance with section 773(a)(4) of the Act, because we determined that Samsung's aggregate volume of home and third country market sales of the foreign like product were insufficient to permit a proper comparison with U.S. sales of the subject merchandise. Prior to the Preliminary Determination, the petitioner disputed Samsung's claim that it did not have a viable third country market during the POI and requested that Samsung report its third country sales. Based on our review of the record at that time, we found no basis to require Samsung to report this data for consideration in the preliminary determination. However, we stated that we intended to verify Samsung's claims for purposes of the final determination.

Samsung argues that the Department has now verified that neither its home market nor its third-country market was viable during the POI, noting that the Department's verification report confirms that the petitioner's allegation was unfounded.

The petitioner did not comment on this issue.

Department's Position:

As stated above, for purposes of the Preliminary Determination we accepted Samsung's claim, based on the record evidence, that neither its home nor third country market was viable during the POI. We reviewed this issue thoroughly at verification and found no evidence to the contrary. See Samsung Mexico Verification Report at pages 13-14. Accordingly, we continue to base Samsung's NV on CV for the final determination.

Comment 26: Calculation of CV Selling Expenses and Profit

For the Preliminary Determination, in accordance with section 773(a)(4) of the Act, we based Samsung's NV on CV because Samsung had no viable comparison market. See 76 FR at 67700. Specifically, pursuant to section 773(e) of the Act, we calculated CV based on the sum of Samsung's cost of materials and fabrication for the foreign like product, plus amounts for G&A and U.S. packing costs. Because Samsung did not have a viable comparison market, we were unable to determine Samsung's profit and selling expenses under section 773(e)(2)(A) of the Act, which requires comparison-market sales by the respondent in the ordinary course of trade. Additionally, we determined that, Samsung's sales in the foreign country of the same general category of merchandise under section 773(e)(2)(B)(i) of the Act were not available, nor was it practicable to use the actual amounts realized by other respondents under section 773(e)(2)(B)(ii) of the Act because of concerns about business proprietary data. Thus, at the preliminary determination, we followed section 773(e)(2)(B)(iii) of the Act and calculated Samsung's profit and selling expenses using any other reasonable method. Specifically, we relied on the weighted-average of the selling expenses and profit incurred by the three other respondents in this investigation (i.e., the selling expenses incurred and profit realized on home-market sales by Mabe, Canadian sales by Electrolux, and Korean sales by LGE). Additionally, we explained that, while section 773(e)(2)(B)(iii) of the Act limits the amount of selling expenses and profit to an amount not greater than the amount realized by exporters or producers in connection with the sale for consumption in the foreign country of merchandise that is in the same general category of merchandise (i.e., the profit cap), the record did not contain information which would permit us to calculate a profit cap. Accordingly, we explained that, as facts available, we applied section 773(e)(2)(B)(iii) without quantifying a profit cap. See Preliminary Determination, 76 FR 67700-67701.

*a) Whether the Department Should Utilize Samsung's 2009 or 2010 Financial Statements*

Samsung argues that, even though the Department explained in the Preliminary Determination that Samsung's financial statements would not satisfy the requirements of section 773(e)(2)(B)(i) of the Act, the Department did not analyze whether Samsung's financial statements would be suitable under section 773(e)(2)(B)(iii) of the Act. Samsung submits that either its 2009 or 2010 financial statements would satisfy the statutory criteria and that their use would be consistent with the Department's past practice. While Samsung acknowledges that its 2010 financial statements show a loss, Samsung cites Atar S.R.L. v. U.S., 791 F. Supp. 2d 1368 (CIT 2011) and asserts that “[a]lthough the Department has held that CV profit must be an amount greater than zero, the courts have rejected this narrow interpretation.” Additionally, Samsung asserts that its 2009

financial statements contain sufficient data.

Samsung argues that the Department has used the financial statements of either the respondent or another producer to calculate profit and selling expenses even though the financial statements contained a large quantity of export sales. In support of its argument, Samsung cites to e.g., Notice of Final Results and Recission in Part of Antidumping Duty Administrative Review; Oil Country Tubular Goods, Other Than Drill Pipe, From Argentina, 68 FR 13262 (March 19, 2003) and accompanying Issues and Decision Memorandum at Comment 1 (explaining that “we do not agree with Acindar that use of Siderca’s financial statement in calculating Acindar’s profit ratio is precluded by the fact that seventy-three percent of Siderca’s sales were export sales”), and Notice of Final Determination of Sales at Less Than Fair Value: Collated Roofing Nails From Taiwan, 62 FR 51427, 51431 (October 1, 1997) (Taiwan Roofing Nails) (using respondents’ own financial statements to calculate overall profit and SG&A as facts available for each respondent because the financial statements reflected total sales and expenses relating to the same general category of merchandise). Additionally, citing e.g., Oil Country Tubular Goods, Other Than Drill Pipe, From Korea: Final Results of Antidumping Duty Administrative Review, 73 FR 14439 (March 18, 2008) and accompanying Issues and Decision Memorandum at Comment 1 and Taiwan Roofing Nails, 62 FR at 51431, Samsung argues that the Department has used a respondent’s own financial statements to calculate CV profit and CV selling expenses even though the financial statements included sales to affiliated parties.

Citing Notice of Final Determination of Sales at Less than Fair Value: Pure Magnesium from Israel, 66 FR 49349 (September 27, 2001) (Israel Magnesium) and accompanying Issues and Decision Memorandum at Comment 8, Samsung explains that the Department considers the following factors when selecting surrogate financial statements for the purpose of calculating CV profit: (1) the similarity of the potential surrogate company’s business operations and products to the respondent’s; (2) the extent to which the financial data of the surrogate company reflect both home-market and U.S. sales; and (3) the contemporaneity of the surrogate data. Additionally, citing e.g., Frozen Concentrated Orange Juice from Brazil: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 66 FR 51008 (October 5, 2001) and accompanying Issues and Decision Memorandum at Comment 3, Samsung argues that the Department has previously relied on data reported for a period prior to the review or investigation. Samsung argues that either its 2010 or 2009 financial statements would satisfy each of the three criteria discussed in Israel Magnesium, and that neither the Act nor the Department’s prior practice precludes the use of Samsung’s 2010 or 2009 financial statements under section 773(e)(2)(B)(iii) of the Act.

The petitioner agrees that section 773(e)(2)(B)(iii) of the Act should govern the calculation of CV selling expenses and CV profit for Samsung. The petitioner argues that the Department should continue to calculate CV selling expenses and CV profit for Samsung based on the experiences of the three other respondents in their respective comparison markets. Citing e.g., Notice of Final Determination of Sales at Less Than Fair Value: Fresh Atlantic Salmon From Chile, 63 FR 31411, 31435 (June 9, 1998), the petitioner argues that there is ample precedent for the Department’s decision in the Preliminary Determination to base Samsung’s CV selling expenses and profit on the weighted-average selling expenses incurred and profits realized by the remaining

respondents in their respective comparison markets.

The petitioner argues that Samsung's assertion that the Department should use Samsung's own financial statements is without merit. The petitioner argues that, because Samsung's financial statements include export sales and sales to affiliated parties, Samsung's financial statements are not representative of a Mexican producer of subject merchandise because they are distorted by the affiliated-party sales transactions and do not reasonably reflect Samsung's home-market selling experience. The petitioner notes that the same deficiency exists with respect to both Samsung's 2010 financial statements and Samsung's 2009 financial statements.

Department's Position:

Neither Samsung's 2009 nor 2010 financial statements would satisfy the statutory criteria or serve as a reliable basis for determining the selling expenses incurred and profit realized by Mexican producers in the domestic market. While Samsung is correct that there have been instances where the Department has used a respondent's own financial statements to calculate CV selling expenses and profit under section 773(e)(2)(B)(iii) of the Act, the Department has explained that its decision was premised on the fact that, due to the absence of alternative data, the respondent's own financial statements were "the most appropriate information on the record." See Taiwan Roofing Nails, 62 FR at 51431.

Samsung's own financial statements are not an appropriate basis for determining the selling expenses incurred and profit realized by a Mexican producer under the "any other reasonable method" alternative in section 773(e)(2)(B)(iii) of the Act.<sup>75</sup> Section 773(e)(2)(B)(iii) of the Act allows the Department to determine the selling expenses incurred and profit realized "based on any other reasonable method, except that the amount allowed for profit may not exceed the amount normally realized by exporters or producers (other than the exporter or producer described in clause (i)) in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise." In the Preliminary Determination, we explained that, because Samsung's financial statements contain both export sales and sales to affiliated parties, we would not use Samsung's financial statements under section 773(e)(2)(B)(i) of the Act because "Samsung's financial statements may not reflect the actual selling expenses and profit incurred by Samsung for sales to customers in the home market." Preliminary Determination, 76 FR at 67700.

Samsung's operations are divided between its sales facility (SEM-S) and its production facility (SEM-P). See page 2 of the public version of Samsung's response to the Department's section D supplemental questionnaire, dated September 22, 2011 (9/22 DSQR). Each facility prepares separate profit and loss statements which are used to prepare Samsung's annual financial statements. Id. at page 41. During the POI, SEM-P produced subject merchandise, top-mount

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<sup>75</sup> We note that, even though Samsung is not arguing that the Department should use Samsung's own financial statements under 773(e)(2)(B)(i) of the Act, because that alternative requires that the Department's determination relate to the "same general category of products as the subject merchandise," our rationale also applies to section 773(e)(2)(B)(i) of the Act.

refrigerators, side-by-side refrigerators, washing machines, and dryers. Id. at page 5. In addition to producing merchandise, SEM-P handles all export sales of its finished goods, as well as, interdivisional sales of its finished goods to SEM-S. Id. at page 42. SEM-S handles all sales of SEM-P's production in the domestic market. Id. at page 42. Additionally, SEM-S "imports and distributes consumer electronic products, such as televisions and mobile telephones, in the domestic market." Id. SEM-P only handles export sales of its own finished goods and is not involved in the sales of imported consumer electronics. Id. Due to the extensive export sales, sales of merchandise not under consideration, and affiliated party transactions, these three sets of financial data (i.e., Samsung's audited financial statement, SEM-S trial balance, or SEM-P trial balance) cannot be relied on as sources for CV profit and selling expenses, especially given that other record evidence provides a better alternative.

We agree with Samsung that, for the purposes of determining the selling expenses and profit component under section 773(e)(2)(B)(iii) of the Act, there have been cases where the Department has used either the respondent's own financial statements or the financial statements of other respondents even though the financial statements contained export sales and/or sales to affiliated parties. However, the cases cited by Samsung demonstrate that factors which are not present in this investigation led to the Department's determination that the use of the selected financial statements was the "most appropriate information on the record" in those proceedings. For example, in several of the cases cited by Samsung, the Department explained that the Department's decision was at least partially based on the fact that the financial statements reflected the selling expenses incurred and profits realized on the same general category of products. See Notice of Final Results and Partial Rescission of Antidumping Duty Administrative Review; Certain Oil Country Tubular Goods from Mexico, 70 FR 60492 (October 18, 2005) (Mexico OCTG) and accompanying Issues and Decision Memorandum at Comment 2 (deciding that, even though the respondent did not have any home-market or third-country sales of foreign like product, the respondent's divisional financial statements satisfied the requirement in section 773(e)(2)(B)(i) of the Act that the selling expenses and profit relate to the same general category of products as the subject merchandise); Taiwan Roofing Nails, 62 FR 51427, 51431 ((October 1, 1997) (explaining that, even though it was appropriate to use two of the respondents own financial statements to calculate their respective selling expense and profit rates based on the fact that the financial statements related to the same general category of products as the subject merchandise, it was inappropriate to do with respect to the third respondent because that respondent's financial statements reflected sales of merchandise "completely unrelated to the subject merchandise"); and Silicomanganese From Brazil; Final Results of Antidumping Duty Administrative Review, 62 FR 37869, 37878 (July 15, 1997) (Brazil Silicomanganese) (explaining that, because the profit rate contained in the respondent's parent's financial statements reflected the profit incurred in the mining and ore-processing industries, it was the only information on the record that reflected the profit realized on the same general category of products as the subject merchandise (i.e., processed ores and minerals)).

Unlike the financial statements selected by the Department in Taiwan Roofing Nails and Brazil Silicomanganese, Samsung's financial statements do not serve as a basis for calculating the selling expenses and profit related to sales in the same general category of products. Specifically, Samsung's financial statements reflect the selling expenses and profit related to both sales of

merchandise in the same general category of subject merchandise (*i.e.*, top-mount refrigerators and side-by-side refrigerators) and merchandise that is completely unrelated to the subject merchandise (*i.e.*, washing machines, dryers, and imported consumer electronics such as televisions and mobile telephones). Aside from the fact that Samsung itself does not classify televisions and mobile telephones in its Digital Appliance Division, Samsung has explained that, unlike subject merchandise, televisions and telecommunications devices are marked by ongoing significant technological changes in which the core technology changes rapidly and dramatically. See Samsung's Rebuttal Brief, dated February 17, 2012, at page 15. Additionally, even though the Department determined that it was appropriate to use a respondent's own divisional financial statements in Mexico OCTG, neither SEM-P's nor SEM-S's profit and loss statements would be an appropriate basis for determining representative selling expenses and profit. Specifically, even though SEM-P's profit and loss statement relates solely to refrigerators and washing machines, SEM-P's financial statements include the selling expenses and profit attributable to export sales solely. Additionally, while SEM-S's profit and loss statement relates to domestic sales solely, its selling expenses and profit are also attributable to sales of merchandise which is completely unrelated to subject merchandise. Moreover, the Department does not have the data which would enable it to separate the expenses and profit attributable to the different product categories covered by SEM-S's profit and loss statement.

Samsung's attempt to dissuade the Department from analyzing the category of products to which its financial statements relate lacks merit. The Department's explanation in Israel Magnesium that the first criterion for analyzing potential surrogate financial statements was the "similarity of the potential surrogate companies' business operations and products to the respondent's," does not indicate that the Department should automatically determine that a respondent's own financial statements satisfy this factor and, thus, are the most appropriate source for calculating selling expenses and profit. Indeed, such an interpretation would nullify the Department's established practice of analyzing whether a respondent's financial statements reflect the selling expenses and profit attributable to sales of the same general category of products in the domestic market to the degree that they are the most appropriate source of information for calculating the selling expenses and profit normally realized by domestic manufacturers. In Israel Magnesium, the Department first explained that the respondent's own financial statements did not permit the Department to determine the actual selling expenses and profit attributable to the same category of products in accordance with section 773(e)(2)(B)(i) of the Act and that, because the respondent was the only respondent under review, the Department was unable to use the selling expense and profit rates attributable to other respondents. Accordingly, because the only information on the record consisted of the financial statements of companies "generally in the business of processing chemicals derived from Dead Sea brine into medical, agricultural, and industrial compounds" whereas the respondent's business was "the refinement of these chemicals into base metal magnesium," the Department enunciated the three factors that it analyzed in selecting the most appropriate surrogate financial statement. Israel Magnesium, 66 FR 49349 and accompanying Issues and Decision Memorandum at Comment 8.

Unlike the situation in Israel Magnesium, as explained below in Section C, the Department has information on the record of this proceeding which is a more appropriate basis for calculating the selling expenses and profit attributable to Mexican producers. Finally, we note that in none of the

other cases cited by Samsung did the Department use a respondent's own financial statements in the final results after determining that other record evidence contained a more appropriate source of information. See Oil Country Tubular Goods, Other Than Drill Pipe, from Korea: Final Results of Antidumping Duty Administrative Review, 73 FR 14489 (March 18, 2008) and accompanying Issues and Decision Memorandum at Comment 1 (using the financial statements of another respondent in the same administrative review). See also, Notice of Preliminary Results of New Shipper Review of the Antidumping Duty Order on Certain Frozen Warmwater Shrimp from Ecuador, 71 FR 34888 (June 16, 2006) (calculating CV profit by weight-averaging the profit data of the respondents in the investigation), unchanged in Notice of Final Results of New Shipper Review of the Antidumping Duty Order on Certain Frozen Warmwater Shrimp from Ecuador, 71 FR 54977 (September 20, 2006); Notice of Final Results and Recision in Part of Antidumping Duty Administrative Review; Oil Country Tubular Goods, Other Than Drill Pipe, From Argentina, 68 FR 13262 (March 19, 2003) and accompanying Issues and Decision Memorandum at Comment 1 (rejecting arguments that the Department utilize the respondent's own financial statement); Certain Preserved Mushrooms from India: Preliminary Results of Antidumping Duty Administrative Review, 67 FR 10371 (March 7, 2002) (using the respondent-specific selling expense and profit rates calculated during the previous review) unchanged in Certain Preserved Mushrooms From India: Final Results of Antidumping Duty Administrative Review, 67 FR 46172 (July 12, 2002); and Frozen Concentrated Orange Juice from Brazil; Final Results and Partial Rescission of Antidumping Duty Administrative Review, 66 FR 51008 (October 5, 2001) and accompanying Issues and Decision Memorandum at Comment 3 (using the profit rate calculated for the respondent during the previous administrative review). In conclusion, for all of the reasons discussed above, we determine that, because the Department has more appropriate information on the record of this investigation, Samsung's financial statements do not satisfy the "reasonableness" requirement of section 773(e)(2)(B)(iii) of the Act.

*b) Whether the Department May Disregard the Profit Cap Under (iii)*

Samsung argues that even though section 773(e)(2)(B)(iii) of the Act allows the Department to use "any other reasonable method" to calculate CV profit and selling expenses, the Act requires that the calculated amounts not exceed the amounts normally realized by producers or exporters in connection with the sale for consumption in the foreign country of merchandise that is in the same general category of merchandise. Samsung agrees that reliance on Mabe's data to calculate the requisite profit cap would impermissibly disclose business proprietary information and recognizes that none of the other respondents' financial statements is public. However, citing e.g., Atar S.R.L. v. U.S., 791 F. Supp. 2d 1368 (CIT 2011) (Atar), Samsung argues that the CIT has recognized the section 773(e)(2)(B)(iii) profit cap requirement and rejected the Department's previous attempts to dismiss its statutory obligation summarily. Samsung cites Certain Polyester Staple Fiber from the Republic of Korea: Notice of Amended Final Determination and Amended Order Pursuant to Final Court Decision, 68 FR 74552, 74553 (December 24, 2003) and argues that, pursuant to remand instructions from the CIT, the Department has used the financial statements of other producers to calculate a profit cap. Accordingly, Samsung concludes that its own financial statements contain information concerning the profits normally realized in the home market (i.e., Mexico) and, therefore, the Department should use Samsung's 2010 or 2009 financial statements to calculate the requisite profit cap.

The petitioner argues that, for the same reasons that Samsung's 2010 and 2009 financial statements provide an unreasonable basis for calculating CV selling expenses and CV profit, Samsung's financial statements provide an unreasonable basis for calculating a profit cap under section 773(e)(2)(B)(iii) of the Act. The petitioner also argues that the Department's decision in the Preliminary Determination to calculate CV selling expenses and profit under section 773(e)(2)(B)(iii) of the Act without quantifying a profit cap accords with the statutory framework. Specifically, citing Statement of Administrative Action Accompanying the Uruguay Round Agreements Act (SAA), H.R. Doc. 103-316 at 870 (1994) at 841, the petitioner argues that Congress recognized that there could be scenarios "where, due to the absence of data, Commerce cannot determine . . . a 'profit cap' under alternative (3), it might have to apply alternative (3) on the basis of 'the facts available.'" Finally, citing Israel Magnesium and accompanying Issues and Decision Memorandum at Comment 8, the petitioner argues that the Department has explained previously that, as facts available, it was calculating CV selling expenses and profit under section 773(e)(2)(B)(iii) of the Act without quantifying the profit cap because "the profit cap cannot be calculated in the instant case because . . . we do not have information allowing us to calculate the amount normally realized by exporters or producers (other than the respondent) in connection with the sale, for consumption in the foreign country, of the merchandise in the same general category." Accordingly, the petitioner concludes that, because record evidence does not allow for the calculation of the profit cap, the Department should calculate CV selling expenses and profit for Samsung pursuant to section 773(e)(2)(B)(iii) of the Act without, as facts available, quantifying the profit cap.

#### Department's Position:

For the purposes of this final determination, we are continuing to calculate CV profit pursuant to 773(e)(2)(B)(iii) of the Act without, as facts available, quantifying the profit cap.

Samsung's arguments concerning the propriety of using its own financial statements to calculate a profit cap pursuant to section 773(e)(2)(B)(iii) of the Act ignore the explicit prohibition against using a respondent's own financial statements for the purposes of calculating the profit cap. The profit cap language in section 773(e)(2)(B)(iii) of the Act requires that the profit rate calculated using the "any other reasonable method" approach "not exceed the amount normally realized by exporters or producers (*other than the exporter of producer described in clause (i)*) in connection with the sale for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise." (Emphasis added). Moreover, the Department has recognized this statutory prohibition previously. See e.g., Notice of Final Determination of Sales at Not Less Than Fair Value: Certain Color Television Receivers From Malaysia, 69 FR 20592 (April 26, 2004) and accompanying Issues and Decision Memorandum at Comment 26; Frozen Concentrated Orange Juice from Brazil; Final Results and Partial Rescission of Antidumping Duty Administrative Review, 66 FR 51008 (October 5, 2001) and accompanying Issues and Decision Memorandum at Comment 3; and Israel Magnesium and accompanying Issues and Decision Memorandum at Comment 8.

In previous cases, the Department has calculated CV profit under section 773(e)(2)(B)(iii) of the Act without, as facts available, quantifying the profit cap. See e.g., Certain Lined Paper Products

From India: Notice of Final Results of Antidumping Duty Administrative Review and Partial Rescission of Antidumping Duty Administrative Review, 76 FR 10876 (February 28, 2011) and accompanying Issues and Decision Memorandum at Comment 3. Indeed, the legislative history indicates that Congress recognized that there may be instances where, due to a lack of data, the Department may need to utilize facts available and calculate a CV profit rate pursuant to section 773(e)(2)(B)(iii) of the Act without quantifying a profit cap. See SAA, H.R. Doc. 103-316 at 870 (1994) at 841.

As discussed above, Samsung's argument that we should rely on its own financial statement to calculate the profit cap ignores the express statutory prohibition against using a respondent's own financial statements to calculate the profit cap. Nevertheless, the Department recognizes that the U.S. Court of International Trade has required that the Department examine all record evidence for the purposes of calculating the profit cap pursuant to section 773(e)(2)(B)(iii) of the Act. See e.g., Atar, 791 F. Supp. 2d at 1377. The record of this investigation does not contain information that would enable the Department to calculate the profit normally realized by producers in connection with domestic market sales of merchandise in the same general category. Specifically, the Department does not have information which would enable us to determine the profits attributable to any of the three remaining respondents' broader category of domestic refrigerator sales. Although the Department does have information concerning the profit rate of the sales of foreign like product in the domestic market, this information only relates to a subset of Mabe's domestic market sales of products in the same general category as subject merchandise (*i.e.*, the profit rate does not reflect Mabe's sales of either top-mount or side-by-side refrigerators or sales of the same by other producers). Moreover, as the Department explained in the Preliminary Determination, the use of Mabe's CV profit figure as the profit cap would disclose Mabe's business proprietary information. See Certain Frozen Warmwater Shrimp from Brazil: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review, 72 FR 10680, 10687 (March 9, 2007) (explaining that the Department's responsibility to protect a respondent's business proprietary information prevents its use to calculate the profit cap if doing so would disclose the information), changed on other grounds in Certain Frozen Warmwater Shrimp from Brazil: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 72 FR 52061 (September 12, 2007) and accompanying Issues and Decision Memorandum at Comment 11 (calculating the respondent's CV selling expenses and profit pursuant to section 773(e)(2)(A) of the Act). Finally, we note that, the Department has utilized Mabe's calculated CV profit rate in its calculation of the profit rate under the "any other reasonable method" alternative of section 773(e)(2)(B)(iii) of the Act, and thus, has attempted to reasonably estimate the profit experience of producers in the Mexican market.

- c) *If the Department Does Not Use Samsung's Financial Statements, How Should the Department Calculate CV Selling Expenses and CV Profit Based on the Experiences of the Remaining Respondents?*

Samsung argues that the Department's decision in the Preliminary Determination to calculate CV selling expenses and CV profit for Samsung by weight-averaging the comparison-market data of the three other respondents (*i.e.*, Mabe's home market sales, Electrolux's Canadian sales, and LGE's Korean sales) unlawfully applied section 773(d) of the Act (the MNC Provision) to

Samsung. Samsung explains that, while section 773(e)(2)(A) of the Act states that CV selling and profit rates should be based on the respondent's actual data if available, section 773(e)(2)(B) of the Act establishes three alternative methods for calculating CV selling expenses and profit when the actual data is not available. Citing SAA, H.R. Doc. No. 103-316, vol. 1, at 840 (1994), Antidumping Duties; Countervailing Duties, 62 FR 27296, 27358 (May 19, 1997) (Preamble), and sections 351.405(b)(1) and (2) of the Department's regulations, Samsung explains that, even though the term "foreign country" is used in sections 773(e)(2)(A) and 773(e)(2)(B) of the Act, the term has a different meaning in each section. Specifically, Samsung explains that, while for the purposes of section 773(e)(2)(A) of the Act, the term "foreign country" refers to either the country in which the merchandise is produced or a third country selected under section 351.404(e) of Department's regulations, the term is explicitly limited to the country in which the merchandise is produced for the purposes of section 773(e)(2)(B) of the Act. See sections 351.405(b)(1) and (2) of the Department's regulations.

Samsung argues that the MNC Provision permits the Department to determine a respondent's NV "by reference to the NV at which the foreign like product is sold in substantial quantities from one or more facilities outside the exporting country" only if all three of the statutory criteria are met. Samsung explains that, pursuant to sections 773(d)(2) and 773(d)(3) of the Act, two of the three statutory criteria are that the respondent's NV would be computed based on third-country sales and that "the NV of the foreign like product produced in one or more of the facilities outside the exporting country is higher than the NV of the foreign like product produced in the facilities located in the exporting country." Samsung argues that, because it had neither a viable home market nor viable third-country market, neither of these two statutory criteria has been met. Accordingly, Samsung argues that the Department is precluded from applying the MNC Provision either directly or indirectly (i.e., by including LGEMM's affiliate's CV selling expenses and CV profit on Korean sales in the calculation of Samsung's surrogate CV selling expenses and CV profit).

Citing S. Rep. No. 93-1298, at 174 (1974), reprinted in 1974 U.S.C.C.A.N. 7186, 7311-12, Samsung argues that the legislative history of the Trade Act of 1974 demonstrates that Congress enacted the MNC Provision out of a concern that a multinational corporation could mask dumping by offsetting low prices in the comparison market with higher prices in another market. Additionally, citing Kerr-McGee Chem. Corp. v. United States, 741 F. Supp. 947, 950 (CIT 1990), Samsung argues that the CIT has recognized that the MNC Provision "is intended to prevent multinational corporations from circumventing the antidumping laws by exporting merchandise from a foreign subsidiary with a low FMV {(foreign market value)}, if FMV were calculated on one of the standard bases." Samsung argues that, in its case, the concern does not exist because NV is being determined based on CV and not on either of the "standard bases" (i.e., using home market or third country sales).

Samsung also argues that the Department has recognized that the MNC Provision should not be applied more broadly than intended. Specifically, Samsung cites Final Determination of Sales at Less Than Fair Value: Certain Small Business Telephone Systems and Subassemblies Thereof From Taiwan, 54 FR 42453, 42550 (October 17, 1989) (Taiwan Business Telephone Systems), and argues that the Department has determined that it would be inappropriate to utilize a rate

which had been calculated based on application of the MNC Provision to calculate the all others rate because the rate would not be representative. Additionally, citing Certain Frozen Warmwater Shrimp From the People's Republic of China: Notice of Final Results and Rescission, in Part, of 2004/2006 Antidumping Duty Administrative and New Shipper Reviews, 72 FR 52049 (September 12, 2007) and accompanying Issues and Decision Memorandum at Comment 12, Samsung argues that the Department has explained that "Congress did not intend the MNC Provision to apply when the 'facility outside the exporting country' . . . does not have a viable home market and when NV is based on CV." Samsung concludes that the Department's decision in the Preliminary Determination to apply the MNC Provision to Samsung indirectly penalized Samsung unfairly. Samsung argues that the Department's decision both contradicts the Department's stated practice and results in CV selling expense and profit rates which are not a "representative" approximation of the amounts that Samsung would have normally incurred and realized on its home market or third country sales. Although Samsung argues that the use of Samsung's own financial statements would be a reasonable alternative method of calculating CV selling expenses and profit, Samsung suggests that an alternative method would be to utilize the selling expenses incurred and profit realized by LGEMM on its sales of foreign like product in Canada, rather than the selling expenses incurred and the profit realized by LGEMM's affiliate's sales in Korea, in the weighted-average calculation of the other respondents' CV selling expenses and CV profit.

The petitioner contends that Samsung misunderstands the statutory basis for the Department's approach to calculating CV selling expenses and CV profit for Samsung in the Preliminary Determination. Specifically, the petitioner argues that, rather than unlawfully applying the MNC Provision to Samsung in the Preliminary Determination, the Department based Samsung's CV selling expenses and CV profit on the experiences of the remaining respondents in their respective comparison markets. The petitioner argues that not only was the Department's approach lawful, but that it would be arbitrary and unreasonable for the Department to disregard LGEMM's selling expenses and profit simply because the comparison market had been determined pursuant to the MNC Provision rather than section 773(a)(1)(B) or (C) of the Act. The petitioner concludes that the Department should not change its methodology for the final determination, but if the Department decides not to utilize LGEMM's affiliate's Korean market selling expenses and profit in its calculations, the logical alternative would be to utilize LGEMM's Canadian market selling expenses and profit in its calculation of the weighted-average CV selling expenses and profit.

#### Department's Position:

For the reasons explained below, in the final determination we have used the weighted-average of the selling expenses incurred and profit realized by Mabe and Electrolux in their respective comparison markets to calculate Samsung's CV selling expenses and profit.

First, we agree with the petitioner that Samsung is not correct in arguing that we applied the MNC Provision to Samsung indirectly. In the Preliminary Determination, we determined that it was reasonable to calculate CV profit and selling expenses based on the experiences of the remaining respondents under section 773(e)(2)(B)(iii) of the Act. See Preliminary Determination, 76 FR at 67701. There is ample precedent for the Department's decision to calculate CV profit and selling

expenses by weight-averaging the data of the remaining respondents even in cases where the respondents each had different comparison markets. See e.g., Notice of Final Determination of Sales at Less Than Fair Value: Fresh Atlantic Salmon from Chile, 63 FR 31411, 31434 (June 9, 1998).

Second, we agree with Samsung that the Department has demonstrated a reluctance to apply data derived from the application of the MNC Provision to other companies if other data are available. See Taiwan Business Telephone Systems, 54 FR at 42550. In applying section 773(e)(2)(B)(iii) of the Act, our goal is to calculate profit and selling expenses for the same general category of products, produced and sold in the foreign country. The use of LGE's sales in Korea of merchandise produced in Korea takes us further from our goal of using record evidence to calculate the selling expenses realized and profit incurred by Mexican producers in the domestic market. Accordingly, we have reconsidered our decision in the Preliminary Determination. We have determined that the selling expenses incurred and profit realized by Mabe and Electrolux are attributable to the production and sale of merchandise produced in Mexico. We have also determined that, because we are not using information pertaining to LGEMM's Canadian sales of merchandise produced in Mexico to calculate LGEMM's NV, it would not be reasonable to use this data for the purposes of calculating Samsung's CV profit and selling expenses under section 773(e)(2)(B)(iii) of the Act.

Furthermore, we have concluded that the use of the weighted-average profit and selling expenses of two respondents sufficiently prevents the disclosure of business proprietary data. To calculate the weighted-average figures, we used each respondent's above-cost sales quantity. Using this calculation methodology, because the actual values of both the above-cost quantities and expense/profit rates of each respondent are unknown to the other respondent, neither Mabe nor Electrolux can derive the other's figures. Moreover, the use of above-cost quantities prevents either party from using publicly ranged sales data to estimate the other party's figures. (We note that the use of a simple average would permit Mabe and Electrolux to discern each other's figures.)

Comment 27: Research and Development Costs

The petitioner agrees with the Department's decision in the Preliminary Determination to adjust Samsung's reported costs to capture the portion of R&D expenses incurred by its parent (SEC) on Samsung's behalf and not already included in Samsung's reported costs. The petitioner argues that Samsung has understated its R&D costs by limiting the portion of the allocable R&D expenses incurred by SEC to those expenses incurred by SEC's Digital Appliance Division. The petitioner argues that, because R&D expenses cut across multiple business lines, SEC's total R&D expenses benefit Samsung's production of subject merchandise and should be included in the pool of allocable expenses. Accordingly, the petitioner argues that the Department should base the calculation of SEC's R&D expenses on SEC's unconsolidated financial statements. The petitioner argues that record evidence demonstrates that there is significant "cross-fertilization" among the various divisions of SEC. For example, the petitioner argues that Samsung uses the integrated circuits produced by the Semiconductor Division in the production of subject merchandise.

Additionally, the petitioner also argues that SEC's financial statements indicate that SEC capitalizes certain R&D costs. The petitioner argues that the Department should include the increase in the relevant balance sheet account in the pool of SEC's R&D expenses. The petitioner concludes that the Department should calculate Samsung's R&D expense rate by first calculating a rate at the unconsolidated company level of Samsung and then adding to that the rate calculated using SEC's unconsolidated financial statements as adjusted to reflect the increase in the intangible asset account.

Samsung argues that, as a general matter, the Department should not adjust Samsung's costs to reflect R&D expenses incurred by SEC on its behalf. Samsung argues that it reimburses SEC for such expenses and that it included the total amount of reimbursements in its reported costs. However, Samsung argues that, if the Department does determine that it should adjust Samsung's reported costs, the adjustment should be limited to a portion of the expenses incurred by SEC's Digital Appliance Division.

Samsung argues that the petitioner's claim of "cross-fertilization" is misplaced. For example, Samsung argues that it is inconceivable that the R&D expenses incurred by a cutting-edge technology business such as SEC's semiconductor business benefit refrigerators to the same extent that it benefits semiconductors. Moreover, Samsung argues that the semiconductors used in the production of subject merchandise account for less than 0.20 percent of the COM. Citing DRAMs from Korea I and DRAMs from Korea II, Samsung argues that, while the Department has examined the "cross-fertilization" issue previously, the Department has never concluded that all R&D incurred by a company which manufactures a variety of products benefits all of products equally. Moreover, Samsung argues that, not only is there no record evidence that the R&D activities of divisions other than the Digital Appliance Division benefit the subject merchandise, but that the nature of the other divisions indicate the differences in R&D activities. For example, Samsung argues that, while the Digital Appliance Division is not a business with rapid and dramatic changes in core technology, televisions have changed dramatically over the past few years and can be expected to continue to evolve due to advances in smart phone and telecommunications technologies.

Concerning the petitioner's argument that the Department should include the increase in the intangible asset account balance in the calculation of SEC's R&D expense rate, Samsung states that the petitioner has not cited any case law in support of its proposition. Samsung also argues that section 773(f)(1)(A) of the Act requires that the Department rely on the records of the respondent if such records are kept in accordance with local GAAP. In addition, Samsung asserts that the petitioner has not cited any record evidence that indicates that the capitalized expenses benefit subject merchandise or that Samsung's reporting was distortive.

Samsung argues further that the petitioner's proposed adjustment is illogical because it would require that the Department calculate an adjustment using one set of data and then apply the result to another set of data. Samsung maintains that, if the Department does determine that a portion of the expenses incurred by SEC's Digital Appliance Division are allocable to Samsung, the same logic dictates that the expenses are also allocable to other affiliates' units which produce digital appliances. Finally, Samsung contends that, if the Department allocates a portion of SEC's R&D

expenses to Samsung, the Department must reduce the allocable expenses by the amount of reimbursements which have already been included in its reported costs.

Department's Position:

We agree with the petitioner that it is appropriate to adjust Samsung's reported costs to reflect the portion of the R&D expenses incurred by SEC on Samsung's behalf. As the Department explained in the Preliminary Determination, the R&D expenses incurred by SEC benefitted Samsung's production of the merchandise under consideration. See Preliminary Determination, 76 FR at 67699. We also agree with Samsung to the extent that, if we continue to attribute a portion of SEC's R&D expenses to Samsung, we must continue to reduce the portion of SEC's R&D expenses attributable to Samsung by the amount of reimbursement fees that Samsung paid to SEC and included in its reported costs. Id.

The issue in this case is how to calculate the amount of R&D expenses incurred by SEC on Samsung's behalf. For this final determination, we have calculated the portion of R&D expenses incurred by SEC for the benefit of Samsung by allocating the total amount of R&D expenses incurred by SEC's Digital Appliance business over all entities in that business unit which includes Samsung. Next, we adjusted Samsung's reported costs to reflect the difference between the amount of these R&D expenses which were allocable to Samsung and the amount of costs which Samsung had already included in its reported costs.

Section 773(f)(1)(A) of the Act does not explicitly address the treatment of R&D expenses in the calculation of a producer's/exporter's COP. The Department, over time, has established a practice of relying on R&D costs as maintained in a company's normal books and records unless the record evidence shows that the normal records unreasonably allocate costs. See Chlorinated Isocyanurates From Spain: Final Results of Antidumping Duty Administrative Review, 72 FR 64194 (November 15, 2007) and accompanying Issues and Decision Memorandum at Comment 5 (explaining “[i]n determining if expenses associated with R&D activities should be included in the reported costs, we look at whether these expenses relate specifically to individual products or are general in nature. Those expenses that can be differentiated by product are allocable to the COM that product.”) In such instances, the Department has determined that certain R&D expenses should be allocated over those products.<sup>76</sup>

In the instant case, Samsung in its normal books and records assigns the R&D expenses specific to certain products to the business which manufactures those products. For example, R&D expenses incurred by SEC related to its digital appliances (e.g., refrigerators and washing machines) are

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<sup>76</sup> See e.g., Dynamic Random Access Memory Semiconductors of One Megabit or Above From the Republic of Korea: Final Results of Antidumping Duty Administrative Review, 61 FR 20,216, 20,218 (May 6, 1996) where the Department found that R&D costs could not be included in the COP of the subject merchandise because there was no record evidence of R&D cross-fertilization. In that case, the Department cited to Micron Tech. v. United States, 832, 893 F. Supp. 21 (CIT 1995), affirmed, 117 F.3d 1386 (Fed. Cir. 1997)), where the CIT held that expenses associated with R&D not directly related to the subject merchandise, and which do not provide an intrinsic benefit to the subject merchandise, should not be included in the COP. As such, the court directed the Department to amend its calculation in the Final Determination of Sales at Less Than Fair Value: Dynamic Random Access Memory Semiconductors of One Megabit or Above from the People's Republic of Korea, 58 FR 15,467, 15,472 (March 23, 1993).

assigned to SEC's Digital Appliance business and, likewise, R&D expenses incurred by SEC that are specific to other products (e.g., telephones and cameras) are allocated to the businesses that manufacture those products (i.e., telecommunications and digital imaging businesses). In the normal course of business, SEC incurs certain R&D expenses that are not product-specific and allocates these general R&D expenses to all of its businesses. In reporting its R&D expenses to the Department, Samsung relied on its normal books and records and calculated an R&D ratio for the Digital Appliance business. The R&D expenses included in the numerator of this ratio include the R&D expenses specific to the digital appliance business as well as an allocated amount of the general R&D.

The petitioner argues that there is evidence of cross-fertilization in the instant case because each bottom mount refrigerator (i.e., the subject merchandise) contains a micro-processor. As such, the petitioner concludes that all R&D expenses incurred by SEC, including the R&D specific to SEC's other businesses (e.g., telecommunications and digital imaging businesses), should be allocated equally among all the products produced by SEC.

As discussed in Comment 14, while the Department has in the past calculated a more expansive R&D expense rate such as in DRAMs from Korea I and DRAMs from Korea II, the petitioner's cites are unpersuasive as the courts have subsequently struck down the Department's theory of cross-fertilization in later segments of those proceedings.<sup>77</sup> See e.g., Hyundai Electronics v. United States 395 F. Supp. 2nd 1231 (CIT 2005) ("Hyundai") and Hynix Semiconductor Inc., v. United States 424 F.3d 1363 (Fed. Cir. 2005) ("Hynix").

In Hynix, the CAFC held that the record failed to provide substantial evidence of cross-fertilization, and, as a result, affirmed the respondent's normal books and records with regard to the allocation of R&D expenses. In reaching its conclusion, the CAFC held that simply citing a list of projects without proof of the underlying activities was paltry evidence of cross-fertilization. See Hynix 424 F. 3d at 1371. A review of Hyundai provides additional guidance on the evidentiary hurdle that must be cleared to disregard a company's normal books to reallocate costs based on the theory of cross-fertilization. The CIT stipulated that specific evidence must be provided to show how non-subject merchandise R&D activities directly impacted the development of subject merchandise. See Hyundai 395 F. Supp. 2nd, at 1239. The CIT found that a mere recitation of a company's R&D projects, even R&D projects that list subject merchandise in the context of non-subject R&D, failed to provide substantial evidence of cross-fertilization. Id. at 1238-1239. Specifically, the CIT held that "simply because the word 'DRAM' is in a project does not provide substantial evidence that the R&D actually relates to DRAM development." Id. Furthermore, the CIT found that the introduction of subject merchandise technology into the design of non-subject merchandise still failed to provide "specific explanation of how these various advancements directly impact DRAM R&D." Id. Hence, while the court's decision suggests that cross-fertilization may exist in certain industries, the burden of proof is high. Upon failing to reach this burden of proof in the DRAMs cases, the Department was directed to rely on the companies' product-specific R&D expenses. See Hynix 424 F. 3d at 1371.

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<sup>77</sup> With regard to antidumping procedures, cross-fertilization refers to the theory that R&D activities related to non-subject merchandise may also benefit or stimulate the development of subject merchandise.

Consequently, the Department's subsequent practice has been to allocate R&D expenses to products consistent with the company's normal books (*i.e.*, calculating product and/or division-specific R&D costs as they are calculated in the company's normal books and records), which in accordance with section 773(f)(1)(A) of the Act, is conditioned upon whether the company's books are in compliance with home country GAAP and reasonably reflect the costs associated with producing the merchandise under consideration.<sup>78</sup>

Thus, contrary to the petitioner's claims, the Department does not have a long-established practice of calculating a company-wide R&D expense rate, nor do we find that this case presents clear evidence of cross-fertilization. Rather, we note that the product lines under SEC's company-wide umbrella fall under a diverse range of production and R&D activities including, for example, mobile communications and semiconductors. While the petitioner concludes that R&D expenses incurred specifically related to mobile telephones, semiconductors, or cameras (*i.e.* products manufactured by SEC's telecommunications, semiconductor, and digital imaging businesses) should be allocated to the subject merchandise there is no compelling evidence that technology advances in the mobile communications arena, for example, directly impacted the company's refrigerator developments. Thus, we do not find that the petitioner's arguments provide substantial evidence that SEC's R&D activities for its other product lines (*e.g.*, mobile communications, etc) directly impacted SEC's product development with regard to the merchandise under consideration.

Absent any other persuasive record evidence that the R&D activities of SEC's other businesses impart intrinsic value to bottom mount refrigerators, we have determined that the total value of the R&D expenses of SEC's other businesses should not be included in the calculation of SEC's COP for the merchandise under consideration.<sup>79</sup> Therefore, we have relied on the R&D expenses incurred by SEC's Digital Appliance business as the basis for SEC's R&D ratio. We calculated the R&D ratio based on SEC's Digital Appliance business's total R&D expenses divided by the consolidated cost of sales of all the production entities within that business group. We used consolidated cost of sales because the R&D functions for the Samsung group as a whole are, for the most part, centrally positioned within SEC. Hence, SEC's subsidiaries produce products that are reliant on the R&D activities performed by SEC. As such, the fact pattern of the current case supports the position that SEC's digital appliance-related R&D activities benefitted all of its subsidiaries that also produced its digital appliance-related products.

We have not revised the numerator of SEC's R&D expense ratio to include an adjustment for the increase to SEC's capitalized development expenses as suggested by the petitioner. The

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<sup>78</sup> See *e.g.*, Chlorinated Isocyanurates from Spain: Final Results of Antidumping Duty Administrative Review, 74 FR 50774, (October 1, 2009), Issues and Decision Memorandum, at Comment 3, where the Department stated that the respondent "records its R&D expense specifically by division. Based on this information, we were able to verify the exact amount of R&D expense related to water treatment products (*i.e.*, the merchandise under consideration. Accordingly, we allocated this amount to all water treatment products in accordance with our practice)."

<sup>79</sup> We note that under the Department's methodology, the R&D activities related to semiconductors would be assigned to the micro-processor and passed on to the down-stream product (*i.e.* the bottom mount refrigerators). As such, the COP of the bottom mount refrigerator would include the full cost of the micro-processor.

petitioner points to footnote 12 accompanying SEC's balance sheet as evidence that SEC capitalized certain R&D costs during the POI. That same footnote, however, shows that the increase in SEC's intangible assets account was related to intellectual property rights, development, and other expenses, and that SEC amortized these capitalized costs during the POI. Furthermore, the footnote shows that a portion of the intangible assets' amortization was allocated to R&D expenses for the POI. Amortization expenses are included in the R&D expenses of each business, as appropriate. Because the record evidence demonstrates that amortization of the R&D expenses associated with intangible assets related to the Digital Appliance business has already been included in the R&D expenses of the Digital Appliance business, we have determined that the petitioner's suggested adjustment is not warranted.

Comment 28: Certain Affiliated Party Purchases

Samsung argues that the Department erred in its calculation of the transactions-disregarded adjustment attributable to the purchases that it made from one of its affiliates. Samsung explains that the affiliate both manufactures products and functions as a middleman between Samsung and input producers. Samsung argues that, as a general matter, the affiliate's G&A functions support the affiliate's own manufacturing activities. Samsung argues that, because the affiliate does not research the market to identify potential suppliers, negotiate prices, or make logistical arrangements, the affiliate does not function as a typical trading company. Additionally, Samsung argues that, because it negotiates its own purchases and monitors its material requirements, the affiliate's services were limited to document handling and acting as a payment intermediary. Samsung argues that these services were provided by the affiliate's purchase-support group. Samsung argues that the only costs which should be allocated to those purchases where the affiliate functioned as a middleman are the costs attributable to the affiliate's purchase-support group. Accordingly, Samsung concludes that the Department should recalculate the transactions-disregarded adjustment attributable to those purchases made by the affiliate's purchase-support group using the purchase-support group expense rate rather than the affiliate's overall SG&A rate.

The petitioner argues that, contrary to Samsung's contention that its affiliate's purchase-support group had the dominant role in these transactions, the affiliate also provides additional valuable services. Accordingly, the petitioner argues that simply adding an amount to reflect the affiliate's shipping and handling charges understates the affiliate's cost of providing these services.

Department's Position:

We agree with Samsung, in part. For the purposes of section 773(f)(2) of the Act (the transactions-disregarded rule), the Department's established practice when the respondent purchases inputs from an affiliated reseller is to value the input at the higher of the transfer price or the adjusted market price for the input (i.e., the affiliate's average acquisition cost plus the affiliate's selling, general, and administrative costs). See Notice of Final Determination of Sales at Less Than Fair Value: Polyethylene Retail Carrier Bags From Thailand, 69 FR 34122 (June 18, 2004) and accompanying Issues and Decision Memorandum at Comment 5. The Department has explained that the inclusion of the affiliate's SG&A expenses ensures that the adjusted market

price reflects the affiliate's cost of providing its services. Id. The Department has also explained that, in cases where the affiliate functions as a middleman between the respondent and the unaffiliated supplier, the trading company's services such as purchasing the input, taking title to the input, and arranging for the item's sale and transportation to the respondent all have value. See Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut-To-Length Carbon-Quality Steel Plate Products from Korea, 64 FR 73196, 73208 (December 29, 1999). Accordingly, the Department includes the cost of services performed by the trading company in the adjusted market price calculation.

In this case, Samsung's affiliated party both manufactures products and functions as a middleman between Samsung and the unaffiliated suppliers. Concerning the inputs purchased from the affiliated supplier which had been produced by unaffiliated producers, Samsung's affiliate does not perform many of the functions traditionally performed by a trading company. For example, Samsung negotiates its purchases with the unaffiliated supplier directly and makes logistical arrangements. Samsung also pays the freight costs associated with the purchases. Samsung's affiliate's services are limited to document handling and acting as a payment intermediary. Additionally, Samsung included its procurement and freight costs in its reported costs. Accordingly, we determine that it would not be appropriate to increase the cost of these inputs by the amount of the affiliate's overall SG&A expense ratio. Rather, it is appropriate to use the costs incurred by the purchase-support group for providing its services plus, as discussed below, an amount for the affiliate's G&A expenses.

We disagree with Samsung that the affiliated reseller's cost of providing services should be limited to the costs incurred by the purchase-support group. Specifically, we disagree with Samsung's argument that its affiliate's G&A expenses benefit the affiliate's manufacturing functions solely. The Department has explained previously that G&A expenses, by definition, relate to the general operations of the company as a whole and not to specific products or processes. See Certain Frozen Warmwater Shrimp from India: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 72 FR 52055 (September 13, 2007) and accompanying Issues and Decision Memorandum at Comment 6. Accordingly, we determine that the affiliate's G&A expenses relate to both the affiliate's manufacturing and middleman operations (i.e., the purchase-support group). Accordingly, for the final determination, we have calculated the adjusted market price by adding the affiliate's acquisition cost to the expenses of the affiliate's purchase-support group and a portion of the affiliate's overall G&A expenses.

#### Comment 29: Affiliated Party Compressor Purchases

In the Preliminary Determination, in order to value compressors purchased by Samsung from an affiliated supplier, we used the higher of the transfer price or the affiliated supplier's COP.

The petitioner argues that, because Samsung evaded the Department's questions concerning the market prices of compressors which Samsung purchased from an affiliated supplier, the Department does not have the information necessary for comparing the affiliate's prices with arm's-length prices. The petitioner argues that, because the record contains a gap which Samsung had the ability to fill, the Department should use other record evidence as AFA. The petitioner

explains that its consultant purchased two compressor models used by Samsung in the production of subject merchandise from a third-party website and that the compressors were shipped by SEA. The petitioner argues that, even though Samsung argues that the prices paid by the petitioner's consultant to a third party for a single compressor are not comparable to the prices paid by Samsung directly to the manufacturer for thousands of compressors, Samsung itself had access to information relating to thousands of compressors purchased directly from the manufacturer. For example, the petitioner points out that, even though record evidence identifies Procold S.r.l. as an unaffiliated European importer of Samsung compressors, Samsung did not submit evidence concerning its presumed large quantities of sales to Procold.

Citing Nippon Steel Corp. v. United States, 337 F.3d 1373, 1383 (CAFC 2003), the petitioner argues that intentional conduct such as deliberate concealment “surely evinces a failure to cooperate.” The petitioner argues that record evidence demonstrates that members of the Samsung group sell the same compressor model used in the production of subject merchandise to unaffiliated parties and that Samsung did not act to the best of its ability when it evaded the Department's requests for information. The petitioner concludes that, as AFA, the Department should value the compressors at the prices paid by the petitioner's consultant.

Samsung argues that, not only is the application of AFA unwarranted, but that record evidence demonstrates that no further adjustment to Samsung's reported cost of compressors is appropriate. Concerning the petitioner's allegation that Samsung evaded the Department's request for information, Samsung explains that its response was premised on a misreading of the question. Specifically, Samsung acknowledges that it limited its response to transactions between itself and other members of the Samsung group rather than discussing transactions between members of the Samsung group and unaffiliated parties. Samsung explains that the error occurred due to the fact that the question had followed several questions concerning Samsung's transactions with affiliated parties and that, while preparing for verification and reviewing the results of the Preliminary Determination, Samsung was only given six business days to respond to the lengthy supplemental questionnaire. Citing e.g., NTN Bearing Corp. v United States, 74 F.3d 1204, 1208 (CAFC 1995), Samsung notes that the courts have held that inadvertent error does not provide an adequate evidentiary basis for the application of AFA.

Samsung also argues that the petitioner's purported market prices do not have probative value. Specifically, Samsung argues that, contrary to the petitioner's speculation about Procold, Procold's website simply includes the publicly available compressor specification sheets and does not indicate that Procold actually purchased compressors from Samsung. Next, Samsung argues that the prices of compressors sold on an individual basis in the parts/replacement market are not market prices reflective of compressors sold in commercial quantities to refrigerator producers. Samsung argues that record evidence concerning Samsung Gwangju Electronics Co., Ltd.'s (SGEC's) relatively large volume of sales of a presumably comparable compressor model to the petitioner's affiliate demonstrates that SGEC's compressor sales to Samsung were set at arm's-length and reflected price levels prevailing in the commercial marketplace between similarly-situated industry buyers and sellers as opposed to prices between aftermarket sellers and individuals. Accordingly, Samsung concludes that no further adjustment is warranted.

Department's Position:

On October 20, 2011, the Department requested that Samsung provide information regarding sales of compressors by any of Samsung's affiliated parties to unaffiliated parties. The Department requested the information so that, pursuant to section 773(f)(2) of the Act (the transactions disregarded rule), the Department could evaluate whether Samsung's purchases of compressors from its affiliate reflected arm's-length prices. In its supplemental questionnaire response, dated October 28, 2011, Samsung limited its response to transactions between Samsung and affiliated parties.

Because the cost verification of Samsung was scheduled to commence on the next business day following the submission of Samsung's deficient supplemental questionnaire response, it was not practicable for the Department to provide Samsung with an opportunity to explain its deficiency. During the cost verification, the Department examined the sales of the affiliate which produced and sold the compressors to Samsung. Although the Department did not find evidence that Samsung's affiliate made sales of the identical compressor in large commercial quantities to unaffiliated parties, the Department found that the petitioner had purchased a large volume of comparable compressors from Samsung's affiliate at a price that was comparable to the prices paid by Samsung to its affiliate. The sheer volume of purchases by the petitioner indicates that they were reflective of price levels in the commercial marketplace between similarly-situated buyers and sellers. Because, however, the models sold to the petitioner were not identical to the compressors in question, for the purposes of this final determination, we have continued to analyze Samsung's purchases of compressors by comparing the transfer price to its affiliate's COP.

Comment 30: Erroneously Reported Input Quantities

During the course of the Samsung cost verification, the Department determined that Samsung had misreported the quantities of several inputs. The petitioner argues that the Department should recalculate the transactions-disregarded adjustment attributable to these inputs.

Samsung does not dispute the error in its reporting. Samsung argues that, as discussed in Comment 28, the Department should recalculate the adjustment attributable to these inputs using the affiliate's purchase-support group expense rate rather than the affiliate's overall SG&A rate. Samsung concludes that, when the Department makes the requisite corrections, the Department will determine that no further adjustment is needed with respect to these inputs.

Department's Position:

We agree with the petitioner to the extent that it is appropriate to ensure that our transactions-disregarded adjustment should be calculated using the correct input quantities. For the final determination, we have recalculated the transaction-disregarded adjustment using the verified input quantities.

Comment 31: G&A Expense Ratio

Samsung argues that the Department should not exclude two “income” items related to the reversal of provisions that had been recorded during the previous year from the G&A-expense rate calculation. We note that the details of these two “income” items are business proprietary. Citing Notice of Final Determination of Sales at Less Than Fair Value: Certain Steel Concrete Reinforcing Bars From Turkey, 62 FR 9737, 9748 (March 4, 1997), Samsung argues that the Department includes all non-operating income and expense items in the G&A-expense rate calculation when, as here, those items relate to the company’s general operations. Moreover, citing Certain Orange Juice from Brazil: Preliminary Results and Partial Rescission of Antidumping Duty administrative Review, 73 FR 18773, 18777 (April 7, 2008) unchanged in Certain Orange Juice from Brazil: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 73 FR 46584 (August 11, 2008), and Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products From Korea: Final Results of Antidumping Duty Administrative Reviews, 62 FR 18404, 18443 (April 15, 1997), Samsung argues that the Department neither excludes items which are related to provisions rather than cash expenses nor excludes items solely because they relate to previous years.

Citing Certain Steel Concrete Reinforcing Bars From Turkey; Final Results, Rescission of Antidumping Duty Administrative Review in Part, and Determination Not to Revoke in Part, 69 FR 64731 (November 8, 2004) and accompanying Issues and Decision Memorandum at Comment 20, the petitioner argues that the Department should follow its established practice and disallow the items which relate to the previous fiscal year.

Department’s Position:

The Department’s established practice in calculating the G&A-expense rate is to include only income items that relate to the current period. In doing so, we generally do not allow respondents to reduce current period expenses by corrections of overestimated costs associated with non-recurring provisions from prior years. See Stainless Steel Sheet and Strip in Coils from Mexico; Final Results of Antidumping Duty Administrative Review, 74 FR 6365 (February 9, 2009) (Mexico Coils) and accompanying Issues and Decision Memorandum at Comment 7. For example, the Department has previously disallowed a respondent to offset its G&A expenses with the reversal of a provision relating to the respondent’s over-estimation of the costs associated with a disposal of fixed assets during the previous year. See Stainless Steel Bar From Brazil: Final Results of Antidumping Duty Administrative Review, 74 FR 33995 (July 14, 2009) (Brazil Bar) and accompanying Issues and Decision Memorandum at Comment 3. We do, however, consider it appropriate to include normal recurring provisions and related reversals in the G&A-expense rate calculation. See Mexico Coils and accompanying Issues and Decision Memorandum at Comment 7. For this final determination, the Department has followed its established practice in analyzing each reversal item. Due to the proprietary nature of the individual items, for further discussion see the Department’s analysis in the business proprietary version of the Memorandum entitled “Cost of Production and Constructed Value Calculation Adjustments for the Final

Determination – Samsung Electronics Mexico S.A. de C.V., dated March 16, 2012.<sup>80</sup>

Comment 32: Interest Expense Offset

Samsung argues that the Department should not disallow the portion of interest income attributable to trade and other receivables which are classified on its balance sheet as current assets. Samsung argues that the Department’s questionnaire instructs respondents that they may offset financial expenses by the amount of interest income earned on short-term investments of working capital. Samsung argues that its consolidated financial statements indicate that all interest-bearing accounts are short-term in nature. Samsung also argues that it submitted a schedule of its consolidated interest income and that the schedule indicated that the vast majority of interest income was earned from deposits and short-term loans. Accordingly, Samsung argues that it has demonstrated that its interest income was derived from short-term assets.

Next, Samsung argues that, even if the Department were to rely on an analysis of its balance sheet, the use of a company’s total short-term financial assets (*i.e.*, including accounts receivable) is consistent with the Department’s past practice. Specifically, Samsung argues that in Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip in Coils From the United Kingdom, 64 FR 30688, 30710 (June 8, 1990), the Department compared the respondent’s liquid assets to its total assets and assumed that the resulting ratio represented the ratio of short-term interest income to total income because liquid assets are, as a general matter, short-term assets. Samsung concludes that, while the Department should not make any adjustment to its financial-expense ratio, the schedule of short-term interest income demonstrates that less than 10 percent of its interest income is attributable to receivable balances.

The petitioner argues that, even though Samsung presumed that all of its interest income was short-term, Samsung’s consolidated financial statements show that short-term financial assets represent 48 percent of Samsung’s financial assets. Citing Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip in Coils From Italy, 64 FR 30750, 30773 (June 8, 1999), the petitioner argues that the Department should follow its established practice and limit the interest income offset to short-term interest income.

Department’s Position:

The Department has a long-standing practice of disallowing an offset to a respondent’s financial expenses for income attributable to short-term receivables. See *e.g.*, Final Determination of Sales

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<sup>80</sup> In the petitioner’s rebuttal brief, the petitioner stated “[a]s discussed in Petitioner’s case brief, for the final determination, the Department should use a ‘layered’ approach for the calculation of G&A expense, including R&D.” We note that, the petitioner’s case brief was limited to a discussion of using a layered approach for the calculation of R&D. Moreover, Samsung did not raise the issue of using a ‘layered’ approach calculation of G&A in its case brief. Accordingly, we conclude that the petitioner’s rebuttal brief impermissibly attempted to raise a new argument rather than limiting its rebuttal arguments to the issues raised in the case briefs. See 19 CFR 351.309(d)(2). Nevertheless, we note that Samsung has included in its reported costs any reimbursements made to SEC as payment for services. See page 14 of the public version of Samsung’s section D supplemental questionnaire response, dated October 28, 2011. The Department has analyzed the bulk of these transactions in the context of the R&D expense and transactions-disregarded adjustment.

at Less Than Fair Value; Stainless Steel Sheet and Strip in Coils From Germany, 64 FR 30710, 30746 (June 8, 1999). The Department has explained that interest revenue attributable to short-term receivables is more appropriately treated as an adjustment to price. See Gray Portland Cement and Clinker from Mexico: Notice of Final Results of Antidumping Duty Administrative Review, 71 FR 2902 (January 18, 2006) and accompanying Issues and Decision Memorandum at Comment 9 (stating that “we treat interest income earned on accounts receivable as an adjustment to the selling price”). Specifically, the Department’s practice is to treat interest income attributable to short-term trade receivables as an offset to a respondent’s imputed-credit expenses. 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) and accompanying Issues and Decision Memorandum at Comment 2. Accordingly, for this final determination, the Department has disallowed an offset to Samsung’s financial expenses for the income attributable to short-term receivables.

Comment 33: Understatement of Input Freight Costs

The petitioner argues that the Department should adjust Samsung’s reported costs to reflect its verification finding that Samsung had not included the full amount of freight costs in its reported materials costs. Samsung did not comment on this issue.

Department’s Position:

We agree with the petitioner. For the purposes of this final determination, we have adjusted Samsung’s reported costs to reflect our verification finding that Samsung’s reported costs did not include the total amount of freight costs.

Comment 34: Critical Circumstances

In the Preliminary Determination, after analyzing the criteria enumerated under section 733(e)(1) of the Act, the Department found that critical circumstances existed with respect to imports of the subject merchandise from Samsung. Specifically, we determined that knowledge of dumping existed with regard to Samsung based on the magnitude of Samsung’s preliminary dumping margin and the International Trade Commission’s preliminary injury determination, and that there had been massive imports of bottom mount refrigerators from Samsung which could not be accounted for by seasonal trends. See Preliminary Determination, 76 FR at 67701-67702. Samsung argues that, for purposes of the final determination, the Department should find that critical circumstances do not exist because none of the statutory criteria outlined in section 735(a)(3) of the Act has been met.

First, Samsung maintains that in the Preliminary Determination the Department correctly determined there was no history of injurious dumping of the subject merchandise from Mexico pursuant to section 733(e)(1)(A)(i) of the Act. Samsung argues that because the petitioner has presented no new evidence related to this criterion, the Department’s preliminary determination should stand. With respect to the importer knowledge of dumping criterion, Samsung argues that once the Department corrects or reverses certain methodological decisions that it applied to

Samsung in the Preliminary Determination, its sales and cost data will demonstrate that its weighted-average dumping margin is far below the 15- and 25-percent thresholds necessary to impute importer knowledge of dumping. Samsung notes that if this statutory criterion has not been satisfied, the Department should make a negative critical circumstances finding for Samsung on this basis alone.

However, in the event the Department determines that there are margins sufficient to impute Samsung's knowledge of dumping, Samsung addresses whether its imports of subject merchandise have been massive over a relatively short period of time in accordance with 735(a)(3)(B) of the Act. Samsung argues that the Department should use seven-month comparison periods for the final determination, as opposed to the four-month periods used in the Preliminary Determination, because this is the longest period for which data is available. Samsung maintains that even though its import volumes increased using seven-month base and comparison periods, the Department should not find that this increase beyond the 15-percent threshold rises to the level of massive imports because in the companion Korean investigation the Department correctly found that, even though the subject imports from Samsung's parent company, SEC, increased by more than 15 percent, the increase was not massive because it was attributable to seasonal trends. Samsung further argues that the Department's preliminary critical circumstances analysis fails to explain how increased imports by every respondent in the Mexican and Korean investigations, except for Samsung, can be explained by seasonal trends.

In addition, Samsung claims that the Department's Preliminary Determination is inconsistent with its operations. Specifically, Samsung notes that it acts solely as a production facility and its selling functions are managed by SEC and SEA. Therefore, it argues that it is subject to the same seasonal trends that the Department found to exist for SEC. Samsung also urges the Department to consider Samsung's combined volume from both Mexico and Korea which it claims demonstrates the significant effect of seasonality on Samsung's overall U.S. shipment patterns. See Samsung's August 24, 2011, submission at Attachment 2. Samsung asserts that, as with its competitors, Samsung's overall shipments in the second and third calendar quarters are always higher than its shipments in the first and fourth quarters because a greater proportion of purchases occur on or around Memorial Day, Labor Day, Columbus Day, and "Black Friday."

The petitioner disagrees with Samsung's assertion that, because Samsung's imports have not been massive since the filing of the petition, there is no basis for a critical circumstances finding in the final determination. The petitioner argues that Samsung's own analysis demonstrates that import volumes increased from the September 2010-March 2011 period to the April-October 2011 by more than 15 percent. Moreover, the petitioner maintains that the Department should not accept Samsung's claim that this increase is due to seasonal trends because, according to the petitioner, Samsung's statement that its overall shipments in the second and third quarters are always higher than its shipments in the first and fourth quarters is false. In addition, the petitioner argues that, if the Department compares Samsung's shipments from April 2011 through October 2011 with its shipments from April 2010 through October 2010, it can also observe a massive increase based on a seasonal analysis. Therefore, the petitioner argues that the Department's final critical circumstances determination should find that imports from Samsung were massive under the

regulations.

Department's Position:

Based on our analysis of the updated shipment information submitted by Samsung after the Preliminary Determination, as verified, and our consideration of the statutory criteria enumerated under section 735(a)(3) of the Act, for the final determination, we continue to find that critical circumstances exist with respect to imports of bottom mount refrigerators produced in and exported from Mexico by Samsung. In making this determination, consistent with the Department's practice of issuing its antidumping duty orders on a country-wide basis and calculating margins on a company-specific basis, we did not combine Samsung's Korea and Mexico shipment data for purposes of "massive import" analysis, as requested by Samsung. Similarly, in considering the impact of seasonality on imports of the subject merchandise, we analyzed seasonal trends on a country-specific, company-specific basis because while seasonality may be an industry trend, industry trends are not dispositive of country-specific, company-specific selling and shipment practices. In other words, there may be factors other than seasonality which affect a company's sales and shipment decisions with respect to a particular market. For further discussion of this issue, see Memorandum to the James P. Maeder from The Team entitled "Antidumping Duty Investigation of Bottom Mount Combination Refrigerator-Freezers from Mexico - Final Determination of Critical Circumstances," dated March 16, 2012.

**Mabe**

Comment 35: Costs Excluded from Cost of Production

Mabe and GEA are affiliated parties in this proceeding. Mabe is the Mexican producer of bottom mount refrigerators while GEA was responsible for the sale and distribution of subject merchandise in the United States during the POI. The terms of this relationship are defined in a Contract Manufacturing Agreement (CMA) between Mabe and GEA, whereby GEA pays Mabe for the bottom mount refrigerator units it purchases using a unique cost plus formula. This results in GEA paying Mabe for each bottom mount refrigerator unit purchased at different time intervals (*i.e.*, monthly, quarterly and at year-end). Because of this unique business relationship, for purposes of the Preliminary Determination Mabe excluded from its reported costs depreciation and amortization (*i.e.*, for research, development and design costs) expenses that were reimbursed by Mabe's U.S. affiliate, GEA. We accepted this reporting methodology in the Preliminary Determination because it appeared that these expenses were included in GEA's ISE ratio. However, as noted in the cost verification report, while the Department confirmed that Mabe had, in fact, excluded the depreciation and amortization expenses from the reported costs, we found that these same expenses were also excluded from GEA's reported selling expenses. In addition, Mabe presented at the beginning of verification some additional corrections (*i.e.*, tooling and equipment, production support, etc.) that were also excluded from the reported costs.

The petitioner argues that because Mabe and GEA did not act to the best of their ability<sup>81</sup> with

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<sup>81</sup> The petitioner cites to Section 776(a) of the Act; Statement of Administrative Action Accompanying the Uruguay Round Agreements Act, H.R. Doc. 103-316 at 870 (1994); and Nippon Steel v. United States, 337 F. 3d at 1382 (Fed.

respect to the costs in question, for the final determination, the Department should apply facts available and use an ISE ratio for GEA that is not lower than the one applied in the Preliminary Determination. According to the petitioner, Mabe and GEA failed to report all the expenses related to the production and sale of the subject merchandise and provided a revised ISE ratio that significantly understated GEA's actual ISE ratio, and, as such, gaps exist in the record.<sup>82</sup> In its brief, the petitioner provides a list of unreported expenses that it claims the Department found during verification. In addition, the petitioner claims that, because Mabe and GEA provided separate responses and failed to make sure all costs were captured and accurately reported, Mabe and GEA obstructed the Department's effort to create a complete record. The petitioner asserts that Mabe treated the expenses that were ultimately absorbed by GEA as GEA expenses that should be reported by GEA. However, according to the petitioner, even though GEA assured the Department that all costs were properly accounted for,<sup>83</sup> neither GEA nor Mabe included in the reported costs the expenses in question that were ultimately absorbed by GEA. The petitioner adds that the amount excluded from the reported costs exceeded the amount removed from GEA's reported ISEs in calculating the revised ISE ratio. The petitioner states that omissions of this scale should not be tolerated, and asserts it is possible that there are additional costs that have not been accounted for. The petitioner notes that the Department did not use GEA's revised ISE ratio in the Preliminary Determination and concludes that it should continue not to do so in order to fill the gap created by Mabe and GEA.

Further, the petitioner argues that the Department should reject GEA's proposed treatment of the production costs ultimately absorbed by GEA. The petitioner contends that adding these costs to Mabe's COP would make them irrelevant to the Department's dumping calculation. The petitioner continues that, by arguing that these costs should be added to Mabe's COP and considered only in the COP analysis of the home market sales (to which these expenses bear no relation), GEA is asking the Department to ignore these expenses in the calculation of CEP and NV. The petitioner asserts that GEA is asking the Department to price U.S. sales of subject refrigerators at a level that ignores the significant expenses incurred by GEA. The petitioner adds that the costs at issue are associated only with Mabe's production of subject merchandise for GEA, and are unrelated to Mabe's production of the foreign like product. The petitioner contends that in order to calculate an accurate CEP for Mabe, all costs and expenses borne by GEA in support of selling the refrigerators made by Mabe have to be deducted from GEA's resale price. The petitioner adds that, because neither the statute nor the Department's regulations define selling expenses,<sup>84</sup> the Department has the discretion to define the term in a way that promotes the purpose of the antidumping statute and the objectives of Section 772(d) of the Act, and to properly allocate expenses. Finally the petitioner suggests that, should the Department decide not to treat

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Cir. 2003).

<sup>82</sup> The petitioner cites to Mabe Cost Verification Report, at 4 and 12; Memorandum to The File from Rebecca Trainor and Katherine Johnson, Re: Verification of the Sales Response of Controladora Mabe S.A. de C.V., Mabe S.A. de C.V., dated January 25, 2012 (Mabe Sales Verification Report), at 3; and, Memorandum to The File from Rebecca Trainor and Alma Sepulveda entitled "Verification of the Sales Responses of General Electric Company," dated January 13, 2012 (GEA Verification Report), at 19 and Exhibit 31.

<sup>83</sup> The petitioner cites to Petitioner's Response to Affidavit on Mabe's ISE Ratio Revision, dated October 13, 2011, at 5; and the GEA Letter dated October 18, 2011, at 6 and 7.

<sup>84</sup> The petitioner cites to 19 C.F.R. § 351.412.

GEA's expenses as ISEs, then NV should be adjusted to account for these expenses in the dumping margin.<sup>85</sup> According to the petitioner, GEA's expenses are "variable" in the sense that they would not be incurred but for Mabe's production of refrigerators for GEA and, as such, could be used as the basis for a difference-in-merchandise adjustment.

First, GEA points out that although these expenses were not reported in the respective sales or cost databases, the expenses were either included in its responses to the Department's questionnaires or presented as a minor correction at verification, and their amount and nature were verified. Accordingly, GEA asserts that there is no gap in the record and contends that the costs cited by the petitioner were not first discovered at verification. Therefore, both Mabe and GEA assert that they did not obstruct the Department's effort to create a complete record and, contrary to what the petitioner claims, there are no additional costs unaccounted for. Second, Mabe and GEA state that the only question is whether to include these costs in Mabe's COP or GEA's ISEs. Both Mabe and GEA argue that these costs are production-related costs and should be included in Mabe's reported COP, not in GEA's ISEs. According to GEA, including these costs in the ISEs, which are deducted from gross U.S. price, would violate the statute and disregard the evidence on the record.<sup>86</sup> GEA asserts that the propriety of including these production costs in Mabe's COP calculation is inherent in the Department's finding that Mabe and GEA are affiliated.<sup>87</sup> GEA asserts that each of these costs<sup>88</sup> is production-related and asserts that these are components of the COP of the subject merchandise and should be treated as such, regardless of where they are incurred or in whose books they appear. Therefore, Mabe and GEA conclude that for the final determination these costs should be included in Mabe's COP, and the Department should not use GEA's original ISE ratio as AFA, as suggested by the petitioner, because Mabe and GEA cooperated to the best of their ability.

### Department's Position

We disagree with the petitioner that that Department should apply AFA to Mabe and GEA and find that they did not act to the best of their ability with respect to the costs in question. Likewise we disagree with the petitioner that the excluded depreciation and amortization expenses were first discovered at verification. Throughout this proceeding Mabe and GEA have responded to each of the Department's questions with regard to the costs in question. While at times further clarification was needed, and certain aspects of this clarification were not fully understood until the Department's verification, the Department does not find that Mabe's and GEA's responses reflect actions that "significantly impede{d}" the proceeding, as outlined by section 776(a) of the Act, or a failure to cooperate to the best of the companies' abilities under section 776(b) of the Act.

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<sup>85</sup> The petitioner cites to Section 773(a)(6)(C)(iii) of the Act.

<sup>86</sup> GEA cites to Sections 773(f)(1)(A), 772(d)(2), and 773(b)(3) of the Act; Antidumping Manual, Chapter 8, Section X; Chapter 7, Section IV.C.3.a; and, Chapter 9, Section II.B.1.a.(4).

<sup>87</sup> GEA cites to Memorandum to James Maeder from Rebecca Trainor and Gemal Brangman, Re: Finding of Affiliation between Controladora Mabe S.A. de C.V., Mabe S.A. de C.V., and Leiser S. de R.L. (collectively Mabe) and General Electric Company (GEA) dated Sept. 2, 2011.

<sup>88</sup> GEA cites to GEA Verification Report, at 19 and Exhibit 31, and Memorandum to The File from Angie Sepulveda and Kristin Case, Re: Verification of the Cost Response of Controladora Mabe S.A. de C.V., Mabe S.A. de C.V., and Leiser S. de R.L. in the Antidumping Investigation of Bottom Mount Combination Refrigerator-Freezers from Mexico, dated January 4, 2012, (Mabe Cost Verification Report), at steps I.A and V.A, and CVEs 1 and 12.

In fact, Mabe disclosed the existence of the depreciation and amortization expenses in question, along with its treatment of the expenses for reporting purposes, in its responses to the Department's questionnaires.<sup>89</sup> Based on the foregoing, we do not find that the petitioner's arguments provide substantial evidence that Mabe and GE failed to provide or have withheld information such that the use of the ISE ratio applied at the Preliminary Determination is warranted.

Further, we disagree with the petitioner that the Department should treat the costs in question as ISEs. As noted above, under the CMA, GEA and Mabe agreed that for each bottom mount refrigerator unit that GEA purchases, it will pay Mabe based on a cost plus formula. We note that although GEA's payments for certain costs occur at different intervals, the terms of the agreement result in Mabe recouping its production costs plus a profit. In other words, the agreement sets the price that GEA pays Mabe for each refrigerator unit it purchases at a fully absorbed cost plus an amount for profit. The fact that the CMA between GE and Mabe presents a novel way of pricing each unit sold does not change what it ultimately costs Mabe to produce each bottom mount refrigerator unit. Consequently, the costs in question are directly related to the production of specific models of bottom mount refrigerators. As such, for the final determination, we increased the COP of those CONNUMs which included refrigerator models sold to GEA accordingly. See Mabe Cost Calculation Memo.

With respect to the petitioner's argument that if the Department includes the costs in question as production costs then they should be classified as variable overhead expenses, we disagree. The majority of these expenses in question are depreciation, R&D, and tooling and leasing. These expenses by their nature are fixed costs and it is the Department's normal practice to classify these categories of expenses as FOH. See Silicomanganese from India: Notice of Final Determination of Sales at Less Than Fair Value and Final Negative Critical Circumstances Determination, 67 FR 15531 (April 2, 2002) and accompanying Issues and Decision Memorandum at Comment 23. Therefore, for the final determination, we have included these expenses in the COM as FOH.

#### Comment 36: Fees Related to Agreements Between Mabe and GEA

At the sales verification Mabe presented a correction related to a technical support and patent license agreement fee it pays to GEA.<sup>90</sup> Mabe argues that, should the Department decide this fee should be included in Mabe's G&A expenses, it should only include the portion related to subject merchandise (i.e., the percentage allocated to the Celaya Plant). Mabe explains that in the normal course of business this fee is allocated to Mabe's production facilities based on their market share of home market sales.

Moreover, Mabe argues that, unlike the technical support and patent license agreement fee, the Department should not include the fee paid pursuant to the purchasing services agreement in Mabe's sales or cost databases because it relates to Mabe's purchases of finished goods, not to the

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<sup>89</sup> See the September 16, 2011, supplemental section D questionnaire response, at 25.

<sup>90</sup> Mabe cites to Mabe Sales Verification Report, at 3 (#7) and SVE-1.

production or sale of subject merchandise.<sup>91</sup> Mabe asserts that this fee is not allocated to the production facilities in its normal books and records unlike the other fees in question. Mabe adds that, should the Department decide this fee should be included in Mabe's G&A expenses, it should only include the portion related to subject merchandise (i.e., the percentage allocated to the Celaya Plant).

The petitioner states that the Department's decision not to examine the technical support and patent license agreement fee further at verification was appropriate.<sup>92</sup> The petitioner argues that, because this item was reported for the first time at verification, the Department was not able to fully analyze the information. The petitioner concludes that, due to Mabe's failure to cooperate to the best of its ability, the Department should make an adverse inference and include the total amount of the fee in Mabe's G&A expenses. The petitioner adds that, for the same reason, the total annual fee Mabe paid to GEA under the purchasing services agreement should also be included in Mabe's G&A expenses.<sup>93</sup>

#### Department's Position

We agree with the petitioner that the total amount of both the technical support and patent license agreement fee and the purchasing services agreement fee should be treated as a G&A expense, but not for the same reasons. In calculating the G&A expense ratio, the Department normally includes certain expenses and revenues that relate to the general operations of the company as a whole and to the accounting period, as opposed to including only those expenses that directly relate to the production of the merchandise. See Indian Shrimp at Comment 6, and Dynamic Random Access Memory Semiconductors of One Megabit and above from Taiwan: Final Determination of Sales at Less Than Fair Value, 64 FR 56308 (October 19, 1999) and accompanying Issues and Decision Memorandum at Comment 18. The CIT has agreed with the Department that G&A expenses are those expenses that relate to the general operations of the company as a whole rather than to the production process. See U.S. Steel Group a Unit of USX Corporation, et al. v. United States, 998 F. Supp 1151, 1154 (CIT 1998) (citing Rautaruukki Oy v. United States, 19 CIT 438, 444 (1995)). The expenses in question here are not production-related costs. By contrast, the nature of the expenses is related to Mabe's general operations as a whole. Therefore, for the final determination, we included the technical support and patent license agreement fee and the purchasing services agreement fee in Mabe's G&A expenses. See Mabe Cost Calculation Memo.

We disagree with the petitioner's assertion that both of these expenses were reported for the first time at verification. The CMA submitted in response to the Department's questionnaire provided the amount and terms of the technical support and patent license agreement.<sup>94</sup> With respect to the purchasing services agreement fee, it was reported for the first time at verification as a part of Mabe's first-day corrections. We note that, contrary to Mabe's assertion, there is nothing in the

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<sup>91</sup> Mabe cites to Mabe Sales Verification Report, at 3 (#8) and SVE-1.

<sup>92</sup> The petitioner cites to Mabe Sales Verification Report, at 3.

<sup>93</sup> The petitioner cites to Mabe Sales Verification Report, at 3.

<sup>94</sup> See the Technical Support and Patent License Agreement for Major Appliances in Mabe's August 15, 2011, section A supplemental questionnaire response at Exhibit SA-2.

contract to indicate that this agreement relates only to Mabe's purchases of finished goods.

Comment 37: U.S. Indirect Selling Expenses

In its initial questionnaire response, GEA reported indirect selling and advertising expense ratios that were derived from a product line management (PLP) report. GEA revised those ratios in the SQR1, substituting ratios that were derived from data in GEA's Appliances Division accounts. As explanation, GEA stated that the PLP data was flawed, and could not be tied into its financial records. GEA claimed that the Appliances-level records were the only available source of data from which GEA could produce verifiable indirect selling and advertising expense ratios. As we explained in the Preliminary Determination, 76 FR at 67695, we had several outstanding questions regarding GEA's claims with respect to both the original and the revised ISE data. Although we used the originally-reported ratios in our preliminary calculations, we stated that we would reconsider this issue for the final determination after obtaining and verifying additional information.

As discussed above in Comment 35, the petitioner argues that the Department should use an ISE factor for GEA that is no lower than the one the Department applied in the Preliminary Determination as AFA to cover possible gaps in the record resulting from Mabe's and GEA's inability to coordinate their responses for this investigation.

GEA argues that the Department has now verified that the original ISE calculation based on the PLP included many items that cannot properly be deducted from gross U.S. price, and that the revised, Appliances-level ISE ratio was based on GEA's general ledger accounts used in the normal course of business to calculate and report its SG&A costs.<sup>95</sup> Therefore, GEA argues, the Department should use the revised ISE ratio in the final determination.

Department's Position:

We have revised the calculation of U.S. ISEs for the final determination, using GEA's Appliances-level ISE ratio, as this ratio is more accurate than the PLP-based ratio we used in the Preliminary Determination.

We used GEA's original PLP-based ISE ratio in the Preliminary Determination because it appeared to have been based on data specific to bottom mount refrigerators, and the record was not clear that this data was unreliable. At verification we examined the underlying data for both the PLP-based ratio and the Appliances-level ratio. We found that the PLP-based ISE figure contained items, such as manufacturing overhead costs, that were not relevant to ISEs, and that the methodology used to allocate various expenses to bottom mount refrigerators was imprecise. We also verified that the ISE ratio GEA calculated based on Appliances-level SG&A account data was accurate and complete.<sup>96</sup>

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<sup>95</sup> GEA cites the GEA Verification Report at 17-19.

<sup>96</sup> Id.

Comment 38: U.S. Rebates

In the Preliminary Determination the Department applied AFA with respect to GEA's reported U.S. rebates because GEA failed to provide information in the form and manner requested by the Department (i.e., on the most specific reporting basis as possible). Specifically, we found that: 1) GEA had the necessary information within its control and did not report this information; and 2) GEA failed to put forth the maximum effort to provide the requested information. As AFA, we recalculated rebates for all U.S. sales based on the highest rebate percentage reported for any of GEA's rebate programs. We stated that we intended to request additional information concerning the U.S. rebate programs and allocation methodology prior to verification for consideration in the final determination. See Preliminary Determination, 76 FR at 67694.

GEA argues that its original reporting of rebates was not incorrect and did not warrant the application of AFA in the Preliminary Determination. In any case, GEA states, in the SQR2, it supplemented its rebate reporting in accordance with the Department's request that it report rebates on as specific a basis as possible, and the Department has verified the accuracy and completeness of its revised reporting.<sup>97</sup> Therefore, GEA concludes, the Department should use the revised rebate amounts in the final determination.

The petitioner states that it does not contest that GEA has largely rehabilitated its reporting of rebates. The petitioner argues, however, that GEA reclassified as advertising expenses two categories of costs that it had previously reported as rebates. The petitioner believes that the expenses at issue should be treated as rebates in the final determination. We address this issue in Comment 39 below in our discussion of advertising expenses.

Department's Position:

Since the Preliminary Determination, GEA has revised its rebate allocation methodology, and has reported rebates on a customer-, product-, and time-period basis, to the extent its records allowed. As GEA notes, we verified the revised allocation methodology and the resulting per-unit rebate amounts, and noted no discrepancies.<sup>98</sup> Therefore, in the final determination we have used GEA's revised per-unit rebate amounts as reported. As discussed below in Comment 39, we agree with the petitioner that we should treat GEA's SC&P expense as an additional rebate, and we have done so in the final determination.

Comment 39: U.S. Advertising Expenses

The petitioner argues that GEA's SC&P and LAA costs, which GEA reported as advertising expenses, are in fact rebates that should be calculated on as specific a basis as possible. The petitioner points out that GEA initially classified these expenses as rebates in the SQR1, but sought to reclassify them as advertising expenses in the SQR2, reallocating them over the entire Appliances Division sales amount, rather than tying those costs directly to subject merchandise. The petitioner claims that the net effect of this reallocation was to substantially reduce the costs

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<sup>97</sup> GEA cites to the GEA Verification Report at 13-16.

<sup>98</sup> Id.

attributed to bottom mount refrigerators.

According to the petitioner, GEA justified its reclassification of SC&P costs in the SQR1 by noting that prior to 2008 the expenses were classified as advertising in GEA's accounting system, and were administered at the Appliances level. However, the petitioner notes that GEA's accounting system during the POI treated SC&P programs as rebates rather than advertising expenses, and GEA conceded that there were particular SC&P programs that were targeted for specific models. The petitioner notes that LAA consists of customer-specific co-op advertising. Moreover, the petitioner argues that GEA reported in the SQR2 that it tracks these expenses in its "Firepower" System, as it does rebates, and can directly tie the expenses to observations in the U.S. sales database. Therefore, the petitioner states, there is no reason why the Department should treat SC&P and LAA expenses any differently from the other reported rebate accounts by allocating them at the Appliances level rather than at the bottom-mount-refrigerator level, in accordance with the Department's preference to fully capture expenses on a transaction-specific basis where possible. The petitioner concludes that under the circumstances, GEA's Appliances-level advertising ratio is not accurate; therefore, the Department should use the originally-reported advertising ratio that the Department used as AFA in the Preliminary Determination to calculate GEA's advertising expenses for the final determination.

GEA acknowledges that SC&P and LAA expenses are tracked in the Firepower System in the same way as rebates, but maintains that the type of promotional activities that gave rise to SC&P expenses fall squarely in the "advertising expense" category as defined in the Department's practice and in standard corporate accounting.<sup>99</sup> GEA agrees with the petitioner that LAA expenses include co-op advertising, but disagrees that this fact supports the classification of LAA expenses as rebates, pointing out that the Department's questionnaire expressly instructed all respondents in this investigation to include co-op advertising within the advertising expense category.<sup>100</sup>

GEA explains that it initially included SC&P expenses in its reporting of rebates, but later combined these expenses with LAA expenses in its calculation of advertising expenses, after gaining a better understanding of the Department's questionnaire and the underlying activities that gave rise to SC&P expenses. GEA adds that, in the SQR2, the Firepower query GEA utilized to add detail to its reporting on rebates also generated a "mapping" of SC&P and LAA expenses to individual transactions reported to the Department. GEA asserts that sharing this extra data made the results of the Firepower query fully transparent, and gave the Department a second methodological option for deducting these expenses from the gross unit price in the margin calculation. GEA claims that, because both advertising expenses and rebates are deducted from gross U.S. price, in the absence of a targeted dumping analysis for Mabe/GEA, the method used to make the deduction has no dumping margin consequences.

GEA argues that only an Appliances-level calculation makes sense because GEA advertising activities are planned and executed at the Appliances level, and there are no programs or activities that single out bottom mount refrigerators. Rather, advertisements are planned and executed for

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<sup>99</sup> GEA cites to the GEA Verification Report at 17, and the SQR2 at 13-15.

<sup>100</sup> GEA cites to Section C of the Antidumping Questionnaire at C-35.

all appliances on an equal basis. GEA asserts that its Appliances-level advertising ratio was fully verified by the Department, and that the initial, PLP-based advertising ratio calculation was shown to be flawed and inflated – including, among other things, mislabeled items that were not advertising expenses. Therefore, GEA concludes, the petitioner’s argument that GEA has substantially reduced costs attributable to bottom mount refrigerators by employing the revised Appliances-level allocation methodology is incorrect, and the Department should use GEA’s Appliances-level advertising expense ratio in the final determination.

Department’s Position:

For the final determination, we treated LAA expenses as a direct advertising expenses, and SC&P expenses as rebates. GEA’s LAA expenses represent co-op advertising that is directed toward GEA’s customer’s customer and is directly related to the product under investigation. Thus, LAA expenses are appropriately classified as direct advertising expenses.<sup>101</sup> On the other hand, SC&P expenses represent a category of incentive programs designed to increase brand and product marketing exposure to the consumer,<sup>102</sup> and involve the types of promotional activities typically characterized as rebates by the Department and other respondents in this investigation.<sup>103</sup>

In the SQR2 at 29, GEA explains that it tracks SC&P expenses in the Firepower System along with rebates and LAA expenses, but GEA considers the activities associated with SC&P expenses to be advertising activities. As such, GEA included them in its calculation of the Appliances-level advertising expense ratio. GEA also stated that it was providing the transaction-specific allocations for these expenses in the detailed rebate allocation spreadsheet in the event that the Department decided to treat SC&P expenses as rebates. Because of our preference for transaction-specific allocations whenever possible,<sup>104</sup> we have used GEA’s reported transaction-specific SC&P and LAA expenses as verified, for the final determination. As stated above, we treated LAA expenses as a direct advertising expense, and we treated SC&P expenses as rebates. To avoid double counting advertising expenses in the margin calculation, we did not use GEA’s Appliances-level advertising expense ratio in the final determination.

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<sup>101</sup> See Section C of the Antidumping Questionnaire at C-35, and Notice of Final Determination of Sales at Less Than Fair Value: Live Swine From Canada, 70 FR 12181 (March 11, 2005) and accompanying Issues and Decision Memorandum at Comment 6.

<sup>102</sup> The specific activities included in GEA’s SC&P expense category, detailed in the SQR2 at 13 – 16, is business proprietary information, and thus, cannot be disclosed in this public memorandum.

<sup>103</sup> See, e.g., the public version of Samsung Electronics Mexico S.A. de C.V.’s Response to 11/11/11 Supplemental Questionnaire, November 23, 2011, at 6-8.

<sup>104</sup> See Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan; Final Results of Antidumping Duty Administrative Reviews, 63 FR 63860, 63864 (Nov. 17, 1998) (where the Department stated that its preference is for transaction-specific reporting).

#### Issue 40: Cost Verification Corrections

At the cost verification, Mabe presented several corrections related to COM and G&A expenses. Mabe argues that, for the final determination, the Department should adjust the COP to account for each of these minor corrections. Here, Mabe highlights four of the corrections and suggests different options on how the Department could handle the adjustments to the reported costs. First, Mabe proposes programming language to correct the calculation errors found in its submitted “mabecop03a” alternative cost database. This database was originally submitted<sup>105</sup> by Mabe to revise its reported FOH to account for depreciation expenses related to the refrigerators produced for GEA; however, it included an overstatement to the FOH costs. Second, Mabe addressed certain year-end adjustments to FOH that also resulted in an overstatement of FOH costs. Mabe suggests that the Department should apply this adjustment either to the total COM (TOTCOM) of each control number, as a percentage of COM, or to the FOH of each CONNUM, based on units produced. Mabe continued by addressing the third correction related to the direct labor and variable overhead (VOH) variances that were inadvertently allocated only to subject merchandise instead of to all merchandise produced, also resulting in an overstatement in the total reported costs. Mabe suggests that the Department should apply this adjustment either to the TOTCOM of each CONNUM or to the direct labor (DIRLAB) and VOH of each CONNUM. Finally, Mabe addressed its correction related to leasing expenses it believes should not be included in the G&A expenses used in the numerator of the G&A expense rate calculation because they were ultimately absorbed by GEA.

The petitioner agrees with Mabe on the first three corrections discussed above (*i.e.*, corrections to errors in the “mabecop03a” alternative cost database; the year-end adjustments to FOH; and the DIRLAB and VOH variances allocation). The petitioner also agrees that the expenses mentioned in the fourth correction (*i.e.*, leasing expenses) should be removed from Mabe’s COP; however, it argues that they should be handled in the same manner as the other production costs borne by GEA and discussed at Comment 35 (*i.e.*, they should be treated as an ISE incurred by GEA). The petitioner adds that it is peculiar that Mabe argues that an expense ultimately absorbed by GEA should be removed from Mabe’s COP, while GEA argues that all costs ultimately absorbed by GEA should be included in Mabe’s COP.

#### Department’s Position

We agree with both the petitioner and Mabe that the Department should revise the reported costs to reflect the first three corrections discussed above (*i.e.*, corrections to errors in the “mabecop03a” alternative cost database; the year-end adjustments to FOH; and the DIRLAB and VOH variances allocation). As a result, for the final determination, we adjusted the reported costs accordingly. With regard to the fourth correction related to leasing expenses, we disagree with both Mabe and the petitioner. The expenses in question relate to COM, not Mabe’s G&A expenses, and likewise not ISEs as proffered by the petitioner. We note that these expenses are associated with the costs in question discussed at Comment 35 above, and likewise should be treated as production expenses as described above. Thus, for the final determination, we increased COM for the fourth minor

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<sup>105</sup> See Exhibit 2SD-11, of the October 14, 2011 second supplemental section D questionnaire response.

correction.

Comment 41: Home Market Rebate Identified at Verification

Mabe argues that the Department should take into account in the final determination the additional rebate Mabe identified at the commencement of the sales verification as a minor correction. Mabe states that it provided customer-specific calculations for this rebate and supporting documentation for its calculations.<sup>106</sup> In addition, Mabe argues, the rebate can be tied to specific home market sales by customer and product. Mabe suggests that incorporating the new rebate into the home market database would be a simple matter of adding a new rebate variable (REBATE2H), and applying the customer-specific ratios Mabe provided at the outset of verification. Finally, Mabe argues, the Department had the opportunity to verify this information.<sup>107</sup>

The petitioner argues that the Department appropriately chose not to review this new information at verification, and should not consider it for the final determination.<sup>108</sup>

Department's Position:

Although we did not examine in detail Mabe's customer-specific calculations for the additional rebate Mabe presented at the beginning of verification, we accepted the supporting documents Mabe offered to explain this correction.<sup>109</sup> Upon further consideration of the documentation provided, we have accepted the additional rebate information as a minor correction to the rebate information already on the record, as it affects only a limited number of customers, and poses no difficulty for the Department to take it into account in the margin calculations.<sup>110</sup> Moreover, we have no evidence on the record to suggest that the additional home market rebate information is

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<sup>106</sup> See the Mabe Sales Verification Report at 3, and Exhibit 1.

<sup>107</sup> Mabe cites Carbon and Certain alloy Steel Wire Rod from Mexico, Final Results of Antidumping Duty Administrative Review, 70 FR 25809 (May 16, 2005) (Steel Wire Rod from Mexico), and accompanying Issues and Decision Memorandum at Comment 1.

<sup>108</sup> The petitioner cites to several cases in support of this argument, including: Wuhan Bee Healthy Co., v. United States, 31 CIT 1182, 1189 (2007) (Wuhan Bee); Circular Welded Non-Alloy Steel Pipe from the Republic of Korea: Final Results of the Antidumping Duty Administrative Review, 75 FR 34980 (June 21, 2010) (Circular Welded Pipe) and accompanying Issues and Decision Memorandum at Comment 6; Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Final Results of the Antidumping Duty Administrative Review and New Shipper Reviews, 74 FR 11349 (March 17, 2009) (Frozen Fish Fillets) and accompanying Issues and Decision Memorandum at Comment 9.C; Certain Steel Nails from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances, 73 FR 33977 (June 6, 2008) and accompanying Issues and Decision Memorandum at Comment 20E (Nails).

<sup>109</sup> See the Mabe Sales Verification Report at 3, and Exhibit 1.

<sup>110</sup> See Steel Wire Rod from Mexico and accompanying Issues and Decision Memorandum at Comment 1 ("the errors identified by Hylsa were minor in that they affect only certain variables ... with respect to a select percentage of sales).

somehow incomplete or inaccurate, given that we were able to verify without discrepancy the other home market rebate information Mabe reported in its questionnaire responses. Therefore, we have included this rebate in Mabe's final margin calculations.

The petitioner cites to many cases in support of its argument that the Department should reject Mabe's additional rebate; however, none of these cases involves corrections voluntarily presented by respondents at the beginning of verification. Rather, at issue in those cases are significant deficiencies or errors discovered by the Department during verification that resulted in the application of AFA. For example, in Frozen Fish Fillets and Nails, the Department discovered at verification that the respondents failed to report certain inputs used in the production process. In Circular Welded Pipe and Wuhan Bee, the Department found at verification that the facts directly contradicted representations made by the respondents in their questionnaire responses. In Lined Paper, the Department rejected all of the information presented at verification, after concluding that the respondent's books and records did not accurately reflect its commercial practices. In contrast, Mabe's failure to report prior to verification an additional home market rebate granted to a small number of customers relates to the completeness of information already on the record, and is the type of minor error we typically allow respondents to correct when they discover the error while preparing for verification.<sup>111</sup> For these reasons, we have accepted Mabe's correction of this error as presented at verification, for the final determination.

### **Electrolux**

#### Comment 42: Verification Findings

The petitioner requests that the Department incorporate in its final determination for Electrolux three adjustments identified as findings in the Department's verification report. These three adjustments are: (1) including in the calculation of NV a fuel surcharge revenue which Electrolux charged certain Canadian customers; (2) adjusting the calculation of the early payment discounts granted to a certain Canadian customer to reflect an increase in the discount based on the verified effective date of that increase; and (3) using Electrolux's U.S. short-term borrowing rate, rather than the reported Federal Reserve rate, in the calculation of credit expenses and inventory carrying costs for Electrolux's U.S. sales.

Electrolux submitted no comments on this issue.

#### Department Position:

For the final determination, we have incorporated all of the data corrections identified in the verification report, including the findings mentioned above, as listed in the "Margin Calculations" section of this memorandum. See Electrolux Calculation Memo.

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<sup>111</sup> See the November 7, 2011, letter to Gregory J. Spak regarding the verification of Mabe's questionnaire responses ("New information will be accepted at verification only when: (1) the need for that information was not evident previously; (2) the information makes minor corrections to information already on the record; or (3) the information corroborates, supports, or clarifies information already on the record.")

Recommendation

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

Agree Disagree 

  
\_\_\_\_\_  
Paul Piquado  
Assistant Secretary  
for Import Administration

16 MARCH 2012

(Date)