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Administrative Review
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MEMORANDUM TO: Ronald K. Lorentzen
Deputy Assistant Secretary
for Import Administration

FROM: Susan H. Kuhbach
Acting Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

RE: Brass Sheet and Strip from Germany (Period of Review: March 1, 2008, through February 28, 2009)

SUBJECT: Amended Issues and Decision Memorandum for the Final Results of the Administrative Review of the Antidumping Duty Order on Brass Sheet and Strip from Germany

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Summary

We have analyzed the case briefs submitted by petitioners[1] and the respondent, Wieland-Werke A.G. ("Wieland"). As a result of our analysis, we have made changes from the Preliminary Results[2] in the margin calculations. We recommend that you approve the positions described in the Discussion of Interested Party Comments, infra. Outlined below is the complete list of the issues in this review for which we have received comments from petitioners and Wieland.

I. Background

On April 13, 2010, the Department of Commerce ("the Department") published in the Federal Register the Preliminary Results of this administrative review. See Preliminary Results. This review covers one manufacturer/exporter of the subject merchandise: Wieland-Werke A.G.

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[1] Petitioners include GBC Metals, LLC of Global Brass and Copper, Inc., doing business as Olin Brass, Heyco Metals, Inc. Luvata Buffalo, Inc., PMX Industries, Inc., and Revere Copper Products., Inc. (collectively, "petitioners").

[2] See Brass Sheet and Strip from Germany: Preliminary Results of Antidumping Duty Administrative Review, 75 FR 18801 (April 13, 2010) ("Preliminary Results").

II. List of Comments

Comment 1: Whether to Use Wieland's Daily Metal Costs for Purposes of Computing Costs of Production for the Sales Below Cost Test

Comment 2: Whether the Department's Quarterly Indexed Cost Methodology Meets the Requirements of the Statute's Cost Recovery Test

Comment 3: Whether to Revise Wieland's General and Administrative ("G&A") Expense Ratio

Comment 4: Whether to make Other Adjustments to the OTHMAT Costs, Fabrication Costs and General and Administrative Expenses

Comment 5: Whether the Department Should Adjust for Fluctuations in Metal Price in its Comparison of Export Price to Normal Value

Comment 6: Whether the Department Should Exclude Samples and Trial Shipments from its Antidumping Analysis

Comment 7: Whether Facts Available Should be Applied

Comment 8: Whether Wieland's U.S. Sale is Bona Fide

Comment 9: Whether to Make a Finding of Reimbursement of Antidumping Duties

III. Discussion of Interested Party Comments

Comment 1: Whether to Use Wieland's Daily Metal Costs for Purposes of Computing Costs of Production for the Sales Below Cost Test

For the Preliminary Results, the Department calculated metal costs based on our established practice of using the quarterly cost indexing calculation methodology. Wieland argues that in the Preliminary Results the Department erred in rejecting, without explanation, Wieland's daily London Metals Exchange ("LME") based reported metal costs as recorded in the company's normal books and records. Likewise, Wieland asserts that under the Department's methodology of averaging Wieland's daily metal costs by quarter, it is only the timing of the sale that determines whether it passes the cost test (i.e., whether the sales were made in the ordinary course of trade).

According to Wieland, this appears to be the first case where a respondent has both submitted daily costs and argued against the averaging of such costs over any longer cost period for the purpose of performing the cost test. Wieland asserts that the statute clearly does not require averaging for the purpose of calculating cost of production ("COP") for the cost test, and the

Department must provide a reason for averaging Wieland's metal costs that is consistent with the objectives of the statute. Wieland notes that the Department has stated that it generally computes costs only on a period of review ("POR") or POI average basis "in order to even out swings in production costs experienced by respondent over short periods of time. This way, we smooth out the effect of fluctuating raw material costs." See Notice of Final Results of Antidumping Duty Administrative Review: Carbon and Certain Alloy Steel Wire Rod from Canada, 71 FR 3822 (January 24, 2006), and accompanying Issues and Decision Memorandum at Comment 5 ("Wire Rod from Canada"). Thus, according to Wieland, the averaging is not appropriate when there is no reason to smooth out fluctuating raw material costs, as is the case here. Wieland, citing to the Department's Antidumping Methodologies for Proceeding that Involve Significant Cost Changes Throughout the POI/POR that May Require Using Shorter Cost Averaging Periods; Request for Comment, 73 FR 56,364 (May 9, 2008) ("Request for Comment"), where the Department expressed concern over the accuracy of costs computed over short time periods, argues that those concerns are not present here, as the company is requesting the use of daily costs only for its metal costs, which are unaffected by production levels, maintenance or any other factor.

Wieland notes that in the last completed review involving brass sheet and strip the Department used monthly average metal costs. Wieland points out that in BSS from the Netherlands,[3] the respondent argued for monthly average costs, thus the Department did not analyze whether daily costs were appropriate. Wieland claims that here, if the daily LME metal price is passed through to the customer, on a daily basis, through daily changes in Wieland's metal prices, the only way to match costs to sales is to use the daily metal cost. According to Wieland, there is no factual or logical basis for abandoning the annual period but stopping at a monthly period, as all of the reasons for not using an annual period apply equally to quarterly or monthly cost periods.

Wieland, citing to section 773(b)(2)(D) of the Tariff act of 1930, as amended ("the Act"), argues that the statute requires the Department to compute a "per-unit cost of production at the time of sale." Wieland points out that the Department has consistently construed the "time of sale" for a U.S. sale to be a single date of sale, thus the cost of production at the "time of sale" for purposes of the below-cost test should be a daily cost on the metal fixation date, where such daily costs can reasonably be computed. Wieland holds that it provided for each sales transaction its daily metal cost at the time the metal was sold to the customer, which represents "per unit costs of production at the time of sale" required by the statute. Wieland argues that because the Department did not find these costs to be unreasonable, the Department is not required to average Wieland's daily costs, and no statutory purpose is served by averaging daily metal costs in light of the facts of this case.

Wieland contends that section 773(f)(1)(A) of the Act requires the Department to base costs on the respondent's books and records unless such costs are unreasonable. Wieland holds that in the Preliminary Results the Department made no finding that the daily metal costs reported by Wieland were unreasonable, therefore, the Department must use the daily costs for all purposes

[3] See Final Results of Antidumping Duty Administrative Review and Determination Not to Revoke the Antidumping Order: Brass Sheet and Strip From the Netherlands, 65 FR 742, 743, 746 (January 5, 2000) ("BSS from the Netherlands").

except the cost recovery test. Wieland further argues that the quarterly indexed metal costs are inconsistent with the statute's requirements that the costs must conform to the generally accepted accounting principles ("GAAP"), because such costs are not permitted by either German or U.S. GAAP, do not reflect Wieland's actual material costs, and cannot be reconciled to Wieland's books and records.

Petitioners argue that Wieland's reported daily metal costs should not be used. In fact, according to petitioners, record evidence demonstrates that even the quarterly costs used by the Department for the Preliminary Results is not a sufficient time period that would allow Wieland's actual purchases of metal to be considered accurately and completely captured.

Petitioners assert that Wieland's reference to the Department's use of monthly costs in BSS from the Netherlands in support of the use of Wieland's daily costs is misplaced. Petitioners, citing to the Stainless Steel Plate in Coils From Belgium: Final Results of Administrative Review, 73 FR 75398, 75399 (December 11, 2008) ("SSPC from Belgium") note that the Department has two criteria that must be met in order for the Department to consider any shorter cost reporting period than its normal annual average costs: first, the change in the quarterly cost of manufacturing recognized by the respondent during the POI or POR must be significant, and second, there should be evidence of linkage between the cost changes and the sales prices for the given POI/POR. Petitioners claim that while they agree with the Department's findings that Wieland's costs of inputs changed significantly during the POR, they disagree that the changes in copper and zinc, as true purchases of raw materials, meet the second prong of the test required for a quarterly cost period. Petitioners argue that, unlike OBV, the respondent in the BSS from the Netherlands, Wieland did not actually purchase metal for each order, but instead hedged its sales and purchases of metal.

In fact, petitioners contend that Wieland's reported data shows that actual metal orders, purchases of metal, metal fixation dates, manufacturing to order, and invoicing for delivery, span long periods between and among themselves, and as such there is no causal cost link between orders and actual metal purchases by Wieland on behalf of a customer. Therefore, petitioners maintain, the shorter the Department segments the period for defining the COP, the greater the divergence between the actual metal purchase prices recorded in the books and records and the metal cost reported for the specific transaction, and as such, the daily costs of manufacturing a product for a given order cannot have any direct relationship to the cost of metals withdrawn from inventory on any given day for production. According to petitioners, the record indicates that the manner in which Wieland both values its metal inventory and accounts for hedging gains and losses in its financial statements is appropriate under GAAP. Thus, petitioners state Wieland's cost of goods sold is properly valued to reflect hedging gains and losses, and in the same manner the Department should for antidumping purposes look at Wieland's costs for a long-term, not daily, period.

Further, petitioners cite to PriceWaterhouseCoopers' "Guide to Accounting for Derivative Instruments and Hedging Activities" to point out that U.S. GAAP categorizes commodity (i.e., metal) hedging as "cash flow" hedging, the gains and losses on which should be recorded as period income or loss and not as inventoried cost, such as the cost of materials. In addition, petitioners argue that the Department's practice with respect to such financial activities is to analyze them on a consolidated basis as part of the cost of production and not the cost of manufacturing.

Regarding Wieland's argument that the statute requires the Department to use costs based on the records of the producer unless such costs are unreasonable, petitioners argue that Wieland's reported metal costs are not based on either its financial accounting records or its cost accounting records, but are based on the costs of metal on the metal fixation date which is done in customized SAP® reports. According to petitioners, these customized reports are akin to informational managerial accounting and are not true company records for purposes of GAAP.

<u>Department's Position</u>:

(Due to the proprietary nature of certain information referred to by the Department in its position, we have placed the full business proprietary version of the Department's position on this issue in the Memorandum from Ernest Gziryan through Taija Slaughter to Neal Halper, titled "Cost of Production and Constructed Value Calculation Adjustments for the Final Results – Wieland-Werke AG", dated October 12, 2010).

For the final results, we have relied on Wieland's reported day-specific metal costs. Wieland uses both copper and zinc as inputs in producing the merchandise under consideration. Copper and zinc are commodity metals traded on the LME, and prices for these metals fluctuate daily. Because of the risk associated with the fluctuating metal prices, Wieland has developed a business model where they go to great lengths in the normal course of business to eliminate all risk associated with the metal fluctuations. It is Wieland's failsafe hedging mechanism which ensures metal neutrality, not the magnitude of the cost changes throughout the POR, that makes it appropriate in this case to use the reported day-specific metal costs. To use any other cost averaging methodology for the metal cost in this unique situation would lead to distortions because we would be ignoring the fact that Wieland ensures that they remain metal cost neutral and fully pass through to its customers any risk related to the volatility in the prices of copper and zinc.

In the instant case, record evidence demonstrates that to avoid the risk associated with fluctuating metal prices Wieland utilizes a business model where the company shifts the entire risk of fluctuating metal prices to its customers. Wieland does not purchase metal for inventory for future sales to its customers. Instead, Wieland either requires its customers to supply the metal necessary to fulfill the order (<u>i.e.</u>, for tolled sales), or for non-tolled sales, Wieland sells the metal component of the sale to its customers based on the LME metal price on the date of the customer's choosing (the "metal fixation date"). In turn, Wieland physically purchases metal at the same LME metal prices. This business practice allows Wieland to ensure metal neutrality as it fully passes through to its customers the cost of the copper and zinc based on the daily market-established LME metal price on the date of the customer's metal purchase (<u>i.e.</u>, the "metal fixation date"). Wieland's reported daily metal costs are based on the metal fixation date specific to the sale, <u>i.e.</u>, Wieland reported a unique daily cost record corresponding to each individual sale included in the company's home market and U.S. sales databases. All remaining costs are reported on an annual average basis.

In their rebuttal brief petitioners make a distinction between Wieland's metal practices and those of OBV, the respondent in the BSS from the Netherlands, arguing that, unlike OBV, Wieland did not actually purchase metal for each order, but instead hedged certain open metal positions, and because such hedging does not represent actual purchases of metal for specific orders, there is no link between Wieland's sales and purchases of metal. We disagree. The hedging gains and losses are a necessary component of the total metal price and are therefore recorded as part of the metal cost in Wieland's books and records. We note that, when comparing the daily physical purchases of metal with purchases involving hedging activities on the same day, the difference is only the timing of the physical purchase of the metal. This is because, as explained in the verification report, when a certain quantity of metal needed to fulfill a daily order is not physically purchased on that same day but instead the daily price for that quantity is hedged, the price of the future physical purchase of that quantity of metal, netted with the hedging gains or losses, represents the LME price in effect on the original day the hedging activity occurred, i.e., the price at which physical purchases were made on that day. Thus, while there may be a timing difference between these two types of purchases, and moreover, the purchases may be recorded in the books and records at different times (i.e., when the metal is actually delivered), they are similarly linked to the sales made on the same day, and their full cost will be passed through to the customers.

We also disagree with petitioners that Wieland's sales and purchases are not linked because Wieland's sales and purchases of metal, as well as metal fixation dates, production dates and invoicing all occur at different points of time. Naturally, the actual delivery of metal purchased on one day may take place on a different day, and production of the order may not begin on the day the order was received. Similarly, the metal fixation date chosen by the customer may not coincide with the metal delivery date, production date, or the date the sale is invoiced. Nevertheless, as explained above, Wieland's sales and purchases are specifically linked on a daily basis through back-to-back physical purchases or hedging transactions.

Further, petitioners argue that, given Wieland's hedging practices, the company's "daily costs of manufacturing a product for a given order cannot have any direct relationship to the cost of metals withdrawn from inventory on any given day of production,"[4] and that such costs are based on costs on the metal fixation dates, rather than accounting records, and thus are not the actual costs incurred. We disagree. Understandably, due to the fungible nature of copper and zinc, the metal purchased pursuant to an order may not necessarily be used in the production of that order. While a limited number of producers may be able to directly trace purchases of inputs to specific products, in cases where material inputs are fungible (i.e., copper and zinc) such a direct relationship may not exist. Wieland does not claim that its day-specific metal costs represent the actual physical metal withdrawn from inventory for the production of that order. However, contrary to petitioners' claim, Wieland's day-specific metal costs are not "paper" costs, but are the actual costs incurred by Wieland pursuant to the order. While these costs are initially

[4] See petitioners' rebuttal brief at 13.

determined by reference to the LME prices, we note that the corresponding quantity of metal is physically purchased, delivered, recorded in the books and records, and becomes Wieland's expense, which is in no way affected by the lack of direct traceability between metal purchased and used in the production of the order. As a result, the total metal cost per Wieland's books and records is the sum of the cost of individual orders, which is supported by the fact that the total reported daily metal costs reconcile to the total metal costs per Wieland's books and records.

Finally, we disagree with petitioners that Wieland's reported costs are not based on the company's records for purposes of GAAP. As the Department verified, Wieland's reported metal costs are based on the costs recorded in its cost accounting system and reconcile to the metal costs recorded on the company's audited financial statements prepared in accordance with German GAAP. With respect to petitioners' argument that under U.S. GAAP commodity hedging gains and losses should be recorded as period income or loss and not as inventoried cost, and that U.S. GAAP considers such hedging as financial activities (which the Department normally analyzes on a consolidated basis as part of the cost of production), we note that Wieland's financial statements are prepared in accordance with German GAAP, under which metal hedging gains and losses may be recorded at part of material purchases and not reported as the results of financial activity. The law requires the Department to use costs as recorded on the company's books and records and kept in accordance with home country GAAP, unless such costs do not reasonably reflect the costs associated with the production and sale of the merchandise. As discussed above, we find no grounds to determine that Wieland's costs calculated and reported in accordance with German GAAP are unreasonable, and thus, the rules of U.S. GAAP are not applicable here. Therefore, based on the reasoning above, for the Final Results, we used Wieland's reported day-specific metal costs and a POR-average for all other product-specific costs.

Comment 2: Whether the Department's Quarterly Indexed Cost Methodology Meets the Requirements of the Statute's Cost Recovery Test

Wieland argues that the Department's quarterly indexed metal costs employed in the Preliminary Results not only do not represent the costs "at the time of sale" as required by the below-cost test, but they also do not reflect Wieland's "weighted average per unit cost of production for the period of investigation or review," as required by the cost recovery test. Wieland holds that the statute requires the use of a single "weighted average per unit cost of production" for the cost recovery test which must be calculated "for the period of review." According to Wieland, the Court of International Trade in the Nucor Remand[5] rejected the Department's attempt to reconcile its preferred quarterly cost of production examination with the period of review-wide cost of production examination (i.e., cost recovery) called for in the statute. Moreover, Wieland asserts that the quarterly indexed cost methodology is inconsistent with the cost recovery provisions purpose. Wieland maintains that Congress recognized that when a producer's costs are changing over time, it might not be feasible for the manufacturer to change prices rapidly or

[5] See Final Results of Remand Redetermination, Nucor Corp. v. United States, Slip. Op. 09-20 (CIT March 24, 2009) ("Nucor Remand").

frequently, however, the manufacturer might instead price its products to recover changing costs over a reasonable period of time. Accordingly, Wieland asserts that the use of the quarterly indexed costs for purposes of the cost recovery test is inconsistent with Congress's objective in selecting a 12 month cost averaging period. Thus, Wieland concludes, for the final results the Department should separately examine whether home market sales that fail the below-cost test are at prices higher than the weighted-average POR cost for that CONNUM.

According to petitioners, Wieland's arguments make the incorrect assumption, with respect to the cost recovery test, that one formula cannot be used to implement two separate tests. Wieland's interpretation of the statute would require that one would distinguish costs at the time of sale separately from the weighted-average COP for the period used to examine the recovery of costs within a reasonable period of time. Petitioners assert that this requirement is not clear from the plain reading of the statute. Petitioners maintain that the statute distinguishes two separate sets of prices, i.e., prices at the time of sale and prices in aggregate by CONNUM. Consequently, petitioners state, the cost test achieves several objectives simultaneously by means of the 20-percent test. Accordingly, as a first step the Department's cost test establishes which, if any, comparison market sales fall below the COP at the time the products are sold, i.e., by a comparison of price and cost on the date of sale. Likewise, the Department's same test determines, in aggregate by CONNUM, the volume of sales that are below cost to establish whether or not sales should be disregarded based on the 20-percent test. Petitioners assert that each sale in aggregate by CONNUM is considered to have recovered costs within the meaning of the statute, only if less than 20 percent of the volume of such sales is below cost.

Moreover, petitioners claim, when the Department uses shorter periods it has created multiple periods of review. Thus, if the Department has the authority to create shorter periods of investigations or reviews in order to determine if a sale is made in the ordinary course of trade at the time of sale, it must have the authority to create shorter periods of investigations and reviews in order to test if sales prices in aggregate are above the same cost over a reasonable period of time. For the reasons noted above petitioners conclude that the Department's interpretation of the law is permissible, as it compares prices in a shorter period to the same shorter period's weighted-average COP, and then determines whether those prices in aggregate during the shorter period can recover costs in the same shorter period.

Department's Position:

We disagree with the respondent. As noted in comment 1 above, it is Wieland's unique business operations with respect to managing metal risk, not the magnitude of the cost changes, that makes it appropriate in this case to use the reported day-specific metal costs. Notwithstanding, Wieland did experience a change in the cost of manufacturing during the POR that was significant. Therefore, the fact that the change in the cost of manufacturing during the POR was significant, and the sales prices and costs sales are linked because they are driven by the LME, consistent with the Preliminary Results and the Department's established practice, we used the quarterly indexing methodology for the cost recovery test. We adjusted our normal cost recovery methodology to account for the distortive effect of significant cost changes. We find that performing the cost recovery test using an unadjusted annual average cost results in a comparison of home market prices to a single period-wide average COP that the Department finds distortive when there is a significant change in cost. Due to the significant change in COM throughout the POR, the use of an unadjusted annual average cost becomes meaningless when used to test sales prices throughout the year. In the alternative, as detailed below, the Department used an annual average cost calculation approach that incorporates an indexing method which neutralizes the distortive effects that the significant change in cost has on the cost recovery calculations.

Although we agree that Congress intended that the Department should normally use the single period average cost for the POI or POR, we disagree that Congress mandated the use of a single period of review weighted-average cost when it leads to distortions. See section 773(f)(1)(A) of the Act (explaining that the costs must reasonably reflect the costs associated with the production and sale of the merchandise); see also Statement of Administrative Action ("SAA") for the Uruguay Round Agreements Act at 832 (stating that the determination of cost recovery is based on an analysis of actual weighted average prices and costs during the POR or POI).

In this case, the Department reasonably exercised its discretion to address significant variations in the cost of a major input that dramatically changed the per-unit cost of manufacturing during the period of review. The magnitude of cost changes from quarter to quarter during the period of review was so significant that the Department believes it is appropriate to deviate from its normal cost recovery methodology of using a single period of review weighted-average cost because it would have resulted in a cost that does not reasonably reflect the costs associated with the production and sales of the merchandise.

In the margin calculation program used for the preliminary results, the Department indexed the quarterly copper and zinc costs to a common period cost level, thereby neutralizing the effect of the significant cost changes for the input between quarters. Then, consistent with the antidumping statute and our normal practice in high inflation cases, the Department calculated a period of review weighted-average per-unit cost. Finally, the weighted-average per-unit cost for the period of review for the metal input was indexed back to the appropriate quarter to keep the weighted-average costs consistent with the main input's significantly changing price levels occurring between quarters. This methodology addresses the statute's requirement of weighted-average costs for the period (i.e., recovery of cost test) while preserving the indexed differences between quarters resulting from the significant price level changes.

Under the Department's indexing methodology, the control number ("CONNUM")-specific costs reflect the period of review weighted-average cost of other materials, labor, and overhead. The only cost components adjusted to reflect price level changes throughout the year are the prices of the inputs experiencing significant cost change. Thus, the Department's methodology relies upon the respondents' actual weighted-average costs for the entire period of review, while also neutralizing the distortion caused by the significant cost changes for the inputs at issue. Despite the respondents' argument to the contrary, the Department finds that this approach satisfies the requirements set forth in section 773(b)(2)(D) of the Act.

We find that the rationale for the Department's methodology is consistent with the intent of the statute. If the Department were to use an unadjusted weighted-average per-unit cost for the period of review for purposes of the cost recovery test, sales prices which were determined to be below cost may be erroneously considered to have recovered costs and be rehabilitated based simply on the law of averages and the timing of the sale. For example, a sale that occurred in the last quarter of the POR that failed the cost test based on the daily sale specific cost methodology would pass the cost recovery test because lower costs from the beginning of the period offset the higher costs at the end of the period in the unadjusted annual cost calculation.

It is undisputed that the cost of the primary inputs, copper and zinc, significantly changed within the POR. In addition, a reasonable linkage between sales prices and costs has been established because they are both driven by the LME. When costs change significantly, and prices follow such cost changes, using an unadjusted annual average cost in performing the recovery of cost test will result in virtually all sales during the highest cost periods passing the recovery of cost test simply due to the timing of the sale in relation to the cost change cycle. This comparison says little about true cost recovery; rather it simply shows which sales were made during high cost periods. Even if the company were to incur losses daily from unprofitable below-cost sale prices that never catch up with rapidly rising costs, prices during the highest cost period will still almost always be higher than the annual average costs. Accordingly, the test would erroneously show that the costs have been recovered, regardless of the true financial state of the company. Therefore, we have continued to use an indexed weighted-average annual average cost in our cost recovery test for the final results.

Comment 3: <u>General and Administrative Expenses</u>

Wieland argues that the Department should compute and apply the general and administrative ("G&A") expense factor based only on fabrication costs, or otherwise equalize Wieland's tolled and full price sales. Wieland explains that it sells brass sheet and strip on a full-price basis, where Wieland buys metal for customers that do not provide their own metal (Wieland takes title for that metal and the cost is recorded on the books), and on a toll basis, where the customer supplies its own metal, and the cost of that metal is not recorded in Wieland's books and records. Wieland states that it stores, handles, processes and fabricates the metal in both cases exactly in the same way, the only difference being that the metal cost for tolled sales does not flow through Wieland's books. Wieland argues that because purchased metal and tolled metal sales are handled and processed in the exact same way, they should bear equal G&A expenses, while in the <u>Preliminary Results</u> the Department allocated less G&A expenses to tolled sales only because Wieland does not take title to the metal for tolled sales and the metal is not recorded in its books and records. Wieland, citing to the <u>Ass'n of Am. Sch. Paper Suppliers v. United States</u>, Consol. Court No. 06-00395, Slip Op. 2009-136, (CIT December 10, 2009) ("<u>Paper Remand Results</u>"), asserts that the court affirmed that where a significant portion of a company's business involved activities that were not reflected in the cost of sales, the Department appropriately modified its G&A allocation methodology to ensure a fair allocation. According to Wieland, because in this case metal costs far outweigh fabrication costs, the traditional cost of goods sold-based allocation grossly over-allocates G&A expenses to full price sales in relation to tolled sales. Therefore, Wieland suggests, for the final results the Department should either allocate G&A expenses based only on fabrication costs, or devise another methodology to cure the distortion.

Petitioners argue that the Department should continue to compute and apply the G&A expense rate based on the total cost of manufacturing, including metal costs. Petitioners hold that Wieland is incorrect in suggesting that the Department should exclude the metal cost from the G&A ratio calculation because purchased metal and tolled metal sales are handled and produced in exactly the same way. According to petitioners, while the factory overhead costs should be very similar between fully manufactured products and tolled products, the G&A expenses incurred for full price sales are much higher as they require additional expenses to manage sales and purchases of metal.

Department's Position:

We agree with petitioners that Wieland's G&A expenses have been properly allocated between its fully manufactured (i.e., Wieland purchases the metal) and tolled products. The record shows and we verified that, due to the uniqueness of its business practices with regard to metal sales and purchases, Wieland devotes significant efforts and resources to managing its metal operations. As petitioners point out, this includes the administrative staff, from the managers overseeing order-specific LME fixation dates, to the managers executing metal hedging policies, the accountants calculating order-specific metal costs, SAP® managers running various metal-related computer reports, and other resources. We note that such expenses are absent for the tolled products, where it is not necessary to manage metal purchases and execute complex hedging operations. Thus, we find it reasonable that the G&A expenses allocated to full price sales exceed those for the tolling sales.

We note that Wieland's reference to the Paper Remand Results in support of its contention is not on point. First, in the Paper Remand Results, Kejriwal, the respondent, had two separate lines of business: paper manufacturing and trading of the newsprint. The Department made various adjustments to the reported G&A expenses and cost of sales so as to allocate a reasonable amount of G&A expenses to the business operations, commensurate with the use of general and administrative resources. Wieland's suggestion to exclude metal costs from the denominator of the G&A ratio to equate the G&A expenses allocated to full price and tolling sales, is akin to Kejriwal's claim to accept their reporting and thereby allocate more G&A expenses to its newsprint trading operation. This claim was denied by the Department because it presupposed that, had Kejriwal actually taken title to the newsprint, it would have incurred no greater G&A expenses than those recorded in the financial statement.

Similarly, in Wieland's case we don't have any information as to the impact on G&A expenses had Wieland handled tolling sales the same way as full price sales (i.e., if it took title to the metal). However, as noted above, we do know that Wieland devotes significant efforts and resources to managing its metal operations, and it is reasonable to assume that, had Wieland taken title to the metal for the tolled sales, it would result in greater G&A expenses. Therefore, for the final results, we continue to calculate and apply the G&A expense rate based on the total cost of manufacturing, including the metal costs.

Comment 4: Whether to make Other Adjustments to the OTHMAT Costs, Fabrication Costs and General and Administrative Expenses

First, petitioners claim that at the cost verification the Department identified, as a methodological discovery, Wieland's estimation of supplier premiums and freight charges. Petitioners make this claim by citing to the cost verification report ("CVR") at 14, where the Department describes how Wieland calculated the reported supplier premiums and freight charges based on the largest daily purchases within each POR month, and assert that Wieland "chose a short-cut" in reporting these costs without seeking approval from the Department. Petitioners further argue that Wieland should have the data for the premiums and freight charges for all purchases, and that data should have been used for the reported premiums and freight costs. Therefore, petitioners suggest that partial adverse facts available should be applied to Wieland's OTHMAT field where these premiums and freight charges have been reported.[6]

Second, petitioners point out that at verification the Department discovered that certain foundry and outside processing costs for products produced by the rolled products division were not included in the reported fabrication costs. The Department noted in the CVR at pages 18 and 19 that the inclusion of the additional foundry and outside processing costs would result in an increase to the reported fabrication costs. Petitioners state that the outside processing costs may be related to the additional step required to achieve a type of business proprietary surface finish, which would affect the U.S. sale's production costs and possibly the costs of any other sales of brass sheet and strip in the home market. Therefore, according to petitioners, the Department should, at a minimum, draw an adverse inference in making the adjustment to the foundry and outside processing costs. Specifically, petitioners suggest that the foundry cost adjustment should be made for all products, while the total additional outside processing costs should be allocated only to products sold in the U.S. and Germany used to produce a specific end use product that is business proprietary. Petitioners further maintain that, as an adverse inference, that increase should be applied to the variable overhead of only the U.S. product, which, according to petitioners, is the sole product known to have incurred these unreported outside processing costs.

Lastly, petitioners argue that the Department should include in the G&A expenses certain items identified during the cost verification that were excluded from the reported cost, but according to petitioners, relate to the general operations of the company as a whole. Specifically, petitioners suggest that the expenses such as "Inventory differences" and "Evaluation amendment for factory supplies and spare parts" should be included in the G&A expenses.

With respect to the premiums and freight charges Wieland notes that its estimation of these charges was not a circumstance discovered at the cost verification, but this methodology was previously applied by Wieland pursuant to the Department's request to report these costs on an actual basis, rather than using Wieland's standard costs. As a result, this information was placed on the record and fully explained by Wieland in its October 5, 2009 supplemental section D response. Thus, according to Wieland, there is no basis for the application of facts available.

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[6] See Cost Calculation Memorandum.

The respondent agrees with petitioners that the excluded foundry and outside processing costs, along with the excluded G&A expenses should be included in the reported costs, but suggests that both the foundry and outside processing costs should be adjusted using the total fabrication costs. Wieland argues that the Department should reject petitioners' suggestion that all of the additional outside processing costs should be allocated to specific end use products that are business proprietary, and further to the single U.S. sale of a like end use product. Wieland maintains that there is no evidence on the record that supports petitioners' speculation that Wieland possibly might not have reported processing costs related to a specific business proprietary type of surface finish for the product sold in the U.S. market, and moreover, that this possible additional processing was accomplished using only outside processing.

Department's Position:

In regard to the argument concerning premiums and freight charges, we disagree with petitioners. As an initial matter, we confirm that Wieland's calculation of supplier premiums and freight charges was not a "methodological discovery" made by the Department at verification, as petitioners claim. As noted above, this information was previously presented and explained by Wieland in its response to the Department's first supplemental section D questionnaire (see Wieland's October 5, 2009 supplemental section D response at 61-62). Further, we note that while relying on estimates was a part of its reporting methodology, in the end, the estimated costs were reconciled to actual through the overall cost reconciliation process.

At verification, we traced information associated with the reported supplier premiums and freight charges to source documents and found no discrepancies. In addition, we found the methodology used to report the supplier premiums and freight charges to be consistent with the narrative response submitted in the supplemental questionnaires. Thus, based on the current record evidence, the Department finds no basis to consider the reporting methodology with regard to its supplier premiums and freight charges to be unreasonable.

With respect to foundry and outside processing costs, we agree with both parties that these costs should be included in Wieland's reported fabrication costs. However, we disagree with the specific adjustments proposed by both petitioners and respondent. First, as noted below in Comment 7, there is no evidence on the record that any specific processing costs used to achieve a certain business proprietary surface finish for the U.S. sale were omitted from the reported costs. Similarly, there is no evidence to indicate that these costs would be incurred only by outside processors. Finally, we note that applying the adjustment only to the business proprietary end use products, as petitioners suggest, would not be possible. The product characteristics defined by the Department do not specifically identify the characteristic in question that would allow the Department to determine the business proprietary end use product. Therefore, we find that the adjustment proposed by petitioners with the application of an adverse inference, is not warranted here.

Further, we disagree in part with the adjustment proposed by Wieland. As stated in our CVR, Wieland demonstrated that the unreported foundry costs were the result of the company not adjusting all costs recorded in the foundry cost centers to reflect the actual costs recorded in the books and records. Thus, we find that the additional unreported foundry costs relate to all products of all Wieland's divisions that use foundry produced products as inputs. However, with regard to unreported outside processing costs, Wieland was unable to identify the amount as specifically related to all products or only to merchandise under consideration. Because it is possible that the entire unreported amount relates only to merchandise under consideration, in accordance with our practice,[7] for the final results, we allocated the unreported outside processing costs only to merchandise under consideration.

Finally, with respect to the excluded G&A expenses we agree with both parties, and for the final results we included those expenses such as "Inventory differences" and "Evaluation amendment for factory supplies and spare parts" in the G&A expenses.

Comment 5: Whether the Department Should Adjust for Fluctuations in Metal Price in its Comparison of Export Price to Normal Value

Wieland argues that limiting price-to-price comparisons to invoice and metal fixation dates within the same month does not does not adequately address the impact of fluctuating LME metal prices present in this case. Wieland believes the solution to this problem lies in adjusting LME metal price differences generated by different metal fixation dates. However, Wieland submits, even after holding the metal premium and fabrication price constant, there could still be an artificial margin created. For example, Wieland notes that the price for the alloy sold in the United States ranges from a low of $ 2,687/MT to a high of $ 3,475/MT. Furthermore, Wieland notes that dumping could be masked if the metal premium and fabrication price for the U.S. sale were lower than the metal premium and fabrication price for the home market match, if the Department does not account for higher LME metal prices. Wieland provides examples of how a margin might be artificially created or masked. See Wieland's case brief at pages 70-72.

Wieland contends that the purpose of the statute is to ensure price differences directly linked to commodity price do not create nor mask dumping margins. See section 773(a) of the Act. In addition, Wieland cites to the Department's Antidumping Duty ("AD") Manual and several cases before the CAFC. Wieland argues that the law is designed to remedy international price discrimination. Furthermore, Wieland asserts that the AD law is not supposed to be punitive, but rather to make fair comparisons. See Fed.-Mogul at 63 F.3d 1572, 1580 (August 28, 1995).

Wieland makes a case that international price discrimination does not result from differences in cost. Moreover, various adjustments are required by the statue, such as for differences in packing costs, movement expense costs, selling expenses, value added after importation, taxes, costs attributable to physical differences, and other differences in the circumstances of sale. In addition, Wieland argues that the statute also requires adjustments which are not cost based, such as for differences in the level of trade. Wieland cites to the Department's AD Manual, at Chapter 6, III, Overview of Adjustments, at page 5, which indicates that the adjustments "make

[7] See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Bar From Italy, 67 FR 3155 (January 23, 2002), and accompanying Issues and Decision Memorandum at Comment 50.

certain that our comparisons are not distorted by factors extraneous to the central issue of price discrimination between markets."

Wieland argues that it passes through to its customers LME prices for copper and zinc, based on the metal fixation date. The metal fixation date directly affects Wieland's cost of production, the value of the brass, and the price to the customer, and thus affects price comparability. Furthermore, Wieland contends that no statutory objective is served by permitting differences in timing of customer metal purchases to inflate or mask dumping margins.

Wieland cites to Fresh Winter Vegetables,[8] where the Department determined that prices change hourly in that industry due to ripeness, perishability, and other factors, which had a significant impact on price comparability. Wieland argues that the Department found that a circumstance of sale adjustment under section 773(a)(4)(B) of the Act (the statute before the 1996 revision) was applicable because of "the fact that different prices prevail at different times within a day represents a circumstance of sale." See Fresh Winter Vegetables at 20516. In that case, Wieland contends that the Department tailored its dumping comparison methodology to the particular circumstances of the industry, to avoid finding dumping as a result of normal price changes.

Next, Wieland argues that the LME metal price movements affect BSS price comparability. Wieland argues that the Department needs to account for the "normal business practice of the industry subject to the investigation." See Seah Steel Corp. v. United States, Slip Op. 10-60 (CIT 2010). Wieland argues that it passes through the daily LME metal price to the customer. Wieland notes that this is shown in correspondence from Wieland to its customer in the U.S. and the correlation between LME metal prices and metal prices to its customers.

Wieland argues that under these circumstances the statute requires an adjustment. Wieland argues that the Department is obligated, under its WTO Antidumping Agreement, to make allowances for difference which affect price comparability. See Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, art. 2.4, 15 April 1994, H.R. Doc. No. 316, 103d Cong., 2d Sess. 1455. Furthermore, Wieland states that provisions in the U.S. antidumping statute which implements the adjustment to normal value ("NV") are at section 773(A)(6)(C)(iii) of the Act. These provisions allow for adjustments based on other differences in the circumstances of sale.

Wieland contends that because the metal fixation date determines the cost for copper and zinc and its price to the customer for the LME-based component of the metal price, metal fixation dates are differences "demonstrated to affect price comparability," "differences in the conditions and terms of sale," and "differences in the circumstances of sale." Therefore, Wieland believes there is a "causal link" between the differences in circumstances of sale and the difference between export price and normal value. See Mantex, Inc. v. United States, 841 F. Supp 1390, 1395 (CIT 1993). Wieland states that the causal link in this review is (1) a near perfect

[8] See Certain Fresh Winter Vegetables From Mexico; Antidumping: Final Determination of Sales at Not Less Than Fair Value, 45 FR 20512 (March 28, 1980) ("Fresh Winter Vegetables").

correlation between there metal prices and LME alloy prices, and (2) the fact that every single home market sale is priced above its LME alloy price on the metal fixation date.

Wieland argues that the Department was incorrect to conclude in its Preliminary Results that circumstances of sale adjustments are limited to direct selling expenses. See Preliminary Results at 18804. Wieland argues that because it typically sells BSS on a tolled basis, metal is not a necessary production expense. Wieland contends that its metal costs bear a direct relationship, in accordance with 19 CFR 351.410(c), and, in fact qualify as a direct selling expenses for purposes of the COS regulation. Wieland reiterates, as in Fresh Winter Vegetables, "This factor clearly is directly related to the sales under consideration."

Wieland also cites to Amended Final Determination of Sales at Less Than Fair Value and Amended Antidumping Duty Order; Tubeless Steel Disc Wheel from Brazil, 53 FR 34566 (September 7, 1988) ("Tubeless Steel Disc Wheel"), where the Department made a COS adjustment to eliminate a distortion resulting from hyperinflation, similar to the request to eliminate a distortion related to metal price deflation over the POR. Wieland notes that the COS adjustment based on replacement costs hardly reflect a direct expense much less a selling expense. Wieland highlights the Department's comment that it "achieved a correct and fair result" with its circumstance of sale adjustment. See Tubeless Steel Disc Wheel at 34567.

Wieland contends that the CIT confirmed that the Department has broad discretion to employ a circumstance of sale adjustment. See Budd Co. v. United States, 746 F. Supp. 1093, 1098 (CIT 1990) ("Budd Co."). Wieland states that the CIT noted that the statute does not define the term "circumstances of sale" and that the Department is required to make a fair comparison. Therefore, the Court agreed that a COS adjustment was appropriate "to address a conflict between the comparison of foreign market value, calculated monthly by using constructed value as of the date of shipment, and the United States price calculated as of the date of sale, in order to effect a contemporaneous comparison of the two values in this case." Wieland further argues that the Court in Budd Co. recognized that finding a LTFV margin resulting solely from a factor beyond the control of the exporter would be unfair. See Budd Co. at 1100. Likewise, Wieland asserts that it is not fair to either mask or create a margin based on the fact the Wieland had different costs and different values on different dates.

Wieland contends that the Department's decision not to recognize metal price volatility and metal price deflation as a "direct selling expense" is too narrow of a construction of the COS provision. First, different terms in a statue must be construed to have different meanings. Wieland states that if Congress wanted to limit an adjustment, such as COS then it would have referred only to selling expenses. Second, Wieland asserts that the reference to quantity difference and physical differences suggest that the use of the word "other" in section 773(a)(6)(C)(iii) of the Act indicates that Congress did not intend for the Department to limit COS to selling expenses. Wieland argues that the word "other" is not insignificant. See Duncan v. Walker, 533 U.S. 167, 174 (2001) ("Duncan"). Third, Wieland contends that the Department's construction of COS is inconsistent with U.S. international legal obligations. Wieland states that the Department must provide adjustments for all difference "which affect price comparability." Wieland contends that since there is no express Congressional language to the contrary, the Department must make a COS and cannot be limited only to "selling expenses." See Fed.-Mogul, 63 F.3d at 1581 (August 28, 1995). Fourth, Wieland argues that the legislative history of the COS provision does not indicate Congress intended to cover only selling expenses. However, Congress intended for the Department to make COS adjustments for direct expenses but not necessarily selling expenses. See Consumer Prods. Div., SCM Corp. v. Silver Reed Am., Inc., 753 F.2d 1033 (January 28, 1985) ("Consumer Prods. Div., SCM Corp.")

Wieland argues that should the Department not make a COS adjustment, the Department still has the authority to ensure a fair comparison. Wieland cites Smith-Corona Group v. United States, 713 F.2d 1568, 1578-79 (CAFC 1983) ("Smith-Corona Group"), when the Court upheld the Department's decision to apply an ESP offset (now referred to as a CEP offset), without express legislative authorization. Wieland asserts that the Court determined that it was within the Department's discretion to make an adjustment to administer the statue fairly.

Wieland notes that it provided the Department with all data necessary for the Department to compute a COS adjustment or other adjustment for differences in prices resulting from differences in metal cost and value on different metal fixation dates. Wieland argues that both U.S. and home market values are affected by the metal fixation date, because that date determines both the cost and value of the copper and zinc in the alloy sold to the customer on that date. Wieland cites 19 CFR 351.410 of the Department's regulations which state, "the Secretary normally will consider the cost of such difference to the exporter or producer but, if appropriate, may also consider the effect of such difference on the market value of the merchandise." Wieland notes that the appropriate adjustment is to subtract this difference from NV, such that NV is increased to the extent metal costs and values are higher on the metal fixation date of the U.S. sale, and decreased to the extent they are higher on the metal fixation date of the U.S. sale, and decreased to the extent they are higher on the metal fixation date of the home market sale.

Finally, Wieland argues that if the Department uses daily metal costs and makes an adjustment for price differences, the Department should not limit its price-to-price comparisons to sales with both a date of sale and a metal fixation date in the same quarter. However, if the Department makes no COS adjustment or other adjustment, Wieland argues that the Department should, at least, limit its price-to-price comparisons to matches with identical metal fixation dates.

Petitioners argue that the Department should reject Wieland's request to broaden the definition of COS under 19 CFR 351.410(c) to include Wieland's metal costs as a direct selling expense. Petitioners contend that Wieland's argument that quantity differences and physical differences should be considered a COS, as well as other selling expenses, is incorrect. Petitioners reason that section 773(a)(6)(C)(iii) of the Act excludes the adjustments already accounted for under subsections (i) and (ii). Further, petitioners argue that Wieland recognizes that it wants a novel adjustment which is not permitted by statute. See Wieland's Case Brief at pages 83-85.

Next, petitioners contend that Wieland's concern that the use of daily LME metal costs will not be properly reflected in its reported DIFMER data is only operative if the Department calculates costs on a daily basis. Petitioners note that no two sales made on different dates in any periods will ever necessarily have the same costs, even two sales of identical merchandise sold one day apart by metal fixation date, and even sales ordered and invoiced on the same day. Petitioners argue that Wieland's concerns are moot if the Department defines one weighted-average COP by CONNUM.

Further, petitioners argue that the Department should consider the premium for the metal it charges to its customers when Wieland argues that a COS adjustment should be made. Petitioners cite to Wieland's case brief which states that "Wieland always passes through to its customer the LME price (for the copper and zinc alloy sold) in full plus a premium." In addition, petitioners cite to the proprietary version of Wieland's case brief at 16 n. 22, which further describes the elements covered by the premium. Petitioners state that given the premium, Wieland can dump on the value of a U.S. sale just as it can dump on the fabrication value of a U.S. sale relative to Wieland's sales in the German home market. Finally, petitioners argue that the metal is not a complete pass through and dumping can result from the negotiated premium.

Department's Position:

(Due to the proprietary nature of certain information referred to by the Department in its position, we have placed the full business proprietary version of the Department's position on this issue in the Memorandum from Dennis McClure through James Terpstra to The File, titled "Sales Analysis Memorandum for the Final Results – Wieland-Werke AG", dated October 12, 2010 ("Sales Analysis Memorandum")).

The Department agrees that, considering the unique fact pattern presented by this case, an adjustment is necessary. However, the Department does not believe that it is appropriate to make a circumstance of sale adjustment using the LME metal prices. In the Preliminary Results, we limited matches of the export price to comparisons to invoice and metal fixation dates within the same month. After further review, we have refined our comparison methodology to completely account for the fluctuation in metal prices.

In most cases, the Department would make adjustments to both the export price and normal value for adjustments to packing costs, movement costs, duty costs, selling expenses, value added importation, costs attributable to physical differences, and other differences in circumstances of sale. See sections 772 and 773 of the Act. However, this is a unique case. Wieland fully passes through to its customers the LME metal prices for copper and zinc in the alloy purchased, based on the metal fixation date. In fact, we agree with Wieland that, under these circumstances, the daily fluctuation of the LME metal prices should be taken into account.

We agree that the Department has made circumstance of sale adjustments in certain instances where a particular and unique business practice merited such an adjustment in cases such as, Fresh Winter Vegetables, Tubeless Steel Disc Wheel, and Budd Co. However, as Wieland explains, the CIT noted that the statute did not define the term "circumstances of sale." In the revised regulations to the updated statute, the Department clearly defines circumstance of sale. Section 19 CFR 351.410 of the regulations states that circumstances of sale adjustments under section 773(a)(6)(C)(iii) of the Act are made only for direct selling expenses and assumed expenses, except for commissions paid only in one market. Furthermore, the regulations define direct selling expenses as "expenses, such as commissions, credit expenses, guarantees, and warranties." An assumed expense is a selling expense that is assumed by the seller on behalf of the buyer, such as advertising expenses.

Moreover, the SAA at 828 states, "Thus, Commerce will continue to employ the circumstance-of-sale adjustment to adjust for differences in direct expenses *and differences in selling expenses* of the purchaser assumed by the foreign seller, between normal value and both export price and constructed export price" (Emphasis added). Furthermore, in the Preamble to the Regulations, the Department notes, "we failed to connect the definitions of "direct selling" and "assumed expenses" in paragraphs (b) and (c) to the COS adjustment itself. Therefore we have revised this section . . . " See Antidumping Duties; Countervailing Duties: Final Rule, 27368 (May 19, 1997) and section 351.410 of the Act. Therefore, the Department clearly intends to make circumstance of sale adjustments for direct selling expenses and assumed expenses.

Although the Court has allowed for considerable deference in the Department making circumstance of sale adjustments, in cases such as Duncan, Fed.-Mogul, and Consumer Prods. Div., SCM Corp., the LME metal price is simply not a direct selling expense or assumed expense. However, as noted by Wieland, the Department has the inherent authority to ensure a fair comparison such that its methodology accurately measures price discrimination. See Smith-Corona Group. Therefore, the unique circumstances of this case call for the Department to account for the daily fluctuation in metal prices. Moreover, as noted in Comment 1 above, because of the risk associated with the fluctuating metal prices, Wieland has developed a business model where they go to great lengths in the normal course of business to eliminate all risk associated with the metal fluctuations. If the Department does not account for the metal fluctuation, then export price is likely to match to a comparison market sale with a different metal fixation date which would have different metal prices.

In this particular case, Wieland provided information in its sales databases which enables the Department to match export price to comparison market price using variables specific to the metal and the date in which the metal price was fixed for each respective sale. Therefore, given the specific facts of this case, we have determined that the application of this matching methodology allows for a fair comparison because on any given metal fixation date, the LME metal prices are always constant depending on the mix of copper and zinc.[9]

[9] For further discussion on the methodology applied by the Department, see the Sales Analysis Memorandum, dated October 12, 2010, on file in the CRU.

Comment 6: Whether the Department Should Exclude Samples and Trial Shipments from its Antidumping Analysis

Wieland argues that the Department should exclude all sample and trial shipments from its analysis. Wieland explains that it did not charge customers for samples shipments. Wieland argues that its samples do not constitute a sale and only prices associated with actual sales can be used to compute NV and EP. See NSK Ltd. v. United States, 115 F.3d 365 (CAFC 1997). In addition, Wieland argues that trial shipments do not constitute sales made in the ordinary course of trade. These trial shipments are pulled from other production lots so that the customer can test a new material before initiating normal purchases. Wieland notes that a metal fixation date is not registered and frequently no separate metal price is recorded.

More specifically, Wieland explains that the Department examined a trial shipment at verification at sales verification exhibits S-1 and S-10a. Wieland notes that the sales documentation indicates that it provided the requested samples for a lump sum price. Moreover, the transaction did not have separately recorded metal and fabrication prices. Therefore, trial shipments such as this should be excluded from the dumping analysis because it is not made in the ordinary course of trade. Wieland asserts that the purpose of the ordinary course of trade provision is to avoid a calculation of normal value and dumping margins that is based on sales that are not representative of the market in question. See U.S. Steel Group v. United States, 177 F. Supp. 2d 1325, 1332 (CIT 2001).

Petitioners argue that the Department may exclude trial or sample sales as long as there is no compensation or there are other attributes that identify them as made outside the ordinary course of trade. Petitioners contend that the Department must make sure trial or sample sales are not made in conjunction with other transactions.

Department's Position:

We agree with Wieland and have excluded the sample sales as we did in our calculation for the Preliminary Results. In addition, we have excluded Wieland's reported trial sales based on the results of the Department's sales verification. We find the both the sample and trial sales were not made in the ordinary course of trade as defined by the Act. The term "ordinary course of trade" means the conditions and practices which, for a reasonable time prior to the exportation of the subject merchandise, have been normal in the trade under consideration with respect to merchandise of the same class or kind. See section 771(15) of the Act.

More specifically, there is no metal or fabrication price associated with any of Wieland's reported sample sales in its database. As for the reported trial shipments, we note that the Department further reviewed one of Wieland's reported trial shipments at verification. See Sales Verification Exhibits S-1 and S-10a. We reviewed an e-mail from Wieland to the customer which indicated that it would provide a sample for a lump sum. Furthermore, we note that this transaction did not have separately recorded metal and fabrication prices following Wieland's normal practice. As a result, we find that this type of transaction was made outside the ordinary course of trade. Therefore, we are excluding both sample and trial sales from the home market sales database. In regards to petitioners' comment concerning the bona fide nature of the U.S. sale, we have addressed this issue in Comment 8.

Comment 7: Whether Facts Available Should be Applied

Petitioners argue that under the protocol set by the antidumping law, Wieland should be deemed an uncooperative respondent that not only has not put forth its maximum effort to be responsive to the Department's requests for information, but that instead, in the interest of unjustifiably achieving a zero dumping margin for itself, has presented incomplete cost data especially that preclude accurate dumping calculations by the Department. Per 19 U.S.C. § 1677e, having been given every opportunity to submit accurate and complete information, petitioners argue that the Department should find Wieland's data to be unusable.

Petitioners state that the gaps in Wieland's data are extensive, bearing on major and critical aspects of the dumping equation, including the selection of the best home market sale or sales for normal value, the cost of production, and adjustments for differences in the physical characteristics of the U.S. and home market sales. Petitioners argue that the inadequacy of the record compiled by Wieland is so great as to call for recourse to total facts otherwise available. Moreover, petitioners assert that an adverse inference should be drawn, because the evidence in the administrative record, particularly the e-mails discovered by the Department at verification,[10] underscore that Wieland failed to cooperate to the best of its ability with the Department's review. Based on these arguments, petitioners argue that the current cash deposit rate of 16.18 percent ad valorem should be assigned to Wieland in this review.

Wieland rebuts petitioners' arguments stating that, there was no failure to provide requested information. Wieland asserts that the Department nowhere requested the specific information[11] which serves as the basis for petitioners' allegation. Wieland contends that the Department did not identify this either as a product matching characteristic in its questionnaire and asserts that the Department never requested that Wieland provide information concerning any such characteristics of its U.S. sale or of any home market sale. Furthermore, Wieland states that petitioners did not argue anywhere that the presence or absence of this particular information should be taken into account as matching characteristics, nor do they do so now. Wieland states that petitioners cannot point to any single question in which Wieland failed to provide requested information.

Next, Wieland disagrees with petitioners' arguments which claim that Wieland might not have reported processing costs associated with the information presented in petitioners' allegation, and, thus, impeding the Department's ability to compute an accurate difference-in-merchandise adjustment ("DIFMER"). Wieland rebuts this argument, stating that its cost data were reported

[10] See petitioner's case brief at 2-6.

[11] The information which serves as the basis for petitioners' allegation is considered business proprietary information ("BPI").

correctly, as the Department verified. Wieland argues that petitioners' argument is based on speculation.

Wieland contends that petitioners arguments are irrelevant, stating that the information alleged by petitioners has not been treated in this case as a product matching characteristic. Wieland argues that it is neither possible nor has appropriate to apply a DIFMER for differences in these characteristics, even where they exist. Citing the Department's July 22, 2010 Cost Verification Report, Wieland argues that petitioners' arguments are contradicted because the Department verified Wieland's submitted cost data. Specifically, Wieland claims that the Department both reconciled Wieland's reported fabrication costs to its audited financial statements, and it verified Wieland's reported unit costs, including per unit metal and fabrication costs, for the U.S. sale at issue. Wieland states that its fabrication costs were verified, and the only discrepancies noted are not relevant to petitioners' argument.

Department's Position:

We agree with Wieland and find that facts available are not warranted in the instant case. During the cost verification, the Department confirmed that its cost data were correctly reported. Specifically, the Department verified Wieland's reported unit metal and fabrication costs and reconciled Wieland's reported fabrication costs to its audited financial statements. Petitioners have speculated that certain costs should have been reported by Wieland. See comment 4 above. Based on Wieland's reporting of its cost and the Department's verification of this information, we find that Wieland fully accounted for its cost. In addition, for the reasons outlined in the comment below, we find that Wieland's U.S. sale was bona fide. Therefore, we do not find that facts available are required for the instant review.

Comment 8:   Whether Wieland's U.S. Sale is Bona Fide

Petitioners argue that Wieland has made an extraordinary effort to ensure, through manipulation rather than normal commercial activity with a large number of sales in substantial quantities in both markets and with all costs recognized, that its single U.S. sale during the POR will not be found to have been dumped. Petitioners assert that this extraordinary effort taken by Wieland has entailed a number of steps that should result in adverse facts available and a continuation of Wieland's current dumping margin of 16.18 percent. Petitioners argue that, if the Department decides against this outcome, petitioners assert that Wieland's U.S. sale should be seen as having not been bona fide. Although the Department rejected this conclusion in the Preliminary Results, petitioners argue that additional information gathered by the Department at verification reinforces that Wieland's U.S. sale was not commercially reasonable and was atypical and unrepresentative of the normal business practices of Wieland and its U.S. customer. As a result, no dumping margin should be computed for this aberrational U.S. sale, this administrative review should be rescinded, and Wieland's present dumping margin of 16.18 percent ad valorem should remain in place.

Petitioners reference the legal standard for evaluating whether a U.S. Sale is bona fide.

Specifically, to determine whether a sale in a review is "unrepresentative or extremely distortive," and therefore excludable as non-bona fide, the Department employs a totality of the circumstances test. In examining the totality of the circumstances, the Department examines whether the transaction is "commercially unreasonable" or "atypical." Atypical or nontypical in this context means unrepresentative of a normal business practice.

Petitioners state that, in evaluating whether or not a sale is bona fide, the Department considers, inter alia, such factors as (1) the timing of the sale; (2) the price and quantity; (3) the expenses arising from the transaction; (4) whether the goods were resold at a profit; and (5) whether the transaction was made on an arms-length {sic} basis. See petitioners' case brief at 13 in which petitioner's cite a number of cases which discuss the Department's bona fide analysis, including Crawfish from the PRC. Petitioners state that the bona fide analysis looks at the totality of the circumstances and the parties' normal selling practices in order to determine whether the U.S. sale is commercially reasonable or atypical, unrepresentative, or extremely distortive. Based on the totality of the circumstances, petitioners assert that there is substantial evidence in the record as a whole supporting the conclusion that Wieland's U.S. Sale was not bona fide.

Petitioners ask that the Department consider the information on the record and obtained at verification and conclude in the final results that Wieland's lone U.S. sale during the POR was not bona fide. Petitioners reference data from the original antidumping investigation of this case to show the trends in volumes previously shipped from Germany. Specifically, petitioners show that, in contrast to Wieland's single U.S. sale to its U.S. customer during the POR, imports of brass sheet and strip from Germany during the POR covered by the original investigation of the U.S. International Trade Commission's ("ITC") were 51.8 million pounds in 1983, 69.5 million pounds in 1984, 48.9 million pounds in 1985, and 34.1 million pounds in the first three quarters of 1986. The ITC noted that it was believed nearly all of these imports taken from the U.S. Census Bureau's records consisted of C.D.A. 200-series subject brass sheet and strip. See Excerpts from U.S. ITC Publication 1987 (Feb. 1987), at A-48 n.1 and A-49, at Attachment 2 of Petitioner's Case Brief, dated August 6, 2010. Petitioners believe that a great part of these volumes from Germany was attributable to Wieland.

Wieland rebuts petitioners' arguments, stating that the Department examined petitioners' arguments in this regard in its Preliminary Results, and properly rejected them. Wieland states that petitioners' arguments lack merit, therefore, Wieland asserts that the Department should continue to treat Wieland's U.S. sale as a bona fide sale.

Citing Silicon Metal from Brazil,[12] Wieland argues that "the Department only disregards U.S. sales in exceptional circumstances where the sale is commercially unreasonable and other facts and circumstances indicate an attempt to manipulate the dumping margin." Wieland addresses the content of the e-mails[13] and contends that there is nothing that indicates that Wieland's U.S.

[12] See Silicon Metal from Brazil: Notice of Final Results of Antidumping Duty Administrative Review, 64 FR 6305, 6317 (February 9, 1999) (LIASA Comment 1).

[13] The information contained in the e-mails reviewed at verification is considered business proprietary information ("BPI"). See Verification of the Sales Response of Wieland-Werke A.G. in the Antidumping Review of Brass Sheet and Strip from Germany at 9-11 and Verification Exhibit ("VE") S-18.

sales transaction was commercially unreasonable. Further, Wieland states that it is not commercially unreasonable for Wieland to consult with an antidumping attorney prior to resuming U.S. sales of a product subject to an antidumping order. Wieland states that one could argue that the converse would be commercially unreasonable.

Wieland addresses the contents of another e-mail examined and collected during verification. Wieland states that the procedures referenced therein were designed to ensure that 1) Wieland did not repeat the problem it had in an early BSS shipment, in which Wieland Metals was involved, but where Wieland Metals initially neglected to declare the importation subject to, and pay, antidumping duty cash deposits,[14] and to (2) to minimize potential antidumping liability by engaging only in EP transactions, where Wieland Metals was adding no value to the product. Wieland argues that both steps are commercially reasonable, and serve legitimate business purposes. Wieland states that petitioners misapprehend the very purpose of the bona fide test in contending that Wieland never would have gone through all of these steps but for the antidumping order.

Wieland argues that it took specific steps to avoid dumping, after the antidumping order was put in place and Wieland argues that is what the U.S. antidumping law, with its retrospective duty assessment schemes, is intended to accomplish. Wieland states that the bona fide test does not examine whether a transaction was structured so as to minimize potential dumping liability. Rather, the test is whether any significant aspect of the transactions had no legitimate, commercial purpose.

Contrary to petitioners' argument, Wieland states that it is neither unusual nor unreasonable, for example, for the producer to become the U.S. importer of record for merchandise subject to an antidumping order. Wieland asserts that customers, particularly those not in the business of importing and distributing, are unwilling to accept the contingent liability for antidumping duties. Wieland states that the Department has itself reviewed numerous cases in which the producer established itself as the importer of record for products covered by AD or CVD orders, and which it has found to be legitimate.

Wieland addresses petitioners' assertion that Wieland's one U.S. sale was for an atypically small volume. Wieland argues that the Department has addressed and rejected this argument previously. Citing Crawfish from the PRC, Wieland states that the "Department practice provides that the size of a transaction is not sufficient, in and of itself, to warrant a finding that the transaction is not bona fide."[15] Citing CTL Steel from Romania, Wieland states that "{s}ingle sales, even those involving small quantities, are not inherently commercially unreasonable and do not necessarily involve selling practices atypical of the parties' normal selling practices."[16]

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[14] Wieland Metals ultimately filed a prior disclosure with CBP and paid the duty deposits. See Wieland December23, 2009 Response at SSAC-7 and Annex SSACA.

[15] See Freshwater Crawfish Tail Meat from the People's Republic of China; Notice of Final Results of Antidumping Duty New Shipper Review, and Final Rescission of Antidumping Duty New Shipper Review, 68 FR 1439 (January 10, 2003), and accompanying Issues and Decision Memorandum at Comment 1 ("Crawfish from the PRC").

[16] See Certain Cut-to-Length Carbon Steel Plate From Romania: Notice of Rescission of Antidumping Duty Administrative Review, 63 FR 47234 (September 4, 1998) ("CTL Plate from Romania").

Further, citing Pistachios from Iran, Wieland argues that the Department correctly reasons that a company's "decision to order small quantities in order to limit its exposure to high dumping liabilities, {is a} commercially reasonable business decision."[17] This is particularly true here given the over 16 percent cash deposit rate in effect during the POR, and the uncertainty as to even how the Department would measure dumping, in light of the fundamental methodological issues in dispute. Wieland contends that there is no statute, regulation, or Department practice supporting petitioners' argument that reviews can only be conducted where a respondent exports to the United States quantities matching those it exported in decades past.

In short, Wieland argues that petitioners have failed to identify any aspect of Wieland's U.S. sales transaction that was commercially unreasonable and not undertaken for legitimate business reasons. Thus, Wieland argues that the Department should reject the argument that its U.S. sale was not a bona fide sale.

Department's Position:

We disagree with petitioners and decline to exclude Wieland's U.S. sale. There is insufficient evidence on the record to warrant exclusion of this sale. First, the Department verified Wieland and found no discrepancies with the information the company reported regarding its U.S. sale. The quantity and value information ("Q&V") were verified by the Department and, based on the Department's review of U.S. import data, we found that the Q&V was consistent with the range of imports. Specifically, in the Preliminary Results, the Department examined the U.S. import data for the respective in-scope U.S. Harmonized Tariff Schedule ("USHTS") categories.[18] We note that the scope of this antidumping duty order includes basket USHTS categories which may include a wide range of disparate products; therefore, we find that it is not a reliable indicator of specific average unit values for the merchandise in question. In certain cases, the Department has specific shipment data which allows for a more accurate bona fide analysis and comparison to a normal pattern or range of import values. In contrast, in the instant case, there is no clear identification of subject merchandise with which we can compare to Wieland's U.S. sale transaction. Because the import data is the only data available, we have examined the pricing patterns and trends of such imports for the POR. Based on our analysis of this data we do not find that Wieland's U.S. sale falls outside the range of quantities or values reported by the U.S. import data.[19] As stated in the analysis memorandum from the Preliminary Results, "{b}ased on the data on the record of this review, we find that Wieland's U.S. does not fall outside the general range of transactions reported in the import data. Moreover, we find no reasonable basis for rejecting the sale."[20]

Petitioners have argued that Wieland's U.S. sale was not commercially reasonable, and was atypical of its normal business practices of Wieland and its U.S. customer. The Department has

[17] See Final Results of Antidumping Duty Administrative Review: Certain In-Shell Raw Pistachios from Iran, 70 FR 7470 (February 14, 2005), accompanying Issues and Decisions Memorandum at Comment 3.
[18] See "Analysis Memorandum for Wieland-Werke AG," dated April 7, 2010.
[19] The U.S. import data was collected from the U.S. International Trade Commission ("USITC") website, which compiles the import data from the U.S. Census Bureau.
[20] See "Analysis Memorandum for Wieland-Werke AG," dated April 7, 2010 at 3.

examined the totality of the circumstances but does not find any specific information that would lead to a change in our conclusion that this sale is a bona fide transaction. Wieland has a U.S. subsidiary, Wieland Metals, which it has previously used in its sales to the United States. In the instant case, Wieland structured its U.S. sale as an export price ("EP") sale transaction. We find that making EP sales, in and of itself, is contemplated and permitted by the antidumping duty ("AD") law, and does not indicate that a sale is not bona fide.

With respect to the ITC import data provided by petitioners, we find that such data is indicative of prior shipments before and during the POI. The quantity of Wieland's U.S. sale is within the range of quantities for other sales that we examined; therefore, the quantity does not contradict that it is bona fide.[21]

Petitioners have also alleged that the e-mails reviewed and collected at verification, which contain BPI, call into question the commercial reasonableness of Wieland's U.S. sale. However, petitioners have not identified any record evidence or presented any persuasive arguments that the U.S. transaction, a transaction between two unaffiliated parties, is not bona fide. Wieland addressed the issues affecting its U.S. sale quantity and price, stating: "In Wieland's case, {Wieland-Werke AG} ("WWAG") has the specialized equipment and expertise to produce subject brass that meets very specific customer requirements for surface finish, physical tolerances, and other properties that neither Wieland-Metals nor any U.S. producer can meet."[22] Wieland also stated that "Wieland brass offers unsurpassed deep drawability characteristics due to metal uniformity, which enables product designs currently not attainable in the United States. Deep draw characteristics are valued by those customers that use BSS in applications requiring drawings. WWAG also can produce a surface finish whose average roughness and deviation are less than any other producer in the world. It is able to do so through a combination of expertise, equipment, and rolling speed. The smoother finish enables certain customers to eliminate secondary operations like buffing, and better suits certain decorative applications. These higher quality products can command a price premium in the U.S. market, because they are not available from U.S. producers, as the customers for whom these particularly characteristics are significant can run their manufacturing operations more efficiently using WWAG material."[23]

With respect to the U.S. customer for the sale at issue, Wieland reported that it has had a long-standing relationship. In fact, Wieland has stated "WWAG sold WWAG-produced BSS directly to this customer. After 1996/97, WWAG ceased selling German-produced BSS to the United States, to any customer, and introduced this customer to Wieland Metals as a source of supply for U.S.-origin BSS. WWAG then ceased any direct contact with the customer. Beginning around 1997, and continuing through the present, the customer has purchased BSS from Wieland Metals on a regular basis, produced using U.S. origin BSS."[24]

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[21] See Crawfish from the PRC, and accompanying Issues and Decision Memorandum at Comment 1; see also CTL Plate from Romania.
[22] See Wieland's Second Supplemental Questionnaire Response, dated December 23, 2009, at SSAC-7.
[23] Id. at SSAC-8.
[24] Id. at SSAC-5.

Based on the record evidence, we find that Wieland made this U.S. sale to a legitimate customer at a quantity and value that was not outside the range of other transactions contained in the import data reviewed by the Department. We also find the quantity of Wieland's U.S. sale falls within the range of quantities reported in Wieland's comparison market for sales transactions of similar merchandise. In addition, petitioners' arguments do not support a finding that Wieland's U.S. sale was commercially unreasonable. Moreover, based on our review of the totality of the circumstances, we find that the Wieland's business practices, the features of the U.S. sale in question, and the price of the sale support the conclusion that Wieland's U.S. sale was a legitimate sales transaction. Therefore, consistent with the Preliminary Results, we have treated Wieland's U.S. sale as a bona fide, arm's-length transaction.

Comment 9: Whether to Make a Finding of Reimbursement of Antidumping Duties

Petitioners assert that there needs to be a downward adjustment to U.S. price in the amount of any dumping margin found for Wieland on its one U.S. sale under the Department's regulations dealing with reimbursement of antidumping duties. Petitioners cite to the Preliminary Results, in which the Department rejected petitioners' request that a finding of reimbursement of antidumping duties be made with respect to Wieland.[25]

Petitioners reference this position, stating that the Department's decision is based on its interpretation of this regulation as requiring that two separate corporate entities must exist to invoke the reimbursement regulation, and that Wieland as both the exporter and importer is only one corporate entity, not two corporate entities. Id. Petitioners request that the Department reconsider this approach and outcome.

Petitioners state that the operative part of the regulation states, as relevant, "In calculating the export price (or the constructed export price), the Secretary will deduct the amount of any antidumping duty ... which the exporter or producer: (A) Paid directly on behalf of the importer...." 19 C.F.R. § 351.402(f)(1)(i)(A). Petitioners assert that this portion of the regulation is to be distinguished from section 351.402(f)(1)(i)(B), which concerns the situation in which the producer or exporter reimburses the importer.

Petitioners state that it can understand how section 351.402(f)(1)(i)(B) lends itself to being read to mean that there must be two parties involved in that section's situation, because the producer or exporter must reimburse the importer. This language signifies that the importer first pays the antidumping duty and then is paid and made whole by the producer or exporter for that expenditure. In this circumstance, the importer is a different party than the producer or exporter. However, petitioners assert that, under section 351.402(f)(1)(i)(A), as the producer and exporter and importer of record of the one U.S. sale, Wieland certainly posted the cash deposit of estimated antidumping duties and will be looked to by U.S. Customs to pay any antidumping duties owed. Petitioners argue that there could not be a payment that could be made more directly by the producer or exporter to the importer than Wieland's to itself as the producer, exporter, and importer. Moreover, if section 351.402(f)(1)(i)(A) is construed to have the same meaning as section 351.402(f)(1)(i)(B) and require different parties (or, alternatively, if

[25] See Preliminary Results, 75 FR at 18801.

somehow the two sections are construed as requiring the same party), then petitioners argue that there is an impermissible redundancy in the regulations.

Petitioners argue that it is important to review why this regulation exists. Petitioners state the party which pays the antidumping duty is a critical aspect of the antidumping law's effective enforcement. Petitioners assert that if it is allowed to pay any antidumping duty owed on Wieland's one U.S. sale during the POR, Wieland will have succeeded in shielding its U.S. customer for the sale at issue from being out of pocket for those antidumping duties. In that case, petitioners argue that Wieland will have thwarted the congressional purpose of having the real importer (i.e., the first unaffiliated U.S. customer of the subject merchandise) not advantaged by being able to buy dumped merchandise subject to the antidumping duty order. Furthermore, petitioners state that, from the vantage of Wieland's U.S. customer as the unaffiliated U.S. buyer, there is absolutely no incentive not to import dumped, injurious subject merchandise as long as Wieland itself pays the antidumping duty and thereby increases the extent of its dumping. Petitioners argue that this result is contrary to the antidumping statute and request that, in its final results the Department find that there needs to be a downward adjustment to U.S. price in the amount of any dumping margin found for Wieland on its one U.S. sale.

Wieland rebuts petitioners' argument, stating that it has no basis in fact or law, and contradicts established Department precedent. Wieland states that, to find reimbursement, the Department must have evidence that "the exporter or producer" paid antidumping ("AD") duties directly "on behalf of the importer," or "{r}eimbursed to the importer." See 19 C.F.R. § 351.402(f). Wieland asserts that nothing of the kind exists.

First, Wieland argues that WWAG would not violate the anti-reimbursement regulation, even if it had paid antidumping duties on the U.S. sale, which it has not done. This is because WWAG cannot reimburse itself. Since 1998, it has been the Department's consistent practice to construe the anti-reimbursement regulation as applying only where the "importer" and the "producer or exporter" are two separate corporate entities. See Notice of Final Results of Fourth Antidumping Duty Administrative Review: Certain Polyester Staple Fiber from the Republic of Korea, 70 FR 73435 (December 12, 2005), and accompanying Issues and Decision Memorandum at Comment 2 ("the reimbursement rule does not apply when the importer and foreign producer are the same entity."); Structural Steel Beams From the Republic of Korea for the Period of Review February 11, 2000, through July 31, 2001 68 FR 2499 (January 17, 2003), and accompanying Issues and Decisions Memorandum at Comment 2 ("The Department has stated in several cases that when the importer and exporter are the same entity, the reimbursement rule does not apply."); Certain Preserved Mushrooms From India: Final Results of Antidumping Duty Administrative Review, 67 FR 46172 (July 12, 2002) ("In numerous cases, the Department has held that reimbursement within the meaning of the regulation does not occur when the importer and exporter are the same legal entity."); Certain Welded Carbon Steel Pipes and Tubes From Thai/and: Final Results of Antidumping Duty Administrative Review, 65 FR 60910 (October 13, 2000), and accompanying "Issues and Decision Memorandum" at Comment 9; Certain-Cold-rolled Carbon Steel Flat Products from the Netherlands: Final Results of Antidumping Duty Administrative Review, 64 FR 11825, 11833 (March 10, 1999)(Comment 10) ("we disagree with petitioners that the reimbursement regulation is applicable where the importer and exporter are the same corporate entity. Our decision as to reimbursement is based upon our regulatory interpretation. . . which is that two separate corporate entities must exist in order for the Department to invoke the reimbursement regulation."); Circular Welded Non-Alloy Steel Pipe and Tube from Mexico; Final Results of Antidumping Duty Administrative Review, 63 FR 33041, 33044 (June 17,1998). Here, WWAG was both the exporter and the importer and, thus, cannot reimburse itself.

Wieland argues that this construction of the regulation, does not, as petitioners argue, create any redundancy between subsections (A) and (B) of the regulation. See Petitioners' Brief at 24. Subsection (A) defines reimbursement as occurring when the exporter or producer pays directly antidumping duties on behalf of the importer. 19 CFR § 351.402(f)(1)(i)(A). Subsection (B) defines reimbursement as occurring when the exporter or producer reimburses to the importer antidumping duties that the importer itself has paid. 19 CFR § 351.402(f)(1)(i)(B). There is no redundancy at all in requiring, under both provisions that reimbursement can only occur when the importer and exporter are distinct entities.

Second, there has been no payment by anyone of any antidumping duties regarding this sale. The Department has preliminarily found that no duties are owed, and there certainly has been no antidumping duty assessment. Thus, no one has paid antidumping duties, and no "exporter or producer" much less paid them on behalf of a separate and distinct "importer." As the Department has previously ruled, the regulation does not apply to the payment of antidumping duty cash deposits. See e.g., Notice of Final Determination of Sales at Less Than Fair Value: Live Cattle from Canada, 64 FR 56739, 56741 (Oct. 21, 1999); Certain Iron Construction Castings from Brazil: Final Results of Antidumping Duty Administrative Review, 55 FR 26238, 26238 (June 27, 1990).

Contrary to petitioners' argument, the law has worked as intended. Wieland charged its unaffiliated U.S. customer a price higher than it charged its home market customer for a comparable sale around the same time. If it had not done so, WWAG, as the importer, and the responsible party, would owe antidumping duties. That is precisely how Congress intended the statute to function. There is nothing in the statute to support petitioners' assertion, without citation, of any "congressional purpose" to ensure that the first unaffiliated U.S. customer be the one to pay any antidumping duties owed. To the contrary, Congress provided that duties be paid by the importer, and, in this case, the first customer was not the importer. The incentive to avoid dumping intended by Congress -- the obligation to pay antidumping duties on dumped sales -- remains fully intact.

For all of these reasons, Wieland argues that petitioners' reimbursement argument is baseless, and that the Department should reject petitioners' arguments for an adjustment to export price for antidumping duties that no one, not even WWAG, has paid.

Department's Position:

We have further considered the facts of the instant review. Consistent with the Preliminary Results and the Department's practice with respect to this issue, we do not find that Wieland's

sale to the United States during the POR is subject to 19 CFR §351.402(f). Our decision as to reimbursement is based upon our interpretation of this regulation, which is that two separate corporate entities must exist to invoke the reimbursement regulation. See Circular Welded Non-Alloy Steel Pipe and Tube From Mexico: Final Results of Antidumping Duty Administrative Review, 63 FR 33041, 33044 (June 17, 1998). In this instance, though it is both an exporter and importer, there is still only one corporate entity, Wieland, not two. Accordingly, we disagree with petitioners and find that Wieland cannot reimburse itself. Therefore, we are not making an adjustment to the export price for antidumping duties.

IV. 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 results and the final weighted-average dumping margin in the Federal Register.

Agree ___________ Disagree ___________

____
Ronald K. Lorentzen
Deputy Assistant Secretary
for Import Administration

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(date)