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Administrative Review
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March 5, 2012

MEMORANDUM TO: Paul Piquado
Assistant Secretary
for Import Administration

FROM: Christian Marsh
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

RE: Certain Lined Paper Products from India

SUBJECT: Issues and Decision Memorandum for the Final Results in the
Fourth Antidumping Duty Order Administrative Review of Certain
Lined Paper Products from India (2009-2010)

Summary

We have analyzed the case and rebuttal briefs of the petitioner¹ and respondents² for the final results in the fourth administrative review of certain lined paper products (CLPP) from India. We recommend that you approve the positions we have developed in the “Department’s Position” sections of this memorandum.

¹ The petitioner in this administrative review is the Association of American School Paper Suppliers and its individual members (petitioner).

² The respondents in this review include two mandatory respondents, Navneet Publications (India) Ltd. (Navneet), and Riddhi Enterprises, and the following 33 manufacturers and exporters of the subject merchandise (collectively, respondents): Abhinav Paper Products Pvt. Ltd.; American Scholar, Inc. and/or I-Scholar; Ampoules & Vials Mfg. Co. Ltd.; AR Printing & Packaging (India) Pvt.; Bafna Exports; Cello International Pvt. Ltd. (M/S Cello Paper Products); Corporate Stationery Pvt. Ltd.; Creative Divya; D.D International; Exel India (Pvt.) Ltd.; Exmart International Pvt. Ltd.; Fatechand Mahendrakumar; FFI International; Freight India Logistics Pvt. Ltd.; International Greetings Pvt. Ltd.; Kejriwal Paper Ltd., and Kejriwal Exports; Lodha Offset Limited; Magic International Pvt Ltd.; Marigold ExIm Pvt. Ltd.; Marisa International; Orient Press Ltd.; Paperwise Inc.; Pioneer Stationery Pvt. Ltd.; Premier Exports; Rajvansh International; SAB International; Sar Transport Systems; Seet Kamal International; Sonal Printers Pvt Ltd; Super Impex; Swati Growth Funds Ltd.; V & M; and Yash Laminates (collectively non-selected respondents).



I. Background

On October 7, 2011, the Department of Commerce (the Department) published in the Federal Register the preliminary results of the antidumping duty administrative review for certain lined paper products (CLPP) from India.³ The period of review (POR) is September 1, 2009, through August 31, 2010. We invited parties to comment on our Preliminary Results. On November 4, 2011, Riddhi submitted its case brief, and on November 7, 2011, petitioner and Navneet submitted their case briefs. On November 14, 2011, Navneet filed a rebuttal brief and the Department rejected this brief because it contained untimely filed factual information. On November 15, 2011, the petitioner filed a rebuttal brief and on December 23, 2011, Navneet filed its rebuttal brief, which excluded the untimely filed factual information.

II. List of Comments

A. General Issue

Comment 1: Treatment of Negative Dumping Margins (Zeroing)

B. Company Specific Issues

Comment 2: Whether to use Navneet's Purchase Order Date for its U.S. Sales

Comment 3: Whether to Recalculate Navneet's Imputed Credit Expenses

Comment 4: Whether to Adjust Navneet's Cost of Manufacturing

Comment 5: Treatment of Navneet's Canvassing Expenses as a Direct Selling Expense

Comment 6: Whether to make an Excise Tax Adjustment for Navneet

Comment 7: Whether to Modify Navneet's Cost Calculation Data

III. General Issue:

Comment 1: Treatment of Negative Dumping Margins (Zeroing)

Both Navneet and Riddhi argue that the Department should calculate their margins without the use of the zeroing methodology. Navneet claims that the Preliminary Results improperly made use of zeroing methodology.⁴ Navneet claims that the zeroing methodology created an artificial dumping margin when it was not dumping. Navneet argues that its margin is solely based on the zeroing methodology that the World Trade Organization (WTO) has found to be inconsistent with the United States' obligations under the WTO Agreements and is in violation of international law. As an example, Navneet cites Appellate Body Report, United States—

³ See Certain Lined Paper Products From India: Notice of Preliminary Results of Antidumping Duty Administrative Review, 76 FR 62343 (October 7, 2011) (Preliminary Results).

⁴ See Navneet's Case Brief at 9 - 10.

Measures Relating to Zeroing and Sunset Reviews, ¶ 213, WT/DS322/AB/RW (August 18, 2009) and claims that under Federal Mogul Corp. v. United States, 63 F.3d 1572, 1581 (Fed. Cir. 1995) Commerce should interpret the law consistent with GATT agreements. Navneet asserts that the Department is required to abolish zeroing in order to bring its calculation of dumping margins into compliance with the WTO's assessment.⁵ Navneet claims that applying zeroing is inconsistent with the Department's own stated intention to abandon zeroing in Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin and Assessment Rate in Certain Antidumping Proceedings, 75 FR 81533 (December 28, 2010).⁶ Navneet also argues that U.S. law does not require zeroing and that Commerce's decision to apply zeroing here is therefore arbitrary.⁷

Navneet further argues that recent decisions issued by the Court of Appeals for the Federal Circuit (CAFC) and Court of International Trade (CIT) require that Commerce abolish zeroing in this review. Specifically, Navneet argues that under Dongbu, the Department cannot continue to use zeroing without explaining how it can apply the same statutory language (specifically section 1677(35) of the Tariff Act) in opposite and inconsistent ways in investigations and reviews.⁸ Navneet also argues that under JTEKT, "to satisfy the requirement set out in Dongbu, Commerce must explain why these (or other) differences between the two phases make it reasonable to continue zeroing in one phase, but not the other."⁹

Riddhi similarly contends that Commerce's use of the zeroing methodology in this review is contrary to the United States' obligations under the WTO Agreements.¹⁰ Riddhi states that the Department has the discretion to not use the zeroing methodology in administrative reviews, as it has done in original investigations. Riddhi asserts that, at the February 20, 2007 meeting of the WTO Settlement Body, the United States agreed to implement the decision.¹¹

Petitioner argues that Navneet's and Riddhi's arguments are unpersuasive and should be rejected for several reasons. First, the petitioner asserts that the WTO Agreements, and the rulings made pursuant to them, are not binding under U.S. law.¹² Thus, the WTO's rulings with respect to zeroing do not obligate the Department to take any action. Second, the Department's Proposed Rule does not support abandoning zeroing in the instant review, as Navneet contends.¹³ The petitioner states that the Department has not issued any final rule regarding its proposed modifications. Rather, the petitioners assert that the December 28, 2010 Proposed Rule published by Commerce sets forth a series of proposals and a request for comments regarding these proposals. The petitioner also claims that nowhere in the Proposed Rule does the

⁵ Id. at 9-10, 13-14.

⁶ See Navneet's Case Brief at 11 - 12.

⁷ Navneet cites Timken Co. v. United States, 354 F.3d 1334, 1342 (Fed. Cir. 2004) (Timken).

⁸ See Dongbu Steel Co., Ltd. v. United States, 635 F.3d 1363 (Fed. Cir. 2011) (Dongbu).

⁹ Citing JTEKT Corp. v. United States, 642 F.3d 1378, 1384 (Fed. Cir. 2011) (JTEKT).

¹⁰ See Riddhi's Case Brief at 1 - 3.

¹¹ See United States – Measures Relating to Zeroing and Sunset Reviews, Request by Japan for Arbitration under Article 21.3(c) of the DSU, WT/DS322/17 (March 30, 2007).

¹² See 19 U.S.C. 3512(a)(1); see also Statement of Administrative Action accompanying the Uruguay Round Agreements Act, 1994 U.S.C.C.A.N. at 4318.

¹³ See Navneet's Case Brief at 11 - 12; see also Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin and Assessment Rate in Certain Antidumping Proceedings, 75 FR 81533 (December 28, 2010) (Proposed Rule).

Department state that it will abandon zeroing in administrative reviews. Moreover, even if Commerce were to implement the Proposed Rule, the petitioner asserts that any change in the treatment of non-dumped sales would not apply to the instant review, as “the final results in this administrative review will be completed prior to the effective date of the final rule.”¹⁴ Third, the CAFC and CIT have not found Commerce’s use of zeroing in administrative reviews to be unlawful, as Navneet argues, but rather have simply required that the Department provide a more thorough explanation for continuing to zero in reviews after ceasing this practice in original investigations.¹⁵ The petitioner asserts that the Department’s recent remand determinations provide such an explanation.

Petitioner states that, in the recent remand determinations responding to the CAFC’s decisions in JTEKT and Dongbu, Commerce has provided several reasons why it reasonably interprets the Act to continue to permit zeroing in administrative reviews.¹⁶ First, the petitioner asserts that the Department has maintained a firmly established, judicially-affirmed interpretation of 19 U.S.C. § 1677(35) whereby the Department does not consider above-fair-value sales to be “dumped.”¹⁷ Second, the petitioner asserts that the decision to limit the Final Modification to average-to-average comparisons in original investigations reflects the United States’ deliberate response to a WTO Panel decision, not a random, unreasonable interpretation of section 771(35) of the Act, and is consistent with the Charming Betsy doctrine.¹⁸ Third, the petitioner argues that continuing to use a zeroing methodology in administrative reviews accounts for the differences between average-to-average comparisons and average-to-transaction comparisons.¹⁹ Based on the aforementioned reasons, the petitioner asserts that the Department has articulated a clear and sound basis for continuing to practice zeroing in administrative reviews even after the issuance of the Final Modification.

Department’s Position:

We have not changed our calculation of the weighted-average dumping margin, as suggested by the respondents, in these final results.

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

¹⁴ See Issues and Decision Memorandum accompanying Certain Preserved Mushroom from the People’s Republic of China, 76 FR 56732 (September 14, 2011) (Final Results of Antidumping Duty Administrative Review and Rescission, in Part) at Comment 14; see also Section 123(g)(2) of the Uruguay Round Agreements Act.

¹⁵ See JTEKT Corp. v. United States, 642 F.3d 1378, 1384-85 (Fed. Cir. 2011); Dongbu Steel Co., Ltd. v. United States, 635 F.3d 1363 (Fed. Cir. 2011).

¹⁶ See Final Second Remand Determination, JTEKT Corp. v. United States, Consol. Court No. 07-00377, slip op. 11-52 at 7-14 (September 19, 2011), CM/ECF Docket No. 147 (JTEKT Remand Results); Results of Redetermination Pursuant to Remand, Union Steel v. United States, Consol. Court No. 11-00083 at 7-14 (Oct. 14, 2011), CM/ECF Docket No. 49 (Union Steel Remand Results).

¹⁷ See Union Steel Remand Results at 7; JTEKT Remand Results at 7.

¹⁸ See Union Steel Remand Results at 7 and 10.

¹⁹ Id. at pages 7, 11-14; JTEKT Remand Results at 11-14.

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

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

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

In light of the comparison methods provided for under the statute and regulations, and for the reasons set forth in detail below, the Department finds that the offsetting method is appropriate when aggregating the results of average-to-average comparisons, and is not similarly appropriate when aggregating the results of average-to-transaction comparisons, such as were applied in this administrative review. The Department interprets the application of average-to-average comparisons to contemplate a dumping analysis that examines the pricing behavior on average of an exporter or producer with respect to the subject merchandise, whereas under the average-to-transaction comparison methodology the Department undertakes a dumping analysis that examines the pricing behavior of an exporter or producer with respect to individual export transactions. The offsetting approach described in the average-to-average comparison methodology allows for an overall examination of pricing behavior on average. The Department's interpretation of section 771(35) of the Act to permit zeroing in average-to-transaction comparisons, as in this administrative review, and to permit offsetting in average-to-average comparisons reasonably accounts for differences inherent in the distinct comparison methodologies.

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

The difference between “zeroing” and “offsetting” reflects the ambiguity the Federal Circuit has found in the word “exceeds” as used in section 771(35)(A).²⁰ The courts repeatedly have held that the statute does not speak directly to the issue of zeroing versus offsetting.²¹ For decades the Department interpreted the statute to apply zeroing in the calculation of the weighted-average dumping margin, regardless of the comparison method used. In view of the statutory ambiguity, on multiple occasions, both the Federal Circuit and other courts squarely addressed the reasonableness of the Department’s zeroing methodology and unequivocally held that the Department reasonably interpreted the relevant statutory provision as permitting zeroing.²² In so doing, the courts relied upon the rationale offered by the Department for the continued use of zeroing, *i.e.*, to address the potential for foreign companies to undermine the antidumping laws by masking dumped sales with higher priced sales: “Commerce has interpreted the statute in such a way as to prevent a foreign producer from masking its dumping with more profitable sales. Commerce’s interpretation is reasonable and is in accordance with law.”²³ The Federal Circuit explained in Timken that denial of offsets is a “reasonable statutory interpretation given that it legitimately combats the problem of masked dumping, wherein certain profitable sales serve to mask sales at less than fair value.”²⁴ As reflected in that opinion, the issue of so-called masked dumping was part of the policy reason for interpreting the statute in the manner applied by the Department. No U.S. court has required the Department to demonstrate “masked dumping” before it is entitled to invoke this interpretation of the statute and deny offsets to dumped sales.²⁵

²⁰ See Timken Co. v. United States, 354 F.3d 1334, 1341-45 (Fed. Cir. 2004) (Timken).

²¹ See PAM, S.p.A. v. United States, 265 F. Supp. 2d 1362, 1371 (CIT 2003) (PAM) (“{The} gap or ambiguity in the statute requires the application of the Chevron step-two analysis and compels this court to inquire whether Commerce’s methodology of zeroing in calculating dumping margins is a reasonable interpretation of the statute.”); Bowe Passat Reinigungs-Und Waschereitechnik GmbH v. United States, 926 F. Supp. 1138, 1150 (CIT 1996) (Bowe Passat) (“The statute is silent on the question of zeroing negative margins.”); Serampore Indus. Pvt. Ltd. v. U.S. Dep’t of Commerce, 675 F. Supp. 1354, 1360 (CIT 1987) (Serampore) (“A plain reading of the statute discloses no provision for Commerce to offset sales made at {less than fair value} with sales made at fair value. . . . Commerce may treat sales to the United States market made at or above prices charged in the exporter’s home market as having a zero percent dumping margin.”).

²² See, e.g., Koyo Seiko Co. v. United States, 551 F.3d 1286, 1290-91 (Fed. Cir. 2008) (Koyo 2008); NSK Ltd. v. United States, 510 F.3d 1375, 1379-80 (Fed. Cir. 2007) (NSK); Corus Staal BV v. United States, 502 F.3d 1370, 1375 (Fed. Cir. 2007) (Corus II); Corus Staal BV v. Department of Commerce, 395 F.3d 1343, 1347 (Fed. Cir. 2005) (Corus I); Timken, 354 F.3d at 1341-45; PAM, 265 F. Supp. 2d at 1370 (“Commerce’s zeroing methodology in its calculation of dumping margins is grounded in long-standing practice.”); Bowe Passat, 926 F. Supp. at 1149-50; Serampore, 675 F. Supp. at 1360-61.

²³ Serampore, 675 F. Supp. at 1361 (citing Certain Welded Carbon Steel Standard Pipe and Tube From India; Final Determination of Sales at Less Than Fair Value, 51 FR 9089, 9092 (Mar. 17, 1986)); see also Timken, 354 F.3d at 1343; PAM, 265 F. Supp. 2d at 1371.

²⁴ See Timken, 354 F.3d at 1343.

²⁵ See, e.g., Timken, 354 F.3d at 1343; Corus I, 395 F.3d at 1343; Corus II, 502 F.3d at 1370, 1375; and NSK, 510 F.3d at 1375.

In 2005, a panel of the World Trade Organization (WTO) Dispute Settlement Body found that the United States did not act consistently with its obligations under Article 2.4.2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 when it employed the zeroing methodology in average-to-average comparisons in certain challenged antidumping duty investigations.²⁶ The initial WTO Dispute Settlement Body Panel Report was limited to the Department's use of zeroing in average-to-average comparisons in antidumping duty investigations.²⁷ The Executive Branch determined to implement this report pursuant to the authority provided in Section 123 of the Uruguay Round Agreements Act (URAA) (19 U.S.C. § 3533(f), (g)) (Section 123).²⁸ Notably, with respect to the use of zeroing, the Panel found that the United States acted inconsistently with its WTO obligations only in the context of average-to-average comparisons in antidumping duty investigations. The Panel did not find fault with the use of zeroing by the United States in any other context. In fact, the Panel rejected the European Communities' arguments that the use of zeroing in administrative reviews did not comport with the WTO Agreements.²⁹

Without an affirmative inconsistency finding by the Panel, the Department did not propose to alter its zeroing practice in other contexts, such as administrative reviews. As the Federal Circuit recently held, the Department reasonably may decline, when implementing an adverse WTO report, to take any action beyond that necessary for compliance.³⁰ Moreover, in Corus I, the Federal Circuit acknowledged the difference between antidumping duty investigations and administrative reviews, and held that section 771(35) of the Act was just as ambiguous with respect to both proceedings, such that the Department was permitted, but not required, to use zeroing in antidumping duty investigations.³¹ In light of the adverse WTO Dispute Settlement Body finding and the ambiguity that the Federal Circuit found inherent in the statutory text, the Department abandoned its prior litigation position – that no difference between antidumping duty investigations and administrative reviews exists for purposes of using zeroing in antidumping proceedings – and departed from its longstanding and consistent practice by ceasing the use of zeroing. The Department began to apply offsetting in the limited context of average-to-average comparisons in antidumping duty investigations.³² With this modification, the Department's interpretation of the statute with respect to non-dumped comparisons was changed within the limited context of investigations using average-to-average comparisons. Adoption of the modification pursuant to the procedure set forth in section 123(g) of the URAA was specifically limited to address adverse WTO findings made in the context of antidumping investigations using average-to-average comparisons. The Department did not, at that time, change its practice of zeroing in other types of comparisons, including average-to-transaction comparisons in administrative reviews.³³ See id., 71 FR at 77724.

²⁶ See Panel Report, United States – Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing), WT/DS294/R (October 31, 2005) (EC-Zeroing Panel).

²⁷ See EC-Zeroing Panel, WT/DS294/R.

²⁸ See Final Modification for Investigations, 71 FR at 77722; and Antidumping Proceedings: Calculation of the Weighted – Average Dumping Margin During an Antidumping Investigation; Change in Effective Date of Final Modification, 72 FR 3783 (June 26, 2007) (together, Final Modification for Investigations).

²⁹ See, EC-Zeroing Panel at 7.284, 7.291.

³⁰ See Thyssenkrupp Acciai Speciali Terni S.p.A. v. United States, 603 F. 3d 928, 934 (Fed. Cir. 2010).

³¹ See Corus I, 395 F. 3d at 1347.

³² See Final Modification for Investigations, 71 FR at 77722.

³³ On February 14, 2012, in response to several WTO dispute settlement reports, the Department adopted a revised

The Federal Circuit subsequently upheld the Department's decision to cease zeroing in average-to-average comparisons in antidumping duty investigations while recognizing that the Department limited its change in practice to certain investigations and continued to use zeroing when making average-to-transaction comparisons in administrative reviews.³⁴ In upholding the Department's decision to cease zeroing in average-to-average comparisons in antidumping duty investigations, the Federal Circuit accepted that the Department likely would have different zeroing practices between average-to-average and other types of comparisons in antidumping duty investigations.³⁵ The Federal Circuit's reasoning in upholding the Department's decision relied, in part, on differences between various types of comparisons in antidumping duty investigations and the Department's limited decision to cease zeroing only with respect to one comparison type.³⁶ The Federal Circuit acknowledged that section 777A(d) of the Act permits different types of comparisons in antidumping duty investigations, allowing the Department to make average-to-transaction comparisons where certain patterns of significant price differences exist.³⁷ The Federal Circuit also expressly recognized that the Department intended to continue to address targeted or masked dumping through continuing its use of average-to-transaction comparisons and zeroing.³⁸ In summing up its understanding of the relationship between zeroing and the various comparison methodologies that the Department may use in antidumping duty investigations, the Federal Circuit acceded to the possibility of disparate, yet equally reasonable interpretations of section 771(35) of the Act, stating that "{b}y enacting legislation that specifically addresses such situations, Congress may just as likely have been signaling to Commerce that it need not continue its zeroing methodology in situations where such significant price differences among the export prices do *not* exist."³⁹

We disagree with the respondent(s) that the Federal Circuit's decisions in Dongbu Steel v. United States, 635 F. 3d 1363 (Fed. Cir. 2011) and JTEKT Corporation v. US, 2010-1516, -1518 (CAFC June 29, 2011) (JTEKT), require the Department to change its methodology in this administrative review. These holdings were limited to finding that the Department had not adequately explained the different interpretations of section 771(35) of the Act in the context of investigations versus administrative reviews, but the Federal Circuit did not hold that these differing interpretations were contrary to law. Importantly, the panels in Dongbu and JTEKT did not overturn prior Federal Circuit decisions affirming zeroing in administrative reviews, including SKF, in which the Court affirmed zeroing in administrative reviews notwithstanding

methodology which allows for offsets when making average-to-average comparisons in reviews. Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings: Final Modification, 77 FR 8101 (February 14, 2012) (Final Modification for Reviews). The Final Modification for Reviews makes clear that the revised methodology will apply to antidumping duty administrative reviews where the preliminary results are issued after April 16, 2012. Because the preliminary results in this administrative review were completed prior to April 16, 2012, any change in practice with respect to the treatment of non-dumped sales pursuant to the Final Modification for Reviews does not apply here.

³⁴ See U.S. Steel Corp., 621 F. 3d. at 1355 n.2, 1362-63.

³⁵ See Id., at 1363 (stating that the Department indicated an intention to use zeroing in average-to-transaction comparisons in investigations to address concerns about masked dumping).

³⁶ See Id., at 1361-63.

³⁷ See Id., at 1362 (quoting sections 777A(d)(1)(A) and (B) of the Act, which enumerate various comparison methodologies that the Department may use in investigations); see also section 777A(d)(1)(B) of the Act.

³⁸ See U.S. Steel Corp., 621 F. 3d at 1363.

³⁹ See Id. (emphasis added).

the Department's determination to no longer use zeroing in certain investigations.⁴⁰ Unlike the determinations examined in Dongbu and JTEKT, the Department, in these final results, provides additional explanation for its changed interpretation of the statute subsequent to the Final Modification for Investigations – whereby we interpret section 771(35) of the Act differently for certain investigations (when using average-to-average comparisons) and administrative reviews. For all these reasons, we find that our determination is consistent with the holdings in Dongbu, JTEKT, U.S. Steel, and SKF.

The Department's interpretation of section 771(35) of the Act reasonably resolves the ambiguity inherent in the statutory text for multiple reasons. First, outside of the context of average-to-average comparisons,⁴¹ the Department has maintained a long-standing, judicially-affirmed interpretation of section 771(35) of the Act in which the Department does not consider a sale to the United States as dumped if normal value does not exceed export price. Pursuant to this interpretation, the Department treats such a sale as having a dumping margin of zero, which reflects that no dumping has occurred, when calculating the aggregate weighted-average dumping margin. Second, adoption of an offsetting methodology in connection with average-to-average comparisons was not an arbitrary departure from established practice because the Executive Branch adopted and implemented the approach in response to a specific international obligation pursuant to the procedures established by the Uruguay Round Agreements Act for such changes in practice with full notice, comment, consultations with the Legislative Branch, and explanation. Third, the Department's interpretation reasonably resolves the ambiguity in section 771(35) of the Act in a way that accounts for the inherent differences between the result of an average-to-average comparison and the result of an average-to-transaction comparison.

The Department's Final Modification for Investigations to implement the WTO Panel's limited finding does not disturb the reasoning offered by the Department and affirmed by the Federal Circuit in several prior, precedential opinions upholding the use of zeroing in average-to-transaction comparisons in administrative reviews as a reasonable interpretation of section 771(35) of the Act.⁴² In the Final Modification for Investigations, the Department adopted a possible construction of an ambiguous statutory provision, consistent with the Charming Betsy doctrine, to comply with certain adverse WTO dispute settlement findings.⁴³ Even where the Department maintains a separate interpretation of the statute to permit the use of zeroing in certain dumping margin calculations, the Charming Betsy doctrine bolsters the ability of the Department to apply an alternative interpretation of the statute in the context of average-to-average comparisons so that the Executive Branch may determine whether and how to comply

⁴⁰ See SKF v. United States, 630 F.3d 1365 (Fed. Cir. 2011).

⁴¹ The Final Modification for Reviews adopts this comparison method with offsetting as the default method for administrative reviews, however, as explained in note 4 this modification is not applicable to these final results.

⁴² See, e.g., SKF USA, Inc. v. United States, 537 F. 3d 1373, 1382 (Fed. Cir. 2008); NSK, 510 F. 3d at 1379-1380; Corus II, 502 F. 3d at 1372-1375; Timken, 354 F. 3d at 1343.

⁴³ According to Murray v. Schooner Charming Betsy, 6 U.S. 64, 118 (1804), “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country.” The principle emanating from the quoted passage, known as the Charming Betsy doctrine, supports the reasonableness of the Department's interpretation of the statute in the limited context of average-to-average comparisons in antidumping duty investigations because the Department's interpretation of the domestic law accords with international obligations as understood in this country.

with international obligations of the United States. Neither section 123 nor the Charming Betsy doctrine require the Department to modify its interpretation of section 771(35) of the Act for all scenarios when a more limited modification will address the adverse WTO finding that the Executive Branch has determined to implement. Furthermore, the wisdom of Commerce's legitimate policy choices in this case – *i.e.*, to abandon zeroing only with respect to average-to-average comparisons – is not subject to judicial review.⁴⁴ These reasons alone sufficiently justify and explain why the Department reasonably interprets section 771(35) of the Act differently in average-to-average comparisons relative to all other contexts.

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

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

⁴⁴ *See Suramerica de Aleaciones Laminadas, C.A. v. United States*, 966 F. 2d 660, 665 (Fed. Cir. 1992).

In contrast, when applying an average-to-transaction comparison methodology, *see, e.g.*, section 777A(d)(2) of the Act, as the Department does in this administrative review, the Department determines dumping on the basis of individual U.S. sales prices. Under the average-to-transaction comparison methodology, the Department compares the EP or CEP for a particular U.S. transaction with the average normal value for the comparable merchandise of the foreign like product. This comparison methodology yields results specific to the selected individual export transactions. The result of such a comparison evinces the amount, if any, by which the exporter or producer sold the merchandise at an EP or CEP less than its normal value. The Department then aggregates the results of these comparisons – *i.e.*, the amount of dumping found for each individual sale – to calculate the weighted-average dumping margin for the period of review. To the extent the average normal value does not exceed the individual EP or CEP of a particular U.S. sale, the Department does not calculate a dumping margin for that sale or include an amount of dumping for that sale in its aggregation of transaction-specific dumping margins.⁴⁵ Thus, when the Department focuses on transaction-specific comparisons, as it did in this administrative review, the Department reasonably interprets the word “exceeds” in section 771(35)(A) of the Act as including only those comparisons that yield positive comparison results. Consequently, in transaction-specific comparisons, the Department reasonably does not permit negative comparison results to offset or reduce other positive comparison results when determining the “aggregate dumping margin” within the meaning of section 771(35)(B) of the Act.

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

In sum, on the issue of how to treat negative comparison results in the calculation of the weighted-average dumping margin pursuant to section 771(35)(B) of the Act, for the reasons explained, the Department reasonably may accord dissimilar treatment to negative comparison results depending on whether the result in question flows from an average-to-average comparison or an average-to-transaction comparison. We note that neither the CIT nor the

⁴⁵ As discussed previously, the Department does account, however, for the sale in its weighted-average dumping margin calculation. The value of any non-dumped sale is included in the denominator of the weighted-average dumping margin while no dumping amount for non-dumped transactions is included in the numerator. Therefore, any non-dumped transactions results in a lower weighted-average dumping margin.

Federal Circuit has rejected the above reasons. In fact, the CIT recently sustained the Department's explanation for using zeroing in administrative reviews while not using zeroing in certain types of investigations.⁴⁶ Accordingly, the Department's interpretations of section 771(35) of the Act to permit zeroing in average-to-transaction comparisons, as in the underlying administrative review, and to permit offsetting in average-to-average comparisons reasonably accounts for the differences inherent in distinct comparison methodologies.

Regarding other WTO reports cited by the respondent(s) finding the denial of offsets by the United States to be inconsistent with the Antidumping Agreement, the Federal Circuit has held that WTO reports are without effect under U.S. law, "unless and until such a {report} has been adopted pursuant to the specified statutory scheme" established in the URAA.⁴⁷ As is clear from the discretionary nature of this scheme, Congress did not intend for WTO reports to trump automatically the exercise of the Department's discretion in applying the statute. See 19 USC 3538(b)(4) (implementation of WTO reports is discretionary). Moreover, as part of the URAA process, Congress has provided a procedure through which the Department may change a regulation or practice in response to WTO reports.⁴⁸

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

Company-specific Comments

Comment 2: Whether to use Navneet's Purchase Order Date for its U.S. Sales

Petitioner asserts that Navneet's reporting of the order dates and customs invoice dates on which its subject merchandise was ordered and shipped to the port of export contradicts the company's selling process narrative, which states that Navneet produces export orders only after the purchase order is received.⁴⁹ Thus, petitioner asserts that this contradictory information calls into question the correctness of the purchase order date as the date of sale, and whether this date sets the final, material terms of sale.

Petitioner argues that sales documents on the record indicate that (1) Navneet failed to abide by material terms of sale set out in the purchase orders, (2) the record is incomplete with respect to the parties' agreements because controlling documents referenced in purchase orders were not submitted, (3) in some cases, the parties had agreed that changes could be made after the purchase order date, and (4) changes were in fact made after the purchase order date. Therefore, petitioner argues that for the final results, the Department should find that Navneet has failed to rebut the presumption in favor of invoice date, and thus, the Department should revert to its normal and preferred practice of using the invoice as the U.S. date of sale.

⁴⁶ See Union Steel v. United States, Consol. Court No. 11-00083, slip op. 12-24 (CIT Feb. 27, 2012).

⁴⁷ See Corus I, 395 F.3d at 1347-49; accord Corus II, 502 F.3d at 1375; and NSK, 510 F.3d 1375.

⁴⁸ See 19 U.S.C. 3533(g).

⁴⁹ See Initial Questionnaire Response dated February 10, 2011, at A-32 (Initial QNR).

Navneet contends that because its U.S. sales are made pursuant to purchase orders that are placed weeks or months prior to shipment, and the product, price and quantity are agreed to at the time of the purchase order, the order date better reflects the date on which the material terms of sale are established. Therefore, Navneet argues that under established Department precedent, the order date is the appropriate date of sale for Navneet's U.S. sales.⁵⁰

Navneet disagrees that purchase order date may only be used where there are long-term contracts and the contract terms are not binding on the parties. Navneet points out that using purchase order date as the date of sale is appropriate if it can satisfy the Department "that the 'material terms of sale' undergo no meaningful change between the proposed date and the invoice date."⁵¹ Navneet contends that delivery dates are routinely delayed by a few days and cannot be considered as amendments to the contracts. Navneet argues that the rare "changes" to sales orders referred to by petitioner are merely shipping delays or allowed short shipments, and are not modifications to essential terms. Navneet claims that the Department normally considers the "essential terms" to be price, quantity, and product specification, with scheduled shipment date considered to be a minor, non-essential term, and the noted small adjustments in shipment dates do not constitute an amendment of the purchase order.⁵²

Navneet further argues that petitioner's reference to a single instance where the quantity ordered was not exactly reflected in the invoice does not call into question the material terms because the change in quantity was within Navneet's standard ten percent quantity tolerance.⁵³ Thus, Navneet argues that the small adjustment to quantity did not amount to a change in contract terms or a breach of those terms, but was fully compliant with the parties' agreement.

Finally, Navneet claims that the majority of petitioner's argument is based on clerical errors in the data reported in customs invoice date field (CINVDTU). Navneet argues that its selling process narrative is accurate and that, apart from the inadvertent error in reporting customs invoice date, nothing in the sales files that calls into question the reported date of sale.⁵⁴

Department's Position:

Under 19 C.F.R. 351.401(i), the Department normally will use the date of invoice as the date of sale, as recorded in the exporter or producer's records kept in the ordinary course of business. However, the Department may use a date other than the date of invoice as the date of sale if the Department is satisfied that a different date better reflects the date on which the exporter or

⁵⁰ See 19 CFR §351.401(i). See also Allied Tube & Conduit Corp. v. United States, 132 F. Supp. 2d 1087, 1090 (CIT. 2001).

⁵¹ See Stainless Steel Sheet and Strip in Coils From France: Final Results of Antidumping Administrative Review, 70 FR 7240 (February 11, 2005), and accompanying Issues & Decision Memorandum at Comment 2; see also Notice of Final Determination of Sales at Less Than Fair Value: Certain Large Diameter Carbon and Alloy Seamless Standard, Line and Pressure Pipe From Mexico, 65 FR 39358 (June 26, 2000), and accompanying Issues and Decision Memorandum at Comment 2.

⁵² See Stainless Steel Plate in Coils From Belgium: Final Results of Antidumping Duty Administrative Review, 67 FR 64352 (October 18, 2002), and accompanying Issues and Decision Memorandum at Comment 4.

⁵³ See Initial QNR at A-35; see also First Supplemental QNR dated April 28, 2011 at Exhibit A-20.

⁵⁴ See Initial QNR at A-30 through A-32.

producer establishes the material terms of sale (e.g., price and quantity).⁵⁵

The regulation makes clear that while the date of invoice is the preferred date of sale, the Department may rely on an alternative date “if ‘material terms’ are not subject to change between the proposed date and the invoice date, or the agency provides a rational explanation as to why the alternative date ‘better reflects’ the date when ‘material terms’ are established.”⁵⁶ For example, in Non-Alloy Steel Pipe from Mexico, the Department used the earlier purchase order date as the date of sale. We took this action because, as in this case, the material terms (e.g., price and quantity) were set at the date of purchase order and there was no evidence on the record that there were any changes to the material terms of sale after the purchase order date.⁵⁷

As in CLPP Second Review,⁵⁸ the Department continues to find that Navneet’s exports are produced to order pursuant to purchase orders that demonstrate the establishment of a commitment to price and quantity and specific products.⁵⁹ We agree with petitioner that certain documents and terms and conditions referenced on purchase orders were not provided on the record. However, based on a comprehensive review of the sales documents, including purchase orders, customs invoices and commercial invoices, there is no indication that the material terms regarding price, quantity, and product specification change after they are established in the purchase orders. We also find that the quantity changes referenced by petitioner are within the ten percent quantity tolerance allowed by Navneet’s contracts. Therefore, we agree that Navneet furnished sufficient documentation to satisfy the Department that purchase order date better reflects the date on which the material terms of sale were set and to rebut the presumption in favor of the commercial invoice date. Thus, based upon the foregoing reasons, the Department’s determination that purchase order date is the appropriate date of sale for the U.S. sales remains unchanged from the Preliminary Results.

Comment 3: Whether to Recalculate Navneet’s Imputed Credit Expenses

Petitioner asserts that Navneet improperly calculated its imputed credit expenses, which represent the opportunity cost of having merchandise sit in inventory prior to sale, and of extending credit after the sale, for Navneet’s U.S. sales. Petitioner argues that Navneet’s calculation methodology does not fully capture Navneet’s opportunity costs, given (1) the length of time that merchandise typically spends at the port; (2) the nature of the company’s production and selling process; (3) that the merchandise normally leaves the factory in sealed shipping containers that are ready for loading, and (4) that Navneet’s claimed date of sale, which is the order date, rather than invoice date is not the appropriate date for its U.S. sales.

⁵⁵ 19 CFR 351.401(i)

⁵⁶ See SeAH Steel Corp. v. United States, 25 C.I.T. 133, 135 (Ct. Int’l Trade 2001).

⁵⁷ See Circular Welded Non-Alloy Steel Pipe from Mexico: Final Results of Antidumping Duty Administrative Review 65 FR 37518 (June 15, 2000) (Non-Alloy Steel Pipe from Mexico), and accompanying Issues and Decision Memorandum at Comment 1.

⁵⁸ See Certain Lined Paper Products from India: Notice of Final Results of Antidumping Duty Administrative Review, 75 FR 7563 February 22, 2010 (CLPP Second Review), and accompanying Issues and Decision Memorandum at Comment 2.

⁵⁹ See Initial QNR at B-31.

Specifically, petitioner asserts that Navneet's imputed credit period, which is based on the time between the actual invoice date and the actual payment date, does not account for the time between the date merchandise leaves Navneet's factory and the date an invoice is issued to its U.S. customer. Petitioner contends that there is a gap period during which imputed credit is not accounted for because the imputed credit expenses are based on actual, set invoice dates whereas the inventory carrying costs are based on an averaging methodology. In addition, petitioner notes that, for each of its sales, Navneet has reported the customs invoice date as the date when the merchandise is shipped to the port, however, petitioner argues that the time between shipment from the factory and the sales invoice date, a substantial portion of Navneet's U.S. sales is also not accounted for in Navneet's imputed credit expenses calculation. Thus, petitioner posits that shipment to the United States begins when the merchandise leaves the factory, and not when the container subsequently leaves the port. Therefore, petitioner argues that for the final results, the Department should recalculate Navneet's imputed credit expenses to capture all of Navneet's opportunity costs by calculating the time period from the date the merchandise leaves Navneet's factory to the port to the date an invoice is issued to its U.S. customer.

In addition, petitioner asserts that Navneet misreported the payment date for some transactions, likely the result of a simple typographical error, that were included in Navneet's calculation of imputed credit expenses for U.S. sales. Thus, petitioner contends that the Department should correct this error in its final results.

Navneet contends that its imputed credit period is correct as reported, there is no gap period as argued by petitioner, and that no adjustment is warranted. Navneet claims that certain of the dates it reported are in error, but contends that all of the essential elements of its sales response and files requested by the Department are accurate, and that an inadvertent misreporting should not be the basis for a different margin analysis.

Navneet asserts that since the obligation to pay an invoice ordinarily begins from the date of invoicing, the credit period should be the number of days between the date of invoicing and the date of payment by the customer. Navneet argues that it has consistently used the commercial invoice date as the starting period for the credit period, in this and prior reviews, to avoid multiple credit periods for each sale.

Navneet notes that the record does not contain the warehouse dispatch date and that the customs invoice dates which might have been used as a surrogate for the warehouse dispatch date cannot be used because the dates were inadvertently reported incorrectly. Therefore, Navneet contends that there is no reliable data on the record for determining an earlier date on which to base Navneet's imputed credit expense.

Furthermore, Navneet contends that the customs invoice dates are unnecessary because they were not used in the dumping analysis. Navneet notes that customs invoice dates were not requested by the Department, nor was the customs invoice data subject to any subsequent inquiry by the Department. Navneet observes that the customs invoice dates were only provided for reference and to help in tracking sales and freight information in case of an eventual verification. However, Navneet argues that if the Department considers adjusting the credit period, Navneet should be allowed to correct the record by providing the updated customs invoice dates. Navneet

supports its argument by noting that in Timken, the Federal Circuit found error in the Department's refusal to allow a respondent to correct the factual record after the preliminary results, but before the final results.⁶⁰

Navneet disagrees with petitioner's assertion that using the purchase order date as the date of sale is inconsistent with Navneet's imputed credit period. On the contrary, Navneet contends that the date of sale determination and the credit period determination are unrelated because date of sale reflects when the material terms were set while credit period reflects the time when opportunity costs are incurred. According to Navneet, even when the date of sale is the order date, the obligation to pay, and the "opportunity cost" of the invoiced funds during the period of non-payment, does not begin until the goods are invoiced or shipped. Therefore, Navneet contends that the credit period does not start from the date of the purchase order or contract.

Lastly, Navneet states that it does not dispute the clerical errors identified by petitioner in its case brief. Navneet claims that it inadvertently misreported the payment date for four of its home market sales transactions.

Department's Position:

Normally, there is a period of time between the shipment of merchandise to a customer and payment for the merchandise. The imputation of credit cost reflects the time value of money, and should correspond to a figure reasonably calculated to account for such value during the gap period between shipment and payment. If actual expenses are unavailable, we impute the cost of credit to account for the opportunity cost associated with the loss of the use of the monies in both the United States and the comparison market by calculating the time between the shipment date and the payment date.⁶¹

The Department has determined that consistent with prior reviews, the commercial invoice dates are appropriate for Navneet's calculation of its imputed credit expenses using the credit period as the number of days between the date the commercial invoice is issued to the customer and the date of payment because the commercial invoice dates are the same as the shipment dates.⁶²

As stated in Navneet's response, the customs invoice is a non-commercial invoice that is generated with respect to export sales. The customs invoice is not the document that creates the sale, and is not sent to the customer.⁶³ Hence, the customs invoices are primarily a mechanism whereby Navneet identifies the country of origin for its products, and provides the valuation of goods for tax purposes.

A review of the commercial and customs invoices on the record show that the commercial invoice dates were properly reported in the U.S. sales database. We did note discrepancies between the customs invoice dates reported in the U.S. sales database, and the customs invoices

⁶⁰ See Timken (citing NTN Bearing Corp. v. United States, 74 F. 3d 1204, 1208 (Fed. Cir. 1995)).

⁶¹ See Notice of Final Determination of Sales at Not Less Than Fair Value: Certain Color Television Receivers from Malaysia, 69 FR 20592 (April 16, 2004), and accompanying Issues and Decisions Memorandum at Comment 17.

⁶² See Initial QNRB-24.

⁶³ See Id., at C-22.

on the record. However, the Department did not request customs invoice dates and, moreover, they were not used in our antidumping duty analysis because we first determined that commercial invoice date is the appropriate date to begin the imputed credit period.⁶⁴

We agree with both petitioner and Navneet that Navneet reported incorrect payment dates for four of its U.S. sales transactions, which appears to be the result of a typographical error. Therefore, in these final results when there were missing payment dates, we used the date of Navneet's last submission, July 28, 2011, to calculate imputed credit expenses.⁶⁵

Comment 4: Whether to Adjust Navneet's Cost of Manufacturing

Navneet contends that the Department is factually incorrect in stating that Navneet failed to allocate common costs related to materials, labor and overhead to Navneet's production divisions and subdivisions in the current review, and the Department's adjustment results in an overstatement of the costs incurred by Navneet. Navneet argues that, in fact, it allocated all common costs to the production divisions and subdivisions in its reported costs. Navneet further argues that the allocation of common costs of manufacturing is further demonstrated by a review of the cost reconciliation.⁶⁶ Therefore, Navneet argues that there are no unallocated common costs requiring further allocation. Thus, Navneet contends that for the final results, the Department must eliminate the adjustment it made to the reported cost of manufacturing.

Petitioner argues that contrary to Navneet's assertion that the Department improperly adjusted Navneet's cost of manufacturing, the Department's Preliminary Calculation Memo – Navneet states that Navneet did not allocate common production costs to its divisions and subdivisions.⁶⁷ Therefore, petitioner contends that the Department should not change its position from the Preliminary Results.

Department's Position:

In the Preliminary Results, the Department stated that because Navneet did not allocate the common production costs related to materials, labor and overhead to its divisions or to any products, we allocated the POR total common production costs to all of the products produced by Navneet during the POR. We also stated that because Navneet did not allocate the stationery division's common production costs related to materials, labor and overhead to the subdivisions, we had adjusted Navneet's reported total cost of manufacturing (TCOM) to include other common production costs of the stationery division to the subdivisions.⁶⁸

After analyzing the comments we received, we have determined, that we incorrectly allocated common costs of manufacturing to the production divisions and subdivisions. A review of the record shows that Navneet did, in fact, allocate all common costs to the production divisions and

⁶⁴ See Initial QNR at Exhibit A-8. See also First Supplemental QNR, at Exhibits C-13, and C-16 through C-18.

⁶⁵ See Notice of Final Results of Antidumping Duty Administrative Review: Carbon and Certain Alloy Steel Wire Rod From Mexico, 70 FR 25809 (May 16, 2005).

⁶⁶ See Initial QNR Exhibits D-10, D-21 and D-22.

⁶⁷ See Preliminary Calculation Memo – Navneet at 5.

⁶⁸ See *Id.*, at 4 and 5.

subdivisions in its reported cost of manufacturing.⁶⁹ Therefore, we have corrected this error in the final results by relying upon Navneet's cost of production database as submitted on July 28, 2011.

Comment 5: Treatment of Navneet's Canvassing Expenses as a Direct Selling Expense

Navneet argues that the Department's preliminary results misconstrue Navneet's canvassing efforts as indirect selling expenses. Navneet contends that its canvassing activities are not selling activities, nor does canvassing involve Navneet's sales staff. Rather, canvassing is a form of hands-on, direct to the consumer, retail-level advertising (*i.e.*, advertising directed at retailers and consumers, who are Navneet's customers' downstream customers). Navneet claims that the Department has long considered that advertising expenses that are aimed not at one's own customers, but at the downstream customers of one's own customers, are direct advertising expenses.

Navneet argues that, conceptually, canvassing is no different than downstream brand advertising because both involve providing a service that directly benefits one's customer. Navneet notes that the SAA⁷⁰ states that the Department will 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. Navneet argues that both canvassing and direct advertising are aimed at the general public, and involve the assumption by Navneet of marketing expenses that would otherwise be the responsibility of the distributors or the individual retailers.

Navneet states that the Department's normal practice with regard to determining whether advertising expenses are direct or indirect selling expenses is to apply a two-pronged test: (1) the Department must determine if the advertising expenses are directed at the customer's customer; and (2) the Department must determine if the advertising expenses are related specifically to sales of the subject merchandise.⁷¹

Navneet argues that its canvassing activity fully complies with the standard two-pronged test for determining whether marketing expenses are direct or indirect because Navneet's canvassing efforts are aimed at Navneet's customers' customers and are directly related to promotion of Navneet's subject merchandise in India. Thus, Navneet argues that the Preliminary Results must be corrected to recognize Navneet's canvassing expenses as direct selling expenses, just like its other direct advertising expenses, as a direct expense, must be deducted from the home market price as a circumstance of sale adjustment.⁷²

⁶⁹ See Initial QNR at Exhibits D-10, D-21 and D-22.

⁷⁰ Statement of Administrative Action of the Uruguay Round Agreements Act, (SAA), H.R. Doc. 103-316 at 828, reprinted in 1994 U.S.C.C.A.N. at 4167.

⁷¹ See Certain Pasta From Italy: Notice of Final Results of the Eleventh Administrative Review and Partial Rescission of Review, 73 FR 75400 (December 11, 2008), and accompanying Issues and Decision Memorandum at Comment 2 (Certain Pasta from Italy).

⁷² See Notice of Final Determination of Sales at Less Than Fair Value: Live Swine From Canada, 70 FR 12181, (March 11, 2005), and accompanying Issues and Decision Memorandum at Comment 6; Notice of Final Determination of Sales at Less Than Fair Value: Certain Pasta From Italy; 61 FR 30326 (June 14, 1996); and Color Television Receivers, Except for Video Monitors, from Taiwan, 58 FR 34415 (June 25, 1993).

Navneet asserts that the Department has recognized similar canvassing expenses as direct expenses in other cases.⁷³ Navneet argues that the same factual situation is present in the instant case, where in its home market merchandising channels, Navneet carries out a canvassing program to assist its customers' customers to make retail sales, and to promote its products directly to the retail public.

Petitioner argues that the Department routinely treats personnel salaries as indirect selling expenses and that the Department's precedent supports this proposition, including the prior review, where the Department concluded that Navneet's salary expenses for merchandising should be treated as indirect selling expenses.⁷⁴

Petitioner asserts that Navneet did not provide any information to demonstrate that the Department should treat these canvassing expenses any differently than the merchandising in the prior review. Petitioner disagrees with Navneet's argument that canvassing is an example of a selling expense like direct advertising and argues that salaries, even for canvassers, are not advertising, and should not be equated with advertising.

Petitioner notes that Navneet failed to cite any case where the Department equated canvassing personnel salaries with advertising expenses or where the Department has applied its two-pronged test for determining whether advertising expenses constitute direct or indirect costs to salaries of any kind. Petitioner argues that in Fresh Kiwifruit From New Zealand, where "direct advertising" expenses were deducted from the constructed export price, the Department makes no mention of canvassing activities or, "merchant assistance," and does not describe these expenses as canvassing expenses or associate them with salaries paid to any employees.

⁷³ See, e.g., Fresh Kiwifruit From New Zealand; Preliminary Results of Antidumping Duty Administrative Review, 61 FR 15922 (April 10, 1996) (Fresh Kiwifruit From New Zealand) (deducting merchant assistance from the CEP price); Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Canned Pineapple Fruit From Thailand, 60 FR 2734, 2738 (January 11, 1995) (treating "credit, bank, and merchandising expenses" as direct expenses); and Frozen Concentrated Orange Juice From Brazil, 55 FR 1071 (January 11, 1990) (reducing home price by direct expenses, including "merchandising expenses").

⁷⁴ See e.g., Stainless Steel Bar From India: Notice of Final Results of Antidumping Duty Administrative Review, 73 FR 52294 (September 9, 2008), and accompanying Issues and Decision Memorandum at Comment 4, (explaining that "{i}ndirect selling expenses are sales expenses which are incurred regardless of whether sales are made and are not linked to a particular sale, such as salesman's salaries and sales office rent."); Polyethylene Retail Carrier Bags from Thailand: Final Results of Antidumping Duty Administrative Review and Partial Rescission of Antidumping Duty Administrative Review, 72 FR 64580 (November 16, 2007), and accompanying Issues and Decision Memorandum at Comment 3 (noting that salaries and bonuses of sales and marketing personnel were included in the calculation of indirect selling expenses); Notice of Final Determination of Sales at Less Than Fair Value: Coated Free Sheet Paper from the Republic of Korea, 72 FR 60630 (October 25, 2007), and accompanying Issues and Decision Memorandum at Comment 2 (noting that salaries and benefits of personnel dispatched to meet with U.S. customers were included in indirect selling expenses); Certain Frozen Warmwater Shrimp from Ecuador: Final Results of Antidumping Duty Administrative Review, 72 FR 52070 (September 12, 2007), and accompanying Issues and Decision Memorandum at Comment 8 (explaining that payments to salaried employees are indirect selling expenses and differentiating payments to a non-salaried outside agent (commissions) as direct expenses); and Certain Lined Paper Products From India: Notice of Final Results of Antidumping Duty Administrative Review and Partial Rescission of Antidumping Duty Administrative Review, 76 FR 10876, (February 28, 2011) (CLPP Third Review), and accompanying Issues and Decision Memorandum at Comment 9.

Petitioner argues that likewise, in Canned Pineapple Fruit from Thailand and Frozen Concentrated Orange Juice from Brazil, there are no indications that the Department treated salaries as direct selling expenses. Petitioner claims that in both cases, the Department made a circumstances-of-sale adjustment to account for “merchandising expenses,” but did not describe the expenses and did not associate them with salaries of any kind. Thus, petitioner contends there is no support for Navneet’s arguments that the Department should deviate from its normal practice of treating salaries for canvassing personnel as indirect selling expenses. Nor is there any support for Navneet’s argument that the Department’s two-pronged test to determine whether advertising expenses are direct or indirect selling expenses should be applied to such salaries.

Petitioner states that even if the Department were to find that salaries could potentially represent a direct selling expense, petitioner contends that the Department should continue to treat Navneet’s canvassing activities as indirect selling expenses because Navneet has failed to demonstrate that these activities are directed at its customer’s customer, consistent with the two-pronged test. Petitioner further argues that while Navneet provided a description of its canvassing personnel’s work, Navneet provided no documentation to support this description.⁷⁵ Thus, petitioner asserts that Navneet’s arguments with respect to the salaries of its canvassing personnel have no basis in the Department’s practice or precedent. Therefore, the Department should reject Navneet’s arguments and continue to treat these salaries as indirect selling expenses for the final results.

Department’s Position:

Section 351.410 of the Department’s regulations governs adjustments for differences in circumstances of sale (COS), which are specified by section 773(a)(6)(C)(iii) of the Act. COS adjustments consist of the following items: (1) direct selling expenses such as commissions, credit expenses, guarantees, and warranties which result from and bear a direct relationship to the particular sale in question; (2) assumed expenses, which are selling expenses that are assumed by the seller on behalf of the buyer, such as advertising expenses; and (3) a reasonable allowance for other selling expenses when commissions are paid in one market under consideration but not the other market under consideration.⁷⁶

First, we note that in the instant review, Navneet refers to these activities as canvassing activities, whereas in the prior review, Navneet described the same activities as merchandising activities.⁷⁷ In the previous review, we determined that Navneet’s merchandising activities were indirect selling expenses because the salaries of Navneet’s retail marketing personnel are expenses incurred by Navneet (the producer) to sell to its primary customers (the retailer), rather than to the customer’s customer (the retailer’s customer). As such, these expenses represent efforts by Navneet’s employees to increase sales from Navneet to Navneet’s direct customer. Even if part of the activity of Navneet’s employees is aimed at the customer (the retailer) increasing its sales

⁷⁵ See Initial QNR at B-47 and B-48.

⁷⁶ See 19 CFR § 351.410.

⁷⁷ See CLPP Third Review, and accompanying Issues and Decision Memorandum at Comment 9.

to other customers, this activity does not translate these salaries into expenses “assumed” by Navneet on behalf of its customers.⁷⁸

In this review, Navneet reported that to support its sales in its full-service distributor channel it employs canvassers who are salaried employees to assist retailers and sales outlets.⁷⁹ It is these salaries that Navneet claims the Department should treat as direct advertising expenses. However, Navneet pays these employees a salary regardless of whether or not a sale is made, and their salaries are not linked to particular sales. In Brass Sheet and Strip from Italy, the Department disallowed the portion of the respondent’s technical service claim attributable to salaries because salaries would have been paid regardless of whether a sale was made, and therefore were indirect selling expenses.⁸⁰

We disagree with Navneet that these expenses should be treated as direct because they are consistent with the Department’s two pronged test used to determine whether advertising expenses should be considered direct or indirect expenses. The Department’s policy is to treat sales expenses that are incurred regardless of whether sales are made and that are not linked to a particular sale, such as salesman’s salaries, as indirect selling expenses.⁸¹ Although Navneet characterizes the activities of the canvassers as “advertising,” we disagree. The expenses reported are salaries, not advertising. Advertising is an “assumed” expense where the producer pays for advertising aimed at its customer’s customer; in doing so, the producer “assumes” these expenses on behalf of the customer.⁸² Navneet’s canvassers are salaried employees who perform various promotional activities, such as exhibitions, and school programs on behalf of Navneet. Typically, the Department does not view these types of promotional activities as direct selling expenses. As such, whether or not the salaries paid meet the two-prong test is irrelevant. The Department’s two-pronged test was developed over time for evaluating how to treat different kinds of advertising expenses.⁸³

Moreover, in the instant case, these salaries are not assumed expenses like advertising. Here, Navneet reported its canvassing expenses separate from, and in addition to, advertising expenses (for which the Department did make a COS adjustment, consistent with 19 CFR § 351.410).⁸⁴ Therefore, consistent with Department policy and the CLPP Third Review, for the final results we continue to treat Navneet’s canvassing activity as an indirect selling expense.

In addition, with regard to salaries paid to employees who are engaged in promotional activities, we note that companies that report fees paid for advertising materials which qualify for treatment

⁷⁸ See Id.

⁷⁹ See Initial QNR at page A-12.

⁸⁰ See Final Determination of Sales at Less Than Fair Value: Brass Sheet and Strip from Italy, 52 FR 816, 816 (January 1, 1987) (Brass Sheet and Strip from Italy). See also Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Sweden, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews, 64 FR 35590, 35624 (July 1, 1999) (Antifriction Bearings, 1999).

⁸¹ See Stainless Steel Bar from India: Notice of Final Results of Antidumping Duty Administrative Review, 73 FR 52294 (September 9, 2008), and accompanying Issues and Decision Memorandum at Comment 4.

⁸² See 19 CFR § 351.410(d).

⁸³ See Final Determination of Sales at Less Than Fair Value: Stainless Steel Plate in Coils from Japan, 64 FR 30574 (June 8, 1999), and accompanying Issues and Decision Memorandum at Comment 5.

⁸⁴ See Initial QNR at Exhibit B-13.

as direct selling expenses usually have employees involved in the preparation of such materials and/or contact with the company creating these advertising materials. The salaries for employees who are involved in these activities are not then included in the reported direct advertising expenses; but are normally included in indirect selling expenses or more generally, selling, general and administrative expenses (SG&A). Normally, the only payments to company employees that we consider direct selling expenses are commissions paid (assuming they are consistent with relevant unaffiliated commissions).

Comment 6: Whether to make an Excise Tax Adjustment for Navneet

Petitioner disagrees with the Department's Preliminary Results where we made adjustments to Navneet's cost and home market sales prices to account for Navneet's excise taxes. Petitioner asserts that the record does not support the Department's adjustment for Navneet's excise taxes because both costs and home market prices were reported exclusive of excise taxes, thus creating a distortion. Therefore, petitioner argues that because neither the reported cost nor the gross unit price include taxes, the Department should remove the excise tax adjustments from its calculations for the final results.

Petitioner also argues that the 5.7 percent excise tax rate reported by Navneet is not supported by record evidence. According to petitioner, the only taxation document on the record for home market purchases does not tie to the 5.7 percent rate that Navneet describes in its narrative.⁸⁵

Finally, petitioner argues that the Department should correct for a ministerial error in the Preliminary Results.⁸⁶ In the Department's Preliminary Calculation Memorandum - Navneet, the Department stated that it subtracted the excise tax from the gross unit price.⁸⁷ However, in the Comparison Market program, the excise tax was added to the home price.⁸⁸ Therefore, petitioner argues that the Department should change the Comparison Market program to match its narrative.

Navneet asserts that the excise tax which must be accounted for is the expense incurred at the time of purchasing raw materials, not at the time taxes are paid or not paid when the finished product is sold. Navneet explains that because it pays excise tax on its raw materials purchased for domestic production for many of its products which is not reimbursed when it sells these products to its home market customer, Navneet incurs an expense for selling in the home market which it does not incur on sales to the U.S. market. Thus, Navneet contends that it must increase its home market price to compensate for this additional expense, which is a "circumstance of sale" difference, and a circumstance of sale adjustment must be made.

Navneet claims that since the excise expense is incurred only with respect to some products (those qualifying as "school supplies"), it had to compute an average excise expense rate based

⁸⁵ See Initial QNR at B-49. See also Second Supplemental Questionnaire Response (Second Supplemental QNR) dated July 28, 2011, at 2S-14 and Exhibit B-35.

⁸⁶ See Preliminary Results.

⁸⁷ See Memorandum to the File Through James Terpstra from Stephanie Moore titled "Calculation Memorandum for Navneet Publications (India) Ltd.," (Preliminary Calculation Memo - Navneet), dated September 30, 2011, at 5.

⁸⁸ See Id., at 5.

on the actual invoice data.⁸⁹ Furthermore, Navneet claims that because the Department’s control number (CONNUM) definition does not match the “school supply” definition of the Indian government, various CONNUMs have a mix of excise and non-excise products. Therefore, Navneet states that it had to allocate the excise expense to the various CONNUMs. Thus, Navneet argues that it is not accurate to imply, as petitioner’s brief does, that Navneet’s derivation of the excise expense is undemonstrated or unexplained. Moreover, Navneet contends that the Department has accepted the unreimbursed excise expense as an appropriate adjustment in prior administrative reviews, and should continue to make the adjustment in the final results because the excise expense is directly related to Navneet’s home market sales, and it is never incurred with respect to U.S. sales.⁹⁰

Furthermore, Navneet states that although the Department’s Preliminary Calculation Memo - Navneet⁹¹ correctly explains that in computing normal value, the excise taxes should be subtracted from gross unit price, the Department incorrectly added the excise taxes to the gross unit price in the Comparison Market program,⁹² which erroneously increases the normal value. Therefore, Navneet argues that the Department should correct this error in the final results.

Department’s Position:

Pursuant to section 773(a)(6)(B)(iii) of the Act, the Department adjusts for the amount of any taxes imposed directly upon the foreign like product to the extent that such taxes are added to or included in the price of the foreign like product. According to the Government of India’s regulations, excise taxes paid on the purchase of raw material inputs are not allowed to be passed onto consumers who purchase school supplies, even though Navneet incurs this cost on its home market sales.⁹³ As a result, Navneet increases its home market sales price to include the unreimbursed excise tax expense it incurs for selling school supplies in the home market, which it does not incur on sales to the U.S. market.⁹⁴ Therefore, in accordance with section 773(a)(6)(B)(iii) of the Act and consistent with our practice in prior reviews, the Department excludes excise taxes from TCOM and from the home market gross unit price.

With respect to the Department’s adjustment to the TCOM to account for the excise taxes, we continue to find that because Navneet does not incur excise taxes on sales of school supplies in the U.S. market, the excise tax expense should not be included in the TCOM. In the Preliminary Results, we made an adjustment to TCOM to exclude excise taxes using the PAPER 1 variable, which includes excise taxes.⁹⁵ However, because TCOM as reported in the COP database is

⁸⁹ See Second Supplemental QNR, at Exhibit D.28.

⁹⁰ See Certain Lined Paper Products From India: Notice of Preliminary Results of Antidumping Duty Administrative Review, 74 FR 51558, 51564 (October 7, 2009) (Preliminary Results CLPP Second Review), unchanged in the final results of CLPP Second Review. See also Certain Lined Paper Products From India: Notice of Preliminary Results of Antidumping Duty Administrative Review, 75 FR 64988, 64992 (October 21, 2010) (Preliminary Results CLPP Third Review), unchanged in the final results of CLPP Third Review.

⁹¹ See Preliminary Calculation Memo - Navneet at 5.

⁹² See lines 6159 -6169 in the Comparison Market Program.

⁹³ See Initial QNR at B-50.

⁹⁴ See Id., at B-49.

⁹⁵ See Preliminary Calculation Memo – Navneet at 5.

exclusive of excise taxes, we find that it is more accurate to use TCOM as reported.⁹⁶ Thus, for the final results, we have used the TCOM as reported in the COP database as submitted on July 28, 2011.⁹⁷ Regarding the actual taxes for which we made an adjustment for Navneet, we used the actual amount paid by Navneet for these products. As Navneet explained in its response, this is a blended rate based on the array of different material inputs used to produce the subject merchandise.

Therefore, because we did not use the 5.7 percent excise tax to reduce TCOM to account for the unreimbursed excise taxes, and instead used TCOM, exclusive of excise taxes in the final results, we find that the actual percentage that the government may have levied is not relevant to the analysis as explained above. Therefore, petitioner's argument regarding the 5.7 percent excise tax rate reported by Navneet does not change our analysis.⁹⁸

Finally, in the Preliminary Results of the instant review, although the Department stated in the Preliminary Calculation Memo - Navneet that we subtracted excise taxes from the gross unit price, in the Comparison Market program we inadvertently added, rather than deducted, excise taxes to the foreign gross unit price. We have now corrected this error in the Comparison Market program for the final results.⁹⁹

Comment 7: Whether to Modify Navneet's Cost Calculation Data

Navneet asserts that the Department made several adjustments to Navneet's TCOM at lines 6159 – 6169 in the Department's Preliminary Results Comparison Market Program, but then inadvertently failed to use the updated adjusted fields in another section of the program. Therefore, Navneet asks that the Department correct this error in the final results.

Petitioner did not comment on this issue.

Department's Position:

We disagree with Navneet that the Department inadvertently failed to use the adjusted TCOM in a certain section of the Comparison Market Program. However, Navneet's argument is moot because, for the final results, the Department has determined that it is more accurate to use TCOM as submitted in Navneet's July 28, 2011, COP database.¹⁰⁰

⁹⁶ See Second Supplemental QNR at 2S-14, and Exhibit D-28.

⁹⁷ See Id., at Exhibit D-27.

⁹⁸ See Initial QNR at B-49.

⁹⁹ A ministerial error, as defined in section 751(h) of the Act, "includes errors in addition, subtraction, or other arithmetic function, clerical errors resulting from inaccurate copying, duplication, or the like, and any other type of unintentional error which the administering authority considers ministerial." See also 19 CFR 351.224(f).

¹⁰⁰ See Id.

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 of this review, and the final weighted-average dumping margins, in the Federal Register.

Agree _____ Disagree _____

Paul Piquado
Assistant Secretary
for Import Administration

Date