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

FROM: John M. Andersen  
Acting Deputy Assistant Secretary  
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Antidumping Duty  
Investigation of Polyethylene Retail Carrier Bags from Indonesia

### Summary

We have analyzed the comments filed in the antidumping duty investigation of polyethylene retail carrier bags (PRCBs) from Indonesia. As a result of our analysis, we have made changes in the margin calculations. We recommend that you approve the positions described in the Discussion of the Issues section of this memorandum. Below is the complete list of the issues in this investigation for which we received comments and rebuttal comments by parties:

1. *Targeted Dumping*
2. *Level of Trade*
3. *Adverse Facts Available*
4. *Home-Market Credit Expenses*
5. *General and Administrative Expenses*

### Background

On November 3, 2009, the Department of Commerce (the Department) published *Polyethylene Retail Carrier Bags from Indonesia: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 74 FR 56807 (November 3, 2009), as amended in *Polyethylene Retail Carrier Bags From Indonesia: Amended Preliminary Determination of Sales at Less Than Fair Value*, 74 FR 63720 (December 4, 2009) (collectively, *Preliminary Determination*), in the *Federal Register*. We selected the following companies for individual examination: P.T. Super Exim Sari Ltd. and P.T. Super Makmur (collectively, SESSM); P.T. Sido Bangun (SBI). The period of investigation (POI) is January 1, 2008, through December 31, 2008. We invited interested parties to submit comments on the *Preliminary Determination*.

SBI withdrew its participation from the investigation on November 16, 2009. In the weeks of November 30, 2009, and December 7, 2009, the Department verified SESSM's questionnaire responses in accordance with section 782(i) of the Tariff Act of 1930, as amended (the Act). On

December 29, 2009, SESSM submitted the sales and cost databases with revisions that reflect SESSM's minor corrections before the verifications and the Department's findings of SESSM's reporting errors during the verifications. See SESSM's December 29, 2009, submission of the sales and cost databases.

SESSM and the petitioners<sup>1</sup> filed their case briefs with the Department on January 22, 2010, and rebuttal briefs on January 27, 2010. At the petitioners' request, we had a public hearing and a closed session of the hearing on January 29, 2010. For the final determination, we used SESSM's December 29, 2009, sales and cost databases to calculate SESSM's antidumping duty margin. No parties have objected to the use of these databases.

## Discussion of the Issues

### *1. Targeted Dumping*

Comment 1: The petitioners argue that the Department should apply the average-to-transaction methodology to all of SESSM's sales. The petitioners state that, in the *Preliminary Determination*, once it made an affirmative finding of targeted dumping and consistent with its practice, the Department limited application of the average-to-transaction methodology solely to targeted sales and applied the average-to-average methodology to all non-targeted sales. The petitioners assert that, because this practice was based on now-withdrawn regulations, the Department announced in the *Preliminary Determination* that it would consider alternative approaches. The petitioners argue that this alternative approach should take the form of applying the average-to-transaction methodology to all of SESSM's sales, given the requirements and the purpose of the underlying antidumping statute.

The petitioners assert that there is no basis to interpret section 777A(d)(1)(B) of the Act as permitting the application of different margin-calculation methodologies to different subsets of export prices (or constructed export prices). Specifically, the petitioners argue, there is nothing in the language of the statute that suggests that for one part of the identified pattern in export prices (*i.e.*, targeted sales) an average-to-transaction comparison methodology is warranted while for the other part (*i.e.*, non-targeted sales) an average-to-average comparison methodology is appropriate. The petitioners assert that such treatment is arbitrary and is contrary to the intent of Congress.

The petitioners argue that the United States has taken a position before the World Trade Organization (WTO) Appellate Body that Article 2.4.2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (1994) (Antidumping Agreement), which mirrors the language in the statute, prohibits the calculation of a dumping margin using different methods for different subsets of sales. The petitioners argue that, as in the Antidumping Agreement, the statute requires that, where a pattern in export prices (or constructed export prices) exists, the average-to-transaction methodology must be applied to all sales and not just to targeted sales. The petitioners dismiss one of the Department's alternatives, announced in the *Preliminary Determination*, of broadening the application of the average-to-transaction methodology to all sales to targeted time periods instead of specific sales found

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<sup>1</sup> The petitioners in this investigation are Hilex Poly Co. LLC and Superbag Corporation.

affirmatively to be targeted. The petitioners assert that such an approach also does not address the intent of the statute.

The petitioners assert that the application of the average-to-average method to the non-targeted subset of sales contravenes the purpose of the statute. Citing the Statement of Administrative Action accompanying the Uruguay Round Agreement Act, H.R. Doc. 103-316, Vol. 1 (1994) (SAA) at 842-843, the petitioners argue that section 777A(d)(1)(B) of the Act is intended to limit the problem of “masking” that occurs under the average-to-average methodology where higher-priced sales of a product would, through averaging, conceal dumping margins attributable to lower-priced sales. The petitioners argue that the now-withdrawn regulation, 19 CFR 351.414(f), limited the application of the average-to-transaction methodology in a way that permitted the concealing of targeted dumping. First, the petitioners argue, the Department assumed arbitrarily that the targeted sales encompass only the low-priced portion of the pattern of prices; they assert that high-priced sales are also part of the requisite pattern and, thus, could also be considered targeted. In order to avoid the masking of dumping margins, the petitioners argue that the average-to-transaction methodology should have been applied to sales with prices on the high-end of the pattern. They contend that the Department’s current practice of applying the average-to-transaction methodology only to the lowest-priced sales, which typically do not have negative margins, does little to prevent the masking problem identified in the SAA. Second, the petitioners argue, the strictures of the Department’s current targeted-dumping test ensure that only a limited number of sales can be found to have been targeted; positive dumping margins even on most low-priced sales, considered targeted under the Department’s current test, are permitted to be offset, through averaging, by application of regulation.

Citing *Antidumping Duties; Countervailing Duties*, 62 FR 27296, 27375 (May 19, 1997), the petitioners comment that, when the Department promulgated 19 CFR 351.414(f), it sought to limit the application of the average-to-transaction methodology because it reasoned that section 777A(d)(1) of the Act establishes a preference for average-to-average price comparisons in investigations. The petitioners argue that there is no expressed statutory preference for the use of this methodology in investigations, such as here, where patterns of significant price differences may conceal dumping. To the contrary, the petitioners argue, the SAA expresses a reluctance to use an average-to-average methodology where patterns of pricing might conceal dumping.

The petitioners argue that at the time 19 CFR 351.414(f) was adopted the Department had not yet abandoned the practice of zeroing under the average-to-average methodology in investigations. With the elimination of zeroing,<sup>2</sup> the petitioners argue, the masking problem, which the targeted-dumping methodology was designed to address, is exacerbated. As such, the petitioners assert, the need for an effective average-to-transaction methodology that unmask dumping margins is now more acute given the current practice of offsetting positive margins with negative ones in investigations. The petitioners argue that the Department’s withdrawal of the former regulation at 19 CFR 351.412(f) now enables the Department to fulfill the Congressional intent of unmasking dumping by applying the average-to-transaction method to all sales and allows the Department to bring its interpretation of the statute into agreement with the position of the United States regarding the meaning of Article 2.4.2 of the Antidumping Agreement.

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<sup>2</sup> The petitioners cite *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification*, 71 FR 77722 (December 27, 2006).

Alternatively, the petitioners assert, if the Department applies the average-to-average methodology to any portion of SESSM's sales, it should reverse the current practice of permitting offsets under such methodology and should reinstate the prior practice of zeroing. The petitioners argue that, although the court has upheld the Department's practice recently in *U.S. Steel Corp. v. United States*, 637 F. Supp. 2d 1199 (CIT 2009), the issue is pending on appeal.

SESSM states that the petitioners argue that the Department has no statutory basis that permits the application of different margin calculation methods to different subsets of U.S. prices. According to SESSM, the petitioners state specifically that the United States argued before the WTO Appellate Body that Article 2.4.2 of the Antidumping Agreement prohibits the calculation of an antidumping duty margin using different comparison methods for different subsets of sales. SESSM agrees with the petitioners that the statute does not allow such bifurcation where two different comparison methods are applied to two subsets of data and that the statute directs the Department instead to apply only one method for all sales.

SESSM alleges that the petitioners do not acknowledge that the SAA at 842-43 and 19 CFR 351.414(c)(1) state a preference for use of the average-to-average methodology, not the average-to-transaction methodology, in investigations. SESSM claims that, although the petitioners present an abstract argument as to why the average-to-transaction methodology should be used in this investigation, the petitioners do not identify any specific factual basis from record evidence to justify the departure from the use of the average-to-average methodology in favor of the application of the average-to-transaction methodology.

SESSM alleges that the petitioners have not shown a pattern in SESSM's U.S. price data that differ significantly among purchasers, regions, or time periods. According to SESSM, in the *Preliminary Determination*, the Department made a finding of targeted dumping that highlights the insignificance of the alleged pattern of targeted sales. SESSM explains that the Department found that only in December 2008 SESSM had more than 33 percent of the total volume of sales made during that month at prices more than one standard deviation below the weighted-average price in the entire POI. SESSM argues that, as a result, the Department's targeted-dumping test in the *Preliminary Determination* shows that the vast majority of SESSM's sales during the POI were not targeted even by the Department's own criteria. SESSM claims that it would be entirely inappropriate for the Department to abandon its own stated preference for using average-to-average comparisons in calculating the antidumping duty margins for this investigation when its own targeted-dumping results in the *Preliminary Determination* show no real pattern of U.S. prices that differ significantly by purchaser, region, or time periods.

SESSM requests that, for the final determination, the Department apply the average-to-average methodology to all sales in calculating the antidumping duty margins in this investigation. SESSM states that the Department should not apply the average-to-transaction methodology to any subsets of data.

Department's Position: With regard to our targeted-dumping methodology, our practice in *Certain Steel Nails from the United Arab Emirates: Notice of Final Determination of Sales at*

*Not Less Than Fair Value*, 73 FR 33985 (June 16, 2008), and *Certain Steel Nails from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances*, 73 FR 33977 (June 16, 2008) (collectively, *Nails*), limited the application of the average-to-transaction comparison methodology solely to targeted sales. Because this practice was based on now-withdrawn regulations, we announced in the *Preliminary Determination* that we would consider alternative approaches. See *Preliminary Determination*, 74 FR at 56809.

With regard to the petitioners' argument that the U.S. government has taken a position that the Antidumping Agreement dictates either an application of the average-to-average or an average-to-transaction comparison methodology for all sales, we disagree. The U.S. government's position in that dispute was that, if offsets are required, mathematical equivalence was obtained regardless of whether the average-to-transaction methodology was applied to a subset of sales or the average-to-transaction methodology was applied to all sales.

Instead, we have reexamined the language in section 777A(d)(1)(B) of the Act in order to discern whether the application of the average-to-transaction comparison methodology to all U.S. sales made by SESSM is warranted, as the petitioners have argued. Section 777A(d)(1)(B) of the Act states:

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

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

In order to determine whether there was a pattern of export prices which differ significantly among time periods, we based all of our targeted-dumping calculations on the U.S. net price which we determined for SESSM's U.S. sales in our standard margin calculations. We found that there were some prices that differed by time periods. For further information about the results, see the memorandum to the file entitled "Final Determination of Sales at Less Than Fair Value in the Antidumping Duty Investigation of Polyethylene Retail Carrier Bags from Indonesia – Analysis Memorandum for P.T. Super Exim Sari Ltd. and P.T. Super Makmur" dated March 25, 2010 (SESSM final analysis memo).

In order to determine whether we could take these differences into account using the average-to-average comparison methodology, we evaluated the extent to which applying the alternative average-to-transaction methodology to all U.S. sales unmasked dumping not accounted for by using the standard average-to-average comparison methodology. Specifically, we applied the average-to-average methodology and the average-to-transaction methodology to all U.S. sales as

well as the other approaches identified in the *Preliminary Determination*. We found that, in this investigation, the standard average-to-average methodology takes into account the price differences because each of the alternative approaches yields no difference in the margins or differences that are so insignificant relative to the size of the resulting margins to be immaterial. Accordingly, we have applied the standard average-to-average methodology as provided in section 777A(d)(1)(A) of the Act to calculate the dumping margin for SESSM.

## 2. *Level of Trade*

Comment 2: The petitioners argue that SESSM did not demonstrate that its home-market customer categories are at different levels of trade. The petitioners claim that SESSM performed the same selling functions at similar degrees for its retail customers and distributors in the home market. The petitioners contend that SESSM did not perform its selling functions in the home market at a more advanced degree than it did for distributors in the United States. The petitioners assert that, even if the Department finds that two different levels of trade exist for SESSM's retail customers and distributors in the home market, the Department should not make a level-of-trade adjustment to normal value because, using the post-verification databases in the cost test, a pattern of consistent price differences does not exist in accordance with section 773(a)(7)(A) of the Act. The petitioners state that the price differences the Department found in the *Preliminary Determination* with respect to SESSM's level of trade is due to the unique nature of a particular retail customer.

SESSM argues that during the sales verification the Department found that SESSM performed selling functions at different degrees for the company's retail customers and distributors in the home market. SESSM lists a number of selling activities and functions which it claims it performed at different degrees to different categories of customers. SESSM states that the Department's finding at the verification supports SESSM's position that sales to distributors in the United States were more similar to its sales to distributors in the home market than to its sales to retail customers in the home market.

Citing *Stainless Steel Bar From Brazil: Final Results of Antidumping Duty Administrative Review*, 74 FR 33995 (July 14, 2009), and the accompanying Issues and Decision Memorandum (I&D Memo) at Comment 1 (*Stainless Steel Bar from Brazil*), SESSM states that a company can perform the same number of selling activities at different levels of intensity for two different levels of trade. SESSM argues that its sales to retail customers in the home market were at a more advanced level of trade than its sales to distributors in the United States. SESSM requests that, for the final determination, the Department continue to match sales first to U.S. distributors with sales to home-market distributors and then, in the absence of such sales to home-market distributors, match sales to U.S. distributors with sales to home-market retail customers with a level-of-trade adjustment to normal value which represents the weighted-average difference in prices between the two home-market levels of trade.

Department's Position: In accordance with 19 CFR 351.412(c)(2), we determine that a company made sales at different levels of trade if the sales are made at different marketing stages. Substantial differences in selling activities are a necessary, but not sufficient, condition to determine that a difference in the stage of marketing exists. Some overlap in selling activities

will not preclude a determination that different stages of marketing exist because different levels of trade exist when a company performs the same selling activities and functions at different degrees or intensities to customers in different customer categories. See *Stainless Steel Bar from Brazil* and the accompanying I&D Memo at Comment 1. In accordance with 19 CFR 351.412(d), we determine that a difference in level of trade has an effect on price comparability only if there is a pattern of consistent price differences between the home-market sales on which normal value is based and home-market sales at the level of trade of the U.S. sales transactions.

We verified information on which we based our finding in the *Preliminary Determination* that different levels of trade exist between home-market sales to retail customers and distributors. See the memorandum to the file entitled “Polyethylene Retail Carrier Bags from Indonesia: Sales Verification of P.T. Super Exim Sari Ltd. and P.T. Super Makmur” dated January 11, 2010, at 3-7, for details which include business-proprietary information on the intensity of selling functions SESSM reported. After using SESSM’s post-verification sales and cost databases for the cost test and using the same methodology we used in the *Preliminary Determination*, *i.e.*, matching identical control numbers between different levels of trade, we found that SESSM’s sales do not demonstrate a pattern of consistent price differences for purposes of finding different levels of trade in the home market. All of SESSM’s sales, except one sale that, in the *Preliminary Determination*, had been the basis of the preliminary finding that a pattern existed, now fail the cost test and have been eliminated from the level-of-trade analysis. See SESSM final analysis memo for more details. As there are no sales of a single control number at both levels of trade for this final determination, there is no basis upon which to find a pattern of consistent price differences. Because there is no pattern of consistent price differences, we have no information to use to calculate a level-of-trade adjustment for SESSM in the final determination.

Comment 3: SESSM contends that, where it is not possible to determine whether a level-of-trade adjustment is appropriate by comparing the prices of identical control numbers at different levels of trade, the Department may use sales of different or broader product lines, sales by other companies, or any other reasonable basis pursuant to 19 CFR 351.412(d)(2) and urges the Department not to limit its analysis to identical products defined by control numbers.

SESSM claims that, for example, the Department has considered the average prices of comparable product categories to determine whether there was a consistent pattern of price differences in *Notice of Preliminary Results of Antidumping Duty Administrative Review: Certain Welded Carbon Steel Pipe and Tube From Turkey*, 69 FR 18049 (April 6, 2004) (*Welded Pipe from Turkey*), and *Notice of Preliminary Results, Partial Rescission of Antidumping Duty Administrative Review, and Preliminary Determination To Not Revoke Order in Part: Canned Pineapple Fruit From Thailand*, 68 FR 38291 (June 27, 2003) (*Pineapple from Thailand*).

SESSM explains that, in this investigation, a comparison with a broader range of sales to distributors is appropriate to establish a consistent pattern of price differences because of the nature of the product being sold. SESSM claims that, although PRCBs for different customers may be the same type and have the same length, width, and gusset, it is rare for any product to be identical to products of other job orders, given that most job orders are custom orders to meet the specific requirements of each customer’s unique requirements. SESSM argues that slight

differences in resin recipe, thickness, number of colors, and number of color composition will result in two very similar PRCBs appearing in two different control numbers. According to SESSM, slightly different but still similar products are sufficiently comparable for the Department to determine whether there is a consistent pattern of price differences between similar products. SESSM requests that the Department consider all home-market sales to distributors and all home-market sales to retail customers that are not only identical but also similar to each other to calculate the amount of a level-of-trade adjustment to apply to normal value.

SESSM observes that, as stated in *Antidumping Proceedings: Affiliated Party Sales in the Ordinary Course of Trade*, 67 FR 69186 (November 15, 2002), the Department considers not only sales of identical products but also sales of similar products in performing the arm's-length test to determine whether affiliated-party transactions should be considered. SESSM argues that, in light of the Department's regulations which provide specifically that sales of a broader product line or any other reasonable means may be used to determine the level-of-trade adjustment to normal value, it would be appropriate for the Department to use not only identical comparisons but also similar comparisons with a difference-in-merchandise adjustment to determine the level-of-trade adjustment.

The petitioners comment that SESSM does not acknowledge explicitly that the Department's level-of-trade adjustment in the *Preliminary Determination* was distortive. The petitioners request that the Department reject SESSM's proposal to calculate a level-of-trade adjustment by comparing home-market prices of non-identical products at different levels of trade.

The petitioners explain that, in evaluating patterns of price differences between levels of trade and in calculating level-of-trade adjustments to normal value, the Department's established practice is to limit comparisons to sales of identical models. According to the petitioners, *Welded Pipe from Turkey* and *Pineapple from Thailand* state merely without elaboration that the Department examined prices of comparable product categories. The petitioners argue that, in the absence of specific indication of a departure from the normal practice, the phrase is presumed to mean nothing more than that the Department limited its comparisons of level of trade to sales of merchandise falling within the same customer categories as defined by model-match control numbers. The petitioners argue that, if the Department had compared non-identical products, *i.e.*, products with different control numbers, it would have stated so explicitly and it would have described how, if at all, it accounted for differences in product mix or physical characteristics between the models. The petitioners explain that SESSM cites no precedent and the petitioners are unaware of any precedent in which the Department relied explicitly on non-identical comparisons in the analysis of a respondent's levels of trade.

The petitioners disagree with SESSM's claim that comparisons involving non-identical products are contemplated by the second sentence of 19 CFR 351.412(d)(2). The petitioners argue that 19 CFR 351.412(d)(2) describes the set of sales to be examined in the analysis of the level of trade, not the methodology for evaluating those sales. The petitioners explain that 19 CFR 351.412(d)(2) permits the Department to examine, when necessary, sales other than sales of the foreign like product for the analysis of the level of trade. The petitioners claim that SESSM is not proposing the use of sales other than sales of the foreign like product and that no such sales

exist on the record of this investigation. The petitioners contend that SESSM is proposing simply a different methodology to evaluate sales of the foreign like product and 19 CFR 351.412(d)(2) is therefore inapplicable.

The petitioners argue that SESSM provides no basis upon which the Department may depart from its established methodology of limiting comparisons to identical products and determining the appropriate level of specificity for comparisons between similar products. The petitioners describe that the Department could base the comparisons, for example, on sales of the single most similar control number to retail customers, on sales of similar product groups (defined narrowly or broadly based upon any physical characteristics or combination of physical characteristics) to retail customers, or on all sales to retail customers. The petitioners explain that the result of the analysis depends heavily on the level at which the comparison is made. The petitioners claim that the narrow single-product comparison of the level of trade as SESSM proposed would produce a significant result but a comparison involving all sales of all products would have yet another different result.

The petitioners state that, regardless of the level of specificity at which non-identical comparisons are made, the limited number of sales to distributors involving a certain number of products after the cost test poses an insurmountable obstacle to determine whether a pattern of consistent price differences exists between SESSM's levels of trade. According to the petitioners, regardless of which non-identical products sold to retail customers are used in the comparisons, there would be insufficient data to establish a pattern of price differences, let alone a consistent pattern of price differences, as required by the statute.

The petitioners conclude that, for all of these reasons, the Department should not depart from its established practice of limiting the analysis of the level of trade to sales of identical products. The petitioners argue that the Department should not make a level-of-trade adjustment to normal value.

Department's Position: We have not used similar control numbers to determine whether there is a pattern of consistent price differences between SESSM's different levels of trade. Assuming, *arguendo*, that it is appropriate to use similar control numbers to determine whether there is a pattern of consistent price differences between different levels of trade, in this investigation, there is only one sale at one of SESSM's levels of trade that passes the cost test that the Department would consider as similar. See page 14 of the comparison-market program output attached to the SESSM final analysis memo. We find that, in this case, this single transaction representing a very small portion of sales at one level of trade is not a sufficient basis for determining whether a "pattern" of consistent price differences exists. Accordingly, we find that we cannot ascertain whether a pattern of consistent price differences between SESSM's different levels of trade exists and, therefore, we have not made a level-of-trade adjustment.

Comment 4: The petitioners request that, if the Department finds that home-market sales to retail customers and distributors are at different levels of trade, the Department consider home-market sequential number (SEQH) 4733 as a sale made at a third level of trade. The petitioners claim that SESSM admitted at the sales verification that, for the retail customer in SEQH 4733, it did not perform the same selling functions, *e.g.*, sales forecasting, order processing, visits to and

by the customer, *etc.*, which it did when it sold to its other retail customers. The petitioners claim further that SEQH 4733 is not like SESSM's sales to its typical retail customers. The petitioners contend that the differences in selling activities SESSM performed for the retail customer in SEQH 4733 and those performed for all other sales in the home market are greater than the differences of the level of trade between the normal retail customers and distributors. The petitioners observe no basis to classify SEQH 4733 as being in the same level of trade as the sales to SESSM's normal retail customers but different from SESSM's distributors in the home market.

SESSM disputes the petitioners' argument that the sale to this retail customer should be treated as a third level of trade for its unique nature of sales. SESSM argues that the petitioners provide no examples in which the Department has ever found such a level of trade. SESSM argues further that the petitioners' arguments do not prove that this transaction is different from other sales transactions to retail customers. SESSM contends that the Department should treat the sale to this retail customer as a retail sale and there is no valid basis to treat this sale as a third level of trade that is neither retailer nor distributor.

Department's Position: After making all appropriate changes in our calculation for the final determination, the transaction involving SEQH 4733 does not affect the antidumping duty margin for SESSM. Accordingly, we have not addressed the issue of whether SEQH 4733 constitutes a different level of trade in the home market. See *Magnesium Metal from the Russian Federation: Final Results of Antidumping Duty Administrative Review*, 72 FR 51791 (September 11, 2007), and the accompanying I&D Memo at Comment 6 (*Magnesium Metal from Russia*). See also the SESSM final analysis memo for more details.

Comment 5: The petitioners argue that SEQH 4733 was made outside the ordinary course of trade within the meaning of sections 771(15) and 773(a)(1)(B)(i) of the Act. Citing 19 CFR 351.102(b), the petitioners explain that the Department considers certain sales as outside the ordinary course of trade when, "based on an evaluation of all of the circumstances particular to the sales in question," they "have characteristics that are extraordinary for the market in question." Citing 19 CFR 351.102(b), the petitioners state that, although there is no exhaustive list of such characteristics, examples of sales that the Department might consider to be outside the ordinary course of trade are "sales or transactions involving off-quality merchandise or merchandise produced according to unusual product specifications, merchandise sold at aberrational prices or with abnormally high profits, merchandise sold pursuant to unusual terms of sale, or merchandise sold to an affiliated party at a non-arm's length price." Citing *Certain Steel Concrete Reinforcing Bars From Turkey; Final Results of Antidumping Duty Administrative Review and Determination To Revoke in Part*, 73 FR 66218 (November 7, 2008), the petitioners state that, for sales to be truly outside the ordinary course of trade, "they should possess unique or unusual characteristics that make them unrepresentative."

The petitioners argue that SEQH 4733 is highly unusual because of, *e.g.*, the location of the customer, the nature of the customer's business operation, the price of the merchandise sold in this sales transaction, the quantity and quantity unit of the merchandise sold in this sales transaction, the profit from this sales transaction, *etc.* The petitioners assert that SEQH 4733 is unrepresentative of the broader set of SESSM's home-market sales and falls outside the ordinary

course of trade according to the factors set forth in 19 CFR 351.102(b). The petitioners request that the Department disregard SEQH 4733 pursuant to sections 771(15) and 773(a)(1)(B)(i) of the Act.

SESSM argues that SEQH 4733 was made within the ordinary course of trade. According to SESSM, the Department's verification report and verification exhibit demonstrate that SEQH 4733 was like SESSM's other home-market sales to retail customers. SESSM argues that SEQH 4733 is not unusual in terms of the location of the customer, the nature of the customer's business operation, the price of the merchandise sold in this sales transaction, the quantity and quantity unit of the merchandise sold in this sales transaction, the profit from this sales transaction, *etc.* when SEQH 4733 is compared with sales to other retail customers.

Citing *NSK Ltd. v. United States*, 510 F.3d 1375 (Fed. Cir. 2007), affirming *NSK Ltd. v. United States*, 462 F. Supp. 2d 1254, 1260 (CIT 2006), SESSM contends that the Department is not required to exclude infrequent small-quantity sales at high prices and high profitability because the Department should consider the totality of circumstances. SESSM urges the Department to evaluate the reasonableness of SEQH 4733 by comparing it with sales to other retail customers in the home market. SESSM claims that, by any measure of how SESSM sells its products to its retail customers in the home market, SEQH 4733 was within the ordinary course of trade like sales to other retail customers in the home market.

Department's Position: After making all changes as appropriate in our calculation for the final determination, the transaction involving SEQH 4733 does not affect the antidumping duty margin for SESSM. Accordingly, we have not addressed the issue of whether SEQH 4733 was made in the ordinary course of trade. See *Magnesium Metal from Russia* and the accompanying I&D Memo at Comment 6. See also the SESSM final analysis memo for more details.

### 3. *Adverse Facts Available*

Comment 6: The petitioners argue that the Department should assign an adverse facts-available rate to SBI because it withdrew its participation from the investigation. The petitioners request that the Department assign the higher of SBI's calculated margin of 67.62 percent from the *Preliminary Determination* or SESSM's calculated margin in the final determination. The petitioners stress that applying 60.24 percent, which was the highest margin alleged in the petition, to SBI would reward the company for failing to cooperate. Citing the SAA at 870, the petitioners assert that the Department should select an adverse facts-available rate that would "ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully." The petitioners argue that SBI's final margin should not be lower than the calculated rate that it received in the *Preliminary Determination*.

SBI did not comment on this issue.

Department's Position: Section 782(i) of the Act requires that we verify all information upon which we rely in making a final determination in an investigation. Section 776(a)(2)(D) of the Act provides that, if an interested party provides information we requested but the information cannot be verified as provided in section 782(i) of the Act, we shall use the facts otherwise

available in reaching the applicable determination. We find that SBI has not provided information that can be verified in accordance with sections 776(a)(2)(D) and 782(i) of the Act. Specifically, SBI withdrew from this investigation on November 16, 2009, a week before the scheduled sales verification for SBI. The precise nature of an antidumping duty investigation makes it imperative that we verify information SBI submitted in order for us to calculate an antidumping duty margin. Without providing us with an opportunity to verify SBI's submissions in this investigation, SBI impeded the investigation significantly because we cannot calculate a dumping margin for SBI without verifying SBI's submissions.

SBI's failure to provide us with an opportunity to verify its submissions exempts it from qualifying for the remedial provisions of sections 782(e)(2) of the Act. Section 782(e)(2) of the Act requires that we accept an interested party's submission of information that is necessary to the determination but does not meet all the applicable requirements if, *inter alia*, the information can be verified. As a result, we find it necessary, under section 776(a)(2)(D) of the Act, to resort to the use of the facts otherwise available to determine the dumping margin for SBI.

Section 776(b) of the Act provides that, if we find that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information, we may use an inference adverse to the interests of that party in selecting from among the facts otherwise available. In addition, the SAA establishes that we may employ an adverse inference "to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully." See SAA at 870. It also instructs us to consider, in employing adverse inferences, "the extent to which a party may benefit from its own lack of cooperation." *Id.*

We find that SBI failed to cooperate because it withdrew from this investigation and failed to provide us with an opportunity to verify information in this investigation. SBI failed to cooperate to the best of its ability because it had within its sole possession the books and records that would enable us to verify its data and it did not permit us to do so. Therefore, we find it appropriate to use an inference that is adverse to SBI's interests in selecting from among the facts otherwise available. By doing so, we ensure that SBI will not obtain a more favorable rate by failing to cooperate than had it cooperated fully.

As adverse facts available for SBI, we have selected an antidumping duty rate of 85.17 percent, the highest control-number-specific margin we found for SBI for the *Preliminary Determination*. See page 54 of the margin program output attached to "Preliminary Determination of Sales at Less Than Fair Value in the Antidumping Duty Investigation of Polyethylene Retail Carrier Bags from Indonesia - Analysis Memorandum for PT Sido Bangun Indonesia" dated October 27, 2009. This is consistent with our practice where we faced an identical situation (*Certain Circular Welded Carbon Quality Steel Line Pipe from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 74 FR 14514 (March 31, 2009), and the accompanying I&D Memo at Comment 12). There is no need to corroborate the rate we selected because we calculated this rate based on information submitted by SBI in this investigation; therefore, this rate is not based on secondary information. See section 776(c) of the Act and 19 CFR 351.308(c). See also *Certain Tow Behind Lawn Groomers and Certain Parts Thereof from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 74 FR 29167 (June 19, 2009), and the accompanying I&D Memo at Comment 2, and *Final*

*Determination of Sales at Less Than Fair Value and Affirmative Determination of Critical Circumstances, in Part: Light-Walled Rectangular Pipe and Tube from the People's Republic of China*, 73 FR 35652 (June 24, 2008), and the accompanying I&D Memo at Comment 1. In selecting a facts-available margin, we sought a margin that is sufficiently adverse so as to effectuate the statutory purposes of the adverse facts-available rule which is to ensure that a party does not benefit by failing to cooperate as well as to induce respondents to provide us with complete and accurate information in a timely manner. We also sought a margin that is indicative of the respondent's customary selling practices and is rationally related to the transactions to which the adverse facts available are being applied.

Comment 7: According to the petitioners, the Department found that, for all U.S. sales transactions with reported bank charges, SESSM calculated bank charges incorrectly and was unable to explain how it calculated the reported bank-charge amounts. The petitioners state that the Department officials were able to calculate correct bank charges for each examined U.S. sales trace, as applicable. The petitioners argue that, because SESSM was in possession of the necessary documentation and could have reported these bank charges correctly, SESSM failed to act to the best of its ability to report accurate bank charges. The petitioners request that, pursuant to section 776(b) of the Act, the Department recalculate the amounts for U.S. bank charge based on partial adverse facts available. The petitioners propose that the Department assign a certain reported bank-charge amount, which, according to the petitioners, is the highest U.S. bank charge amount incurred for any U.S. sales transaction, to all U.S. sales involving a bank charge.

SESSM concedes that it calculated U.S. bank charges incorrectly for all U.S. sales with bank charges. SESSM opposes the use of the petitioners' proposed methodology of applying the highest amount for U.S. bank charges SESSM reported. SESSM claims that, as the petitioners and the verification report point out, the reported bank-charge amount is inaccurate. SESSM asserts that it is inappropriate to use as partial facts available the highest bank-charge amount as the best available information, given that the highest reported bank charge has questionable validity.

SESSM explains that the Department took the difference between the total invoice price and the total payment amount it received to identify the invoice-specific bank charge and then allocated the invoice-specific bank-charge amount by the ratio of the sales value for each invoice line item divided by the total sales-invoice value. SESSM explains further that the Department divided this allocated bank-charge amount by the total kilogram amount of the sales-invoice line item to calculate the per-kilogram bank-charge amount. SESSM contends that applying the highest bank charge it reported in the U.S. sales database to all U.S. sales transactions with reported bank charges would be excessively punitive because it incurred bank charges proportionally to the invoiced price allocated over the line item in each invoice.

SESSM explains that, for most U.S. sales transactions with bank charges, it overreported the bank-charge amounts. SESSM claims that the bank charges were mostly less than a penny and were to be allocated over the transactions with significantly larger payment values and shipment weights. SESSM states that it is being punished unnecessarily because the reported bank charges are higher consistently than what should have been reported. SESSM asserts that the Department does not need to apply additional partial facts available with an adverse inference

that would skew the calculation of the antidumping duty margin, particularly when the highest reported bank-charge amount has not been verified and is likely an inaccurate amount. SESSM urges that the Department use either the reported bank charges because they are higher in general than what they should have been or only a bank-charge amount that has been calculated accurately.

Department's Position: For the final determination, we have applied the highest verified transaction-specific bank-charge amount as a partial facts available with an adverse inference to all U.S. sales transactions for which SESSM reported bank charges. Because we were unable to verify SESSM's reported U.S. bank charges and the calculation methodology it used for this expense, the use of facts available is necessary. See section 776(a)(2)(D) of the Act. In addition, SESSM had the documents necessary to report the correct U.S. bank charges. See SESSM sales verification report at 22 and Exhibits 4A, 10C, and 10D. Because it did not do so, we find that SESSM did not act to the best of its ability in reporting this expense and, accordingly, the use of an adverse inference is appropriate. See section 776(b) of the Act and *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003).

When we apply partial adverse facts available to a specific expense in the calculation of a dumping margin, we use the highest transaction-specific expense which we verified, if available. See, e.g., *Polyethylene Retail Carrier Bags from Thailand: Final Results of Antidumping Duty Administrative Review*, 72 FR 1982 (January 17, 2007), and the accompanying I&D Memo at Comment 2. Accordingly, we are using the highest transaction-specific bank charge amount we found during the sales verification, which is higher than most of the bank-charge amounts SESSM reported in its U.S. sales database. See the SESSM final analysis memo for more details which rely on SESSM's business-proprietary information.

Comment 8: The petitioners request that the Department apply a partial adverse facts-available rate to SESSM's five U.S. sales which the Department discovered as unreported during the completeness check of the U.S. sales database. The petitioners quote the Department's statement in *Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip in Coils From Italy*, 64 FR 30750, 30757 (June 8, 1999) (*Stainless Steel Sheet from Italy*), that "the failure to report sales data is one of the most serious errors a respondent can commit." The petitioners argue that SESSM possessed the sales records for these five U.S. sales transactions but failed to act to the best of its ability to report them. According to the petitioners, SESSM claims that it excluded these sales transactions from the U.S. sales database due to data-entry errors in its Excel spreadsheet. The petitioners claim that it was SESSM's responsibility to check the accuracy of its response and to correct such errors before the start of the verification. The petitioners argue that the Department's established practice is to apply partial adverse facts available to these five U.S. sales transactions. The petitioners request that the Department apply to these five U.S. sales transactions the highest transaction-specific margin calculated for any reported sale.

SESSM requests that the Department disregard the petitioners' call for applying partial adverse facts available to these five U.S. sales transactions. SESSM claims that it did not report these five U.S. sales transactions due to data-entry errors in the physical characteristics of the product. SESSM explains that, because these data-entry errors designated these five U.S. sales

transactions incorrectly as sales of non-subject merchandise, SESSM eliminated these five U.S. sales transactions as non-subject sales.

SESSM asserts that the Department should not apply partial facts available with an adverse inference because the Department was able to verify the accuracy and reliability of all data related to these five U.S. sales transactions and the corresponding cost data fully. Citing *Maui Pineapple Co. Ltd. v. United States*, 264 F. Supp. 2d 1244 (CIT 2003), and *Coalition for the Pres. of Am. Brake Drum and Rotor Aftermarket Mfrs. v. United States*, 44 F. Supp. 2d 229, 235-37 (CIT 1999), which, according to SESSM, the Department accepted fully verifiable clerical and minor corrections made before and during the verification, SESSM explains that the Department has accepted previously unreported sales transactions at verification when they were deemed insignificant in impact or number. Citing *Notice of Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review: Canned Pineapple Fruit From Thailand*, 66 FR 18596, 18599-18600 (April 10, 2001), SESSM states that the Department accepted additional sales presented during the verification due to a correction of a data-entry error that resulted in a change in the respondent's channel of distribution which made the sales reportable and did not apply partial adverse facts available to those sales transactions. Citing *Notice of Final Determination of Sales at Less Than Fair Value: Small Diameter Circular Seamless Carbon and Alloy Steel, Standard, Line and Pressure Pipe From Italy*, 60 FR 31981 (June 19, 1995), at Comment 10, SESSM claims that it did not report its five U.S. sales transactions at issue due to clerical errors in entering incorrect physical characteristics and that these five U.S. sales transactions are insignificant in sales volume. SESSM argues that it is unnecessary to apply adverse facts available to the five U.S. sales transactions at issue because the previous omission of these sales transactions in the U.S. sales database was due to a clerical error and because the Department was able to verify these sales transactions and corresponding cost data fully.

Department's Position: We have included the five U.S. sales transactions at issue in the calculation of the antidumping duty margin for SESSM in the final determination. In our verification agenda, we stated that we will accept new information at the sales verification "only under the following circumstances: (1) the need for that information was not evident previously; (2) the information makes minor corrections to information already on the record; (3) the information corroborates, supports, or clarifies information already on the record." See the SESSM sales verification agenda dated November 19, 2009.

Section 782(e) of the Act requires that, for the final determination, we "shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements" we established if the respondent's submission meets all of the statutory requirements as follows:

- The information is submitted by the deadline established for its submission.
- The information can be verified.
- The information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination.
- The interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by the administering authority

or the Commission with respect to the information.

- The information can be used without undue difficulties.

In accordance with section 782(e) of the Act, for the final determination, we have used the five U.S. sales transactions at issue for the following reasons:

- We allowed SESSM to make minor corrections at the sales verification so SESSM's submission of these five U.S. sales transactions during the sales verification was not untimely. For this investigation, we find that an addition of five U.S. sales transactions to the U.S. sales database SESSM submitted already constitutes a minor correction.
- We verified these five U.S. sales transactions.
- We found no evidence during the sales verification that these five U.S. sales transactions were incomplete.
- We found no evidence that SESSM failed to cooperate to the best of its ability. SESSM discovered during the verification that it did not report these five U.S. sales transactions and presented these sales transactions to us.
- These five U.S. sales transactions can be used without difficulty.

The U.S. Court of International Trade has upheld our practice. See *Maui Pineapple Co. Ltd. v. United States*, 264 F. Supp. 2d at 1256-60.

We find that there are significant factual differences between SESSM and a respondent, Acciai Speciali Terni, S.p.A. (AST), in *Stainless Steel Sheet from Italy*, which the petitioners cite to call for an application of partial adverse facts available to these five U.S. sales transactions. In *Stainless Steel Sheet from Italy*, we indicated that AST did not report a significant number of U.S. sales transactions until three days before the verification started and that AST was unable to explain why it did not report its U.S. sales transactions at issue earlier. See *Stainless Steel Sheet from Italy*, 64 FR at 30757. We also distinguished *Stainless Steel Sheet from Italy* from other cases in which we analyzed such additional sales transactions, found that they had no or negligible effect, and used them in the calculation of antidumping duty margins. *Id.* Therefore, *Stainless Steel Sheet from Italy* is distinguishable from the facts concerning SESSM in this investigation. Moreover, during the sales verification, we verified SESSM's quantity and value of sales and we did not find any other U.S. sales that SESSM did not report. See the SESSM sales verification report at 10-12.

#### 4. *Home-Market Credit Expenses*

Comment 9: According to the petitioners, the Department found during the verification that SESSM made certain errors in its calculation of Indonesian Rupiah-based home-market short-term interest rate that it used in calculating its home-market credit expenses. The petitioners request that the Department recalculate SESSM's home-market credit expenses by using the revised short-term interest rate that the Department calculated during the sales verification.

SESSM states that it agrees with the petitioners' assertion.

Department's Position: For the final determination, we have used the revised short-term interest

rate that we calculated during the sales verification in our recalculation of SESSM's home-market credit expenses.

## 5. *General and Administrative Expenses*

Comment 10: The petitioners argue that the Department should revise SESSM's general and administrative (G&A) expense ratio to include land and building taxes, government permit charges, vehicle license taxes, and sundry other taxes and fees. Citing *Certain Frozen Warmwater Shrimp From India: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 74 FR 33409 (July 13, 2009), the petitioners point out that the Department's practice is to include taxes (with the exception of income taxes and value-added taxes) such as land and property taxes and fringe benefit taxes in the calculation of the G&A expenses because they are related to the company's general operation and because they are a cost of doing business. The petitioners assert that the taxes SESSM excluded from the calculation of the G&A expenses were not income taxes or value-added taxes but they are related to the company's general operations and included in the G&A expenses properly.

SESSM responds that the petitioners are correct in pointing out that the company excluded land and building taxes, government permit charges, vehicle license taxes, and other taxes and fees in calculating the G&A expense ratio. SESSM argues that one of the items that it excluded from the G&A calculation – “taxes on interest revenue earned on bank deposits” – represents an income tax that is excluded appropriately under the Department's practice. SESSM maintains that, should the Department revise the G&A expense ratio for the final results, it should not include this item in its calculation.

Department's Position: In calculating its G&A expense ratio, SESSM excluded all expenses included in the “taxes” line item on the financial statements. During the cost verification, we obtained a detailed list of all expenses recorded in the account corresponding to this line item. See the cost verification report dated January 12, 2010, at Exhibit 24. The account included government permit charges, property taxes, notary fees, motor vehicle license taxes, taxes on interest incurred on bank deposits, *etc.* We normally consider expenses of this nature as period expenses that relate to the general operations, as they are a cost of doing business and not taxes on income. See, *e.g.*, *Notice of Final Determination of Sales at Less Than Fair Value: Citric Acid and Certain Citrate Salts from Canada*, 74 FR 16843 (April 13, 2009).

With regard to taxes on interest earned on banking balances, we find that, while SESSM labeled these expenses as “taxes,” nothing on the record indicates that these expenses in fact represent income taxes paid to the government. Moreover, these expenses were not included in the line item “corporate income taxes” on the company's audited financial statements but rather were recorded as current period expenses that the company incurred. Therefore, we have revised SESSM's G&A ratio to include all expenses recorded in the “taxes” account.

Recommendation

Based on our analysis of the comments received, we recommend adopting the above positions. If these recommendations are accepted, we will publish the final determination of this investigation and the final antidumping duty margins for SBI and SESSM in the *Federal Register*.

Agree \_\_\_\_\_

Disagree \_\_\_\_\_

\_\_\_\_\_  
Ronald K. Lorentzen  
Deputy Assistant Secretary  
for Import Administration

\_\_\_\_\_  
(Date)