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

FROM: Christopher Marsh
Deputy Assistant Secretary
for Antidumping and Countervailing Operations

SUBJECT: Issues and Decision Memorandum for Final Results of Antidumping Duty Administrative Review: Certain Circular Welded Non-Alloy Steel Pipe from Mexico

SUMMARY: We have analyzed the case briefs and rebuttal briefs of interested parties in the antidumping duty administrative review of certain circular welded non-alloy steel pipe from Mexico. As a result of our analysis, we have made certain changes in our calculations from the preliminary results. *See Certain Circular Welded Non-Alloy Steel Pipe From Mexico: Preliminary Results of Antidumping Duty Administrative Review*, 75 FR 78216 (December 15, 2010) (*Preliminary Results*). We recommend that you approve the positions we have developed in the "Discussion of the Issues" section of this Issues and Decision Memorandum. Below is the complete list of the issues in this review.

<u>Case Briefs</u>

Respondent Mueller Comercial, S. de R.L. de C.V., and Southland Pipe Nipples Company, Inc., Case Brief dated February 25, 2011 (Mueller case brief)

Petitioner U.S. Steel Case Brief regarding Tuberia Nacional, S.A. de C.V., dated February 25, 2011 (U.S. Steel's TUNA case brief)

Petitioner U.S. Steel Case Brief regarding Mueller Comercial, S. de R.L. de C.V., and Southland Pipe Nipples Company, Inc., dated February 25, 2011 (U.S. Steel's Mueller case brief)

Petitioners Allied Tube and Conduit and TMK-IPSCO Case Brief dated February 25, 2011 (Allied/TMK case brief)

Rebuttal Briefs

Respondent Mueller Comercial, S. de R.L. de C.V., and Southland Pipe Nipples Company, Inc., Rebuttal Brief dated March 9, 2011 (Mueller rebuttal brief)

Respondent Tuberia Nacional, S.A. de C.V., Rebuttal Brief dated March 9, 2011 (TUNA rebuttal brief)

Petitioner U.S. Steel Rebuttal Brief dated March 9, 2011 (U.S. Steel rebuttal brief)

Petitioners Allied Tube and Conduit and TMK-IPSCO dated March 9, 2011 (Allied/TMK rebuttal brief)

Comment 1: Total AFA for TUNA Because It "should have known" Its Products Were Exported to the United States

In U.S. Steel's case brief at pages 1-5, U.S. Steel rejects TUNA's no-shipment claims and argues that our verification demonstrated TUNA did, in fact, have knowledge that much of the subject merchandise it sold to Mueller was destined for the United States. *See* Memorandum from Robert James and Mark Flessner to the file entitled "Certain Circular Welded Non-Alloy Carbon Steel Pipe from Mexico: Verification of Questionnaire Responses of Tuberia Nacional, S.A. de C.V.," dated February 11, 2011 (TUNA Verification Report). U.S. Steel maintains that TUNA "should have known" that its sales of subject merchandise to Mueller were destined to the United States because: (1) TUNA knew that its sales to Mueller would ultimately be exported under the IMMEX program whereby export sales are exempted from Mexico's value-added taxes (IVA) because the documentation required to qualify for this program links TUNA's sales to Mueller's eventual sales to the United States; (2) TUNA sold large quantities of pipe made to a certain U.S. specification to Mueller, indicating knowledge of a U.S. destination; (3) Mueller's plant is relatively close to the United States-Mexican border, which meant that TUNA should have known some merchandise would be imported into the United States; (4) Mueller is well known for its operations and presence in the United States, indicating that TUNA could not claim that it had no knowledge that any products purchased by Mueller were destined for the United States; and (5) TUNA and Mueller shared certain services from third parties, demonstrating that TUNA should have been cognizant of Mueller's exports of subject merchandise to the United States. U.S. Steel contends that TUNA did not cooperate with the Department's request for information by failing to respond to the questionnaire; consequently, U.S. Steel urges the Department to apply total adverse facts available (AFA) in determining a dumping margins for TUNA.

In Allied/TMK's case brief at pages 1-7, Allied/TMK also cite to the TUNA Verification Report, stating that Mueller is the only company with whom TUNA has a co-export arrangement for the subject merchandise. Allied/TMK argue that TUNA knew at the time sales were made to Mueller under the IMMEX program that Mueller requested VAT-free treatment of purchases from TUNA. They maintain that TUNA had constructive knowledge of the export of the subject merchandise to the United States because the export of this merchandise is an express condition for participation in the IMMEX program. Allied/TMK also argue that (a) the proximity of

TUNA's plant to the United States border, (b) the fact that merchandise was produced to a certain U.S. specification, and (c) TUNA and Mueller's sharing of certain third-party services all combine to indicate that TUNA had knowledge of the export of subject merchandise to the United States.

In Mueller's rebuttal brief at pages 2-7, Mueller maintains that TUNA's sales to Mueller under the IMMEX program are not "reviewable sales" under Section 772(a) of the Act because TUNA neither knew or should have known that any specific shipment of the subject merchandise under the IMMEX program was destined for the United States. Mueller allows that TUNA had a general knowledge that some of its merchandise would be exported to the United States. However, citing *Certain In-Shell Raw Pistachios from Iran*, 70 FR 7470 (Feb. 14, 2005) and its accompanying Issues & Decision Memorandum at Comment 1 (*Pistachios from Iran*), Mueller maintains that general knowledge is insufficient to fail the export price "knowledge test" used by the Department; the company being examined must have reason to know at the time of the sale that the specific sales of subject merchandise were destined to the United States. Mueller states that the IMMEX program has an 18-month "window" in which the purchasing company is only required to export an equivalent volume of the same product. Mueller also points out that it sells products in markets other than the United States without informing TUNA of the destination. Further, Mueller maintains that it converts a large amount of the subject merchandise it purchases from TUNA into non-subject merchandise, also without informing TUNA of the conversion. Mueller argues that petitioners' contention that Mueller is proximate to the United States is insufficient to establish the high level of requisite knowledge needed to fail the Department's "knowledge test." Mueller makes the same argument with regard to petitioners' contention that it shares certain service providers with TUNA. Mueller again makes this argument with regard to petitioners' contention concerning purchase of material produced to a certain U.S. specification. Mueller submits that no circumstances have changed from the Department's decision in the previous review, citing *Certain Circular Welded Non-Alloy Steel Pipe from Mexico*, 75 FR 20342 (April 19, 2010), and accompanying Issues and Decision Memorandum at Comment 3.

In TUNA's rebuttal brief at pages 1-13, TUNA also cites *Pistachios from Iran*, delineating the various portions of the Department's "knowledge test." TUNA states that there is no evidence on the record of shipping, handling, or packing documentation indicating a destination in the United States for any product it sold to Mueller. TUNA further submits that neither it nor Mueller has ever admitted, stated, suggested, or implied that it has knowledge of the ultimate destination of specific sales. TUNA relates that the Department's analysis of documentation from U.S. Customs and Border Protection (CBP) indicated that there were no reviewable sales by TUNA. TUNA restates Mueller's assertion that a substantial portion of the product sold to Mueller is reprocessed by the latter into non-subject merchandise, but without knowing which specific sales are so reprocessed. TUNA maintains that the contentions of both U.S. Steel and Allied/TMK that participation in the IMMEX program indicates constructive knowledge of export to the United States are incorrect because there existed the possibilities of export to other countries and conversion to non-subject merchandise by Mueller. TUNA disputes the positions of U.S. Steel and Allied/TMK that use of certain services in common with Mueller ought to have alerted TUNA that its pipe was bound for the U.S. market because that service provider was used for co-export sales, not necessarily for export sales. Citing *Timken Co. v. United States*, 166 F.

Supp. 2d 608 (CIT 2001) (*Timken I*), TUNA states that the use of U.S. specifications indicates little with regard to knowledge of export to the United States because these are widely used in other markets. TUNA rebuts Allied/TMK's contention that it should have known at the time of its sales to Mueller that the merchandise was destined for export to the United States because Mueller was the only company with which it had a co-export arrangement for pipe by questioning how the number of co-export arrangements is relevant to the Department's "knowledge test."

Department's Position:

After considering all factual information on the record of this review, including the information reviewed in our verifications of both TUNA and Mueller, we continue to find that TUNA neither knew nor should have known that the merchandise under review was destined for export to the United States at the time of the sale.

The Department's standard for the "knowledge test" is well-established. *See Pistachios from Iran; see also Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, et al.; Final Results of Antidumping Duty Administrative Reviews, Partial Termination of Administrative Reviews, and Revocation in Part of Antidumping Duty Orders*, 60 FR 10900, 10951-10952 (Feb. 28, 1995). In general, the Department's practice has been to consider documentary or physical evidence that the producer knew or should have known its goods were destined for the United States, because this type of evidence is more probative, reliable and verifiable than unsubstantiated statements or declarations. *See Wonderful Chemical Industrial, Ltd. v. United States*, 259 F. Supp. 2d 1273 (CIT 2003) (*Wonderful Chemical*), at footnote 4. This is not the only type of evidence that the Department will consider. An admission by the producer or a representative of the producer to the Department that it knew of the ultimate U.S. destination can also establish knowledge. In *Dynamic Random Access Memory Semiconductors of One Megabit or Above from the Republic of Korea: Final Results of Antidumping Duty Administrative Review and Determination Not to Revoke the Order in Part*, 64 FR 69694 (December 14, 1999), the individual who had been the world-wide sales manager for the relevant company during the POR told the Department that he knew that the merchandise was destined for the United States. CBP entry information corroborated the admissions of this individual. Therefore, based on this information, including the statements of admission, the Department found that the company had knowledge of the ultimate U.S. destination. In some cases, the Department might find other evidence to be relevant to the knowledge issue. In prior cases, the Department has considered whether the relevant party prepared or signed any certificates, shipping documents, contracts, or other such documents stating that the merchandise was destined for the United States. *See Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Synthetic Indigo from the People's Republic of China*, 64 FR 697236, 69727 (December 14, 1999). The Department has also considered whether the relevant party used any packaging or labeling stating that the merchandise was destined for the United States. *See Certain Pasta from Italy: Termination of New Shipper Antidumping Duty Administrative Review*, 62 FR 66602 (December 19, 1997). Additionally, the Department has examined whether the features, brands, or specifications of the merchandise indicated that it was destined for the United States. *See*, *e.g.*, *GSA, S.R.L. v. United States*, 77 F. Supp. 2d 1349, 1355 (CIT 1999). These factors considered by the Department in past knowledge determinations were relied upon by the Department in order to determine whether the producer had constructive knowledge (*i.e.*, should have known) that the goods were destined for the United States. *See Wonderful Chemical* at 1279. In other words, we were able to determine whether or not a producer should have known that its merchandise was destined for export to the United States by examining evidence on record that the producer or relevant party used packaging or labeling materials unique to U.S. sales of the merchandise under investigation or review or signed documentation stating the ultimate U.S. destination.

It is important to note that a general knowledge or belief on the part of a producer that an exporter generally sells to the United States is insufficient to establish knowledge with respect to particular sales. Rather, the standard for making a knowledge determination is that the producer must have reason to know *at the time of the sale* that the *specific sales* of subject merchandise were destined for the United States. *See Pistachios from Iran; see also Final Determination of Sales at Not Less Than Fair Value: Pure Magnesium from the Russian Federation*, 66 FR 49347 (September 27, 2001), and accompanying Issues and Decision Memorandum at Comment 3. The possibility that the producer may have speculated that the goods might ultimately be destined for the United States is insufficient for a knowledge determination. Rather, the standard is whether the producer knew or should have known at the time of the sale that the goods were destined for the United States.

As described below, none of the normal factors indicative of knowledge are present in this case. In the absence of any substantial evidence, we find that the record does not support a finding that TUNA either knew or should have known at the time of the sale that any specific sale of the circular welded non-alloy steel pipe it sold to Mueller was destined for the United States. Verified information on the record indicates that Mueller sells products in markets other than the United States. *See* Mueller's section A response at page 5.

We find that there is no record evidence that TUNA prepared or signed any documentation relevant to the shipping, handling, and packing of the merchandise for export during the POR. Instead, the record clearly indicates that Mueller, not TUNA, prepared and signed all certificates, shipping documents, contracts or other papers identifying the destination of the merchandise as the United States. The record is void of evidence that TUNA used any packaging or labeling which stated that the merchandise was destined for the United States. Rather, the record indicates that Mueller re-packed the merchandise for shipment to the United States. *See* TUNA Verification Report at 10 and Exhibit 21. *See also* Memorandum from Robert James and Mark Flessner to the file entitled "Antidumping Duty Administrative Review of Certain Circular Welded Non-Alloy Steel Pipe from Mexico: Verification of Mueller Comercial de Mexico, S. de R.L. de C.V.," dated February 11, 2011 (Mueller Verification Report) at page 11.

Further, there were no unique features of the merchandise that would otherwise indicate that it was destined for the United States. In our verification, we questioned plant floor personnel at both the Mueller and the TUNA facilities closely about stenciling; all maintained that the U.S. specification is widely used in Mexico, the United States, and third countries. *See* TUNA Verification Report at pages 9-10; *see also* Mueller Verification Report at page 10. "The test employed by Commerce is not whether, in theory, the merchandise could have arrived in the United States," but rather whether the supplier knew or had reason to know of the U.S. destination. *See Timken I* at 633-34. In *Timken I*, the CIT found that the fact that the merchandise was marked with the name of a U.S. company was insufficient to establish knowledge of the U.S. destination. The Court noted that the presence of the markings did not mean that the manufacturer made the mental connection between the markings and the U.S. destination, and that even if the manufacturer did make such a connection, this was insufficient to create the requisite level of knowledge. *Id.* at 633. This reasoning applies *a fortiori* when the markings are stenciling which are widely accepted in countries other than the United States rather than a particular American company's name.

In addition, nowhere on the record of this proceeding is there any statement from either TUNA or Mueller admitting or indicating or even implying actual knowledge of a destination in the United States for any specific sale of subject merchandise. Rather, TUNA has repeatedly expressly denied actual knowledge of a destination in the United States for any specific sale of subject merchandise. *See* TUNA Verification Report at 1 and 4-8. We do not find that sharing of certain third-party services on some – or even all – occasions means that knowledge of one company's sales can be imputed to another; in actuality, this would only imply a breach of confidence on the part of the service provider himself, of which we have no evidence.

The record of this proceeding is devoid of any of the normal factors, as developed in prior cases, that indicate knowledge. We find that, in the absence of substantive evidence to the contrary indicating knowledge, there is an insufficient basis to find that TUNA knew or should have known the ultimate U.S. destination of any specific sale of circular welded non-alloy steel pipe sold to Mueller.

Comment 2: Treatment of "Negative Dumping Margins" (Zeroing)

In its case brief at pages 9-14, Mueller contends that for administrative reviews the Department interprets section 1677(35)(A) of the Department's regulations to mean that a dumping margin exists only when NV is greater than the export price (EP) or constructed export price (CEP) and therefore denies offsets, whereas in antidumping investigations the Department interprets section 1677(35)(A) to mean that a dumping margin exists whether or not NV is greater than the EP or CEP and grants offsets; Mueller concludes from this that the Department is employing contradictory interpretations of the same regulation. Citing to Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R, adopted May 20, 2008, paras. 133-34 (*US – Stainless Steel (Mexico)*), Mueller -- while acknowledging that zeroing in administrative reviews is consistent with current practice -- encourages the Department to depart from its established practice because it can articulate reasonable grounds for doing so, *i.e.*, compliance with *US – Stainless Steel (Mexico)*, where the WTO Appellate Body found that the Department's practice of zeroing in administrative reviews is inconsistent with U.S. WTO obligations. Mueller maintains that since April 30, 2009, the Department has been obligated to refrain from zeroing in administrative reviews. Mueller also acknowledges – citing to *Calculation of the Weighted Average Dumping Margin and Assessment Rate in Certain Antidumping Proceedings*, 75 FR 81533 (December 28, 2010) (*Proposed Modification*) -- the Department's proposed timetable for compliance with *US – Stainless Steel (Mexico)* would preclude application of the final rule to this review, but proposes that the Department should modify its timetable. Mueller suggests, in the alternative, that the President of the United States ought to invoke the exception to Section 123(g)(2) in order to apply the final methodology to this review because an earlier effective date is in the national interest.

In its rebuttal brief at pages 11-17, U.S. Steel points out that Section 777(d) of the Act contains various comparison methodologies. U.S. Steel contends that use of zeroing is therefore required by Section 777(d) of the Act, as that section would be rendered meaningless without zeroing since the margin results would all be exactly the same regardless of what comparison methodology is used. U.S. Steel concludes, therefore, that Congress amended the Act in 1994 specifically to mandate zeroing. U.S. Steel further maintains that, even if the statute does not require zeroing, it is certainly a reasonable interpretation of the law that zeroing is permitted. Citing *Corus Staal BV v. United States*, 502 F.3d 1370 (Fed. Cir. 2007) (*Corus II*) at 1374, U.S. Steel argues that *Modification Concerning the Calculation of the Weighted-Average Dumping Margin in Antidumping Investigations*, 71 FR 77722 (December 27, 2006) (*Final Modification of Zeroing Methodology*) is restricted to antidumping investigations and has no bearing on administrative reviews. U.S. Steel points out that the Department's change in practice as set out in the *Proposed Modification* was to apply to proceedings in which the preliminary results were issued more than 60 business days after of the final rule in the Federal Register; U.S. Steel points out that the *Preliminary Results* were published before that date.

In their rebuttal brief at pages 9-15, Allied/TMK cite *Corus Staal BV v. Department of Commerce*, 395 F. 3d 1343 (Fed. Cir. 2005) (*Corus I*) at 1347 to rebut Mueller's contention that the Department's use of zeroing in administrative reviews when we do not do so in antidumping investigations implies that the Department has different meanings of the term "dumping margin." Allied/TMK further characterize as "unfounded" Mueller's conclusion that such multiple definitions of "dumping margin" would determine whether zeroing ought to be used. Allied/TMK point out, citing 19 USC 1675(a)(2)(A) and (C), that the Department is required to determine an antidumping duty assessment for each individual entry; Allied/TMK claim that this makes the use of offsets contrary to the specific requirements of the statute. Allied/TMK argue that the WTO does not establish U.S. law. Allied/TMK maintain that if the Department were to abandon zeroing in this proceeding, it would be tantamount to the Department deciding that the WTO takes precedence over the Congress. Quoting from the *Statement of Administrative Action accompanying the Uruguay Round Agreements Act*, H.R. Doc 103-316, Vol. 1, 103d Cong. (1994) (*SAA*) at 659 to the effect that inconsistencies between WTO decisions and U.S. law will be resolved in favor of U.S. law, Allied/TMK state that this would be a decision for which the Department has no authority.

Department's Position:

We have not changed our calculation of the weighted-average dumping margin as suggested by the respondent for 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." Outside the context of antidumping investigations involving average-to-average comparisons, the Department interprets this statutory definition to mean that a dumping margin exists only when normal value (NV) is greater than EP or CEP. As no dumping margins exist with respect to sales where NV is equal to or less than EP or CEP, the Department will not permit these non-dumped sales to offset the amount of dumping found with respect to other sales. The CAFC has held that this is a reasonable interpretation of the statute. *See*, *e.g.*, *Timken Co. v. United States*, 354 F.3d 1334, 1342 (Fed. Cir. 2004) (*Timken II*).

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 Department applies these sections by aggregating all individual dumping margins, each of which is determined by the amount by which NV exceeds EP or CEP, and dividing this amount by the value of all sales. The use of the term "aggregate dumping margins" in section 771(35)(B) of the Act is consistent with the Department's interpretation of the singular "dumping margin" in section 771(35)(A) of the Act as applied on a comparison-specific level and not on an aggregate basis. At no stage of the process is the amount by which EP or CEP exceeds the NV permitted to offset or cancel out the dumping margins found on other sales.

This does not mean that non-dumped sales are disregarded in calculating the weighted-average dumping margin. It is important to note that the weighted-average margin will reflect any non-dumped merchandise examined during the period of review: the value of such sales is included in the denominator of the weighted-average dumping margin, while no dumping amount for non-dumped merchandise is included in the numerator. Thus, a greater amount of non-dumped merchandise results in a lower weighted-average margin.

The CAFC explained in *Timken II* that denial of offsets is a "reasonable statutory interpretation given that it legitimately combats the problem of masked dumping, wherein certain profitable sales serve to mask sales at less than fair value." *See Timken II*, 354 F.3d at 1343. As reflected in that opinion, the issue of so-called masked dumping was part of the policy reason for interpreting the statute in the manner interpreted 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. *See*, *e.g.*, *Timken II*, 354 F.3d at 1343; *see also NSK Ltd. v. United* States, 510 F.3d 1375, 1379-80 (Fed. Cir. 2007) (*NSK*).

In 2007, the Department implemented a modification of its calculation of weighted-average dumping margins when using average-to-average comparisons in antidumping investigations. *See Final Modification of Zeroing Methodology*. 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. The Department's interpretation of the statute was unchanged in other contexts. Recognizing that the change in the Department's interpretation of the statute was limited to investigations using average-to-average comparisons, the CAFC upheld the Department's interpretation as applied in an investigation using average-to-average comparisons as a reasonable interpretation of ambiguous statutory language. *See U.S. Steel Corp., v Gallatin Steel Co.*, 621 F.3d 1351 (Fed. Cir. 2010) Rehearing, en banc, denied by *United States Steel Corp. v. United States*, 2011 U.S. App. LEXIS 4499 (Fed. Cir. 2011), petitions for certiorari filed, Case Nos. 2009-1572, 2009-1573 (May 24, 2011). In addition, the CAFC recently upheld, as a reasonable interpretation of ambiguous statutory language, the Department's continued application of zeroing in the context of an administrative review completed after the implementation of the *Final Modification of Zeroing Methodology*. *See SKF USA, Inc. v. United States*, 630 F.3d 1365 (Fed. Cir. 2011) (*SKF*). In that case, the Department had explained that the changed interpretation of the ambiguous statutory language was limited to the context of investigations using average-to-average comparisons and was made pursuant to statutory authority for implementing an adverse WTO report. We find that our determination in this administrative review is in accordance with the CAFC's recent decision in *SKF*. We also disagree that *Dongbu* litigation is relevant. *See Dongbu Steel Co., Ltd. v. United States*, 635 F.3d 1363 (Fed. Cir. 2011); *see also* Mueller's case brief at footnote 26. The CAFC's recent decision in *Dongbu* did not find zeroing contrary to law and require the Department to change its methodology in this administrative review. Unlike the circumstances examined in *Dongbu*, the Department is providing a reasoned explanation for the changed interpretation of statute subsequent to the *Final Modification of Zeroing Methodology* whereby we interpret section 771(35) of the Act differently for certain investigations (when using average-to-average comparisons) and administrative reviews. This is the same statutory interpretation that the Federal Circuit affirmed in *SKF*. For that reason, we find that the present administrative review is distinguishable from the proceeding before the CAFC in *Dongbu*.

We also find that Mueller's reliance on *Clark v. Martinez,* an immigration law case, is misplaced. Contrary to Mueller's contentions, the case does not stand for a sweeping proposition that the same statutory term may never be interpreted differently in different contexts. Rather, the court simply found that the operative language of the immigration statute at issue "applies without differentiation to all three categories of aliens that are its subject" and all categories of aliens must be treated equally with respect to duration of their detention. *See Clark v. Martinez*, 543 U.S. 371 (2005) at 378. In fact, Mueller's position that the same statutory term may not be interpreted differently in two different contexts is contrary to the Supreme Court's precedent, where the court recognized that federal agencies may adopt different interpretations of an ambiguous statutory provision in different contexts. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (the Environmental Protection Agency adopted two different interpretations of the same statutory term "source" in two different contexts.). Moreover, where a different interpretation is adopted in response to a WTO report, the SAA expressly contemplates that "multiple permissible interpretations of the law and the facts may be legally permissible in any particular case. . . ." *See SAA* at 1027.

The respondents have cited WTO dispute-settlement reports (WTO reports) finding the denial of offsets by the United States to be inconsistent with the Antidumping Agreement. As an initial matter, the Court of Appeals for 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. *See Corus I*, 395 F.3d at 1347-49; accord *Corus II*¸ 502 F.3d at 1375; *NSK*. Congress has adopted an explicit statutory scheme in the *URAA* for addressing the implementation of WTO reports. *See, e.g.*, 19 U.S.C. § 3538. As is clear from the discretionary nature of this scheme, Congress did not intend for WTO reports to automatically trump the exercise of the Department's discretion in applying the statute. *See* 19 U.S.C. § 3538(b)(4) (implementation of WTO reports is discretionary). Moreover, as part of the *URAA* process, Congress has provided a procedure through which the Department may change a regulation or practice in response to WTO reports. *See* 19 USC § 3533(g); *see, e.g., Final Modification of Dumping Margin Calculation*. With regard to the denial of offsets in administrative reviews, the United States has not adopted any change to its methodology pursuant to this statutory procedure.

Further, the *Proposed Modification*, cited by Mueller, does not provide a basis for changing the Department's approach of calculating weighted-average dumping margins in the instant administrative review. *See Proposed Modification*. The *Proposed Modification* is only a proposal that remains subject to review of comments from the public and statutory consultation requirements involving congressional committees, among others. 19 U.S.C. § 3533(g)(1). It does not provide legal rights or expectations for parties in this review. The *Proposed Modification* further makes clear that, in terms of timing, any changes in methodology will be prospective only, and "will be applicable in . . .all {administrative} reviews pending before {Commerce} for which a preliminary results is issued more than 60 business days after the date of publication of {Commerce's} Final Rule and Final Modification." *Proposed Modification*, 75 FR at 82535. Additionally, the *Proposed Modification* would not apply to this administrative review because, normally, "{a} final rule or other modification . . . may not go into effect before the end of the 60-day period beginning on the date which consultations {between the Trade Representative, heads of the relevant departments or agencies, and appropriate congressional committees} under paragraph 1(E) begin . . ." 19 U.S.C. § 3533(g)(2). Because the final results of review will be completed prior to the effective date of the final rule, any change in the treatment of non-dumped sales, pursuant to the *Proposed Modification*, if implemented, would not apply to this review.

Accordingly, and consistent with the Department's interpretation of the Act described above, in the event that any of the export 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.

Comment 3: Partial AFA for Mueller Because of Failure to Report Manufacturer for Sales

In its Mueller case brief at pages 4-7, U.S. Steel argues that we should base margins for CEP transactions upon AFA because Mueller failed to keep necessary records. Specifically, U.S. Steel maintains that Mueller failed to report the manufacture of CEP sales shipped from the warehouses of Streamline, its U.S. sales affiliate. U.S. Steel contends that Mueller had the capability to identify and report the manufacturer for Streamline's sales on a transaction-specific basis (such as tracking the labels affixed to pipes by Mueller) but did not do so despite the fact that Mueller knew (or should have known) of the necessity of such documentation. U.S. Steel notes that Mueller itself requested this review, charging that it was therefore incumbent upon Mueller to ensure all needed information for accurate sales reporting was generated and maintained. U.S. Steel calls *Certain Softwood Lumber Products from Canada: Notice of Final Results of First Antidumping Duty Administrative Review*, 69 FR 75921 (December 20, 2004) (*Softwood Lumber from Canada*) inapposite in that there is no evidence Weyerhauser had the capacity to track its inventory while Streamline did have that capacity. U.S. Steel cites Letter from Robert James to Mueller Comercial de Mexico, S. de R.L. de C.V. (Yohai Baisburd) entitled "Administrative Review of Certain Circular Welded Non-Alloy Steel Pipe from Mexico," dated June 17, 2010, in which the Department determined that Mueller "is aware or should have been aware" that these documents were important in the calculation of Mueller's dumping margin, stating that the Department rejected Mueller's claim that it did not have the capacity to report these data. U.S. Steel, citing *Zhejiang Dunan Hetian Metal Co., Ltd. v. United States*, 707 F. Supp. 2d 1355, 1378-79 (CIT 2010) (*Zhejiang Dunan*), concludes that the Department must base margins for these CEP transactions upon AFA because Mueller failed to retain documents relevant to an antidumping proceeding.

In its rebuttal brief at pages 8-12, Mueller repeats its explanation that Streamline, in the normal course of its business, neither tracks the manufacturer nor identifies the manufacturer in its sales documents; rather, Streamline assigns the same product codes to identical products regardless of manufacturer. Mueller refutes U.S. Steel's contention that *Softwood Lumber from Canada* is inapposite because Weyerhauser may not have been able to track its products after commingling, whereas Streamline was able to do so; Mueller states that Weyerhauser indeed had such a capability, but that the key point is not whether it <u>could</u> do so but whether it <u>did</u> do so. Mueller contends that the cases relied upon by U.S. Steel with regard to keeping of records of manufacturers for antidumping purposes do not apply to Streamline's circumstances because (a) the *Zhejiang Dunan* respondents had a policy of maintenance of the records whereas Streamline never did and (b) the respondents in *Brake Rotors from the People's Republic of China*, 71 FR 4112 (January 25, 2006) and *Stainless Steel Bar from India*, 70 FR 54023 (September 13, 2005) and accompanying Issues & Decision Memorandum did not <u>retain</u> documents each had once possessed, whereas Streamline never possessed any such records. Mueller points out that there was no duty to track these sales, citing again to *Softwood Lumber from Canada* where the Department did not apply AFA to Weyerhauser.

Department's Position:

Section 776(a)(2) of the Tariff Act of 1930, as amended (the Act), provides that, if an interested party (A) withholds information that has been requested by the Department; (B) fails to provide such information in a timely manner or in the form or manner requested subject to sections 782(c)(1) and (e) of the Act; (C) significantly impedes a proceeding under the antidumping statute; or (D) provides such information but the information cannot be verified, the Department shall, subject to section 782(d) of the Act, use facts otherwise available in reaching the applicable determination.

Section 782(c)(1) of the Act provides that if an interested party "promptly after receiving a request from {the Department} for information, notifies {the Department} that such party is unable to submit the information requested in the requested form and manner, together with a full explanation and suggested alternative form in which such party is able to submit the information," the Department may modify the requirements to avoid imposing an unreasonable burden on that party.

Section 782(d) of the Act provides that, if the Department determines that a response to a request for information does not comply with the request, the Department will inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person the opportunity to remedy or explain the deficiency. If that person submits further information that continues to be unsatisfactory, or this information is not submitted within the applicable time limits, the Department may, subject to section 782(e), disregard all or part of the original and subsequent responses, as appropriate.

Section 782(e) of the Act states that the Department shall not decline to consider information deemed “deficient” under section 782(d) of the Act if: (1) the information is submitted by the established deadline; (2) the information can be verified; (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination; (4) the interested party has demonstrated that it acted to the best of its ability; and (5) the information can be used without undue difficulties.

Furthermore, section 776(b) of the Act states that if the Department “finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from the administering authority or the Commission, the administering authority or the Commission…in reaching the applicable determination under this title, may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available.” *See also SAA* at 870.

We agree with Mueller that the situation is analogous to that in *Softwood Lumber from Canada*.

Mueller stated it made CEP sales through its U.S. affiliate, Streamline, by two methods during the POR. *See Preliminary Results* at 78218. The first was sales of Mueller subject merchandise by Streamline from Streamline’s U.S. warehouses (which Mueller calls “warehouse sales”). The second was sales of Mueller subject merchandise by Streamline in which Mueller shipped its product directly to the Streamline customer (which Mueller calls “indent sales”). Because Streamline neither segregates product in its warehouses according to manufacturer, nor records the manufacturer when the subject merchandise is entered into its warehouses, Streamline and Mueller are unable to state with certainty which of Mueller’s suppliers manufactured the particular subject merchandise in any given Streamline “warehouse sale.” However, Mueller is able to report the percentage manufactured by its suppliers (for each diameter and surface coating) which it shipped to Streamline warehouses. Applying these percentages, a percentage for each manufacturer can be assigned for each such sale. *See* Mueller’s supplemental section A response at 6-8. This methodology is reasonable, not distortive, and the information provided to the Department is usable. Moreover, Mueller accounts for all but a tiny fraction of the Streamline sales. *Id.* at 8. Accordingly, we have sufficient information on the record to make our determination and we find that Mueller cooperated to the best of its ability.

With regard to the June 17, 2010, letter cited by U.S. Steel above, it is informative to read the entire passage from the Department’s letter:

> We remind Mueller it is imperative to provide a full and complete response to the Department’s questions in order to perform a fair and thorough analysis. We also note that Mueller is aware, or should have been aware that it is subject to the antidumping duty order and that the identity of manufacturers is necessary for model matching purposes. Mueller and/or its U.S. affiliates’ failure to maintain inventory records in a manner that traces the pipe’s manufacturer could potentially be considered inadequate record keeping that significantly impedes this proceeding. Section 782(d) of the Tariff

> Act of 1930, as amended states "if the administering authority or the Commission determines that a response to a request for information under this subtitle does not comply with the request, the administering authority or the Commission (as the case may be) shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency in light of the time limits established for the completion of investigations or reviews under this title. If that person submits further information in response to such deficiency and either (1) the administering authority or the Commission (as the case may be) finds that such response is not satisfactory, or (2) such response is not submitted within the applicable time limits, then the administering authority or the Commission (as the case may be) may, subject to subsection (e), disregard all or part of the original and subsequent responses."

Mueller was questioned at length both in our supplemental questionnaires and at verification on this very issue. *See* the Department's first supplemental questionnaire to Mueller dated May 25, 2010, at Question 3; *see also* the Department's second supplemental questionnaire to Mueller dated June 7, 2010, at Questions A-4, A-5, A-6, A-12, A-22, and C-12; *see also* Mueller Verification Report at page 11. Mueller was provided with an opportunity to "explain the deficiency" and Mueller timely did so; Mueller's explanation was deemed satisfactory by the administering authority (the Department). We have no reason to believe that Streamline has ever recorded the manufacturer; thus, the petitioners' reliance upon cases where a party failed to retain existing information is misplaced. We have no grounds to make adverse inferences in this case, and we find Mueller's "shipment model" of allocation is reasonable and non-distortive. We therefore continue to accept Mueller's "shipment model" of allocating sales to specific suppliers based upon *Softwood Lumber from Canada*.

Comment 4: Application of Adverse Inferences to TERNIUM's Reported Information

In the post-preliminary results, the Department applied adverse inferences to the cost data provided by Ternium, one of the two unaffiliated Mexican producers that supplied Mueller during the POR. *See* the memorandum from Heidi K. Schriefer to Neal M. Halper, "Cost of Production and Constructed Value Calculation Adjustments for the Post-Preliminary Results – Mueller Comercial de Mexico, S. de R.L. de C.V." dated February 11, 2011 (Post-Preliminary Calculation Memo). Because Mueller is not a producer, but it instead resells purchased subject merchandise with or without performing minor further processing on it, the Department requested the costs of production from Mueller's unaffiliated suppliers, Ternium and TUNA. *See* Memorandum from Maryanne Burke to the File, "*Administrative Review of Circular Welded Non-Alloy Steel Pipe from Mexico: Mueller Comercial de Mexico, S. de R.L. de C.V. and Southland Pipe Nipples Company, Inc.,*" dated June 30, 2010.

The Department issued multiple questionnaires to Ternium, but Ternium repeatedly refused to provide the control number-(CONNUM) specific cost information requested by the Department. Accordingly, the Department determined that Ternium failed to cooperate to the best of its ability and used facts available with an adverse inference with respect to the costs reported by Ternium. As adverse inferences, the Department replaced each of Ternium's reported CONNUM costs with Mueller's acquisition cost increased by a factor that was the highest percentage difference between Mueller's CONNUM-specific acquisition cost and TUNA's CONNUM-specific cost of production, where the cost of production was higher than the acquisition cost. *See* the Post-Preliminary Calculation Memo at 2.

Mueller argues that it acted to the best of its ability by fully complying with all of the Department's requests for its own information and by making every effort to facilitate the submission of the information required of Ternium. Consequently, Mueller contends that the Department's decision to apply adverse inferences to Mueller for the actions of its unaffiliated supplier fails to comport with section 776(b) of the Act. According to Mueller, this section of the Act only grants the Department the authority to use adverse inferences against the party that failed to comply with the request for information, *i.e.*, Ternium, not Mueller.

In support of these contentions, Mueller points to the court's ruling in *SKF USA INC. v United States*, 675 F. Supp. 2d 1264 (Ct. Int'l Trade 2009) (*SKF*). In *SKF*, the Department claimed that the application of adverse inferences against an unaffiliated supplier's customer, *i.e.*, the respondent, was warranted because it would induce the unaffiliated supplier to cooperate in future segments of the proceeding. *Id.* at 1275. However, the Court of International Trade opined that "{a}lthough 19 U.S.C. § 1677e(b) does not expressly state that Commerce may not adversely affect a party to a proceeding based upon another interested party's failure to cooperate, a construction permitting such an absurd result makes a mockery of any notion of fairness." *Id.* at 1276. According to Mueller, the Department on remand then recalculated the respondent's margin using acquisition costs as neutral facts available and did not appeal the case to the Federal Circuit. As such, Mueller contends that the court's *SKF* decision confirms that the Department's application of adverse inferences to a cooperative respondent for the actions of an unaffiliated interested party is impermissible under section 776(b) of the Act. Therefore, Mueller argues that *SKF* precludes the Department from using adverse inferences in the instant review. As such, Mueller concludes that the Department may only employ neutral facts available in the final results and proffers the use of Mueller's acquisition costs unadjusted or TUNA's costs as surrogates for Ternium's costs.

Finally, Mueller also argues that the adverse facts selected by the Department created aberrational and punitive results that are contrary to the legal standards articulated by the Federal Circuit. In particular, Mueller notes that the Federal Circuit has stated that the Department "must balance the statutory objectives of finding an accurate dumping margin and inducing compliance, rather than creating an overly punitive result" when selecting adverse inferences. *See e.g.*, *Timken II*, 354 F.3d 1334, 1345. Mueller also complains that the factor relied on by the Department was an outlier that does not accurately reflect the percentage difference between Mueller's acquisition costs and TUNA's costs. In fact, Mueller contends that the nearly fivefold increase in the margin from 4.81 percent to 23.89 percent demonstrates that the Department's intention was to punish Mueller at the expense of calculating an accurate dumping margin.

U.S. Steel counters that it is Mueller that has the burden to show it acted to the best of its ability and in this regard Mueller has failed to do "the maximum that it is able to do." U.S. Steel argues that Mueller's single email to Ternium urging the company to cooperate fails to even approach meeting this burden. Furthermore, U.S. Steel also believes that Mueller's reliance on *SKF* is misplaced. According to U.S. Steel, *SKF* only holds that it is improper for the Department to apply adverse facts available to a respondent if the respondent itself was not found to have failed to cooperate to the best of its abilities. Thus, U.S. Steel concludes that it is completely appropriate for the Department to apply adverse facts available since Mueller failed to do the maximum that it was able to do to induce Ternium to provide product-specific costs.

Additionally, U.S. Steel refutes Mueller's contention that the partial AFA adjustment factor selected by the Department in the post-preliminary results was punitive and therefore unlawful. Rather, U.S. Steel argues that both the Department and the courts have recognized that the adverse facts available rate must be inherently adverse for the dual purpose of ensuring that parties do not benefit from their lack of cooperation and to offer incentive for the parties to provide complete and accurate information. *See e.g.*, *Certain Lined Paper Products from the People's Republic of China*, 74 FR 17160, 17163-17164 (April 14, 2009) (*Lined Paper*) and the *SAA* at 870. Finally, pointing to the Department's use of the lowest reported per-unit inland freight expense as adverse facts available in *Chlorinated Isocyanurates from Spain*, U.S. Steel contends that it is the Department's practice to use the most adverse data on the record when applying adverse facts available. *See Chlorinated Isocyanurates from Spain: Notice of Final Determination of Sales at Less Than Fair Value*, 70 FR 24506 (May 10, 2005), *and accompanying Issues and Decision Memorandum*, at Comment 3. Thus, U.S. Steel concludes that it was completely appropriate and within the Department's discretion to select the most significant cost difference between TUNA's CONNUM-specific costs and Mueller's CONNUM-specific acquisition costs as the basis for the partial adverse facts available adjustment factor.

In rebuttal, Allied/TMK also advocate for the continued application of the adjustment factor with regard to Ternium's costs in the final results. Allied/TMK refute Mueller's assertion that the adjustment factor relied on by the Department is an outlier and should not be used. Rather, Allied/TMK note that the Department is attempting to establish what Ternium's CONNUM-specific costs could have been had they been reported. Accordingly, Allied/TMK proffer that the *SAA* recognizes "that because it is impossible to compare facts available with missing information, Commerce need not provide that the facts selected are the best alternative facts." *See SAA* at 869-70. Thus, Allied/TMK conclude that the facts available selected by the Department are the best information on the record and reasonably reflect what Ternium's CONNUM-specific costs could have been if Ternium had provided them. As such, Allied/TMK maintain that the Department's selection for facts available is non-adverse and renders a response from the Department to Mueller's complaints unnecessary.

Department's Position:

We have continued to apply adverse facts available to Ternium's cost information for the final results. As explained *infra*, Ternium is an interested party to these proceedings and the Act provides for the application of adverse facts available with regard to uncooperative interested parties. Accordingly, as explained further below, the Department's decision to apply adverse facts available based on Ternium's refusal to provide product-specific costs fully comports with the law. Given that Ternium has refused to provide the necessary cost of production information, as repeatedly requested by the Department, the Department finds it reasonable to infer that the actual information Ternium has chosen to withhold will not be favorable to its interests. Accordingly, the Department has applied an adverse inference only with respect to the missing information from Ternium. The Department has found that the necessary information is absent from the record because Ternium failed to cooperate, and has not made a finding that Mueller failed to cooperate. Accordingly, the Department has not applied an adverse inference against the interest of Mueller. Instead, the Department has selected from the facts otherwise available, the best information to use in place of Ternium's withheld cost data. Although premised on the adverse inference that Ternium's actual cost information would not be favorable – otherwise Ternium may not have elected to withhold it from the Department – the selected facts available are intended to produce an accurate, non-punitive, dumping margin for Mueller.

In response to the parties' comments regarding Mueller's lack of cooperation in the review, we do not reach that question because Ternium is itself an interested party and bears responsibility for cooperating to the best of its ability with the Department's requests for information. We are making an adverse inference with regard to Ternium's withheld costs of production, based on Ternium's refusal to provide the relevant information.

Section 771(9)(A) of the Act defines an interested party as "a foreign manufacturer, producer, or exporter, or the United States importer, of subject merchandise." It is undisputed that Ternium was a producer of the subject merchandise in Mexico during the POR and accordingly an interested party to these proceedings. Consequently, as an interested party, Ternium is subject to section 776(a)(2)(A) of the Act, which states that "if an interested party or any other person withholds information that has been requested by the administering authority…", then the Department shall "use the facts otherwise available in reaching the applicable determination under this title." Moreover, section 776(b) of the Act articulates that if the Department "finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information" the Department "may use an inference that is adverse to the interest of that party in selecting from among the facts otherwise available."

Throughout the course of this segment of the proceeding, the Department issued multiple requests for product-specific cost data from Ternium. *See* the original and supplemental section D questionnaires issued to Ternium dated July 13, 2010, October 13, 2010, and December 7, 2010. However, in each instance, Ternium refused to provide the requested product-specific data. In explanation, Ternium simply stated that "the requested information is not readily available in the form requested by the Department" and that it was not "practical" for the company "to undertake the massive efforts required to compile that information within the limited time available on a matter that does not directly involve TerMex's own exports to the United States."[1] *See* Ternium's August 20, 2010, section D questionnaire response at 1. Furthermore, Ternium stated that it "does not believe it is under any contractual or other legal obligation to supply that information." *See* Ternium's December 21, 2010, section D questionnaire response at 3. Thus, Ternium maintained that it was willing to provide information "readily available from its accounting records, as a courtesy to the Department and to Mueller;" however, the company was unwilling to "provide detailed product-specific calculations that allocate costs based on product dimensions." *Id.*

We note that few companies keep their own records in the exact manner requested by the Department; consequently, the Department directs all respondents, Ternium included, to use "a

[1] We note that Ternium and TerMex are different short-hand references to the same company.

reasonable method based on available company records" to calculate the appropriate cost differences for all of the Department's physical characteristics. *See, e.g.*, the Department's standard section D questionnaire at step III.A.3. However, it is important that the costs a respondent reports to the Department reflect cost differences attributable to the different physical characteristics. This ensures that the product-specific costs we use for the below-cost test reflect the costs incurred by a respondent to obtain the corresponding product's physical characteristics. This principle is supported by section 773(a)(6)(c)(ii) of the Act, which requires the Department to account for and adjust for any differences attributable to physical differences between the subject merchandise and the foreign like product if similar products are compared in the analysis of home-market price and U.S. prices. Such comparison criteria are appropriate because physical characteristics provide the Department with a dependable, measurable means of comparing two different products sold in two different markets. Ternium's failure to provide product-specific costs impedes the Department's ability to make appropriate comparisons. Under section 776(a)(2)(B) of the Act, if a respondent "fails to provide {requested} information by the deadlines for submission," the Department shall fill in the gaps with "facts otherwise available." As noted by the courts, the focus here is the *failure to provide information*. *See Nippon Steel Corp v. United States*, 337 F.3d 1373, 1381, Federal Circuit (2003) (*Nippon Steel*). Thus, the reason for the failure is of no moment. In *Nippon Steel*, the Federal Circuit stated that "the mere failure of a respondent to furnish requested information--for any reason--requires Commerce to resort to other sources of information to complete the factual record on which it makes its determination." *Id.* To then draw an adverse inference under section 776(b) of the Act, the Department need only show that the interested party "failed to cooperate by not acting to the best of its ability to comply with a request for information." "Thus, the statutory mandate that a respondent act to "the best of its ability" requires the respondent to do the maximum it is able to do." *Id.* at 1382. In this case, Ternium acknowledges that its predecessor Hylsa, S.A. de C.V. (Hylsa) was able to perform the cost analyses required by the Department. *See* Ternium's 11/8/2010 section D response at 5. In fact, Ternium provides sample copies of the cost analyses performed for a prior administrative review when the production facilities were owned by Hylsa.[2] Consequently, as the successor-in-interest to Hylsa and new owner of these production facilities, Ternium was aware that such record-keeping should have been maintained. See, *e.g., Nippon Steel*, at 1832, where the Federal Circuit reiterated that to conclude that a party has not cooperated to the best of its ability, the Department need only show that a "reasonable and responsible importer would have known that the requested information was required to be kept and maintained under the applicable statutes, rules, and regulations. Furthermore, in the absence of adequate current records, Ternium's responses to the Department establish that the company had access to Hylsa's detailed records which could have formed the basis of an allocation methodology in the current review. *See* Ternium's December 21, 2010 section D questionnaire response at exhibit 1, and the November 8, 2010 section D response at exhibit 6. As such, we find that Ternium failed to cooperate by not acting to the best of its ability to comply with the Department's request for information.

Nonetheless, in a footnote, Mueller makes an assertion that Ternium has fully cooperated because Ternium provided the non-product specific information that was readily available to it from its records. *See* Mueller's February 25, 2011 Case Brief, at 5, FN 12. However, Mueller cites no legal authority supporting the position that Ternium's refusal to provide product

[2] Specifically, the 2004-1005 administrative review on oil country tubular goods from Mexico.

specific costs can be justified by Ternium's decision to eliminate a pre-existing tracking of such costs in the accounting system of its predecessor-in-interest. Accordingly, we are rejecting Mueller's argument because we find that Ternium failed to act to the best of its ability by not providing information necessary for the Department's calculations in this administrative review.

The issue here is whether the Department has the authority to apply adverse facts available to the information submitted by Ternium, Mueller's unaffiliated supplier. Pursuant to section 771(9)(A) of the Act, Ternium is an interested party to this proceeding, and as such is subject to section 776(a)(2)(A) of the Act which states that if an interested party or any other person withholds information that has been requested by the administering authority…", then the Department shall "use the facts otherwise available in reaching the applicable determination under this title." The courts have recognized that the Department has the authority to request the cost of production data from unaffiliated suppliers such as Ternium. *See SKF* at 1269-72. The Department, however, is unable to obtain such information without the cooperation of the interested party. Because the Department does not have subpoena power, the use of adverse facts available is the only recourse available to the agency to ensure that interested parties provide it with full and complete information. *See SAA* at 868-869. Hence, the Department's ability to use facts available provides the only incentive for an interested party to cooperate. When an interested party fails to cooperate with the Department's requests for information to the best of its ability, section 776(a) of the Act provides the Department with authority to fill in the gaps in the record due to non-cooperation by using facts available with an adverse inference. The *SKF* decision correctly recognized the Department's authority to request information from unaffiliated suppliers. The Department does not interpret section 776 of the Act as manifesting an intent by Congress to provide the agency with authority to seek such information without providing the agency with a mechanism to induce compliance if the interested party's failure to cooperate might affect the dumping margin of another party.

With regard to Mueller's contention that *SKF* precludes the Department from applying an adverse inference in selecting from the facts available because Mueller is a cooperative respondent regardless of the actions of its unaffiliated supplier or producer, the Department disagrees. In the remand determination, the Department expressly stated that it "respectfully disagree{d} with the U.S. Court of International Trade's decision" in *SKF*. *See the March 16, 2011 Results of Redetermination Pursuant to Court Remand, SKF USA Inc., SKF France S.A., SKF Aerospace France S.A.S., SKF GmbH, and SKF Industrie S.p.A. v. United States*, Court No. 08-00322, Slip Op. 09-148, December 21, 2009. Thus, while the Department did not take the matter to the appellate court, this was not because the Department adopted the lower court's decision. The Department has a duty to both ensure that uncooperative parties do not benefit from their lack of cooperation and to encourage their future compliance. *See Notice of Final Determination of Sales at Less than Fair Value: Static Random Access Memory Semiconductors from Taiwan,* 63 FR 8909, 8932 (February 23, 1998) (*Semiconductors from Taiwan*) and *SAA* at 870. The fact that Ternium has elected to withhold necessary information from the Department is not a fact that the Department should simply ignore in the selection of facts available. The application of an adverse inference that Ternium's information is not favorable is reasonable, appropriate and in accordance with section 776(b) of the Act. Contrary to Mueller's contentions, we do not attempt to penalize Mueller. Rather, we seek to induce compliance and to ensure that

Ternium does not benefit from its non-compliance. As a general matter, companies that choose to do business with uncooperative parties may also be impacted. In this regard, the current circumstances are not unlike that of an unaffiliated United States importer who must pay duties based upon adverse facts available when it was the exporter that refused to cooperate with the Department in providing necessary information. In such a situation, the United States importer bears the consequences of the exporter's non-cooperation. If the Department were not able to apply adverse facts available in these cases, all unaffiliated United States importers could avoid paying their exporter's adverse facts available rates. In fact, in *KYD, Inc. v. United States, 607 F.3d 760, 768 (Fed. Cir. 2010)* (*KYD*), the Court had the following to say regarding KYD's argument for an importer specific assessment rate in order to avoid paying their exporter's adverse rate:

> KYD's argument would allow an uncooperative foreign exporter to avoid the adverse inferences permitted by statute simply by selecting an unrelated importer, resulting in easy evasion of the means Congress intended for Commerce to use to induce cooperation with its antidumping investigations. The prospect that domestic importers will have to pay enhanced antidumping margins because of the uncooperativeness of the exporters from whom they purchase goods may, in some cases, result in the imposition of costs on an individual importer that the importer is unable to avoid. In the aggregate, however, the importers' exposure to enhanced antidumping duties seems likely to have the effect of either directly inducing cooperation from the exporters with whom the importers deal or doing so indirectly, by leaving uncooperative exporters without importing partners who are willing to deal in their products.

In other words, the Federal Circuit has recognized that the Department may lawfully use adverse facts available against an interested party even when it results in enhanced antidumping margins and antidumping duties for another unaffiliated party. The Federal Circuit expressly stated that the unaffiliated party's "exposure to enhance antidumping duties seems likely to have the effect of either directly inducing cooperation from the exporters with whom the importers deal or doing so indirectly, by leaving uncooperative exporters without importing partners who are willing to deal in their products." *Id.* Thus, to the extent that the Court of International Trade concluded that "{a}llowing an interested party's failure to cooperate to affect adversely the dumping margin of another interested party who is a party to the proceeding, about whom Commerce did *not* make a finding of non-cooperation, violates the Department's obligation to treat fairly every participant in an administrative proceeding," the Court of International Trade's decision appears to be contradicted by the Federal Circuit precedent in *KYD.*

Here, the producer of the merchandise, *i.e.,* Mueller's supplier Ternium, failed to cooperate to the best of its ability with the Department's requests for information. If we were unable to apply adverse facts available to Ternium's exports through Mueller, Ternium would benefit from its failure to cooperate with the Department's requests for information. Ternium was also selected as a mandatory respondent in this review and was issued the standard questionnaires to which the company failed to respond. As a result, Ternium was assigned a total adverse facts available rate of 48.33 in the *Preliminary Results,* which is unchanged in these final results. Consequently, if we were to accept Mueller's arguments, the subject merchandise produced and exported by Ternium would be subject to a total adverse facts available rate of 48.33, while the Ternium-produced merchandise exported by Mueller would be subject to the much lower weighted-average rate of Mueller, such as the rate of 4.81 from the *Preliminary Results*. Accordingly, Ternium could continue to produce and sell the subject merchandise for prices less than its normal value to the U.S. market, by directing it merchandise through Mueller, where it would have no obligation to ever provide cost of production information, under Mueller's argument. Therefore, based on the Court's reasoning in *KYD*, the fact that Mueller, the exporter, may be affected by Ternium's actions should not prevent the Department from applying an adverse inference against Ternium, as such would enhance future cooperation from Ternium or leave the company without exporting partners willing to deal in their products.

We also disagree with Mueller's contention that the adverse inference selected by the Department is punitive, and unlawful. Section 776(a) of the Act allows for the use of facts otherwise available on the record for specific items of information requested by the Department which are to be used in the computation of a margin. *See Certain In-shell Pistachios from the Islamic Republic of Iran: Final Results of Countervailing Duty Administrative Review*, 71 FR 37056 (June 29, 2006) (*Pistachios from Iran II*) and the accompanying Issues and Decisions Memorandum at Comment 1. Section 776(b) of the Act further provides that the Department may use an adverse inference in applying the facts otherwise available on the record for specific items of information requested by the Department which are to be used in the computation of a margin when a party has failed to cooperate by not acting to the best of its ability to comply with a request for information. *See Certain Woven Electric Blankets From the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 75 FR 38459 (July 2, 2010) and the accompanying Issues and Decisions Memorandum at Comment 1. In selecting facts available with the application of an adverse inference, the Department selects facts that are sufficiently adverse "as to effectuate the purpose of the facts available rule to induce respondents to provide the Department with complete and accurate information in a timely manner." *See Semiconductors from Taiwan* at 8932. It is also the Department's practice to select facts with 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 Brake Rotors* at 69939 and *SAA* at 870. . Given that Ternium has refused to provide the necessary cost of production information, as repeatedly requested by the Department, the Department finds it reasonable to infer that the actual information Ternium has chosen to withhold will not be favorable to its interests. Accordingly, the Department has applied an adverse inference only with respect to the missing information from Ternium. The Department has selected from the facts otherwise available, the best information to use in place of Ternium's withheld cost data. Although premised on the adverse inference that Ternium's actual cost information would not be favorable – otherwise Ternium may not have elected to withhold it from the Department – the selected facts available are intended to produce an accurate, non-punitive, dumping margin for Mueller. The Department considers that if it ignores the fact that Ternium chose to withhold necessary information and fails to apply an adverse inference in the selection of the facts available, the resulting dumping margin would not reflect accurately the rate at which Mueler's sales of merchandise produced by Ternium was sold at less than normal value. The Department does not agree that Mueller is entitled to benefit in this manner from Ternium's failure to cooperate. Application of an adverse inference only to the missing cost of production information that Ternium has withheld is a reasonable and limited inference based on the information on the record that ensures Ternium does not benefit from its failure to cooperate and also avoids an inaccurate dumping margin for Mueller.

Finally, we also disagree with Mueller's contention that the adverse inference selected by the Department is aberrational. In accordance with section 776(b) of the Act, adverse facts available may include information derived from the petition, the final determination, a previous administrative review, or other information placed on the record. Therefore, as partial adverse facts available in the final results, we used information from this administrative review. Specifically, we have adjusted Ternium's price to Mueller by a factor that represents the highest reported difference between a comparison of TUNA's CONNUM-specific reported cost of production and Mueller's CONNUM-specific acquisition cost, where the cost of production is higher than the acquisition cost. By reference, we incorporate here the Department's analysis of facts available and the alternatives, finding that the selection made here is not aberrational. *See* the memorandum from Mark Flessner to Richard Weible entitled "Certain Circular Welded Non-Alloy Steel Pipe from Mexico: Use of Adverse Facts Available (AFA) for Final Results," dated June 13, 2011.

Comment 5: Application of Adverse Inferences to TUNA's Reported Information

U.S. Steel argues that TUNA failed to reconcile its cost data to its financial records. Referencing, *e.g., Stainless Steel Wire Rods from India: Final Results and Partial Rescission of Antidumping Duty Administrative Review,* 68 Fed. Reg. 26288 (May 15, 2003), and accompanying Issues and Decision Memorandum at Comment 1, U.S. Steel points out that the Department's normal practice is to reject un-reconciled data. Accordingly, U.S. Steel contends that TUNA's section D response is deficient and should likewise be rejected. Moreover, U.S. Steel observes that even TUNA acknowledged this failure when it stated that "{b}ecause of the combination of costs from the accounting records of {various TUNA affiliates}; the use of hot-rolled coil purchase prices from the different companies; and the methodologies adopted for scrap offsets, it is not possible for TUNA to provide a reconciliation in the exact manner requested by the Department." Additionally, U.S. Steel contends that TUNA's attempted reconciliation identifies two significant issues that further demonstrate the company's data are incomplete, unreliable, and unusable. U.S. Steel proffers that TUNA's reported costs are based on purchases rather than consumption and that TUNA excluded significant costs from its reported data. In particular, U.S. Steel contests the exclusion of differences in purchases, materials in transit, and adjustments for physical inventory.

Continuing, U.S. Steel rejects any contention that the Department lacks the authority to apply adverse facts available to Mueller based on the actions of its unaffiliated suppliers. Rather, U.S. Steel notes that the Department's application of adverse inferences to Ternium, Mueller's other unaffiliated supplier, in the post-preliminary results disproves Mueller's assertions.

Finally, U.S. Steel claims that Mueller has the burden to show that it acted to the best of its ability to persuade its suppliers to report the cost data requested by the Department. In U.S. Steel's opinion, there is no evidence that Mueller contacted TUNA regarding its failure to provide a proper reconciliation. Therefore, based on the foregoing, U.S. Steel argues that the application of adverse inferences with respect to TUNA's cost data is warranted for the final results.

Mueller counters that the Department must reject U.S. Steel's argument that adverse facts available should be used in place of TUNA's costs in the calculation of Mueller's margin. Citing *SKF*, Mueller argues that section 776(b) of the Act has been interpreted by the Court to prohibit the application of adverse facts available to a cooperative respondent based on an unaffiliated company's lack of cooperation. *See SKF at 1275-77.* Moreover, Mueller contends that U.S. Steel's argument also fails as a factual matter since TUNA provided a complete and adequate cost reconciliation. Mueller maintains that despite having no contractual or legal means of compelling its unaffiliated suppliers to respond, the company has tried to the best of its ability to persuade its suppliers to provide complete responses to the Department. As such, Mueller concludes that there is no basis to apply adverse facts available in the calculation of the company's margin.

Department's Position:

We have continued to rely on the costs submitted by TUNA, as adjusted, for the final results. Specifically, we find no merit to U.S. Steel's argument that the Department disregard TUNA's reported cost data and resort to adverse facts available.

Section 776(a)(2)(B) of the Tariff Act provides that, if an interested party fails to provide information in the form or manner requested, the Department shall, subject to section 782(d) of the Tariff Act, use facts otherwise available in reaching the applicable determination. Furthermore, section 776(b) of the Tariff Act, provides that if the interested party is found to have failed to cooperate to the best of its ability, the Department may use adverse inferences. However, we find that TUNA complied with each of the Department's requests for information throughout the course of the proceeding. In accordance with section 782(d) of the Tariff Act, the Department issued multiple supplemental questionnaires requesting additional information where TUNA's responses were found to be deficient. *See* TUNA's original and supplemental section D responses dated August 20, 2010, November 8, 2010, and January 4, 2011. In these responses, TUNA submitted cost reconciliations and product-specific costs that accounted for each of the physical characteristics identified by the Department. While TUNA's overall cost reconciliation did not comport with the Department's typical format, we found that the company's approach to the reconciliation was satisfactory and was the result of an amalgamation of circumstances. These circumstances, which included an affiliated tolling arrangement, a transfer of productive assets, and a merger, required incorporating the following: 1) the hot-rolled steel coil costs of both TUNA and its collapsed affiliate Lamina y Placa Comercial, S.A. de C.V. (LYPSCA); 2) the processing costs of TUNA from January 1, 2009 through September 30, 2009; and, 3) the processing costs of Temple de Monterrey which acquired TUNA's productive assets from September 30, 2009 through December 31, 2009. *See* TUNA's section D response dated August 20, 2010, at 4.

Section 782(e) of the Act states that the Department shall not decline to consider information deemed "deficient" under section 782(d) if: (1) the information is submitted by the established deadline; (2) the information can be verified; (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination; (4) the interested party has demonstrated that it acted to the best of its ability; and (5) the information can be used without undue difficulties. Although the circumstances precluded TUNA from reporting the overall reconciliation in, as referred to by TUNA, "the exact manner requested by the Department," we find that pursuant to section 782(e) of the Act, the reconciliation provided adequate support for the Department's reliance on the company's reported cost calculations. Accordingly, we find that TUNA complied to the best of its abilities with the Department's requests for additional information in this proceeding.

We also find unavailing U.S. Steel's comments with regard to the significant issues identified in the reconciliation, *i.e.*, the use of purchase, rather than consumption costs with regard to direct materials, and the exclusion of differences in purchases, materials in transit, and adjustments for physical inventory. Based on both TUNA's narrative and reported per-unit calculation worksheets, the company calculated coil costs based on the annual average consumption cost of the specific gauges of hot-rolled coil consumed in the production of each CONNUM, yielded for production losses. *See* TUNA's section D response dated August 20, 2010, at 26 and exhibit D-13. Regarding the exclusion of certain items from reported costs, the particular reconciliation schedule referenced by U.S. Steel incorporates a reconciliation of inventory values (*i.e.*, beginning inventory plus purchases less ending inventory); therefore, it was necessary to exclude items that may impact inventory balances, but should not be considered in consumption costs (*e.g.*, materials in transit, the difference in transfer prices and actual cost between collapsed affiliates, *etc*). *See* TUNA's supplemental section D response dated November 8, 2010, at exhibit 16. For inventory adjustments, TUNA stated that it had no inventory write-offs or write-downs during the period; therefore, any other adjustments would be related to shrinkage, misstatements in inventory records, *etc*, uncovered during the company's periodic physical counts. *See* TUNA's section D response dated August 20, 2010, at 13. However, as this particular question was not raised prior to the briefing period and the record evidence does not identify an amount for physical inventory adjustments, nor does it conclusively allow us to ascertain whether such amounts are already incorporated in the company's general and administrative (G&A) expense ratio, we have not adjusted TUNA's costs relative to physical inventory adjustments.

Finally, we do not find that the parties' arguments with regard to Mueller's cooperation are germane to the issue raised by U.S. Steel's request for adverse facts available because this issue relates to TUNA's, rather than Mueller's, participation in the proceeding.

Comment 6: Use of Production Quantities for Calculating Mueller's CONNUM-Specific Costs

In reporting data to the Department, Mueller provided two separate costs for each CONNUM – the cost of the CONNUM when resold with no further processing (RESOLD) and the cost of the CONNUM when further processed (PROCESSED). In the preliminary and post-preliminary results, the Department calculated a simple average of the reported RESOLD and PROCESSED CONNUM costs. Mueller argues that the use of a simple average is distortive and is not in accordance with the Department's own requirements that respondents calculate weighted-average costs. As such, Mueller urges the Department to calculate a weighted-average of the RESOLD and PROCESSED CONNUM costs for the final results.

U.S. Steel urges the Department to continue to calculate a simple average cost for each CONNUM. Although agreeing that the Department normally calculates a weighted-average CONNUM cost based on the production quantities of the respondent, U.S. Steel points out that in this case it would require the production quantities of Mueller's two unaffiliated suppliers, TUNA and Ternium. However, because the Department has determined that Ternium's data is unusable, U.S. Steel argues that a calculation of weighted-average costs based on TUNA's and Ternium's production quantities is not possible. As such, U.S. Steel encourages the Department to continue to calculate a simple average CONNUM-specific cost in the final results.

Department's Position:

We have revised the final calculations to weight-average TUNA and Ternium's respective CONNUM costs based on Mueller's reported RESOLD and PROCESSED quantities. While these quantities are not specific to manufacturer, they do reflect the sales experience of Mueller, which arguably, is a reflection of Mueller's purchases from TUNA and Ternium. Moreover, the Department normally instructs respondents to calculate weighted-average costs based on the producer's world-wide production quantities. *See* sections I.A and I.B of the Department's standard section D questionnaire which direct respondents to calculate a weighted-average CONNUM specific cost regardless of market destination.[3]

Yet this case provides a unique set of circumstances whereby the Department is faced with combining the weighted-average RESOLD and PROCESSED costs of a respondent reseller/further processor with the weighted-average input CONNUM costs from two unaffiliated producers/suppliers.[4] Hence, this fact pattern adds a further dimension of complexity to the Department's normal producer-specific weighted-average cost calculations. To summarize, TUNA and Ternium have reported their respective world-wide production quantities, while Mueller has reported the quantities of each CONNUM purchased and resold with no processing and the quantities of each CONNUM purchased, further processed into another CONNUM, and then resold. However, what proportion of each resold CONNUM was sourced from TUNA or Ternium is not part of this record. Consequently, because TUNA and TERNIUM's respective portions of Mueller's RESOLD and PROCESSED CONNUM quantities are unknown, we find that the use of a weighting factor proportional to Mueller's company-wide experience is a reasonable alternative in the absence of manufacturer-specific information. Accordingly, for the final results, where multiple costs exist for a CONNUM, we have weight-averaged TUNA and Ternium's respective company-specific costs based on Mueller's reported RESOLD and PROCESSED quantities.

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[3] The Tariff Act does not dictate a specific method for calculating costs during the POR. Thus, the Department has adopted a consistent and predictable methodology of calculating costs (*i.e.*, COP, constructed value (CV) and difference in merchandise (DIFMER)) on a POR weighted-average basis. As such, the Department's standard questionnaire requests that respondents report their costs on a POR weighted-average basis. *See, e.g.*, *Certain Pasta from Italy: Notice of Final Results of the Twelfth Administrative Review*, 75 FR 6352 (February 9, 2010), and accompanying Issues and Decision Memorandum at Comment 5 (explaining the Department's practice of computing a single weighted average cost for the entire period).

[4] We note that due to certain reporting deficiencies, the Department has not relied on the costs reported by Ternium. *See* Comment 4 for additional details.

Finally, we are not relying on Ternium's reported production quantities for the final results; therefore, we have not addressed U.S. Steel's contentions with regard to the use of a company's data when adverse inferences have been drawn on the company.

Comment 7: Inclusion of Impairment Losses in General and Administrative Expenses

Mueller argues that the Department should continue to exclude the write-offs of goodwill and other intangible asset balances reported in its fiscal year 2009 unconsolidated financial statements from the calculation of the G&A expense rate. First, Mueller contends that the goodwill write-off should not be included in the reported costs because the loss is related to periods prior to the POR. Although recorded in its own books in 2009, Mueller explains that the goodwill was actually impaired in 2008 and 2007. Specifically, Mueller alleges that its parent company, Mueller Industries, prepared the necessary impairment analyses and wrote off the goodwill in total in its 2008 and 2007 consolidated financial statements. Mueller contends that it simply recorded the goodwill write-off in 2009 to reflect the impairment losses recorded by its parent company in 2008 and 2007. As such, Mueller concludes that the goodwill was impaired prior to the POR and should not be included in the reported costs.

Next, Mueller holds that the write-off of goodwill does not reasonably reflect the costs associated with Mueller's production and sale of subject merchandise. While recognizing that the Department's practice is to treat goodwill impairments as a G&A expense, Mueller argues that the circumstances of this case are unique. Specifically, Mueller contends that although the goodwill was recorded on its books, the company did not derive any benefit since it does not use its financial statements to obtain credit or attract investors. Rather, any benefit from the goodwill was enjoyed by Mueller Industries which recognized the asset on its publicly-available, consolidated financial statements filed with the SEC. In fact, Mueller proffers that Mueller Industries' actions, *i.e.*, performing the impairment analyses of the intangible assets, are further proof that Mueller Industries was the actual benefactor of the goodwill. Because the goodwill did not directly benefit the company, Mueller concludes that its write-off was not related to its production, sales, or general operations. Mueller also suggests that inclusion of these impairment losses would result in a distorted G&A expense ratio.

Finally, Mueller contends that the write-off of the other intangible assets should also be excluded from G&A expenses since it would result in a double-counting of expenses. Specifically, Mueller points out that the intangible assets represented the revalued portion of fixed assets acquired in 2005. As such, the intangible assets, *i.e.*, the revalued portion of the fixed assets, were amortized in its normal books and records. However, despite having written off the balance of the intangible assets in September of 2009, Mueller states that it continued to record monthly amortization expenses on its books. According to Mueller, these amounts were then included in the depreciation expense reported to the Department in the buildup of reported costs. Thus, if the Department were to also include the intangible asset write-off, Mueller remarks that some double-counting of expenses would occur and the costs would be distorted.

Both U.S. Steel and Allied/TMK argue that the Department should include the write-offs of goodwill and other intangible asset balances in the calculation of Mueller's G&A expense ratio. While Mueller's pre-preliminary comments suggest that the goodwill impairment loss should be excluded because goodwill is not a productive asset and because *Terephthalamide from the Netherlands* identifies such inclusions as an impermissible double-counting of expenses, U.S. Steel asserts that these arguments are without merit. *See Aramid Fiber Formed of Poly Para-Phenylene Terephthalamide from the Netherlands: Final Results of Antidumping Administrative Review*, 61 FR 51406, 51407 (October 2, 1996), *(Terephthalamide from the Netherlands).* First, U.S. Steel posits that in calculating the cost of production the Department does not distinguish impairment losses related to goodwill. Instead, the Department's normal practice is to include the entire amount of all such impairment losses in the calculation of a respondent's G&A expense. In support, U.S. Steel cites to*, et al.*, *Chlorinated Isocyanurates from Spain: Final Results of Antidumping Duty Administrative Review*, 74 FR 50774 (October 1, 2009) and accompanying Issues and Decision Memorandum at Comment 1 *(Isocyanurates from Spain)*, where the Department concluded that the respondent's entire POR impairment loss should be included since such losses are a period cost, and *Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Polyvinyl Alcohol from the Republic of Korea*, 68 FR 13681, 13684 (March 20, 2003) *(Polyvinyl from Korea)*, where the Department included impairment losses related to goodwill in the calculation of the G&A expense ratio.

Next, U.S. Steel asserts that Mueller has misconstrued the Department's determination in *Terephthalamide from the Netherlands* to stand for the proposition that including goodwill in the cost of production always leads to double-counting when a respondent has revalued its assets. Instead, U.S. Steel contends that in *Terephthalamide from the Netherlands* the Department had already included all expenses related to goodwill in the respondent's costs; therefore, also including the amortization of the revalued goodwill in the G&A expense ratio would have resulted in double-counting. According to U.S. Steel, this record clearly demonstrates that there would be no double-counting of costs since the goodwill recorded on Mueller's balance sheet, which is now being written off as impaired, was adjusted to reflect the revaluation of assets.

Neither does U.S. Steel find credible Mueller's contention that while recorded on its own unconsolidated books in fiscal year 2009, the goodwill impairment predates the POR because it was recognized on its consolidated parent's books in fiscal years 2008 and 2007. U.S. Steel argues that Mueller is attempting to exclude the impairment loss by conflating consolidated and unconsolidated financial statements. As such, U.S. Steel contests that this is a direct violation of the Department's practice of calculating the G&A expense ratio based on the records of the producer, *i.e.*, at the unconsolidated producer-specific level. *See e.g., Certain Softwood Lumber Products from Canada: Notice of Final Results of First Antidumping Duty Administrative Review*, 69 FR 75921 (December 20, 2004), and accompanying Issues and Decision Memorandum ("*Softwood Lumber from Canada*") at Comment 23. Thus, U.S. Steel concludes that because Mueller, the unconsolidated producer, recorded the goodwill impairment during the POR, the loss should be included in Mueller's G&A expense ratio for the current review. In a final comment, U.S. Steel proffers that although large, the size of the impairment loss also fails to provide a justification for excluding the loss from the calculation of the G&A expense ratio.

Allied/TMK argue that because goodwill impairments are ordinarily amortized forward, the Department should include in G&A expenses the current year portion of this impairment loss, *i.e.*, the amount included in Mueller's 2009 financial statements. In support, Allied/TMK referenced *Solvay Solexis S.p.A. v. United States*, 637 F. Supp. 2d 1306 (CIT 2008) (*Solvay Solexis*), where the court noted that the Act directs the Department to rely on a company's GAAP-compliant records, if such records provide for a reasonable calculation of costs. Finding no evidence that the respondent's normal records, which were in compliance with Italian GAAP, provided for a distorted cost calculation, the court affirmed the Department's inclusion of goodwill amortization costs in the calculation of the G&A expense ratio. *Id.* Allied/TMK also contest Mueller's contention that the write-off of goodwill and other intangible assets do not reasonably reflect the costs associated with the production of the subject merchandise. Again relying on *Solvay Solexis*, Allied/TMK argue that the court acknowledged that included goodwill amortization expense in the cost of production was reasonable. *Id.* Consequently, Allied/TMK encourage the Department to include the goodwill and other intangible assets write-offs in the calculation of Mueller's G&A expense ratio for the final results.

Department's Position:

We agree with Mueller in part. For the final results, we have continued to exclude the impairment loss related to goodwill, but we have included the amount related to other intangible assets in the reported costs. Specifically, we agree with Mueller that the goodwill write-off should be excluded because record evidence supports that the goodwill was impaired prior to the POR. However, we disagree that the record evidence supports that the intangible assets were impaired prior to the POR; neither do we find persuasive Mueller's argument that the write-off should be excluded because expenses would be double-counted and the costs would be distorted.

As an initial matter, we note that Mueller Industries created Mueller as a Mexican holding company to acquire the shares of several Mexican target companies in 2004. Both the goodwill and the other intangible asset balances currently under discussion originated with Mueller's acquisition of these target companies. *See* Mueller's supplemental section D response dated January 4, 2011, ("Mueller's 1/4/11 section D response") at 2-3. Additionally, Mueller's ultimate parent, Mueller Industries, is a U.S.-based public company that is required to file its financial information with the SEC. Thus, as a wholly-owned subsidiary of Mueller Industries, Mueller's results are also presented in Mueller Industries' annual audited consolidated financial statements. In preparing these consolidated financial statements, Mueller Industries is directed by U.S. GAAP to perform an annual impairment analysis of all unamortized intangible assets, including goodwill, reported on its consolidated balance sheet. *See* Statements on Financial Accounting Standards (SFAS) No. 142 and Accounting Standards Codification (ASC) 350 "Goodwill and Other Intangible Assets" which state that goodwill should be tested for impairment on an annual basis. These pronouncements can be found at http://www.fasb.org/. Further, with regard to long-lived assets such as intangible assets that are being amortized, U.S. GAAP instructs entities to review the assets for impairments whenever events or changes in circumstances indicate that the carrying amount of an asset may not be recoverable. *See* SFAS No. 144 and ASC 360 "Plant, Property and Equipment." Under the guidance of these pronouncements, Mueller Industries' 2008 and 2007 annual goodwill impairment tests resulted in the total impairment of the goodwill at Mueller Industries' Mexican Operations. Accordingly, the goodwill relative to Mueller was completely written-off of Mueller Industries' books in 2008 and 2007. However, Mueller Industries' financial statements made no mention of impairments with regard to the other intangible assets. *See* Mueller Industries' 2009, 2008, and 2007 Audited

Consolidated Financial Statements presented in Mueller's 1/4/11 section D response at exhibits 1-3.

In keeping with its parent company's journal entries, Mueller likewise wrote off the total carrying value of the goodwill on its books, but not until 2009. Thus, Mueller's journal entry was recorded in 2009 and was reflected in its 2009 financial statements. In addition to goodwill, Mueller also wrote off its other intangible assets balances in 2009. Despite the fact that Mueller's 2009 financial statements were audited, the auditors qualified their opinion as a result of certain matters of a proprietary nature which are further discussed in a separate memorandum to the file which will be placed on the official records and served upon parties with access to such information under administrative protective order. *See* Cost Analysis Memorandum. When an auditor qualifies an opinion, the auditor is stating that the company's financial statements do not reflect GAAP with regard to the items mentioned. As such, Mueller's auditors were stating that Mueller's 2009 financial statements were not in conformity with Mexican Financial Reporting Standards (*i.e.*, Mexican GAAP) with regard to the items qualified. *See* the Report of Independent Auditors on Mueller's 2009 Financial Statements, provided in Mueller's supplemental section D response dated November 8, 2010, (Mueller 11/18/10 section D response) at exhibit1.

When calculating the cost of production and constructed value, section 773(f)(1)(A) of the Act states that "{c}osts shall normally be calculated based on the records of the exporter or producer of the merchandise, if such records are kept in accordance with the generally accepted accounting principles of the exporting country (or the producing country, where appropriate) and reasonably reflect the costs associated with the production and sale of the merchandise." However, Mueller's auditors' expressed a qualified opinion on Mueller's 2009 financial statement. Therefore, the company's financial statements failed to fully comport with Mexican GAAP. Consequently, to ensure that Mueller's reported costs properly reflect Mexican GAAP as directed by the Act, we considered all available evidence on the record, including the consolidated financial statements of Mueller's parent, Mueller Industries. Mueller Industries' 2009, 2008, and 2007 consolidated financial statements were prepared in conformity with U.S. GAAP and included Mueller's financial position and results for the respective fiscal years. *See* Mueller Industries' 2009, 2008, and 2007 Audited Consolidated Financial Statements presented in Mueller's 1/4/11 section D response, at exhibits 1-3. As noted previously, an annual impairment analysis is also a requisite of U.S. GAAP. Therefore, as directed by U.S. GAAP, Mueller Industries undertook the annual impairment analyses of its individual reporting units finding that the goodwill relative to its Mexican operations (*i.e.*, Mueller and its subsidiaries) was fully impaired in 2008 and 2007. *See* the 2008 and 2007 impairment analyses presented in Mueller's 1/4/11 section D response, at exhibit 7. According to Mexican GAAP, Mueller improperly wrote-off both the goodwill and other intangible asset balances in 2009 since the respective impairment analyses were not prepared. As noted above, the Act instructs the Department to rely on a company's normal books and records, *i.e.*, its financial statements which have been prepared in accordance with home country GAAP. *See* section 773(f)(1)(A) of the Act. However, because Mueller's normal books do not reflect home country GAAP, we considered all of the record evidence in determining how to remedy the non-GAAP compliant elements of Mueller's normal books. Accordingly, we have relied on the impairment analyses prepared by Mueller's U.S. parent. These impairment tests demonstrated that the goodwill was fully impaired in 2008 and 2007, *i.e.*, prior to the POR. Thus, based on the available record evidence, we have excluded the goodwill write-off from the reported costs as the impairment occurred prior to the POR.[5]

However, we found that the record evidence fails to support that the other intangible asset write-off was incurred prior to the POR. Neither do we find persuasive Mueller's arguments that inclusion of the amount would lead to double-counting and distorted costs. Rather, we found that any potential double-counting of expenses could be identified and remedied. For the final results, we have included in G&A expenses the other intangible assets write-off, adjusted to exclude any double-counting of amortization expense. Due to citations to proprietary information, further discussion of this issue has been included in a separate memorandum to the file. *See* Cost Analysis Memorandum.

While U.S. Steel correctly states that the Department's practice is to calculate G&A expenses based on the producer's unconsolidated, company-wide financial statements, we disagree that Mueller is attempting to exclude the write-offs by conflating the Department's practice with regard to consolidated and unconsolidated financial statements. Although section 773(b)(3)(B) of the Act directs the Department to include "an amount for selling, general and administrative expenses" in the calculation of the cost of production, the Act does not provide a specific definition for G&A expenses, nor does it provide direction for the calculation of the G&A expense ratio. Thus, in exercising its discretion, over time the Department has developed a consistent and predictable practice for calculating and allocating G&A expenses. This practice is to allocate the company-wide G&A costs incurred by the producing company over the company-wide cost of sales of the producing company. *See, e.g., Softwood Lumber from Canada* at Comment 23. Therefore, G&A expenses are not calculated on a consolidated, divisional, or product-specific basis. *Id.* However, while the Act does not provide specific direction with regard to the calculation of G&A expenses, the Act does articulate that costs should be calculated based on home country GAAP. *See* section 773(f)(1)(A) of the Act. Here, the Department examined Mueller Industries' financial statements and impairment analyses for guidance with regard to when Mueller's assets became impaired. As such, we are relying on the parent company's analyses relative to Mueller's goodwill and other intangible assets balances; we are not calculating Mueller's G&A expense rate based on Mueller Industries' consolidated G&A expenses and consolidated cost of sales

We also find no merit to Mueller's contention that Mueller Industries, not Mueller, was the true benefactor, and consequently, should bear the expense of the goodwill. The Department's consistent practice has been to treat impairment losses (goodwill included) as expenses related to the general operations of a company and to include the amounts in the calculation of a company's G&A expense ratio. *See e.g.*, *Isocyanurates from Spain*. Because the goodwill impairment loss was recognized on Mueller's books, it is an expense to Mueller, regardless of the extent to which it benefitted from the asset. Consequently, it is only due to the unique circumstances of this case that the impairment loss was not included in Mueller's G&A expense ratio.

[5] We note that our final calculations also take into consideration all non-GAAP compliant items listed by the company's auditors. *See* the Cost Calculation Memorandum for further discussion of these proprietary items.

Finally, we agree with Allied/TMK that the courts have affirmed the Department's inclusion of goodwill amortization in the cost of production. However, based on the foregoing reasons, we have not included Mueller's goodwill write-off as it was found to be related to a prior period. Additionally, the instant case should be distinguished from *Solvay Solexis* in that under Italian GAAP, *i.e.*, the relevant home country GAAP, goodwill was amortized over 20 years. *See Solvay Solexis* at 1308. However, under relevant Mexican and U.S. GAAP, goodwill is not amortized, but instead tested annually for impairment. *See* SFAS 142 and ASC 350. Therefore, the total goodwill found to be impaired would be written off in the current period and not amortized over time. Consequently, under both Mexican and U.S. GAAP, the goodwill write-off would be considered an expense of the period in which it was found to be impaired.

Comment 8: Other Minor Revisions to the G&A Expense Ratio

U.S. Steel argues that the Department should revise the G&A expense ratio to correct for an error in the calculation of administrative expenses based on the 2009 unaudited financial statements, to reflect the 2009 audited (rather than unaudited) financial statements, and to incorporate a portion of Mueller's parent company's corporate-wide G&A expenses.

Mueller rejects U.S. Steel's arguments regarding the calculation of G&A expenses. First, Mueller states that the contention that the Department used an incorrect amount for G&A expense in calculating Mueller's preliminary margin is moot because Mueller has since revised its calculation. Next, Mueller also refutes U.S. Steel's argument that it failed to update its G&A expense ratio after the issuance of its 2009 fiscal statement. Rather, Mueller contends that other income was included in G&A expenses for reporting to the Department, but was listed separately in the 2009 financial statements. Thus, if this account were added back to the total G&A expenses from the reported G&A worksheets, the result would agree with the total G&A expenses reported in Mueller's 2009 audited financial statement. However, Mueller concedes that this other income amount should be excluded from Mueller's G&A expense ratio calculation. Last, Mueller also rejects U.S. Steel's argument that the Department should allocate a portion of Mueller Industries' G&A expenses to Mueller because it is inappropriate to first raise this issue in its case brief. Further, Mueller contends such information is already captured in Mueller's G&A expenses.

Department's Position:

For these final results, we have relied on Mueller's revised G&A expense ratio based on its 2009 audited financial statements, as reported in its supplemental response submitted subsequent to the *Preliminary Results*. *See* Mueller's January 4, 2011, section D submission at exhibit 11. We agree with Mueller that the total G&A expenses from the reported calculation worksheets can be reconciled to the total reported in the 2009 financial statements by adding back other income. Additionally, as both parties are in agreement, we have adjusted the reported G&A expense ratio calculation for the final results to exclude the other income amount. We also agree with Mueller that the reported G&A expenses already include the payments made to its parent company for corporate expenses. Finally, because we are relying on the figures from the audited financial statements, we have not addressed issues raised regarding the G&A expense ratio calculation based on the unaudited financial statements.

RECOMMENDATION:

Based on our analysis of the comments received, we recommend adopting all of the above changes and positions. If accepted, we will publish the final determination of the review in the *Federal Register*.

AGREE___________ DISAGREE___________

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Ronald K. Lorentzen
Deputy Assistant Secretary
for Import Administration

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Date