

February 29, 2012

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

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

SUBJECT: Issues and Decision Memorandum for the Final Results of the
Fifth Administrative Review of the Antidumping Duty Order on
Carbon and Certain Alloy Steel Wire Rod from Mexico

Summary:

We have analyzed the case and rebuttal briefs submitted by interested parties. As a result of our analysis, we have made changes in the margin calculations. We recommend that you approve the positions described in the *Discussion of Interested Party Comments* section of this memorandum. Below is the complete list of the issues in this review for which we have received comments from the parties:

I. List of Comments

- Comment 1: Treatment of Sales with Negative Dumping Margins (Zeroing)
Comment 2: Application of Partial Adverse Facts Available to ArcelorMittal Las Truchas, S.A. de C.V.'s Reported Home Market Inland Freight Expenses

II. Background

On November 1, 2011, the Department of Commerce (the Department) published the preliminary results of its fifth administrative review of the antidumping duty order on carbon and certain alloy steel wire rod (wire rod) from Mexico.¹ The merchandise covered by this review is described in the *Federal Register* notice issued the same date as this memorandum. The review covers one manufacturer/exporter ArcelorMittal Las Truchas, S.A. de C.V (AMLT). The period of review (POR) is October 1, 2009, through September 30, 2010.

¹ See *Carbon and Certain Alloy Steel Wire Rod from Mexico: Notice of Preliminary Results of Antidumping Duty Administrative*, 76 FR 67407 (November 1, 2011) (“*Preliminary Results*”).

On December 1, 2011, the Department received case briefs from AMLT and Nucor Corporation (Nucor) and Cascade Steel Rolling Mills, Inc. (Cascade Steel). On December 6, 2011, the Department received rebuttal briefs from Nucor and Cascade Steel, ArcelorMittal USA Inc., (ArcelorMittal USA), Gerdau Ameristeel U.S. Inc., (Gerdau), and Evraz Rocky Mountain Steel (Evraz) (collectively, the Coalition).²

No party requested a hearing.

III. Discussion of Interested Party Comments

Comment 1: Treatment of Sales with Negative Dumping Margins (Zeroing)

AMLT contends that the Department should not engage in the practice of zeroing for calculating AMLT's final margin in this administrative review. AMLT argues that the Department improperly "assigned sales made above normal value a dumping margin of zero rather than a negative margin" in the prelim calculations of this antidumping duty margin. *See AMLT's December 1, 2011, case brief at 2.*

AMLT argues that the Department should adopt in the final results of this review any changes in zeroing policy that may take place as a result of the Department's published proposed modifications to its methodology for calculating weighted average dumping margins in administrative reviews and pending litigation regarding the Department's zeroing practice. *See Antidumping Proceedings: Calculation of the Weighted-Averaged Dumping Margin and Assessment Rate in Certain Antidumping Proceedings: Proposed Rule, 75 FR 81533 (December 28, 2010) ("Proposed Modification").* Citing to *Proposed Modification*, AMLT argues that the Department signaled its intention to eliminate zeroing in administrative reviews.

Nucor and Cascade Steel argue that the Department should continue with its practice of zeroing for calculating AMLT's final margin in this administrative review. Citing to *Proposed Modification* they argue that AMLT's argument that the Department should implement any changes in zeroing policy that may occur prior to the date of the final results of this review is without basis. According to Nucor and Cascade Steel, the *Proposed Modification* explains that any modifications to the Departments' dumping margin methodology will apply only to cases where the preliminary results are published more than sixty days after publication of the Department's final rule. Therefore, Nucor and Cascade Steel argue that in light of the fact that the Department has not issued the final ruling any changes in the Departments zeroing methodology will not apply in this administrative review.

Department's Position:

² We use the term petitioners to refer to Nucor, Cascade Steel, and the Coalition.

We have not changed our calculation of the weighted-average dumping margin, as suggested by the respondents, in these final results. Section 771(35)(A) of the Tariff Act of 1930, as amended (the Act) defines “dumping margin” as the “amount by which the normal value exceeds the export price or constructed export price of the subject merchandise” (emphasis added). The definition of “dumping margin” calls for a comparison of normal value (NV) and export price (EP) or constructed export price (CEP). Before making the comparison called for, it is necessary to determine how to make the comparison.

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

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

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

In light of the comparison methods provided for under the statute and regulations, and for the reasons set forth in detail below, the Department finds that the offsetting method is appropriate when aggregating the results of average-to-average comparisons, and is not similarly appropriate when aggregating the results of average-to-transaction comparisons, such as were applied in this administrative review. The Department interprets the application of average-to-average comparisons to contemplate a dumping analysis that examines the pricing behavior on average of an exporter or producer with respect to the subject merchandise, whereas under the average-to-transaction comparison methodology the Department undertakes a dumping analysis

that examines the pricing behavior of an exporter or producer with respect to individual export transactions. The offsetting approach described in the average-to-average comparison methodology allows for an overall examination of pricing behavior on average. The Department's interpretation of section 771(35) of the Act to permit zeroing in average-to-transaction comparisons, as in this administrative review, and to permit offsetting in average-to-average comparisons reasonably accounts for differences inherent in the distinct comparison methodologies.

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

The difference between "zeroing" and "offsetting" reflects the ambiguity the Federal Circuit has found in the word "exceeds" as used in section 771(35)(A). *Timken Co. v. United States*, 354 F.3d 1334, 1341-45 (Fed. Cir. 2004) (*Timken*). The courts repeatedly have held that the statute does not speak directly to the issue of zeroing versus offsetting.³ For decades the Department interpreted the statute to apply zeroing in the calculation of the weighted-average dumping margin, regardless of the comparison method used. In view of the statutory ambiguity, on multiple occasions, both the Federal Circuit and other courts squarely addressed the reasonableness of the Department's zeroing methodology and unequivocally held that the Department reasonably interpreted the relevant statutory provision as permitting zeroing.⁴ In so doing, the courts relied upon the rationale offered by the Department for the continued use of zeroing, *i.e.*, to address the potential for foreign companies to undermine the antidumping laws by masking dumped sales with higher priced sales: "Commerce has interpreted the statute in such a way as to prevent a foreign producer from masking its dumping with more profitable sales. Commerce's interpretation is reasonable and is in accordance with law."⁵ The Federal

³ See *PAM, S.p.A. v. United States*, 265 F. Supp. 2d 1362, 1371 (CIT 2003) (*PAM*) ("{The} gap or ambiguity in the statute requires the application of the *Chevron* step-two analysis and compels this court to inquire whether Commerce's methodology of zeroing in calculating dumping margins is a reasonable interpretation of the statute."); *Bowe Passat Reinigungs-Und Waschereitechnik GmbH v. United States*, 926 F. Supp. 1138, 1150 (CIT 1996) (*Bowe Passat*) ("The statute is silent on the question of zeroing negative margins."); *Serampore Indus. Pvt. Ltd. v. U.S. Dep't of Commerce*, 675 F. Supp. 1354, 1360 (CIT 1987) (*Serampore*) ("A plain reading of the statute discloses no provision for Commerce to offset sales made at {less than fair value} with sales made at fair value. . . . Commerce may treat sales to the United States market made at or above prices charged in the exporter's home market as having a zero percent dumping margin.").

⁴ See, e.g., *Koyo Seiko Co. v. United States*, 551 F.3d 1286, 1290-91 (Fed. Cir. 2008) (*Koyo 2008*); *NSK Ltd. v. United States*, 510 F.3d 1375, 1379-80 (Fed. Cir. 2007) (*NSK*); *Corus Staal BV v. United States*, 502 F.3d 1370, 1375 (Fed. Cir. 2007) (*Corus II*); *Corus Staal BV v. Department of Commerce*, 395 F.3d 1343, 1347 (Fed. Cir. 2005) (*Corus I*); *Timken*, 354 F.3d at 1341-45; *PAM*, 265 F. Supp. 2d at 1370 ("Commerce's zeroing methodology in its calculation of dumping margins is grounded in long-standing practice."); *Bowe Passat*, 926 F. Supp. at 1149-50; *Serampore*, 675 F. Supp. at 1360-61.

⁵ *Serampore*, 675 F. Supp. at 1361 (citing *Certain Welded Carbon Steel Standard Pipe and Tube From India; Final Determination of Sales at Less Than Fair Value*, 51 FR 9089, 9092 (Mar. 17, 1986)); see also *Timken*, 354 F.3d at

Circuit explained in *Timken* that denial of offsets is a “reasonable statutory interpretation given that it legitimately combats the problem of masked dumping, wherein certain profitable sales serve to mask sales at less than fair value.” See *Timken*, 354 F.3d at 1343. As reflected in that opinion, the issue of so-called masked dumping was part of the policy reason for interpreting the statute in the manner applied by the Department. 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*, 354 F.3d at 1343; *Corus I*, 395 F.3d at 1343; *Corus II*, 502 F.3d at 1370, 1375; and *NSK*, 510 F.3d at 1375.

In 2005, a panel of the World Trade Organization (WTO) Dispute Settlement Body found that the United States did not act consistently with its obligations under Article 2.4.2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 when it employed the zeroing methodology in average-to-average comparisons in certain challenged antidumping duty investigations. See Panel Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing)*, WT/DS294/R (Oct. 31, 2005) (*EC-Zeroing Panel*). The initial WTO Dispute Settlement Body Panel Report was limited to the Department’s use of zeroing in average-to-average comparisons in antidumping duty investigations. See *EC-Zeroing Panel*, WT/DS294/R. The Executive Branch determined to implement this report pursuant to the authority provided in Section 123 of the Uruguay Round Agreements Act (URAA) (19 U.S.C. § 3533(f), (g)) (Section 123). See *Final Modification for Investigations*, 71 FR at 77722; and *Antidumping Proceedings: Calculation of the Weighted – Average Dumping Margin During an Antidumping Investigation; Change in Effective Date of Final Modification*, 72 FR 3783 (Jun. 26, 2007) (together, *Final Modification for Investigations*). Notably, with respect to the use of zeroing, the Panel found that the United States acted inconsistently with its WTO obligations only in the context of average-to-average comparisons in antidumping duty investigations. The Panel did not find fault with the use of zeroing by the United States in any other context. In fact, the Panel rejected the European Communities’ arguments that the use of zeroing in administrative reviews did not comport with the WTO Agreements. See, *EC-Zeroing Panel* at 7.284, 7.291.

Without an affirmative inconsistency finding by the Panel, the Department did not propose to alter its zeroing practice in other contexts, such as administrative reviews. As the Federal Circuit recently held, the Department reasonably may decline, when implementing an adverse WTO report, to take any action beyond that necessary for compliance. See *Thyssenkrupp Acciai Speciali Terni S.p.A. v. United States*, 603 F. 3d 928, 934 (Fed. Cir. 2010). Moreover, in *Corus I*, the Federal Circuit acknowledged the difference between antidumping duty investigations and administrative reviews, and held that section 771(35) of the Act was just as ambiguous with respect to both proceedings, such that the Department was permitted, but not required, to use zeroing in antidumping duty investigations. See *Corus I*, 395 F. 3d at 1347. In light of the adverse WTO Dispute Settlement Body finding and the ambiguity that the Federal Circuit found inherent in the statutory text, the Department abandoned its prior litigation position – that no difference between antidumping duty investigations and administrative reviews exists

1343; *PAM*, 265 F. Supp. 2d at 1371.

for purposes of using zeroing in antidumping proceedings – and departed from its longstanding and consistent practice by ceasing the use of zeroing. The Department began to apply offsetting in the limited context of average-to-average comparisons in antidumping duty investigations. *See Final Modification for Investigations*, 71 FR at 77722. With this modification, the Department’s interpretation of the statute with respect to non-dumped comparisons was changed within the limited context of investigations using average-to-average comparisons. Adoption of the modification pursuant to the procedure set forth in section 123(g) of the URAA was specifically limited to address adverse WTO findings made in the context of antidumping investigations using average-to-average comparisons. The Department did not, at that time, change its practice of zeroing in other types of comparisons, including average-to-transaction comparisons in administrative reviews.⁶ *See id.*, 71 FR at 77724.

The Federal Circuit subsequently upheld the Department’s decision to cease zeroing in average-to-average comparisons in antidumping duty investigations while recognizing that the Department limited its change in practice to certain investigations and continued to use zeroing when making average-to-transaction comparisons in administrative reviews. *See U.S. Steel Corp.*, 621 F. 3d. at 1355 n.2, 1362-63. In upholding the Department’s decision to cease zeroing in average-to-average comparisons in antidumping duty investigations, the Federal Circuit accepted that the Department likely would have different zeroing practices between average-to-average and other types of comparisons in antidumping duty investigations. *Id.*, at 1363 (stating that the Department indicated an intention to use zeroing in average-to-transaction comparisons in investigations to address concerns about masked dumping). The Federal Circuit’s reasoning in upholding the Department’s decision relied, in part, on differences between various types of comparisons in antidumping duty investigations and the Department’s limited decision to cease zeroing only with respect to one comparison type. *Id.*, at 1361-63. The Federal Circuit acknowledged that section 777A(d) of the Act permits different types of comparisons in antidumping duty investigations, allowing the Department to make average-to-transaction comparisons where certain patterns of significant price differences exist. *See id.*, at 1362 (quoting sections 777A(d)(1)(A) and (B) of the Act, which enumerate various comparison methodologies that the Department may use in investigations); *see also* section 777A(d)(1)(B) of the Act. The Federal Circuit also expressly recognized that the Department intended to continue to address targeted or masked dumping through continuing its use of average-to-transaction

⁶ On February 14, 2012, in response to several WTO dispute settlement reports, the Department adopted a revised methodology which allows for offsets when making average-to-average comparisons in reviews. *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification*, 77 FR 8101 (February 14, 2012) (“*Final Modification for Reviews*”). The *Final Modification for Reviews* makes clear that the revised methodology will apply to antidumping duty administrative reviews where the preliminary results are issued after April 16, 2012. Because the preliminary results in this administrative review were completed prior to April 16, 2012, any change in practice with respect to the treatment of non-dumped sales pursuant to the *Final Modification for Reviews* does not apply here. Further, the *Proposed Modification*, cited by respondent, 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* itself is only a proposal that does not provide legal rights or expectations for parties in this review.

comparisons and zeroing. See *U.S. Steel Corp.*, 621 F. 3d at 1363. In summing up its understanding of the relationship between zeroing and the various comparison methodologies that the Department may use in antidumping duty investigations, the Federal Circuit acceded to the possibility of disparate, yet equally reasonable interpretations of section 771(35) of the Act, stating that “{b}y enacting legislation that specifically addresses such situations, Congress may just as likely have been signaling to Commerce that it need not continue its zeroing methodology in situations where such significant price differences among the export prices do *not* exist.” *Id.* (emphasis added).

We disagree with the respondent(s) that the Federal Circuit’s decisions in *Dongbu Steel v. United States*, 635 F. 3d 1363 (Fed. Cir. 2011) and *JTEKT Corporation v. US*, 2010-1516, -1518 (CAFC June 29, 2011) (*JTEKT*), require the Department to change its methodology in this administrative review. These holdings were limited to finding that the Department had not adequately explained the different interpretations of section 771(35) of the Act in the context of investigations versus administrative reviews, but the Federal Circuit did not hold that these differing interpretations were contrary to law. Importantly, the panels in *Dongbu* and *JTEKT* did not overturn prior Federal Circuit decisions affirming zeroing in administrative reviews, including *SKF*, in which the Court affirmed zeroing in administrative reviews notwithstanding the Department’s determination to no longer use zeroing in certain investigations. See *SKF v. United States*, 630 F.3d 1365 (Fed. Cir. 2011). Unlike the determinations examined in *Dongbu* and *JTEKT*, the Department, in these final results, provides additional explanation for its changed interpretation of the statute subsequent to the *Final Modification for Investigations* – whereby we interpret section 771(35) of the Act differently for certain investigations (when using average-to-average comparisons) and administrative reviews. For all these reasons, we find that our determination is consistent with the holdings in *Dongbu*, *JTEKT*, *U.S. Steel*, and *SKF*.

The Department’s interpretation of section 771(35) of the Act reasonably resolves the ambiguity inherent in the statutory text for multiple reasons. First, outside of the context of average-to-average comparisons,⁷ the Department has maintained a long-standing, judicially-affirmed interpretation of section 771(35) of the Act in which the Department does not consider a sale to the United States as dumped if normal value does not exceed export price. Pursuant to this interpretation, the Department treats such a sale as having a dumping margin of zero, which reflects that no dumping has occurred, when calculating the aggregate weighted-average dumping margin. Second, adoption of an offsetting methodology in connection with average-to-average comparisons was not an arbitrary departure from established practice because the Executive Branch adopted and implemented the approach in response to a specific international obligation pursuant to the procedures established by the Uruguay Round Agreements Act for such changes in practice with full notice, comment, consultations with the Legislative Branch, and explanation. Third, the Department’s interpretation reasonably resolves the ambiguity in section 771(35) of the Act in a way that accounts for the inherent differences between the result of an average-to-average comparison and the result of an average-to-transaction comparison.

⁷ The *Final Modification for Reviews* adopts this comparison method with offsetting as the default method for administrative reviews, however, as explained in note 4 this modification is not applicable to these final results.

The Department's *Final Modification for Investigations* to implement the WTO Panel's limited finding does not disturb the reasoning offered by the Department and affirmed by the Federal Circuit in several prior, precedential opinions upholding the use of zeroing in average-to-transaction comparisons in administrative reviews as a reasonable interpretation of section 771(35) of the Act. *See, e.g., SKF USA, Inc. v. United States*, 537 F. 3d 1373, 1382 (Fed. Cir. 2008); *NSK*, 510 F. 3d at 1379-1380; *Corus II*, 502 F. 3d at 1372-1375; *Timken*, 354 F. 3d at 1343. In the *Final Modification for Investigations*, the Department adopted a possible construction of an ambiguous statutory provision, consistent with the *Charming Betsy* doctrine, to comply with certain adverse WTO dispute settlement findings.⁸ Even where the Department maintains a separate interpretation of the statute to permit the use of zeroing in certain dumping margin calculations, the *Charming Betsy* doctrine bolsters the ability of the Department to apply an alternative interpretation of the statute in the context of average-to-average comparisons so that the Executive Branch may determine whether and how to comply with international obligations of the United States. Neither section 123 nor the *Charming Betsy* doctrine require the Department to modify its interpretation of section 771(35) of the Act for all scenarios when a more limited modification will address the adverse WTO finding that the Executive Branch has determined to implement. Furthermore, the wisdom of Commerce's legitimate policy choices in this case – *i.e.*, to abandon zeroing only with respect to average-to-average comparisons – is not subject to judicial review. *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 966 F. 2d 660, 665 (Fed. Cir. 1992). These reasons alone sufficiently justify and explain why the Department reasonably interprets section 771(35) of the Act differently in average-to-average comparisons relative to all other contexts.

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

The Department may reasonably interpret section 771(35) of the Act differently in the context of the average-to-average comparisons to permit negative comparison results to offset or reduce positive comparison results when calculating "aggregate dumping margins" within the meaning of section 771(35)(B) of the Act. When using an average-to-average comparison methodology, *see, e.g.*, section 777A(d)(1)(A)(i) of the Act, the Department usually divides the export transactions into groups, by model and level of trade (averaging groups), and compares an average export price or constructed export price of transactions within one averaging group to an

⁸ According to *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804), "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country." The principle emanating from the quoted passage, known as the *Charming Betsy* doctrine, supports the reasonableness of the Department's interpretation of the statute in the limited context of average-to-average comparisons in antidumping duty investigations because the Department's interpretation of the domestic law accords with international obligations as understood in this country.

average normal value for the comparable merchandise of the foreign like product. In calculating the average export price or constructed export price, the Department averages all prices, both high and low, for each averaging group. The Department then compares the average EP or CEP for the averaging group with the average normal value for the comparable merchandise. This comparison yields an average result for the particular averaging group because the high and low prices within the group have been averaged prior to the comparison. Importantly, under this comparison methodology, the Department does not calculate the extent to which an exporter or producer dumped a particular sale into the United States because the Department does not examine dumping on the basis of individual U.S. prices, but rather performs its analysis “on average” for the averaging group within which higher prices and lower prices offset each other. The Department then aggregates the comparison results from each of the averaging groups to determine the aggregate weighted-average dumping margin for a specific producer or exporter. At this aggregation stage, negative, averaging-group comparison results offset positive, averaging-group comparison results. This approach maintains consistency with the Department’s average-to-average comparison methodology, which permits EPs above normal value to offset EPs below normal value within each individual averaging group. Thus, by permitting offsets in the aggregation stage, the Department determines an “on average” aggregate amount of dumping for the numerator of the weighted-average dumping margin ratio consistent with the manner in which the Department determined the comparison results being aggregated.

In contrast, when applying an average-to-transaction comparison methodology, *see, e.g.*, section 777A(d)(2) of the Act, as the Department does in this administrative review, the Department determines dumping on the basis of individual U.S. sales prices. Under the average-to-transaction comparison methodology, the Department compares the EP or CEP for a particular U.S. transaction with the average normal value for the comparable merchandise of the foreign like product. This comparison methodology yields results specific to the selected individual export transactions. The result of such a comparison evinces the amount, if any, by which the exporter or producer sold the merchandise at an EP or CEP less than its normal value. The Department then aggregates the results of these comparisons – *i.e.*, the amount of dumping found for each individual sale – to calculate the weighted-average dumping margin for the period of review. To the extent the average normal value does not exceed the individual EP or CEP of a particular U.S. sale, the Department does not calculate a dumping margin for that sale or include an amount of dumping for that sale in its aggregation of transaction-specific dumping margins.⁹ Thus, when the Department focuses on transaction-specific comparisons, as it did in this administrative review, the Department reasonably interprets the word “exceeds” in section 771(35)(A) of the Act as including only those comparisons that yield positive comparison results. Consequently, in transaction-specific comparisons, the Department reasonably does not permit negative comparison results to offset or reduce other positive comparison results when determining the “aggregate dumping margin” within the meaning of section 771(35)(B) of the

⁹ As discussed previously, the Department does account, however, for the sale in its weighted-average dumping margin calculation. The value of any non-dumped sale is included in the denominator of the weighted-average dumping margin while no dumping amount for non-dumped transactions is included in the numerator. Therefore, any non-dumped transactions results in a lower weighted-average dumping margin.

Act.

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

In sum, on the issue of how to treat negative comparison results in the calculation of the weighted-average dumping margin pursuant to section 771(35)(B) of the Act, for the reasons explained, the Department reasonably may accord dissimilar treatment to negative comparison results depending on whether the result in question flows from an average-to-average comparison or an average-to-transaction comparison. Accordingly, the Department's interpretations of section 771(35) of the Act to permit zeroing in average-to-transaction comparisons, as in the underlying administrative review, and to permit offsetting in average-to-average comparisons reasonably accounts for the differences inherent in distinct comparison methodologies.

Regarding other WTO reports cited by the respondent(s) finding the denial of offsets by the United States to be inconsistent with the Antidumping Agreement, the Federal Circuit has held that WTO reports are without effect under U.S. law, "unless and until such a {report} has been adopted pursuant to the specified statutory scheme" established in the URAA. *See Corus I*, 395 F.3d at 1347-49; accord *Corus II*, 502 F.3d at 1375; and *NSK*, 510 F.3d 1375. As is clear from the discretionary nature of this scheme, Congress did not intend for WTO reports to trump automatically the exercise of the Department's discretion in applying the statute. See 19 USC 3538(b)(4) (implementation of WTO reports is discretionary). Moreover, as part of the URAA process, Congress has provided a procedure through which the Department may change a regulation or practice in response to WTO reports. *See* 19 U.S.C. 3533(g).

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

For the foregoing reasons, we have not changed the methodology employed in calculating AMLT's weighted-average margin for these final results.

Comment 2: Application of Partial Adverse Facts Available to ArcelorMittal Las Truchas, S.A. de C.V.'s Reported Home Market Inland Freight Expenses

AMLT argues that the Department inappropriately applied partial adverse facts available ("AFA") to AMLT's home-market inland freight expense. AMLT claims that the calculation methodology used by the Department "significantly undervalues AMLT's actual, verified freight expense." *See AMLT's December 1, 2011, case brief at 2.* According to AMLT the Department verified both the average inland domestic freight cost and the total domestic freight cost. AMLT asserts that the Department in the final results should apply the average home market sales inland freight cost verified by the Department rather than the lowest domestic inland freight expense reported in the INLFTH field in the home market database.

Nucor and Cascade Steel agree with the Department's application of partial AFA methodology to AMLT's home market inland freight expense. They argue that the Department should reject AMLT's alternative methodology because the use of an average inland freight cost is inappropriate. Citing to the Department's regulations 19 CFR 351.401(g), Nucor and Cascade Steel argue that AMLT's alternative methodology is untimely proposed. Nucor and Cascade Steel argue that the use of an alternative methodology should have been proposed by AMLT prior to verification. They state that the Department's regulations permit, in cases where transaction-specific reporting is not feasible, the Department to accept alternative reporting. However, the appropriate time for the respondent to have proposed such alternative reporting expired with the passing of the questionnaire stage of the proceeding.

However, Nucor and Cascade Steel argue that the Department made a clerical error in applying the lowest reported inland freight expense not only to home market sales with reported inland freight expense, but also to home market sales with no reported inland freight expense. Accordingly, they urge the Department to correct this error for these final results and apply AFA only to AMLT's home sales with reported inland freight expense.

In its rebuttal briefs the Coalition argues that the Department should continue to use the lowest reported freight cost in the calculation of home market inland freight for the final results as a replacement for the non-verifiable data. Further, the Coalition argues against AMLT's proposed alternative methodology to apply the average home market sales inland freight cost in the final results of this review. First, it claims that it is inappropriate for the Department to use the overall average domestic freight cost because this cost reflects the average cost incurred to "ship a variety of non-subject merchandise." *See the Coalition's December 6, 2011, rebuttal brief at 3.* Second, according to the Coalition, ALMT provides no evidence that the overall average cost accurately represents "the cost for transporting wire rod."

Third, the Coalition argues that AMLT inaccurately claims that its overall freight expense was verified. According to the Coalition, the Department's Verification Report does not

state that.¹⁰ Fourth, citing to the Verification Outline the Department issued to AMLT prior to verification, the Coalition claims that the Department instructed AMLT that “verification is not intended to be an opportunity for submission of new information.” *See the Department’s May 23, 2011, Verification Agenda Outline for AMLT*, of which the public version is on file in the CRU. Fifth, the Coalition argues that it is inappropriate for the Department to use the overall average domestic freight cost information in the final results because such information was not provided prior to verification. Thus, the Coalition asserts that the Department should continue using inland freight expenses for home-market sales as reported by AMLT for the final results.

Department’s Position: The Department disagrees with AMLT’s claim that the Department should not apply a partial AFA methodology with respect to reported home market inland freight expense. We have re-examined the record and determined that the Department properly applied the partial AFA methodology to AMLT’s reported home market inland freight expense, except where AMLT reported that no home market inland freight expense was incurred.

Section 776(a)(2) of 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 subsections 782(c)(1) and (e) of the Act; (C) significantly impedes a determination under the antidumping statute; or (D) provides such information but the information cannot be verified, the Department shall, subject to subsection 782(d) of the Act, use facts otherwise available in reaching the applicable determination. Section 776(b) of the Act further states that the Department may resort to the use of adverse inferences in applying the facts otherwise available if it determines that an interested party has failed to act to the best of its ability.

Pursuant to section 776(b) of the Act, in the preliminary results we applied partial AFA with regard to AMLT’s inland freight expense in the home market as a replacement for the non-verifiable data in the INLFTCH field of the home market database. Our decision to apply partial AFA in the *Preliminary Results* was based on the fact that AMLT did not act to the best of its ability because portions of the inland freight data it provided in its questionnaire responses did not verify. AMLT has not provided any information to warrant a reconsideration of our decision to apply partial AFA under these circumstances.

We disagree with AMLT that the Department should revise its partial AFA methodology by calculating AMLT’s inland freight expense using the average of its inland freight costs during the POR. As petitioners correctly point out, verification is not intended to be an opportunity for submission of new information. Further, under 19 CFR 351.401(g)(1) and (2), AMLT failed to first demonstrate prior to verification that it was not feasible to report expenses on a transaction-specific basis and that use of an allocation methodology was necessary. AMLT did not present the inland freight allocation methodology at issue until after the commencement of verification.

¹⁰ *See the Department’s July 12, 2011, Memorandum to Melissa G. Skinner, Director, Office 3, AD/CVD Operations, “Verification of the Sales Response of ArcelorMittal las Truchas, S.A. de C.V. (AMLT) in the Administrative Review of Carbon and Certain Alloy Steel Wire Rod from Mexico,” (Verification Report) at VE-30*, of which a public version is on file in room 7046 of the Central Records Unit (CRU) in the main Commerce Building.

Moreover, the only reason that AMLT presented the allocation methodology and data was because it was not able to successfully trace the transaction-specific inland freight data it reported to the Department to the corresponding entries in its financial records. On this basis, we find that AMLT failed verification with respect to the data it reported for inland freight expenses in the home market.

Further, the weighted-average freight expense advocated by AMLT is inappropriate for use as AFA because the proposed expense is itself a partial function of the individual inland freight expenses that AMLT could not trace to the corresponding financial records and that the Department could not verify. In addition, as petitioners note, AMLT's overall, average freight expense reflects the average expense incurred to ship a variety of subject and non-subject products and, thus, is not appropriate for use as a proxy for freight costs incurred on subject merchandise given that there are other data that are specific to subject merchandise.

In the preliminary results, as AFA, we used the inland freight expense for a single transaction and applied the lowest reported inland freight expense for all other sales with reported inland freight expense.¹¹ However, we agree with Nucor and Cascade Steel that the Department made a clerical error in applying this partial AFA methodology to home market sales in which no inland freight expenses were reported. Therefore, in these final results, we have applied an inland freight expense of zero for those home market transactions in which AMLT reported that no inland freight costs were incurred. For all other home market sales, we have continued to apply the partial AFA methodology utilized in the *Preliminary Results*.

Recommendation

¹¹ See Memorandum to the File "Calculation Memorandum for ArcelorMittal Las Truchas S.A. de C.V. (AMLT)."

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

Agree _____ Disagree _____

Ronald K. Lorentzen
Acting Assistant Secretary
for Import Administration

Date