



A-523-801
Investigation
PUBLIC DOCUMENT
AD/CVD Operations, Office 7: JD, EU

October 15, 2012

MEMORANDUM TO: Paul Piquado
Assistant Secretary
for Import Administration

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

SUBJECT: Issues and Decision Memorandum for the Final Determination of
the Antidumping Duty Investigation of Circular Welded Carbon-
Quality Steel Pipe from the Sultanate of Oman

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 calculation of the sole respondent as discussed below. We recommend that you approve the Department of Commerce's (the Department's) positions, described in the "Discussion of Interested Party Comments" section of this Issues and Decision Memorandum. Below is the complete list of the issues in this investigation for which we received comments from parties:

I. List of Comments

- Comment 1: Date of Sale
- Comment 2: Targeted Dumping
- Comment 3: Hot-Rolled Steel Coil Cost and Yield Ratio
- Comment 4: Model Matching Hierarchy
- Comment 5: Double-Counting of Certain Export Charges

II. Background

On June 1, 2012, the Department published in the Federal Register its preliminary determination in the antidumping duty investigation of circular welded carbon-quality steel pipe (circular welded pipe) from Sultanate of Oman (Oman). See Circular Welded Carbon-Quality Steel Pipe from the Sultanate of Oman: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination, 77 FR 32531 (June 1, 2012) (Preliminary Determination).

The merchandise covered by this investigation is circular welded pipe from the Sultanate of Oman (Oman), as described in the “Scope of the Order” section in the Federal Register notice of the final determination. The period of investigation (POI) is October 1, 2010, to September 30, 2011. Id. at 32533. This investigation covers one manufacturer/exporter that was selected as a mandatory respondent, Al Jazeera Steel Products Co. SAOG (Al Jazeera). Id. at 32532.

Petitioners Allied Tube and Conduit and the JMC Steel Group (collectively, petitioners) timely requested a hearing on July 2, 2012.¹ On August 29, 2012 and September 4, 2012, respectively, both petitioners and Al Jazeera timely submitted case and rebuttal briefs commenting on our Preliminary Determination.² Petitioners withdrew their hearing request on September 13, 2012.³

Discussion of Interested Party Comments

Comment 1: Date of Sale

Both petitioners and Al Jazeera submitted comments and rebuttals on this issue. Below are summaries of the arguments.

In their case brief, petitioners note that the Department preliminarily determined that the date of sale should be invoice date. See petitioners’ case brief at 2. Petitioners note that the Department intended to examine the issue in greater detail after the Preliminary Determination, and believes that the Department’s subsequent factual findings support the continuation of using the date of invoice as the date of sale. Id. at 2-3. Petitioners state that the Department’s sales verification report found a number of issues, which include an inability by Al Jazeera to match some purchase orders to sales due to a change in data management systems and material changes in the purchase order terms beyond a quantity tolerance or price. Id. at 3-4. Additionally, petitioners assert that there were amendments to the original purchase order for some purchase orders that “provide substantial evidence to support the Department’s preliminary determination to use invoice date for the U.S. date of sale.” Id. at 4. Petitioners further note that some of the “sales” to the United States that were reported by Al Jazeera in fact were not invoiced and shipped during the POI, and that the examination of one of these sales during the sales verification revealed errors that “provides yet another reason for determining margins and cash deposits for U.S. sales, as well as for home market sales, based on invoice date, and excluding sales that are unshipped and uninvoiced from examination” by the Department in the margin program for the final determination. Id. at 5. Thus, petitioners argue that the Department should continue to use invoice date as the date of sale for the final determination.

In its case brief, Al Jazeera states that all sales to the United States begin with a purchase order. See Al Jazeera case brief at 3. The purchase order, according to Al Jazeera, is the basis on which the company issues and ships all invoices for U.S. sales, and contains all of the information necessary to generate the associated sales and invoices for each U.S. customer. Id. For sales to

¹ See Letter from petitioners to the Secretary of Commerce, dated July 2, 2012.

² See Letter to the Secretary of Commerce from petitioners, dated August 29, 2012 (petitioners’ case brief); Letter to the Secretary of Commerce from Al Jazeera, dated August 29, 2012 (Al Jazeera case brief); Letter to the Secretary of Commerce from petitioners, dated September 4, 2012 (petitioners’ rebuttal brief); Letter to the Secretary of Commerce from Al Jazeera, dated September 4, 2012 (Al Jazeera rebuttal brief).

³ See Letter from petitioners to the Secretary of Commerce, dated September 13, 2012.

the United States, Al Jazeera “as a general practice . . . does not buy raw material until a PO {purchase order} has been placed and confirmed” and that “Al Jazeera thus maintains a direct link from the PO through the raw-material purchase to production and then to shipment, balancing the quantities throughout.” Id. Al Jazeera states that it was able to track all purchase orders beginning from May 1, 2011, (the date that Al Jazeera installed a new data management system), and that the total quantity variance between purchase orders (or amended purchase orders) and shipments after May 1, 2011, was equal to 0.018 percent and a total variance of 0.74 percent in value. Id. at 4. The quantity variance, Al Jazeera maintains, is well within the +/-10 percent quantity tolerance specified in the purchase orders. Id. Al Jazeera states that four of the purchase orders show variances by quantity in excess of 10 percent. However, Al Jazeera avers that these purchase orders are smaller in total tonnage than the average tonnage of all purchase orders. Id. at 5. Al Jazeera further states that the Department’s Preliminary Determination regarding the issue of date of sale was based on the fact that “the record at that time was insufficient to provide a clear indication that the PO date was the date of sale.” Id. Al Jazeera believes that the information provided at the sales verification is sufficient to prove that the correct date of sale should be purchase order date. Id. at 5-6.

Al Jazeera does note that some of the purchase orders, which were booked into the company’s database system before May 1, 2011, cannot be tracked. Id. at 6. Nevertheless, even without those purchase orders, Al Jazeera maintains that the remaining purchase orders “covered 88% of the purchase orders reported in the U.S. sales database” and that “{t}his is manifestly an adequate and representative sample on which to make a reasoned determination as to date of sale.” Id. Al Jazeera acknowledges that some “purchase orders had a variance between order quantity and shipped quantity in excess of the leeways of the contracts,” but maintains that these variances do not negate the use of purchase order date as the date of sale. Id.

Al Jazeera cites to a decision by the Court of International Trade (CIT), Habas v. United States, 625 F.Supp. 2d 1339, 1372-73 (CIT 2009) (Habas) in support of its contention that the date of sale should be the purchase order date. Id. at 7-8. Al Jazeera avers that the court “specifically held in Habas that the proponent of contract (or PO) date as date of sale need not establish that its contracts or PO’s were not “subject to change” after the original meeting of the minds; what was required was that shipments be within contract leeways as a general rule; contract or PO date could be the date of sale even if contract leeways were not met on every individual sale under consideration.” Id. at 8. Al Jazeera also cites to two decisions by the Department where there were material changes in the terms of sale but the Department continued to find purchase order or contract date to be the date of sale. Those decisions are Circular Welded Non-Alloy Steel Pipe From the Republic of Korea; Final Results of Antidumping Duty Administrative Review, 63 FR 32833, 32836 (June 16, 1998) (Korean Pipe), and Certain Welded Carbon Steel Pipes and Tubes From Thailand: Final Results of Antidumping Duty Administrative Review, 65 FR 60910 (October 13, 2000) (Thai Pipe), and accompanying Issues and Decision Memorandum at Comment 1. Id. Al Jazeera believes that the fact pattern in this investigation is similar to those cited above. Therefore, for all of these reasons, Al Jazeera states that the Department should use purchase order date as the date of sale for the final determination.

In their rebuttal brief, petitioners take issue with Al Jazeera’s claim that the material terms of sale are established with the purchase orders. See petitioners’ rebuttal brief at 1. Petitioners

again note that Al Jazeera was not able to establish concordance between purchase order dates and invoice dates for purchase orders booked prior to May 1, 2010. *Id.* at 1-2. Petitioners cite to 19 CFR 351.401(i) (which establishes a rebuttable presumption that the invoice date better reflects the date on which the material terms of sale were established) and to Allied Tube et al. v. United States, 132 F. Supp 2d 1087, 1090 (CIT 2001) (which states in part that “a party seeking to establish a date of sale other than the invoice date bears the burden of providing sufficient evidence to satisfy the Department that a different date better reflects the date on which the exporter or producer establishes the material terms of sale”). Thus, petitioners believe that Al Jazeera’s inability to create a concordance for all of the purchase orders means that Al Jazeera “did not provide evidence to establish that the purchase order date better reflects the date on which the material terms were set than invoice date.” *Id.* at 2. Petitioners note that Al Jazeera’s aggregate quantity and value variances of 0.018 percent and 0.74 percent fail “to quantify differences between individual purchase orders and invoices” and that “the variances between aggregate purchase orders and aggregate invoices do not establish the extent or magnitude of differences between individual orders and their invoices.” *Id.* Petitioners reiterate their argument that the unshipped “sale” examined by the Department during verification provides “yet another reason for determining margins and cash deposits for U.S. sales based on invoice date, and excluding sales that are unshipped and uninvoiced from examination in the margin program for the Department’s final determination.” *Id.* at 3. Petitioners conclude by stating that when all of the record evidence is considered, the invoice date is the appropriate date to select for the date of sale.

Al Jazeera states that “other than the four trivial instances discussed in Al Jazeera’s case brief at 5” there is no evidence that any of Al Jazeera’s shipments to the United States were outside of volume tolerances specified in the purchase orders examined by Al Jazeera. *See* Al Jazeera rebuttal brief at 2. With respect to the purchase orders that Al Jazeera could not trace, which occurred prior to May 1, 2012, Al Jazeera states that “all of Al Jazeera’s purchase orders beginning from a point six months before the POI were fulfilled exactly as ordered, again with the minuscule four instances of under-filling.” *Id.* With respect to those purchase orders that were amended, Al Jazeera states that it had reported the date of the amended purchase order as the purchase order date. *Id.*

Finally, Al Jazeera concurs with petitioners that any unshipped sales should not be used in the Department’s antidumping duty analysis. *Id.* at 3. While Al Jazeera states that the unshipped sales have no sales-specific adjustments to them, since they are unshipped, Al Jazeera rejects the suggestion that these unshipped sales might have a bearing on the Department’s date of sale analysis. Al Jazeera asserts that “{t}here is no logical connection between the treatment of unshipped articles and the use of PO versus invoice date for the date of sale.” Therefore, Al Jazeera asks that the Department reject petitioners’ arguments.

Department’s Position:

We have continued to find that the invoice date is the appropriate date of sale for Al Jazeera’s sales to customers in the United States. The regulation governing date of sale determinations, 19 CFR 351.401(i), states the following:

In identifying the date of sale of the subject merchandise or foreign like product, the Secretary normally will use the date of invoice, as recorded in the exporter or producer's records kept in the ordinary course of business. However, the Secretary may use a date other than the date of invoice if the Secretary is satisfied that a different date better reflects the date on which the exporter or producer establishes the material terms of sale.

The regulation indicates that while the date of invoice is the preferred date of sale, the Department will consider a different date if it is satisfied that the material terms of sale are established on a date other than the invoice date. Importantly, "unless the party seeking to establish a date of sale other than the invoice date produces sufficient evidence to overcome this presumption, Commerce will use invoice date as the date of sale." See Sahaviriya Steel Industries Public Company Limited v. United States, 714 F. Supp. 2d 1263, 1279-80 (CIT 2010) (SSI); see also Allied Tube & Conduit Corp. v. United States, 127 F. Supp. 2d 207, 220 (CIT 2000) ("Plaintiff, therefore, must demonstrate that it presented Commerce with evidence of sufficient weight and authority as to justify its factual conclusions as the only reasonable outcome. If, however, the record indicates that Commerce's decision to use the invoice date as the date of sale was reasonable and was supported by substantial evidence, Plaintiff's arguments must fail."); accord Yieh Phui Enterprise Co. v. United States, 791 F. Supp. 2d 1319, 1324 (CIT 2011). In determining the date of sale, the Department considers which date best reflects the date on which the exporter/producer establishes the material terms of sale (e.g., price and quantity). See SSI, 714 F. Supp. 2d at 1279-80.

In the instant case, Al Jazeera reported that sales to its United States customers are based on purchase orders, where the quantity and value are set at the time of the confirmation of the purchase order. Therefore, Al Jazeera claims that the date of the purchase order is the date of sale. See Al Jazeera's section B&C response, dated February 9, 2012 (BCQR) at 62, and Al Jazeera's section A response, dated January 26, 2012 (AQR) at 15. According to Al Jazeera, these purchase orders are akin to contracts. See Al Jazeera's second supplemental questionnaire response, dated May 4, 2012 (SSQR) at 7. We noted that the confirmed purchase orders are subject to a quantity tolerance, which is generally +/-10 percent. See AQR at 15. Al Jazeera also stated that, for one or more individual items within an order, the quantity shipped is not within the +/-10 percent tolerance of the contract, but the total of the shipment is within the tolerance. See Al Jazeera's first supplemental questionnaire response, dated April 9, 2012 (FSQR) at 7. Al Jazeera stated that sales to the United States are produced to order. See AQR at 18. Also, Al Jazeera stated that purchase orders are generally not subject to change after the confirmation. *Id.* at 19. Al Jazeera issues a commercial invoice for each shipment of merchandise to the United States. *Id.*

On April 18, 2012, the Department requested that Al Jazeera provide a chart with a complete listing of all of its U.S. sales purchase orders, including a chart showing the original purchase orders, any addenda or amendments and the changes based upon the addenda, the final purchase order terms (including the final agreed quantity and value, as well as agreed tolerances), and the final quantity and value shipped to the customer. See Letter from the Department to Al Jazeera, dated April 18, 2012. In response, Al Jazeera submitted a table with information regarding its purchase orders during, and prior to, the period of investigation. Purchase orders confirmed prior to the investigation had sales as a result of these purchase orders which occurred during the

investigation. See SSQR at 7-11 and Exhibit 4. In Al Jazeera's submission, Al Jazeera indicated that there may be amendments to a purchase order. Id. at Exhibit 4. Al Jazeera stated that it considers the purchase order date to be the date of sale for U.S. sales unless there is an amendment to the purchase order. In those instances, the amended purchase order date is the date that Al Jazeera considers as the date of sale. See Al Jazeera rebuttal brief at 2.

The Department requested clarifications of Al Jazeera's SSQR submission with respect to purchase orders for U.S. sales in a supplemental questionnaire dated June 6, 2012, to which Al Jazeera submitted a supplemental response. See Al Jazeera's third supplemental questionnaire response, dated June 14, 2012 (TSQR). Al Jazeera indicated that it was able to extract information from all purchase orders stored in the Orion database system which the company maintains. Al Jazeera installed the Orion system in May of 2010. See TSQR at 3. Al Jazeera provided tables showing any quantity and value differences by invoice and by purchase order, but summed the totals and gave a sum-total percentage difference for quantity and value of all purchase orders stored in the Orion system. Id. at Exhibits 1 – 3. However, Al Jazeera did not provide total percentage differences in quantity and value for each individual purchase order. At the sales verification, the Department examined this issue closely. See Memorandum to the File, from Ericka Ukrow and John K. Drury, Case Analysts, titled "Verification of the Sales Response of Al Jazeera Steel Products Co. SAOG in the Antidumping Duty Investigation of Circular Welded Carbon-Quality Pipe from the Sultanate of Oman," dated August 14, 2012 (Sales Verification Report) at 11-13.

In examining the information provided by Al Jazeera, the Department looked to the differences between the final purchase order terms (*i.e.*, the terms expressed in the amended purchase orders or the terms of un-amended purchase orders) and the actual shipments to determine if there were any price or quantity changes outside of the tolerance limit. During verification, Al Jazeera noted that some of the purchase orders and purchase order dates reported in the U.S. sales database were based on purchase orders booked in the Swan database system. The Swan system preceded the Orion system. Id. at 12. Al Jazeera indicated that it was unable to match sales based on purchase orders originating from the Swan system and, therefore, was unable to perform the exercise that the Department requested in its supplemental questionnaires of April 18, 2012 and June 6, 2012. Id. Consequently, we were unable to examine purchase orders dated prior to May 2010 to determine if Al Jazeera had any quantity or price changes outside of the tolerance limits, or any other material changes to the terms of sale for these purchase orders.⁴

Additionally, we found during verification that a number of purchase orders had not been completely executed. Al Jazeera reported a number of these as sales, when in fact no shipments had occurred and Al Jazeera had not issued any invoices associated with these sales. Id. at 12-13, and verification exhibit 38. We noted that none of the purchase orders associated with these unshipped line items occurred before May of 2010.

⁴ In its U.S. sales database, Al Jazeera submitted purchase orders which occurred prior to the POI but from which Al Jazeera generated invoices during the POI. In addition, Al Jazeera submitted purchase orders which occurred during the POI but from which Al Jazeera generated invoices after the POI. Al Jazeera therefore submitted U.S. sales information to the Department that would cover the POI whether the Department selected purchase order date or invoice date as the date of sale.

In analyzing the purchase orders booked under the Orion system, which Al Jazeera indicated were completed and all sales executed, the Department found that more than one delivered purchase order exceeded the specified “Delivery Allowance” per the respective purchase order. Id. at 12. In addition, at least one of these contracts contained multiple sales. Id. at pages 54-55 of verification exhibit 8. Therefore, our analysis indicates that, of the purchase orders that we can examine and for which all sales have been completed, Al Jazeera had more than one such purchase order with final shipment quantities that fell outside of the quantity tolerance specified on the confirmed purchase orders. Some of these purchase orders had more than one sale and shipment.

Based upon these sales, which are outside of the tolerances specified in the purchase orders, the facts of this review resemble the facts of Certain Cut-to-Length Carbon Steel Plate from Romania: Preliminary Results of the Antidumping Duty Administrative Review and Intent to Rescind in Part, 72 FR 36658, 36659-60 (July 5, 2007), unchanged in Notice of Final Results of Antidumping Duty Administrative Review and Final Partial Rescission: Certain Cut-to-Length Carbon Steel Plate from Romania, 72 FR 63555 (November 9, 2007) (Romanian Plate 05-06), and Certain Hot-Rolled Carbon Steel Flat Products from Thailand: Preliminary Results of Changed Circumstances Review and Intent To Reinstate Sahaviriya Steel Industries Public Company Limited in the Antidumping Duty Order, 73 FR 79809, 79813 (December 30, 2008), unchanged in Certain Hot-Rolled Carbon Steel Flat Products from Thailand: Final Results of Antidumping Duty Changed Circumstances Review and Reinstatement in the Antidumping Duty Order, 74 FR 22885 (May 15, 2009), and accompanying Issues and Decision Memorandum at Comment 2 (Thai Hot-Rolled).

In Romanian Plate 05-06, the Department relied upon the date of invoice as the date of sale. The Department’s determination was based, in part, upon its finding that the respondent’s U.S. sales quantities admittedly “varied between the order acknowledgments and the invoices,” or in other words, “there were various sales with changes outside of the allowable tolerance for quantity that took place after the order acknowledgment date.” See Romanian Plate 05-06, 72 FR at 36659. In Thai Hot-Rolled, the Department also relied upon the date of invoice as the date of sale. The Department’s determination was also based, in part, on the fact that respondent “had multiple contracts, representing multiple sales, with final shipment quantities that fell outside of the quantity tolerance specified on the final contract terms.” See Thai Hot-Rolled, and accompanying Issues and Decision Memorandum at 17.

As in Romanian Plate 05-06 and Thai Hot-Rolled, the instant case involves U.S. sales that fell outside of the quantity tolerance level specified in the final confirmed purchase order, whether the final purchase order reflects modifications by amendment or is an unmodified original contract. See Memorandum to the File from Ericka Ukrow and John Drury, Analysis of Data Submitted by Al Jazeera Steel Products Co. SAOG in the Final Determination of the Antidumping Duty Investigation of Circular Welded Carbon-Quality Steel Pipe from the Sultanate of Oman, dated October 15, 2012 (Final Analysis Memorandum) and Memorandum to the File from Ericka Ukrow and John Drury, Analysis Memorandum for the Preliminary Determination of the Antidumping Duty Investigation of Circular Welded Carbon-Quality Steel Pipe from the Sultanate of Oman: Al Jazeera Steel Products Co. SAOG, dated May 23, 2012, for further discussion.

With regard to Al Jazeera's argument that the instant case is similar to Thai Pipe and Korean Pipe, we believe that the instant case can be distinguished from these by the fact pattern in the instant investigation. In Thai Pipe, the Department stated that "even though quantity changed for virtually all contracts, most of the changes were within the overall weight tolerance agreed to by respondents and customers in each contract" and "based on the terms of the contracts, the quantity changes were not changes to the terms of the contract, because the changes for all products shipped were within the tolerance that both the seller and the buyer had agreed upon at the time of the contract." See Thai Pipe, 65 FR 60910, and accompanying Issues and Decision Memorandum at Comment 1. In contrast, the instant case involves numerous sales outside of quantity tolerance for a number of purchase orders. In addition, the Department noted in Thai Pipe that the Department was "able to analyze the limited number of the contracts, purchase orders and invoices contained on the record covering all subject merchandise entered during" the review. Id. For this investigation, however, we were unable to analyze all of the purchase orders because some were recorded in an older, obsolete company system and could not be retrieved, and others had unshipped line items that may or may not be realized as future sales and may or may not result in Al Jazeera meeting the sales terms of the purchase orders. Given the uncertainty of the purchase orders that we were not able to examine, and the fact that the purchase orders that we did examine had instances where the total sales resulted in the terms of the purchase orders not being met, we do not find that the fact pattern in Thai Pipe is applicable.

Similarly, for Korean Pipe, the Department found that "the material terms of sale in the {United States} are set on the contract date and any subsequent changes are usually immaterial in nature or, if material, rarely occur." See Korean Pipe, 63 FR at 32836. We do not believe that the nature of the changes in the purchase orders for Al Jazeera, nor the frequency, are "immaterial in nature" or "rarely occur." While the nature of the orders for U.S. sales in both the instant case and Korean Pipe are similar in that the sales involve merchandise that is not sold from inventory, but rather made pursuant to purchase orders that require longer times to manufacture, we believe it is clear from the purchase orders that we were able to analyze that the frequency and scope of the instances where shipments exceed the purchase order tolerances is sufficient to demonstrate that the terms of sale are not set at the time of the purchase order. Specifically, multiple purchase orders for which we have complete information, representing multiple invoices and sales, had quantity changes beyond the tolerance levels specified in the purchase orders. Further, as we noted previously, our inability to analyze all purchase orders submitted by Al Jazeera creates further uncertainty as to whether the purchase order date better reflects the date on which the material terms of sale are established.

With respect to Al Jazeera's citation of Habas, we recognize that there may be instances where a date other than invoice date might be chosen in spite of the fact that some contracts or purchase orders might be outside of the tolerances specified in those documents. The question is one of magnitude and whether such changes are material and sufficient, and supported by record evidence, to indicate that the Department's presumption of invoice date as date of sale is proper. As noted in Korean Pipe, the changes between the contract and the invoice in that case were immaterial and rare. See Korean Pipe, 63 FR at 32836. Similarly, in Notice of Final Results of Antidumping Duty Administrative Review and Final Partial Rescission: Certain Cut-to-Length Carbon Steel Plate from Romania, 72 FR 6522 (February 12, 2007), and accompanying Issues

and Decision Memorandum at Issue I (Romanian Plate 04-05), the Department determined to use contract date as the date of sale even though one sale fell outside of the quantity tolerance limits set in the contracts. However, Romanian Plate 04-05 involved only “one small sale” outside of the specified quantity tolerance, which the Department did not consider to be “meaningful” to its date of sale analysis. See Romanian Plate 04-05, 72 FR 6522, and accompanying Issues and Decision Memorandum at Issue I. In contrast, as previously stated, the instant case involves numerous sales outside of quantity tolerance for a number of purchase orders. Given the breadth of the departure from these contracts for a material term of sale, these outside of tolerance sales are meaningful to the Department’s date of sale analysis. Thus, we do not believe, based on our analysis of Al Jazeera’s purchase orders (amended where applicable) and invoices that the changes are “immaterial” or “rare.”

With respect to Al Jazeera’s arguments regarding the total variance between orders and shipments, we do not find this argument persuasive. Our analysis is neither the total variance of the aggregate sales and shipments, nor the variances of individual sales within the purchase orders. The proper analysis is to examine the individual purchase orders or contracts, where the material terms of the sales and the expectations of the parties are established, and the subsequent sales based on those purchase orders or contracts, to determine whether Al Jazeera fulfilled the terms of those purchase orders/contracts. See Romanian Plate 04-05, 72 FR 6522, and accompanying Issues and Decision Memorandum at Issue I; Notice of Final Determination of Sales at Less Than Fair Value: Certain Large Diameter Carbon and Alloy Seamless Standard, Line and Pressure Pipe from Mexico, 65 FR 39358 (June 26, 2000), and accompanying Issues and Decision Memorandum at Comment 2. The decision in SSI by the CIT also is instructive. In SSI, the CIT upheld the Department’s date of sale methodology where it determined that date of invoice, and not purchase order date, better reflected the date upon which materials terms of sale were established. With respect to the significance of the changes in terms of the aggregate quantity and value of U.S. sales, the CIT stated:

Equally unconvincing is Plaintiff’s argument that the changes in quantity tolerance levels are not meaningful in relation to the total quantity of U.S. sales {T}his is not the relevant measure of whether a quantity change is meaningful. Plaintiff’s position would render meaningless the quantity tolerance levels negotiated by the contracting parties. Under this theory, SSI could conceivably exceed the quantity tolerance level of virtually every contract, meriting a 100% non-compliance rate, yet if the impact of these changes on the aggregate quantity and value of all U.S. sales was minor, contract date would still be appropriate for the date of sale analysis. Thus, SSI could effectively evade the mutually agreed upon terms of its contracts and thwart the agency’s efforts to calculate a dumping margin as accurately as possible. This, the Court finds, is simply untenable and cannot be understood as an accurate reflection of when the material terms of sale were established by the parties.

SSI, 714 F. Supp. 2d 1281-82. Consequently, the Department takes the view that the date of sale determination should not be based on aggregate shipments, but instead on individual contracts or purchase orders because individual contracts or purchase orders better reflect the commercial realities and expectations of the buying and selling parties. An analysis of the individual purchase orders or contracts also indicates whether all parties truly establish the material terms of

the sales at that time, or if there are instances where those material terms of sale change beyond agreed tolerances.

For all these reasons, the Department determines that Al Jazeera has not demonstrated that its material terms of sale were established on a date other than invoice date and, consistent with 19 CFR 401(i), the Department has relied upon the invoice date as the date of sale for Al Jazeera's U.S. sales. This issue is further discussed in the Final Analysis Memorandum.

Comment 2: Targeted Dumping

Petitioners state that they support the Department's methodology in the Preliminary Determination with respect to targeted dumping, which considered only positive margins in determining the weighted-average dumping margin. In the event that the Department does not use a targeted dumping methodology in the final determination, or if the Department offsets any positive margins with negative margins, petitioners aver that the statute requires that the Department only consider positive margins in determining a weighted-average dumping margin. See petitioners' case brief at 1, 7-28.

With respect to the Preliminary Determination, petitioners first note that the current investigation is one of the first antidumping duty proceedings that is being administered under the new practice regarding zeroing. Id. at 7-8 (citing Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate, 77 FR 8101 (February 14, 2012)). Petitioners state that the Department's new practice provides that the new average normal value to average export price transaction methodology incorporated in the new practice can be disregarded when the Department finds that a different methodology (*i.e.*, targeted dumping) is warranted. Id. at 8. Petitioners note that the Department, in the Preliminary Determination, used the targeted dumping methodology. Petitioners support this determination and urge the Department to continue using the targeted dumping methodology in the final determination. Id. at 8-10.

In the event that the Department declines to use the targeted dumping methodology used in the Preliminary Determination, Petitioners offer several alternative arguments and claim that "the investigation's weighted-average margins and cash deposits must be based on only positive dumping margins". Petitioners state that the arguments apply to "any U.S. sales for which positive margins are offset by negative margins and, accordingly, would not apply where targeted dumping is found and no positive margins are offset by negative margins." Id. at 10. Petitioners argue that section 736(a)(1) of the Tariff Act of 1930, as amended (the Act), requires that the Department assess antidumping duties equal to the amount by which normal value is greater than export price, and that the only way to do that is to consider only positive margins in the antidumping duty calculation. Id. at 10-11. According to petitioners it is impossible to do this, and contrary to the statute, if the Department considers negative margins as part of the Department's analysis. Id. at 11-12.

Furthermore, petitioners argue that cash deposits which are based on rates that are offset with negative margins do not provide an accurate assessment of potential dumping or sufficient protection to the U.S. industry. Petitioners argue that the holding in Udine & All Belg. v. United

States, 551 F.3d 1339,1341-42 (Fed. Cir. 2009) requires that the cash deposits for antidumping duties be sufficient to cover the estimated duties found in a review. According to petitioners, if the Department uses negative margins in calculating a cash deposit, then the cash deposit does not cover estimated duties as required under section 736(a)(1) of the Act. Id. at 13-14. Petitioner also notes that in an investigation if all positive margins are offset with negative margins, then a producer/exporter of merchandise under investigation “is exempted from coverage under any ensuing AD order or future proceedings under any such order.” Id. at 14. Such a preclusion, according to petitioners, “is contrary to the aforementioned duty collection and assessment provisions” under the statute. Id. at 15. Petitioners further argue that the holding in Badger-Powhatan v. United States, 633 F. Supp 1364 (CIT 1986), indicates that the Department “does not have the discretion to derive an inaccurately estimated cash security deposit in a case in which a more accurate calculation can be made” and that subtracting negative margins when calculating such a cash deposit is contrary to that holding. Id. at 15. Therefore, a cash deposit rate must be calculated only on the basis of positive margins, according to petitioners. Id. at 15-16.

Concurrently, petitioners argue that a positive difference between normal value and export price must serve as the basis for both cash deposits and assessments of antidumping duties. Petitioners cite to Torrington v. United States, 44 F.3d 1572, 1578 (Fed. Cir. 1995) which, petitioners aver, held that the difference between foreign market value and the United States price must serve as the basis for both assessed duties and cash deposits of estimated duties under section 751(a)(2) of the Act. Id. at 16. Petitioners further state that the statute requires that the difference “must be only a positive amount since the assessment equals the amount by which the normal value exceeds the export price” and thus “the positive difference between the normal value and export price upon which the assessment is based must also be the basis for the cash deposit.” Id. at 17. While petitioners note that section 751(a)(2) of the Act applies to administrative reviews, they nevertheless argue that statute also applies to investigations. Id. Petitioners cite to Daewoo Electronics v. United States, 712 F Supp 931 (CIT 1989) in support of their contention. Id. at 18. Petitioners also cite to various portions of the statute, involving both administrative reviews and investigations, which petitioners argue require that security and cash deposit rates estimate the actual duty assessment and provide for security in payment of that assessment.⁵ Id. at 19.

Petitioners argue that the offsetting of positive margins with negative margins, for the purposes of establishing a cash deposit rate, in effect “under-collects the security needed for payment of antidumping assessments.” Id. at 20. This “under-collection,” according to petitioners, does not prevent dumping, but instead encourages dumping as it “allows such foreign producers and exporters to dump their goods on the U.S. market with impunity.” Id. at 20-21. Petitioners further assert that the “under-collection” of cash deposits also allows importers to avoid paying the appropriate level of antidumping duties. Id. at 21. For these reasons, petitioners argue that all negative margins should be disregarded. Id. at 22.

Petitioners state that they are mindful of the decision in U.S. Steel v. United States, 621 F.3d 1351 (Fed. Cir. 2010) (U.S. Steel), in which the court held that the Department had the discretion to subtract negative margins in certain investigations. However, petitioners state that U.S. Steel specifically addresses the case in the context of section 771(35)(A) of the Act. Petitioners assert

⁵ Petitioners cite to sections 733(d), 735(c), and 736(a)(3) of the Act. See petitioners’ case brief at 19.

that section 736(a)(1) of the Act, on the other hand, does not grant the Department discretion in offsetting positive margins with negative margins for the purposes of assessment of antidumping duties. Id. at 22-24. In comparing the two different sections of the statute, petitioners state that:

The statutory definition of the antidumping duty assessment at {section 736(a)(1) of the Act} contains the words “**equal to**” followed by the phrase “the amount by which the normal value exceeds the export price.” In contrast, the statutory definition of the dumping margin at {section 771(35)(A) of the Act} contains the word “**means**” followed by essentially the same phrase. The rationale provided by the Court of Appeals for the Federal Circuit (CAFC) in U.S. Steel for allowing Commerce to subtract negative margins from positive margins for investigation cash deposits is based on the silence of the statute as to what to do when the amount calculated by Commerce pursuant to {section 771(35)(A) of the Act} is negative. But this rationale does not apply to the statutory definition of the antidumping duty assessment at {section 736(a)(1) of the Act} which requires the assessment to be “equal to” the amount by which the normal value exceeds the export price.

Id. at 24-25. Thus, according to petitioners, section 736(a)(1) of the Act does not allow the Department to offset positive margins with negative margins. Id. at 25-26.

Similarly, in discussing section 736(a)(1) of the Act, petitioners also argue that there is no ambiguity in meaning with the term “exceeds” in this portion of the statute. Coupled with the words “equal to,” petitioners argue that the full meaning of the statute can only be construed as mandating the use of positive margins without any offsets by negative margins. Id. at 26-28. For all of these reasons, if the Department does not continue to use the targeted dumping methodology in these final results, then petitioners ask that the Department not offset positive margins with negative margins.

In its case brief, Al Jazeera states that it objects to the Department zeroing sales that were not found to be targeted. See Al Jazeera case brief at 14. Al Jazeera cites to Antidumping Duties; Countervailing Duties, Part II, 62 FR 27296, 27375 (May 19, 1997) (Preamble), and states that the Department found at that time that the application of the zeroing methodology to sales that were not found to be targeted was not reasonable. Id. Al Jazeera notes that the Department withdrew its targeted dumping regulations in 2008, but argues that the Department’s statements in the Preamble with respect to concerns over the use of the zeroing methodology when targeted dumping is found remain valid. Id. at 15.

Al Jazeera lists a table with various combinations of antidumping duty calculation methodologies, including average-to-average and average-to-transaction, with and without zeroing, targeted and non-targeted dumping analysis, and zeroing for targeted and all sales. The table includes antidumping duty cash deposit rates/margins that Al Jazeera claims would be the result of each combination of methodologies. Id. Al Jazeera states that the methodology used by the Department in the Preliminary Determination is an average-to-transaction methodology using zeroing that is applied to all sales. Al Jazeera contends that this methodology results in the largest possible rates/margins that could have been calculated in the Preliminary Determination. Id. at 16. Al Jazeera further analyzes the various methodologies and claims that the average-to-average and average-to-transaction methodologies yield the same results when there is no

zeroing. Id. Al Jazeera thus proposes that the proper methodology to calculate antidumping duty margins would be to apply average-to-transaction plus zeroing methodology to targeted sales only, and an average-to-average transaction without zeroing to all remaining non-targeted sales.

Al Jazeera states that the actual sales subject to the targeted dumping analysis are not the primary reasons for the margin calculated in the Preliminary Determination. Rather, Al Jazeera again states that the primary reason for the margins in the Preliminary Determination is the Department's use of zeroing. Id. at 16-17. Al Jazeera also points to Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation: Final Modification, 71 FR 77722 (December 27, 2006), and states its belief that "the WTO decision underlying the final modification gives no reason to believe that the WTO appellate body would accept the application of zeroing to any sales that were not found specifically to be targeted in an investigation." Id. at 17 (footnote omitted). Furthermore, Al Jazeera asserts that the Statement of Administrative Action, H.R. Doc. No. 103-316 (1994), reprinted in 1994 U.S.C.C.A.N. 4040 (SAA) at 842-43 indicates clearly that "it was the intent of Congress that the targeting methodology be applied only to sales that were found to be targeted." Id. Al Jazeera further states that the SAA does not contemplate the use of a targeted dumping methodology against non-targeted sales. Id. at 18. Therefore, for all of the reasons cited, Al Jazeera claims that the Department's application of the zeroing methodology to all sales is unlawful and should be changed for the final determination.

In their rebuttal brief, petitioners disagree with Al Jazeera's proposals and reasoning with respect to targeted dumping and zeroing. Petitioners argue that the statute allows the Department to apply an average-to-transaction methodology with zeroing to all sales when there is a targeted dumping allegation. See petitioners' rebuttal brief at 9-10. Petitioners cite to Certain Oil Country Tubular Goods from the People's Republic of China: Final Determination of Sales at Less Than Fair Value, Affirmative Final Determination of Critical Circumstances and Final Determination of Targeted Dumping, 75 FR 20335 (April 19, 2010) (OCTG from the PRC), and accompanying Issues and Decision Memorandum at Comment 2, stating that the Department's decision in that determination clearly indicates that it is lawful to use an average-to-transaction methodology and zero all sales and that this is the Department's current methodology. Id. Petitioners state that Al Jazeera's citation to the Preamble is outdated, and that Al Jazeera acknowledges this fact. Id. at 10.

Citing to section 777A of the Act, petitioners state that the Department's current policy with respect to targeted dumping follows a two-prong test.⁶ Id. Petitioners argue that the facts in the current investigation meet both prongs of this test, and that Al Jazeera has not disputed the factual pattern with respect to the prongs in the statute. Id. at 10-13. Petitioners believe that the

⁶ Section 777A(d)(1)(B) of the Act indicates that the two conditions necessary to perform a targeted dumping analysis are:

- (i) there is pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among customers, regions, or time periods, and
- (ii) the administering authority explains why such differences cannot be taken into account using a method described in {section 777A(l)(A)(i) or (ii) of the Act}.

Department's affirmative finding of targeted dumping in the Preliminary Determination indicates that the use of the average-to-transaction methodology "is necessary to unmask dumping." Id. at 12. Petitioners also claim that Al Jazeera's arguments rest on the misunderstanding that the choice between average-to-average and average-to-transaction methodologies is a choice between zeroing (in the average-to-transaction methodology) and offsetting (in the average-to-average methodology). Petitioners state that this difference exists "because the averaging of U.S. sales offsets positive margins on U.S. sales by negative margins on other U.S. sales, whereas comparing individual U.S. sale transactions to the average normal value and retaining only positive margins does not" and that averaging U.S. sales masks dumping. Id. at 13-14. Petitioners conclude by stating that the Department's methodology in the Preliminary Determination is consistent with the criteria established in section 777A(d)(1)(B) of the Act and that the Department's methodology is reasonable and supported by substantial evidence. Id. at 14.

In Al Jazeera's rebuttal brief, Al Jazeera states that petitioners' arguments on the use of zeroing, if the Department does not use the average-to-transaction methodology for all sales in the final results, should be rejected. Al Jazeera notes that the current proceeding is an investigation and not an administrative review. Therefore, according to Al Jazeera, the Department's newest practice regarding targeted dumping does not apply as they address administrative reviews. See Al Jazeera rebuttal brief at 5. Al Jazeera argues that the current investigation is governed by Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation – Final Modification, 71 FR 77722 (December 27, 2006), and that the methodology outlined in this notice was upheld in U.S. Steel. Id. Al Jazeera further argues that since petitioners' entire argument is based upon a faulty understanding of the methodology governing targeted dumping, the Department should reject petitioners' arguments in their entirety. Id. Al Jazeera asserts that petitioners' arguments attempt to compel the Department to abandon the methodology purportedly promulgated in 2006. Id. at 6.

In addition, Al Jazeera believes that petitioners' proposed methodology rests on a hypothetical future margin that cannot be predicted and is unlawful. Al Jazeera cites to E.I. Dupont De Nemours & Co. v. United States, 22 CIT 19, 35 (CIT 1998), which according to Al Jazeera compels the Department to treat each segment of a proceeding as an independent proceeding and not to calculate cash deposit rates based on a hypothetical and unknown future. Id.

Department's Position:

In these final results, we have not changed our calculation methodology of the weighted-average dumping margin from the Preliminary Determination. As a result, and because we did not depart from the methodology used in the Preliminary Determination, petitioners' arguments on the use of offsetting are moot. We address the interested parties' comments in three parts, with the first section dedicated to the targeted dumping methodology, the second dedicated to the treatment of individual dumping comparison results in average-to-transaction comparisons, and the third dedicated to the use of the average-to-transaction comparison methodology for all U.S. sales when targeted dumping occurs. Our reasoning is set forth below.

A. The Targeted Dumping Methodology

In this investigation, petitioners submitted an allegation of targeted dumping by Al Jazeera prior to the Preliminary Determination, pursuant to section 777A(d)(1)(B) of the Act. See Preliminary Determination, 77 FR at 32,532. Petitioners asserted that there are patterns of U.S. sales prices for comparable merchandise that differ significantly among customers, time periods, and regions. See Letter from petitioner Wheatland Tube Company (Wheatland Tube) to the Department, dated April 3, 2012 (Targeted Dumping Allegation Letter). We conducted time-period targeted dumping analyses using the methodology we adopted in Certain Steel Nails from the United Arab Emirates: Notice of Final Determination of Sales at Not Less Than Fair Value, 73 FR 33985 (June 16, 2008) (UAE Nails), and Certain Steel Nails from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances, 73 FR 33977 (June 16, 2008) (PRC Nails) (collectively, Nails), and more recently articulated in Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From Indonesia: Final Determination of Sales at Less Than Fair Value, 75 FR 59223 (September 27, 2010), and accompanying Issues and Decision Memorandum at Comment 1 (Coated Paper), and Multilayered Wood Flooring From the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 76 FR 64318 (October 18, 2011) (Wood Flooring), and accompanying Issues and Decision Memorandum at Comment 4. Our methodology is discussed in more detail in the Preliminary Determination and the Department's analysis memorandum entitled "Analysis Memorandum for the Preliminary Determination of the Antidumping Duty Investigation of Circular Welded Carbon-Quality Steel Pipe from the Sultanate of Oman: Al Jazeera Steel Products Co. SAOG," dated May 23, 2012. In the Preliminary Determination, we found both a pattern of prices that differed significantly for certain regions and time periods, and that these differences could not be taken into account using the average-to-average methodology. See 77 FR at 32535. Accordingly, we applied the average-to-transaction methodology to all U.S. sales made Al Jazeera in the Preliminary Determination. Id.

Based on the updated U.S. sales data and calculation revisions discussed in this Decision Memorandum and in the Final Analysis Memorandum, we have continued to find that, pursuant to section 777A(d)(1)(B) of the Act, the use of an average-to-transaction methodology is warranted. Consistent with our practice and the statute, we have applied the Nails test, as updated, to determine whether Al Jazeera engaged in targeted dumping, and in making average-to-transaction comparisons, we have not granted an offset for non-dumped transactions in aggregating the comparison result for purposes of calculating the weighted-average dumping margin. Our findings and methodology are further discussed below.

Section 771(35)(A) of Act, defines "dumping margin" as the "amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." The definition of "dumping margin" calls for a comparison of normal value and export price or constructed export price. 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 CFR 351.414 provide the methods by which normal value may be compared to export price or constructed export price. 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. 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 export prices or constructed export prices have been averaged together (i.e., 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 CEPs 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.

Section 777A(d)(1) of the Act establishes that, in a less-than-fair-value investigation, the normal comparison methodology will be either average-to-average or transaction-to-transaction. As petitioners noted, section 777A(d)(1)(B) of the Act sets forth the exception when the Department may apply an average-to-transaction methodology:

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

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

Consistent with the text of Section 777A(d)(1)(B) of the Act and the language of the SAA,⁷ the Department has analyzed whether or not a pattern existed, and whether or not differences in prices were “significant.” The Act and legislative history do not require that the Department conduct an additional analysis and determine the reasons that significant differences in prices exist. Accordingly, where the Department has determined that there was a pattern of export prices (or constructed export prices) for comparable merchandise that differs significantly among or between customers, regions, or periods of time, the Department has not opined on the reasons for such price differences. Instead, the Department simply has applied a different comparison methodology, average-to-transaction, rather than average-to-average, as directed by the Act. In

⁷ See Statement of Administrative Action, Uruguay Round Agreements Act, H. Doc. 316, Vol. 1, 103d. Cong. (1994)(SAA) at 843. Congress explained in the SAA that this provision is meant to address “situations where an average-to-average or transaction-to-transaction methodology cannot account for a pattern of prices that differ significantly among purchasers, regions, or time periods, i.e., where targeted dumping may be occurring.” Id. Congress explained further that “before relying on this methodology, however,” after finding a pattern among the time periods, the Department is first required to “establish and provide an explanation why it cannot account for such differences through the use of an average-to-average or transaction-to-transaction comparison.” Id.

order to determine whether or not a pattern existed in this case, as well as whether or not the differences in prices were “significant,” the Department relied on the Nails test, as it did in the Preliminary Determination. This test has been applied and updated in numerous cases since UAE Nails and PRC Nails. See, e.g., Wood Flooring, and Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From Indonesia: Final Determination of Sales at Less Than Fair Value, 75 FR 59223 (Sept. 27, 2010), and accompanying Issues and Decision Memorandum at Comment 1 (Coated Paper) Further, the CIT has upheld our use of the Nails test, finding it reasonable and consistent with the statute and regulations. See Mid Continent Nail v United States, 712 F. Supp 2nd 1370 (CIT 2010) (Mid Continent Nail).

In the first stage of the test, the “standard-deviation test,” we determined the share of the alleged targeted time-period sales of subject merchandise (by sales volume) that are at prices more than one standard deviation below the weighted-average price of all sales during the POI, targeted and non-targeted. We calculated the standard deviation on a product-specific basis (*i.e.*, by control number (CONNUM)) using the POI-wide weighted-average prices for the alleged targeted time period and the time periods not alleged to have been targeted. If that share did not exceed 33 percent of the total volume of a respondent’s sales of subject merchandise during the alleged targeted time period, then we determined that the pattern requirement was not met and we did not conduct the second stage of the test. If that share exceeded 33 percent of the total volume of a respondent’s sales of subject merchandise during the alleged targeted time period, on the other hand, we determined that the pattern requirement was met and we proceeded to the second stage of the test.

In the second stage, we examined all sales of identical merchandise (*i.e.*, by CONNUM) sold during the alleged targeted time period. From those sales, we determined the total volume of sales for which the difference between the weighted-average price of sales during the alleged targeted time period and the next higher weighted-average price of sales during the non-targeted time periods exceeds the average price gap (weighted by sales volume) for the non-targeted group. We weighed each of the price gaps in the non-targeted group by the combined sales volume associated with the pair of prices during the non-targeted time period that made up the price gap. In doing this analysis, the alleged targeted time-period sales were not included in the non-targeted group; the alleged targeted time-period average price was compared only to the average prices during the non-targeted time periods. If the share of the sales that met this test exceeded five percent of the total sales volume of subject merchandise during the targeted time period, we determined that the significant-difference requirement was met and we determined that time-period targeting occurred.

Based on our final analysis, we found that Al Jazeera met both of the stages of the Nails test. As a result, we determine that there was a pattern of prices that differed significantly by time and region. Notably, Al Jazeera does not contest the Department’s finding of targeted dumping. See Al Jazeera case brief at 14-18.

Our analysis shows that the standard average-to-average methodology does not take into account the price differences because the alternative average-to-transaction methodology yields a material difference in the margin. Accordingly, we find that these differences cannot be taken into account using the average-to-average methodology because the average-to-average

methodology conceals differences in the patterns of prices between the targeted and non-targeted groups by averaging low-priced sales to the targeted group with high-priced sales to the non-targeted group. We therefore applied the average-to-transaction methodology to all U.S. sales made by Al Jazeera. See Memorandum to The File, through Angelica Mendoza, Program Manager, from John Drury and Ericka Ukrow, International Trade Analysts, titled “Analysis Memorandum for the Preliminary Determination of the Antidumping Duty Investigation of Circular Welded Carbon-Quality Steel Pipe from the Sultanate of Oman: Al Jazeera Steel Products Co. SAOG,” dated May 23, 2012 (Preliminary Analysis Memorandum) at 7-11, unchanged in the Final Analysis Memorandum.

B. Treatment of Individual Dumping Comparison Results in Average-to-Transaction Comparisons

Both petitioners and Al Jazeera have made numerous arguments as to how we should treat individual dumping comparison results in connection with the targeted dumping analysis. As noted above, because we do not depart from our findings in the Preliminary Determination, petitioners’ arguments on offsetting are moot. We address Al Jazeera’s arguments below. 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 investigation.

The issue of “zeroing” versus “offsetting” involves how certain results of comparisons are treated in the aggregation of the numerator for the “weighted-average dumping margin” and relates back to the ambiguity in the word “exceeds” as used in the definition of “dumping margin” in section 771(35)(A) of the Act. Application of “zeroing” treats comparison results where normal value is less than export price or constructed export price 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.

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 investigation, 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 POI; 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 that the U.S. Court of Appeals for the Federal Circuit (CAFC or Federal Circuit) has found in the word “exceeds” as used in section 771(35)(A) of the Act. See 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.⁸ 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 CAFC 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.⁹ 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.”¹⁰ The CAFC 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.

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 WTO AD Agreement when it employed the zeroing methodology in average-to-average comparisons in

⁸ 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.”); and 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.”).

⁹ 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.”); and Bowe Passat, 926 F. Supp. at 1149-50; and Serampore, 675 F. Supp. at 1360-61.

¹⁰ See Serampore, 675 F. Supp. at 1361 (citing Certain Welded Carbon Steel Standard Pipe and Tube From India: Final Determination of Sales at Less Than Fair Value, 51 FR 9089, 9092 (Mar. 17, 1986)); see also Timken, 354 F.3d at 1343; PAM, 265 F. Supp. 2d at 1371.

certain challenged antidumping duty investigations. See Panel Report, United States – Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing), WT/DS294/R (October 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 USC § 3533(f), (g)) (Section 123). See Final Modification; and Antidumping Proceedings: Calculation of the Weighted – Average Dumping Margin During an Antidumping Investigation; Change in Effective Date of Final Modification, 72 FR 3783 (June 26, 2007) (together, Final Modification for Investigations). 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.

Without an affirmative inconsistency finding by the Panel, the Department did not propose to alter its zeroing practice in other contexts, such as in investigations using average-to-transaction comparisons. As the CAFC 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). 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 change its practice of zeroing in other types of comparisons, including average-to-transaction comparisons in investigations. Id., 71 FR at 77724.

The CAFC 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 certain investigations and administrative reviews. See U.S. Steel, 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 CAFC 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 CAFC’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 CAFC 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. *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 CAFC also expressly recognized that the Department intended to continue to address targeted or masked dumping through continuing its use of average-to-transaction comparisons and zeroing. See U.S. Steel, 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 CAFC 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). Furthermore, we note that where average-to-transaction comparisons are used in situations of targeted dumping, the results of not applying zeroing methodology in those comparisons as well as in average-to-average comparisons would be the same. Therefore, the provision for different comparison methodologies under section 777A(d) of the Act would be meaningless. This outcome could not have been intended by Congress in providing for different comparison methodologies under section 777A(d) of the Act.

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, 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 URAA 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.

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.¹¹ Even where the Department maintains a separate interpretation of the statute to permit the use of zeroing in certain dumping margin

¹¹ 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.

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 for the Department to evaluate and not, for example, reviewed by the courts. Suramerica de Aleaciones Laminadas, C.A. v. United States, 966 F. 2d 660, 665 (Fed. Cir. 1992) (“[The court’s] duty is not to weigh the wisdom of, or to resolve any struggle between, competing views of the public interest, but rather to respect legitimate policy choices made by the agency in interpreting and applying the statute.”) (citation omitted). These reasons alone sufficiently justify and explain why the Department reasonably interprets section 771(35) of the Act differently in average-to-average comparisons relative to all other contexts.

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

The Department may reasonably interpret section 771(35) of the Act differently in the context of the average-to-average comparisons to permit negative comparison results to offset or reduce positive comparison results when calculating “aggregate dumping margins” within the meaning of section 771(35)(B) of the Act. When using an average-to-average comparison methodology, *see, e.g.*, section 777A(d)(1)(A)(i) of the Act, the Department usually divides the export transactions into groups, by model and level of trade (averaging groups), and compares an average export price or constructed export price of transactions within one averaging group to an average normal value for the comparable merchandise of the foreign like product. In calculating the average export price or constructed export price, the Department averages all prices, both high and low, for each averaging group. The Department then compares the average export price or constructed export price 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 export prices above normal value to offset export prices 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 in a targeted dumping analysis in an investigation under 777A(d)(1)(B) of the Act, the Department determines dumping on the basis of individual U.S. sales prices. Under the average-to-transaction comparison methodology, the Department compares the export price or constructed export price 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 export price or constructed export price 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 or investigation. To the extent the average normal value does not exceed the individual export price or constructed export price 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.¹² Thus, when the Department focuses on transaction-specific comparisons in its targeted dumping analysis, the Department reasonably interprets the word “exceeds” in section 771(35)(A) of the Act as including only those comparisons that yield positive comparison results. Consequently, in transaction-specific comparisons, the Department reasonably does not permit negative comparison results to offset or reduce other positive comparison results when determining the “aggregate dumping margin” within the meaning of section 771(35)(B) of the Act.

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

¹² 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.

The CIT recently has sustained the Department’s explanation for using zeroing in administrative reviews using an average-to-transaction comparison methodology, while not using zeroing in certain types of investigations. See Far Eastern New Century Corp. v. United States, 2012 WL 3715105 (CIT Aug. 29, 2012); Grobst & I-Mei Indus. (Vietnam) Co. v. United States, 853 F. Supp. 2d 1352 (CIT 2012); Union Steel v. United States, 823 F. Supp. 2d 1346 (CIT 2012). Because the Department’s explanation in both situations relies, in part, on the inherent differences between average-to-transaction comparisons and average-to-average comparisons, the explanation is also relevant to the context of investigations using average-to-transaction comparisons as a result of a targeted dumping analysis.

With respect to other WTO reports finding the denial of offsets by the United States to be inconsistent with the WTO AD Agreement, the CAFC 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, the Department employed the average-to-transaction comparison methodology for Al Jazeera in this investigation, and if any of the U.S. sales transactions examined in this investigation are found to exceed normal value, the amount by which the price exceeds normal value will not offset the dumping found in respect of other transactions.

C. The Department’s Use of Average-to-Transaction Comparisons for All U.S. Sales

Turning to Al Jazeera’s argument that the Department should not apply the average-to-transaction methodology to the non-targeted sales, the Department has previously determined that the language of section 777A(d)(1)(B) of the Act does not preclude adopting a uniform application of average-to-transaction comparisons for all transactions when satisfaction of the statutory criteria suggests that application of the alternative average-to-transaction methodology is appropriate. See, e.g., Polyethylene Retail Carrier Bags from Taiwan: Final Determination of Sales at Less Than Fair Value, 75 FR 14659 (March 26, 2010) (PET Bags), and accompanying Issues and Decision Memorandum at Comment 1. The only limitations the statute places on the application of the average-to-transaction method are the satisfaction of the two criteria set forth in the provision. When the criteria for application of the average-to-transaction method are satisfied, section 777A(d)(1)(B) of the Act does not limit application of the average-to-transaction comparison methodology to certain transactions. Instead, the provision expressly permits the Department to determine dumping margins by comparing weighted-average normal values to the export prices (or CEPs) of individual transactions. While the Department does not find that the language of section 777A(d)(1)(B) of the Act mandates application of the average-to-transaction method to all sales, it does find that this interpretation is a reasonable one and is

more consistent with the Department's approach to the selection of the appropriate comparison methodology under section 777A(d)(1) of the Act more generally.

If Congress had intended for the Department to apply the average-to-transaction methodology only to a subset of transactions and use a different methodology for the remaining sales of the same respondent, Congress could have explicitly said so, but it did not. Instead, Congress expressed its intent with the language of section 777A(d)(1)(B), which imposes a general preclusion from using average-to-transaction comparisons and withdraws that preclusion entirely if the two criteria are satisfied. In the absence of a preclusion, the Department is free to apply average-to-transaction comparisons to all transactions. The Department may choose any method or methods that are appropriate. In this case, the Department determined that the two criteria are satisfied. The statute does not preclude the Department's decision to apply the average-to-transaction comparison to all of Al Jazeera's transactions, and the Department has explained its reasons for doing so.

Contrary to Al Jazeera's contentions, the statute does not require the Department to determine whether such differences can be taken into account by a combination of average-to-transaction and average-to-average methodologies. The Department has established criteria for determining whether the average-to-average or transaction-to-transaction methodology is the more appropriate methodology; the Department generally uses its average-to-average methodology, except under relatively rare circumstances that make the use of the average-to-transaction methodology more appropriate. See, e.g., Notice of Final Determination of Sales at Less Than Fair Value and Negative Critical Circumstances Determination: Bottom Mount Combination Refrigerator-Freezers from the Republic of Korea, 77 FR 17414 (Mar. 26, 2012), and accompanying Issues and Decision Memorandum at 19-26. However, the Department does not use a hybrid methodology of making average-to-transaction comparisons for certain transactions and average-to-average comparisons for other transactions in calculating the weighted-average dumping margin. Rather, the Department determines the appropriate comparison methodology and applies it uniformly to all comparisons of NV and EP (or CEP).

Moreover, Al Jazeera's proposal of applying the average-to-transaction methodology to some of its sales, but not the others, is based on a flawed assumption that profitable sales are not involved in masked dumping. The CAFC has explained that "masked" dumping occurs, when "profitable sales serve to 'mask' sales at less than fair value." U.S. Steel, 621 F.3d at 1361. An Omani exporter, who competes with U.S. producers, could gain U.S. customers either by dumping to all customers at once or by dumping to a specific customer (or customers). In the latter scenario, the Omani exporter uses its profitable sales to mask its dumped sales to a particular customer by "offsetting" its dumped sales to one customer with its profitable sales to other customers. In other words, the masked or targeted dumping involves both profitable and dumped sales. The Department reasonably addresses such dumping by applying the alternative average-to-transaction methodology to all sales involved in masked dumping, *i.e.*, both the masked sales and the sales that are used for masking. When the Department applies the average-to-transaction methodology to all of the exporter's sales (including the profitable sales that the exporter used to mask its dumping through offsetting), it eliminates the offsetting that masks dumping. Accordingly, the Department's current methodology of making average-to-average comparisons for all transactions reasonably addresses the problem of masked dumping by eliminating the

offsetting. And when the conditions set forth in section 777A(d)(1)(B) are satisfied, the Department will use average-to-transaction comparisons without offsets, *i.e.*, the Department will use zeroing. The CIT and the Federal Circuit repeatedly have recognized that zeroing combats the targeted, or masked, dumping, which section 777A(d)(1)(B) addresses. See, e.g., Timken Co. v. United States, 354 F.3d 1334, 1343 (Fed. Cir. 2004) (Timken); see also Serampore Industries Pvt. Ltd. v. United States Dep't of Commerce, Int'l Trade Admin., 675 F.Supp. 1354, 1360-1361 (Ct. Int'l Trade 1987); see also Bowe Passat v. United States, 926 F.Supp. 1138, 1150 (Ct. Int'l Trade 1996).

Finally, the Department disagrees with Al Jazeera's interpretation of the SAA. Al Jazeera contends that the SAA clearly limits the use of the average-to-transaction methodology only to targeted sales. However, the SAA does not contain any such limitation. In relevant part, the SAA states that "section 777A(d)(1)(B) {of the Act} provides for a comparison of average normal values to individual export prices or constructed export prices in situations where an average-to-average or transaction-to-transaction methodology cannot account for a pattern of prices that differ significantly among purchasers, regions, or time periods, *i.e.*, where targeted dumping may be occurring." See H.R. Doc. No. 103-316 at 843. The SAA goes on to say that "{b}efore relying on this methodology, however, Commerce must establish and provide an explanation why it cannot account for such differences through the use of an average-to-average or transaction-to-transaction comparison." Id. Notwithstanding Al Jazeera's claim to the contrary, and as explained above, the SAA places no limitation on the application of the alternative average-to-transaction comparison methodology once the Department satisfies these criteria. Id. at 842-43. Instead, the Department interprets the passage cited by Al Jazeera as speaking to the legal conditions that must exist for the Department to find targeted dumping. Thus, Al Jazeera's claim does not find support in the text of the SAA.

Thus, because the criteria of section 777A(d)(1)(B) of the Act are satisfied in this investigation, the Department will continue to apply the alternative average-to-transaction methodology to all sales in calculating the weighted-average dumping margin. See, e.g., PET Bags, and accompanying Issues and Decision Memorandum at Comment 1; and OCTG from the PRC, and accompanying Issues and Decision Memorandum at Comment 2.

Comment 3: Hot Rolled Steel Coil Costs and Yield Ratio

Al Jazeera claims that the Department should not subtract the quantity of scrap generated during the POI from the quantity of finished goods produced in order to increase Al Jazeera's yield-loss percentage. Al Jazeera case brief at 18-21. Al Jazeera argues that the finished-goods production quantity does not include scrap, so there is no reason to subtract scrap from these figures. Id. Al Jazeera argues that its reported yield loss is fully consistent with industry norms, when proper account is taken of the fact that Al Jazeera's coil purchase and consumption is booked and reported in actual kilograms, while its steel pipe production is booked and reported in theoretical kilograms. Id. at 21-24.

Al Jazeera argues that the pipe quantity reported represents the total quantity of finished goods entered into inventory during the POI, and that there are no scraps or semi finished goods included in the figure. Id. at 18-21. According to Al Jazeera, it reduced the quantity of finished

goods entering into inventory by the quantity of “rejected pipes.” Id. According to Al Jazeera, the rejected pipes are identified in Al Jazeera’s information system and were subtracted from finished goods inventory (i.e., for damage that occurred during the loading of the pipe or during the movement of the pipe from finished-goods inventory to the loading area or pipes rejected and returned by customers). Id. Al Jazeera argues that the various scraps generated, including scrap pipe designated as rejected GI plain pipes, rejected short-length pipes, and scrap black pipes, are not included in the finished-goods production quantities reported, and therefore should not reduce the finished production quantity reported. Id.

Al Jazeera argues that, like pipe mills everywhere, it buys coils in actual kilograms, but produces (and sells) pipes in pieces or lengths, which it converts to weight according to standard conversion factors embedded in its information system. Al Jazeera contends that when an adjustment for the difference between theoretical and actual kilograms is made, its yield is in line with the rest of the industry. Id. at 21-24. According to Al Jazeera, the Department has a long experience in the issue of actual versus theoretical weight in steel pipe cases. Al Jazeera cites to Circular Welded Austenitic Stainless Pressure Pipe From the People’s Republic of China: Final Results of Antidumping Duty Administrative Review, 76 FR 43981 (July 22, 2011), and accompanying Issues and Decision Memo at Comment 1 (footnotes omitted), where the Department discussed a situation similar to that in the present case. Id. at 24-27. Al Jazeera argues that the Department knows from its experience, that theoretical weight is generally higher than actual weight, as producers tend to produce on the lighter side of the tolerance so as to conserve on raw material expense. Id.

Petitioners argue that Department should adjust Al Jazeera’s coil cost because Al Jazeera’s scrap offset is greater than the yield factor used to calculate its coil costs. Petitioners’ case brief at 6-7. Petitioners claim that while Al Jazeera reports a production yield loss based on the ratio of steel coil inputs to finished production output, Al Jazeera’s scrap offset exceeds this amount. Id. Petitioners argue that some adjustment is needed to account for the error in Al Jazeera’s reported data. Id. According to petitioners, the adjustment noted in the verification report reasonably adjusts finished production tonnage to an amount equal to the steel input tonnage less the scrap tonnage taken as an offset. Petitioners’ rebuttal brief at 5.

Department’s Position:

In the cost verification report Summary of Issues Section, the Department stated two facts concerning the tons of rejected pipe and then raised the issue of whether all costs were fully captured.¹³ The cost verification report did not make findings or conclusions on this issue; it simply raised the issue for consideration. At the time, the Department did not consider the fact that the yield rate is the difference between the total actual weight of the coils used in production and the total theoretical weight of the pipe produced, while the scrap generated, which is used as a cost offset, is based on the actual weight of recovered scrap. The Department has reviewed the parties’ arguments and the record evidence and, as described below, finds that Al Jazeera did not

¹³ See Memorandum to the File, from Laurens van Houten, Senior Accountant, through Michael Martin, Lead Accountant, and Neal Halper, Office Director, titled “Verification of the Cost Response of Al Jazeera Steel Products Co. SAOG in the Antidumping Investigation of Circular Welded Carbon-Quality Pipe from the Sultanate of Oman,” dated August 21, 2012 (Cost Verification Report) at 2.

understate its yield loss.

Al Jazeera's reported production quantities are based on the theoretical weight of the finished pipe. See Cost Verification Report at 10. In addition, the sales quantities were also reported on a theoretical weight basis, resulting in an apples-to-apples comparison of sales prices and cost of production. Id. In the normal course of business, Al Jazeera records the actual weight of steel coils consumed in producing pipe, but does not weigh the finished pipe produced. Id. Instead, Al Jazeera uses a standard formula to calculate a theoretical weight for the finished pipe produced and records this theoretical weight in its finished goods inventory records. Id. at 11. Al Jazeera also records the theoretical weight of pipe sold in its sales documentation. Id. at 10. In reporting costs, Al Jazeera basically divided the input coil cost by the corresponding quantity of pipe produced which captured the entire yield loss. The resulting costs however are stated on a theoretical weight basis.

While it appears from record information that Al Jazeera generated more scrap than yield loss, (which would be physically impossible), we note that the comparison provided by petitioner relies on production and consumption data that are on different bases. See petitioners' case brief at 6-7. The yield loss amount at issue is the difference between the total actual weight of the coils used in production and the total theoretical weight of the pipe produced. See Cost Verification Report at 13. The scrap generated, which is used as a cost offset, is based on the actual weight of recovered scrap. Id. at Exhibit 15. Comparing the actual weight of recovered scrap to the calculated weight of the yield loss, (which relies on theoretical production), does not provide a reliable comparison. The theoretical weight assumes a wall thickness at the average of the specification, whereas the actual pipe is typically rolled to the minimum of the specification.

We reviewed and confirmed the accuracy of the actual weight of coils consumed during the POI, the theoretical weight of pipe produced, and the actual weight of scrap generated. See Cost Verification Report at 13. Absent reliable record evidence supporting the inaccuracy of these amounts, there is no basis to adjust the reported costs.

We did, however, find that Al Jazeera sold more scrap than it produced during the POI. See Cost Verification Report at 13, Ex. 15 at 6. We also note that Al Jazeera based its scrap offset on the total scrap sold during the POI. Id. at 13. Al Jazeera has not challenged these findings. Scrap sold but not produced during the POI should not be included within the scrap offset because it would be unreasonable to offset the cost during the POI for scrap produced prior to the POI. As a result, for the final determination, we have limited the scrap offset to the total scrap produced during the POI. See Memorandum to Neal M. Halper, Director of the Office of Accounting, from Laurens van Houten, Senior Accountant, titled "Cost of Production and Constructed Value Calculation Adjustments for the Final Determination – Al Jazeera Steel Products Co. SAOG," dated October 15, 2012 (Al Jazeera's Final Cost Memorandum).

Comment 4: Model-Matching Hierarchy

Al Jazeera argues that the Department's model-match hierarchy is incorrect and should be revised. Specifically, Al Jazeera believes that the order of the physical characteristics for model-matching purposes should first be coating, then end finish, then diameter, then wall

thickness. See Al Jazeera case brief at 9. Al Jazeera notes that the Department considered, and rejected, a similar argument in the concurrent antidumping duty investigation of circular welded pipe from the United Arab Emirates. Id. Nevertheless, Al Jazeera believes that the Department should reconsider the issue. For its proposed hierarchy, Al Jazeera selected all of the U.S. sales that would be affected by this change and listed them in order to compare the results of the antidumping duty program. In each case, the first matching criterion is coating rather than diameter. Id. at 9-10 and Exhibit 1. Al Jazeera asserts that its proposed hierarchy is a better reflection of both its sales and accounting practices, and industry practices in general, and cites to various purchase orders of subject merchandise sold during the POI to support its contention. Id. at 10-11. Al Jazeera also undertakes an analysis of certain sales and matches, using both its proposed criteria and the Department's criteria, and asserts that its analysis demonstrates that matching with coating first results in better matches. Id. at 11. Finally, Al Jazeera argues that its proposed model-match hierarchy better reflects the actual cost of production of circular welded pipe and the factors that create the largest differences in cost. Id. at 11-13. For all of these reasons, Al Jazeera believes that the Department should adjust the model-matching criteria to place coating as the first matching criterion.

In the rebuttal brief, petitioners disagree with Al Jazeera's proposed model-matching hierarchy. Specifically, petitioners state that they "do not believe that the order in which characteristics are listed on Al Jazeera's purchase orders or invoices establish an authoritative or appropriate basis for selecting product matching criteria." See petitioners' rebuttal brief at 3-4. Rather, petitioners believe that Al Jazeera's proposed matching criteria would result in matches that are "nonsensical." While petitioners concur with Al Jazeera that, all things being equal, it is better to match black-to-black and galvanized-to-galvanized pipe, petitioners do not believe that matching coating before size necessarily produces more reasonable product matches. Id. at 4. Petitioners further state that "the best match compares products in the U.S. to home market products that are identical with respect to size, coating, and end finish" and that Al Jazeera's proposed "reshuffling of the product matching criteria relates to the selection of similar rather than identical merchandise." Id.

Petitioners note that the Department has years of experience with matching sales of pipe products. Id. Petitioners also state that the Department has broad discretion in establishing a model-matching hierarchy, citing to Koyo Seiko Co. v. United States, 66 F.3d 1204, 1209 (Fed. Cir. 1995) and United Engineering & Forging v. United States, 779 F. Supp. 1375 (CIT 1991). Id. at 4-5. Petitioners conclude by reiterating their contention that the Department's current model-match hierarchy is reasonable and should not be changed. Id. at 5.

Department's Position:

The Federal Circuit has stated that "Congress has implicitly delegated authority to Commerce to determine and apply a model-match methodology necessary to yield 'such or similar' merchandise under the statute" and that such delegation of authority "empowers Commerce to choose the manner in which 'such or similar' merchandise shall be selected." Koyo Seiko Co., 66 F.3d at 1209. Moreover, the Federal Circuit has reasoned that the Department must be given "considerable discretion to fashion the methodology used to determine what constitutes 'foreign like product' under the statute." See SKF USA, Inc. v. United States, 537 F.3d 1373, 1379 (Fed.

Cir. 2008); accord Pesquera Mares Australes Ltda. v. United States, 266 F.3d 1372, 1384 (Fed. Cir. 2001).

In the Federal Register notice initiating this and other concurrent investigations covering circular welded pipe from various countries, including Oman, the Department solicited comments from interested parties on product characteristics. See Circular Welded Carbon-Quality Steel Pipe from India, the Sultanate of Oman, the United Arab Emirates, and the Socialist Republic of Vietnam: Initiation of Antidumping Duty Investigations, 76 FR 72164, 72164-65 (November 22, 2011). The Department stated that “interested parties may comment on the order in which the characteristics should be used in model matching.” Id. at 72165. Additionally, the Department stated that “{i}n order to consider the suggestions of interested parties in developing and issuing the antidumping duty questionnaires, we must receive comments by December 9, 2011.” Id. Al Jazeera did not submit timely comments. Al Jazeera submitted untimely comments as part of its sections B and C questionnaire response (BCQR) on February 9, 2012, i.e., two months after the deadline. See BCQR at 16-19. However, other parties to the concurrent investigations submitted timely comments. The Department addressed these comments in the Preliminary Determination. See Preliminary Determination, 77 FR at 32533-34. In the Preliminary Determination, the Department stated that no interested party “demonstrated why the coating product characteristic should be considered the most important of all when defining models and for comparison purposes.” Id. at 32534. Consequently, the Department declined to change either the type or the hierarchy of the model match characteristics. Id.

We have examined Al Jazeera’s comments in its case brief and have not found evidence to suggest that we should change our model match hierarchy. As the Department noted in the Preliminary Determination:

while variations in cost may suggest the existence of variation in product characteristics, such variations do not constitute differences in products in and of themselves. Furthermore, the magnitude of variations in cost may differ from company to company, and even for a given company over time, and therefore do not, in and of themselves, provide a reliable basis for identifying the relative importance of different product characteristics. The Department has noted that for defining products and creating a model match hierarchy, “the physical characteristics are used to distinguish the differences among products across the industry,” that “cost is not the primary factor for establishing these characteristics,” and, in short, “cost variations are not the determining factor in assigning product characteristics for model-matching purposes.” See Stainless Steel Wire Rod From Sweden: Final Results of Antidumping Duty Administrative Review, 73 FR 12950 (March 11, 2008), and accompanying Issues and Decision Memorandum at Comment 1.

Id. Al Jazeera’s evidence does not indicate that the model match hierarchy used by the Department fails to distinguish differences among products across the industry. As the Department stated, the Department “did include coating as a characteristic because whether or not the product is coated (e.g., galvanized) is important enough to distinguish products from one another” but that “differences in other product characteristics also influence potential end uses.” Id. Additionally, making changes in the model match hierarchy to affect changes in the margin

calculation is not a factor in the Department's analysis. Therefore, we are not making any changes to our model match hierarchy for the purposes of this final determination.

Comment 5: Double-Counting of Certain Export Charges

Al Jazeera states that it inadvertently double-counted expenses related to export letters of credit. Specifically, Al Jazeera states that it reported these expenses both in the field BANKCHARU and also as part of the INTEX expense. See Al Jazeera case brief at 28. Al Jazeera asks that the Department eliminate the BANKCHARU field in order to eliminate this double-counting. Id.

Petitioners did not comment on the issue.

Department's Position:

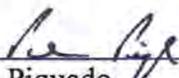
After careful review of Al Jazeera's reporting of expenses in the BANKCHARU and INTEX fields and record evidence, for the final determination, we agree with Al Jazeera that certain expenses related to export letters of credit were reported twice by Al Jazeera. Specifically we find that these expenses were reported both in the field BANKCHARU and also as part of the INTEX expense. See Cost Verification Report at 18. Therefore, we have recalculated Al Jazeera's financial expense ratio to exclude export letter of credit expenses from the numerator of the financial expense ratio to avoid double counting the expenses. See Al Jazeera's Final Cost Memorandum.

RECOMMENDATION:

Based on our analysis of the comments received, we recommend adopting the positions set forth above. If these recommendations are accepted, we will publish the final determination, including the final dumping margins, for this investigation in the Federal Register.

Agree

Disagree



Paul Piquado
Assistant Secretary
for Import Administration

15 OCTOBER 2012
Date