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MEMORANDUM TO: Paul Piquado
Assistant Secretary
for Import Administration

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

SUBJECT: Issues and Decision Memorandum for the Less Than Fair Value
Investigation of Certain Steel Nails from the United Arab Emirates

SUMMARY

We have analyzed the case briefs and rebuttal briefs submitted by interested parties in the antidumping duty less-than-fair value investigation of certain steel nails from the United Arab Emirates (UAE). As a result of our analysis, we have made certain changes to the *Preliminary Determination*. We recommend that you approve the positions described in the "Discussion of Issues" section of this Issues and Decision Memorandum. Below is the complete list of the issues in this investigation for which we received comments and rebuttal comments by parties:

- Comment 1: Targeting Dumping Allegations
- Comment 2: Methodologies Underlying Targeted Dumping Test
- Comment 3: *De Minimis* Standard in the Targeted Dumping Test
- Comment 4: Application of the Average-to-Transaction Comparison Methodology
- Comment 5: Zeroing under the Average-to-Transaction Comparison Methodology in Investigations
- Comment 6: Constructed Value Profit
- Comment 7: Constructed Value Selling Expenses
- Comment 8: Affiliated Loans
- Comment 9: Cost Differences Unrelated to Differences in Physical Characteristics
- Comment 10: General & Administrative Expenses
- Comment 11: Quarterly Cost Methodology
- Comment 12: Affiliation



BACKGROUND

On November 3, 2011, the Department of Commerce (the Department) published in the *Federal Register* the preliminary determination of the less-than-fair value investigation on certain steel nails from the UAE.¹ The period of investigation (POI) is January 1, 2010, through December 31, 2010. We invited interested parties to comment on the *Preliminary Determination*. We verified the responses of Precision Fasteners LLC (Precision) and Dubai Wire FZE (Dubai Wire) from December 5, 2011, through December 16, 2011. We received case briefs and rebuttal briefs from the petitioner, Mid Continental Nail Corporation (Mid Continent), Precision, and Dubai Wire.

DISCUSSION OF ISSUES

Targeted Dumping Allegations

Comment 1: Dubai Wire asserts that the Department should not find targeted dumping because there are other explanations for the price differences among customers, times, and regions. Citing *AK Steel Corp. v. United States*, 192 F.3d 1367, 1385 (CAFC 1999), among other cases, and *Notice of Final Determination of Sales At Less Than Fair Value: Coated Free Sheet Paper from Korea*, 72 FR 60630 (October 25, 2007) and accompanying Issues and Decision Memorandum (IDM) at Comment 1. Dubai Wire contends that the Department must consider factors that drive pricing patterns before relying on the mechanical nature of its targeted dumping test in establishing the prevalence of targeted dumping. Dubai Wire asserts that the mere existence of pricing patterns do not demonstrate targeted dumping. Citing *Certain Steel Nails from the United Arab Emirates: Notice of Final Determination of Sales at Not Less Than Fair Value*, 73 FR 33985 (June 16, 2008) and accompanying IDM at Comment 2, Dubai Wire argues that the Department is required to undertake a more thorough analysis that demonstrates that the price differences are linked to targeted pricing behavior. Dubai Wire asserts that record evidence explains that the price differences for certain customers, time periods, and regions are not the result of targeted dumping but, rather, normal business practices in the nail industry.

Customer Targeted Dumping

Dubai Wire argues that the alleged sales to two customers were outside the ordinary course of trade because they were re-sales, made at a discount, and were sales of products that had been previously rejected by another customer due to quality issues. Citing *Notice of Final Determination of Sales at Less Than Fair Value; Certain Hot-Rolled Carbon Steel Flat Products From The Netherlands*, 66 FR 50408 (October 3, 2001), among other cases, Dubai Wire argues that even if the Department concludes that the alleged sales to these customers were not made outside the ordinary course of trade, the Department's practice indicates that it is not appropriate to compare sales of second quality, non-prime goods to sales of prime, first quality merchandise.

¹ See *Certain Steel Nails From the United Arab Emirates: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 76 FR 68129 (November 3, 2011) (*Preliminary Determination*).

Accordingly, Dubai Wire argues, the Department should not have an affirmative finding of targeted dumping with respect to these customers because the alleged targeted sales of non-prime merchandise to these customers cannot be compared to sales of prime merchandise made to other customers.

Dubai Wire argues that the alleged sales to a certain third customer were also outside the ordinary course of trade pursuant to section 771(15) of the Tariff Act of 1930, as amended (Act), and 19 CFR 351.102(b)(35) because they involved old inventory and have certain unique physical characteristics and packaging that are different from other products comprising the same control numbers. Dubai Wire asserts that the alleged sales to the customer in question were made at reduced prices because of the customer's earlier refusal to take all of the stock Dubai Wire produced for the customer at the time. Citing *Notice of Final Determination of Sales at Less Than Fair Value: Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From Japan*, 64 FR 24329 (May 6, 1999), among other cases, Dubai Wire asserts that its sales to the customer in question fall under the definition of sales outside the ordinary course of trade, from which the Department routinely excludes from the home market database when calculating a dumping margin. Dubai Wire argues that if home market sales of small quantities of low priced merchandise sold to one customer after a time lag following production are normally excluded from the comparison to the U.S. sales in the margin calculations, then similarly situated U.S. sales cannot be used to compare to other U.S. sales in the targeted dumping analysis.

With respect to the alleged sales to two customers, the petitioner argues that there is no record evidence confirming the nature of the sales in question as sales of non-prime merchandise. The petitioner contends that a review of the documentation that Dubai Wire provided establishing the asserted reasons for product rejections do not form the basis for concluding that the merchandise was non-prime. Further, the petitioner argues that Dubai Wire did not demonstrate how the observed price pattern is caused by the sale of alleged non-prime merchandise. For these reasons, the petitioner argues that there is no basis to conclude that sales of the underlying merchandise were not targeted.

With respect to the alleged sales to the remaining certain customer, citing *Wood Flooring*² and accompanying IDM at Comment 4, the petitioner argues that the Department previously rejected arguments similar to those raised by Dubai Wire. Specifically, the petitioner argues that because the targeted dumping test relies on CONNUMs, it automatically accounts for the physical characteristics most relevant in identifying the identical products and, accordingly, the test found merchandise identical to merchandise of the alleged targeted sales. Therefore, the petitioner argues, the product differences identified by Dubai Wire are not so unique to render the alleged targeted sales inappropriate for use in the targeted dumping test. Lastly, the petitioner argues that the nature of the old stock and small quantity of the alleged targeted sales does not qualify the sales as outside the ordinary course of trade, or so unusual as to be exempted from the targeted dumping analysis. The petitioner observes that Dubai Wire's U.S. sales database contains numerous instances of sales with quantities comparable to those of the alleged targeted sales.

² See *Multilayered Wood Flooring from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 76 FR 64318 (October 11, 2011) (*Wood Flooring*).

Department's Position: When calculating dumping margins in an investigation, section 777A(d)(1)(B) of the Act allows the Department to employ the alternative average-to-transaction (A-T) margin-calculation methodology only if: (1) there is a pattern of export prices that differ significantly among purchasers, regions, or periods of time; and (2) such differences cannot be taken into account using the standard average-to-average (A-A) or transaction-to-transaction methodologies. The targeted dumping test in *Nails/PRC*³ provides a two-stage analysis to determine whether there is a pattern of EPs that differs significantly among purchasers, regions, or periods of time. The first stage addresses the "pattern" requirement; the second stage addresses the "significant difference" requirement. We do not agree with Dubai Wire's claim that the alleged targeted sales to certain two customers were of non-prime merchandise. Record evidence demonstrates that, while the original customer referred to the merchandise as "defective," the reason the customer rejected the material was because the shipments the customer received contained nails with a shank type that was different from the shank type of nails the customer ordered. *See* Exhibits S5-9(a) and S5-9(b) of Dubai Wire's October 13, 2011, submission. Further, record evidence establishes that the sales in question were made on a consignment basis. *Id.* As such, it is entirely plausible that the consignee retained a portion of the proceeds from the sales in question that it executed. Therefore, the reason for a lower price associated with the sales in question may have been because an intermediary agent was involved in reselling the previously rejected merchandise and not because the merchandise was of non-prime quality. Further, record evidence does not establish whether such arrangements are entirely abnormal business practices in the nail industry.

With respect to the alleged targeted sales to a certain third customer, we do not agree with Dubai Wire that certain unique physical characteristics and packaging associated with the underlying product rendered it significantly different for the purpose of comparison to sales of non-targeted products comprising the same CONNUM. As a preliminary matter, we do not consider packaging as criteria that differentiate products. Further, after the initiation of this investigation, based on comments submitted by interested parties, we determined the product characteristics most relevant in the identification of identical products. *See* May 26, 2011, questionnaires issued to Dubai Wire and Precision in this investigation. The targeted dumping test is performed on a CONNUM-specific basis, which identified non-targeted sales of products and alleged targeted sales as having the same CONNUM. As such, there is no basis to conclude that the products underlying the alleged targeted sales were so unique that they cannot serve as proper comparisons in the targeted dumping test. In addition, Dubai Wire provided no argument with respect to why we should define identical products for purpose of targeted dumping analysis differently than how we identify identical products in the dumping margin calculations. *See Wood Flooring* and accompanying IDM at Comment 4. Further, Dubai Wire presented no analysis to support its assertion that the sales in question involved quantities that are atypical of other sales Dubai Wire made during the POI.

We find Dubai Wire's argument that the exhibited pattern of differences in prices with respect to all alleged targeted sales can be rebutted by an assertion that the sales in question are outside the

³ *See 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) (*Nails/PRC*) and accompanying IDM at Comments 3-6.

ordinary course of trade to be misplaced. As we stated in *Notice of Final Determination of Sales at Less Than Fair Value; Certain Hot-Rolled Carbon Steel Flat Products From The Netherlands*, 66 FR 50408 (October 3, 2001) and accompanying IDM at Comment 3, the antidumping laws does not provide that the Department will disregard U.S. sales because they as outside the ordinary course of trade. The courts have recognized that the ordinary course of trade provision of the Act is applicable only to sales made in the home market. *Id.* (citing *FAG U.K. Ltd. v. United States*, 945 F. Supp. 260, 265 (CIT 1996)). Because we do not disregard U.S. sales as outside the ordinary course of trade, we find that the alleged customer targeted sales can serve as the appropriate basis in the targeted dumping analysis.

Lastly, we find that Dubai Wire did not demonstrate to what extent, the observed price patterns for sales to all alleged targeted customers are explained by reason of underlying merchandise having been previously rejected, of old stock, or of small volume. *See, e.g., Wood Flooring* and accompanying IDM at Comment 4. Accordingly, for the reasons discussed above, we find no factual or legal support for Dubai Wire's claims that the price differences for the alleged sales to certain customers are not the result of targeted dumping.

Time Period Targeted Dumping

Dubai Wire and Precision assert that the reason for nail price variations across the POI was not because the companies engaged in targeted dumping, but because nail price increases reflected sharp increases in wire rod costs during the POI. Dubai Wire argues that the Department now holds Dubai Wire responsible for following a prudent business practice of increasing nail prices to cover rising raw material costs, thus reducing the possibility that it would sell subject merchandise at less than fair value. Citing *Polyvinyl Alcohol From Taiwan: Final Determination of Sales at Less Than Fair Value*, 76 FR 5562 (February 1, 2011), Dubai Wire argues that the Department previously accepted the principle that an allegation of targeted dumping by period can be rebutted with evidence that the rising costs were responsible for rising prices. Dubai Wire and Precision assert that they provided evidence establishing that during the POI a substantial increase in wire rod prices led to an increase in nail prices for their top selling CONNUMs. Dubai Wire and Precision also assert that they provided evidence establishing a precise correlation between the sales prices and the underlying costs. Dubai Wire and Precision contend that the Department's analysis of the time period targeted dumping allegation must account for the price change in wire rod purchases. In its October 13, 2011, submission, Dubai Wire provided an analysis which adjusts reported U.S. prices to reflect quarterly increases in wire rod purchase prices. Dubai Wire argues that, once wire rod prices are incorporated into the targeted dumping analysis, there is no time period targeted dumping.

The petitioner argues that record evidence demonstrates that fluctuations in both respondents' cost of manufacturing, due to increases in raw material costs, were not significant enough to warrant application of the quarterly cost methodology. The petitioner contends that fluctuations in costs that are not significant enough to trigger a quarterly costing methodology cannot be found relevant in explaining differences in nails prices between time periods. The petitioner argues that there is no basis to conclude that the raw material costs account for the pattern of pricing that the Department identified for both respondents in its time period targeted dumping analysis.

Department's Position: As in the *Preliminary Determination*, we continue to find that record evidence demonstrates a pattern of export prices (or constructed export prices) for comparable merchandise that differs significantly among periods of time. See section 777A(d)(1)(B)(i) of the Act; company-specific analysis memoranda, dated concurrently with this memorandum.

We disagree with Dubai Wire's and Precision's assertion that changes in wire rod costs preclude the Department from finding that a pattern exists. Additionally, we found Dubai Wire's analysis in support of the assertion to be unnecessary and significantly flawed. Dubai Wire argues that the change in wire rod costs during the POI affects the Department's targeted dumping analysis to the extent that it should account for all time period targeted dumping. However, we examined the wire rod costs as they affect the comparability of nail prices during the POI in connection with our examination of the quarterly cost methodology. For the reasons stated in Comment 11, *infra*, the Department finds that changes in wire rod costs do not compromise price comparability in the POI for purposes of the dumping margin calculations. For the same reasons, we find that changes in wire rod costs do not compromise price comparability in the POI for targeted dumping analysis purposes. In terms of the significant flaw in the analysis, we find that it: 1) incorrectly aggregates and calculates wire rod percentage price increases across all steel types (*i.e.*, low carbon, high carbon, and stainless steel) and applies the calculated percentages equally to prices of all nails sold in a particular fiscal quarter with no regard to the specific type of steel in the wire rod consumed by the underlying nail products and with no regard to the differences in consumption rates of wire rod among the underlying nail products; and 2) fails to reflect the inventory valuation method by which Dubai Wire costs out, in the normal course of business, the depletion of raw materials, such as wire rod, issued into the production of nails.

We also do not agree with Dubai Wire's assertion that we must incorporate changes in wire rod costs in our time period targeted analysis by adjusting U.S. prices. In *Nails/PRC* and accompanying IDM at Comment 2, we stated that the statute and the regulations do not provide detailed guidance on comparing different sets of U.S. prices for purposes of determining the existence of targeted dumping. The Department interprets comparability in the context of a targeted dumping analysis without determining "why" an exporter's pricing behavior may differ significantly as between different customers, regions or time periods. Indeed, inserting this kind of standard into a targeted dumping analysis is nowhere found in the Act and it would likely create an unmanageable standard for the Department. Instead, the Act requires the Department to determine whether a pattern of export price differences exists without regard to "why." When such a pattern exists, the Act indicates that export prices may not be appropriate for application of the A-A comparison methodology. For these reasons, and because we have determined that the difference in the steel wire rod costs during the POI have not affected price comparability, we reject Dubai Wire's and Precision's arguments.

While the following discussion explains why Dubai Wire's and Precision's argument related to the wire rod costs is analytically incorrect, this argument is also unsupported by the record evidence. Our analysis indicates that wire rod costs do not explain the increases in nail prices during the POI. Because of the extensive use of business-proprietary information, *see* Attachment I of Dubai Wire's analysis memorandum, dated concurrently with this

memorandum, which contains the programming language underlying our analysis and the results thereof. Generally, the record evidence shows that nail prices increased at a faster rate than wire rod costs. *See id.* If we control for increases in wire rod costs during the POI which, according to Dubai Wire, accounts for all U.S. price variation, we still find that a pattern of prices that differs significantly among time periods exists. *See id.* Finally, we emphasize that, while this discussion of the record evidence further demonstrates that Dubai Wire's argument is incorrect, such an analysis is not necessary whenever changes in cost occur in an antidumping proceeding involving targeted dumping. As explained in the preceding paragraphs, once the Department determines that changes in costs do not compromise price comparability, no further analysis of costs is required.

Geographic Targeted Dumping

Dubai Wire argues that the Department's analysis is flawed by way of an internal inconsistency. Dubai Wire argues that it is illogical for the Department to find that Dubai Wire targeted a certain region when an analysis of more discrete geographic areas (*i.e.*, divisions) within that region reveals that none of the sales were sold at targeted prices. Further, Dubai Wire argues that the analysis for the alleged divisional targeted dumping improperly compares the final destination for targeted sales with the port of entry for non-targeted sales, even though the final destination for non-targeted sales may have ultimately been the same as for the alleged targeted sales. Dubai Wire argues that this discrepancy exists because the geographic targeted dumping test identifies geographic region based on reported destinations, and Dubai Wire's reported destinations differ based on differences in the terms of delivery for the alleged targeted and non-targeted sales. Dubai Wire alleges that it does not know the final destination for non-targeted sales. Lastly, Dubai Wire argues that the reason the net U.S. prices for the alleged targeted division are lower than those for other divisions is because of a mistake whereby Dubai Wire did not recover from its customer the full cost for the U.S. inland freight incurred for these sales.

Precision asserts that the Department's regional targeted dumping analysis was based on an arbitrary geographical area making up three individual states, which the Department referred to as a "division." Precision argues that the Department's division-based targeting analysis has no support in the statute because section 777A(d)(1)(B)(i) of the Act refers specifically to a "region," and not to a "division." Precision asserts that the Department had no authority to use geographic areas that are not formally recognized as regions. Precision asserts that the U.S. Census Bureau formally recognizes four geographic areas that constitute "regions" in the United States: Northeast, South, Midwest, and West. Citing *GPX Int'l Tire Corp. v. U.S.*, court nos. 2011-1107, -1108, -1109 (CAFC) (decided December 19, 2011), Slip Op. at 15-16, Precision argues that Congress must be deemed to have been aware of the Department's formal definition of "region" at the time it enacted the targeted dumping statute and that the Department does not have the discretion to change the definition upon which Congress relied. Citing *Lightweight Thermal Paper from Germany*, 73 FR 27498, 27500 (May 13, 2008) (*Thermal Paper*), Precision asserts that the Department recognized that the reference to "region" in section 777A(d)(1)(B)(i) of the Act requires an analysis based on well-known and uniformly recognized geographic regions of the country. Precision argues this should be regions that are recognized officially by the U.S. Census Bureau.

With respect to Dubai Wire’s first argument, the petitioner asserts that the Department’s test identifies and compares pricing patterns based on different aggregate groups. In the regional analysis, prices and quantities were aggregated across multiple divisions and no regional targeted dumping was identified. In a divisional analysis, because a smaller geographical grouping is represented, Dubai Wire’s alleged targeted dumping to a certain division was exposed (a trend that was masked in the regional analysis) since the alleged targeted division-specific prices were weight-averaged with the prices of non-targeted divisions. In short, the petitioner asserts that, if only a specific region is alleged as a targeted geographical area and such activity cannot be exhibited in the broader regional analysis, then targeted dumping which may occur on a more specific basis would remain hidden.

With respect to Dubai Wire’s second argument, the petitioner contends that Dubai Wire had knowledge that the destination variable in the original questionnaire serves as the basis for the regional targeted dumping analysis. Citing *Chinsung Indus. Co., Ltd. v. United States*, 705 F. Supp. 598, 601 (CIT 1989), the petitioner argues that it was Dubai Wire’s responsibility to provide accurate data for its U.S. sales and ensure accurate reporting. The petitioner contends further that Dubai Wire never attempted to revise the information concerning the destination of its sales nor provided any analysis that refutes the allegation of division targeted dumping.

With respect to Dubai Wire’s last argument, the petitioner argues that Dubai Wire does not assert that it made an error in its reported data but, instead, contends that it realized that it did not properly charge the customer for the full value of freight costs that it incurred. The petitioner takes issue with Dubai Wire’s statement that the shortfall was not contemplated and argues that Dubai Wire’s suggestion that the Department adjust its calculations to account for the revenue the company intends to recoup in the future is self-serving.

With respect to Precision’s argument, the petitioner contends that, similar to regions, divisions are also officially recognized in the U.S. Census geographical delineation. Citing *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984) (*Chevron*), the petitioner asserts that the Department is permitted to reasonably define the term when section 777A(d)(1)(B)(i) of the Act does not explicitly define “region.”

Department’s Position: Dubai Wire argues that an absence of targeted dumping on a divisional level contradicts an affirmative finding of targeted dumping on a regional level that includes the examined division. However, in the *Preliminary Determination*, after accepting certain corrections Dubai Wire made to its U.S. sales database, we found no targeted dumping in the alleged region. See *Preliminary Determination*, 76 FR at 68133 (citing Memorandum to Christian Marsh entitled “Less-Than-Fair-Value Investigation on Certain Steel Nails from the United Arab Emirates: Targeted Dumping—Dubai Wire FZE,” dated October 27, 2011). Therefore, Dubai Wire’s argument is premised on a finding of targeted dumping that does not exist on the record. Instead, we found geographically recognized areas, which we termed “division,” to have been targeted, while the broader “region” in which the “division” exists was not targeted. There is nothing internally inconsistent with this determination. A company may target a smaller geographical area of the country and/or engage in a broader targeting practice. The regional and division analysis involves, however, calculations independent of each other, may involve different product mixes, and aggregation and examination of data at two different

levels of detail. Thus, it is possible that there may be an affirmative targeted dumping finding for a division irrespective of whether that division is part of a broader area which was not targeted or whether other broader areas were targeted.

We are not convinced by Dubai Wire's argument that a flaw in the methodology Dubai Wire used to report destination for its U.S. sales imparts flaws in the results of our targeted dumping analysis with respect to the alleged division. The original questionnaire instructed Dubai Wire to report the U.S. postal "ZIP" code of the customer's place of delivery. The focus of the regional targeted dumping analysis is the location to which the customer instructs Dubai Wire to deliver the merchandise based on the terms of delivery specified in Dubai Wire's invoices. This may be different than the ultimate destination of merchandise, but under such circumstances the ultimate destination is not germane to a regional targeted dumping analysis.

With respect to Dubai Wire's last argument, in the standard questionnaire the Department instructs respondents to report actual expenses incurred and actual revenues recovered, as evidenced by the payment for recognized expenses and revenue for recognized income in the normal course of business. *See, generally*, the Department's May 26, 2011, questionnaire. It does not contemplate the reporting of adjustments to the reported prices on the basis of what the company intends to recognize in the future. Accordingly, we find no basis to reject the affirmative targeted dumping determination based on a purported mistake which is not reflected in Dubai Wire's books and records.

With respect to Precision's argument, section 777A(d)(1)(B)(i) of the Act directs the use of the A-T comparison methodology when "there is a pattern of export prices (or constructed exported prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time." We do not find merit in Precision's argument that the term "region" is meant to have been interpreted by the Department in some narrow manner. Rather, we find that the Department has discretion to determine the exact meaning of the term "region" because the statute does not define what constitutes a "region." We have previously found that a region is a generally recognized geographical area. *See Thermal Paper*, 73 FR at 27500. In this case, the divisions that we established are based on geographically areas as recognized by the U.S. Census Bureau. In this regard, there is nothing inconsistent with the approach the Department took in *Thermal Paper*. There, we stated that the Department "has not yet established explicit criteria or standards for defining 'region' in the targeted dumping context," however, for purposes of that investigation we accepted petitioner's use of the U.S. Census Bureau-based "regions." *Id.* Therefore, because there is no established definition of "region" in the targeted dumping context, it is not inconsistent or unreasonable for the Department to have considered geographical areas of different size in *Thermal Paper* and this investigation. We recognize that our interpretation of these statutory terms may be dictated by the specifics of each case necessitating either a broader or a narrow definition of a "region." The courts have found repeatedly that, when a statute is silent on a specific issue, the Department has discretion in fashioning a reasonable interpretation as long as the intent of the legislature or the guiding purpose of the statute is not compromised. *See, e.g., Chevron* at 837, 842-44 (1984); *Ceramica Regiomontana v. United States*, 10 C.I.T. 399, 405 (CIT 1986) and *Board of Governors of the Federal Reserve System v. Dimension Financial Corp.*, 474 U.S. 361, 106 S. Ct. 681, 686 (1986). Accordingly, contrary to Precision's assertion, we do not find that our reliance on divisions in this investigation is an unreasonable

interpretation of the term “region” that renders our identification of regional targeted dumping contrary to section 777A(d)(1)(B)(i) of the Act.

Methodologies Underlying Targeted Dumping Test

Comment 2: Dubai Wire asserts that the methodology the Department uses in its targeted dumping test is merely a means to mathematically ensure affirmative targeted dumping findings in all investigations. Dubai Wire urges the Department to alter substantially its current methodology. Dubai Wire argues that the Department’s use of one standard deviation in the first stage of the test, identifying the pattern of export prices, is too lenient and does not identify the true outliers in the database. Dubai Wire argues that a mathematical certainty ensures that a substantial amount of sales in any database will have weighted-average prices that are more than one standard deviation away from the mean. Similarly, Dubai Wire argues that the second stage of the Department’s test, qualifying the significant differences in prices, is also too lenient because it only requires an insignificant percentage of sales to a targeted group to pass the “gap” test in order to find targeted dumping. Dubai Wire argues that, at a minimum, the Department should adopt a pattern test which incorporates two standard deviations and a significantly higher threshold for the “gap” test.

Dubai Wire argues that the Department’s gap test is arbitrary in that it is completely random whether the gap between the weighted average price to the targeted group and the next highest weighted average price to the non-targeted group will be higher or lower than the weighted-average of the gaps for the non-targeted groups. Dubai Wire argues that a finding of significant price differences may be as simple as the result of a targeted customer’s prices being slightly below the otherwise similarly situated prices of non-targeted customers. Lastly, Dubai Wire argues that the Department does not even consider in its price gap test the weighted average prices of non-targeted groups that are below the weighted average price of the targeted group. In sum, Dubai Wire argues that the Department’s methodology does not establish a pattern of targeted prices which differs significantly from non-targeted prices.

Dubai Wire and Precision argue that section 777A(d)(1)(B)(i) of the Act requires the analysis of individual export prices in the context of a targeted dumping inquiry. Dubai Wire alleges that the Department’s use of the weighted-average prices on a CONNUM-specific basis unnecessarily diminishes the effect of the mathematical functions it uses in its tests, thereby increasing the likelihood of outlier sales qualifying as targeted. This is so, Dubai Wire argues, because the weight-averaging of prices creates a less dispersed dataset, which in turn results in a smaller standard deviation, which in turn results in smaller price gaps. Similarly, Precision argues that the Department must examine the individual export prices, not the averages that obscure the very “pattern of export prices” the Department is trying to discern in its assessment of whether there has been targeted dumping. Precision argues that by averaging prices, the Department eliminates a portion of the variability in those prices and, thus, does not truly measure the dispersion in prices. Precision provided an analysis contrasting (1) a comparison of monthly weighted-average prices between the targeted and non-targeted sales (where prices are comparable) to (2) a comparison of monthly weighted-average prices for targeted sales to POI-average prices for the non-targeted sales of CONNUMs (where prices for targeted sales are lower). Precision argues that this analysis exemplifies how the distortion is caused by the use of

broad price averages.

The petitioner argues that Dubai Wire did not identify any record evidence to demonstrate that the Department's gap test does not meet the statute's significant difference requirement. Specifically, the petitioner argues that Dubai Wire does not explain how the Department's gap test, applied in Dubai Wire's targeted dumping analysis, distorted the outcome and/or failed to properly test for significant differences in Dubai Wire's reported prices. Citing *Wood Flooring* and accompanying IDM at Comment 4, the petitioner argues that the Department has already explained how the gap test identifies significant differences in prices. Following the Department's logic, the petitioner contends that the gap test's comparison of prices to the alleged targeted group to the next highest price is methodologically sound because a pattern of consistently lower pricing has already been identified in the previous test. The petitioner argues that, within this framework, the five percent threshold is a reasonable basis to meet the significance requirement.

Citing *Wood Flooring* and accompanying IDM at Comment 4, the petitioner asserts that the Department rejected similar arguments concerning the use of weighted-average prices in its targeted dumping analysis. Further, the petitioner contends that because Precision's analysis did not involve individual prices, there is no basis for Precision's assertion that, had the Department performed its analysis using individual prices instead of monthly weighted-average prices, the distortion would be even more dramatic. The petitioner argues that the presence of the term "or" in the statutory language of section 777A(d)(1)(B)(i) of the Act ("a pattern of export prices...that differ significantly among purchasers, regions, or periods of time") requires separate consideration of targeted dumping for each such group of sales. The petitioner argues that Precision's analysis introduces a time element (*i.e.*, months) to the customer-specific targeted dumping analysis, which artificially and self-servingly distorts the results.

Department's Position: We disagree with Dubai Wire's assertion that the targeted dumping test is too lenient or somehow, arbitrary. In the first stage of the targeted dumping test, the "standard deviation test," the Department determines the share of the alleged targeted-customer's purchases of subject merchandise (by sales volume) that are at prices more than one standard deviation below the weighted-average price to all customers, targeted and non-targeted. *See Nails/PRC* and accompanying IDM at Comment 3; *Wood Flooring* and accompanying IDM at Comment 4. The Department calculates the standard deviation on a product-specific basis (*i.e.*, CONNUM by CONNUM) using the POI-wide weighted-average prices for each alleged targeted customer, and for customers not alleged to have been targeted. *See Nails/PRC* and accompanying IDM at Comment 4. If that share exceeds 33 percent of the total volume of a respondent's sales of subject merchandise to the alleged targeted customer, then the pattern requirement has been met and the Department proceeds to the second stage of the test.⁴ In the second stage of the targeted dumping test, the Department examines all sales of identical merchandise (*i.e.*, by CONNUM) by a respondent to the allegedly targeted customer. *Id.* From those sales, the Department determines the total volume of sales for which the difference between the weighted-average price of sales to the allegedly targeted customer and the next higher weighted-average price of sales to a non-targeted customer exceeds the average price gap

⁴*Id.*

(weighted by sales volume) for the non-targeted group. *Id.*, at Comment 6. If the share of the sales that meets this test exceeds 5 percent of the total sales volume of subject merchandise to the allegedly targeted customer, the significant difference requirement is met and the Department determines that targeting has occurred.

From the onset, the use of one standard deviation limits the number of sales that could be considered targeted because no more than 16 percent of all prices would typically be found to be more than one standard deviation below the mean, assuming a normal distribution of prices. Further, the use of the 33 percent threshold ensures that the volume of those sales for which the prices are more than one standard deviation below the mean must exceed 33 percent of sales considered targeted. Thus, contrary to respondent's argument, the first stage of the test is not likely to qualify a substantial portion of all sales for which a pattern requirement would have been established.

Further, as we stated, we find the price threshold of one standard deviation below the average market price to reasonably show a price difference that indicates targeted dumping. This is because (1) it is a distinguishing measure relative to the spread or dispersion of prices in the market in question, and (2) it strikes a balance between two extremes, the first being where any price below the average price is sufficient to distinguish the alleged target from others, and the second being where only prices at the very bottom of the price distribution are sufficient to distinguish the alleged target from others. *See 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) and accompanying IDM at Comment 2. In contrast, the number of sales with prices that are two standard deviations below the average market prices is too restrictive a standard because it would likely only identify outliers in the observed price data and not identify a pattern of targeted prices within the observed price data. *Id.*

With respect to the second stage of the test, the price gap test determines whether the price gap associated with the alleged target is significant relative to the price gaps in the non-targeted group "above" the alleged target price gap. *See Nails/PRC* and accompanying IDM at Comment 6. The significance in this context is determined based on whether the price gap associated with the alleged target is greater than the average price gap in the non-targeted group. *Id.* In this regard, we have not set a bright-line standard or threshold, such as a fixed percentage, for measuring the price gap. *Id.* If the difference exceeds the average price gap found in the group of non-target prices, then the difference in the price to the alleged target for a specific product is found to be significant. *Id.* In essence, the price gap test qualifies whether a degree of separation between a low targeted price and the next lowest non-targeted prices is sufficient in determining the significant difference in prices with respect to the targeted sales. Further, we consider a five-percent share of sales to the alleged target, by volume, that are found to be at prices that differ significantly to be a reasonable indication of whether or not the alleged targeting has occurred. *Id.* This threshold must be considered with the standard deviation test and the 33-percent sales volume threshold for determining whether there is a pattern of prices that differ significantly, as required by the statute. *Id.*

These calculation methodologies and the rationale supporting our targeted dumping analysis

have been affirmed by the Court of International Trade. Specifically, in *Mid Continent* the court found that our use of standard deviation was not in violation of Section 777A(d)(1)(B)(i) of the Act. *See Mid Continental Nail Corp. v. United States*, 712 F. Supp. 2d 1370, 1378 (CIT 2010) (*Mid Continent*). Further, the court upheld our use of the five percent threshold. *Id.*

Specifically, the court stated that, “[i]n other AD contexts, and for a long period of time five percent tests have been used to measure significance for AD purposes.” *Id.* at 1378-79 (citing section 773(a)(1)(C) of the Act (for using a five percent test to determine home market viability); section 773(a)(1)(B)(ii)(II) of the Act (for using a five percent test to determine third-country market viability); and 19 CFR 351.403(d) (for using a five percent test to calculate normal value (NV) on the basis of an affiliated party’s sales)). In short, the court concluded that “[t]he various aspects of the nails test do not violate the statutory language of 19 U.S.C. § 1677f-1(d)(1)(B)(i)” and the Department’s tests are “not otherwise arbitrary and capricious.” *Id.*

We are not persuaded by Dubai Wire’s argument that our price gap test is arbitrary because “randomness” dictates whether the price gap associated with the alleged target is higher or lower than the price gaps in the non-targeted group. Such would be the case if randomness explains differences in the prices that Dubai Wire reported, which we do not find here. Further, Dubai Wire does not point to any specific record evidence to exemplify distortions in the Department’s gap test with respect to Dubai Wire’s reported prices. We also do not agree with Dubai Wire’s argument that our gap test is arbitrary because it does not consider the weighted-average prices of non-targeted groups that are below the weighted-average price of the targeted group. As a preliminary matter, presumably, the alleged targeted prices are the lowest prices among all sales so the test has no option but to “look up” to the next higher price. In addition, Dubai Wire does not demonstrate why the significant difference requirement can only be met by the use of gaps that both “look up” and “look down.”

With respect to Dubai Wire’s and Precision’s arguments concerning the use of weighted-average prices in our targeted dumping test, we previously considered and rejected identical arguments. *See Coated Paper* and *Wood Flooring*. We previously stated that, in exercising our discretion, we interpret “export prices” in section 777A(d)(1)(B)(i) of the Act to mean an average of the individual prices to the alleged target. We stated in *Coated Paper*⁵ that “the relevant price variance, in the Department’s view, is the variance in prices across customers, not transactions. For this reason, the Department approached the problem by analyzing the variance in the average price paid by each customer.” *See Wood Flooring* and accompanying IDM at Comment 4.

***De Minimis* Standard in the Targeted Dumping Test**

Comment 3: Dubai Wire contends that the Department’s current policy to use zeroing when it finds any instance of targeting is a drastic measure. Dubai Wire argues that such a drastic measure requires the introduction of a *de minimis* standard in the Department’s targeted dumping methodology. Citing *Alcan Aluminum Corp. v. United States*, 165 F.3d 898, 899-906 (CAFC 1999), Dubai Wire argues that the *de minimis* principle is required in the Department’s targeted dumping methodology to prevent a rigid interpretation of the statutory language that frustrates

⁵ *See Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From the People’s Republic of China: Final Determination of Sales at Less Than Fair Value*, 75 FR 59217 (September 27, 2010), and accompanying Issues and Decision Memorandum at Comment 3 (*Coated Paper*).

the original intent of the statute. Dubai Wire argues that the plain interpretation of the language in section 777A(d)(1)(B)(i) of the Act, requiring a “pattern” of prices, suggests a presence of a meaningful number of targeted sales. Dubai Wire asserts that other parts of the statute or the regulations can be used as guidance in establishing a threshold above which a certain number of sales constitutes a pattern under section 777A(d)(1)(B)(i) of the Act. Dubai Wire cites section 733(b)(3) of the Act, which defines *de minimis* margin in an investigation, and 19 CFR 351.106(c), which defines *de minimis* margin in administrative reviews. Similarly, citing *Antifriction Bearing (Other Than Tapered Roller Bearings) and Parts Thereof) From France, Germany, Italy, Japan, Romania, Sweden, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews*, 64 FR 35590 (July 1, 1999), Dubai Wire argues that the Department identified the vast majority of sales as the basis for qualifying as a “pattern” under section 773(a)(7)(A)(ii) of the Act, which defines the level of trade adjustments. Dubai Wire contends that while the Department may have an affirmative determination of targeted dumping without finding targeting in the vast majority of sales, it is nevertheless legally required to introduce some *de minimis* standard in its targeted dumping methodology.

Dubai Wire and Precision argue that with respect to the customer targeted dumping allegation, the Department found an insignificant number of targeted sales to certain customers in relation to all sales made by each company, respectively. Dubai Wire and Precision argue that this inconsequential quantity of targeted sales does not constitute a pattern of variation in export prices as envisioned by section 777A(d)(1)(B)(i) of the Act. Precision makes the same argument with respect to the region targeted dumping allegation, claiming that the Department found an insignificant number of targeted sales in a certain region in relation to all sales made by Precision.

Citing *Wood Flooring* and accompanying IDM at Comment 4, the petitioner argues that the Department identifies a pattern on the basis of a pre-established threshold achieved when the percentage of sales made to a targeted group at prices more than one standard deviation below the weighted-average price of sales made to non-targeted groups exceeds 33 percent of all sales made to a targeted group. The petitioner asserts, once this threshold is achieved, a pattern is established regardless of whether the targeted transactions may represent a small portion of overall sales. The petitioner asserts that, in previous cases and as Precision itself acknowledges, the Department’s methodology was upheld by the Court of International Trade. Further, citing *Wood Flooring*, the petitioner argues that the Department specifically rejected the application of the *de minimis* standard in its targeted dumping analysis. Lastly, the petitioner argues that the *de minimis* standard should not apply to targeted dumping because it would eliminate the Department’s ability to take action at the very onset of targeted dumping and before the full intent of targeting behavior is achieved.

Department’s Position: In calculating margins, pursuant to section 777A(d)(1)(B)(i) of the Act the Department may use the A-T comparison methodology if “there is a pattern of export prices...for comparable merchandise that differ significantly among purchasers, regions, or periods of time.” This statutory language does not establish how a pattern of prices should be measured in terms of the prevalence of underlying sales in relation to all sales. Instead, the statute states that there must be a variance in export prices among purchasers, regions, or periods of time, and that the variance must exhibit a pattern. Thus, the task of finding a pattern involves

determining the frequency of low prices in a given group of sales, and not whether the sales in that group were frequent in relation to all sales. In meeting the statutory requirement of establishing a pattern, our use of a standard deviation test first finds targeted sales with prices that comprise 16 percent of all prices (*i.e.*, the left tail of the distribution curve) assuming a normal distribution of prices. At this stage, a certain portion of all targeted sales have prices that are one standard deviation away and below the mean price of all sales in the database. Arguably, this constitutes a pattern because the prices for targeted sales do not comprise the group representing the majority of prices (*i.e.*, 68 percent of all prices, under a normal distribution of prices) that are closer to the mean. In other words, the prices for the targeted sales show the infrequent tendency to differ from the mean of all prices. In order to establish a pattern of low prices concerning targeted sales, our test introduces a 33-percent threshold in determining whether a significant portion of targeted sales were made at prices one standard deviation below the mean of all prices. Because the statute is silent as to what is a pattern in prices, we have discretion to interpret the statutory language so long as our interpretation is reasonable. As we stated before, we do not use the standard deviation measure to make statistical inferences but, rather, use the standard deviation as a relative standard against which to measure the differences between the price to the alleged target and to the non-targeted group. For this purpose, one standard deviation below the average price is sufficient to distinguish the alleged target from the non-targeted group. *See Oil Country Tubular Goods from the People's Republic of China*, 75 FR 20335 (April 19, 2010) (*OCTG*) and accompanying IDM at Comment 2.

Dubai Wire and Precision did not demonstrate why the prices for products corresponding to a small percentage of overall sales cannot be found to exhibit a pattern under the statute. We find that the methodology underlying our targeted dumping test in identifying a pattern of prices pursuant to section 777A(d)(1)(B)(i) of the Act is reasonable. As indicated correctly by interested parties, this methodology has also withstood judicial scrutiny. *See Mid Continent*, 712 F. Supp. 2d at 1378. Lastly, the targeted sales are not likely to account for a significant portion of sales because, by definition, targeting is an act of selectively pursuing a specific market segment or product.

Application of the Average-to-Transaction Comparison Methodology

Comment 4: Dubai Wire and Precision contend that section 777A(d)(1)(B)(ii) of the Act does not provide for the application of the A-T comparison methodology to the U.S. sales for which no finding of targeted dumping exists. Dubai Wire and Precision argue that the application of the alternative comparison methodology does not further the intent of the statute to take into account the dumping associated with targeted sales when calculating a margin. Moreover, they argue it is unreasonable and unnecessarily punitive. Dubai Wire and Precision assert that under the Department's now withdrawn regulations at 19 CFR 351.414(f)(2), the Department's prior practice was to limit the A-T comparison methodology to only those sale that constituted targeted dumping (citing *Notice of Final Determination of Sales at Less Than Fair Value: Light-Walled Rectangular Pipe and Tube from the Republic of Korea*, 73 FR 35655 (June 24, 2008) and accompanying IDM at Comment 2; *Lightweight Thermal Paper from Germany: Notice of Final Determination of Sales at Less Than Fair Value*, 73 FR 57326 (October 2, 2008) and accompanying IDM at Comment 4; *Antidumping Duties; Countervailing Duties; Preamble to Proposed Rule*, 61 FR 7308, 7350 (February 27, 1996)).

Precision argues that, in drafting the now withdrawn regulations, the Department explicitly rejected the suggestion that the A-T comparison methodology can be applied to non-targeted sales. Further, Dubai Wire argues that even if the Department is justified in applying the A-T comparison methodology to all U.S. sales (whether or not targeted), the rationale the Department provided in *Polyethylene Retail Carrier Bags from Taiwan: Final Determination of Sales at Less Than Fair Value*, 75 FR 14569 (March 26, 2010) (*PRCBs*) and accompanying IDM at Comment 1, is insufficient in explaining the significant change in its practice.

Dubai Wire and Precision contend that the Department's withdrawal of the regulations guiding its prior practice was contrary to law because there was no requisite notice and comment period. Precision argues that the process of withdrawal of regulations at 19 CFR 351.301(d)(5), 19 CFR 414(f), and 19 CFR 414(g), announced in *Withdrawal of Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations*, 73 FR 74930 (December 10, 2008) (*Withdrawal Notice*), was ineffective because it did not comply with the requirements of the Administrative Procedures Act (APA). Citing, *inter alia*, *Tunik v. Merit Sys. Protection Bd.*, 407 F.3d 1326, 1344 (CAFC 2005), Precision asserts that the Department's stated reasons for claiming that a "good cause" for its decision to waive the requirements of the APA cannot be supported by any reasonable assessment of the circumstances facing the Department at the time of publishing the *Withdrawal Notice*. Further, citing *Mid Continent*, 712 F. Supp. 2d at 1379-80, Precision contends that the withdrawal of the regulations governing targeted dumping is not a validation that the regulations were unlawful. For these reasons, Precision argues, in the final determination the Department should revise its targeted dumping calculations to adhere with the methodology described in the purportedly withdrawn regulations.

The petitioner argues that the plain language of section 777A(d)(1)(B) of the Act makes clear that where a pattern of targeted dumping is identified, the A-T methodology must be applied to the entire body of sales that form the pattern of targeted dumping. Citing *OCTG* and accompanying IDM at Comment 2, the petitioner argues that the Department found this statutory interpretation reasonable and more consistent with the Department's approach in selecting the appropriate comparison methodology under section 777A(d)(1) of the Act. Citing *Wood Flooring* and accompanying IDM at Comment 4, the petitioner asserts that the Department previously provided a rationale explaining in detail why the application of the A-T comparison methodology is appropriate and in accordance with the law.

With respect to Dubai Wire's and Precision's arguments concerning APA, citing *Wood Flooring* and accompanying IDM at Comment 4, the petitioner argues that the Department expressly articulated its reasons for withdrawing the targeted dumping regulations. The petitioner argues that there is no legal requirement for the Department to adhere to its withdrawn targeted dumping regulations for the final determination in this investigation.

Department's Position: When calculating dumping margins in an investigation, section 777A(d)(1)(B) of the Act provide that the Department may employ the alternative A-T margin-calculation methodology if: (1) there is a pattern of export prices that differ significantly among purchasers, regions, or periods of time; and (2) such differences cannot be taken into account using the standard A-A or transaction-to-transaction methodologies. Unless these two criteria

are satisfied, the Department may not use A-T comparisons to determine dumping margins in an investigation. *See, e.g., Coated Paper* and accompanying IDM at Comment 3, and *Wood Flooring* and accompanying IDM at Comment 4. Thus, unless the criteria are satisfied, in an investigation the Department will use either the standard A-A, or the transaction-to-transaction comparison methodology provided in section 777A(d)(1)(A) of the Act. *Id.*

For both companies we found targeted dumping for the final determination because there was a pattern of prices that differ significantly by customer, region, and time period (*i.e.*, targeted dumping). *See* company-specific analysis memoranda, dated concurrently with this memorandum. We find that the pattern of price differences cannot be taken into account using the standard A-A methodology because the A-A methodology conceals differences in price patterns 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. *See Coated Paper* and accompanying IDM at Comment 3, and *Wood Flooring* and accompanying IDM at Comment 4. Thus, we find, pursuant to section 777A(d)(1)(B) of the Act, that the application of the standard A-A comparison methodology would result in the masking of dumping, which is unmasked by application of the alternative A-T comparison method to all of Dubai Wire's and Precision's sales. *Id.*

In accordance with our decision in *PRCBs* and accompanying IDM at Comment 1, we determine to apply the alternative A-T methodology to all of Dubai Wire's and Precision's U.S. sales on the basis of our examination of the language in section 777A(d)(1)(B) of the Act. The only limitations that section 777A(d)(1)(B) of the Act places on the application of the alternative A-T methodology are the satisfaction of the two criteria set forth in the provision. When the criteria for application of the A-T methodology are satisfied, section 777A(d)(1)(B) of the Act does not limit application of the alternative A-T methodology to only certain transactions. Rather, the Department determines dumping margins by comparing weighted-average NV to the export price or constructed export price of individual transactions. *See, e.g., Coated Paper* and accompanying IDM at Comment 3, *Wood Flooring* and accompanying IDM at Comment 4.

Section 777A(d)(1)(A) of the Act requires the Department to use either A-A or transaction-to-transaction comparisons. The Department has established criteria for determining whether A-A or transaction-to-transaction is the more appropriate methodology; the Department generally uses A-A comparisons except under relatively rare circumstances that make use of the transaction-to-transaction method more appropriate. *See Notice of Final Determination of Sales at Less Than Fair Value: Coated Free Sheet Paper from the Republic of Korea*, 72 FR 60630 (October 25, 2007), and the *Matter of Sales at Less Than Fair Value of Certain Softwood Lumber from Canada, Remand Redetermination*, Secretariat File No. USA-CDA-2002-1904-02 (July 11, 2005), at 11. The Department does not have a practice of using transaction-to-transaction comparisons for certain transactions and A-A comparisons for other transactions in calculating the weighted-average dumping margin. *See Wood Flooring* and accompanying IDM at Comment 4. Rather, the Department chooses the appropriate comparison method and applies it uniformly for all comparisons of NV and export price or constructed export price. *Id.*

We find that the language of section 777A(d)(1)(B) of the Act does not preclude adopting a similarly uniform application of A-T comparisons for all transactions when satisfaction of the

statutory criteria suggests that application of the A-T method is the appropriate method. *See PRCBs* and accompanying IDM at Comment 1; *Wood Flooring* and accompanying IDM at Comment 4. The only limitations the statute places on the application of the A-T method are the satisfaction of the two criteria set forth in the provision. *Id.* When the criteria for application of the A-T method are satisfied, section 777A(d)(1)(B) of the Act does not limit application of the A-T comparison methodology to certain transactions. Instead, the provision expressly permits the Department to determine dumping margins by comparing weighted-average NV to the export price (or constructed export price) of individual transactions. We find that this interpretation is a reasonable one and is more consistent with our approach to selection of the appropriate comparison method under section 777A(d)(1) of the Act more generally. Accordingly, we are not applying A-T comparisons to only a subset of sales. Instead, if the criteria of section 777A(d)(1)(B) of the Act are satisfied, we will apply A-T comparisons for all sales in calculating the weighted-average dumping margin. We find that it is reasonable to apply A-T comparison methodology to all sales because doing otherwise conceals margins associated with targeted sales. Accordingly, consistent with our decision in *PRCBs* and *Wood Flooring*, we are exercising our interpretive authority without relying upon the withdrawn regulation. *See United States v. Eurodif S.A.*, 129 S. Ct. 878, 885-887, n. 7 (2009) (explaining that the tolling regulation withdrawn by the Department cannot constrain the Department's interpretive authority under *Chevron*). Thus, if the criteria of section 777A(d)(1)(B) of the Act are satisfied, as is the case in this investigation for Dubai Wire and Precision, we will apply the alternative A-T methodology for all sales in calculating the weighted-average dumping margin. *See Coated Paper* and accompanying IDM at Comment 3; *Wood Flooring* and accompanying IDM at Comment 4.

Lastly, we do not agree with Dubai Wire and Precision that we did not comply with the requirements of the APA when we withdrew the targeted dumping regulations in December 2008.⁶ The petitioner is correct that this issue has been previously addressed by the Department. As we stated in other proceedings, the targeted dumping regulation was withdrawn in a determination separate from this antidumping duty proceeding and a notice of withdrawal was published in the *Federal Register*. *See Coated Paper* and accompanying IDM at Comment 3, citing *Withdrawal of the Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations*, 73 FR 74930 (December 10, 2008). Additionally, the Department explained in the withdrawal notice that it found good cause existed in this instance to waive the notice and comment period. *See Withdrawal of Targeted Dumping Regulations*, 73 FR at 74931. Further, as we stated above, a withdrawn regulation does not constrain our interpretive authority. *See Coated Paper* and accompanying IDM at Comment 3; *Wood Flooring* and accompanying IDM at Comment 4.

Zeroing under the Average-to-Transaction Comparison Methodology in Investigations

Comment 5: Dubai Wire asserts that the Department's statutory authority to apply A-T methodology does not give rise to its statutory authority to deny offsets in the margin calculations. Dubai Wire argues that the practice of zeroing has no statutory basis and has been found illegal by the World Trade Organization. In fact, citing the Department's policy change in

⁶ The APA allows an agency to change regulations after notifying the public, soliciting comments, considering those comments, and publishing final rules at least thirty days before they come into force. *See* 5 U.S.C. § 553.

Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification, 71 FR 77722 (December 27, 2006) (*Final Rule*), Dubai Wire asserts that the Department abandoned the application of zeroing in investigations. Dubai Wire contends that an affirmative finding of targeted dumping does not sanction the Department in resurrecting its practice of zeroing in investigations. Citing *Dongbu Steel Co. v. United States*, 635 F.3d 1363 (CAFC 2011) (*Dongbu*) and *JTEKT Corp. v. United States*, 642 F.3d 1378 (CAFC 2011) (*JTEKT*), Dubai Wire and Precision assert that the Department's practice arising from its inconsistent interpretation of section 771(35) of the Act, in applying zeroing in administrative reviews (which are based on A-T comparisons) while allowing offsets in investigations (which are based on A-A comparisons), has been rejected by the Court of Appeals for the Federal Circuit. Precision argues that the decision in *Dongbu* favors a conclusion that it is not permissible to adapt a different interpretation of section 771(35) of the Act for investigations involving the A-T comparison methodology (invoking the application of zeroing) and investigations involving the A-A comparison methodology in which offsets are allowed.

Dubai Wire argues that there is a misconception that, when the Department changed its targeted dumping methodology in *Notice of Final Determination of Sales at Less Than Fair Value: Coated Free Sheet Paper from the Republic of Korea*, 72 FR 60630 (October 25, 2007), it applied zeroing to the targeted sales. Dubai Wire asserts that, instead, the Department simply disallowed the positive values associated with the potentially uncollectible dumping duties of the targeted sales to be offset by the negative value associated with the potentially uncollectible dumping duties of the targeted sales. Dubai Wire argues that it would not make any sense to apply zeroing to the presumably high-margin targeted sales. Accordingly, Dubai Wire argues that zeroing was, in fact, not applied until the Department announced its targeted dumping policy change in *PRCBs* when it started applying the A-T methodology to all U.S. sales. Dubai Wire argues that in the *PRCBs* investigation, contrary to numerous court cases, the Department applied zeroing by making the appearance that the A-T methodology could not be used without it.

The petitioner argues that *Dongbu* did not specifically strike down the Department's use of zeroing when calculating margins using the A-T comparison methodology. Rather, the petitioner asserts, the court in *Dongbu* sought the explanation for the Department's use of zeroing under the A-T comparison methodology and not under the A-A comparison methodology.

The petitioner asserts that the A-T comparison methodology necessitates the use of zeroing because, were it not so, the provisions of section 777A(d) of the Act (setting forth various comparison methodologies to be used in calculating the weighted average margin) will be rendered meaningless because the margin calculation result will be the same under both methodologies used in the investigations. The petitioner contends that this is the case because, if zeroing is not used, all positive margins are offset by all negative margins under either an A-A or A-T comparison methodology. Citing various World Trade Organization Panel reports, the petitioner contends that this principle has been expressly recognized. The petitioner argues that the mandate instituted by Congress into law in 1994, requiring the use of the particular comparison methodology in investigations, demonstrates that Congress intended the Department to engage in zeroing. In short, the petitioner argues that there is simply no purpose to the

targeting provision of the statute if non-dumped sales are allowed to offset dumped sales because the same result would be obtained under the A-A comparison methodology.

Department's Position: We do not have a practice of granting offsets for non-dumped sales when applying the alternative A-T methodology under section 777A(d)(1)(B)(ii) of the Act. *See Final Rule*, 71 FR at 77722. While it is our standard practice to grant offsets for non-dumped comparisons when using the standard A-A methodology in an investigation, we have not adopted a similar standard practice in the context of applying the alternative A-T methodology to respondents' sales. *See Final Rule*, 71 FR at 77722. Therefore, to the extent that application of the alternative A-T methodology demonstrated that any of Dubai Wire's or Precision's sales are not dumped, we did not provide offsets for such sales to reduce the amount of dumping found on other sales. *See OCTG* and accompanying IDM at Comment 2, *Coated Paper* and accompanying IDM at Comment 5.

Section 777A(d)(1) of the Act and 19 CFR 351.414 provide the methods by which NV may be compared to export price or constructed export price. Specifically, the statute and regulations provide for three comparison methods: A-A, transaction-to-transaction, and A-T. These comparison methods are distinct from each other, and each produces different results. When using transaction-to-transaction or A-T comparisons, a comparison is made for each export transaction to the United States. When using A-A comparisons, a comparison is made for each group of comparable export transactions for which the export price or constructed export price have been averaged together.

In light of the comparison methods provided for under the statute and regulations, we find that the offsetting method is appropriate when aggregating the results of A-A comparisons and is not similarly appropriate when aggregating the results of A-T comparisons, such as were applied in the final determination of this investigation. We interpret the application of A-A 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 A-T 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 A-A comparison methodology allows for an overall examination of pricing behavior on average. Our interpretation of section 771(35) of the Act to permit zeroing in A-T comparisons, as in this investigation, and to permit offsetting in A-A comparisons reasonably accounts for differences inherent in the distinct comparison methodologies.

In upholding the Department's decision to cease zeroing in A-A comparisons in antidumping duty investigations, the Federal Circuit accepted that the Department likely would have different zeroing practices between A-A and other types of comparisons in antidumping duty investigations. *See United States Steel Corp. v. United States*, 621 F.3d 1351, 1363 (CAFC 2010) (*U.S. Steel Corp.*) (stating that the Department indicated an intention to use zeroing in A-T comparisons in investigations to address concerns about masked dumping). The Federal Circuit's reasoning in upholding the Department's decision relied, in part, on differences between various types of comparisons in antidumping duty investigations and the Department's limited decision to cease zeroing only with respect to one comparison type. *Id.* at 1361-63. The Federal Circuit acknowledged that section 777A(d) of the Act permits different types of

comparisons in antidumping duty investigations, allowing the Department to make A-T comparisons where certain patterns of significant price differences exist. *See id.* at 1362 (quoting sections 777A(d)(1)(A) and (B) of the Act, which enumerate various comparison methodologies that the Department may use in investigations). The Federal Circuit also expressly recognized that the Department intended to continue to address targeted or masked dumping through continuing its use of A-T comparisons and zeroing. *See id.* at 1363. In summary of its understanding of the relationship between zeroing and the various comparison methodologies that the Department may use in antidumping duty investigations, the Federal Circuit acceded to the possibility of disparate, yet equally reasonable interpretations of section 771(35) of the Act, stating that “{b}y enacting legislation that specifically addresses such situations, Congress may just as likely have been signaling to Commerce that it need not continue its zeroing methodology in situations where such significant price differences among the export prices do *not* exist.” *Id.* (emphasis added). Furthermore, the Court of International Trade recently sustained the Department’s explanation for using zeroing in administrative reviews while not using zeroing in certain types of investigations. *See Union Steel v. United States*, Consol. Court No. 11-00083, slip op. 12-24 (CIT Feb. 27, 2012).

As such, our interpretation of section 771(35) of the Act reasonably accounts for inherent differences between the results of distinct comparison methodologies. We interpret 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 A-A comparison and the result of an A-T comparison.

We do not find the decision in *Dongbu* and *JTEKT* controlling with respect to our specific practice in investigations of disallowing offsets for non-dumped sales when applying the alternative A-T methodology under section 777A(d)(1)(B)(ii) of the Act. These holdings were limited to finding that the Department had not adequately explained the different interpretations of section 771(35) of the Act in the context of investigations versus administrative reviews, but the Federal Circuit and Court of International Trade did not hold that these differing interpretations were contrary to law. We generally accepted that, when offsets are used, the mathematical equivalence is obtained regardless of whether the A-A methodology or the A-T methodology was applied to all sales. *See OCTG* and accompanying IDM at Comment 6. As such, the petitioner is correct that the intent of section 777A(d)(1) of the Act is not effectuated if offsets are used under the A-T comparison methodology. This is so because record evidence shows that for both *Dubai Wire* and *Precision*, the A-A comparison methodology masks 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.

Constructed Value Profit

Comment 6: *Dubai Wire* agrees with the Department’s *Preliminary Determination* that constructed value (CV) profit should be calculated based on section 773(e)(2)(B)(iii) of the Act. However, *Dubai Wire* argues that Arab Heavy Industries (AHI) should not be used for calculating CV profit because it results in an “irrational and unrepresentative result” for the following reasons: 1) AHI’s primary business activity is repairing ships for the marine industry and AHI does not produce or sell merchandise in the same general category as *Dubai Wire*; 2) in

the *UAE Nails 2008* investigation, the Department recognized that Dubai Wire's affiliate, Global Fasteners Limited (GFL) (a producer and seller of screws and seller of further processed nails purchased from Dubai Wire) was a more appropriate surrogate than AHI; 3) the Department has applied a much lower profit rate than AHI's for nails in past cases using third party financial statements; 4) during the preliminary investigation of material injury in the instant investigation, the U.S. International Trade Commission reported a much lower profit for U.S. nail producers than that of AHI; and 5) a review of U.S. industries engaged in production of products more similar to nails than AHI's shipbuilding operations reveals profitability similar to GFL and distinctly different from AHI. Dubai Wire also argues that AHI's profit should not be used because there are more reasonable surrogate financial statements on the record than AHI's. This includes Al Jazeera Steel Products Co. SAOG, an Omani company that produces steel products, Conares Metal Supply Limited (Conares), a UAE company that manufactures tubes and pipes, National Metal Manufacturing and Casting's Companies (NMN), a Saudi Arabia manufacturer of steel wire rod and wire related products, including nails, Abu Dhabi National Company for Building Materials (BILDICO), a UAE manufacturer and trader of a wide range of building materials, and GFL.

Instead of using AHI's 2010 profit, Dubai Wire advocates that the Department use GFL's 2010 profit on sales of screws and nails, which is merchandise in the same general category as nails. Dubai Wire argues that the methodological concerns the Department found at its cost verification are without merit. Specifically, GFL sold only a *de minimis* quantity of nails during the POI and its nails allocation methodology was valid. GFL's weight-based cost allocation methodology for determining the cost of sales of screws is reasonable because the cost of carbon steel wire per kilogram is identical for virtually all screws produced. In addition, Dubai Wire states that GFL's processing costs to produce screws are substantially similar for all models, notwithstanding the fact that screws may vary in size and thickness, *etc.* Dubai Wire contends that a more specific cost analysis would have been burdensome and unwarranted because of the insignificant cost difference associated with producing the various types of screws. Dubai Wire argues that if the Department disagrees with its methodology then it should use the combined profit on GFL's home market and export sales of screws. Dubai Wire also states that included in GFL's 2010 CV profit calculation are imputed interest from affiliated loans and income from a 2009 and 2010 screw project as reflected in its normal books and records. Dubai Wire states that in *UAE Nails 2008* the Department based CV profit for Dubai Wire on GFL's profit from domestic sales of nails and screws. Alternatively, Dubai Wire argues, if the Department does not use GFL's 2010 profit, it should use GFL's fiscal year 2010 audited financial statements, which show a net profit for 2010. As a third option, Dubai Wire argues that GFL's fiscal year 2009 financial statements should be used to calculate CV profit. Dubai Wire concludes that if the Department determines that GFL operated at a loss then the Department should use a profit of zero as the best information on the record as to the profit cap.

Precision asserts that the Department's use of AHI's financial statements in the *Preliminary Determination* to calculate and apply a CV profit rate of 34.8% was unlawful and unreasonable. Precision argues that for the final determination the Department should use a different source to calculate CV profit. Precision asserts that the use of AHI's profit rate is contrary to the requirement and purpose of section 773(e)(2)(B)(iii) of the Act, which directs the Department to apply a profit rate that represents profits normally realized by manufacturers producing and

selling merchandise in the same general category as the subject merchandise. Precision argues that AHI is a ship repair and ship building company that does not produce any products remotely in the same general category as steel nails. Therefore, it argues, using AHI's financial statement leads to an irrational and unrepresentative result. Precision cites to AHI's website which it claims demonstrates that AHI is primarily a ship repair company and that any production the company might have engaged in was custom designed to support its ship repair services (e.g., the construction of platforms and other structures to support its repair of ships). Precision points out that AHI's financial statements do not include raw materials, inventories, or cost of sales. Precision also notes that "materials and subcontractor costs" are less than the total "payroll and related expenses" of AHI, which supports the conclusion that it is primarily a services company and not a steel manufacturer.

Precision asserts that the Department should follow alternative (i) under section 773(e)(2)(B) of the Act and calculate CV profit using Precision's profit on the sales of drawn wire in the home market. Precision points to record evidence that drawn wire is a product in the same general category as steel nails⁷ and cites *Magnesium Metal from the Russian Federation*⁸ as support that the Department prefers to use a respondent's own profit experience in calculating CV profit. Precision asserts that it produced all of the drawn wire that it sold and that Precision meets the Department's "totality of circumstances" standard (i.e., when considering which party is the "producer" the Department considers such factors as whether the producer purchases all of the inputs, pays the subcontractor a processing fee, and maintains ownership at all times of the inputs as well as the final product).⁹ Additionally, Precision argues that the statute imposes no minimum quantity requirement for domestic sales to be eligible for use as measures of profitability under section 773(e)(2)(B)(i) of the Act.

Alternatively, Precision argues that if the Department concludes that it cannot rely on Precision's profit on its sales of drawn wire, then under section 773(e)(2)(B)(iii) of the Act it could use the information for one or a combination of several other producers of merchandise in the same general category as the subject steel nails whose financial statements are on the record. Precision suggests that the Department could use the profit realized on GFL's 2010 domestic sales of screws in the UAE or GFL's 2009 financial statements. Further, Precision suggests the Department could use the financial statements of BILDCO or Conares, two steel manufacturers located in the UAE. Additionally, Precision suggests that the Department could use the profit rate of Al Jazeera, a producer of steel products in Oman, or the profit rate of NMN, a Saudi Arabian steel nail producer. Precision argues that Al Jazeera and NMN are appropriate sources because Oman, Saudi Arabia, and the UAE are all part of the Gulf Cooperation Council which formed a single common market by agreement, essentially expanding the home market of the UAE to encompass these other countries.

⁷ See Precision's August 31, 2011, response at Exhibit SA-8 and its September 27, 2012, response at Exhibit S2D-5.

⁸ See *Magnesium Metal from the Russian Federation: Final Determination of Antidumping Duty Administrative Review*, 76 FR 56396 (September 13, 2011) (*Magnesium Metal from the Russian Federation*).

⁹ See *Certain Pasta from Italy: Preliminary Results of New Shipper Antidumping Duty Administrative Review*, 63 FR 5641 (October 6, 1998).

Finally, Precision asserts that regardless of the method used to calculate CV profit, the Department is statutorily obligated under section 773(e)(2)(B)(iii) of the Act to limit the profit rate to a rate normally realized by other exporters or producers in the foreign country of merchandise in the same general category of products as the subject merchandise (*i.e.*, the “profit cap”). Precision contends that GFL sold products in the home market (*i.e.*, steel screws) that are in the same general category as the subject merchandise, and therefore the Department must limit CV profit to the profit experienced by GFL on its sales of steel screws. Precision contends that the profit cap provision is applicable even when the profit is actually a loss, and that there is no requirement in the statute that the sales be made in the ordinary course of trade.

The petitioner argues that, for the final determination, the financial statements of AHI continue to be the best source on the record from which to calculate CV profit for Dubai Wire and Precision. The petitioner advocates that for the final determination, the Department must continue to base CV profit upon section 773(e)(2)(B)(iii) of the Act. The petitioner contends that AHI is the best information available on the record because: (1) it is a UAE company that produces fabricated steel products which is merchandise in the same general category as steel nails; (2) its data is publicly available; (3) it has contemporaneous financial statements from which to calculate profit for the POI; (4) no evidence demonstrates that its financial data is exclusively or predominantly U.S. sales; and (5) its profit is reflective of profits realized from sales within the UAE. The petitioner maintains that the Department should establish a profit cap using facts available with the best information on the record, AHI data.

In analyzing the best option under any other reasonable method, the petitioner asserts that the Department must reject GFL as a potential source for CV profit because its data is neither reasonable nor accurate. The petitioner states that the Department reviewed the 2010 profit reported on screws and nails by GFL, as a potential source for CV profit. The petitioner argues that GFL’s profit reported on its 2010 domestic sales of screws and nails is critically flawed resulting in an inadequate and unreliable CV profit because: (1) GFL reported the cost of nails based on its affiliate’s cost of nails; (2) GFL reported the cost of screws as simply its total cost of sales less its affiliate’s cost of nails; (3) GFL allocated the flawed total cost of screws between the export and domestic markets with an overly simplified volume weight-based ratio that did not account for cost differences due to the sizes and types of screws sold; (4) imputing interest on affiliated loans results in a loss for GFL; and (5) GFL improperly included reimbursements from a research and development project for plastic screws.

The petitioner argues that Precision’s sales of drawn wire in the home market are not an appropriate basis to calculate CV profit because the quantities sold were insignificant, and as such do not represent the true home market profit rate. The petitioner also contends that Precision did not produce the drawn wire that it sold.

Although numerous third party financial statements were submitted by Dubai Wire and Precision as possible CV profit alternatives to AHI, the petitioner argues that none represents a more reasonable profit than that of AHI. Specifically, financial statements from companies outside of the UAE are not an appropriate basis for CV profit as the Department has consistently relied on profit from home-market sources when applying alternative (iii). Of the UAE-based alternative third party financial statements submitted, BILDICO and Conares, the petitioner argues that

although these two companies are located within the UAE they are inappropriate for determining CV profit. BILDSCO is a trading company that produces some cement products and cuts and bends rebar, but does not produce any steel products. For Conares, both the ranged public and proprietary financial statements are on the record. The petitioner claims that the ranged public financial statements are more representative of a trading company than a manufacturer, and the Department has never before used third party ranged public data in an investigation. The petitioner argues that Conares' proprietary financial statements cannot be used for CV profit because when scrutinized, the data from the proprietary financial statements is flawed.

Finally, the petitioner argues that the Department should reject Precision's claim that the Department is statutorily required to apply a profit cap using GFL's financial data even if that data results in a loss. The petitioner argues that the Department determined that the 2010 loss on GFL's sales of screws in the home market was not an acceptable basis for CV profit in the preliminary determination, and therefore it is also not appropriate to use as the profit cap. The petitioner contends that if the Department determines that a profit cap is necessary in the final determination, then it should use facts available and apply AHI's rate as the profit cap. The petitioner points out that the Court of International Trade affirmed the Department's ability to use facts available to establish a profit cap and base the profit rate and cap on the same data.¹⁰ The petitioner contends that the financial statements of Al Jazeera, NMN, Conares, and BILDSCO are also unacceptable sources to calculate the profit cap because the profit on sales of merchandise comparable to steel nails in the UAE, as required by section 7739(e)(2)(B)(iii) of the Act, cannot be determined from these financial statements. Additionally, the petitioner points out that GFL's and Conares' data cannot be used because they are proprietary.

Department's Position: In the *Preliminary Determination*, under section 773(e)(2)(B)(iii) of the Act, the Department relied on AHI's 2010 financial statements to calculate CV profit for both Dubai Wire and Precision based on "any other reasonable method in connection with the home market sales of merchandise that is in the same general category of products as the subject merchandise." AHI is a publicly owned joint stock company located in the UAE that primarily is in the business of ship repair, conversion, shipbuilding and steel fabrication services to the marine, offshore and engineering industries.

After the *Preliminary Determination*, parties placed new financial statements on the record that we have considered below. Interested parties have made arguments on whether we should select certain financial statements and how certain expenses should be treated for purposes of calculating CV profit. We have addressed each argument below.

We have revised our *Preliminary Determination* regarding the calculation methodology for CV profit. For this final determination, we have determined that BILDSCO's financial statements constitute the best available information on the record for CV profit for Dubai Wire and Precision. As discussed in the *Preliminary Determination*, respondents Dubai Wire and Precision did not have a viable home or third country market during the POI. Therefore, we are not able to determine the CV profit in accordance with section 773(e)(2)(A) of the Act. In situations where we cannot calculate CV profit under section 773(e)(2)(A) of the Act, section

¹⁰ See *Atar S.R.L v. United States*, 703 F. Supp. 2d 1359 (CIT 2010).

773(e)(2)(B) of the Act sets forth three alternatives. There is no hierarchy or preference among these alternative methods. *See* Statement of Administrative Action (SAA) at 840, H.R. Doc. 103-316 (1994).

Section 773(e)(2)(B)(i) of the Act specifies that profit may be calculated based on “actual amounts incurred by the specific exporter or producer . . . of merchandise that is in the same general category of products as subject merchandise.” Dubai Wire and Precision produce both merchandise under consideration and other products that could be considered to be in the same general category of merchandise (*e.g.*, roofing nails and drawn wire, respectively). We disagree, however, that basing the CV profit calculation on the respondents’ extremely low volume of home market sales of roofing nails and drawn wire is appropriate in this case. Although the statute does not impose a minimum quantity requirement under section 773(e)(2)(B)(i) of the Act, we find that Precision’s and Dubai Wire’s home market sales of drawn wire and roofing nails, respectively, are too insignificant to represent a meaningful home market profit rate.¹¹

Section 773(e)(2)(B)(ii) of the Act specifies that profit may be calculated based on “the weighted average of the actual amounts incurred and realized by {other} exporters or producers that are subject to the investigation or review. . . .” However, we are not able to calculate profit based on this alternative for either Precision or DWE because these are the only two producers subject to the investigation and neither company had a viable home or third country market during the POI.

Thus, we must calculate CV profit for Dubai Wire and Precision under section 773(e)(2)(B)(iii) of the Act. Pursuant to section (iii), the Department has the option of using any other reasonable method, as long as the result is not greater than the amount realized by exporters or producers “in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise,” an amount referred to as the “profit cap.” The profit cap cannot be calculated in this case because there is no record information on the profit normally realized by exporters or producers in connection with the sale, for consumption in the foreign country, of the merchandise in the same general category. The proxy financial statements provided by the respondents reflect both export and domestic sales in the UAE and appear to include products other than just the general category of merchandise. Further, GFL’s reported profit information on the domestic sales of screws contains critical flaws as discussed below, and therefore cannot be used. Therefore, because there is no useable profit cap information available on the record, as facts available, we are applying section 773(e)(2)(B)(iii) of the Act, without quantifying a profit cap. This decision is consistent with the Department’s decision in previous cases involving similar circumstances.¹²

In this case, we have six potential financial statements to use for calculating CV profit. In past

¹¹ *See* Precision’s September 27, 2011, response at exhibit S2D-5; *see* Dubai Wire’s September 26, 2011, response at exhibit S3-24 (a).

¹² *See Notice of Final Determination of Sales at Less Than Fair Value: Pure Magnesium from Israel*, 66 FR 49349 (September 27, 2001), and accompanying Issues and Decision Memorandum at Comment 8 (*Pure Magnesium from Israel*); and *Frozen Concentrated Orange Juice from Brazil: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 66 FR 51008 (October 5, 2001), and accompanying Issues and Decision Memorandum at Comment 3.

cases, when determining which financial statement(s) to use for calculating CV profit under section (iii) we have weighed several factors, including: (1) similarity of the potential surrogate company's business operations and products to the respondent; (2) the extent to which the financial data of the surrogate company reflects sales in the United States as well as the home market; (3) the contemporaneity of the surrogate data to the POR; and, (4) the similarity of the customer base.¹³ The greater the similarity in business operations and products, the more likely that there is a greater correlation in the profit experience of the companies. *Id.*

We have on the record financial statements for Al Jazeera, an Omani producer of steel products, and NMN, a Saudi Arabian producer of steel products. Regardless of whether these companies operate in countries located near the UAE or that Oman and Saudi Arabia are members of the Gulf Cooperation Council along with the UAE, we disagree that the profit experience of these companies reflects the profit experience for a UAE company on sales of merchandise that is in the same general category in accordance with section 773(e)(2)(B) of the Act because these companies are not UAE companies. In accordance with section 773(e)(2)(B) of the Act, we generally seek to the extent possible home market profit experience.¹⁴

Subsequent to the *Preliminary Determination* we further analyzed the submitted profit information for GFL's domestic sales of screws and nails, and have determined that the information has critical flaws resulting in an unreliable profit figure. In its submitted CV profit calculation, GFL included its 2010 sales for screws and nails. Although GFL produces all of the screws it sells, it does not produce nails. The nails sold by GFL are purchased from GFL's affiliate, Dubai Wire. In its CV profit calculation, GFL included Dubai Wire's cost for producing the nails it sold instead of the transfer price GFL paid for purchasing the nails from Dubai Wire. Additionally, GFL calculated the cost of screws sold as its total company-wide cost of sales less Dubai Wire's cost of nails sold by GFL, as opposed to GFL's actual cost of producing the screws it sold. Further, to allocate the calculated cost of screw sales between domestic and export markets, GFL calculated a single per kilogram cost for all screws sold, regardless of the physical characteristics of the screws sold. GFL's overly simplified weight-based allocation fails to account for cost differences due to the sizes and types of screws sold, and ignores the impact of product mix in and between markets (*i.e.*, domestic and export). Dubai Wire cites to its supplemental section C response dated September 8, 2011 at 4, where it claims that materials costs are identical per kilogram for virtually all screws produced, and that GFL's processing costs to produce screws of different sizes are similar for all types of screws. These claims, however, are unsupported assertions as they only explain how Dubai Wire allocated costs between home and export markets rather than supporting mathematically that costs per kilogram for all screws are identical.

¹³ See, *e.g.*, *Certain Lined Paper Products from India: Notice of Final Results of Antidumping Duty Administrative Review and Partial Rescission of Antidumping Duty Administrative Review*, 76 FR 10876 (February 28, 2011) and accompanying Issues and Decision Memorandum at Comment 3; and *Notice of Final Determination of Sales at Less Than Fair Value: Pure Magnesium from Israel*, 66 FR 49349 (September 27, 2001), and accompanying Issues and Decision Memorandum at Comment 8.

¹⁴ See *Pure Magnesium from Israel*.

Record evidence indicates that both nails and screws are wire-drawn, heat treated, electro-galvanized and phosphate processed.¹⁵ Similar to the nails produced by Dubai Wire, GFL produced a large variation of screw types, varying in length, width, head-type, and application. In order to gauge the extent to which production costs may vary for different sizes and types of screws produced, we looked to Dubai Wire's reported nail costs for the various nail types and sizes produced. We found that Dubai Wire's nail costs, for both materials and conversion costs, do in fact vary significantly depending on the size and type of nail. *See* the Memorandum to Neal Halper from Gary Urso (Dubai Wire), entitled "Constructed Value Calculation Adjustments for the Final Determination, attachment 3," (Dubai Wire Cost Memorandum) dated concurrently with this memorandum for the proprietary analysis. We also disagree with Dubai Wire's comment that any methodological concerns regarding the cost of screws and nails are negated if we use GFL's combined profit from the sales of screws and nails worldwide. This alternative misses the point of using a profit figure derived from home market sales of products in the same general category.

Dubai Wire makes additional arguments about the appropriate interest rate to use for GFL's affiliated loans and whether GFL's other income from a plastic screw project should be included in its calculation of GFL's profit. As we have determined that, for other more significant reasons discussed above, GFL's reported profit calculation results in an unreliable profit figure, we do not reach these issues.

We disagree with Dubai Wire's assertion that even if we do not use GFL's profit on its 2010 sales of screws and nails, we should simply use GFL's company-wide 2009 or 2010 financial statements. GFL's 2009 and 2010 company-wide financial statements primarily reflect export sales of nails and screws, instead of home market sales as is used in calculating CV profit. *See* Dubai Wire's Section A Questionnaire Response dated June 23, 2011, at exhibits A-9 (a) and A-9 (b). Further, we disagree that when a respondent (*i.e.*, Dubai Wire) has access to a company's data (*i.e.*, GFL in this case) whereby it is able to calculate the profit on home market sales of the general category of merchandise, that it should be able to choose when to report a world-wide profit versus a home market profit. In this instance, it is expected that Dubai Wire will report GFL's home market profit experience using a reasonable methodology. In calculating an amount for CV profit, it is the responsibility of the holder of the data, the respondent, to present to the Department a reasonable, and verifiably accurate methodology. We reject Dubai Wire's explanation that to provide the Department with a more precise screw cost allocation would have been burdensome. We do not consider it appropriate to rely on inaccurate information because it would have required more work for the respondent to provide the accurate data. In summary, we do not consider any of GFL's submitted profit information a reasonable or reliable alternative for calculating CV profit.

As for Dubai Wire's claim that the Department accepted GFL's profit on nails and screws in the prior LTFV investigation, we are not bound by prior segment decisions. *See Certain Frozen Warmwater Shrimp from Ecuador: Final Results of Antidumping Duty Administrative Review*, 74 FR 47201 (September 15, 2009) and accompanying IDM at Comment 12. It is an established principle that each administrative review is a separate segment of the proceeding. *See Shandong*

¹⁵ *See* September 26, 2011, response at Exhibit S3-3.

Huarong Mach. Co. v. United States, 29 CIT 484, 491 (CIT 2005). Similarly, one investigation does not constrain a subsequent investigation in this respect.

We have not used Conares's 2010 financial statements for CV profit because it is our practice to use non-proprietary, publicly available financial statements when presented with third-party financial statements. Because Conares's statements are proprietary and not publicly available, we do not reach the petitioner's argument that Conares's proprietary financial statements are flawed. We did not use Conares's publicly ranged financial statements because they are imprecise and do not reflect the segmented operations that are reported in the proprietary version.

Based on our analysis, we consider BILDCO's 2010 financial statement data to be the best source for CV profit for Precision and Dubai Wire. We compared the 2010 financial statements of BILDCO and AHI, two companies located in the UAE and find that the BILDCO financial information is a better source for calculating CV profit than that of AHI. While neither company produces subject merchandise, BILDCO's business operations and products appear to be more similar to those of Precision and Dubai Wire. We disagree with the petitioner that BILDCO is an inappropriate source for CV profit because it does not produce any steel products. The record shows that BILDCO is a trader and manufacturer of building materials and is also a steel processor.¹⁶ While BILDCO does not produce the steel it sells, it does have a steel processing facility to cut and bend steel, and it operates within the same UAE construction industry as Dubai Wire and Precision.¹⁷ Comparatively, the principal activities of AHI are ship repair, shipbuilding and fabrication of relatively sophisticated products such as platforms, barges, and pontoons.¹⁸ Moreover, BILDCO's customer base, the construction industry, is the same as Precision's and Dubai Wire's, whereas AHI's customer base includes the marine, offshore, and engineering industries.¹⁹ While it appears that both companies sell a substantial amount of their products and services in the UAE, based on record evidence we could not quantify for either company the amounts of their products or services sold in the U.S. or home market. *See* Precision's factual information letter, dated December 2, 2011, at exhibit FA-3, for BILDCO, and *See* Memorandum to Neal Halper from Gary Urso (Dubai Wire), entitled "Constructed Value Calculation Adjustments for the Preliminary Determination" dated October 27, 2011, for AHI. With regard to contemporaneity, both companies' financial statements coincided with the POI.

In sum, we determined that the profit from BILDCO is a more reasonable option than the profit of AHI which is predominately a provider of services and products to a customer base of marine, offshore, and engineering industries which is substantially divergent from that of Precision and Dubai Wire. *See* Memorandum to Neal Halper from James Balog (Precision), entitled

¹⁶ *See* Precision's December 2, 2012 submission at Exhibit FA-4.

¹⁷ *Id.*

¹⁸ *See* Dubai Wire's November 3, 2011 submission at Exhibit 1.

¹⁹ *See* Precision's December 2, 2011 submission at Exhibit FA-4 and Dubai Wire's November 3, 2011 submission at Exhibit 1.

“Constructed Value Calculation Adjustments for the Final Determination” dated concurrently with this notice; and Dubai Wire Cost Memorandum.

Constructed Value Selling Expenses

Comment 7: Precision states that, in the *Preliminary Determination*, the Department properly calculated Precision’s selling-expense ratios pursuant to section 773(e)(2)(B)(i) of the Act, *i.e.*, based on Precision’s sales of merchandise in the same general category of product as the subject merchandise. (Precision acknowledges that 773(e)(2)(A) of the Act was not applicable because the home market was not viable for purposes of establishing NV.) Precision argues, however, contrary to alternative (i) of 773(e)(2)(B), the Department calculated the selling expense ratios on a company-wide basis, which incorrectly incorporated export sales. *See* Precision’s September 7, 2011, response at Exhibit S2D-5. *See also* Precision’s Preliminary Results Analysis Memorandum (October 27, 2011) at 5 and attachment B. Precision argues that section 773(e)(2)(B)(i) of the Act requires that selling expenses for CV be connected to the production and sale for consumption in the foreign country, *i.e.*, “the country in which the merchandise is produced” as defined in 19 CFR 351.405(b)(2). Therefore, for the final determination, Precision urges the Department to recalculate Precision’s selling expense ratios basing them on domestic sales of merchandise in the same general category, rather than on company-wide information.

The petitioner argues that for the final determination, the Department should continue to apply selling-expense ratios based on Precision’s company-wide expenses to calculate CV. Mid Continent asserts that Precision’s argument is premised on a fundamental error because Precision incorrectly states that the Department based its calculation of selling expenses on section 773(e)(2)(B)(i) of the Act. Rather, as clearly stated in the *Preliminary Determination*, the Department relied on section 773(e)(2)(B)(iii) of the Act, and therefore properly relied on Precision’s company-wide ratios. *See Preliminary Determination*, 76 FR at 68134.

Department’s Position: In the *Preliminary Determination*, we found that Precision did not have a viable comparison market for purposes of calculating NV. When establishing CV pursuant to section 773(a)(4) of the Act, as recognized by the petitioner, we determine selling, general and administrative expenses, and profit under section 773(e)(2)(B)(iii) of the Act. We did not rely on section (B)(i) as Precision argues. Instead, we selected section (iii) in the *Preliminary Determination* because it was the only viable alternative. As stated in the *Preliminary Determination*, 76 FR at 68134:

The statute does not establish a hierarchy for selecting among the alternative methodologies provided in section 773(e)(2)(B) of the Act. *See SAA* at 840. Section 773(e)(2)(B)(iii) of the Act specifies that profit and selling expenses may be calculated based on any other reasonable method as long as the result is not greater than the amount realized by exporters or producers “in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise” (*i.e.*, the profit cap).

As explained in Comment 6, *supra*, for this final determination, we continue to reject alternative section (B)(i) because Precision’s sales of drawn wire in the home market were of extremely low

quantities. *See, e.g.*, Precision's September 27, 2011, response at exhibit S2D-5. We also continue to reject alternative section (B)(ii) because GFL's financial statements are business proprietary information of Dubai Wire and they reflect predominantly export sales. We selected alternative section (B)(iii), using "any other reasonable method," because profit could be derived from contemporaneous, publicly available information from the UAE. We based profit on the financial statements of a producer of merchandise of the same general category. However, as in the *Preliminary Determination*, we were unable to rely on the same financial statements that were used to derive profit to calculate selling expenses because the source information did not provide enough detail to calculate the selling expenses ratios. In this final determination we have continued to use Precision's company-wide selling expense ratios to construct CV.

Affiliated Loans

Comment 8: The petitioner states that the Department should analyze the accrued interest from prior years included in the principal balance of Dubai Wire's affiliated loans and evaluate the interest paid on its affiliated loans during 2010 under section 773(f)(2) of the Act, *i.e.*, the transactions disregarded rule. In doing so, the Department should increase the amount of the 2008 and 2009 accrued interest included in the principal balance of the affiliated loans and include the amount of accrued interest for calendar year 2010 based on the adjusted principal balance of the loans from the affiliate because the affiliated interest rate was not at a market rate.

The petitioner presents two alternatives for calculating a market interest rate to use in evaluating the arm's length nature of affiliated loans under the transactions disregarded rule. First, the petitioner argues that the appropriate market interest rate is a weighted average rate based on loans Dubai Wire obtained from unaffiliated banks, adjusted to account for the time each loan was in effect during 2010. Alternatively, the petitioner argues that the Department should calculate a market interest rate from Dubai Wire's financial statements by dividing bank charges plus bank interest by the average time-adjusted balance for loans outstanding during 2010.

Dubai Wire presents two alternatives to calculate a market interest rate. First, Dubai Wire argues that the Department should use a calculated market interest rate from Dubai Wire's financial statements, by dividing interest expense by the average loan balance during 2010. Alternatively, Dubai Wire states that if the Department calculates a market interest rate based on the interest rates paid on outstanding loans during 2010, the calculation should include loans from unaffiliated banks and an unaffiliated supplier.

Dubai Wire argues that the interest rate used by the Department at the *Preliminary Determination* was excessive and that the Department's suggestion in its verification report to use an interest rate based on Dubai Wire's unaffiliated loans is also excessive because the unaffiliated loans are short-term loans whereas the affiliated loan is a long-term loan. In addition, Dubai Wire disputes the petitioner's suggested interest rate calculation based on the financial statements on the grounds that it includes bank charges. According to Dubai Wire, the bank charges are not related to Dubai Wire's borrowing activities and therefore should be excluded from the interest rate calculation. Dubai Wire also rejects the petitioner's claim that the accrued interest amounts from 2008 and 2009 are calculated at a below-market interest rate, thus understating the principal amount owed to the affiliate. Dubai Wire states that the petitioner has

incorrectly analyzed Dubai Wire's reported accrued 2008 and 2009 interest. Dubai Wire contends that the petitioner incorrectly assumes that Dubai Wire calculated the accrued interest for 2008 and 2009 with an interest rate much lower than it actually used, which respondent claims is a market rate for 2008 and 2009. Dubai Wire claims that the petitioner's use of a calculated market interest rate based on 2010 data and applying it retroactively to previous years is inappropriate. Dubai Wire argues that the interest rate used for the affiliated loan in 2008 and 2009 was accepted as a market interest rate in the last investigation and should be accepted in the present investigation. If the Department does not accept the interest rate used in the accrued interest calculations, the Department should apply the interest rate to the 2008 and 2009 accruals using an interest rate calculated from Dubai Wire's 2010 financial statements, excluding bank charges. Dubai Wire disagrees with the petitioner's proposed time based weighted-average loan methodology because Dubai Wire's suggested calculation of 2010 interest already takes into account the average balance of loans outstanding.

Department's Position: In the *Preliminary Determination*, we analyzed the interest expense on loans between Dubai Wire and its affiliate under the "transactions disregarded rule" of section 773(f)(2) of the Act, and determined that the interest rate charged was not at arm's length. As a result, we included an imputed interest expense amount associated with these non-arm's length affiliated loans.

For the final determination, we continue to find that the interest rate charged on loans between Dubai Wire and its affiliate was not at arm's length. As a result, and in accordance with the transactions disregard rule, we have applied a market interest rate to the affiliated loan balance to calculate an imputed interest amount to add to the reported interest expense. *See, e.g., Certain Lined Paper Products from India: Notice of Final Results of Antidumping Duty Administrative Review and Partial Rescission of Antidumping Duty Administrative Review* 76 FR 10876 (February 28, 2011) and accompanying IDM at Comment 1 (where we found that Super Impex had incurred interest-free intercompany loans and we added to Super Impex's reported interest expenses an imputed interest to capture the amount of interest free loans taken by Super Impex from its affiliates).

We agree with the petitioner that accrued interest applicable to the affiliated loans should be analyzed for years prior to 2010 (*i.e.*, 2008 and 2009) under the transactions disregarded rule but we disagree that the accrued interest from these years was not at arm's length. In 2010, Dubai Wire had outstanding loans with its affiliate that originated in 1996 and 1999. In 2004 and 2010, Dubai Wire restructured the terms of the 1996 and 1999 loans. The 2004 restructured terms applied through the end of 2009.²⁰ Because the loans were renegotiated with different terms effective December 31, 2009 forward, we consider this to constitute separately identifiable loans distinguishable by the cut-off date of December 31, 2009.²¹ As such, we consider it appropriate to use different arm's-length benchmark borrowing rates for analyzing the affiliated party loans, one for analyzing the 2008 and 2009 accrued interest, and another for analyzing the affiliated loans outstanding during 2010. We compared the affiliated interest rate associated with the

²⁰ See submission dated October 4, 2011 at 3-4.

²¹ See submission dated September 26, 2011 at 7-8.

renegotiation in 2004, which was used to calculate the 2008 and 2009 accrued interest, to the market interest rate we determined from a 2004 loan Dubai Wire obtained from an unaffiliated bank, and found the affiliated interest rate to be at arm's length. Accordingly, there is no basis to adjust the amounts of accrued interest on these loans. We additionally note that the terms applicable to the 2008 and 2009 loans were tested and found to be at arm's length in *UAE Nails 2008*. See Dubai Wire Cost Calculation Memo.

In determining the market interest rate to use for the POI, we relied on the interest rates on loans Dubai Wire obtained from unaffiliated banks during 2010. These loans represent actual commercial banking interest rates available in the UAE market to Dubai Wire. Although these rates are for short-term loans and the affiliated loans are long-term, this is the best information available on the record as Dubai Wire did not enter into any unaffiliated long-term loans during the POI. Further, based on record information, Dubai Wire paid comparable interest rates on both short and long-term loans in prior years.²² As Dubai Wire obtained a number of loans from unaffiliated banks in 2010, with a slight variation in the rates, we used the mid-point interest rate from these loans as our benchmark market rate. We did not calculate the market interest rate using Dubai Wire's financial statements because we have actual loan rates from unaffiliated UAE banks during the POI on the record, which we consider to be better information. This is better information because these loans represent actual commercial banking interest rates available in 2010 in the UAE market to Dubai Wire which is reflective of a market interest rate in 2010 in the UAE.

We disagree with the respondent that in calculating Dubai Wire's 2010 market interest rate, we should also include loans from unaffiliated suppliers. Loans from vendors have considerations other than simply commercial lending that may influence the rates ultimately charged. For example, a vendor may offer its customer favorable rates in order to maintain a good customer relationship. Accordingly, the Department excluded the supplier loan in the calculation of the market interest rate.

Cost Differences Unrelated to Differences in Physical Characteristics

Comment 9: Precision asserts that the Department's adjustment to direct material costs in the *Preliminary Determination* was unnecessary, unfounded, and should be eliminated for the final determination. Precision argues that it fully complied with the reporting requirements of the Department's Section D questionnaire by reporting a single weighted-average cost for each CONNUM using its normal accounting system. Precision argues that reporting a weighted-average direct material cost by steel type and finish is inconsistent with Precision's obligation to report costs using its normal accounting system. Precision contends that the Department's finding in the *Preliminary Determination* that Precision's reported costs result in differences unrelated to physical characteristics has no bearing on the dumping margin determination because the Department has not employed a methodology where the use of a difference in merchandise (DIFMER) adjustment would be necessary (*i.e.*, because NV is based on CV). Precision argues that the Department improperly re-averaged its costs to eliminate the effects of timing differences to calculate CV because the Department presumably would not do so if NV

²² See submission dated August 31, 2011 at 6-7.

had been based on prices on home market sales that may have been made at different times.

The petitioner argues that Precision reported its costs using a fundamentally unacceptable reporting methodology by not reporting direct material costs over the entire POI, which resulted in significantly different costs being reported for two nearly identical products due to timing differences (*i.e.*, the months in which the products were produced). The petitioner argues that a respondent is required to calculate and report CONNUM-specific costs based on POI weighted-average values for inputs used to produce the subject merchandise. The petitioner argues that if the Department were to compare sales prices for products to CV as reported by Precision then the comparison would not be based on a POI average direct material cost but on an average cost based on the month on which the product was produced, thus distorting the dumping margin calculation. The petitioner contends that the Department properly adjusted Precision's costs in the *Preliminary Determination* and should do so again for the final determination.

Department Position: We agree with the petitioner that Precision's reported direct material costs resulted in product-specific cost differences which were unrelated to differences in physical characteristics. Therefore, we have not altered the adjustment made at the *Preliminary Determination*. In the *Preliminary Determination* we reallocated the reported direct material costs to products by calculating a weighted average of the reported direct material costs by steel type and surface finish for the POI to alleviate the issue of cost differences unrelated to differences in physical characteristics. *See Preliminary Determination*, 76 FR at 68134.

In this case, because there is no viable home or third country market, NV is based on CV. Under section 773(f)(1)(A) of the Act, the Department is directed to rely on a company's normal books and records if those records are kept in accordance with the exporting or producing country's GAAP and reasonably reflect the costs associated with the production and sale of the merchandise under consideration. Precision reported its cost to produce nails using its normal books and records, which are based on the monthly per-unit inventory values of drawn wire²³ used to produce the products. We inquired of Precision in a supplemental questionnaire why there were large cost differences for several pairs of control numbers (CONNUMs) where the only physical characteristic difference between each pair was shank style.²⁴ Precision acknowledged in its response that the cost differences were caused mostly by factors other than differences in physical characteristics. *Id.* Although Precision calculated its reported costs using its normal books and records, in this case we find that those costs as reported are not reasonable because large differences in costs between CONNUMs are driven by factors other than physical characteristics.

Normally, under sections 773(f)(1)(A) and 773(a)(6)(c)(ii) and (iii) of the Act, a respondent's reported product costs should reflect cost differences attributable to the different physical characteristics. This ensures that the product-specific costs we use for the sales-below-cost test, CV, and the DIFMER adjustment accurately reflect the corresponding product's physical

²³ The cost of drawn wire is the most significant component of the CONNUM cost build-up, representing most of the cost of manufacturing.

²⁴ *See* the September 27, 2011, response at page S2D-27.

characteristics. Critical to an accurate sales-below-cost test are product costs that accurately reflect the precise physical characteristics of the products whose sales prices they are being compared to. Similarly, the dumping analysis should likewise use a CV calculation that accurately reflects the precise physical characteristics of each product. Since CV is a type of NV, the CV must reasonably and accurately reflect the cost of the physical characteristics defining each product because the CV will ultimately be used as NV for comparison to the U.S. sales prices for the identical products. In our DIFMER adjustment calculation we adjust for variable cost of manufacturing differences attributable to physical differences between subject merchandise and the foreign like product when similar products are being compared. The CIT has upheld our reallocation of costs for the sales-below-cost test, the CV calculations, and the DIFMER adjustment where a respondent's reported costs reflect cost differences due to factors other than physical characteristics.²⁵ The court sustained the Department's determination that if a component of a respondent's COP and CV is distortive for one aspect of its analysis, then it is reasonable to make the same determination with respect to those other aspects of its margin calculation where it relied on the identical cost data. *Id.* Thus, where a respondent's reporting methodology results in unreasonable cost differences extraneous to our identified physical characteristics, we may adjust the respondent's reporting methodology, whether it be for the sales-below-cost test, the DIFMER adjustment, or CV.

We disagree with Precision's assertion that it is improper for the Department to re-average its costs to eliminate the effects of timing differences for calculating CV when we would presumably not do so had NV been based on prices on home market sales that may have been made at different times. In the section D questionnaire, we require respondents to report a single annual weighted-average cost for each CONNUM as defined by the Department's product characteristics.²⁶ This requirement is irrespective of the methodology required when a price-to-price comparison is applicable in the dumping analysis.

We require annual average costs based on the theory that respondents price their products to recover costs over an extended period of time. While sales in the comparison market may only occur in a given month or two, the expectation is that the prices reflect the costs incurred over an extended period of time. As such, the prices, while made at distinct times throughout the year, should reflect the average costs incurred throughout the year.

General & Administrative Expenses

Comment 10: The petitioner states that the Department should continue to calculate Dubai Wire's general and administrative (G&A) expense ratio based on its unconsolidated financial statements in accordance with its normal practice. The petitioner also argues that Dubai Wire should have provided an allocation of the expenses it suggests were incurred for the benefit of its wholly owned subsidiary, Integrated Engineering (IE). Lastly, the petitioner claims that the present record does not contain the detail necessary for the Department to accurately determine what portion of Dubai Wire's G&A expenses were incurred for IE.

²⁵ See *Thai Plastic Bag Indus. Co. Ltd. v. United States*, 752 F. Supp. 2d 1316, 1324-25 (CIT 2010).

²⁶ See page D-1 of the Department's section D antidumping duty questionnaire dated May 26, 2011 that was sent to Precision.

Dubai Wire argues that the Department should calculate the G&A expense ratio using its 2010 consolidated financial statements because Dubai Wire's unconsolidated G&A expense rate is higher than it should be since it did not allocate management and administrative expenses to IE. Dubai Wire states that although IE is an operating business, with sales and costs, Dubai Wire did not apportion any management and administrative expenses (*i.e.*, rent and salaries) to IE. Instead, Dubai Wire allocated 100 percent of these expenses to itself because IE is significantly smaller than Dubai Wire. According to Dubai Wire, the same personnel are responsible for both companies' business operations, and Dubai Wire did not believe it was necessary to allocate corporate general expenses between the two companies. Dubai Wire argues that if this investigation encompassed merchandise produced by IE, rather than merchandise produced by Dubai Wire, the Department would have calculated IE's G&A based on the consolidated audited financial statement of these companies, reasoning that IE's company specific G&A was distortive. Therefore, the converse is also true.

Department's Position: The Department's practice is to calculate G&A expenses based on the company-specific unconsolidated financial statements of the producing entity. *See Stainless Steel Round Wire From Canada; Notice of Final Determination of Sales at Less Than Fair Value* 64 FR 17324, 17334 (April 9, 1999) and accompanying IDM at Comment 14. While we have continued to calculate Dubai Wire's G&A expense ratio using Dubai Wire's 2010 unconsolidated data, we have revised our calculation from the *Preliminary Determination* by allocating a portion of the administrative rent and salaries to IE. As Dubai Wire reported no administrative rent or salary expense for IE, we consider it reasonable to assume that Dubai Wire incurred some of these costs for the benefit of IE. Therefore, for the final determination we have allocated a portion of these expenses to IE. *See Dubai Wire Cost Memorandum.*

Quarterly Cost Methodology

Comment 11: The petitioner states that there is no basis for applying the quarterly cost methodology to Dubai Wire's costs because the cost of manufacturing (COM) fluctuations during the POI did not meet the threshold established by the Department.

Dubai Wire argues that its wire rod cost increased significantly from the first to the last quarter of the POI and that, as a result, sales prices also increased. Because there is a reasonable correlation between costs and sales prices, Dubai Wire contends that the Department should apply its alternative quarterly cost methodology for the final determination. Dubai Wire maintains that even though COM did not increase by 25 percent, the Department's threshold, that is not sufficient reason for the Department to not switch from its normal annual weighted-average cost methodology to the alternative quarterly cost methodology.

Department's Position: For the final determination we have not applied our alternative quarterly cost methodology. Our normal practice is to calculate an annual weighted-average cost for the entire POI. *See, e.g., Certain Pasta from Italy: Final Results of Antidumping Duty Administrative Review*, 65 FR 77852 (December 13, 2000) and accompanying IDM at Comment 18, and *Notice of Final Results of Antidumping Duty Administrative Review of Carbon and Certain Alloy Steel Wire Rod from Canada*, 71 FR 3822 (January 24, 2006) and accompanying

IDM at Comment 5 (explaining the Department’s practice of computing a single weighted-average cost for the entire period). However, the Department recognizes that possible distortions may result if our normal annual average cost method is used during a period of significant cost changes. In determining whether to deviate from our normal methodology of calculating an annual weighted-average cost, we evaluate the case-specific record evidence using two primary factors: (1) whether the change in the COM recognized by the respondent during the POI was significant; and, (2) whether the record evidence shows that sales during the shorter averaging periods can be reasonably linked with the cost of production (COP) or CV during the same shorter averaging periods. *Id.* The Department defines a “significant” cost change in the COM as a 25 percent change between the lowest quarterly COM and the highest quarterly COM. *See Stainless Steel Plate in Coils from Belgium: Final Results of Administrative Review*, 73 FR 75398, 75399 (December 11, 2008), and *Certain Welded Stainless Steel Pipe from the Republic of Korea: Final Results of Antidumping Duty Administrative Review*, 74 FR 31242 (June 30, 2009).

We continue to find for this final determination that record evidence demonstrates that Dubai Wire did not experience significant changes in the COM during the POI.²⁷ We disagree with Dubai Wire that just because COM doesn’t change by the Department’s established threshold of 25 percent, the Department doesn’t have sufficient reason to not use its alternative cost methodology. The Department has adopted a consistent and predictable approach in using POI or period of review-average costs—the result being a normalized, average production cost to be compared to sales prices covering the same extended period of time. Our 25 percent threshold has been affirmed by the court and allows for a change in methodology when significantly changing input costs are clearly affecting our annual average cost calculations.²⁸ Dubai Wire has submitted its own calculation of cost of manufacturing changes during the POI and admits that the change in COM does not meet our established threshold.

Affiliation

Comment 12: The petitioner argues that the Department should find that Precision and Millennium Steel and Wire LLC (Millennium) are affiliated because Millennium is in a position to exercise restraint or control over Precision pursuant to section 771(33)(G) of the Act. Petitioner also argues that Precision and Millennium are affiliated by way of a close supplier relationship.

Precision maintains that the Department should affirm its *Preliminary Determination* finding that Precision and Millennium are unaffiliated, independent corporate entities, which operate entirely separately. Precision argues that there is no affiliation whether through corporate structure, stock ownership, common directors or employees, or otherwise.

Department’s Position: Based on our review of record evidence related to the allegation of affiliation, we continue to find that Precision and Millennium are not affiliated. Arguments

²⁷ See Correction of Clerical Error in Section C Database; Constructed Value Based on Quarterly Costs and Response to Petitioner’s Targeting Allegations submission dated October 13, 2011.

²⁸ See *ibid* and *SeAh Steel Corporation v. United States*, 704 F. Supp. 2d 1353 (CIT 2010).

made by parties about the alleged affiliation contain Precision's Business Proprietary Information. See Final Determination Analysis Memorandum for Precision dated March 19, 2012, for a summary of parties' arguments and the discussion concerning our position.

Adverse Facts Available

Comment 13: Mid Continent argues that Precision has impeded the Department's investigation by denying that it is affiliated with Millennium. Mid Continent contends that for this reason the record is incomplete and the Department is not able to calculate an accurate dumping margin for Precision. In the absence of complete information the Department should apply facts available to calculate Precision's dumping margin.

Precision contends that it is not affiliated with Millennium, that it has answered all of the Department's requests for information, and that there is no reason to resort to facts available.

Department's Position: The application of facts available is not warranted with respect to issues linked to the alleged affiliation of Precision and Millennium. Because we continue to find that Precision and Millennium are not affiliated, their transactions are not subject to the arm's length test. See Comment 12, *supra*. We find that Precision has provided sufficient responses to our requests for information on matters concerning its alleged affiliation with Millennium. Arguments made by the parties about the proposed application of facts available contain Precision's business proprietary information. See Final Determination Analysis Memorandum for Precision dated March 19, 2012, for a summary of parties' arguments and the discussion concerning our position.

RECOMMENDATION

Based on our analysis of the comments received, we recommend adopting all of the above positions. If these recommendations are accepted, we will publish the final determination of this investigation in the *Federal Register*.

Agree Disagree



Paul Piquado
Assistant Secretary
for Import Administration

19 MARCH 2012

Date