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October 15, 2012

MEMORANDUM TO: Paul Piquado
Assistant Secretary
for Import Administration

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

SUBJECT: Circular Welded Carbon-Quality Steel Pipe from the Socialist
Republic of Vietnam: Issues and Decision Memorandum for the Final
Determination

SUMMARY

The Department of Commerce (the Department) has analyzed the comments submitted by the petitioners,¹ the two mandatory respondents,² and another interested party³ in the antidumping investigation of circular welded carbon-quality steel pipe from the Socialist Republic of Vietnam (Vietnam). Following issuance of the preliminary determination, verification, and the analysis of the comments received, we made changes to the margin calculation for the final determination. We recommend that you approve the positions described in the “Discussion of the Issues” section of this memorandum. Below is a complete list of issues for which we received comments and rebuttal comments from parties.

BACKGROUND

The Department published the preliminary determination in the Federal Register on June 1, 2012.⁴ The period of investigation (POI) is April 1, 2011, through September 30, 2011. Between June 25, 2012, and July 6, 2012, the Department conducted verifications in Vietnam of the sales and factors responses of Haiphong Hongyuan and SeAH VINA. Between July 25, 2012, and August 3, 2012,

¹ Allied Tube and Conduit and the JMC Steel Group (petitioners).

² Vietnam Haiphong Hongyuan Machinery Manufacturing Co., Ltd. (Haiphong Hongyuan) and SeAH Steel VINA Corporation (SeAH VINA).

³ Sun Steel Joint Stock Company (SUNSCO).

⁴ See Circular Welded Carbon-Quality Steel Pipe From the Socialist Republic of Vietnam: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination, 77 FR 32552 (June 1, 2012) (Preliminary Determination).

the Department conducted verifications of Haiphong Hongyuan's U.S. affiliate Midwest Air Technologies, Inc. (MAT) and of SeAH VINA's U.S. affiliates State Pipe & Supply, Inc. (SPS) and SeAH Steel America, Inc. (SSA). On August 21, 2012, and August 28, 2012, SeAH VINA submitted updated sales and factors data, respectively. On August 27, 2012, Haiphong Hongyuan submitted revised factors and sales data.

In accordance with 19 CFR 351.309(c)(1)(i), we invited parties to comment on our preliminary determination. On September 11, 2012, we received case briefs from petitioners, Haiphong Hongyuan, SeAH VINA, and SUNSCO. On September 17, 2012, we received rebuttal briefs from petitioners, Haiphong Hongyuan, and SeAH VINA.

On September 21, 2012, we placed documentation on the record supporting the surrogate value (SV) for brokerage and handling we used in the preliminary determination, and invited parties to comment on that documentation. We received comments from Haiphong Hongyuan and SeAH VINA on September 25, 2012, and rebuttal comments from petitioners on September 27, 2012.

On September 26 and 27, 2012, we met with representatives of SeAH VINA and petitioners, respectively, to discuss issues raised in the case and rebuttal briefs.

Case Issues:

General Issues

Comment 1: Calculating Weighted-Average Margins and Cash Deposit Rates Using Only Positive Dumping Margins

Comment 2: Financial Statements Used for Calculating Financial Ratios

Comment 3: Use of Factors of Production Methodology

Comment 4: Targeted Dumping

Comment 5: Surrogate Value for Labor

Comment 6: Surrogate Value for Brokerage and Handling

Comment 7: Surrogate Value for Steel Straps

Comment 8: Whether the Department Should Update Certain Surrogate Values

Comment 9: Rate Applicable to the Separate-Rate Applicants Not Selected for Individual Analysis

Issues Regarding Haiphong Hongyuan

Comment 10: The Department Should Make Adjustments to the Quantity of Certain U.S. Sales

Comment 11: Inputs that Should Be Included in Packing, Rather than Cost of Manufacture

Comment 12: The Department Should Use the Most Recently Submitted Factors of Production and U.S. Sales Databases

Comment 13: Ministerial Error

Issues Regarding SeAH VINA

Comment 14: Date of Sale for U.S. Sales through SSA

Comment 15: Credit Period for "Back-to-Back" Sales

Comment 16: Double Counting Countervailable Subsidies
Comment 17: Ministerial Error

DISCUSSION OF THE ISSUES:

General Issues

Comment 1: Calculating Weighted-Average Margins and Cash Deposit Rates Using Only Positive Dumping Margins

Petitioners argue the Department should calculate weighted-average dumping margins and cash-deposit rates using only positive dumping margins, rather than offsetting the positive margins by the negative margins (i.e., that the Department should “zero” any negative margins found in the final determination calculations). Petitioners address two scenarios under which the Department should do this. The first is if the Department finds targeted dumping. In the preliminary determination the Department investigated targeted dumping for both mandatory respondents, but preliminarily found that the price differences could be taken into account using the standard average-to-average methodology because both the standard and alternative methodologies yielded zero or de minimis margins for both respondents. See Preliminary Determination, 77 FR at 32552. Petitioners assert that after the Department makes the various adjustments petitioners believe the Department should make, there will be significant differences between the outcome of the standard and alternative margin computation methodologies. Petitioners therefore ask the Department to make findings of targeted dumping and, in accordance with standard computational methodology where targeted dumping is found that cannot be taken into account using the standard methodology, compare average normal values (NVs) to individual export prices or constructed export prices without offsetting negative margins from positive margins.

Petitioners also address a second scenario under which they argue the Department should zero the negative margins: any U.S. sales for which positive margins are offset by negative margins. They base this argument upon sections 736(a)(1), (3) and 751(a)(2) of the Tariff Act of 1930, as amended (the Act).

With respect to section 736(a)(1) of the Act, petitioners state that this section of the statute requires the Department to “assess an antidumping duty equal to the amount by which the normal value (NV) of the merchandise exceeds the export price” (emphasis added). Offsetting the positive margins by the negative margins to calculate the weighted-average dumping margins and the cash deposit rates, petitioners argue, would not result in a value equal to the amount by which the NV of the merchandise exceeds the export price (EP), and would thus violate the statute. Petitioners argue there is only one amount that is “equal to” the “amount by which NV exceeds the EP or CEP,” and the calculation of that amount precludes consideration of negative margins.

Furthermore, petitioners argue that section 736(a)(3) of the Act is also relevant because it requires the deposit of estimated antidumping duties. This statute has been interpreted, petitioners state, to mean that the amount of those antidumping duties must be “sufficient to cover the estimated antidumping duties” for assessment. See Ugine & ALZ Belgium v. United States, 551 F.3d 1339, 1341-42 (Fed. Cir. 2009). The cash deposit is not sufficient to cover the estimated antidumping

duties, petitioners argue, when the Department calculates the cash deposit by offsetting the positive margins with the negative margins.

Moreover, petitioners argue that the Court of International Trade (CIT) has indicated the Department does not have the discretion to derive an inaccurately estimated cash security deposit in a case in which a more accurate calculation can be made, even though the cash deposit rate merely estimates the assessment, given that cash deposits are intended to provide security for payment of a future final assessment.

See Badger-Powhatan v. United States, 633 F.Supp. 1364 (CIT 1986) (Badger-Powhatan). Petitioners argue that because cash deposit rates calculated by offsetting positive margins by negative margins inaccurately estimate the final assessment, which must be based on only positive margins, calculating them in this way would violate the CIT's ruling in Badger-Powhatan.

With respect to section 751(a)(2) of the Act, petitioners state that the Court of Appeals for the Federal Circuit (Federal Circuit) has ruled in reference to it that “[t]he statute merely requires that PUDD, the difference between foreign market value and United States price, serves as the basis for both assessed duties and cash deposits of estimated duties” (emphasis added). See Torrington v. United States, 44 F.3d 1572, 1578 (Fed. Cir. 1995) (Torrington). Therefore, petitioners argue, since section 736(a)(1) of the Act requires that the assessment rate be based on positive margins not offset by negative margins, and section 751(a)(2) of the Act requires (under Torrington) that both the cash deposit rate and the assessment rate be calculated as the difference between foreign market value and U.S. price, the cash deposit rate must also be based on only the positive difference between the NV and EP without an offset for negative margins.

Petitioners further argue that their interpretation of the statute is not inconsistent with the Federal Circuit's ruling in U.S. Steel v. United States, 621 F.3d 1351 (Fed. Cir. 2010) (U.S. Steel). In U.S. Steel the Federal Court held that the authority under U.S. law for Commerce's present practice of offsetting positive margins by negative margins in determining the investigation cash deposit rate (i.e., section 771(35)(B) of the Act weighted average dumping margin) is as follows:

The statute defines a dumping margin as “the amount by which the NV exceeds the export price or constructed export price of the subject merchandise,” 19 U.S.C. §1677(35)(A), and subsequently requires Congress to use this amount in calculating a weighted-average dumping margin, id., § 1677(35)(B). However, the statute is silent as to what to do when the “amount” calculated by Commerce pursuant to § 1677(35)(A) is negative. Congress has given Commerce discretion in forming its methodology in antidumping investigations, and where the statutory language does not address the methodology at issue, we decline to conclude that Congress has manifested its unambiguous intent.

See 621 F.3d 1351 (Fed. Cir. 2010).

Petitioners state that it is not their position that the language of section 771(35) of the Act is unambiguous or precludes Commerce from offsetting positive margins by negative margins. Nevertheless, they point out that in discussing section 771(35) of the Act the Federal Circuit did not

find the word “exceeds” to be ambiguous, and it is the word “exceeds” that appears in section 736 (a)(1) of the Act. Thus, petitioners argue that though section 771(35) of the Act may be ambiguous, section 736(a)(1) of the Act is not. In a previous ruling the Federal Circuit had stated, “Basically, one number ‘exceeds’ another if it is ‘greater than’ the other, meaning it falls to the right of it on the number line.” See Timken v. United States, 354 F.3d 1334, 1341-42 (Fed. Cir. 2004) (Timken). Given the unambiguousness of the word “exceeds,” petitioners assert that section 736(a)(1) of the Act does not afford the Department discretion to offset positive margins by negative margins for assessment.

Furthermore, petitioners argue that two words distinguish the statutory definition of the dumping margin at section 771(35)(A) of the Act from the statutory definition of the antidumping duty assessment at section 736(a)(1) of the Act. Specifically, the statutory definition of the antidumping duty assessment in section 736(a)(1) of the Act contains the words “equal to,” followed by the phrase “the amount by which the NV exceeds the export price.” In contrast, the statutory definition of the dumping margin at section 771 (35) of the Act contains the words “means” followed by essentially the same phrase. The rationale the Federal Circuit provided in U.S. Steel for allowing Commerce to subtract negative margins from positive margins for investigation cash deposits is based on the silence of the statute as to what to do when the amount Commerce calculates pursuant to section 771(35)(A) of the Act is negative. But this rationale does not apply, petitioners assert, to the statutory definition of the antidumping duty assessment at section 736(a)(1) of the Act, which requires the assessment to be “equal to” the amount by which the NV exceeds the export price.

Petitioners state that while the foregoing analysis of the statute regarding antidumping duty collection and assessment reaches a different conclusion regarding whether negative margins may be subtracted from positive margins in determining investigation security deposit rates than U.S. Steel, it does not denigrate or derogate the holding of the Federal Circuit in U.S. Steel, which was based on the silence of certain provisions of the statute regarding negative margins. Petitioners state that their analysis simply addresses different provisions of the statute than addressed in U.S. Steel, most particularly section 736(a)(1) of the Act, which expressly precludes negative margins for assessment.

SeAH VINA argues that the targeted dumping test (which the Department used in its preliminary determination to analyze targeted dumping) is unreliable, and routinely finds “patterns” of dumped sales where none exist. Thus, SeAH VINA argues there is no basis for the Department’s preliminary finding of targeted dumping. See Comment 4 (below).

However, SeAH VINA also argues that if the Department does find targeted dumping in the final determination, there is no reason to apply the transaction-to-average dumping calculation to any but the particular sales found to be targeted. SeAH VINA acknowledges that using the transaction-to-average methodology for all sales, whether found to be targeted or not targeted, appears to be the Department’s current practice,⁵ but argues the statute authorizes the Department to use the transaction-to-average methodology in investigations only when it finds that the price differences that give rise to the finding of targeted dumping cannot be taken into account using the normal

⁵ See Polyethylene Retail Carrier Bags from Taiwan: Final Determination of Sales at Less Than Fair Value, 75 FR 14569 (March 26, 2010), and accompanying Issues and Decision Memorandum at 5.

average-to-average methodology. See section 777A(d)(1)(B)(ii) of the Act. As a matter of policy, then, the departure from the normal methodology should be limited to the specific situations in which the normal average-to-average methodology is inadequate.

With respect to petitioners' argument that calculating an assessment rate by offsetting positive margins with negative margins would result in an assessment that does not equal the amount by which the NV exceeds the export price, SeAH VINA argues the petitioners' argument is flawed because it is based on a misreading of Timken. SeAH VINA states that contrary to petitioners' claims, the Federal Circuit in Timken did not rule that the term "exceeds" in Section 771(35)(A) of the Act unambiguously precludes the Department from finding a negative dumping margin. SeAH VINA argues that, to the contrary, the Federal Circuit specifically held that the term "exceeds" is ambiguous – and that an interpretation that allows findings of negative margins is, although not mandatory, entirely permissible. Moreover, SeAH VINA states that since the Federal Circuit's decision the Department's practice regarding zeroing has changed, and that the Department's current practice is to interpret the word "exceeds" to allow the calculation of negative margins. SeAH VINA states the subsequent U.S. Steel case also explicitly stated that the term "exceeds" is ambiguous, and can be read either (1) to allow only positive or zero margins, or (2) to allow negative margins. See also Dongbu Steel v. United States, 635 F.3d 1363, 1366, 1369-670 (Fed. Cir. 2011) (Dongbu) and JTEKT v. United States, 642 F.3d 1378, 1384 (Fed. Cir. 2011) (JTEKT), which also, SeAH VINA states, affirmed that the term "exceeds" can be interpreted either to permit or disallow zeroing.

SeAH VINA also argues that petitioners' distinction between the term "means" and "equals" is irrelevant and nonsensical. Furthermore, it is flawed in that it is based on the assumption that the term "exceeds" unambiguously refers only to a positive or zero amount. SeAH VINA asserts that, as discussed above, that interpretation has been explicitly and repeatedly rejected by the Federal Circuit.

Haiphong Hongyuan argues the Department should reject petitioners' request to make a finding of targeted dumping and to calculate antidumping margins without offsetting negative margins from positive margins. First, Haiphong Hongyuan argues petitioners' allegation of targeted dumping was untimely. The notice of initiation stated that any allegation of targeted dumping must be submitted no later than 45 days prior to the scheduled date of the preliminary determination. Thus, the deadline was April 8, 2012. Petitioners submitted their allegation on April 2, 2012. On April 11, 2012, Haiphong Hongyuan submitted a letter explaining the flaw in petitioners' allegation. On April 16, 2012, petitioner submitted a new and different allegation, without having previously requested an extension to the time limit for submitting the allegation. Thus, Haiphong Hongyuan argues, petitioners' April 16, 2012, allegation should be rejected as untimely.

Second, Haiphong Hongyuan argues petitioners' allegation failed to include a sufficient explanation of the basis for its targeted dumping allegation. Instead, it blindly applies the Nails test to MAT's sales, and does not provide any explanation as to why and how MAT supposedly "selected" the alleged targeted customers, time periods, or regions, and thus engaged in targeted dumping. Such an explanation is necessary, Haiphong Hongyuan argues, for the Department to reasonably evaluate whether any observed price pattern may be the result of specific pricing behavior, market forces, or a reasonable variation in a large set of data. Haiphong Hongyuan states that a comparison of

petitioners' two allegations illustrates the point. In its first allegation, petitioners alleged that MAT had targeted six customers. After correcting the error, petitioner alleged that MAT had targeted only two customers, only one of which was alleged to be targeted in the first allegation. Haiphong Hongyuan notes that petitioners provided no explanation of what these customers have in common, the significance of the grouping, or how and why MAT allegedly targeted this particular combination of customers. The only apparent commonality is they pass the Nails test.

Third, Haiphong Hongyuan argues that given the Department has stated that it is returning to a case-by-case adjudication,"⁶ it must perform a case-by-case analysis of targeted dumping, and here the petitioners have not provided a meaningful analysis as to why its own calculated data are reliable and probative of the issues surrounding the allegation. Moreover, the facts of this case demonstrate that petitioners' use of the Nails test to allege targeted dumping is not a reasonable basis for finding targeted dumping. Haiphong Hongyuan substantiates this point with the following information. MAT reported 28,000 observations (public version figure) and 96 percent (public version figure) of the total quantity of those observations went to one particular customer, CUSTOMER1. As mentioned above, petitioners alleged that MAT targeted two customers. However, in the preliminary determination, the Department found that only 0.01 percent (public version figure) to CUSTOMER2 passed both stages of the Nails test. Considering these facts, Haiphong Hongyuan argues, it is unreasonable to conclude that MAT's strategy was to sell at higher prices to over 99.99 percent (public version figure) of its customers, overwhelming CUSTOMER1, in order to subsidize its aggressively low prices to one targeted customer, CUSTOMER2. These facts, Haiphong Hongyuan states, both illustrate the lack of logic and the randomness of petitioners' allegation, and undermine the validity of the Nails test as a reasonable measure of analyzing pricing patterns in this case. Haiphong Hongyuan further alleges that petitioners' other bases for alleging targeted dumping are equally untenable.

Haiphong Hongyuan argues that the Department should determine that satisfying the Nails test is not synonymous with a finding of targeted dumping in this case, just as it did in the antidumping investigation of certain stilbenic optical brightening agents from Taiwan. There the Department used its normal average-to-average comparison methodology even though certain sales satisfied the targeted dumping test because those sales were too small as a percentage of the respondent's total sales. See Certain Stilbenic Optical Brightening Agents from Taiwan: Final Determination of Sales at Less Than Fair Value, 77 FR 17027, 17028 (March 23, 2012) (Brightening Agents from Taiwan).

Based on the above, Haiphong Hongyuan argues that the Department should consider whether other factors might explain why the Nails test would find differences in prices by region. One such factor, Haiphong Hongyuan argues, might be that the Nails test considers *net* prices when comparing targeted and non-targeted sales. Thus, the results of the analysis may be driven more by adjustments to the selling price rather than the selling prices themselves. For example, for sales from MAT warehouse, the Department used MAT's country-wide average expenses for international freight from port to warehouse. Thus, MAT's sales prices from one region of the country are adjusted using average freight-in expenses for all regions of the country. Such use of country-wide averages for selling expenses when region-wide expenses could differ significantly

⁶ Withdrawal of the Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations, 73 FR 74930, 74931 (December 10, 2008).

from the country-wide averages could contribute to an erroneous finding of a pattern of price differences.

Furthermore, Haiphong Hongyuan argues that even if the Department does find targeted dumping in this investigation, it is legally barred from zeroing the negative margins. Haiphong Hongyuan states that under the antidumping statute if the Department finds that targeted dumping exists in an investigation and cannot be taken into account using average-to-average or transaction-to-transaction comparisons, the remedy is to make an average-to-transaction comparison. See section 777A(d)(1)(B) of the Act. The statute mirrors the language of Article 2.4.2 of the WTO Antidumping Agreement under the same circumstances. However, Haiphong Hongyuan points out, neither the statute nor the Antidumping Agreement mention zeroing in this regard.

Moreover, the WTO Appellate Body has twice ruled that the United States acts inconsistently with Articles 2.4 and 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 by maintaining zeroing procedures in periodic reviews. See United States – Measures Relating to Zeroing and Sunset Reviews, (January 9, 2007) and United States – Continued Existence and Application of Zeroing Methodology (February 4, 2009). In fact, Haiphong Hongyuan alleges, it was in response to these rulings that the Department published Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Proceedings; Final Modification, 71 FR 8101 (February 14, 2012) (Final Modification). The purpose of this notice, Haiphong Hongyuan states, was to end the Department's practice of using average-to-transaction comparisons with zeroing. Additionally, Haiphong Hongyuan argues the current position of the Federal Circuit is that it is unreasonable to interpret section 771(35) of the Act differently in different situations, allowing zeroing in average-to-transaction comparisons and prohibiting zeroing in average-to-average comparisons.

Furthermore, Haiphong Hongyuan argues if the Department does find targeted dumping, it may lawfully use the average-to-transaction comparisons only for sales that are both dumped and targeted.

Finally, Haiphong Hongyuan argues the petitioners' comments regarding duty assessment are irrelevant to the current investigation because duty assessments are relevant only to administrative reviews. To the extent they relate to cash deposit rates, they contradict the Department's current practice. Therefore, Haiphong Hongyuan argues, the Department should ignore petitioners' comments on this matter entirely.

Department's Position:

We disagree with petitioners that either section 736(a)(1), section 736(a)(3) or section 751(a)(2) of the Act require the Department to apply a zeroing methodology in regard to comparisons where normal value is less than export price (or constructed export price). In particular, the Department finds these provisions of the Act no less ambiguous than 771(35) in regards to the question of whether offsetting or zeroing are permitted or precluded in aggregating comparison results to determine the numerator of the weighted average dumping margin. With regard to section 736(a)(3), the Department uses this same numerator as the numerator of the rate for deposit of estimated antidumping duties which are required upon entry of subject merchandise until revised

pursuant to section 751(a)(2)(C) in an annual administrative review. The language of section 736(a)(1), “the amount by which the normal value of the merchandise exceeds the export price (or the constructed export price) of the merchandise” must be read harmoniously with other provisions of the statute, including for example section 777A(d)(1) which provides for a selection among a variety of comparison methods when comparing export price (or constructed export price) and normal value) and section 7771(35) which the Federal Circuit has found on multiple occasions does not unambiguously require or preclude the application of zeroing in determining an aggregate amount of dumping for use in the numerator of the weighted average dumping margin. Petitioners’ conclusion that there can unambiguously be only one amount that is can satisfy section 736(a)(1) of the Act, fails to account for the considerable discretion explicitly afforded to the Department in establishing calculation methodologies and the considerable ambiguity in the governing statutory provisions, which the Department may reasonably resolve in multiple ways consistent with the statute. In U.S. Steel the Federal Circuit upheld the Department’s practice with respect to granting offsets rather than zeroing in antidumping investigations as a reasonable interpretation of the statute. Although the Federal Circuit may not specifically address a every potentially related provision of the statute, including the particular provisions upon which the petitioners base their argument, we understand the Federal Circuits holdings to be based upon a reading of the statute as a whole, and therefore to take such provisions into account in framing the decision. Furthermore, we regard the holding of the Federal Circuit in U.S. Steel as binding precedent directly contrary to petitioners’ position that zeroing is mandated by the statute in antidumping investigations. We therefore conclude that the Department’s practice of granting offsets for non-dumped comparisons when aggregating the results of average-to-average comparisons in this investigation is a reasonable resolution of statutory ambiguity.

With respect to SeAH VINA’s argument that the Nails test is unreliable and routinely finds patterns of targeted dumping where none exist, see our response to Comment 4 (below).

We disagree with Haiphong Hongyuan’s argument that the petitioners’ allegation of targeted dumping was untimely. As we explained in the preliminary determination, we regard petitioners’ April 16, 2012, allegation as a revision to a timely allegation, rather than a new, untimely allegation. See Preliminary Determination, 77 FR at 32555. Therefore in this final determination, as in the preliminary determination, we have analyzed targeted dumping with respect to Haiphong Hongyuan based on petitioners’ April 16, 2012, allegation.

We also disagree with Haiphong Hongyuan’s argument that petitioners’ allegation was deficient in that it blindly followed the Nails test, and “failed to include a sufficient explanation of the basis for its targeted dumping allegation.” The Department has never required an explanation of the sort Haiphong Hongyuan seems to argue is mandatory, nor has Haiphong Hongyuan cited to any statutory or regulatory basis for requiring one.

Moreover, Haiphong Hongyuan’s argument that the validity of the Nails test is undermined because of the small (0.01 percent (public version figure)) of its sales volume that passed both stages of the Nails test, and its argument that we should follow the precedent of Brightening Agents from Taiwan, are no longer germane because in this final determination the volume of its sales that passed both stages is much higher than 0.01 percent. For this final determination, unlike the

circumstances present in Brightening Agents from Taiwan, we find in this case that a sufficient proportion of sales are targeted to satisfy section 777A(d)(1)(B)(i) of the Act.

Furthermore, we also do not agree with SeAH VINA and Haiphong Hongyuan that we should apply the average-to-transaction methodology only to those sales that are found to have been targeted. As we stated in the antidumping investigation of multilayered wood flooring from the People's Republic of China:

The Department finds that the language of section 777A(d)(1)(B) of the Act does not preclude adopting a similarly uniform application of average-to-transaction comparisons for all transactions when satisfaction of the statutory criteria suggests that application of the average-to-transaction method is the appropriate method. The only limitations the statute places on the application of the average-to-transaction method are the satisfaction of the two criteria set forth in the provision. When the criteria for application of the average-to-transaction method are satisfied, section 777A(d)(1)(B) of the Act does not limit application of the average-to-transaction comparison methodology to certain transactions. Instead, the provision expressly permits the Department to determine dumping margins by comparing weighted-average NV to the EP (or CEP) of individual transactions. While the Department does not find that the language of section 777A(d)(1)(B) of the Act mandates application of the average-to-transaction method to all sales, it does find that this interpretation is a reasonable one and is more consistent with the Department's approach to selection of the appropriate comparison method under section 777A(d)(1) of the Act more generally.

Multilayered Wood Flooring From the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 76 FR 64318 (October 18, 2011) (Wood Flooring from the PRC) and accompanying Issues and Decision Memorandum at 32 (citations omitted).

Furthermore, we do not agree with Haiphong Hongyuan that we are legally prohibited from zeroing in either average-to-average comparisons or average-to-transaction comparisons. We recently addressed the same argument in an antidumping investigation of high pressure steel cylinders from the People's Republic of China.

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

permits offsetting in the A-to-A methodology reasonably accounts for differences inherent in the distinct comparison methodologies.

High Pressure Steel Cylinders from the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 77 FR 26739 (May 7, 2012) and accompanying Issues and Decision Memorandum at 27 (citation omitted).

We note too that the Federal Circuit also expressly recognized that the Department intended to continue to address targeted or masked dumping through continuing its use of the average-to-transaction comparisons and zeroing. See U.S. Steel, 621 F.3d at 1363.

Furthermore, the Final Modification to which Haiphong Hongyuan cites concerns new shipper reviews, administrative reviews, and expedited reviews, and not, as here, an antidumping investigation. Moreover, the WTO decisions and the Dongbu and JTEKT cases to which Haiphong Hongyuan cites also concern administrative reviews, and not investigations. Hence, they are not applicable.

For the above reasons we have continued to refrain from permitting non-dumped sales from offsetting the amount of dumping found in connection with dumped sales when using average-to-transaction comparisons pursuant to a finding of targeted dumping pursuant to section 777A(d)(1)(B) of the Act. However, we do not agree with petitioners that the statute mandates zeroing of non-dumped comparison results where we have not found targeted dumping and are using average-to-average comparisons. Furthermore, as explained above, we are unpersuaded by any of the arguments respondents have given us for either not investigating targeted dumping or for changing our targeted dumping methodology. Therefore, we have investigated targeted dumping in this final determination using the same methodology we used in the preliminary determination.

Comment 2: Financial Statements Used for Calculating Financial Ratios.

Petitioners argue the Department should not use any of the four financial statements it used in the preliminary determination to calculate selling, general, and administrative expenses (SG&A), overhead, and profit. They argue the Department should instead use the five financial statements they placed on the record on July 11, 2012. Those companies were Maharashtra Seamless, Ltd. (Maharashtra), Technocraft Industries (India), Ltd. (Technocraft), KLT Automotive and Tubular Products, Ltd. (KLT), Ratnamani Metals and Tubes, Ltd. (Ratnamani), and Innoventive Industries, Limited (Innoventive).

The four Indian companies whose financial statements the Department used for calculating financial ratios in the preliminary determination are Crimson Metal Engineering Co., Ltd. (Crimson), Rajasthan Tube Manufacturing Co., Ltd. (Rajasthan), APL Apollo Tubes, Ltd. (Apollo), and Nezone Tubes, Ltd. (Nezone). The financial statements of these companies were placed on the record by respondent Haiphong Hongyuan in an April 25, 2012, submission. Petitioners argue that each of these companies suffer from flaws that make them unsuitable for purposes of calculating the financial ratios. Specifically, petitioners argue:

- Crimson’s financial statement shows that it incurred losses that exceeded fifty percent of its net worth, and was subject to orders by India’s Board for Industrial and Financial Reconstruction (BIFR) under the Sick Industrial Companies Act. Furthermore, Crimson’s financial statement indicates that it produced only 18,115 MT of black pipe and only 8,458 MT of GI pipe during the year. See Crimson’s financial statement at 29.
- Rajasthan’s financial statement indicates that “the company’s product shall enjoy a 4% price preference and a 80% purchase preference in all govt and semi govt organization of Rajasthan Govt Steel Tube and Pipe {and that} changed state govt policies may effect (sic) the profitability of the company.” See Rajasthan’s financial statement at 6. Furthermore, Rajasthan produced a total of only 20,287 tons of steel pipes and non-subject steel sheet together. See Rajasthan’s financial statement at 38.
- Nezone’s financial statement (at Schedule K) identifies subsidies in the form of “Duty Entitlement on Exports” under the category “other income.”
- Apollo’s financial statement identifies export incentives received or receivable. See Apollo’s financial statement at 64, 65, 80, and 82.

Petitioners state that, in contrast, the financial statements of all of the companies they put on the record show that they are significant producers of identical or comparable merchandise. Specifically:

- Maharashtra’s 200,000 MT production of electric resistance weld (ERW) pipe (the type of pipe subject to this investigation) constitutes more than a third of its total pipe production, and is far more welded pipe and subject merchandise than companies whose financial statements were placed on the record by Haiphong Hongyuan and used by the Department in the preliminary determination.
- Ratnamani is also a significant producer of subject and comparable merchandise, with 83,850 MT of carbon-steel pipes sold during the 2010-11 fiscal year.
- Technocraft’s annual report indicates that its production of scaffolding pipe (a form of pipe subject to the investigation) represents about 20 percent of its revenue.
- KLM’s production of ERW and cold-drawn welded tubes represents slightly more than twenty percent of its revenue.
- Innoventive’s precision-tube segment accounts for almost 60 percent of its revenue.

Petitioners conclude from the above that the companies whose financial statements they placed on the record are significant producers of both identical and comparable merchandise. Moreover, the financial statements themselves, petitioners state, are reliable, complete, and contemporaneous.

SeAH VINA and Haiphong Hongyuan argue the Department should use the same financial statements in the final determination to value financial ratios that it used in the preliminary determination. With respect to these financial statements, SeAH VINA points out that petitioners have failed to identify any evidence that Rajasthan, Apollo and Nezone actually received benefits under programs the Department has previously found to constitute countervailable subsidies. Petitioners’ references to vague statements in those companies’ financial statements, SeAH VINA states, do not constitute an adequate basis for rejecting them. Haiphong Hongyuan adds that the Department’s long-standing practice is to not reject a financial statement that mentions subsidies “unless the Department has previously found the program to be a countervailable subsidy in a

countervailing duty proceeding.” See Preliminary Results of the Eighth Administrative Review: Frozen Fish Fillets from Vietnam, 77 FR 56180, 56186 (September 12, 2012). Haiphong Hongyuan states that this practice has been sustained by the CIT. See Catfish Farmers of America v. United States, 641 F.Supp. 2d 1362, 1380 (CIT 2009).

SeAH VINA and Haiphong Hongyuan also argue that in contrast, the financial statements of each of the five companies that petitioners put on the record indicate that they received export benefits, export incentives, or income under the DEPB program, which the Department has previously found to constitute a countervailable subsidy. SeAH VINA points out too that petitioners included the amount of the subsidy in their computation of the surrogate financial ratios.

Furthermore, Haiphong Hongyuan argues that, contrary to petitioners’ assertion, Crimson’s financial statement makes no reference to it being “Sick” under the Indian Sick Industrial Companies Act. Additionally, it shows that Crimson made a profit in the two years of financial data available on the record. SeAH VINA argues too that there is nothing in Crimson’s financial statement that indicates that Crimson’s overhead, SG&A expenses, or profitability were in any way affected by the alleged insolvency process.

Moreover, Haiphong Hongyuan argues, the four companies whose financial statements the Department used in the preliminary determination all produce merchandise identical to that under investigation, and the additional merchandise they produce are in the same general class of merchandise as subject pipe (i.e., basic carbon pipe, whether rectangular or spiral arc welded). Furthermore, none of them produce seamless pipe or stainless pipe (both of which are not subject to this investigation) as do the companies whose financial statements petitioners advocate, nor engage in completely unrelated business activities (e.g., wind power generation, yarn and garment production, or drum closure production), as do petitioners’ recommended companies.

Furthermore, SeAH VINA argues, it is clear that the four companies whose financial statements were used to calculate financial ratios in the preliminary determination have operations that are similar to those of SeAH VINA. In contrast, each of the five companies for which petitioners submitted financial statements has operations that require substantially different production processes and facilities. Given these differences, SeAH VINA argues, the five companies whose financial statements were submitted by petitioners do not provide an appropriate basis for determining the financial ratios.

Haiphong Hongyuan also argues that petitioners’ claim that Crimson and Rajasthan and “marginal producers” of the subject merchandise is irrelevant. Haiphong Hongyuan states that accuracy of financial ratios is not served by selecting larger producers over smaller producers. Instead, Haiphong Hongyuan argues, the Department will calculate more accurate ratios by selecting companies that produce identical or the most comparable products.

Moreover, Haiphong Hongyuan argues that because the purpose of the antidumping law is to calculate margins as accurately as possible, the Department may not calculate financial ratios by simply taking the average of all the financial statements on the record. Rather, the Department must examine the record evidence to determine which of the Indian financial statements on the record

most specifically reflect the production experience of the respondents and also reflect the production and sale of merchandise identical to the subject merchandise.

Finally, Haiphong Hongyuan argues that if the Department does use any of the financial statements suggested by petitioners it should also use that of Bhawani Industries Limited (Bhawani), which is an Indian producer of identical pipe as well as of billets and flat products, and whose financial statement Haiphong Hongyuan put on the record after the Department issued the preliminary determination. Haiphong Hongyuan argues that the products Bhawani produces other than carbon pipe are more comparable to the subject merchandise than are the stainless and seamless products produced, for example, by Ratnamani.

Department's Position:

We agree with Haiphong Hongyuan and SeAH VINA that the four financial statements (i.e., Crimson, Rajasthan, Apollo and Nezone) we used in the preliminary determination are suitable financial statements for calculating surrogate financial ratios. In this final determination we have also used the financial statements of Ratnamani. These five financial statements together constitute the best available information on the record.

In selecting surrogate values for factors of production, section 773(c)(1) of the Act instructs the Department to use “the best available information” from the appropriate market-economy country. In choosing surrogate financial ratios, it is the Department’s policy to use data from market-economy surrogate companies based on the “specificity, contemporaneity, and quality of the data.” Silicon Metal from the People’s Republic of China: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 75 FR 1592 (January 12, 2010) (Silicon Metal from China), and accompanying Issues and Decision Memorandum at 36. However, when the financial statement in question contains a reference to a program or programs the Department has previously found to be countervailable, the Department may consider that the financial ratios derived from that company’s financial statements are less representative of the financial experience of the relevant industry than the ratios derived from financial statements of a company that do not contain evidence of subsidization. Consequently, the Department does not rely on financial statements that contain references to programs previously found to be countervailable by the Department and there are other sufficient reliable and representative data on the record for purposes of calculating the surrogate financial ratios. See Certain Steel Nails From the People’s Republic of China: Final Results of the First Antidumping Duty Administrative Review, 76 FR 16379 (March 23, 2011) (Nails from the PRC), and accompanying Issues and Decision Memorandum at 11.

With respect to the five financial statements petitioners placed on the record, four of them evidence receipt of subsidies through Indian programs that we have previously found countervailable. Specifically:

- Innoventive received benefits through the DEPB program. See Innoventive’s financial statement at 15 and 73.
- KLT received benefits through the DEPB and EPCG programs. See KLT’s financial statement at 10 and 12, respectively.

- Maharashtra received benefits through the DEPB and EPCG programs. See Maharashtra’s financial statement at 54 and 60, respectively.
- Technocraft received income through the DEPB program. See Technocraft’s financial statement at 37.

With respect to the financial statements of Apollo, Crimson, Nezone, and Rajasthan, the references to “export incentives,” “duty entitlement,” and “preferences” to which petitioners cite do not identify any specific subsidy programs we have found to be countervailable. It is our policy not to reject financial statements on grounds that the company received export subsidies unless we have previously found the specific export subsidy to be countervailable. See, e.g., Nails from the PRC, Issues and Decision Memorandum at 12; Silicon Metal from China Issues and Decision Memorandum at 437-38; Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review, 77 FR 55800 (September 11, 2012) and accompanying Issues and Decision Memorandum at 16; Certain Steel Threaded Rod From the People’s Republic of China: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review, 76 FR 68400 (November 4, 2011) and accompanying Issues and Decision Memorandum at 11-12.

Therefore, because the financial statements of Innoventive, KLT, Maharashtra, and Technocraft indicate that they received subsidies that we have found to be countervailable, while the financial statements of Apollo, Crimson, Nezone, and Rajasthan do not, we find that the financial statements of Innoventive, KLT, Maharashtra, and Technocraft are not the best available information on the record with which to calculate surrogate financial ratios.

Furthermore, it is not our policy to disqualify a financial statement solely because a company is a small volume producer, as petitioners argue we should do here with respect to Crimson and Rajasthan. For example, in an antidumping duty review of folding metal tables and chairs from the PRC, where a petitioner argued we should not use the financial statement of a company, Maximaa Systems Limited (Maximaa), because it was a small-volume producer, we stated, “Maximaa’s lower levels of production do not necessarily indicate that Maximaa’s financial statements are unsuitable for calculating surrogate financial ratios.” Folding Metal Tables and Chairs From the People’s Republic of China: Final Results of 2007-2008 Deferred Antidumping Duty Administrative Review and Final Results of 2008-2009 Antidumping Duty Administrative Review, 76 FR 2883 (January 18, 2011) and accompanying Issues and Decision Memorandum at 20. See also Nails from the PRC, Issues and Decision Memorandum at 12; 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) and accompanying Issues and Decision Memorandum at 36.

Moreover, we do not agree with petitioners that there is sufficient evidence on the record to conclude that Crimson is a “sick” company under Indian law. Not all Indian companies working with the BIFR are classified as “sick” under the Indian Sick Industrial Companies Act,⁷ and Crimson’s financial statement does not indicate that it was “sick.”

⁷ See Silicon Metal from China, Issues and Decision Memorandum at Comment 4.

Therefore, we find the four companies whose financial statements we used in the preliminary determination to be sufficient, reliable, and representative because they produce merchandise identical and comparable to the merchandise subject to the investigation. In addition to these four financial statements, we have decided also to use the financial statement of Ratnamani in this final determination. The income which SeAH VINA believes disqualifies Ratnamani's financial statement, *i.e.*, income from the sale of export license incentives (See Ratnamani's financial statement at 31), is not income from a program we have previously found to be countervailable. Furthermore, it is a significant producer of carbon steel tubes. See Ratnamani's financial statement at 36. Therefore, we have used its financial statement in this final determination.

Finally, we have not used the financial statement of Bhawani in this final determination as Haiphong Hongyuan has argued we should. Bhawani's financial statement indicates that during the reporting period Bhawani received income from the DEPB program, a program that (as indicated above) we have found to be countervailable. See Bhawani's financial statement under "Schedule 12." Therefore, because there are other financial statements on the record with which to calculate surrogate financial ratios that do not evidence receipt of countervailable subsidies, Bhawani's financial statement is disqualified as a surrogate.

Comment 3: Use of Factors of Production Methodology

SeAH VINA argues the Department has failed to establish the factual basis for use of its factors of production methodology (FOP). Specifically, SeAH VINA argues the statute clearly states that a finding that the country under investigation is a non-market economy (NME) does not, by itself, justify the use of the FOP methodology. Instead, section 773(c) of the Act requires a further finding that the "available information" does not permit the NV of the subject merchandise to be determined under section 773(a).

Furthermore, SeAH VINA states that it presented this issue earlier in this proceeding in a letter to the Department dated January 9, 2012. SeAH VINA states that in the Department's January 27, 2012, response, the Department stated it intended to use the FOP methodology in this investigation based solely on the fact that it had previously determined that Vietnam is an NME. SeAH VINA argues in response that while section 771(18)(c) of the Act does provide that a determination that a foreign country is an NME shall remain in effect until revoked, that provision applies only to the determination that a country is an NME. It does not apply, SeAH VINA argues, to the separate determination, required by section 773(c)(1)(B) of the Act, that the available information does not permit the determination of NV under the methodology described in section 773(a) of the Act (*i.e.*, using home market or third country sales prices).

Moreover, SeAH VINA argues, the statute also clearly indicates that the determination of NV under section 773(a) of the Act must be based on an exporter or producer-specific analysis of the relevant information. Thus, SeAH VINA argues, it is not possible for the Department to make this determination without considering the situation of specific producers and exporters under investigation. A finding in a previous investigation involving different products and different respondents concerning Vietnam's overall status as an NME does not meet the statutory requirement for a finding that in this investigation the available information does not permit the

determination of NV for each respondent under the methodology described in Section 773(a) of the Act.

Petitioners argue the Department properly applied the FOP methodology in determining SeAH VINA's margin. They point out that section 773(c)(3) of the Act does not indicate how the Department is to ascertain whether available information permits the determination of NV for application of the FOP methodology, or the type of information the Department is to consider in making the determination. However, petitioners state, the Department may rely on the findings it made in determining that Vietnam does not have a market economy in establishing that the NV may not be determined in Vietnam, because these findings specifically relate to the prices and costs upon which the NV is based. In this case, petitioners argue, the Department's findings in determining that Vietnam is an NME clearly establish that the NVs cannot be determined based on Vietnamese costs or prices. These findings specify that there is a pervasive and "continued significant government control over the economy" in Vietnam, the Vietnamese currency is not freely convertible, and that "market forces are not yet sufficiently developed in Vietnam to permit the use of prices and costs in that country for purposes of the Department's dumping analysis." Furthermore, petitioners argue, there is no requirement in section 773(c) of the Act that the "available information" that may or may not permit the NV of the subject merchandise to be determined under the standard ME methodology must relate specifically to the producers or exporters that the Department individually investigates.

Department's Position:

We disagree with SeAH VINA that the Department has not established the factual basis on which it may use the FOP methodology.

We do not agree with SeAH VINA that we must make this determination on an exporter or producer-specific basis. Section 773(c)(1) of the Act imposes no such requirement, and there is no reason why market-wide factors should not be used to make the determination.

In our memorandum explaining our determination that Vietnam is an NME, we stated, "Our conclusion is that market forces in Vietnam are not yet sufficiently developed to permit the use of prices and costs in that country for purposes of the Department's dumping analysis." See November 8, 2002, Memorandum to Faryar Shirzad, Re: Antidumping Duty Investigations of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam – Determination of Market Economy Status at 42, a copy of which is attached to our January 27, 2012, letter.

The available information does not permit NV to be determined under subsection (a) of section 773(a) of the Act because neither prices nor costs in Vietnam can be used for purposes of the Department's dumping analysis. Accordingly, the requirement of section 773(c)(B) of the Act is met.

Moreover, the questions of whether a country is an NME and of whether available information permits the NV of the subject merchandise to be determined under section 773(a) of the Act are

closely related. For this reason the NME-status determination is not irrelevant. For instance, in Paper from the PRC, we addressed a similar issue:

APP-China argues that under section 773(c)(1) of the Act, the Department must justify why, for a particular respondent, the “available information does not permit the NV of the subject merchandise to be determined under subsection (a),” in order for the Department to determine NV on the basis of FOPs. We disagree with this contention. Pursuant to section 771(18)(A) of the Act, when a country is determined to be an NME, it means that the designated country, in this case the PRC, “{d}oes not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise.” In accordance with section 771(18)(C)(i) of the Act, the presumption of NME status remains in effect until revoked by the Department. The presumption of NME status for the PRC has not been revoked by the Department and remains in effect for the purpose of this investigation. Accordingly, the NV of the product is appropriately based on FOP valued in a surrogate ME country in accordance with section 773(c) of the Act, a methodology that has been repeatedly upheld by the Courts. See, e.g., Sigma Corp. v. United States, 117 F.3d 1401, 1405 (Fed. Cir. 1997); Nation Ford Chem. Co. vs. United States, 166 F.3d 1373 (Fed. Cir. 1999).

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) (Paper from the PRC) and accompanying Issues and Decision Memorandum at 31.

Therefore, while two criteria are delineated in the statute, the analysis used in the two questions overlap. The extent of the overlap is such that in effect the only mechanism for market-economy treatment currently available to respondents in NME proceedings is “market-oriented industry” classification. This classification is granted only on a case-by-case basis, and the test for it is performed only upon request by a respondent. See Paper from the PRC, Issues and Decision Memorandum at 31. In this investigation no party requested such treatment for the Vietnamese pipe industry.

Therefore, given the above analysis, we determine that the record establishes that we have met the statutory criteria for using the FOP methodology. We have continued to use it in this final determination.

Comment 4: Targeted Dumping

SeAH VINA argues the Department erred in its preliminary determination in finding there is a pattern of prices for comparable merchandise that differs significantly by time period, customer, and region (i.e., targeted dumping). The Department made this determination using the targeted dumping test as described in Steel Nails from the UAE (Nails),⁸ as clarified in Wood Flooring from

⁸ See 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) (Steel Nails from the UAE), and accompanying Issues and Decision Memorandum at Comments 1-9.

the PRC. See Preliminary Determination, 77 FR at 32555. SeAH VINA argues that application of the Nails methodology in this case routinely gives rise to “false positive” findings of “patterns” of targeted dumping.

SeAH VINA’s basis for this assertion is an analysis it submitted to the Department on May 2, 2012, in which it created a set of ten alternate U.S. sales databases based on the U.S. sales listing it submitted on April 9, 2012. For each of these ten alternate databases all non-price information (such as customer code, destination, date of sale, and sales quantity) was the same as on the actual listing, but the actual prices and price adjustments were ignored, and a random number between zero and one was assigned as the “net price” for each transaction. SeAH VINA then ran the statistical test described in Nails on each of the ten databases containing random price data to test the specific customers, regions, and time periods for which petitioners had alleged targeted dumping. SeAH VINA states that the results of the analysis were as follows:

- For all ten random trials, the Nails methodology found targeted dumping by customer;
- For four of the ten random trials, the Nails methodology found targeted dumping by region;
- For one of the ten random trials, the Nails methodology found targeted dumping by time period.

In other words, SeAH VINA concludes, the Nails methodology routinely found “patterns” of targeted dumping in purely random data. Such results, SeAH VINA states, cannot be correct because random data by definition have no pattern in them. Consequently, that the Nails test routinely finds “patterns” in the randomized databases means that the purported finding of a pattern of targeted dumping in the actual SeAH VINA data may also be a “false positive,” and not a real pattern. This means the Department cannot reject the “null hypothesis” that the variations in SeAH VINA’s prices were also random, and not evidence of a “pattern” by customer, time period, or region.

Petitioners argue the Department’s Nails test provides a reasonable statistical basis for determining whether there is a significant difference in prices between targeted and non-targeted groups. First, with respect to SeAH VINA’s findings with its ten contrived databases, while petitioners do not dispute the findings, they point out that these results do not establish that the Department’s application of its targeted dumping methodology was contrary to law. In fact, SeAH VINA has not identified any particular provision of U.S. law that is violated by its findings of patterns in its random-number datasets.

Second, petitioners argue that SeAH VINA’s argument is based on the false premise that by definition random data have no patterns in them. Petitioners assert that random data do have patterns in them. They state that it is the patterns in random data that determine the statistical significance of results derived from experiments in engineering and medicine, as well as the physical and social sciences, and clearly apply to the pricing data at issue.

Third, petitioners reject SeAH VINA’s argument that because “we cannot reject the ‘null hypothesis’ that the variations in SeAH VINA’s prices were also random,” the statistical test for the Department’s targeted dumping methodology is not supported by substantial evidence. Petitioners state that statistical probability does not establish whether events occur with “metaphysical certainty,” which appears to be the standard that SeAH VINA is demanding for acceptance of the

Nails statistical test, but only to the likelihood that events occur. When more than a third of prices for a particular customer, period, or region fall more than one deviation below the statistical average, it is reasonable to conclude that the prices are targeted. Therefore, petitioners state, it is quite reasonable for the Department to find targeting dumping under its Nails test.

Department's Position:

We agree with petitioners that the Department's Nails test is a reasonable tool for determining whether or not targeted dumping has occurred. We find unpersuasive SeAH VINA's argument that the Nails test is flawed because it allegedly generated findings of false positives in random data. The premise of SeAH VINA's argument is that random data are an appropriate proxy for actual sales data exhibiting no pattern of prices that differ significantly by purchaser, region, or time period. The Department consider that exporters will typically have a more regularized price- setting mechanism than a random-number generator. Accordingly, the Department disagrees that random data constitute a useful yardstick by which to assess the merits of a test designed for the analysis of actual export prices set by actual exporters to actual purchasers, regions and time periods. SeAH VINA has not presented evidence that the Nails test does not successfully uncover patterns of export prices that differ significantly among purchasers, regions and time periods. What it may or may not uncover with respect to random data is irrelevant, and therefore does not shake our confidence in the test. Furthermore, the CIT has upheld the Nails test as reasonable and consistent with the statute and regulations. See Mid Continent Nail Corp. v, United States, 712 F. Supp. 2d 1370, 1380 (CIT 2010). Therefore in this final determination we have used the Nails test again, as we did in our preliminary determination.

Comment 5: Surrogate Value for Labor

Haiphong Hongyuan argues that in the final determination the Department should select Division 28 ("Manufacture of Fabricated Metal Products – Excluding Machinery and Equipment") of the ISIC – Revision 3 as the SV for labor, rather than Division 27 ("Manufacture of Basic Iron and Steel") because Division 28 is most specific to its labor. Moreover, Haiphong Hongyuan points out that the merchandise subject to this investigation is all covered under chapter 73 of the United States HTS (i.e., articles of iron and steel), not chapter 72 (i.e., iron and steel). Thus, because the subject merchandise is manufactured from a basic metal (i.e., from iron and steel), and is not itself a basic metal, Division 28 is the more appropriate classification for labor because it pertains to the manufacture of fabricated metal products. Haiphong Hongyuan also argues that Division 28 is the division it had identified earlier in the proceeding as the division specific to its labor. See Haiphong Hongyuan's April 25, 2012, submission at 4 and Exhibit SV-6.

Petitioners did not comment on this issue.

Department's Position:

We disagree. Despite its title, Division 27 includes more than just the manufacture of basic iron and metals. The U.N. Classifications Registry states that class 2710 ("Manufacture of basic iron and metal") includes "Manufacture of primary iron and steel products, i.e., production of:"... (inter alia) "pipes and hollow profiles of iron or steel." See "Detailed Structure and Explanatory Notes"

relating to ISCI Rev. code 2710 contained in the Final Determination Surrogate Values Memorandum, dated October 15, 2012. Therefore, even though Haiphong Hongyuan is not a producer of “basic iron and steel” or a “manufacturer of basic metals,” the circular welded pipe it produces is a product that is properly classified under Division 27. Furthermore, there is no necessary correlation between HTS numbers and the labor divisions given in the U.S. Classifications Registry. We fully agree that the subject merchandise is properly classified under chapter 73 (Articles of Iron or Steel) of the HTS, but based on the explanatory notes to class 2710 (quoted above), we still determine that Division 27 is the correct division for valuing labor. Accordingly, in this final determination we have continued to value labor using Division 27.

Comment 6: Surrogate Value for Brokerage and Handling

Haiphong Hongyuan argues the Department should value brokerage and handling using the three sources it placed on the record of this investigation (collectively “Hongyuan Brokerage SV”), rather than from the publication Doing Business India 2010 (Doing Business). The three sources it placed on the record are the terminal handling charges/origin handling charges and the export documentation fees from three Indian brokerage houses. Haiphong Hongyuan gives three reasons for why the Department should use these data.

First, the Hongyuan Brokerage SV is more contemporaneous than are the Doing Business data. The Doing Business data are from June 2009 and thus almost two full calendar years prior to the POI. In contrast, the Hongyuan Brokerage SV is from the second quarter of 2012. Thus, the Doing Business data are at least five quarters removed from the POI, while the Hongyuan Brokerage SV is only two quarters removed from the POI.

Second, the Doing Business data are not representative of a broad market average. With respect to this argument, Haiphong Hongyuan makes the following points:

- The entire Doing Business publication sheds no light on the source of the information.
- The introduction to Doing Business states that “To make the data comparable across economies, the indicators refer to a *specific* type of business; generally a local limited liability company operating in the largest business city” (emphasis added). Doing Business at 1.
- The report further narrows the survey scope by identifying the costs relating to a “medium size” and “private” business that “employs about 60 people,” and that “is located in the peri-urban area.” Doing Business at 37. Haiphong Hongyuan states that such specificity is the very antithesis of a broad market average.

In contrast, Haiphong Hongyuan argues, the Hongyuan Brokerage SV is a broad market average. It is based on charges throughout India by the Indian subsidiaries of three major international carriers.

Third, Haiphong Hongyuan argues the Doing Business data are not specific to the factor being valued. The Department should select an SV that reflects the brokerage and handling costs associated with Haiphong Hongyuan’s exports of subject merchandise. In contrast, the costs identified in Doing Business include “every procedure and the associated document, time and cost, for importing and exporting the goods,” and reflect all costs “starting with the contractual agreement between the two parties and ending with delivery of the goods.” Doing Business at 37.

Furthermore, the report goes on to explain the costs include “all official documents exchanged between the parties to the transaction” and that additional non-brokerage costs such as “the time and cost for issuing or securing a letter of credit is taken into account.” Id. Such costs, Haiphong Hongyuan argues, are not brokerage and/or handling costs.

Fourth, the documents in Doing Business that form the “document preparation” costs (bill of lading, certificate of origin, the commercial invoice) are documents typically prepared by the exporter, and not the broker. The costs associated with this document preparation are normally captured in SG&A. Thus, to include them in brokerage and handling would be to double count them.

SeAH VINA, like Haiphong Hongyuan, argues the Department should use the brokerage and handling SV that Haiphong Hongyuan put on the record of this investigation in its July 11, 2012, submission, rather than the SV used in the preliminary determination. SeAH VINA bases its contention on the fact that the SV data the Department used in the preliminary determination is from 2009, whereas the data Haiphong Hongyuan put on the record are from a more recent period.

Petitioners argue the Department should use the Doing Business data in the final determination as it did in the preliminary determination. They make three points.

First, Department precedent overwhelmingly supports use of the World Bank data. Petitioners state the Department has used Doing Business literally dozens of times, including for brokerage and handling, in a broad array of cases. This fact reflects the Department’s strong preference for publicly available, published information, which, in this case, is compiled by an international organization.

Second, there are numerous flaws in Haiphong Hongyuan’s calculation that tend to reduce the overall average. Petitioners state their point is that there is risk involved in allowing parties to selectively present isolated bits of specific data. Such an approach allows parties a great deal of discretion in their calculations. Thus, the Department is justified to leave the inevitable choices in data selection to an outside, publicly available source such as the World Bank that is attempting to portray the most accurate picture of charges in India, rather than advance a litigation position.

Third, petitioners argue that Haiphong Hongyuan’s objections to the Doing Business data are baseless. They argue:

- The 2009 data of the World Bank report can easily be inflated to the POI using the wholesale price index. Alternatively, the Department could use a later version of the report. Furthermore, the data Haiphong Hongyuan submitted is seven to ten months after the POI’s end, even though earlier data would have been available. This raises the potential that Haiphong Hongyuan specifically picked the quarterly data that best suited their interests.
- The Department has repeatedly found that Doing Business is based on broad market averages. The type of business it describes is average or typical. In any case, Haiphong Hongyuan does not point to any way in which the brokerage and handling costs of the typical business the report relates to would differ from its own. Petitioners argue, for example, that Haiphong Hongyuan never explained how peri-urbanity would have any effect on brokerage or handling costs.

- Haiphong Hongyuan errs in saying that the Doing Business data include many costs not related to brokerage and handling. In making this claim, petitioners argue, Haiphong Hongyuan is misreading the report. Petitioners state these alleged costs that are not part of brokerage and handling are actually included by the Doing Business report in the category “rankings,” and not the category “costs.”

Department’s Position:

We agree with petitioners that the Doing Business data are the best data on the record for valuing brokerage and handling.

Regarding Haiphong Hongyuan’s argument that the Doing Business data are not specific to the factor being valued, we believe Haiphong Hongyuan, as petitioners have noted, misconstrued the reported data. It appears that the documentation or costs Haiphong Hongyuan states it did not incur were included in the categories “documents” and “time,” rather than in the category “cost,” which is the category the Department used in its preliminary determination. See Doing Business at 37 (sidebar). With respect to what is included in the category “cost,” Doing Business states:

Cost includes the fees levied on a 20-foot container in U.S. dollars. All the fees associated with completing the procedures to export or import the goods are included, such as costs for documents, administrative fees for customs clearance and technical control, terminal handling charges and inland transport.

See Doing Business at 37. All the fees itemized are properly included in brokerage and handling except for inland transport, which the Department removed in its computation.

Furthermore, as petitioners have pointed out, the Department has many times found the World Bank’s Doing Business report to be representative of a broad market average. See, e.g., Floor-Standing, Metal-Top Ironing Tables and Certain Parts Thereof From the People’s Republic of China: Final Results of Antidumping Duty Administrative Review, 76 FR 15297 (March 21, 2011) and accompanying Issues and Decision Memorandum at 19. The factors that Haiphong Hongyuan has identified that allegedly make it not representative of a broad market average (e.g., that it was based on a “medium size” and “private business” that employees “about 60 people”) indicate to us not that the costs are not representative of a broad market average, but that they are the costs of a typical business. Where, as here, the alternative is to use the costs from only three brokerage firms, our preference is to use costs calculated by the World Bank. Doing so is consistent with our previous determinations. See, for example, Certain Polyester Staple Fiber From the People’s Republic of China: Final Results and Partial Rescission of Second Antidumping Duty Administrative Review, 76 FR 2886 (January 18, 2011) and accompanying Issues and Decision Memorandum at 10-11 (citation omitted), where we said,

We determine that for B&H costs, the World Bank study is a more broad-based survey of costs in the Indian market and, thus, constitutes a more credible and representative source, than the data that are limited to the experiences of individual Indian companies or four Indian ports. We note that the cost data have an official nature, in that they represent statistical analysis by the World Bank, an international organization. In past

cases, we have found international organization publications to be reliable and credible sources of information.

See also Floor-Standing, Metal-Top Ironing Tables and Certain Parts Thereof From the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 76 FR 15297 (March 21, 2011) and accompanying Issues and Decision Memorandum at 19 (selecting Doing Business as the best source on the record for valuing brokerage and handling, rather than data from individual companies that a respondent had placed on the record).

Finally, with respect to contemporaneity, we note for the record that we will inflate the Doing Business data to the POI through use of the wholesale price index, as we did in the preliminary determination.

Comment 7: Surrogate Value for Steel Straps

SeAH VINA and Haiphong Hongyuan both argue the Department should revise the HTS number used as the SV for steel straps. In the preliminary determination the Department used 7904.00.00, which is for “zinc bars, rods, profiles, and wire.” SeAH VINA argues the Department should use HTS 7212.20.90 because this is the HTS number under which its steel straps are properly classified. Haiphong Hongyuan argues the Department should use HTS 7212.30.90 (“Flat-rolled Products of Iron or Non-Alloy Steel, of a Width of Less Than 600 mm, Clad, Plated, or Coated: Otherwise Coated with Zinc”) because the Department confirmed at verification that the steel strap Haiphong Hongyuan uses is a galvanized steel strap.

Petitioners did not comment on this issue.

Department’s Position:

We agree with respondents that the HTS numbers they suggest are more appropriate than 7904.00.00, which we used in the preliminary determination. Therefore, in this final determination we have valued steep straps using 7212.30.90 (for Haiphong Hongyuan) and 7212.20.90 (for SeAH VINA).

Comment 8: Updating Certain Surrogate Values Used for SeAH VINA

SeAH VINA argues the Department should use updated Indian import data to calculate SVs. In the preliminary determination, Indian Global Trade Atlas (GTA) data were available only through July 2011. Presently, however, data are available through September 2011, thus covering the entire POI. SeAH VINA argues the Department should therefore use import data through September 2011.

Petitioners did not comment on this issue.

Department’s Position:

We agree. In this final determination we have used GTA data covering the POI through September 2011 in calculating the margins for both Haiphong Hongyuan and SeAH VINA.

Comment 9: Rate Applicable to the Separate-Rate Applicants Not Selected for Individual Analysis

SUNSCO (a Vietnamese exporter that qualified for a separate rate but that was not selected for individual examination (separate-rate applicant)) argues the Department should assign the separate-rate applicants a rate based on the weighted-average of the rates of the individually investigated respondents, even if such margins are zero or de minimis. Furthermore, if application of this calculation results in the separate-rate applicants being assigned a zero or de minimis rate, they should be excluded from any antidumping duty order issued.

Petitioners counter that the statute explicitly provides for using an adverse facts available (AFA) rates in cases where, as here, all available rates are either zero or de minimis, or based on facts available. In fact, petitioners continue, the SAA's "expected method" in such cases is to include the AFA margin in determining the separate rate for non-investigated respondents.

Department's Position:

In our final determination calculations, we found positive antidumping margins for both mandatory respondents. We have calculated the margin as the average of the two margins in accordance with our standard practice. See Wood Flooring from the PRC Issues and Decision Memorandum at 51. Therefore, this issue is moot.

Issues Regarding Haiphong Hongyuan

Comment 10: The Department Should Make Adjustments to the Quantity of Certain U.S. Sales

Petitioners argue that the Haiphong Hongyuan and MAT verification reports indicate that Haiphong Hongyuan misreported the quantity of certain sales to a particular U.S. customer. Petitioners assert the Department should correct these errors in reaching the final determination.

Haiphong Hongyuan did not comment on this issue.

Department's Position:

We agree. Haiphong Hongyuan corrected the quantity variable for this customer in the U.S. sales listing it submitted on August 27, 2012, which is the one we are using in the final determination. Therefore this error has been corrected for the final determination.

Comment 11: Inputs that Should Be Included in Packing, Rather than Cost of Manufacture

Haiphong Hongyuan argues the Department erred in its preliminary determination by including ten items related to packing in the cost of manufacture, rather than among the total packing costs.

Petitioners did not comment on this issue.

Department's Position:

We agree, and have corrected this error in the final determination.

Comment 12: The Department Should Use the Most Recently Submitted FOP and Sales Databases

Haiphong Hongyuan argues the Department should use the FOP and U.S. sales databases Haiphong Hongyuan submitted on August 27, 2012, as they incorporate various changes based on the minor corrections that Haiphong Hongyuan and MAT submitted at the start of each verification.

Petitioners did not comment on this issue.

Department's Position:

We agree. In this final determination we have used the databases Haiphong Hongyuan and MAT submitted on August 27, 2012, and the U.S. sales listing and FOP database SeAH VINA submitted on August 21, 2012, and August 28, 2012, respectively.

However, with respect to Haiphong Hongyuan, we made one change to the sales listing. We did not accept a change to commissions for one sales agent. MAT had submitted this change as an opening-day correction at its verification, but the sales traces performed at the verification did not substantiate the correction. See Haiphong Hongyuan's August 27, 2012, submission at 3, and the MAT verification report, dated August 29, 2012, at 13.

Comment 13: Clerical Error

Petitioners argue that in calculating Haiphong Hongyuan's net U.S. price in the preliminary determination the Department used an incorrect variable for the gross unit price. They argue the Department should correct this error in the final determination calculations.

Haiphong Hongyuan did not comment on this issue.

Department's Position:

We agree, and have corrected this error in the final determination.

Issues Regarding SeAH VINA

Comment 14: Date of Sale for U.S. Sales through SSA

SeAH VINA argues that in the final determination the Department should use the date of shipment from Vietnam as the date of sale for all of SeAH VINA's sales shipped through its U.S. affiliate SSA. In the preliminary determination the Department used the date SSA issued the invoice. The

Department used this date, SeAH VINA states, because it mistakenly believed SeAH VINA had reported this date as the sales date. Thus, the preliminary determination stated:

Both Haiphong Hongyuan and SeAH VINA reported their dates of sale based on the date their affiliates issued an invoice to the unaffiliated U.S. customer. No information on the record demonstrates that any other date better reflected the date on which the material terms of sale were established. Therefore, consistent with 19 CFR 351.401(i), the Department has preliminarily determined that the invoice date is the date that best reflects when the material terms of sale are set, and used it as the date of sale in this preliminary determination.

See Preliminary Determination, 77 FR at 32558.

SeAH VINA argues that the Department's statement above is incorrect. It states that it reported the invoice date as the date of sale for all sales made through its U.S. affiliate SPS, but for sales made through SSA it reported the shipment date from Vietnam as the date of sale. SeAH VINA states that the shipment date is the date on which a final binding agreement regarding price and quantity was established between itself and the U.S. customer, and therefore it is the date the Department should use as the date of sale.

Petitioners did not comment on this issue.

Department's Position:

We agree. In this final determination, we have used the date of shipment from Vietnam as the date of sale for all sales that SeAH VINA made through SSA.

Comment 15: Credit Period for "Back-to-Back" Sales

SeAH VINA argues the Department should calculate imputed credit for the "back-to-back" sales made through SSA (*i.e.*, sales for which the merchandise was sold on paper from SeAH VINA to SSA, and then from SSA to the U.S. customer, but which was shipped directly from SeAH VINA to the U.S. customer without any SSA affiliate ever taking physical possession of the merchandise) using the date of SSA's invoice to the U.S. customer, rather than the date of shipment from Vietnam, as the start of the credit period. SeAH VINA gives four reasons for this contention.

First, in a back-to-back transaction, the merchandise is not shipped, in legal terms, to the customer until the affiliated U.S. importer issues its invoice and title is transferred to the customer. The transfer of title and the customer's payment obligation for these "back-to-back" sales through SSA was, therefore, the same as it would have been if the merchandise had been stored at SSA's facilities in the United States prior to sale. Thus, because shipment to the customer does not occur until the importer transfers title, the calculation of the credit period should also begin with that date.

SeAH VINA states that the facts of this investigation demonstrate the significance of SSA's retention of title to the merchandise until its invoice is prepared. Specifically, one of the customers for one of SSA's U.S. sales asked SSA to help find an alternative customer for a portion of the

shipment after the merchandise had already left Vietnam. SSA was able to find an alternative, and as a result, when the merchandise arrived in the United States, SSA invoiced the alternative customer, and not the original customer that had contracted for the merchandise. See SeAH VINA verification report at 12. This example illustrates, SeAH VINA argues, that even when the merchandise is shipped from Vietnam under a binding contract, it is always possible for SSA to re-direct the shipment to a different customer. Thus, SeAH VINA argues, until SSA makes that direction, it is not entitled to receive payment from the customer, and SeAH VINA retains the ability to re-direct the merchandise to another customer. Consequently, the credit expense incurred for any delay in the receipt of payment does not begin until SSA issues the invoice.

Second, the Department's use of the date of shipment from Vietnam as the start of the credit period is inconsistent with basic contract law principles (e.g., the Uniform Commercial Code), which holds that a seller is not entitled to payment from the buyer until title has transferred to the buyer. Thus, until title transfers, there is no "opportunity cost" to the seller from allowing the buyer to delay payment. The seller begins to incur an "opportunity cost" only when it transfers title to the buyer and thus (1) is in a position of holding neither the right to the merchandise nor the buyer's payment, and (2) would be able to demand payment from the buyer under the default contract rules. The Department's calculation of credit expense, SeAH VINA argues, should reflect that reality.

Third, using the shipment date from Vietnam as the start of the credit period is inconsistent with the statutory scheme. Specifically, the 1995 Uruguay Round amendments to the U.S. antidumping statute made clear that the adjustments to CEP are limited to expenses associated with economic activities in the United States. Thus, in its 1997 commentary on the regulations adopted to implement the statutory amendments, the Department noted that both section 772(f) of the Act and the Statement of Administrative Action make clear that only those expenses associated with economic activities in the United States should be deducted from CEP. See Antidumping Duties; Countervailing Duties; Final Rule, 62 FR 26296, 27351 (May 19, 1997).

SeAH VINA notes in this regard that the Department has consistently held that the imputed inventory carrying costs (ICC) for the time prior to the arrival of the merchandise in the United States, when the merchandise is "on the water," cannot be deducted from CEP. See Certain Stainless Steel Butt-Weld Pipe Fittings from Taiwan: Final Results and Final Rescission in Part of Antidumping Duty Administrative Review, 68 FR 69996 (December 16, 2003), and accompanying Issues and Decision Memorandum at Comment 10. Thus, SeAH VINA argues, the Department's decisions establish that imputed financing costs prior to the time merchandise arrives in the United States are not expenses associated with economic activities in the United States, and therefore cannot be deducted from CEP.

Fourth, the Department's differential treatment of back-to-back sales and sales from inventory held in the United States is inconsistent with the interpretation of the statute by the Federal Circuit. Specifically, in AK Steel Corporation v. United States, 226 F.3d at 1361 (Fed. Cir. 2000) (AK Steel), the Federal Circuit overturned a Departmental practice under which the Department classified U.S. sales as CEP only if they were made from inventory stored in the United States, and classified all other sales as EP sales. In AK Steel, SeAH VINA states, the Federal Circuit clarified that sales made in the United States by a U.S. affiliate of an exporter had to be classified as CEP sales. Therefore, SeAH VINA argues, the statutory provisions concerning additional adjustments to

CEP, and the limitations on those adjustments, apply, whether the CEP sale was made from merchandise stored in inventory in the United States or through back-to-back transactions. But by applying different rules to CEP sales based on whether the sales were made from inventory in the United States or through back-to-back transactions, the Department has effectively undone the rule adopted by the Federal Circuit in AK Steel.

Furthermore, SeAH VINA notes that in a recent decision concerning non-alloy steel pipe from Korea the Department held that the decision in AK Steel was irrelevant because it did not specifically address the calculation of imputed credit. See Circular Welded Non-Alloy Steel Pipe from the Republic of Korea: Final Results of the Antidumping Duty Administrative Review, 77 FR 34344 (June 11, 2012) (Pipe from Korea) and accompanying Issues and Decision Memorandum at 25. SeAH VINA argues that this narrow reading of AK Steel is implausible. The decision in AK Steel, SeAH VINA argues, stands for the proposition that the same statutory provisions govern all sales made in the United States through an affiliated importer. Because the Department's preliminary credit calculation in this investigation applies different rules to such sales, it is not consistent with the interpretation of the statute adopted by the Federal Circuit in AK Steel.

Petitioners argue the Department properly calculated the imputed credit using the shipment date from Vietnam as the start of the credit period. First, petitioners argue that SeAH VINA's argument is premised on a theory that "shipment" does not refer to the delivery of the merchandise, but to when legal transfer of title takes place. Petitioners assert that, to the contrary, shipment occurs when the merchandise is shipped from Vietnam, and not when SSA transfers title or invoices the U.S. customer.

Second, petitioners disagree with SeAH VINA that no opportunity cost is incurred until title is transferred to the U.S. customer. They argue that the inventory carrying and credit adjustments together reflect the opportunity costs that arise from holding merchandise after production until payment from the customer occurs. After production and before sale an inventory carrying cost results. After sale and before payment a credit expense results. For the back-to-back sales at issue, petitioners state, SeAH VINA reported the date of shipment from Vietnam as the date of sale, and therefore this date should serve as the start of the credit period.

Third, petitioners argue that, contrary to SeAH VINA's claim, credit expenses on U.S. sales are expenses associated with economic activity in the United States. They cite to section 772(d) of the Act which requires a reduction to CEP whenever certain enumerated expenses (which include "expenses that result from, and bear a direct relationship to, the sale, such as credit expenses") are "incurred by or for the account of the producer or exporter, or the affiliated seller in the United States, in selling the subject merchandise." Furthermore, petitioners argue, the courts have made it clear that the expenses associated with economic activities occurring in the United States do not have to occur in the United States. In Brother Industries, Ltd., v. United States (Brother), the CIT stated:

By stripping all of the selling expenses incurred in the United States from the exporter's selling price, Congress made it plain that it did not want a comparison between a price in the home market and a price in the United States market (which price would then

properly reflect all selling expenses incurred), but rather between a price in the home market and a price for export to the United States.

See Brother, 540 F.Supp. 1342, 1357 (CIT 1982). Therefore, to fulfill the Congressional intent, petitioners argue, it is necessary to deduct the opportunity costs associated with credit on U.S. sales.

Department's Position:

We disagree with SeAH VINA. As SeAH VINA itself has noted, we addressed this same issue in Pipe from Korea, with respect to a respondent called SeAH. There, in a case with a similar fact pattern, we addressed many of the same arguments as SeAH VINA has presented here. We stated:

The Department's practice is to calculate credit expenses based upon the date the merchandise was shipped to the unaffiliated customer to the date on which the customer paid for the merchandise.⁶⁷ As we explained in Wire Rod from Trinidad and Tobago 2005, "Credit expense is the interest expense incurred (or interest revenue foregone) between shipment of merchandise to the customer and receipt of payment from the customer. Inventory carrying costs are the interest expense incurred (or interest revenue foregone) between the time the merchandise leaves the production line at the factory to the time the goods are shipped to the first unaffiliated customer."⁶⁸

In Wire Rod from Trinidad and Tobago 2005, we further stated that it is our intention, in CEP cases, where the merchandise does not enter the inventory of a U.S. affiliate in the United States, to calculate the credit period from the time the merchandise leaves the port in the foreign country to the date of payment.⁶⁹ As SeAH indicates above, its U.S. sales are not sold from its U.S. affiliate's warehouse.⁷⁰ While the merchandise may temporarily enter the U.S. affiliate's inventory on paper while the affiliate is clearing the merchandise through customs, the U.S. affiliate does not maintain any subject merchandise inventory available for sale in the United States.⁷¹ Moreover, SeAH produced the merchandise it sold in the United States to order. Thus any merchandise that is in the affiliate's inventory while clearing through customs is already on its way to specific U.S. customers. As such, the credit expenses SeAH incurred relate to sales destined to specific, unaffiliated U.S. customers. Under these circumstances, our normal practice is to calculate credit expenses from the date the

⁶⁷ See Notice of Final Results of the Tenth Administrative Review and New Shipper Review of the Antidumping Duty Order on Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea 70 FR 12443 (March 14, 2005) and accompanying Issues and Decision Memorandum at Comment 13 and Stainless Steel Wire Rod from the Republic of Korea: Final Results of Antidumping Duty Administrative Review, 69 FR 19153 (April 12, 2004) and accompanying Issues and Decision Memorandum at Comment 4.

⁶⁸ See Notice of Final Results of Antidumping Duty Administrative Review: Carbon and Certain Alloy Steel Wire Rod from Trinidad and Tobago, 70 FR 12648 (March 15, 2005) and accompanying Issues and Decision Memorandum at Comment 6 (Wire Rod from Trinidad and Tobago 2005).

⁶⁹ See Id.

⁷⁰ See SeAH's Section C Questionnaire Response at 30.

⁷¹ See SeAH's Section A Questionnaire Response at 27-28.

merchandise is first shipped to the unaffiliated customer to the date of payment by that customer.⁷²

We do not find that the AK Steel case is applicable to this issue because AK Steel does not address the issue of U.S. imputed credit expenses. AK Steel addresses the issue of whether the sales transactions made in the United States between a respondent's U.S. sales affiliate and unaffiliated U.S. customers constitute CEP sales even when the shipment of subject merchandise was made directly from the respondent to the unaffiliated U.S. customers. The CAFC's decision in AK Steel does not challenge in any way our use of the difference between the date of payment and the date of shipment in the calculation of U.S. imputed credit expenses. AK Steel does not overturn our practice of using the difference between the payment date and the shipment date in the calculation of U.S. imputed credit expenses.

See Pipe from Korea Issues and Decision Memorandum at 24-25.

As noted above, the fact pattern here is similar to that of Pipe from Korea, and we find no compelling reason to change our determination. Here, as in Pipe from Korea, the merchandise is produced to order and shipped directly to U.S. customers without ever physically entering the inventory of the U.S. affiliate. See SeAH VINA's January 20, 2012, Section A questionnaire response at 12-13. Even though for one shipment (as SeAH VINA noted), the final customer who was invoiced for a portion of the sale was not the same as the originally-invoiced customer, this does not change our determination that the essential terms of sale (and hence the sale date) are set before the merchandise is shipped from Vietnam. The particular sale at issue to which SeAH VINA points appears to be highly aberrational. If it were not, this would speak in favor of changing the sale date as well as the shipping date to the date on which SSA issues the invoice, and SeAH VINA has consistently advocated the date of shipment from Vietnam as the date of sale. See Comment 14 (above).

Moreover, we do not agree with SeAH VINA's application of contract law principles to antidumping calculations. Even if a seller is not entitled to payment until after title has transferred, such principles are not always controlling in antidumping law. For instance, in rare instances customers pay in advance of shipment, and when that happens the imputed credit period is still calculated from the date of shipment. Thus, antidumping calculations are not always in accord with the strict rules of contract law. For purposes of antidumping calculations, as explained in Pipe from Korea (above), the date of shipment represents the end of the inventory carrying period ends and the beginning of the credit period.

⁷² See Wire Rod from Trinidad and Tobago 2005 and accompanying Issues and Decision Memorandum at Comment 6 and Certain Hot-Rolled Carbon Steel Flat Products from Romania: Final Results of Antidumping duty Administrative Review, 72 FR 18204 (April 11, 2007) and accompanying Issues and Decision Memorandum at Comment 3 ("Hot-Rolled from Romania"). An exception to this practice can occur where the material terms of sale are not set until after date of shipment. For example, in Wire Rod from Trinidad and Tobago 2007 and accompanying Issues and Decision Memorandum, Methodology for Calculating Imputed Expenses for CEP Sales, we calculated credit expense from date of invoice, rather than date of shipment, because the material terms of sale were not set until date of invoice, which was after shipment in that case. See also Mittal Steel Point Lisas Ltds. v. United States, 502 F. Supp. 2d 1345 (CIT 2007). However, in the instant review, we have determined that the material terms of sale are set by shipment date.

Furthermore, we do not agree with SeAH VINA that our reading of AK Steel is too narrow and that the decision stands for the proposition that the same statutory provisions govern all sales made in the United States through an affiliated importer. Therefore, for this final determination we have continued to use the date of shipment from Vietnam as the start of the credit period for sales made through SSA.

Comment 16: Double Counting Countervailable Subsidies

SeAH VINA argues that in the event the Department’s countervailing duty (CVD) investigation finds countervailable subsidies against SeAH VINA, the Department should make an adjustment to the dumping calculations to avoid double counting. SeAH VINA states that such an adjustment is authorized by the amendment to the antidumping statute that authorized the Department to conduct CVD investigations on NME countries.

Petitioners did not comment on this issue.

Department’s Position:

This issue is moot because the Department did not find countervailable subsidies in the final CVD determination.

Comment 17: Clerical Error

SeAH VINA argues the calculations used in the preliminary determination contained a programming error that resulted in the deletion of 53 U.S. observations from the analysis, and that this error should be corrected in the final determination calculations.

Petitioners did not comment on this issue.

Department’s Position:

We agree, and have corrected this error in this final determination.

RECOMMENDATION

Based on our analysis of the comments received, we recommend adopting all of the above changes and positions, and adjusting the margin calculation program accordingly. If accepted, we will publish the final determination and the final dumping margins in the Federal Register.

✓ Agree

_____ Disagree

Paul Piquado
Paul Piquado
Assistant Secretary
for Import Administration

15 OCTOBER 2012
Date