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July 2, 2012

MEMORANDUM TO: Paul Piquado
Assistant Secretary
for Import Administration

FROM: Gary Taverman 
Senior Advisor
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Final Determination of
the Antidumping Duty Investigation of Large Power Transformers
from the Republic of Korea

SUMMARY:

We have analyzed the case and rebuttal briefs submitted by interested parties. As a result of our analysis, we have made changes to the margin calculations of both respondent companies, as discussed below. We recommend that you approve the Department of Commerce (the Department) positions, described in the "Discussion of Interested Party Comments" section of this Issues and Decision Memorandum. Below is the complete list of the issues in this investigation for which we received comments from parties:¹

I. List of Issues

General

Comment 1: Date of Sale

Comment 2: Facts Available

¹ Due to the proprietary nature of certain details in the case and rebuttal briefs regarding certain issues raised in the above-referenced proceeding, the Department has drafted proprietary memoranda for each respondent. See Memorandum to Paul Piquado, Assistant Secretary for Import Administration, entitled, "Proprietary Arguments from the Issues and Decision Memorandum for the Final Results of the Antidumping Duty Investigation of Large Power Transformers from the Republic of Korea – Hyosung Corporation" (Hyosung Proprietary Memorandum) and Memorandum to Paul Piquado, Assistant Secretary for Import Administration, entitled, "Proprietary Arguments from the Issues and Decision Memorandum for the Final Results of the Antidumping Duty Investigation of Large Power Transformers from the Republic of Korea – Hyundai Heavy Industries (HHI) and Hyundai Corporation, U.S.A. (collectively, Hyundai)" (Hyundai Proprietary Memorandum), both dated July 2, 2012. These memoranda are incorporated by reference into this Issues and Decision Memorandum, providing supplementary detail regarding business proprietary aspects of the issues discussed and summarized below.



Hyundai Heavy Industries Co., Ltd.-Specific Comments

Comment 3: Home Market Gross Unit Price
Comment 4: U.S. Gross Unit Price
Comment 5: U.S. Selling Expenses; Commissions and U.S. Duty
Comment 6: CEP Offset
Comment 7: Inconsistent Allocation of Certain Selling Expenses
Comment 8: General and Administrative and Financial Expenses
Comment 9: Unshipped Sales
Comment 10: Normal Value versus Constructed Value

Hyosung Corporation-Specific Comments

Comment 11: Selling Expense Classifications
Comment 12: Gross Unit Price
Comment 13: The Understatement of U.S. Selling Expenses
Comment 14: The Use of Actual Data in Margin Calculation
Comment 15: General and Administrative and Indirect Selling Expense Ratios
Comment 16: Clerical Error

II. Background

On February 16, 2012, the Department published the preliminary determination in the above-referenced antidumping duty investigation on large power transformers from the Republic of Korea (Korea). *See Large Power Transformers from the Republic of Korea: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 77 FR 9204 (February 16, 2012) (*Preliminary Determination*). The merchandise covered by this investigation is large power transformers from Korea, as described in the “Scope of the Order” section in the *Federal Register* notice of the final determination. The period of investigation (POI) is July 1, 2010, through June 30, 2011. This investigation covers two manufacturers/exporters that were selected as mandatory respondents, Hyundai Heavy Industries Co., Ltd. (HHI)² and Hyosung Corporation (Hyosung). The petitioners in this investigation are ABB Inc., Delta Star, Inc., and Pennsylvania Transformer Technology Inc. (collectively, Petitioners).

On May 25, 2012, all interested parties timely submitted case briefs commenting on our *Preliminary Determination*. Rebuttal briefs were also timely filed by all parties on June 1, 2012. No hearing was requested. Department officials met separately with counsel to Petitioners, Hyundai, and Hyosung on June 14, 18, and 19, 2012, respectively. *See* Memoranda to the File, dated June 15, 20, and 19, 2012, concerning each meeting.

² In instances where we or parties refer to both HHI and its U.S. affiliate, Hyundai Corporation, U.S.A., we have referred to these companies collectively, as “Hyundai.”

III. Discussion of Interested Party Comments

General Issues

Comment 1: Date of Sale

Purchase Order

Petitioners state that the respondents originally wanted to report sales based on invoice date. *See* Case Brief on Behalf of ABB, Inc., Delta Star, Inc., and Pennsylvania Transformer Technology, Inc. regarding Large Power Transformers from the Republic of Korea, dated May 25, 2012 (Petitioners' Case Brief) at 6. However, Petitioners state, sales of large power transformers can be invoiced years after material terms have been agreed upon. *Id.* Petitioners also state that the record demonstrates that prices for large power transformers declined during the period 2008 to 2010 and that they filed this case in July 2011 in order to capture the lower-priced sales of large power transformers made during the POI (*i.e.*, late 2010 and early 2011). *Id.* If invoice date is used as the date of sale, Petitioners argue the sales databases would include higher-priced sales, negotiated prior to the POI. *Id.*

Petitioners state that in its *Preliminary Determination*, the Department relied on the purchase order (PO) as the date of sale, while excluding sales known to be made pursuant to long-term contracts executed prior to the POI, because that date best reflected the date upon which the material terms of sale were established. *See* Petitioners' Case Brief at 6-7. Petitioners also state that in its *Preliminary Determination*, the Department noted that its date of sale policy includes relying on the earliest document establishing the material terms of sale. *Id.* at 7. Petitioners note that in their pre-verification comments, they identified "numerous anomalies" in the respondents' reported use of PO as the date of sale. *Id.* These examples, Petitioners claim, suggest that, for some sales, a long-term contract or other document prior to the PO first established the material terms of sale. *Id.*

Additionally, Petitioners claim, during verification, the Department discovered previously unreported documents which precede the PO. *See* Petitioners' Case Brief at 8. These documents, Petitioners argue, first establish the material terms of sale for large power transformers for a "significant but unknown number of sales." *Id.* Petitioners also argue that the Department identified material terms of sale established in the alliance agreements for certain other sales. *Id.* Consequently, Petitioners state, the Department should determine that the respondents' assertions that the PO is the first document that establishes the material terms of sale are incorrect.

Respondents' Reported Date of Sale

Petitioners state that the Department's long-standing methodology for identifying the date of sale for large custom-made products (*i.e.*, large power transformers) is to rely on the earliest document in the sales process that establishes the material terms of sale. *See* Petitioners' Case Brief at 9. The earliest date at which point material terms of sale in these custom-made products were established, Petitioners state, has been the contract date. *Id.* Petitioners cite to *Mechanical Transfer Presses from Japan: Final Determination of Sale at Less Than Fair Value*, 55 FR

335341 (January 4, 1990) (*MTPs from Japan*) and *Notice of Final Determination of Sales at Less Than Fair Value: Large Newspaper Printing Presses and Components Thereof, whether Assembled or Unassembled, From Germany*, 61 FR 38166 (July 23, 1996) (*LNPPs from Germany*) as proof of the Department's practice. *Id.* In these cases, Petitioners argue, the Department recognized that for large custom-made products, the producer and customer engage in negotiations which result in detailed contracts. *Id.* These contracts, Petitioners claim, result in a "meeting of the minds," establishing a sale.

In the instant case, Petitioners claim, the respondents have argued that such contracts did not represent a "meeting of the minds" and never established the material terms of sale. *See* Petitioners' Case Brief at 10. Petitioners state that the respondents have continued to assert the PO, and no other document, first establishes the material terms of sale, despite the Department's finding of previously unreported documents (discussed in detail, below) which precede the PO and establish material terms of sale. *Id.*

Petitioners again cite to *MTPs from Japan* and *LNPPs from Germany* as evidence that the contract date is the appropriate date of sale. *Id.* at 11. For example, Petitioners note that in *LNPPs from Germany* (which also cites to *MTPs from Japan*), the Department found that the sales contract established the material terms of sale despite the fact that a specific quantity was not provided in the contract. *Id.* Furthermore, Petitioners note that in *LNPPs from Germany*, the Department determined that, "the earliest point in the sales transaction where the essential terms of sale for the LNPP industry (*i.e.*, specifications, price, payment schedules, warranty terms, and installation requirements) would be established definitively, is the sale contract date, given the volume of sales correspondence generated in the sales process and the potential minor specification changes that may be made to the merchandise during the production process and after delivery." *Id.*

Additionally, Petitioners point to record evidence in the instant investigation which, they claim, identifies inconsistencies in dates related to the ordering of materials (*i.e.*, field ORDMATDATEH/U), production (*i.e.*, fields PRDCOMCDATEH/U, STARTDATE, and COMPLETEDATE) and engineering drawings (*i.e.*, field DRAWDATEH/U). *Id.* at 11-12. Petitioners state that for a "high-value, produced-to-order product" such as large power transformers, the purchasing of materials, reservation of production space, or commencement of productions "demonstrates that the sale has already been consummated between the purchaser and producer." *Id.* at 13. These inconsistencies, Petitioners argue, demonstrate that there is an earlier document in the sales process than the PO that establishes material terms of sale. *Id.* at 12-13.

Verification Findings

Petitioners argue, that based upon verification findings, it is not possible to determine which document first establishes the material terms of sale for any given sale. They claim that the respondents "have neither fully reported nor accurately described all of the documents in their sales process." *See* Petitioners' Case Brief at 14.

With respect to Hyosung, Petitioners claim that at verification, "Commerce discovered a previously unreported document -- the Letter of Award (LOA) - that precedes the PO and

triggers production.” *Id.* Petitioners claim that “given that each unit is made to order, entry of the order in response to an LOA, sales contract, or other document indicates the terms of sale have been set,” and that “this undermines the reported date of sale for all of Hyosung’s sales.” *Id.* Petitioners argue that Hyosung had failed to disclose certain documents in their sales process prior to verification. *Id.* at 15. *See also* Hyosung Proprietary Memorandum. Similar arguments are made with respect to Hyundai. *Id.* at 16. *See also* Hyundai Proprietary Memorandum.

Petitioners claim that the Department’s verifiers independently uncovered information that undermines the respondents’ contentions with regard to “PO” date and that both respondents failed to report the existence of such documents. Petitioners further argue that neither respondent had reported the existence of such documents and that “this is not a case of Commerce uncovering a few exceptions to a general rule” but rather that “respondents asserted that long-term contracts never set the material terms of sale, and systematically failed to disclose other documents that triggered sales recognition and LPT production within the company.” *Id.*

Petitioners further argue that the respondents “never submitted a *comprehensive* description of the documents generated in the sales process, despite the fact that both companies had set policies and specified documents to trigger a sale.” *Id.* As a result, Petitioners believe it is not clear whether “some other contract or communication between the parties is generated for every sale or only for certain sales” and that as a result the Department cannot determine an accurate database or margin. Therefore, Petitioners call for the Department to rely on total adverse facts available (AFA) for the final determination with respect to Hyundai and Hyosung. *Id.* at 17.

Petitioners concede that “the Department often tries to identify a single document or point in time that fixes the material terms of sale.” *Id.* However, Petitioners argue that “the agency should abide by its stated policy in *LNPPs {from Germany}* of retaining flexibility to rely on the *earliest date* in cases involving custom-made capital equipment,” and that this is consistent with the Department’s “differential approach to the date of sale issue” discussed in *MTPs from Japan*, which led the Department to rely on the ‘internal order’ date, when ‘no other document existed prior to the internal order.’” *Id.* citing *MTPs from Japan*.

Petitioners believe that the “respondents’ approach of using the date of the PO would have Commerce ignore its entire prior history for custom-made equipment, and disregard the actual documents that set all material terms of sale, including long-term contracts.” *Id.* Petitioners dispute the respondents’ claims that the alliance agreements “are ‘menus’ from which {large power transformers} may or may not be ordered.” *Id.* at 18. Petitioners claim that “alliance contracts sometimes set *all* of the material terms” and that “alliance agreements, just as with the Letters of Awardestablish the material terms of sale *before* the purchase order is issued.” *Id.*

Petitioners argue that because U.S. sales databases are normally quite small in cases involving custom made goods, the respondents can “scrutinize their records to identify the appropriate date of sale for each transaction.” *Id.* Petitioners claim that the “respondents chose not to do so in this case and actually engaged in significant efforts to avoid doing so.” *Id.* Petitioners believe that “in cases such as this, it is possible, and is much more accurate, to require the date of sale to reflect the *earliest point* at which the LPT’s price and specifications are settled, even if this means using different triggering documents for different sales.” *Id.* at 19 (emphasis in original).

Petitioners believe the Department cannot assign accurate margins and that because documents “were never disclosed by the respondents, Commerce should conclude that one or both likely exist for every sale, rendering the respondents’ entire databases - for both markets - incorrect.” *Id.*

Petitioners conclude that “the Department’s only recourse is to rely on total adverse facts available for the final determination” and that if “the Department elects to rely on the reported sales databases, as ‘facts available,’” it should continue to exclude sales made pursuant to long-term contracts where the date of the contract precedes the POI.” *Id.*

Petitioners also highlight selected examples, business proprietary in nature, to further demonstrate their belief that the “respondents withheld documents relevant to the ‘date of sale’ issue from the Department, did not fully or accurately describe the sales process or list the universe of sales documents, reported incorrect dates of sale and failed to cooperate to the best of their ability.” *Id.* at 20. *See also* Hyundai Proprietary Memorandum and Hyosung Proprietary Memorandum. Petitioners also reassert their claim that the documents that trigger production start time are critical. In Petitioners’ view, “production on a piece of capital equipment worth \$2 million will not begin unless the parties have a ‘meeting of the minds’ on the material terms of the sale. The risk would simply be too great otherwise. That is one reason why Commerce treats custom-made goods differently than commodity goods for ‘date of sale’ purposes.” *Id.* at 23.

With regard to Hyosung’s U.S. sales, Petitioners state that Hyosung failed to disclose the existence of various documents (*i.e.*, letter of intent (LOI), LOA, or order entry sheets) in any of its discussions regarding sales process, date of sale, or order entry. *See* Petitioners’ Case Brief at 24. Rather, Petitioners state, these documents were discovered during the Department’s verification exercise and described in the Department’s verification reports. *Id.* These documents, Petitioners argue, memorialize price and quantity and, in certain instances, permit Hyosung to enter an order into its system and begin production. *Id.*

Petitioners discussed, in detail, aspects of certain of Hyosung’s alliance agreements. *See* Petitioners’ Case Brief at 24-29. For example, Petitioners noted the following:

- (1) Certain alliance agreements included references to (or first establish) specific transformers, quantities, and prices. *Id.* at 24 and 26.
- (2) Certain alliance agreements did not permit Hyosung to make changes to material terms of sale. *Id.* at 24-25.
- (3) Hyosung maintains that prices can change after the contract but that once the PO has been issued, material terms of sale can change (*e.g.*, due to escalation clauses). *Id.* at 25. Petitioners argue that the price changes referenced by Hyosung are made pursuant to escalation clauses within the contracts themselves and that the Department treats such escalation clauses as established prices in the contracts where Petitioners cite to *Notice of Final Determination of Sales at Less Than Fair Value: Emulsion Styrene-Butadiene Rubber from Mexico*, 64 FR 14872 (March 29, 1999) (where the Department found that the long-term contract set the date of sale and price term is fixed if it is established by a

published source outside of the control of either party to the contract). *Id.* Therefore, Petitioners claim, a change in price under an escalation clause is not a change in the material terms of sale. *Id.*

- (4) As part of its presentation of minor corrections during the Department's constructed export price (CEP) verification, Hyosung stated that it inadvertently failed to provide the Department with copies of certain alliance agreements. *Id.* at 27. This contract, Petitioners argue, covered certain sales which were shipped after the *Preliminary Determination* but prior to the December 31, 2011, cut-off point for inclusion in the Department's final determination. *Id.* Based on the Department's methodology utilized at the *Preliminary Determination* of excluding those sales known to be made pursuant to an alliance agreements negotiated prior to the start of the POI, these sales should have been excluded from analysis. *Id.*

At Attachment 1 of their Case Brief, Petitioners provide documentation which, they state, applies to the sales shipped after the *Preliminary Determination* but prior to the December 31, 2011, cut-off point. This documentation, Petitioners argue, operates as a "new contract" between Hyosung and its U.S. customer, covering the aforementioned sales. *Id.* at 28. Because this documentation operates as a "new contract," and is dated within the POI, Petitioners argue that the Department should include these sales in its analysis at the final determination. *Id.*

For these reasons, Petitioners argue, alliance agreements are the earliest document establishing price, quantity, and specifications for sales to customers made pursuant to alliance agreements. *See* Petitioners' Case Brief at 25. Because certain of these alliance agreements were negotiated prior to the start of the POI, Petitioners argue, it would be "fundamentally wrong" to compare U.S. sales priced prior to the POI to home market sales priced during the POI. *Id.* at 26. Based on this evidence, Petitioners argue that Hyosung has improperly described all alliance agreements as "menus" that do not "bind" Hyosung to its customers in an effort to "justify reporting of PO date for large power transformers sold pursuant to these alliance agreements, as the date of sale." *Id.* at 29.

With respect to Hyundai's U.S. sales, Petitioners argue that "evidence collected at Hyundai's verification was equally unresponsive of 'purchase order' date as the proper 'date of sale' for all sales, and the agency uncovered numerous examples where the purchase order reported by Hyundai was not the earliest document establishing the material terms of sale." Because much of this information is proprietary in nature, *see* Hyundai Proprietary Memorandum at "Date of Sale" for further discussion.

Petitioners then assert that "from the outset of this proceeding, respondents have engaged in a systematic attempt to manipulate the reported date of sale." *Id.* at 34. They claim that the respondents should have relied on a variety of documents such as the alliance contracts for sales, the LOA, and other documents proprietary in nature to set the date of sale. Petitioners aver that "only if none of these documents existed, would the agency properly rely on the *last* document in time, the purchase order, to establish the date of sale." *Id.*

Petitioners claim that the respondents first tried to report date of sale based on invoice date and then tried to persuade the Department the appropriateness of using 'purchase order' date,

“through generalizations regarding the sales processes and material omissions of actual records and policies maintained in the ordinary course of business.” *Id.* at 35.

Petitioners declare that “verification established that for some significant volume of sales in both markets the purchase order is not the earliest document establishing the material terms of sale.” Further, they maintain that “verification established that certain alliance contracts - on the date they are signed - set the material terms of sale.” Finally, they claim that there are at least two further documents that “set the material terms of sale and are received *prior to* the purchase order date.” *Id.* (emphasis in original). They also criticize Hyosung in particular for failing to provide certain documentation that is proprietary in nature and that for all these reasons “Commerce is within its authority to rely on total ‘facts available’ for the final determination.” *Id.*

Petitioners maintain that the “burden establishing the correctness of their proposed date of sale, and therefore of the completeness and accuracy of their sales databases” is on the respondents “who have failed to do so.” *Id.* Moreover, Petitioners claim that the respondents had to report completely and accurately “the earliest document establishing the material terms for *all* sales, if only to allow Commerce to make an informed selection of the correct date of sale.” *Id.* at 36. Because the respondents deprived the Department of any opportunity to do this, Petitioners profess that “the Department is unable to rely on the sales databases or dates of sale reported by respondents.” *Id.*

Petitioners state that because the U.S. and home market databases provided by Hyundai and Hyosung are incorrect, and do not accurately capture sales, the Department must rely on ‘facts otherwise available’ to reach its final determination. *Id.* Petitioners concede that the Department could apply, as non-AFA, the methodology in the *Preliminary Determination* and attempt to adjust the respondents’ sales listings to yield final margins, but claim that this would necessarily involve speculation and “it is not the Department’s job to correct the respondents’ databases.” *Id.* at 37.

They further claim that “the systematic underreporting of relevant sales informationconstitutes a failure by the respondents to cooperate to the best of their ability, justifying the application of adverse facts.” They further avow that “when faced with unusable databases where information was purposefully withheld, the Department has relied on the petition margins as total adverse facts available, pursuant under 19 U.S.C. §1677e(b).” *Id.*

Hyundai notes that it was Petitioners who “insisted at the outset of the investigation that the respondents report sales with a PO date within the POI, even though the POs may have been issued pursuant to a long-term framework agreement from before the POI.” *See* Hyundai’s Case Brief dated May 25, 2012, citing the letter from Petitioners dated October 14, 2011 at 2. They further cite to Petitioners’ statement that the contract “will still have a purchase order that sets the material terms of sale.” *Id.* at 4. Hyundai claims that it followed the Department’s instructions to “report all sales in the period of investigation (POI) between July 1, 2010 and June 30, 2011 using purchase order date as the date of sale.” *Id.* citing the Department’s letter to all interested parties dated October 17, 2011, at 1.

Hyundai asserts that “every one of the POs that HHI received during the POI contains: a quantity, a price, and detailed technical specifications for the LPT.” Hyundai continues that

“there is no other document prior to the PO that firmly establishes the material terms of sale and, while the specifications and price can change after a PO is issued, the PO date is still the appropriate date of sale.” *Id.* at 4 and 5.

Hyundai claims the Department should reverse its decision at the *Preliminary Determination* and not exclude those sales with POs issued during the POI based upon a long-term agreement that was before the POI. Hyundai argues that “quantity and price are both material terms of sale that must be firmly established before there can be a sale,” and that “the Department has repeatedly determined that when quantity is not established in a contract, the contract does not establish the date of sale.” *Id.* at 6 citing numerous case decisions by the Department. Citing to *Nucor Remand*,³ Hyundai refers to the Department’s determination that “while preliminary terms of sale had been reduced to writing in the contract, they were not firmly established, and therefore the material terms of sale were set at a later date.” *Id.* at 7 citing to *Nucor Remand* at 44. It goes on to refer to the Department’s conclusion that “even though the agreements were reduced to writing, the Department found that the parties intended for them ‘to establish a framework for the sales in question, rather than irrevocably to set the final terms.’” *Id.* at 7, citing *Nucor Remand* at 84. Hyundai argues that the long-term “agreements simply establish basic and general terms that may come into play if – and only if – a PO is later issued.” *Id.* at 6.⁴

Hyundai then reviews the proprietary long-term framework agreements in detail and concludes that they do not establish the material terms of sale. *Id.* at 8-13. Most of the details are proprietary in detail, and are summarized in the Hyundai Proprietary Memorandum, but with respect to one of the agreements, Hyundai states the agreement “does not set the material terms of sale because of the frequent departures from the {large power transformers} listed in the agreement.” *Id.* at 9.

Hyosung states that the Department has followed a “consistent, well-established” policy of setting the date of sale as the point in time in which the material terms of sale were fixed. *Id.* at 8-12. Specifically, Hyosung argues that the *Preamble* to the Department’s regulations,⁵ as well as case precedent, establish that the appropriate date of sale is the date in which material terms of sale become fixed. *Id.* For example, Hyosung cites to the *Preamble* to the Department’s regulations as evidence that, because sales terms may change after they are initially set, the Department has established a consistent practice of treating the date on which sales terms become finalized (*i.e.*, no longer subject to change) as the appropriate date of sale and applied this policy to sales of large, custom-made merchandise. *Id.* at 9. Therefore, Hyosung states, no

³ See *Final Results of Redetermination Pursuant to Court Remand: Nucor Corporation, et al. v. United States*, Consol. Court No. 05-00616, Slip Op. 09-20 (CIT March 24, 2009) (“*Nucor Remand*”).

⁴ Citing the Memorandum to the file entitled, “Home Market Verification of the Sales Response of Hyundai Heavy Industries Co., Ltd. (“HHI”) and Hyundai Corporation, U.S.A., (collectively Hyundai) in the Antidumping Duty Investigation of Large Power Transformers from the Republic of Korea,” dated May 10, 2012 (Hyundai Home Market Verification Report) at 22-23, 27; and Memorandum to the file entitled “Constructed Export Price Verification of the Sales Response of Hyundai Heavy Industries (HHI) and Hyundai Corporation, U.S.A. (collectively Hyundai) in the Antidumping Duty Investigation of Large Power Transformers from the Republic of Korea,” dated May 16, 2012 (Hyundai CEP Verification Report) at 13.

⁵ See *Antidumping Duties; Countervailing Duties; Final Rule*, 62 FR 27296, 27348-49 (May 19, 1997) (*Preamble*).

“rule or procedure requires that the date of sale always be the contract date, even in the case of large, custom-made merchandise.”⁶

Hyosung argues that its alliance agreements do not govern its sales of large power transformers. *See* Hyosung’s Case Brief at 6-8. Rather, in the power transformer industry, Hyosung argues, these agreements establish business relationships or alliances between the supplier and potential customers and ensure that a “qualified supplier” with the “necessary expertise” will be willing and able to design and manufacture transformers when the customer is ready to place an order. *Id.* at 6-7.

Hyosung argues that the above-mentioned alliance agreements in the instant proceeding differ from long-term contracts that the Department has examined in prior cases.⁷ In those prior cases, Hyosung claims, “the contracts themselves governed the sale of the goods, including identification of the units, and set forth the material terms of sale.” *Id.* at 7. Additionally, Hyosung argues, in those prior cases, “...the fact that subject merchandise may or may not have been custom-built was irrelevant to the Department’s date of sale examination.” *Id.* Rather, in those prior cases, Hyosung states, the Department followed its practice of identifying the earliest document (*i.e.*, long-term contract) that established the price and quantity of goods.

Hyosung argues that it has demonstrated in the instant proceeding that its alliance agreements do not govern sales of large power transformers or fix material terms of sale as the long-term contracts did in those prior cases. *See* Hyosung’s Case Brief at 7. Rather, Hyosung argues, the record in the instant proceeding makes clear that subject merchandise purchased by U.S. customers “frequently varied from the sample product specifications and prices listed in the agreements” and that “none of the agreements contain language stipulating that the alliance agreement operates as a legally binding agreement....” *Id.* at 7-8.

Hyosung states that its alliance agreements “set forth a general framework of terms and conditions that are intended to apply only if a sale is in fact later made.” *See* Hyosung’s Case Brief at 11. These agreements Hyosung states, “do not establish, confirm, or guarantee any sale, much less fix the technical specifications, price, quantity, terms of delivery, or terms of sale of an individual unit.” *Id.* Whether a sale is made, Hyosung states, depends on whether the customer “subsequently places an order, which is entirely at the customer’s discretion.” *Id.* Hyosung compares alliance agreements, in principle, to price lists, which set forth various options from which a customer may choose at any time. *Id.* Hyosung states that the Department has never held that the mere issuance of a price list constitutes a “sale.” *Id.*

Additionally, Hyosung argues that certain of its alliance agreements contain “a multitude of options” and do not “provide Hyosung with enough information to determine with any degree of certainty the specific LPT model that will ultimately be ordered, its technical specifications, its final price, the quantity to be purchased, or the delivery requirements.” *See* Hyosung’s Case Brief at 11-12. Furthermore, Hyosung states, U.S. purchasers typically enter into alliance

⁶ Hyosung cites to *LNPPs from Germany* as precedence that “the Department underscored that the date of sale must be determined on the facts of the administrative record in light of the sales process of the industry in question.” *See* Hyosung’s Case Brief at 10.

⁷ Hyosung cites to *Brass Sheet and Strip From the Netherlands; Final Results of Antidumping Duty Administrative Review*, 61 FR 1324 (January 19, 1996), and *LNPPs from Germany*

agreements with multiple suppliers and “survey prices offered by manufacturers before selecting a supplier from which to actually source individual transformers.” *Id.* at 13. Hyosung states that with all this uncertainty at the time the alliance agreement is executed, there can be no “meeting of the minds” that constitutes a sale under Department practice.” *Id.* at 12.

Hyosung argues that record evidence demonstrates that it is the customer’s PO, not the alliance agreement, which fixes the terms of sale for sales made pursuant to alliance agreements. *See* Hyosung’s Case Brief at 12-19. Hyosung cites to numerous examples in the Department’s verification reports that (1) specify that the primary purpose of the alliance agreement is to “establish a supplier relationship” (*id.* at 14), and (2) demonstrate that the agreement is not intended to “create a contractual basis for a sale” (*id.* at 14-19). Hyosung also cites to additional record evidence (*i.e.*, alliance agreements and POs submitted pursuant to alliance agreements, as discussed in the Department’s verification reports) demonstrating that the PO fixes material terms of sale. *Id.* at 16-18.

In rebuttal, Petitioners state that “a primary point of contention between parties in this case has been the Department’s choice of the proper date of sale to define the universe of sales that is representative of the Korean producers’ selling practices during the POI.” *See* Rebuttal Brief on Behalf of ABB, Inc., Delta Star, Inc., and Pennsylvania Transformer Technology, Inc., regarding Large Power Transformers from the Republic of Korea (Hyundai), dated June 1, 2012 (Petitioners’ Hyundai Rebuttal Brief), at 4. Petitioners claim that Hyundai is trying to include in the margin calculation “higher-priced U.S. sales from 2008 and 2009, Hyundai’s General Manager conceded stemmed from an ‘unusual situation’ of raw material shortages and longer lead times.” *Id.* Petitioners dispute Hyundai’s claim that Petitioners have urged the use of PO date, noting that Petitioners “have consistently argued that the sales document that first sets the material terms of sale should define the date of sale.” *Id.* at 5. They also stress that Petitioners were initially demonstrating “that the Department should not, as urged by Hyosung, use invoice date to define date of sale.” *Id.*

Petitioners claim that “in most investigations of commodity products without the extended lead times or long term contracts that characterize the {large power transformers} industry, a {PO} would be a likely source document to set the date of sale.” *Id.* However, Petitioners believe that the “use of purchase orders to define the date of sale suffer from the same problem as use of invoices when the price and the other material terms of sale are set by a contract remote in time from the POI when market conditions were different.” *Id.* Petitioners claim that Hyundai has “failed to report its full list of sales related documents that can result in a sale being recognized in its books and records.” *Id.* Therefore, Petitioners believe that “the record shows that it is the contract date or some other document generated before the purchase order that sets the date of sale for Hyundai.” *Id.*

Petitioners then reiterate their assertion that the “respondents bear the burden of creating a complete and accurate record” and that the “respondents have, throughout this investigation, sought to include unrepresentative, higher priced U. S. sales made from long-term or alliance contracts entered in 2008 and 2009.” *Id.* at 5 and 6. Petitioners do not believe unrepresentative prices, which were driven by an unusual situation two years before the POI, should be used to

define the dumping margin and that “the Department should focus on sales priced during the POI and eliminate from its analysis any sales priced prior to July 2010.” *Id.* at 6.

Petitioners contest Hyundai’s assertion that “the PO is the earliest point at which the material terms of sale are firmly established and is the date the Department should use as the date of sale for all of HHI’s sales.” *Id.* Citing to business proprietary information on the record, Petitioners argue that “documents discovered by the Department at verification demonstrate that the material terms of sale are set prior to issuance of the PO.” *Id.* Petitioners then claim that “the record confirms that long-term contracts, which also precede the purchase order date, set the material terms of sale,” and cite to business proprietary information to substantiate their claims... “that the long-term agreements entered into by Hyundai establish the material terms of sale prior to the date on which the purchase order is issued.” *Id.* at 7. Petitioners also cite to other record evidence, which is business proprietary in nature, to further substantiate their claims. *See* Hyundai Proprietary Memorandum at “Date of Sale” for further discussion.

To conclude, Petitioners believe that “the record clearly establishes that, contrary to Hyundai’s arguments, the PO is not the “earliest” document that establishes the material terms of sale for *any* sale.” (emphasis in original). Petitioners believe that as “Hyundai withheld key documents from the Department regarding the establishment of the material terms of sale, “the Department should conclude that Hyundai failed to verify the accuracy of the reported dates of sale,” and urges the Department to “assign total adverse facts available to Hyundai in the final determination.” *Id.* at 8 and 9.

With respect to Hyundai’s claims that the “long-term framework agreements do not establish the material terms of sale” and, thus, should not be removed from the dumping analysis” Petitioners ask the Department to reject. *Id.* at 9. Petitioners further claim that “quantity is not a material term of sale for such custom-made equipment - the quantity is *one* unless the contract specifies additional units.” (emphasis in original). Citing to *LNPPs from Germany*, Petitioners claim that the Department acknowledged “quantity is not a material term for custom-made equipment”, and “potential minor specification changes during production and after delivery do not alter the contract as establishing the material terms of sale.” *Id.* Petitioners further claim that “Hyundai has failed to acknowledge that the long-term contracts establish the material terms of sale, and not the purchase order.” *Id.* at 10. Citing to business proprietary information, Petitioners claim that Hyundai is “trying to encourage the Department to consider only a portion of the facts of record.” *Id.*

Petitioners conclude by stating that “if the Department does not rely on total adverse facts available for Hyundai, then it should, at a minimum, find that the date of the long-term contract is the most appropriate date of sale, where applicable” and that “if any of the contract dates precede the period of investigation, then sales made pursuant to those contracts should be excluded from the Department’s margin analysis in the final determination.” *Id.* at 10 and 11.

Hyundai accuses Petitioners of being disingenuous in their arguments, noting that “before the Department issued the questionnaire, Petitioners were unwavering in their conclusion that the purchase order (“PO”) establishes the material terms of sale and should be used as the date of sale.” *See* Hyundai’s Rebuttal Brief, dated June 1, 2012 (Hyundai’s Rebuttal Brief), at 3 citing

Petitioners' letter to the Department dated October 14, 2011, at 2. Furthermore Hyundai claims that Petitioners do not offer a "coherent position on what does set the date of sale." *Id.* Hyundai also accuses Petitioners of playing "fast and loose" with the facts throughout the investigation and disputes Petitioners' claim that the "respondents systematically failed to disclose other documents {that is, documents aside from the PO} that triggered sales recognition and {large power transformers} production." *Id.* Contrary to Petitioners' claim, Hyundai argues "it has provided each-and-every date that could be used on a systematic basis to set the date of sale." *Id.* Hyundai also notes its belief that Petitioners have resorted to "carpet bombing" the Department and Hyundai with "repeated, redundant submissions that served no constructive purpose." *Id.*

Hyundai makes clear its belief that it correctly reported the date of sale based on the PO date. Hyundai argues that "{t}he Department's verification reports establish there was no document prior to the PO that established the material terms of sale." *Id.* at 6. Referencing a document that is business proprietary in nature, Hyundai claims that "the material terms of sale were not set" and that "this is the only instance in which HHI's customer issued such a notice." *Id.* See also Hyundai Proprietary Memorandum at "Date of Sale" for further discussion.

With respect to the "LOA" cited by Petitioners, Hyundai notes that this was only one situation for "a customer that placed only one order during the POI, during commercial negotiations that "deviate{d} from the normal sales pattern." Hyundai also notes that this single document neither calls "into question HHI's entire sales database" nor does it "reflect an attempt to mislead the Department regarding the date of sale." It also notes, as did the Department at verification, that the LOA was issued during the POI and, was properly included in the U.S. sale database. *Id.* at 8.

Hyundai also refutes Petitioners' allegations that it commenced production on any of the U.S. sales before it received the PO. Hyundai notes that, in their case brief, Petitioners incorrectly referred to field PRDCOMCDATEH/U as the date of the large power transformer's completion and argue "{t}his is inexplicable because HHI clearly explained that this field was for the date production commenced." *Id.* citing Hyundai's January 23, 2012 Supplemental Questionnaire Response at 2.

Hyundai claims that Petitioners' citation to sales in which Hyundai ordered materials before the PO date is "an attempt to discredit HHI's reported date of sale." Citing to the Hyundai Home Market Verification Report, Hyundai argues that "the fact that HHI attributes the materials to a project does not, as Petitioners claim, mean that production has begun." It goes on to state that "{t}he materials are only charged to the project if it is completed, which occurs after a PO is received and that "{i}f HHI does not receive a PO, the materials are charged to the project on which they actually are consumed." It also disputes Petitioners' analysis with respect to field PRDCOMCDATEH/U and its relationship with the date of the engineering drawings (DRAWDATEH/U). *Id.* at 9.

With respect to lead times, Hyundai disputes Petitioners' claims that "HHI's lead times are implausibly short." Hyundai accuses Petitioners of mischaracterizing the record evidence and having erroneously equated "the time from the start of production to the end of production with the time from the order to delivery." Hyundai stresses that "the production period does not

include design time, customer approval, time on the water, and inland transport time.” Hyundai acknowledges “there may be instances in which a customer has a more immediate need and the lead time may be reduced, but that is not typical,” and that “{a} review of HHI’s reported lead times (from order to delivery) shows them to be within the normal range. *Id.* at 10.

With respect to the long-term agreements, Hyundai argues that Petitioners “make generalized statements about long-term framework agreements setting the date of sale, along with the untenable claim that quantity is not a material term of sale, but provide no evidence to support their claims.” *Id.* Hyundai claims that Petitioners “could come up with only three sales to attack” and, referencing proprietary information, Hyundai argues those attacks are unjustified. *Id.* With respect to the first sale, Hyundai claims “it is evident that there was no meeting of the minds and that HHI did not know whether its proposal had been accepted until it received the purchase order” which is the reported date of sale. *Id.* at 10 and 11. With respect to the second sale, Hyundai notes that Petitioners base their claim on the fact that there is a “difference in the high voltage winding rating” because they are ‘close enough.’ However, Hyundai notes that the specification in question is “clearly material to the sale” and that Petitioners’ own submissions on this specification when they submitted model match comments supports this view. *Id.* at 11 and 12. With respect to the final sale, Hyundai notes that the Department examined this sale and discussed it during the CEP verification. Citing to the Hyundai CEP Verification Report, Hyundai notes the Department referenced Exhibit 16 at 4-9 for the alliance agreement and 11-15 for the original PO. According to Hyundai, the Department also noted Hyundai’s explanation that there was a previous alliance agreement in place between Hyundai USA and the customer in question that contained “general terms and conditions,” and referenced Hyundai’s supplemental response dated December 12, 2011, at Attachment SA-10. Hyundai concludes that the Department’s report makes clear that Hyundai did not have an earlier, undisclosed agreement with the customer in question. *Id.* at 13; *see also* Hyundai Proprietary Memorandum for further discussion.

Hyundai rebuts Petitioners arguments that “a specific quantity is not a material term of sale in cases” such as this. It argues that “{t}he Department’s consistent and established practice is that quantity is a material term of sale.” *Id.* at 14. Hyundai argues that “{i}n none of the cases cited by Petitioners did the Department say that quantity was not a material term of sale” and that “Petitioners have inferred that point.” Moreover, Hyundai stresses that “the record in this investigation clearly establishes that quantity cannot be assumed because there are instances in which more than a single {large power transformers} specified in a long-term framework agreement is purchased, and there are instances where none of the specified {large power transformers} are purchased.” As a result, Hyundai concludes that “{t}here simply is no basis to conclude that quantity is not a material term of sale in the {large power transformers} industry.” *Id.*

In rebuttal, Petitioners contend that Hyosung “incorrectly asserts that Petitioners ‘reversed their position’ and argued for contract date “just days before the preliminary determination.” *See* Rebuttal Brief on Behalf of ABB, Inc., Delta Star, Inc., and Pennsylvania Transformer Technology, Inc., regarding Large Power Transformers from the Republic of Korea (Hyosung), dated June 1, 2012 (Petitioners’ Hyosung Rebuttal Brief), at 9. Rather, Petitioners assert that they have “consistently argued that the sales document that first sets the terms of sale should

define the date of sale.” *Id.* at 4. Concurrently, Petitioners argue, they have “opposed the use of *invoice* date, which would require the reporting of prices for sales consummated as early as 2008, noting that {large power transformers} prices declined by 35 percent between 2008 and June 2011.” *Id.* (emphasis in original).

Petitioners contend that with “a more complete understanding of Hyosung’s sales process, which was only fully uncovered by the Department at verification, it has become clear that, like the invoice, the purchase order is not the earliest document in the sales process to establish the material terms of sale.” *See* Petitioners’ Case Brief at 5-6. Rather, Petitioners argue, “the record shows that in many cases, or perhaps every case, it is the contract date or some other document (prior to the PO) that sets the date of sale for Hyosung.” *Id.* at 6. Petitioners argue that Hyosung’s assertion that verification demonstrated that these alliance contracts “never establish the requisite ‘meeting of the minds’ with its customers ‘as to price, quantity, product or delivery terms’ is not supported by record evidence” and that it is the respondents who “bear the burden of creating a complete and accurate record.” *Id.* at 6 and 8. Petitioners contend that Hyosung failed to disclose the existence of alliance agreements (or other sale-related documentation) early on in the instant proceeding. *Id.* at 7-9.

Petitioners also argue that Hyosung’s alliance agreements with certain customers establish all material terms of sale, while “unreported” documents establish the material terms of sale for other alliance agreements. *See* Petitioners’ Hyosung Rebuttal Brief at 10-15. With regard to certain of Hyosung’s alliance agreements establishing all material terms of sale, Petitioners contend that while Hyosung argues that the alliance agreements the Department reviewed in *LNPPs from Germany*, for example, are different from the alliance agreements in the instant case, the circumstances in the instant review are similar to those in *LNPPs from Germany*. *Id.* at 10-11. Petitioners contend that Hyosung’s citation to the *Preamble* to the Department’s regulations as evidence that the Department relies on the document “on which the terms become finalized,” is not supported by any record evidence. *See* Petitioners’ Hyosung Rebuttal Brief at 11-12. By “disqualifying” contract date as the date of sale for alliance agreements, Petitioners argue, Hyosung “ignores the existence” of certain language within these agreements. *Id.* at 12. More importantly, Petitioners reiterate, the Department’s policy has been that “quantity is not a material term for large, custom-made equipment - the quantity is *one* unless the contract specifies additional units.” *Id.*

With regard to “unreported” documents establishing the material terms of sale for other alliance agreements, Petitioners argue that Hyosung’s assertion that the PO is the first document to establish all material terms of sale in all cases (as well as the alliance agreement-specific examples cited in Hyosung’s Case Brief) is incorrect. *See* Petitioners’ Hyosung Rebuttal Brief at 13-14. “Even if there are cases where the material terms of sale are not established in the alliance contracts,” Petitioners contend, “those terms *are* set in these other documents that precede the issuance of the purchase order.” *Id.* at 15.

In rebuttal, Hyosung contends that Petitioners’ arguments fail because “substantial record evidence demonstrates that none of these documents establish, confirm, or guarantee any sale, much less fix the technical specifications, price, quantity, terms of delivery, or terms of sale of an individual unit or otherwise bind Hyosung and its customers for individual sales” and that

“whether a sale is made depends on whether the customer subsequently places an order, which is entirely at the customer’s discretion.” *See* Hyosung’s Rebuttal Brief at 4. Accordingly, Hyosung argues, the Department should reject Petitioners’ arguments and find that Hyosung has correctly reported its home market and U.S. sales.

Petitioners contend that the Department’s date of sale analysis focuses on the first point in time where the material terms of sale are firmly fixed; however, Hyosung argues that the Department has “repeatedly rejected Petitioners’ argument that the date of sale is the point in time in which the terms of sale are first proposed.” *See* Hyosung’s Rebuttal Brief at 4-6. Hyosung argues that “although Petitioners refer to the word ‘established,’ they use it to mean the first point in the sales process in which terms of sale are proposed.” *Id.* at 5. Hyosung cites to the Department’s *Preamble* as evidence that the Department “confirmed that the appropriate date of sale is the date on which the material terms of sale become finalized by parties and are no longer subject to change.” *Id.* Hyosung contends that “in many industries, in particular those involving sales of large custom-made merchandise, sales negotiations are complex, requiring extensive communications between the buyer and seller until the material terms of sale are finally agreed upon.” *See* Hyosung’s Rebuttal Brief at 6 where Hyosung also cites to the *Preamble*. In these instances, Hyosung argues, the *Preamble* states that “the ultimate date of sale must be the date on which the material terms of sale are ‘finally established’ and no longer subject to change without penalty.” *Id.*

Hyosung contends that while Petitioners claim the Department has an established date of sale policy for large, custom-made capital equipment (*i.e.*, that the Department has historically relied on the contract date as the date of sale), none of the cases pointed to by Petitioners establishes an “automatic rule that dates of sale for large, custom-made equipment must always be based on contract dates.” *See* Hyosung’s Rebuttal Brief at 7. In contrast, Hyosung argues, “these cases confirm that the date of the first binding sales agreement between the buyer and seller, which specifies the material terms of sale, governs the relevant date of sale.” *Id.*

Hyosung also states that none of the alternative dates that Petitioners propose (*i.e.*, letters of intent and letters of award) are the appropriate date of sale. *See* Hyosung’s Rebuttal Brief at 8-12. Hyosung contends that these documents are general notices from the customer and that Hyosung has no control over whether a customer issues either of these notices. *Id.* at 9. These notices, Hyosung states, do not bind the buyer or vendor and are “simply a signal of the customer’s intention to pursue serious negotiations with Hyosung.” *Id.* Hyosung claims that Petitioners mischaracterize these notices in several ways: (1) Petitioners claim Hyosung never disclosed the existence of these notices to the Department prior to verification when, in fact, Hyosung submitted several in its questionnaire responses, (2) Petitioners “speculate that these documents may govern all POI sales” when, in fact, “the Department’s verification report makes clear that only a limited number of U.S. and home market sales involved LOAs or LOIs,” and (3) substantial record evidence confirms that neither document firmly establishes any material terms of sale nor constitutes a binding sales agreement although Petitioners claim they do. *Id.*

Additionally, Hyosung contends that Petitioners’ assertion that order entry date could be an appropriate date of sale is incorrect. *See* Hyosung’s Rebuttal Brief at 10-12. Hyosung argues that order entry does not govern when Hyosung recognizes a sale and that a sale, as defined by

the Department, does not occur until “the contracting parties reach a ‘meeting of the minds’ on the material terms of sale, such that no further action is required by either party.” *Id.* at 11. Hyosung cites the Department’s verification reports which noted instances (involving alliance customers) where Hyosung was forced to cancel a number of orders after order entry had taken place because the “units HICO America hoped to sell were ultimately not ordered.” *Id.*

Hyosung also argues that Petitioners’ assertion that alliance agreements fix the material terms of sale is incorrect. *See* Hyosung’s Rebuttal Brief at 12-14. Hyosung focuses its rebuttal on the three alliance agreements highlighted in Petitioners’ Case Brief. For example, regarding these alliance agreements, Hyosung contends that Petitioners cannot “credibly claim that all prior and future transactions” with these customers are governed by the corresponding alliance agreements and that the agreements state that all materials, prices, and services must “conform” to the requirements established in POs issued pursuant to the alliance agreements. *Id.* at 12-13. Additionally, Hyosung argues that certain alliance agreements may include price schedules but make no mention of quantities. *Id.* at 14.

Lastly, Hyosung contends that Petitioners’ assertion that Hyosung failed to provide the Department with sales documentation (other than a copy of an alliance agreement), related to certain alliance agreements, prior to verification is incorrect. *See* Hyosung’s Rebuttal Brief at 14-15. Hyosung points to record evidence demonstrating that it provided a copy of a “work order” earlier in the proceeding. *Id.* Furthermore, Hyosung addresses Petitioners’ claim that POs issued pursuant to this alliance agreement do, in fact, establish material terms of sale. Hyosung argues that, “[i]n all respects, differences between the work order and the alliance agreement are no more (or less) significant than the ‘difference’ reflected in every other purchase order that related to an alliance agreement” and that “if these ‘changes’ are significant enough to generate a change in the material terms of sale” for certain alliance agreements, then they are “‘significant’ enough to generate a change in the material terms of sale in all cases.” *Id.* at 15.

Department’s Position:

The Department finds that the PO date is the appropriate date of sale for both Hyundai and Hyosung’s U.S. and home market sales (including those sales made pursuant to alliance agreements). The regulation governing date of sale determinations, 19 CFR 351.401(i), states the following:

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

The Department has observed that “in many industries, even though a buyer and seller may initially agree on the terms of a sale, those terms remain negotiable and are not finally established until the sale is invoiced.” *See Preamble*, 62 FR at 27348-49. The *Preamble* further

states that “in most industries, the negotiation of a sale can be a complex process in which the details often are not committed to writing. In such situations, the Department lacks a firm basis for determining when the material terms were established.” *Id.* at 27348-49. The *Preamble* explains that, although invoice date is the “presumptive date of sale,” a party “will be free to argue that the Department should use some date other than the date of invoice.” *Id.* The Court of International Trade (CIT) has held that a party seeking to establish a date of sale other than invoice date bears the burden of producing sufficient evidence to satisfy the Department that a different date better reflects the date on which the exporter or producer establishes the material terms of sale. *See Allied Tube & Conduit Corp. v. United States*, 132 F. Supp. 2d 1087, 1090 (CIT 2001).

The *Preamble* further explains that:

If the Department is presented with satisfactory evidence that the material terms of sale are finally established on a date other than the date of invoice, the Department will use that alternative date as the date of sale. For example, in situations involving large custom-made merchandise in which the parties engage in formal negotiation and contracting procedures, the Department usually will use a date other than the date of invoice. However, the Department emphasizes that in these situations, the terms of sale must be firmly established and not merely proposed. A preliminary agreement on terms, even if reduced to writing, in an industry where renegotiation is common does not provide any reliable indication that the terms are truly “established” in the minds of the buyer and seller. This holds even if, for a particular sale, the terms were not renegotiated. *Id.* at 27349.

Furthermore, the CIT has recognized that “[t]he Department may exercise its discretion to rely on a date other than invoice date for the date of sale” if “the agency provides a rational explanation as to why the alternative date ‘better reflects’ the date when ‘material terms’ are established.” *SeAH Steel Corp. v. United States*, 25 C.I.T. 133, 135 (Ct. Int’l Trade 2001). Thus, the regulation makes clear that while the date of invoice is the preferred date of sale, the Department will consider a different date if it is satisfied that the material terms of sale are established on a date other than the invoice date.

In determining the date of sale, the Department considers which date best reflects the date on which the producer/exporter establishes the material terms of sale (*e.g.*, price and quantity). When defining the material terms of sale, the Department normally focuses on when the price and quantity for a particular product are set. However, the Department makes determinations as to what constitutes the material terms of sale on a case-by-case basis. The phrase “material terms” is not defined in the statute or the regulations, but “price and quantity” are “terms determined to be material both by {the Court of International Trade} and Commerce.” *See USEC Inc. v. United States*, 31 C.I.T. 1049, 1055 (Ct. Int’l Trade 2007) (citing *SeAH Steel Corp. v. United States*, 25 C.I.T. 133 (price, quantity and payment terms material); *Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip in Coils from the*

Republic of Korea, 64 FR 30664, 30679 (1999) (price and quantity material)); accord *Hornos Electricos De Venez., S.A. v. United States*, 27 C.I.T. 1522, 1535-1537 (Ct. Int'l Trade 2003) ("Commerce has interpreted 'material terms of sale' to include price, quantity, and payment terms."); see also *Drill Pipe From the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Critical Circumstances*, 76 FR 1966, 1971 (January 11, 2011) ("the Department considers the material terms of payment to include price and quantity. . . . Additionally, as the United States Supreme Court held in *United States v. Eurodif S.A.*, 129 S. Ct. 878, 887-90 (2009), the Department is not restricted by contract law in its implementation and enforcement of the Act."). Although the term "sale" is not defined in either the Tariff Act of 1930, as amended (the Act), or the Department's regulations, the Department finds that a sale exists when the parties finally agree upon the material terms of sale within their commercial arrangement. Thus, in accordance with its regulations, the Department must closely examine the record to determine whether its regulatory presumption is overcome by evidence supporting an alternative date.

Further, with regard to long-term contracts, the Department also noted in the *Preamble* that, "{b}ecause of the unusual nature of long-term contracts, whereby merchandise may not enter the United States until long after the date of contract, the Department will continue to review these situations carefully on a case-by-case basis." *Preamble*, 62 FR at 27349. The "date of invoice normally would not be an appropriate date of sale for such contracts." *Id.* Rather, "{t}he date on which the material terms of sale are finally set would be the appropriate date of sale for such contracts." *Id.* Additionally, the CIT recently upheld the Department's decision to use invoice date for sales governed by long-term contracts because the evidence on the record did not demonstrate that the respondent's U.S. customers were contractually bound such that the material terms of sale were finally and firmly established on the contract date. See *Yieh Phui Enter. Co. v. United States*, 791 F. Supp. 2d 1319, 1325-1327 (Ct. Int'l Trade 2011).

Consistent with the *Preliminary Determination*, we continue to find that PO date, rather than invoice date, better reflects the date when the material terms were established. See *Preliminary Determination*, 77 FR at 9206. With regard to the sales made pursuant to long-term agreements which we excluded from our analysis in the *Preliminary Determination* pending further development of the record, we have determined that the material terms of sale are not established in those long-term (or "alliance") agreements for those sales made pursuant to such agreements. Rather, as discussed below, PO date is also the date which best reflects when the material terms were finally established for sales made pursuant to those agreements.

With regard to Hyundai, we examined the alliance agreements at both the foreign sales verification in Korea and the CEP sales verification in California. The evidence from these observations is clear. The alliance agreements do not set the material terms of sale as alleged by Petitioners. Rather, they are framework agreements. Due to the proprietary nature of these agreements, see Hyundai Proprietary Memorandum at "Date of Sale" for further discussion.

With regard to Hyosung, we find that it has demonstrated in its questionnaire responses and at verification that HICO America Sales and Technology, Inc.'s (HICO America's) alliance agreements do not govern sales of subject merchandise or fix the material terms of sale. We agree with Hyosung that the record makes clear that subject transformers purchased by HICO

America's customers frequently varied from the sample product specifications and prices listed in the agreements (to the extent that the agreements had schedules of products and prices at all). We also find that the record demonstrates that HICO America's alliance agreements establish various performance measures required by the customer in the event of a sale.

Further, we reviewed HICO America's alliance agreements at length during our CEP verification. Due to the proprietary nature of these agreements, *see* Hyosung's Proprietary Memorandum at "Date of Sale" for further discussion.

With regard to Hyundai, we find that the PO is the earliest document which establishes both a price and a quantity, even though all parties have acknowledged that changes to pricing may occur up until invoicing or later. However, the record shows that it is the PO where there is a meeting of the minds with regard to both price and quantity. The Department disagrees with Petitioners that quantity can be inferred from the existence of a long-term agreement because the record demonstrates instances in which, subsequent to a long-term agreement, more than a single large power transformer is purchased as well as instances in which none of the specified large power transformers were purchased despite having entered into a long-term agreement. *See* Hyundai's Case Brief at 8, 9, 10 and 12. Based upon our examination of the explicit language of the alliance agreements, we find that none of the agreements obligate Hyundai to sell large power transformers, or Hyundai's customers to buy any large power transformers such that quantity can be considered established. *See* Hyundai Proprietary Memorandum for further discussion.

Because the material terms of sale—particularly, quantity—were not firmly established in alliance agreements for sales subject to these agreements, we do not find that those agreements reflect the date of sale. In particular, we have identified differences between the terms specified in the agreements and those specified in the POs in sales made pursuant to alliance agreements. Moreover, the alliance agreements are not sales contracts, but rather appear to serve as mechanisms for prescreening potential suppliers.

With regard to the date of sale in *MTPs from Japan* and *LNPPs from Germany*, the contract date in those cases was roughly coincidental with the beginning of production. Due to the nature of the products in *MTPs from Japan* and *LNPPs from Germany*, the beginning of production, once set in motion, provided certainty that a sale had been made regardless of the terms of the contracts. Here, the PO date most closely coincides with the beginning of production and, unlike the circumstances in *MTPs from Japan* and *LNPPs from Germany*, the large powers transformers in this case are not so unique and infrequently produced that mere purchasing of materials or reservation of production space can be said to be the date of sale in contrast to the PO. Similarly, the long-term agreements in this case can be differentiated from the contracts in *MTPs from Japan* and *LNPPs from Germany* because, unlike in the instant case, those contracts were not issued so far in advance of production. Further, unlike the *Notice of Final Determination of Sales at Less Than Fair Value: Emulsion Styrene-Butadiene Rubber from Mexico*, 64 FR 14872 (March 29, 1999) case cited by Petitioners, the record in the instant case does not demonstrate that all price changes or escalation clauses were outside the control of the parties. *See* Hyundai Proprietary Memorandum and Hyosung Proprietary Memorandum.

Additionally, with regard to Hyosung, contrary to Petitioners' claims, we find that PO best represents the time when materials terms of sale are established for *all* sales in both the U.S. and home markets. *See* Hyosung Proprietary Memorandum at "Date of Sale." Among other things, it would be impractical to have different dates of sale for each sale, and no party has cited to case precedent in which the Department has departed from its normal practice of a universal date of sale.

Therefore, without resorting to establishing a different date of sale for each individual sale, the Department is following its normal practice of using a uniform date of sale. *See Preamble*, 62 FR at 27348-50 ("{W}e have retained the preference for using a single date of sale for each respondent, rather than a different date of sale for each sale" because, *inter alia*, "by simplifying the reporting and verification of information, the use of a uniform date of sale makes more efficient use of the Department's resources and enhances the predictability of outcomes"). Based on the record evidence in this investigation concerning both respondents, we have determined that there is no document prior to the PO that establishes the material terms of sale, including price and quantity. While prices may change even after the issuance of the PO, it is clear from the record that the issuance of the PO takes place before production begins and is the document which commits the parties to the purchase and production of an actual large power transformer (in contrast to simply committing to be a potential supplier of transformers). There may be documents in individual sales which are issued internally or on occasion by the U.S. customer, but none of these documents alone establish a commitment of the parties in the manner of the PO. Thus, in light of the totality of the record in this proceeding, the PO date is the date that best reflects the date on which the material terms are established.

For the above-mentioned reasons, and after considering comments from all interested parties and upon further review of the record, we continue to find that the PO established the material terms of sale for all of Hyundai's and Hyosung's U.S. and home market sales.

Comment 2: Facts Available

Petitioners assert that "the dates of sale reported by respondents are incorrect which means that (1) the U.S. and home market databases are incorrect, and do not accurately capture sales with pricing established in the POI, and (2) reported sales cannot properly be matched to other contemporaneous sales." *See* Petitioners' Case Brief at 36. Therefore, Petitioners demand that the Department rely on 'adverse facts available' (AFA) in its final determination. *Id.*

Petitioners note that the Department could apply, as facts available (FA), the methodology in the *Preliminary Determination* but that "would necessarily involve speculation." Moreover, it is not the Department's job, according to Petitioners "to correct the respondents' databases for them." *Id.* Petitioners claim that the systematic underreporting of relevant sales information "constitutes a failure by the respondents to cooperate to the best of their ability," justifying the application of adverse facts. *Id.* at 36 citing *Tianjin Mach. Import & Export Corp. v. United States*, 806 F. Supp. 1008, 1015 (CIT 1992) (stating "the burden of creating an accurate record lies with respondents and not with Commerce"). Petitioners argue that the respondents withheld requested information related to the proper date of sale. They conclude that "when faced with unusable databases where information was purposefully withheld, the Department has relied on

the petition margins as total adverse facts available, pursuant to 19 U.S.C. §1677e(b).”

Hyundai rebuts Petitioners’ argument that the Department should apply total AFA because the “respondents have engaged in a systematic attempt to manipulate the reported date of sale.” *See* Hyundai’s Rebuttal Brief at 14. To support this claim with respect to Hyundai, Petitioners cite to the LOA and other documents. Hyundai notes that Petitioners also claim that the “Order Notice is an undisclosed document that establishes the material terms of sale before the PO is issued.” *Id.* at 15. Hyundai rebuts Petitioners’ allegation that “HHI failed to ‘disclose the Order Notice’ in the questionnaire responses, and that the ‘existence’ of the Order Notice was only ‘discovered’ by the Department during verification.” *Id.* Hyundai cites to record evidence in its responses and argues that it not only disclosed the order notices, but it explained their function in the production planning process and provided sample copies prior to verification and summarizes that “Petitioners should have paid closer attention to HHI’s responses.” Therefore, Hyundai disputes Petitioners’ allegations that Hyundai has misled the Department in its reported date of sale and urges the Department to reject Petitioners’ call for total AFA.

Hyosung contends that the Department should not apply facts available to any aspect of Hyosung’s margin calculation. *See* Hyosung’s Rebuttal Brief at 16-21. First, Hyosung argues that “statutory preconditions” for applying facts available, adverse or otherwise, have not been satisfied in the instant proceeding. *Id.* at 16-19. Hyosung states that “facts otherwise available” may not be used unless the Department first complies with 19 U.S.C. 1677m(d), which states that if the Department determines that a response to a request for information does not comply with the request, then the Department notifies respondents and provides an opportunity to further explain. *Id.* at 16-17. Furthermore, regarding AFA, Hyosung contends that the Department may only use “adverse inferences” under 19 U.S.C. 1677e(b) if it finds that, “an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information.” *Id.* at 17.

Hyosung argues that “Petitioners’ call for AFA based on the purported ‘underreporting of relevant sales information,’ based solely on its wrong interpretation of Hyosung’s date of sale methodology and its mischaracterizations of record evidence, is unfounded.” *See* Hyosung’s Rebuttal Brief at 17. Hyosung contends that Petitioners “fully understood the sales process and the implications for reporting when they urged the Department to adopt the PO date as the date of sale.” *Id.* at 17-18. Hyosung argues that “despite their own prior position, petitioners now claim that other dates should have been used for purposes of sales reporting and that Hyosung is somehow at fault for not using those dates.”

Hyosung states that nothing on the record “suggests that Hyosung has failed to cooperate to the best of its ability in this proceeding,” or that Hyosung has improperly reported the date of sale. *See* Hyosung’s Case Brief at 18. Rather, Hyosung contends, the record establishes that Hyosung has “complied fully with the Department’s instructions to report all transactions with purchase order dates in the POI” and that Hyosung “expended substantial effort and acted in good faith in answering every question that the Department asked in its multiple supplemental questionnaires and at its comprehensive on-site verifications.” *Id.* at 18. Finally, Hyosung argues that Petitioners’ “desire for additional documentation” from Hyosung “far exceeds the scope of

evidence required by the Department's date of sale regulation and agency practice"⁸ and reiterates that Hyosung did, in fact, provide all information requested by the Department. *Id.* at 19.

Department's Position:

We disagree with Petitioners that "facts otherwise available" or an adverse inference with respect to Hyundai and Hyosung is warranted. Sections 776(a)(1) and (2) of the Act provide that the Department shall apply "facts otherwise available" if, *inter alia*, necessary information is not on the record or an interested party or any other person: (A) Withholds information that has been requested; (B) fails to provide information within the deadlines established, or in the form and manner requested by the Department, subject to subsections (c)(1) and (e) of section 782 of the Act; (C) significantly impedes a proceeding; or (D) provides information that cannot be verified as provided by section 782(i) of the Act. Section 776(b) of the Act further provides that the Department may use an adverse inference in applying the facts otherwise available when a party has failed to cooperate by not acting to the best of its ability to comply with a request for information.

As Hyosung correctly pointed out, the statutory preconditions must first be met. These preconditions have not been met here. While there may have been instances where the Department put the respondents on notice that certain initial responses or information required clarification, we found that the respondents subsequently provided such information in the manner requested. The Department only uses "adverse inferences" under section 776(b) of the Act if it finds that "an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information." Although Petitioners may not agree with the respondents' arguments, the Department has found that the respondents cooperated and responded to the best of their abilities, including their responses to the Department's numerous supplemental questionnaires. Moreover, the Department finds no record evidence demonstrating that the respondents withheld material information in this proceeding. The Department notes the complexity of the issues involved in this case and determines that both respondents have cooperated throughout the proceeding. Therefore, we have determined that reliance on facts otherwise available or adverse inferences with respect to Hyundai and Hyosung is not appropriate in this proceeding.

Hyundai-Specific Comments

Comment 3: Home Market Sales Gross Unit Price

Hyundai reported two different gross unit prices for each home market sale, GRSUPR1H and GRSUPR2H. In our *Preliminary Determination*, the Department determined to use the higher of these two prices because Hyundai did not satisfactorily explain why it had reported two home market gross unit prices. See Memorandum to the file, through Angelica Mendoza, Program Manager, from David Cordell and Brian Davis, International Trade Analysts, titled "Analysis Memorandum for the Preliminary Determination of the Antidumping Duty Investigation of

⁸ See Hyosung's Rebuttal Brief at 20 where Hyosung cites to the *Preamble*, 62 FR at 27364 (indicating that the Department will examine "a respondent's description of its selling processes" to determine the appropriate date of sale).

Large Power Transformers from the Republic of Korea: Hyundai Heavy Industries Co., Ltd.,” dated February 9, 2012, at 4. Petitioners ask the Department to find that “neither of Hyundai’s reported gross unit prices can serve as the basis for the calculation of normal value” and the Department “should, as partial facts available, continue to rely on the *higher* of the two reported home market prices in determining normal value.” *See* Petitioners’ Case Brief at 43 (emphasis in original).

Petitioners claim “Hyundai has offered no meaningful explanation as to why the value reported in GRSUPR1H cannot be reconciled with the value reported in GRSUPR2H.” *Id.* They ascertain that “the value reported in GRSUPR2H differs significantly from that reported in GRSUPR1H, raising concerns about how accurately GRSUPR2H reflects Hyundai’s sales experience.” *Id.* at 44. Petitioners further argue that “the value reported in GRSUPR2H cannot be tied to Hyundai’s accounting records (sales ledger, general ledger) or its financial statements, despite that it purports to be taken from its actual sales documentation.” They assert that “the value reported in GRSUPR1H is the basis for Hyundai’s financial statements (and the reported Quantity and Value), which have been independently audited.” *Id.*

Petitioners also argue that GRSUPR1H values “do not represent the actual sales values in the documentation to the customer, nor do they represent actual revenues received or expenses incurred on these sales.” As such, Petitioners claim they have concerns about the potential for manipulation. *Id.* at 45. Petitioners also believe that value reported in GRSUPR2H wrongly includes non-subject items and cite to examples of their claims based on business proprietary information. *Id.* Petitioners make similar claims with respect to the GRSUPR1H value similarly (and improperly) including the value of non-subject items. *Id.* at 46. Petitioners also claim that Hyundai was required to report both prices in order to reconcile the reported sales to its accounting records. *Id.* Petitioners conclude by asking the Department to either find that Hyundai failed to report a valid price for its home market sales and assign a margin to Hyundai on the basis of total AFA or “continue to rely on the *higher* of the two reported home market prices, as partial facts available.” *Id.*

Hyundai argues that the Department should reverse its preliminary decision “to set the GRSUPRH to the highest reported gross unit price” between GRSUPR1H and GRSUPR2H. *See* Hyundai’s Case Brief, at 39. Hyundai claims that it answered the questions as asked in the Department’s questionnaire and reported the price “as recognized in the commercial sales documents between the customer and the respondent.” *Id.* Citing to its January 23, 2012, supplemental response at SBC-5, Hyundai claims that “GRSUPR2H ties directly to the customer’s PO or sales contract after the application of the sales value of common items (*e.g.*, installation charges),” and cites to the Hyundai Home Market Verification Report at 2 in which the Department stated “we found that GRSUPR2H is based on the commercial documents of the sale to the end customer but that in order to reconcile the sales to the general ledger, GRSUPR1H has to be used.”

Petitioners rebut Hyundai’s contentions and reiterate their belief that the Department cannot rely on either of the home market gross unit prices reported by Hyundai (GRSUPR1H or GRSUPR2H), because “neither of these values properly includes the sales value for all relevant LPT items while excluding the sales value for all non-LPT items.” *See* Petitioners’ Hyundai

Rebuttal Brief at 33. They reiterate arguments from their initial brief as to why the Department cannot rely on GRSUPR1H. Petitioners claim “{t}he statute requires the Department to use reported prices and costs that are reliable and not distortive” and argue that “{t}he fact that the allocations used by Hyundai in determining GRSUPR1H do not conform with the sales documents and actual expenses reflects that they are distortive relative to the sales documentation.” *Id.* at 35. Petitioners conclude that “GRSUPR1H is not ‘the price at which the foreign like product {was} first sold ... in the ordinary course of trade.’” *Id.* Furthermore, they claim that the use “of GRSUPR1H would ... unacceptably provide an opportunity for a respondent to manipulate dumping margin calculations.” *Id.*

Petitioners conclude that “{f}aced with using either a price that is not recorded in its normal books and records (GRSUPR2H) or one that ...does not tie to sales documents (GRSUPR1H), the Department has no choice but to apply facts available.” *Id.* Petitioners once again ask the Department to either find that Hyundai failed to report a valid price for its home market sales and assign a margin to Hyundai on the basis of total AFA; or to continue to rely on the higher of the two reported home market prices, as it did in the *Preliminary Determination*, as partial facts available. *Id.* Petitioners also ask the Department to inform Hyundai in the final determination that a new examination of the home market prices will occur in any subsequent administrative review. *Id.*

Hyundai rebuts Petitioners’ argument by claiming “... the Department’s questionnaire instructs respondents to report the gross unit price based on the commercial sales documents with the customer.” It goes on to argue that “HHI did so in the GRSUPR2H field and the Department verified the accuracy of HHI’s reported home-market prices” as noted in the Home Market Sales Verification Report at 2. *See* Hyundai’s Rebuttal Brief at 25. Furthermore, Hyundai argues that “Petitioners’ fixation on HHI’s internal accounting valuation is irrelevant” and that even “if they were relevant, Petitioners’ arguments on GRSUPR1H remain without merit.” *Id.* at 26. Citing to proprietary information, Hyundai argues that Petitioners’ argument that GRSUPR2H does not “properly include{ } the sales value for all relevant LPT items while excluding the sales value for all non-LPT items’ is refuted by the record evidence and the Department’s verification exhibits.” *Id.* at 27.

Hyundai then rebuts Petitioners’ complaints that the “value reported in GRSUPR2H differs significantly from that reported in GRSUPR1H, raising concerns as to how accurately GRSUPR2H reflects Hyundai’s sales experience.” *Id.* at 27 citing Petitioners’ Case Brief at 44. Hyundai points to the Department’s findings at verification, in which the Department noted “GRSUPR2H is based on the commercial documents of the sale to the end customer.” *Id.* at 27. With respect to Petitioners’ complaint that the total amounts for GRSUPR1H and GRSUPR2H do not directly match and that “the value reported in GRSUPR2H cannot be tied to Hyundai’s accounting records . . . or its financial statement,” Hyundai notes the verification report states that as the initial step in the sales reconciliation “in order to reconcile the sales to the general ledger, GRSUPR1H has to be used.” *Id.* at 28. Hyundai notes the Department did so at verification and that Hyundai also “reconciled GRSUPR1H and GRSUP2H on a sale-by-sale basis, as is necessary for sales that include both subject and non-subject merchandise.” Hyundai asserts that the Department’s verification report confirms that “the total amount for all projects in a purchase order tie.” *Id.* at 28.

Hyundai also disputes Petitioners' claims that "the value reported in GRSUPR2H wrongly includes non-LPT items." *Id.* at 28 citing Petitioners' Case Brief at 45. Citing to Petitioners' reference to a certain observation number, Hyundai argues that the "line item breakdowns and sales documentation for this sale examined by the Department demonstrate that Petitioners have either misread or misrepresented the record." Hyundai continues to say that "{a}ll of the items cited by Petitioners relate to non-subject merchandise that was not included in the GRSUPR2H reported for this sale," and there were no discrepancies noted in the Department's Home Market Verification Report other than those identified in the minor corrections. *Id.* at 28 and 29. Hyundai also believes that Petitioners' remaining complaints are similarly contrary to the record evidence. *Id.* at 30.

Department's Position:

The Department has determined to rely upon Hyundai's reported GRSUPR2H in its final margin calculation. The Department asked in its initial questionnaire that Hyundai "report the unit price as it appears on the invoice for sales shipped and invoiced in whole or part," and "to report portions of sales not yet shipped, provide the agreed unit sale price for the quantity that will be shipped to complete the order." *See* Department's questionnaire to Hyundai, dated September 28, 2011, at B-23. In its section B response, Hyundai reported that GRSUPR2H reflects "the gross unit price based on the commercial sales documents with the customer."⁹ The Department verified both prices at verification and noted that, as Hyundai stated in its rebuttal brief, GRSUPR1H is a result of "HHI's internal accounting valuation." *See* Hyundai's Rebuttal Brief at 25. As Hyundai noted, the verification report states that as the initial step in the sales reconciliation, "in order to reconcile the sales to the general ledger, GRSUPR1H has to be used," and the Department confirmed this at verification. *See* Hyundai's Home Market Verification Report at 2. The Department also "reconciled GRSUPR1H and GRSUPR2H on a sale-by-sale basis" and the Department's verification report confirmed that "the total amount for all projects in a purchase order tie." *Id.* at 2, and 39-40. The Department notes that GRSUPR1H is the price that is used to tie the sales to Hyundai's audited accounts but that (as we further noted in the report) it is based on an internal discussion which has "no effect on the sales documentation or the sales price the customer pays HHI, which is reflected in GRSUPR2H." *Id.* With respect to the allocation methodology used to derive GRSUPR2H in certain instances, the verification report states, "{w}e also verified how GRSUPR2H was calculated when an allocation methodology was used to apply certain common parts of the pricing to subject and non-subject merchandise." *Id.*

We therefore disagree with Petitioners' arguments that Hyundai has offered no meaningful explanation as to why the value reported in GRSUPR1H cannot be reconciled with the value reported in GRSUPR2H. *See* Petitioners' Case Brief at 42-46. We found that Hyundai did in fact provide an explanation and that while some of Petitioners' concerns may be valid, in particular the concern that it is GRSUPR1H that is used to reconcile Hyundai's financial accounts, the fact remains that GRSUPR2H reflects the price on the commercial sales documents with the customer and the price ultimately paid by the home market customer. *See* Hyundai's Home Market Verification Report at 2. While it would be preferable to have that price directly

⁹ *See* Hyundai's Rebuttal Brief at 25 and Hyundai's Section B Questionnaire Response dated November 16, 2011, at B-26.

tie into Hyundai's audited financial accounts, Hyundai provided an explanation and examples of how the two prices can be reconciled by tying the total amount for all projects in a PO. *See* Hyundai's Home Market Verification Report at 38-40. Therefore, for purposes of this final determination, we have used GRSUPR2H as the reported gross unit price for Hyundai's home market sales.

Comment 4: U.S. Gross Unit Price

Petitioners claim that that Hyundai has overstated the U.S. gross unit price (GRSUPRU) of large power transformers sold in the United States "by including the value of various revenues that are not associated with the price of the transformer and the installation of the transformer (if included in the contract)." *See* Petitioners' Case Brief at 47 - 55. Much of the detailed information related to these alleged revenues is proprietary in nature. While calling for a finding of total AFA, because in Petitioners' view Hyundai has not cooperated, Petitioners also suggest as an alternative, neutral facts available option in which the Department would make a downward adjustment to the U.S. gross unit price for Hyundai's failure to "separately report the associated expenses for the Department to cap these revenues to the level of the associated expenses." *Id.* at 55.

Hyundai first disputes Petitioners' claims that Hyundai has not cooperated, and notes that "the very documents Petitioners allege that HHI failed to disclose have been on record for months." *See* Hyundai's Rebuttal Brief at 29. Hyundai claims that it "provided copies of the relevant sales documents, including copies of nearly every PO for all sales to the United States" and that it provided copies of the purchase orders for all of the U.S. sales observations cited by Petitioners in its questionnaire responses. *Id.* at 30.

Hyundai states it reported the gross unit price in accordance with the instructions in the Department's questionnaire and notes that because "the contract price is on a lump sum basis, HHI invoices the customer on such basis." *Id.* at 31. Referencing the instructions for reporting gross unit price in the Department's questionnaire Hyundai notes that it was told to "{r}eport the unit price as it appears on the invoice for sales shipped and invoiced in whole or in part." Thus, for example, where a large power transformer was sold on a DDP to site basis, Hyundai notes that is what it did. Hyundai claims that "{b}ecause the price charged to HHI's customer included "the direct cost incurred to bring the merchandise from the original place of shipment to the customer's place of delivery, HHI reported the respective movement expenses in the relevant expense fields" and "there are no separate revenues which HHI failed to report to the Department." *Id.*

Hyundai disputes Petitioners' claims that because the Department instructed Hyundai to "verify for all sales, that the gross unit price reported only reflects the actual LPT and not any spare parts, unless such parts are needed to assemble an incomplete LPT," that such instruction also applies to freight expenses. Hyundai claims that "{t}his instruction is limited to spare parts" and that Section C of the Department's questionnaire dated September 28, 2011 instructed Hyundai to report "the information requested concerning the direct cost incurred to bring the merchandise from the original place of shipment to the customer's place of delivery if included in the price charged to its customer." *Id.* at 32. Hyundai concludes that "Petitioners' demand is inconsistent

with the statute, the Department's regulations, and the Department's well-established practice." *Id.*

Hyundai states that "Petitioners pin their entire argument on the U.S. gross unit price on a fundamental misrepresentation of the record evidence in suggesting that Hyundai does not invoice on a lump-sum, project basis and separately invoices customers for services." *Id.* at 33. Citing to Petitioners' reliance on certain case precedent, Hyundai distinguishes those cases from this case by claiming that in those cases "the respondent made arrangements for the freight and the payment of U.S. customs duties on behalf of the customer and sought reimbursement for its costs for making such arrangements," or "when freight and insurance are not included in the selling price under the applicable terms of delivery but when the respondent arranges and prepays freight and insurance for the customer." *Id.* at 34.

Hyundai stresses that in the sales cited by Petitioners, it "did not make arrangements for freight, etc. on behalf of the U.S. customer, requiring reimbursement for such costs. Rather, in accordance with the contractual term of sales (*e.g.*, DDP jobsite), Hyundai was required to deliver the large power transformers to the site on its own behalf. Thus, Hyundai did not provide any separate service on behalf of the U.S. customer, which could be viewed as outside the term of sale." *Id.* at 35. Hyundai claims that Petitioners have not cited to a single instance where it provided separate services that were not required by the term of sale. *Id.*

Hyundai also points out that Petitioners' demand that the Department apply total AFA is based on a single page for each of their cited transactions and that "Petitioners offer no analysis or discussion of the entire context of the documents they cite and seek to draw broad, universally-applicable conclusions based on a misunderstanding of the document." *Id.* at 36.

Hyundai alleges that Petitioners' arguments "demonstrate a fundamental misunderstanding of the most basic attributes of the subject merchandise" and Hyundai argues against determining that "components that are incorporated into a {large power transformer} constitute value that must be separated from the reported gross unit price." *Id.* at 37. Citing to various items that are business proprietary in nature, and were raised by Petitioners, Hyundai argues that such items are integral to the large power transformer itself, as evidenced by Petitioners' own submissions to the International Trade Commission when they stated that "{c}omponents such as bushings, cooling systems (*e.g.*, radiators and fans), tap changers, controls, and indicators are added." *Id.* citing *USITC Publication 4256*¹⁰ at I-10. Hyundai also points out that "HHI properly included the costs for these items in its reported DIRMAT costs, as verified by the Department." *Id.* at 38. With respect to warranty revenue, Hyundai questions Petitioners' demand for "the universal application of AFA to HHI's entire sales database based on a single sale to a customer that previously had not ordered any transformers from HHI and through a sales process 'not usual' and deviates from the normal sale pattern" as "absurd." *Id.* Hyundai also argues that it previously demonstrated that the revenue in question related directly to the large power transformer itself and "as such, this amount was properly included in the reported sales price." *Id.* at 39. Hyundai concludes that "HHI itself provides warranties and ... the price of the {large power transformer} varies based on the customer's 'warranty requirements'." *Id.* at 39 and 40.

¹⁰ See *Large Power Transformers from Korea* (Investigation No. 731- TA-1189 (Preliminary), USITC Publication 4256, September 2011).

Citing to other business proprietary examples, Hyundai again emphasizes that Hyundai addressed the issues raised by Petitioners in its supplemental questionnaire responses. *Id.* at 40. Hyundai admits Petitioners' identification of "one instance that deviated from the pattern for all other sales," and that for this "highly-unusual, post-delivery request from the customer for additional services, . . . it might be appropriate in this case to adjust the selling price for this sale" but strongly argues "there would be no basis to impute this anomalous transaction to all of HHI sales." *Id.* at 41. Because this information is proprietary in nature it cannot be summarized in this public document, but Hyundai provided a suggested correction for this one situation. *Id.* at 41. With respect to a second situation, Hyundai notes that the expense incurred by Hyundai Corporation was the same as the amount of the additional order from the customer. *Id.* Hyundai notes that Petitioners' remaining complaint involves a sales observation for which the customer placed a PO on a lump-sum basis. Hyundai notes that Petitioners "complain that the bid submitted by HHI had an informational breakdown of the components of the delivery term, which required HHI to deliver the transformer to site and offload it to the transformer pad." *Id.* at 42. Hyundai stresses that "the customer awarded the project to HHI on a lump sum basis and HHI invoiced the customer on that basis. *Id.* Hyundai notes that "this was not an instance where HHI procured separate services after the fact not related to the delivery term of the transformer." *Id.* Hyundai claims "HHI was responsible to deliver the transformer to the site and offload it on the transformer pad" and that as "HHI did not make arrangements on behalf of the customer to have the transformer delivered and then receive reimbursement; the obligation (and the risk) of delivering the transformer to the site was HHI's." *Id.*

Department's Position:

Based on our review of record evidence at verification and comments by interested parties, we have determined to rely upon Hyundai's reported GRSUPRU for purposes of calculating net U.S. price for its U.S. sales. We note Hyundai has reported the U.S. price based on the "lump-sum" of the invoice price, or in the case of non-invoiced sales, the PO or contract price. We find that there is no evidence, based on the invoices and POs examined at verification, to indicate that Hyundai has separate revenues which it has failed to report to the Department. The Department asked Hyundai to verify that for all sales, the gross unit price only reflects the actual large power transformer, and not any spare parts, unless such parts are needed to assemble an incomplete large power transformer.¹¹ Hyundai argues the Department did not instruct Hyundai to exclude, for example, freight expenses that are built into the gross unit price. As highlighted by Hyundai, we found that it invoices on a lump-sum, project basis and that it does not separately invoice customers for services. *See* Hyundai's CEP Verification Report at 32 and, *e.g.*, Exhibit 19 at 42, 43, 47, 84, 94, *etc.* We agree that in certain cases where the respondents have made separate arrangements for freight on behalf of the customer, and sought reimbursement for that cost, the Department has, in these instances, excluded separately invoiced charges that are not included in the term of sale or in some cases capped the revenue so that it does not exceed the expense incurred. *See, e.g., Wooden Bedroom Furniture From the People's Republic of China: Final Results and Final Rescission in Part*, 75 FR 50992, 50999 (August 18, 2010) in which the

¹¹ *See* "Memorandum to the File, Antidumping Duty Investigation of Large Power Transformers from the Republic of Korea: Phone Conversation with Frank Morgan, counsel to Hyundai Heavy Industries Co., Ltd. (Hyundai)" dated January 11, 2012, and Hyundai's Supplemental Questionnaire Response, dated January 23, 2012 at 43 to 44.

Department stated that “{w}ith respect to Fairmont’s argument that its freight revenue should be considered as integral to the price of subject merchandise, this argument ignores the fact that Fairmont itself charges separately for freight as separate line items in its invoices.” However, in this case, when the contractual term calls for a particular service, and when there is no separate service provided on behalf of the customer and no separate identification of such service on the invoice, such “lump-sum” price is what Hyundai correctly reported to the Department. *See* Hyundai’s Rebuttal Brief at 34 and 35. As Hyundai indicated, many of the assertions made by Petitioners are based on internal documents such as an Order Notice, or from a single page from a bid. However, the POs and invoices of such documents identify that the sales are made on a lump-sum basis and there is no separate invoice issued for separate services that are not part of the terms of sale. *See* Hyundai’s Rebuttal Brief at footnote 121.

The Department agrees with Petitioners that there was one instance in which there was a post-delivery request from the customer for additional services and that Hyundai itself concedes this, acknowledging that it might be appropriate to adjust the selling price for this sale. *See* Hyundai’s Rebuttal Brief at 41. The Department will therefore make the suggested change with respect to that one instance and will note this change in our analysis memorandum with respect to Hyundai. *See* Memorandum to the File entitled, “Analysis of Data Submitted by Hyundai Heavy Industries (HHI) and Hyundai Corporation, U.S.A. (collectively Hyundai) in the Final Determination of the Antidumping Duty Investigation of Large Power Transformers from the Republic of Korea,” dated July 2, 2012.

Based upon its review of record evidence and comments by interested parties, the Department has determined that no changes are needed with respect to Hyundai’s reporting of U.S. gross unit prices and that other than the one instance already identified above, there is no evidence that Hyundai provided separate services that were separately invoiced, which would require the Department to rely upon a different U.S. price.

Comment 5: U.S. Selling Expenses; Commissions and U.S. Duty

With respect to commissions, Petitioners claim that “Hyundai failed to report commissions for its U.S. sales accurately” and cited to such examples, which are business proprietary in nature. *See* Petitioners’ Case Brief at 56. Thus, Petitioners ask the Department to use the highest reported commission rate as neutral facts available. *Id.* Further, Petitioners argue the Department should apply this same commission rate to calculate the commissions for all other U.S. sales where Hyundai reported no commission rate as Petitioners claim, HHI is involved with those sales and a commission rate should apply. *Id.* at 56 and 57.

With respect to U.S. duty, Petitioners claim the Department should include within the U.S. duty field an additional expense for certain U.S. sales. Petitioners claim Hyundai incorrectly assumed it would not incur this expense due to the entry into force of the Korea-U.S. free trade agreement (“KORUS”), and that such expenses should be captured. *Id.* at 57.

Hyundai rebuts Petitioners’ arguments with respect to commissions noting that as verified by the Department, sales to two California customers, for which no commission agent is was reported, was based on the fact that Hyundai USA handles the customer relationship directly. *See*

Hyundai's Rebuttal Brief at 43. Hyundai argues therefore, "there is no record evidence from which to assume that HHI incurred any commission expense for sales to these two Californian customers." *Id.* at 44, 45.

With respect to the two other sales, Hyundai admits that a commission rate should have been reported and suggests the evidence on the record indicates Petitioners' suggested AFA commission rate lacks any support. Hyundai instead suggests a neutral facts available estimate of the commission expense, based on HHI's records." *Id.* at 45.

Turning to its reporting of U.S. duties for certain U.S. sales, Hyundai agrees that for the few sales with entry dates that fall between January 1, 2012 and March 15, 2012 before KORUS entered into effect, the estimated U.S. duty expense reported for such sales should be corrected and provides suggested corrections. *Id.* at Attachment 3

Department's Position:

With respect to Petitioners' claims that we should apply the highest commission rate for U.S. sales to two California customers, we find that there is no record evidence to support Petitioners' claim that Hyundai incurred any commission expense for sales to these two Californian customers. In fact, the Department examined documentation at verification and found no evidence to indicate that an unaffiliated commission agent was used to obtain these two customers. Rather, record evidence showed that sales personnel from Hyundai Corporation, USA, handled these sales and that no commission expenses were incurred. *See* Hyundai's December 13, 2011 Supplemental Questionnaire Response at SA-11 to 12, SA 15-18 and its January 23, 2012, response at 1; *see also* Hyundai's Home Market Verification Exhibits 30, 66, 64 and Hyundai's Home Market Verification Report at 45-46. Therefore, there are no grounds upon which to assign a commission rate based upon the highest U.S. commission rate for these sales.

With respect to the two sales observations identified by Petitioners, the evidence on the record suggests that a facts available commission rate should be applied as no commission was reported for these sales where estimated commission expenses should have been reported. *See* Hyundai's Rebuttal Brief at 44 and 45 and CEP Verification Report at 32. With respect to the first sales observation, the Department agrees with Hyundai's suggested commission, but with respect to the second sales observation in question, the Department will apply a different rate, as neutral facts available. *See* Hyundai Proprietary Memorandum.

With respect to the U.S. duty expenses reported in field USDUTY for certain U.S. sales, the Department will correct Hyundai's estimated USDUTY expenses to reflect the date that KORUS entered into force, *i.e.*, March 15, 2012, as suggested by Petitioners and acknowledged by Hyundai. We note that Hyundai provided a calculation sheet at Attachment 3 of its rebuttal brief to estimate the revised customs duty based on a FOB value, which is needed as customs duties are calculated on an FOB basis. We examined and checked the calculations in this attachment and used the revised USDUTY expenses provided by Hyundai for those sales observations in our final margin calculation for Hyundai. *See* Hyundai Proprietary Memorandum.

Comment 6: CEP Offset

Petitioners argue that the Department should find that “no CEP offset is warranted, because the record confirms that Hyundai’s selling functions in its home market are fewer and at a much *lower* level than that provided to the U.S. market.” *Id.* at 57 (emphasis in original). Petitioners summarize their arguments by examining the various selling functions.

Petitioners first argue that “HHI provides the same level of intensity of sales functions to both the home market and U.S. markets and there is no basis to conclude for these factors that HHI’s sales functions in the home market were at a higher level than in the home market.” *Id.* at 63. They do so by referencing verification findings that HHI officials are heavily involved in the U.S. sales process. *Id.* at 61. Moreover, Petitioners claim that the “only Hyundai entity that can prepare a bid in response to an RFQ is HHI as HHI is the only party among the named Hyundai companies that can develop a preliminary engineering design of the transformer, determine the delivery date (that conforms with HHI’s production schedule), estimate the cost, and determine the pricing point for the LPT.” *Id.* at 63. Petitioners go on to claim that “while Hyundai has identified various U.S. offices – HHI’s U.S. offices, Hyundai Corporation and Hyundai Corp. USA – their involvement in the sales process and functions is relatively minimal, as HHI works with sales agents in the United States for its sales.” *Id.*

Petitioners also claim that based on the verified record, HHI provides the same or fewer selling functions to the home market than to the United States with respect to the following functions: (1) preparing and negotiating contracts for sale; (2) preparing additional sales documentation for U.S. sales; (3) providing additional U.S. and international selling functions; and (4) providing installation and other technical assistance.

Petitioners also dispute HHI’s claim that it provides a higher level of engineering services to its home market customers than to its U.S. customers. They claim that “all engineering services are concentrated in HHI” and that “U.S. customers interact directly with HHI’s sales managers about technical issues, as the HHI personnel have greater expertise than Hyundai Corporation USA’s personnel.” *Id.* at 67. Petitioners therefore argue that HHI “provides the same level of engineering services to the home market as to the United States given that all engineering functions are centered at HHI.” *Id.*

Petitioners cite to additional factors in their argument, including the offering of discounts. However, this information is business proprietary in nature and no public summary was provided. *Id.* at 69. Petitioners conclude that “HHI does not provide a greater level of selling functions to its home market customers than to its U.S. customers.” They go on to state that “the home market level of trade is not at a more advanced stage than the CEP level of trade” and that “for this reason, the Department should find in its final determination that no CEP offset is warranted for Hyundai’s home market sales.” *Id.*

Hyundai notes that “Petitioners no longer challenge the fact that HHI’s sales are appropriately categorized as CEP” but that Petitioners claim “HHI’s home-market sales are at a less advanced level of trade.” *See* Hyundai’s Rebuttal Brief at 46 and 47. Hyundai claims that Petitioners’ arguments fail because they base their arguments on “the functions that HHI performs with

respect to the unaffiliated U.S. customer” and that as Hyundai notes “HHI sells at a more advanced level of trade to customers in the home market than in the CEP sales to Hyundai Corporation USA.” *Id.* at 47.

Hyundai notes that, as the Department verified, the first sale to a U.S. customer is to Hyundai USA – not the unaffiliated U.S. customer. It goes on to argue that in “comparing the {normal value (NV)} and CEP levels of trade, the CEP level of trade is considered to be that which corresponds to the foreign producer’s sale to the U.S. affiliate – not the level of trade corresponding with the U.S. affiliate’s sale to the first unaffiliated U.S. customer.” *Id.* Hyundai goes on to argue that “Petitioners’ examination of the functions HHI performs for the unaffiliated customer therefore is irrelevant” and that as the Department has done, the proper analysis is “to compare the selling activities performed by HHI for home-market sales to the functions HHI performs in sales to Hyundai USA.” *Id.*

Hyundai notes that Petitioners allege that “Hyundai has stated that there are no differences in the level of selling functions between the U.S. and home market for the following selling activities: advertising, packing, inventory maintenance, order input/processing, warranty service, rebates, after-sales services, and repacking.” *Id.* at 49. Hyundai claims this statement is false and the record shows that “HHI divided its U.S. selling functions between those provided in the sale to Hyundai USA and those provided to the unaffiliated customer.” Hyundai notes the difference in the following functions: advertising, packing, order input/processing, warranty service, and after-sales services. With respect to the remaining selling functions (inventory maintenance, rebates, and repacking), Hyundai notes that “HHI did not provide those functions – at all – in either market” and that Petitioners’ claim that “HHI provided those functions at the same level in both markets is, therefore, disingenuous.” *Id.*

Hyundai then examines each of Petitioners’ claims with respect to a number of different selling functions and notes that “HHI made no effort to hide the role it played in the U.S. market” with respect to certain functions. Hyundai notes that Petitioners’ argument is based upon the mistaken emphasis of Petitioners on what HHI does for the unaffiliated U.S. customer when the level of trade analysis and the determination of whether to deny or grant a CEP offset should rely on analyzing the services HHI provides Hyundai Corporation, USA and not the services HHI provides to the unaffiliated U.S. customer. *Id.* at 49 and 50.

Department’s Position:

We continue to find that a CEP offset with respect to Hyundai’s U.S. sales is warranted as the home market level of trade is at a more advanced stage than the CEP level of trade. Thus, we made a CEP offset pursuant to section 773(a)(7)(B) of the Act and 19 CFR 351.412(f). Petitioners mistakenly base their analysis on comparing the functions that HHI performs with respect to the unaffiliated U.S. customer with the functions that HHI performs in the home market. However, as was made clear in the Department’s *Preliminary Determination*, the level of trade analysis, and the decision whether to grant a CEP offset, centers on whether HHI sells at a more advanced level of trade to customers in the home market than with respect to the CEP sales to its affiliate in the U.S. market, Hyundai Corporation USA. *See Preliminary Determination*, 77 FR at 9208 (“Under section 773(a)(7)(B) of the Act and 19 CFR 351.412(f),

we are preliminarily granting a CEP offset to reduce NV by the appropriate amount of indirect selling expenses for both Hyundai and Hyosung because the NV sales for each company are at a more advanced LOT than the LOT for their U.S. CEP sales.”). Indeed, Hyundai acknowledges that it made no effort to hide the role it played in the U.S. market with respect to certain functions. However, as described in the *Preliminary Determination*, the Department’s analysis is comparing the selling functions of HHI in the home market, with the selling functions it performs for the U.S. affiliate, not the selling functions it performs for the unaffiliated U.S. customer as suggested by Petitioners. See 77 FR at 9208. We analyzed the level of activity of HHI’s selling functions with respect to CEP sales in the Memorandum to the File, entitled “Analysis of Data Submitted by Hyundai Heavy Industry and Hyundai Corporation USA (collectively “Hyundai”) in the Preliminary Determination of the Antidumping Duty Investigation of Large Power Transformers from the Republic of Korea” dated February 9, 2012, and we have found no argument or evidence to support finding otherwise. We verified HHI’s reporting of its selling activities with respect to home market and CEP sales (*i.e.*, activities it performed for U.S. sales to Hyundai Corporation, U.S.A.). Therefore, we have continued to find it appropriate to grant Hyundai a CEP offset in our final dumping analysis.

Comment 7: Inconsistent Allocation of Certain Selling Expenses

Petitioners argue that Hyundai inconsistently relied on two different allocation methods which distorted certain reported home market sales and associated costs data. Specifically, Petitioners claim that Hyundai misreported variable overhead costs by relying on different methods for allocating common installation expenses, first by using one method to assign these costs to the cost of manufacturing (COM), and then by using a second method to deduct such installation expenses from the COM. Petitioners further assert that Hyundai reported these incorrect amounts as selling expenses. Accordingly, Petitioners suggest that the Department make the following sale-specific adjustments to account for the different cost calculation methods: (1) Add the sale-specific differences that resulted from using two methods as noted in the Department’s cost verification report¹² to the corresponding variable overhead costs (VOH); (2) Subtract the differences from the other movement costs (OTHERMOVEH); and (3) add the differences to the variable cost of manufacturing (VCOM).

Petitioners further claim that according to the Hyundai Cost Verification Report, not only did Hyundai follow this inconsistent methodology for installation expenses, it also did the same for transportation expenses.

Petitioners claim that this resulted in an inaccurate reporting of the cost data, difference in merchandise data, and transportation expenses reported in computer fields INLFTCH, BARGE, TRUCK and INSURER. However, Petitioners state, no information exists on the record to determine the differences associated with the improper reporting of these variables and to make the corresponding adjustments to them. Therefore, Petitioners conclude, the Department should, as partial AFA, not permit a deduction from the home market price for the transportation expenses by setting all the above home market transportation expenses to zero.

¹² See Memorandum to file from Ernest Z. Gziryan and Michael P. Martin through Neal M. Halper entitled, “Verification of the Cost of Production and Constructed Value Data Submitted by Hyundai Heavy Industries Co., Ltd. in the Antidumping Duty Investigation of Large Power Transformers from the Republic of Korea,” dated May 2, 2012 (Hyundai Cost Verification Report).

Hyundai responds that it would not object if the Department was to make the proposed adjustments to the COM related to installation expenses “for the purposes of absolute accuracy.” However, Hyundai believes that the adjustments are only necessary, in accordance with 19 CFR 351.413, for certain of the home market sales identified by the Department. Hyundai asserts that “{u}nder Section 351.413, the Department ordinarily will disregard insignificant adjustments under Section 777A(a) of the Statute. An “insignificant adjustment” is any individual adjustment having an *ad valorem* effect of less than 0.33 percent, or any group of adjustments having an *ad valorem* effect of less than 1.0 percent, of normal value” (*see* Hyundai’s Rebuttal Brief at 51). Hyundai maintains that most of the adjustments proposed by the Department fall below the 0.33 percent threshold and, thus, would be insignificant adjustments which the Department need not make for the final determination. According to Hyundai, should the Department decide to make changes to the COM as proposed in the verification report, it should make these adjustments only with respect to the five observations noted above that individually exceed the threshold for insignificant adjustments.

While not objecting to the adjustments to the COM of the related large power transformers, Hyundai disagrees with the second adjustment suggested by Petitioners, *i.e.*, the adjustment to other movement expenses (OTHERMOVEH). Hyundai claims that the purpose of the adjustment proposed by the Department is to rectify the use of an inconsistent methodology to deduct selling expenses, but the additional adjustment to subtract the amount from OTHMOVEH essentially would negate the very correction that the Department proposed.

Hyundai also disagrees with the third adjustment proposed by Petitioners, *i.e.*, the adjustment to the variable cost of manufacturing (VCOM). Hyundai points out that VCOM is the sum of the cost elements which already would include any adjustment to VOH, and thus, the additional adjustment to VCOM suggested by Petitioners is redundant.

Finally, Hyundai disagrees with Petitioners’ assertion that the inconsistent methodology was followed by Hyundai not only for installation expenses, but also for transportation expenses. Hyundai contends that the record evidence does not support such assumption. According to Hyundai, the Department’s cost verification report makes clear that the inconsistency in allocation methodology occurred only for installation expenses, which were allocated between subject and non-subject products within one sale, while the other expenses are specific to the transformer and thus there is no inconsistency. Therefore, Hyundai concludes, Petitioners’ claim that the Department should apply partial facts available and not permit a deduction from the home market price for transportation expenses is baseless and should be rejected.

Department’s Position:

We agree with Petitioners, in part. At verification we found that for certain large power transformers sold in the home market, installation expenses recorded as a single project may apply to more than one large power transformer. Hyundai normally allocates such common installation expenses to the COM of the related large power transformers based on the internal selling price of each unit (reported in the home market sales database as GRSUPR1H). For reporting purposes Hyundai deducted installation expenses from the COM and included them in

the home market sales database. However, in determining the amounts of common installation expenses to deduct from the COM, the company used a different allocation base (*i.e.*, the contract selling price) which was reported in the home market sales database as GRSUPR2H. For the final determination, we adjusted the reported COM of the corresponding large power transformers to reflect a consistent allocation basis for the installation expenses added to and deducted from the COM. To do so, we added the noted difference to the variable overhead costs (VOH) as suggested by Petitioners and to which Hyundai did not object. While we acknowledge that, as pointed out by Hyundai, 19 CFR 351.413 defines an “insignificant adjustment” as any individual adjustment having an *ad valorem* effect of less than 0.33 percent, or any group of adjustments having an *ad valorem* effect of less than one percent of NV, we note that section 777A(a)(2) of the Act also allows the Department flexibility to determine, on a case-by-case basis, whether it should disregard a particular insignificant adjustment. *See Preamble*, 62 FR at 27372-73 (“both section 777A(a)(2) and § 351.413 give the Department the flexibility to determine, on a case-by-case basis, whether it should disregard a particular insignificant adjustment”). In the instant case, we find it appropriate to adjust the VOH of all affected home market sales, rather than only for sales for which the adjustment exceeds 0.33 percent as suggested by Hyundai, in order to ensure more accurate results.

We agree with Petitioners that in addition to the VOH, we should also adjust the corresponding selling expenses, *i.e.*, the other movement expenses (OTHERMOVEH) to reflect the consistent allocation basis. As discussed above, the installation expenses deducted from the COM and added to OTHERMOVEH were calculated based on GRSUPR2H, rather than GRSUPR1H which is used as the allocation base in the normal course of business. In other words, incorrect installation expense amounts were not only deducted from the COM, but were subsequently added to selling expenses, rendering both the COM and OTHERMOVEH amounts inaccurate. Therefore, both the COM and the corresponding selling expenses (OTHERMOVEH) should be adjusted to correct for the inconsistency in the allocation methods. Finally, we agree with Hyundai that, because the VCOM includes VOH as one of the components, any adjustment to the VOH is effectively an adjustment to the VCOM and, as such, no additional adjustment to the VCOM is necessary.

As for Petitioners’ claim that the same inconsistency exists with respect to the transportation expenses, we disagree. At verification, we examined various selling expenses which Hyundai excluded from the COM and reported as selling expenses: “{w}e reviewed the calculation of selling expenses, such as packing costs, transportation and installation charges, which are normally recorded in the COM. HHI excluded these expenses from the COM and reported them as selling expenses.” *See Hyundai Cost Verification Report* at 19. We found that inconsistent allocation methods were used only with respect to the installation expenses. Moreover, nothing on the record suggests that similar problems existed with regard to the transportation or any other selling expenses which are normally recorded by Hyundai as part of the COM. Consequently, for the final determination we did not make any adjustment to the reported transportation expenses.

Comment 8: General and Administrative and Financial Expenses

Petitioners argue that Hyundai erred in calculating its general and administrative (“G&A”) and

financial expense ratios. Petitioners state that Hyundai included gains and losses on foreign exchange forward contracts in its G&A calculation, while excluding such losses from the financial expense ratio calculation. Petitioners note that the Department's established practice is to treat these types of gains and losses as financial expenses. Thus, according to Petitioners, in the final determination the Department should reclassify Hyundai's foreign exchange gains and losses as financial expenses.

Hyundai agrees that the Department should make the above adjustments to G&A and financial expenses, which were also identified in the Hyundai Cost Verification Report.

Department's Position:

We agree with Petitioners, and for the final determination, we excluded Hyundai's foreign exchange gains and losses from the G&A expenses and included them in the calculation of the financial expenses. *See generally Notice of Final Determination of Sales at Not Less Than Fair Value: Expandable Polystyrene Resins from the Republic of Korea*, 65 FR 69284, 69285 (November 16, 2000) and accompanying Issues and Decision Memorandum at Comment 10.

Comment 9: Unshipped Sales

Hyundai notes that in the *Preliminary Determination*, "the Department used only sales that had been shipped as of December 31, 2011, even though no party made such a request." *See* Hyundai's Case Brief at 13. Hyundai claims such a decision is "inconsistent with past cases where the record evidence included reliable evidence for unshipped sales." *Id.* at 13 and 14.

Hyundai first notes the difference between an administrative review in which "the Department calculates the actual amount of dumping for assessment purposes for actual entries of subject merchandise" and "original investigations examine the behavior of the respondent to estimate its dumping margin." *Id.* at 14.

Citing to the original investigation concerning *Stainless Steel Butt-Weld Pipe Fittings from Malaysia*,¹³ Hyundai cites to both Petitioners' arguments in that case and to the Department's decision in which the Department stated it was "using the reported sales quantity and including the sale, reported by {the respondent} Kanzen as unshipped, in {our} final margin analysis." *Id.* at 15. Hyundai also cites to the Department's questionnaire in which the Department "required HHI to report all sales, shipped and unshipped, made during the POI, and to provide estimated expenses and costs." *Id.* (citing examples from the questionnaire). Hyundai argues that the "questionnaire clearly contemplates the use of unshipped sales in the margin calculation" and that the Department's supplemental questionnaires stated that the Department might apply AFA with respect to unshipped sales if HHI did not provide estimated sales and cost data. *Id.* at 16.

¹³ *See Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Butt-Weld Pipe Fittings from Malaysia*, 65 FR 81825 (December 27, 2000) (*Stainless Steel Butt-Weld Pipe Fittings from Malaysia*) and accompanying Issues and Decision Memorandum at Comment 13.

Hyundai also argues that past case precedent shows that when “there is no indication that any of HHI’s unshipped orders have been cancelled,” there is no reason to exclude such unshipped sales and that to do so would contradict Petitioners’ recognition “that unshipped sales should be included in the margin calculation.” *Id.* at 18 and 19. From Hyundai’s point of view, excluding the unshipped sales from Hyundai’s preliminary margin analysis resulted in “a distorted and unrepresentative calculation,” and that “rather than calculate HHI’s margin based on the sales during the POI, the Department considered only a small subset of sales, which is too small to reasonably estimate HHI’s margin of dumping.” *Id.* at 17. Hyundai claims that “in effect, the Department has shortened the POI for U.S. sales to just five months, creating an effective POI that is contrary to the Department’s regulations.” *Id.* at 20 (citing 19 CFR 351.204(b)(1)). Citing to proprietary information, Hyundai further argues that the decision by the Department also “distorts the product mix available for the margin calculation.” *Id.* at 20 and 21. Thus, Hyundai believes that “excluding the unshipped sales results in inadequate product coverage and a distorted and unrepresentative selection of sales, which is inconsistent with the statutory requirement to calculate dumping margins as accurately as possible.” *Id.* at 22.

With respect to the reported costs, Hyundai argues that “to the extent that the Department might have had concerns regarding the reliability of HHI’s estimated costs, the record evidence demonstrates the reliability and appropriateness of HHI’s estimated costs.” *Id.* at 22. Hyundai also cites to Petitioners’ own statements that the estimates prepared by HHI provide “very reliable estimates of the relevant costs and charges...” and “the Department’s cost verification report and exhibits confirmation of the reliability of the estimated costs.” *Id.* at 22 and 23.

Finally, Hyundai believes that as “HHI’s unshipped sales rest on definitive, binding agreements with home-market and U.S. customers, and have reliable, verified expense and cost information. “There is no basis for excluding HHI’s unshipped sales from the final margin calculation.” *Id.* at 24. Hyundai claims that there is no reason to exclude such sales as the information submitted was timely, verified and complete, reliable and sale-specific. Thus, in Hyundai’s view, the Department has no grounds not to use the estimates Hyundai has provided.

In rebuttal, Petitioners ask the Department to reject Hyundai’s argument that the Department considers all sales in its U.S. and home market sales databases in its final analysis. *See* Petitioners’ Hyundai Rebuttal Brief at 11. Petitioners cite to the Department’s *Preliminary Determination* in which the Department stated that we do “not expect to request updated information on sales or cost estimates for dates subsequent to December 31, 2011.” *Id.* (citing the *Preliminary Determination*, 77 FR at 9205). Petitioners also cite to the Department’s actions at verification to limit its acceptance of minor corrections in line with this announcement in the *Preliminary Determination*. *Id.* Petitioners then claim that the “Department has not requested, and has not verified, information concerning sales that were shipped (or expenses and costs that were incurred) after December 31, 2011.” *Id.*

Petitioners go on to argue that “the statute requires that the Department verify all information that it relies upon in reaching a final determination in a less than fair value investigation.” Accordingly, because the Department made clear to the parties that it would not accept updates on actual costs and actual sales after December 31, 2011, and because it has not verified any of

that information, the Department should not rely on any such information in its final determination. *Id.* at 13 (citing 19 U.S.C. §1677m(i)(1)).

Petitioners claim that “the Department’s determination not to rely on estimated costs and sales shipped after December 31, 2011, is reasonable because Hyundai’s estimates are subject to manipulation, particularly as the estimates were most likely prepared subsequent to the filing of the petition.” Petitioners cite to case precedent in which submitted costs that were derived after the initiation of the investigation were not relied upon to substantiate their argument. *Id.*

Petitioners dispute Hyundai’s claim that because it submitted information to the Department concerning estimated expenses and costs, such submission compels the Department to rely on that information in its final determination. Citing to various cases, Petitioners argue “the Department has the discretion to gather information relevant to its analysis and weigh it as it sees fit,” and that “the Department’s determination to rely only on information concerning actual and estimated sales expenses incurred prior to December 31, 2011 is a reasonable and entirely appropriate action that will ensure the Department is calculating the most accurate antidumping margin possible.” *Id.* at 14. Petitioners go on to note that “this proceeding at most sets only a duty deposit rate for Hyundai, which will have an opportunity to have its excluded sales reviewed with their actual expenses during an administrative review.” *Id.*

Petitioners dispute Hyundai’s assertion “that the Department’s determination to decline to analyze {large power transformer} sales where the unit was shipped after December 31, 2011 ‘result{s} in a distorted and unrepresentative calculation.’” *Id.* at 15. Petitioners claim that by including transactions with dates of sale that are based on long-term contracts that fall outside the POI, “Hyundai has self-generated a situation where it can (incorrectly) allege that the Department’s calculations are distorted because a significant portion of its U.S. and home market sales are not considered by the Department in its margin analysis.” *Id.* Petitioners also state that “there is nothing inherently distortive about the Department’s limitation of its analysis to sales shipped before December 31, 2011, a date that falls six months after the conclusion of the POI. Hyundai has reported a large number of U.S. sales occurring in the POI that were shipped before December 31, 2011.” *Id.* at 15 and 16.

Petitioners emphasize that “Hyundai has reported a large number of U.S. sales occurring in the POI that were shipped before December 31, 2011” and that “these sales are not inadequate to determine an appropriate antidumping duty cash deposit rate.” *Id.* at 16. Petitioners claim that, Hyundai has not shown that there is anything to distinguish the sales that are excluded from the sales that are not excluded and that “{t}he only distinguishing factors are that the data from the post-December 31, 2011 sales remain unverified, and that the estimated expenses for those sales remain subject to manipulation given that those estimates were created after the petition was filed.” *Id.* Citing to Hyosung’s Case Brief at 31, Petitioners assert it is “axiomatic that the inclusion of a higher number of sales in an antidumping calculation does not, in and of itself, make the calculation more accurate.” *Id.*

Petitioners dispute Hyundai’s reliance on *Stainless Steel Butt-Weld Pipe Fittings from Malaysia* claiming there are “{f}undamental differences in the manufacture of butt-weld pipe fittings and {large power transformers}.” *Id.* Petitioners note butt-weld pipe fittings are “a commodity

product that can be manufactured quickly at a readily determined cost, and expenses for these sales, on average, are not likely to vary significantly over time.” *Id.* at 17. Petitioners claim that “given the complexity of this investigation, the extended period required to design, manufacture, test, and deliver {large power transformers}, and the unique nature of individual {large power transformers}, it is perfectly reasonable for the Department to establish a deadline of December 31, 2011 for the reporting of actual cost and sales information and estimated costs that will be considered in the final determination.” *Id.*

Petitioners cite to past case precedent, including *Notice of Final Results of the Antidumping Duty Administrative Review: Large Newspaper Printing Presses and Components Thereof, Whether Assemble or Unassembled from Japan*, 66 FR 11555 (February 26, 2001) (*LNPPs from Japan*), where the Department has, in cases involving large custom-made products, “explicitly declined to rely on estimated data where the manufacture of a large piece of capital equipment have not progressed to a point where the Department determines it can reasonably rely on estimated data.” *Id.* at 18. Thus, Petitioners argue the Department should continue to apply the same methodology in the final determination.

Petitioners dispute Hyundai’s claim that the Department is improperly shortening the POI and argue that the Department “is calculating a margin based on the sales during the POI based upon its reasonable determination to consider sales shipped and actual expenses incurred before December 31, 2011.” *Id.* at 19. They further dismiss Hyundai’s claim that the Department’s determination not to consider large power transformers shipped after December 31, 2011 “would be tantamount to the application of facts available by the Department” because it has complete and verified information for unshipped sales.” *Id.* at 19. Petitioners believe that because the Department limited its examination of minor corrections to “those updates for which actual sales expenses were incurred through December 31, 2011, and which had (or should have) been reported prior to the submission of the last dataset,” the Department “has not verified all of the information relating to the unshipped sales,” which it is required to do under the statute. *Id.* at 20. Petitioners conclude that a “decision by the Department not to rely on information that has not been verified (and, thus, that is may not consider pursuant to 19 U.S.C. § 1677m(i)(1)) does not constitute a reliance on facts available.” *Id.* Petitioners finally cite to Hyosung’s divergent views on this issue, in terms of its argument that no estimated data should be used. Petitioners conclude that “the Department may reasonably rely on estimated data provided by a respondent, so long as it has a reasonable basis for concluding the estimated data are accurate and it has verified the data.” *Id.* at 21.

Hyundai notes that “Hyosung argues that the Department should not include unshipped sales in the calculation of its dumping margin.” *See* Hyundai’s Rebuttal Brief at 16. Hyundai claims it “takes no position with respect to whether the Department should include or exclude unshipped sales based on the facts relating to Hyosung” but claims that the law, Departmental practice, and the facts relating to Hyundai “dictate that the Department should include all sales – both shipped and unshipped – during the POI in the calculation of its dumping margin.” *Id.* at 16.

Hyundai claims that the cases cited by Hyosung support its contention that unshipped sales be included in the margin calculation. Citing to *LNPPs from Germany*, Hyundai notes that in that case the Department included the unshipped sales “despite finding that the respondent failed to

‘provide the data necessary to justify the accuracy and reliability of its projected cost methodology,’ had misrepresented its methodology for providing cost projections, and prepared projected costs solely for the purpose of providing {constructed value (CV)} information in this case.” *Id.* at 17. Hyundai notes that in the instant case, it “provided detailed, specific, reliable, and accurate calculation of the estimated expenses and costs for the unshipped transformers.” They argue that “with respect to HHI’s estimated costs, there is no basis to find that they are not reliable and accurate, and no basis to exclude HHI’s unshipped sales from the final margin calculation.” *Id.*

Hyundai cites to both the sales verification and cost verification reports to support its contention that its “estimated selling expenses were not simple ‘estimates,’ but specific quotations from the vendors that would provide the services.” *Id.* at 18. It also points out that with respect to the cost estimates, “the Department verified that HHI prepared cost estimates in its normal course of business based on the technical designs and updated the estimates as necessary when preparing the reported cost data in its questionnaire responses.” *Id.* at 18 and 19. It notes that this contrasts to the *LNPPs from Germany* situation where costs were developed “solely for the purpose of providing CV information in this case.” *Id.* at 18. It stresses that “HHI fully disclosed and documented its methodology for preparing the costs reported for the unshipped sales” and that “all necessary information to support the use of HHI’s estimated costs was available and the Department was able to verify HHI’s calculation of the estimated costs.” *Id.* at 19 and 20.

Hyundai also notes that the *Low Enriched Uranium from France*¹⁴ case cited by Hyosung does not apply to the factual situation faced by Hyundai as the inclusion of unshipped sales would not involve any speculation, as was the case in *Low Enriched Uranium from France*. *Id.* at 21. Hyundai also stress that unlike the estimates used as ‘facts available’ for unshipped sales by the Department in *Stainless Steel Butt-Weld Pipe Fittings from Malaysia*, Hyundai’s estimates were accurate and reliable, as verified at verification. *Id.*

Hyundai cites to Petitioners’ desire to “capture all of the sales made during the POI in the dumping margin calculations to reflect the current level of dumping” and that it is important to include “all sales made during the POI as it ‘greatly affects the sales reporting and dumping margins.’” *Id.* at 22 citing various Petitioners’ comments and submissions.

Hyundai claims the only way to capture “all sales with pricing established during the POI” is to use estimated expenses and costs. *Id.* It notes that both the statute and the CIT distinguish dumping calculations in original investigations from those in administrative reviews. *Id.* at 23. Hyundai stresses that the CIT has determined that unlike dumping margin calculations in administrative reviews which are required to be based on the data for actual entries, the dumping margins in original investigations are estimates based on the sales made during the POI. *Id.* Hyundai substantiates its claims by citing to cases before the Court of Appeals for the Federal Circuit and concludes that “[t]o calculate a dumping margin for HHI in this investigation that fulfils the requirement to estimate HHI’s ‘current margin’ of dumping and meets Petitioners’ expectation that the Department should ‘capture the . . . LPT sales made during the POI in late

¹⁴ See *Low Enriched Uranium from France: Final Less Than Fair Value Determination*, 66 FR 65877 (December 21, 2001) (*Enriched Uranium from France*) and accompanying Issues and Decision Memorandum at Comment 5.

2010 and early 2011,’ the Department must include all of HHI’s sales, both shipped and unshipped.” *Id.* at 24.

Hyosung provided comments on Hyundai’s urging of the Department to rely on all reported sales and cost data for purposes of calculating the margins in the final determination. *See* Hyosung’s Rebuttal Brief at 21-27. Regardless of whether the data are estimated or actual, Hyosung contends, the Department must “determine margins based on each respondent’s particular facts.” *Id.* at 21. First, Hyosung argues that the statute requires the Department to calculate accurate margins¹⁵ and that there is “no rule mandating that the Department adopt the same methodology for different respondents when the underlying facts are very different.” *Id.* at 22.

Hyosung contends that “case law confirms that the Department has relied on estimated data in only limited circumstances and even then, only after ensuring that the estimates were accurate and not distortive.” *See* Hyosung’s Rebuttal Brief at 22-26. Hyosung argues that the facts in the instant proceeding are similar to those in the cases Hyosung cited in its Case Brief. In those cases, Hyosung reiterated, the Department rejected the use of estimates because the accuracy of those estimates was in question. *Id.* at 24. The CIT, Hyosung contends, also confirmed that the Department may use estimates “only to the extent that the Department can be reasonably certain that the estimates accurately reflect the costs incurred.” *Id.* at 25.

Hyosung argues that record evidence shows that while Hyosung’s estimates were determined based on its normal records, there were significant differences between estimates and actual expenses. *Id.* Hyosung also argues that the “vast majority” of sales used by the Department at the *Preliminary Determination* relied on estimated data and that because there were differences between estimates and actual expenses, the Department should only rely on actual expenses at the final determination. *Id.* at 23.

Finally, Hyosung contends that if the Department does determine that it is appropriate to use estimated data for Hyosung, it should use all of the reported data. *See* Hyosung’s Rebuttal Brief at 27. Hyosung agrees with Hyundai that the Department’s decision to limit transactions included in the analysis to those with shipment dates before January 1, 2012 was arbitrary. *Id.*

Department’s Position:

We find that our preliminary determination to rely only on information concerning actual manufacturing costs and limited estimated sales expenses incurred prior to December 31, 2011, is a reasonable and appropriate action that will ensure the Department is calculating the most accurate antidumping margin possible. As certain expenses are not realized until post-completion/shipment, we included certain sales that have been completed and shipped but for which a limited number of selling expenses or costs are based on estimates. The Department notes that December 31, 2011, six months after the conclusion of the POI, is a reasonable cut-off point for obtaining updated information related to expenses from POI sales. Further, Petitioners correctly noted that the Department stated in its *Preliminary Determination* that we did “not expect to request updated information on sales or cost estimates for dates subsequent to December 31, 2011.” Thus, adhering to the date announced in the *Preliminary Determination*

¹⁵ *See* Hyosung’s Rebuttal Brief at 22, citing *Lask Metal Prods. Inc. v. United States*, 43 F.3d 1442, 1446 (Federal Circuit 1994).

allowed the Department to have a completed record to analyze, verify, and rely upon rather than attempting to analyze and verify a database that was being revised on a continual basis which would have precluded thorough analysis due to time constraints.

With respect to manufacturing costs, Hyundai argues that, because it has demonstrated the reliability, reasonableness, and accuracy of its reported estimated costs, there is no basis for rejecting unshipped sales based on the fact that the reported costs are estimates. We disagree. Management's estimates of manufacturing costs that have not been incurred cannot be confirmed by source documents, cannot be reconciled to the company's books, and will change as the result of changes in product design and material prices. In other words, any estimate, regardless of how well it is prepared, will always be different from the actual costs incurred. At verification, we confirmed that the actual cost of manufacturing did in fact differ from the company's reported estimate (*see* Hyundai's Cost Verification Report at page 22). Therefore, the Department's preference is to use in all cases and to the fullest extent possible the actual costs incurred rather than estimates. Such an approach is consistent with the statute, which refers to the "actual" costs in the calculation of the cost of production and CV. *See* sections 773(b)(3) and 773(e) of the Act.

In cases where the merchandise under consideration are large, complex, capital intensive custom made products that take many months to produce and install, the Department often is faced with the decision to balance the use of actual costs in their entirety with maximizing the population of sales to use to calculate a dumping margin. In the instant case, we recognize that if we followed our preferred approach of using only actual costs in their entirety, and excluded those POI sales which were not fully produced, shipped and fully installed by the end of the POI, we would end up excluding a significant quantity of home market and U.S. sales from the margin calculation. Therefore, to increase the population of useable sales, we extended the period for reporting actual costs incurred to cover six months beyond the end of the POI. This way, we allowed for more time for the respondents to complete production and installation of those sales made during the POI. We reasonably limited the extended cost reporting period to 6 months after the POI because, as those unfinished sales continued to be produced, the data on the record continued to change, and we necessarily needed a cutoff point to allow sufficient time for the Department and outside parties to obtain and analyze the data.

In addition, we decided to use in our analysis only those POI sales that have been completed and shipped as of December 31, 2011, because for those sales all the reported manufacturing costs and the majority of selling expenses reflect actual costs. While this approach still requires the use of some estimated costs in order to capture more sales, it results in a significant increase in the number of usable sales. In addition, the vast majority of costs reflect actual and only minimal estimates for selling and installation expenses will be used in the margin calculation. The use of same estimates here results in a more representative data pool, does not systematically over- or underestimate expenses, and does not distort the overall margin calculation. The exclusion of the incomplete and unshipped sales does not adversely affect our analysis, as we still have a robust population of remaining home market and U.S. sales to use in our calculation, with the added benefit of using predominantly actual costs incurred which will not change, can be reconciled to the company's books, and provide for a more accurate results.

We note that while the sales used may result in a different product mix, Hyundai has reported a large number of U.S. sales occurring in the POI that were shipped before December 31, 2011, and that such sales are not inadequate to determine an appropriate antidumping duty cash deposit rate.

For the above reasons, we have continued to rely only on information reported by Hyundai and Hyosung concerning actual and estimated sales expenses incurred prior to December 31, 2011.

Comment 10: Normal Value versus Constructed Value

Hyundai cites to the Department's *Initiation Notice* in which the Department "noted Petitioners' assessment that the custom-built nature and complexity of LPTs renders price-to-price comparisons 'virtually impossible.'" See Hyundai's Case Brief at 28. Hyundai disputes Petitioners' arguments and claims that the Department's established practice is to use CV as NV for highly-customized products, and argues there is record evidence demonstrating the appropriateness of a CV margin calculation. *Id.* Citing to the Analysis Memorandum at the *Preliminary Determination*, Hyundai challenges the Department's decision that "the statute at 773(a)(1)(B), establishes a preference for a price-to-price comparison unless there is a problem with price-to-price, such as a particular market situation." *Id.* Hyundai goes on to argue that "the now-verified record evidence establishes that there are indeed 'problems' with price-to-price comparisons and that CV comparisons are more appropriate." *Id.* at 29.

Hyundai cites to previous Departmental decisions for custom-built products, including the prior investigation of large power transformers from France,¹⁶ to substantiate its claims that the Department's normal practice in such cases is to use CV for NV. Hyundai further argues that "because the physical differences between {large power transformers} are so numerous and significant, the Department found in the previous investigation of {large power transformers} that it could not rely on DIFMER adjustments to ensure the comparability of the sales prices compared." *Id.* at 30. (citing to other cases, such as *LNPPs from Germany*). Hyundai cites to the Department's explanation that "{t}he Department may determine that home market sales are inappropriate as a basis for determining NV if the particular market situation would not permit a proper comparison. Where the particular market situation does not permit a proper comparison, the Department may rely on CV." ¹⁷ *Id.* at 30.

Hyundai goes on to state that "where a 'particular market situation' exists, the Department will base NV on CV, regardless of whether the home market or third-country markets are viable, and regardless of whether the products could be compared with a DIFMER adjustment of less than 20%." *Id.* at 31. Hyundai claims that, as was the case in *LNPPs from Germany*, "altering a single specification in the merchandise may result in significant and numerous changes to the other physical characteristics of the merchandise." *Id.* at 32. Hyundai uses Petitioners' arguments to underline its belief that "an analysis of how products are chosen for comparison

¹⁶ See *Large Power Transformers from France: Final Results of Antidumping Duty Administrative Review*, 60 FR 62808 (December 7, 1995) and *Large Power Transformers from France: Preliminary Results of Antidumping Duty Administrative Review*, 61 FR 15461, 15462 (April 8, 1996).

¹⁷ See November 9, 1995 Memorandum on Determining the Appropriate Basis for Normal Value (NV) in the Antidumping Duty Investigation of Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, from Germany (A-428-821) at 2; see also *LNPPs from Germany*, 65 FR at 62697.

demonstrates that the CONNUMs do not match products that are truly similar in terms of physical characteristics.” *Id.* Hyundai uses business proprietary information to argue that “the LPTs being selected for comparison are not even remotely similar in terms of their physical characteristics.” *See* Hyundai’s Proprietary Memorandum in discussion on Normal Value versus Constructed Value. Rather, Hyundai believes the models “are being selected simply because the DIFMER adjustment that would be required coincidentally is less than 20%.” *Id.*

Hyundai cites to the use of cooling oil as an example of a difference that cannot be captured using a DIFMER adjustment. Citing to business proprietary information, Hyundai argues that “because the cost of oil is significant, and because the DIFMER adjustment does not account for the different treatments of oil costs..., making a DIFMER adjustment will not ensure price comparability.” *Id.* at 34, 35. Hyundai also cites to cost drivers, other than those accounted for through the 18 CONNUM characteristics that significantly increase costs, such as monitoring systems. Hyundai cites to the Hyundai Cost Verification Report to substantiate its claims. *Id.* at 35. Hyundai again notes the non-interchangeability of large power transformers and highlights additional factors such as labor and cabling costs, as well as the customer-required specifications for each transformer, to further justify its arguments. *Id.* at 36.

Hyundai then points to Petitioners’ arguments on Hyundai’s own cost reporting as being “aberrational” to substantiate Hyundai’s claim that “price-to-price comparisons based on such CONNUMs are distortive.” *Id.* at 36. Hyundai cites to its supplemental questionnaire response in which it stated on the record that “it is not feasible to determine, in general, which one factor is the key factor for determining the cost of an LPT.” *Id.* Hyundai claims that “such analysis needs to be performed on a case-by-case basis, accounting for the design of the particular LPT at issue.” *Id.* at 36. Hyundai therefore concludes that “the Department should calculate NV based on CV in its final determination, as it has in previous proceedings relating to large power transformers and other customized goods.” *Id.* at 39.

Petitioners refute Hyundai’s arguments that the Department should base NV on CV in this case. *See* Petitioners’ Hyundai Rebuttal Brief, at 22. Petitioners argue that “{t}he statute makes clear that the Department may rely on constructed value to determine normal value only after concluding that it cannot establish normal value based upon price.” *Id.* at 23. Petitioners cite to the Department’s *Preliminary Determination* in this case, as well as other precedents, which makes clear the Department’s “recognition of the statutory preference for price-to-price comparisons and its efforts to identify such comparisons before resorting to CV as the basis for determining NV.” *Id.* (citing *Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, Singapore, and the United Kingdom; Final Results of Antidumping Duty Administrative Review*, 70 FR 54711 (September 16, 2005) and the accompanying Issues and Decision Memorandum at Comment 15).

Citing to 19 CFR 351.405(a), Petitioners argue that the conditions upon which the Department may resort to CV do not apply in this situation. *Id.* Furthermore, Petitioners rebut Hyundai’s claims that “the Department’s use of CV to determine NV in {certain} prior proceedings, however, should not result in the Department’s automatically resorting to utilizing CV to determine NV in this proceeding.” *Id.* (citing Hyundai’s reference to various cases involving large custom-made products). Petitioners specifically rebut Hyundai’s implications with respect

to *Large Power Transformers from France*. Petitioners note “the Department resorted to CV in that proceeding only after finding the existence of a particular market situation that “does not permit proper price-to-price comparisons in either the home market or a third country market.” *Id.* at 26. Petitioners also note that “while the Department invited the parties to comment on the matches under a price-to-price comparison in their case briefs, Hyundai did not formally or timely allege that a ‘particular market situation’ exists that would require the Department to depart from the statutory preference for price-to-price comparisons. Petitioners note that such allegations are due to be made “within 40 days after transmission of the initial questionnaire.” *Id.* (citing 19 CFR 351.404(c)(2), (d) and 351.301(d)(1)).

Petitioners also argue that comparisons can be made using the Department’s model-matching characteristics to account for each of these physical elements by comparing the total variable costs (VCOMs). *Id.* at 27. Petitioners note that Hyundai had an opportunity to submit comments to the Department on the model-matching criteria, but that in its comments dated August 30, 2011, Hyundai “did not propose specific model-matching criteria, generally arguing instead that the Department should rely on CV to determine NV.” *Id.* Petitioners stress that “[a]ll of the material changes in physical characteristics are accounted for in the matching criteria and VCOMs, allowing for use of a DIFMER adjustment based on differences in VCOMs,” and claim that “[w]here that is not possible, the Department’s use of CV would be appropriate.” *Id.*

Petitioners disagree with Hyundai’s statement that Petitioners themselves recognize a problem with using price-to-price comparisons and instead claim that “information on the record demonstrates there are a significant number of proper price-to-price comparisons.” *Id.* at 28. Petitioners continue by examining a number of matches, from the *Preliminary Determination* to show that “[e]ach of these price-to-price matches were properly generated by the Department from Hyundai’s U.S. and home market sales databases.” *Id.* at 30.

With respect to Hyundai’s claims that “the costs for cooling oil cannot be accounted for in the DIFMER adjustment” Petitioners cite to a business proprietary example to show that “the DIFMER adjustment would consider the differences in the costs attributable to cooling oil, as these costs are reported as part of the material costs reported in the cost of manufacture.” *Id.* at 30 and 31.

As for Hyundai’s concerns regarding “numerous, significant cost elements,” Petitioners argue that such elements (for example, a monitoring system), are reported by Hyundai as part of the material costs of the cost of manufacture. Therefore, Petitioners argue that “like the cooling oil, if the Department matches a product where Hyundai incurred higher costs for an ‘expensive’ monitoring system, with a product where Hyundai incurred lower costs for an inexpensive monitoring system, then the DIFMER adjustment would consider the differences in the costs attributable to the cost differences associated between the two monitoring systems.” *Id.* at 30 and 31. With respect to Hyundai’s concerns that there may be differences in the labor costs associated with the monitoring system, Petitioners argue these differences are also taken into consideration by the Department’s DIFMER adjustment. *Id.* Petitioners also stress that the “DIFMER adjustment is based on the VCOM, which includes all additional materials (*e.g.*, cables, monitoring equipment, core steel, copper, labor, etc.).” Thus, in Petitioners’ view, any differences in costs would be taken into account through the DIFMER adjustment. *Id.* at 31.

Petitioners also repeat their assertion that Hyundai had the opportunity to suggest additional model match criteria early in the proceeding and it failed to do so. *Id.* at 32. Petitioners further argue that Hyundai has not, in Petitioners' view, "demonstrated that any other physical characteristic significantly impacts the price and costs of the LPT." *Id.* Finally, Petitioners note that "just because there are cost differences between two similar CONNUMs - a situation that the Department faces in every case where it compares 'similar' products - does not negate the comparability of the two CONNUMs." Petitioners conclude that "Hyundai's concerns regarding price-to-price matches are unjustified." *Id.*

Hyosung agrees with Hyundai to the extent that it "may be appropriate" for the Department to use CV as NV in the final determination. *See* Hyosung's Rebuttal Brief at 28-29. Hyosung contends that the control number characteristics and model match hierarchy do not "sufficiently capture meaningful physical characteristics." *Id.* Hyosung states that "a fundamental characteristic of LPTs is the custom-built nature of the product" and that "a manufacturer can achieve a specified maximum MVA rating through a number of alternative designs and, as a result, LPTs with the same maximum MVA ratings will have significant physical differences." *Id.* at 28. Therefore, given the unique nature of these products, Hyosung contends that "it may never be possible to achieve a control number structure that adequately accounts for all of the relevant physical characteristics of each unit." *Id.* at 29.

Hyosung cites to several cases (*e.g.*, *LNPPs from Germany* and *MTPs from Japan*) as evidence that the Department has used CV as NV in proceedings involving large custom-made products. *See* Hyosung's Rebuttal Brief at 29. The only exception to this practice, Hyosung argues, is *Large Power Transformers from France: Final Results of Administrative Review of Antidumping Finding*, 49 FR 36888 (September 20, 1984). Consequently, Hyosung argues, the Department abandoned this practice in subsequent reviews and based NV on CV. *Id.* at 29.

Department's Position:

We continue to find it appropriate conduct price-to-price comparisons, when possible, for purposes of NV. Section 773(a) of the Act states, "a fair comparison shall be made between the export price or constructed export price and normal value." The Act expresses a preference for calculating NV using price comparisons rather than using CV: "{t}he normal value of the subject merchandise shall be the price described in subparagraph (B), at a time reasonably corresponding to the time of the sale used to determine the export price or constructed export price." *See* section 773(a)(1)(A) of the Act. The relevant price is "the price at which the foreign like product is first sold (or, in the absence of a sale, offered for sale)" in the home market. However, if the Department cannot determine NV using this price, then the Act provides that "the normal value of the subject merchandise may be the constructed value of that merchandise, as determined under subsection (e)." *See* section 773(a)(4) of the Act.

Similarly, the Statement of Administrative Action (SAA) expresses a preference for price rather than CV, stating that "{u}nder new section 773(a), as under existing law, the preferred method for identifying and measuring dumping is to compare home market sales of the foreign like product to export sales to the United States. Consistent with the Agreement, if home market

sales of a foreign like product do not exist or are not useable as a basis for determining NV, Commerce may identify and measure dumping by comparing the export price or CEP to NV based on either: (1) sales of the foreign like product to a country other than the United States; or (2) constructed value.” See Uruguay Round Agreement Act, Statement of Administrative Action (SAA), H.R. Doc. No. 103-316 at 820 (1994), reprinted in 1994 U.S.C.C.A.N. 4040, 4161; see also *Koyo Seiko Co., Ltd. v. United States*, 31 C.I.T. 1512, at 1518 (Ct. Int’l Trade 2007).

Here, the record evidence confirms the Department’s decision in the *Preliminary Determination* to use price-to-price comparisons as the basis for NV. First, the statute is clear that the preferred method for identifying and measuring dumping is to compare home market sales of the foreign like product to export sales to the United States. This use of price-to-price comparisons is not simply “optional,” but rather constitutes a clear requirement as laid out in the statute, and, absent any showing that the use of such prices was inappropriate, the Department followed its statutory obligation to consider this preference in its determination. In other words, the Department achieved a proper price-to-price comparison and the record evidence did not call for the Department to resort to using only CV. Second, there were ample opportunities for all parties to comment on the model match criteria and if Hyundai or Hyosung continue to believe that the model match criteria should be reordered to obtain better matches, they will have an opportunity to do so at the beginning of the first administrative review, should this case go to order. Third, the cases cited by the respondents as support for using CV are factually distinguishable and do not apply to the circumstances of this case.

With regard to proper price-to-price comparisons, the model matching criteria resulted in a majority of reasonable comparisons. In other words, an analysis of how products are chosen for comparison demonstrated that the majority of CONNUMs matched products that were similar in terms of physical characteristics, particularly with respect to those physical characteristics at the top of the model match hierarchy. Where the comparisons were unreasonable, *i.e.*, unable to find a proper match, the Department relied on CV to ensure the accuracy of the overall margin. Although Hyundai points to factors that may not be perfectly reflected, such as costs attributable to cooling oil, these variations are within the statutory allowance of comparisons of such or similar merchandise. These variations certainly do not amount to “aberrational” or “distortive” or “not even remotely similar” comparisons. Rather, these variations are incidental to the model match system used by the Department in its normal practice. See Hyundai’s Proprietary Memorandum.

With regard to the appropriateness of model matching, Hyundai and Hyosung participated in the process of developing the model match criteria, but did not voice the objections they now raise in their case briefs. See Hyundai’s Proprietary Memorandum (Hyundai argues—without pointing to record evidence—that “the {large power transformers} being selected for comparison are not even remotely similar”). In the *Initiation Notice*, the Department specifically asked for comments on the product comparison criteria and the hierarchy under which the physical characteristics should be considered in product matching. See *Initiation Notice*, 76 FR at 49439-43 (“We are requesting comments from interested parties regarding the appropriate physical characteristics of large power transformers to be reported in response to the Department’s antidumping questionnaire. This information will be used to identify the key physical characteristics of the subject merchandise in order to more accurately report the relevant factors

and costs of production, as well as to develop appropriate product comparison criteria.”). In response, Petitioners, but notably not the respondents, provided extensive comments and proposed a hierarchy of product characteristics in their August 30, 2011, letter to the Department. *See* Letter from Petitioners, entitled “Petitioners’ Comments on Product Comparison Criteria,” dated August 30, 2011.

Although Hyundai also submitted comments on August 30, 2011, Hyundai did not propose suggested product characteristics or any possible hierarchy. Instead, Hyundai submitted comments on reasons why it believed the Department should proceed directly to using CV in this case.¹⁸ Therefore, the Department notes it gave Hyundai and Hyosung an opportunity to submit a suggested hierarchy of model match criteria in their initial comments to the Department, and both companies declined to do so.¹⁹ The Department carefully considered both Petitioners’ initial comments and Hyundai’s and Hyosung’s rebuttal comments with regard to the product characteristics and the model matching hierarchy to be used in this investigation.²⁰ Thus, Hyundai’s argument that the models are being selected “coincidentally” is not persuasive. Rather, the models are being selected as the result of a thorough and deliberative analysis (in which all parties had the opportunity to participate) for selecting the most representative, meaningful model match criteria.

With respect to arguments regarding the particular market situation, the Department notes that neither Hyundai nor Hyosung made such a formal allegation with all supporting factual information within the time limits prescribed in the Department’s regulations. The Act states that a particular market situation may exist when “the particular market situation in the exporting country does not permit a proper comparison with the export price or constructed export price.” *See* section 773(a)(1)(C)(iii) of the Act. Section 351.404(c)(2)(d)(1) of the Department’s regulations states that with respect to “[a]llegations concerning market viability and the basis for determining a price-based normal value,” such allegations “must be filed, with all supporting factual information, in accordance with section 351.301(d)(1).” *See* 19 CFR 351.301(d)(1) (such allegations are “due, with all supporting factual information, within 40 days after the date on which the initial questionnaire was transmitted, unless the Secretary alters this time limit.”). As Petitioners noted in their rebuttal to Hyundai’s request for using CV, Hyundai provided “no facts or evidence to support” its assertion that a particular market situation exists in this case to preclude the use of price-based NV. *See* Petitioners’ Rebuttal Comments on product comparison criteria dated September 6, 2011, at 5 and 6.

With regard to circumstances in which price-to-price comparisons are not proper, Hyundai cites to several cases where the Department used CV. The facts of these cases, however, are readily distinguishable from the facts of this case. For example, Hyundai cites to *LNPPs from Germany* as an example of where the Department determined that a particular market situation may allow

¹⁸ *See* Letter from Hyundai, entitled “Comments on Choice of Normal Value” dated August 30, 2011.

¹⁹ In response to Petitioners’ model match comments, however, both Hyundai and Hyosung filed rebuttal comments reiterating their belief that CV was the appropriate mechanism to use in this case and also made suggestions in rebuttal to petitioners’ model match criteria. The Department notes that both Hyundai and Hyosung limited their comments on this issue to rebutting Petitioners’ comments rather than demonstrating that the model match analysis would lead to unreasonable comparisons.

²⁰ The Department also sent a letter to all interested parties on September 21, 2011, asking parties to submit comments on how to measure particular product characteristics. On September 23, 2011, all parties provided comments and the Department notes that Hyundai limited its comments to two particular model match criteria.

the Department to rely on CV. However, the sales of large newspaper printing presses occurred in markedly smaller quantities and the degree of customization in the individual large newspaper printing press products far exceeds any customization of large power transformers in this case. Furthermore, previous case precedent is not as clear cut as Hyundai has claimed. For example, in the *MTPs from Japan* investigation the Department actually “calculated foreign market value based on a home market sale or constructed value, as appropriate,” and resorted to CV only when there “were no sales of merchandise which were sufficiently similar to that sold to the United States to serve as a basis for comparison.” *See Preliminary Determination of Sales at Less Than Fair Value; Mechanical Transfer Presses From Japan*, 54 FR 34208 (August 18, 1989).

Regardless of what may have been done in the 1970’s investigations involving large power transformers, in this case we have applied a methodology consistent with current law and regulations. Therefore, the Department, while examining its past precedent, also examines the unique facts and circumstances found in the industry today when making its determinations on a case-by-case basis as it has here. Finally, we stress that the unique factors in this case are different from both commodity products such as steel and “one-off” custom made products such as mechanical transfer presses and large newspaper printing presses. Large power transformers are neither a “one-off” special product nor an “off-the-shelf” commodity. Rather, the Department’s experience with this case, as developed by the record and through parties’ comments, demonstrates that price-to-price comparisons can be properly made in light of the current industry practices and model match criteria used in this case. Furthermore, we note there are large numbers of sales by both respondents in both the home and U.S. markets.

We note, as do Petitioners, that Hyundai’s claims that in the previous investigation of large power transformers that the Department could not rely on DIFMER adjustments to ensure the comparability of sales prices, is misplaced. *See* Hyundai’s Case Brief at 30. Specifically, to assert this claim, Hyundai cites in a footnote to the *LNPPs from Germany* case, and provides no precedent to support its assertion that the Department previously found it could not rely on DIFMER adjustments in prior proceedings involving large power transformers. Unlike the previous large power transformer investigation, in which the scope was considerably broader in terms of MVA, the scope of this case is narrower and therefore the fact pattern is not the same. In the previous case, the scope covered all types of transformers rated 10,000 KVA (kilovolt-amperes) or above, whereas the scope of this investigation covers only those large power transformers that are above 60 MVA.

As a further example of the Department’s evolving practice, it is also important to note that even in an administrative review of *Large Power Transformers from France*, the Department disagreed that CV should be preferred to price lists despite wide physical differences and instead stated that the Department needed “to establish a reasonable, uniform methodology by which differences in physical characteristics of the transformers being compared can be quantified.” *See Large Power Transformers From Japan; Final Results of Administrative Review of Antidumping Finding*, 48 FR 26498 (June 8, 1983). Similarly, in this case, the Department has captured these physical characteristics by using its model match criteria and the DIFMER to quantify differences in physical characteristics.

Therefore, based on record evidence and consideration of interested parties' comments, we have found it appropriate to continue to rely upon price-to-price analysis in our final determination, except for those instances in which the DIFMER adjustment was too great, where we relied upon CV. Despite information submitted by Hyundai in its brief (which we have analyzed), while there are no identical matches when relying upon price-to-price comparison, the Department's matches do achieve the level of similarity required by the statute. The statute establishes a preference for a price-to-price comparison (which the courts have recognized) unless there is a problem with a price-to-price comparison such as a particular market situation. No party has sufficiently identified a systematic or categorical flaw in the matches that would require using only CV. Thus, we have used a price-to-price analysis for purposes of this final determination.

Hyosung-Specific Comments

Comment 11: Selling Expense Classifications

Petitioners argue that the Department should not permit Hyosung to claim identical expenses as direct expenses incurred in sales in the home market while classifying these same expenses as indirect expenses in the United States. *See* Petitioners' Case Brief at 73-81. Petitioners cite to the *Preamble* to the Department's regulations, to establish that the Department set out the burden of proof standard applicable to respondents' reporting of selling expenses. *Id.* at 73. In doing so, Petitioners state, the Department recognizes that the respondents have an "incentive" to understate direct expenses on their U.S. sales and to overstate direct expenses on their home market sales. *Id.* at 73-74. In the instant investigation, Petitioners argue that Hyosung has claimed identical selling expenses such as installation expenses, warranty expenses, and bank charges as direct selling expenses in the home market and as indirect selling expenses in the U.S. market.

- (1) With regard to Hyosung's classification of installation expenses, Petitioners argue that there is "no question that installation expenses are direct expenses." *See* Petitioners' Case Brief at 74. Petitioners state that Hyosung reported certain costs related to installation differently in the home market than in the United States. *Id.* at 74-75. Petitioners state that Hyosung has explained that it simply tracks these costs differently in both markets. *Id.* at 75. Hyosung, Petitioners state, has "provided no justification for treating identical costs differently" in the home and U.S. markets. *Id.* at 76.

Consequently, Petitioners argue, the Department should adjust installation expenses for the final determination using facts available. *See* Petitioners' Case Brief at 76. Specifically, Petitioners argue that the Department should increase all installation expenses reported in the U.S. sales database as facts available for certain actual costs related to installation.²¹

²¹ Petitioners point to record evidence located at Exhibit 15 of Hyosung's November 16, 2011, response to section B of the Department's antidumping duty questionnaire (BQR) as to how the Department should adjust, as facts available, Hyosung's reported U.S. installation expenses (*i.e.*, the Department should use the sample calculation at Exhibit 15 and apply it to all U.S. installation expenses). *See* Petitioners' Case Brief at 76.

- (2) With regard to warranty expenses, Petitioners state that Hyosung's explanation of its warranty expenses (as described at page C-36 of Hyosung's November 16, 2011, response to section C of the Department's antidumping duty questionnaire) indicated that Hyosung reported warranty expenses as part of HICO America's indirect selling expenses in field INDIRSU because HICO America is not able to track those expenses on a transaction-specific basis. *See* Petitioners' Case Brief at 77. Petitioners argue that 19 CFR 351.402(g) provides that Hyosung should have allocated direct warranty expenses rather than reclassify them as indirect and that the Department's antidumping duty questionnaire never required Hyosung to report direct warranty expenses on a transaction-specific basis. *Id.* at 78.

Consequently, Petitioners argue, the Department should apply Hyosung's reported average warranty cost, as a percentage of the value of sales for fiscal year 2010, to each U.S. sale. *See* Petitioners' Case Brief at 79.²²

- (3) Finally, regarding bank charges, Petitioners argue that the Department should, in addition to "bank charges," deduct certain other expenses (as shown at Exhibit 37 of Hyosung's January 19, 2012, supplemental questionnaire response) as a direct selling expense from the price of each U.S. sale. *See* Petitioners' Case Brief at 81.

Petitioners' argue that the Department should not allow Hyosung to "change a direct expense to an indirect expense" by "choosing to track expenses differently in the U.S." *Id.* at 74. As noted in the *Preamble*, Petitioners argue, it is the nature of the expense, rather than Hyosung's accounting practices (*i.e.*, how Hyosung tracks expenses), that determines whether an expense is direct or indirect in nature. *Id.* Consequently, Petitioners argue that the Department should either treat the expenses described above as either indirect or direct in both markets. *Id.*

Hyosung argues that it did, in fact, correctly categorize selling expenses incurred in the home market and the United States. *See* Hyosung's Rebuttal Brief at 30-38. Hyosung contends that the Department should continue to reject Petitioners' requested adjustments to the reported expenses at the final determination because the Department has verified Hyosung's data to be accurate and complete. *Id.* at 30-31. Specifically, Hyosung rebutted the following:

- (1) With regard to installation expenses, Hyosung argues that its methodology for reporting installation expenses was "fully consistent" with the Department's instructions and practice.²³ *See* Hyosung's Rebuttal Brief at 32. Hyosung contends that the Department "evaluates each claimed adjustment on the underlying facts, regardless of market" and that "the same type of expense may be classified as fixed (*i.e.*, indirect) or variable (*i.e.*, direct), depending on the activities that give rise to the expense." *Id.* Additionally, Hyosung argues, "an expense must be dependent on the sales of the subject merchandise to qualify as a direct selling expense."²⁴ *Id.* Finally, Hyosung cites to the Department's

²² Petitioners cite to Exhibit B-12 of Hyosung's BQR which includes Hyosung's schedule of warranty expenses incurred for sales of subject and non-subject merchandise in all markets.

²³ Hyosung cites to the Department's questionnaire which instructs that direct expenses generally must be (1) variable and (2) traceable in a company's financial records to sales of the merchandise under investigation or review.

²⁴ Hyosung cites to case precedent (*e.g.*, *Bottom Mount Combination Refrigerator-Freezers from the Republic of Korea: Notice of Final Determination of Sales at Less Than Fair Value and Negative Critical Circumstances Determination: Bottom Mount*

verification reports as evidence that the Department has verified Hyosung's data to be accurate and complete. *Id.* at 34.

- (2) With regard to warranty expenses, Hyosung alleges that Petitioners failed to acknowledge that Hyosung "subsequently clarified that the activities that the Department categorizes as 'warranty' are classified as installation expenses in Hyosung's accounting records and were already included in the reported costs." *See* Hyosung's Rebuttal Brief at 36. Moreover, Hyosung contends, during verification the Department "verified Hyosung's reported warranty expenses at the U.S. subsidiary and concluded that that these expenses were included in the reported installation costs." *Id.* Even if the Department were to adjust its *Preliminary Determination* and apply a ratio derived from Hyosung's Korean warranty expenses to U.S. sales, as advocated by Petitioners, Hyosung argues it would be incorrect to do so because Petitioners' ratio is incorrect. *Id.* at 36.
- (3) Finally, with regard to bank charges, Hyosung argues that Petitioners' proposal would unnecessarily inflate this expense. *See* Hyosung's Rebuttal Brief at 37. Moreover, Hyosung contends, the record demonstrates that bank charges are "miniscule" in this proceeding. *Id.*

Department's Position:

The Department has determined to continue to rely upon Hyosung's reporting of installation and warranty expenses for this final determination. Furthermore, with regard Petitioners' claim that certain additional charges should be included in the Department's calculation of U.S. bank charges for its final analysis, we disagree. With respect to these selling expenses, based on record evidence, we have determined Hyosung's methodology to be reasonable and its classification of these expenses to be consistent with the Department's questionnaire and practice and Hyosung's selling practices in the market in which these expenses were incurred.

In our September 28, 2011, antidumping duty questionnaire to Hyosung, we explained the following:

Direct expenses generally must be (1) variable and (2) traceable in a company's financial records to sales of the merchandise under investigation or review.

- (1) Variable vs. fixed expenses: Direct expenses are typically variable expenses that are incurred as a direct and unavoidable consequence of the sale (*i.e.*, in the absence of the sale these expenses would not be incurred). Indirect expenses are fixed expenses that are incurred whether or not a sale is made.

The same expense may be classified as fixed or variable depending on how the expense is incurred. For example, if an exporter pays an unaffiliated contractor to perform a service, this fee would normally be considered variable and treated as a direct expense

(provided that condition 2, below, is also satisfied). However, if the exporter provides the service through a salaried employee, the fixed salary expense will be treated as an indirect expense.

- (2) Tying of the expense to sales of the merchandise under investigation or review: Selling expenses must be reasonably dependent upon sales of the merchandise under investigation or review to qualify as direct selling expenses. However, even if a fixed expense is allocable to the merchandise under investigation or review, the Department normally will treat it as an indirect expense.

Common examples of direct selling expenses include credit expenses, commissions, and the variable portions of guarantee, warranty, technical assistance, and servicing expenses. Common examples of indirect selling expenses include inventory carrying costs, salesmen's salaries, and product liability insurance. The fixed portion of expenses, such as salaries for employees who perform technical services or warranty repairs, are indirect expenses.

See the Department's antidumping duty questionnaire, dated September 28, 2011, at Appendix 1 (pages I-6 through I-7). As the language in our questionnaire demonstrates, the Department evaluates each claimed adjustment on the underlying facts, regardless of market.

Additionally, we reviewed Hyosung's classification of these expenses, at length, during our verifications and noted no discrepancies. See Memorandum to the File, "Home Market Verification of the Sales Response of Hyosung Corporation in the Antidumping Duty Investigation of Large Power Transformers from the Republic of Korea," dated May 4, 2012 (Hyosung's Home Market Verification Report), at sections X, "Verification of Reported Transaction-Specific Data for Selected Comparison Market and U.S. Sales," and XI, "Other Expenses and Adjustments;" see also Memorandum to the File, "Constructed Export Price Verification of the Sales Response of Hyosung Corporation in the Antidumping Duty Investigation of Large Power Transformers from the Republic of Korea," dated May 15, 2012 (Hyosung's CEP Verification Report), at sections X, "Verification of Reported Transaction-Specific Data for Selected U.S. Sales," and XI, "Other Expenses and Adjustments;" see also Hyosung Proprietary Memorandum at section "Selling Expense Classifications" for additional verification-specific examples.

Based on this record evidence, we find that there is not a reliable basis to, as Petitioners argue, reclassify such expenses. See *Honey from Argentina: Final Results of Antidumping Duty Administrative Review*, 76 FR 29192 (May 20, 2011) and the accompanying Issues and Decision Memorandum at Comment 1, where we found that information on the record was not sufficient and could not serve as a reliable basis for a reclassification of such expense.

Due to the proprietary nature of this issue, the case and rebuttal brief summaries as well as the Department's position are contained in the Hyosung Proprietary Memorandum.

Comment 12: Gross Unit Price

Petitioners argue that Hyosung overstated gross-unit prices for U.S. sales and failed to report expenses directly related to individual U.S. sales. *See* Petitioners' Case Brief at 81-85. Specifically, Petitioners argue that during verification, the Department collected various sales-related documentation that demonstrate Hyosung inflated the prices for its U.S. sales by including items and services (other than the large power transformer) in its reported gross-unit price whereby Hyosung separately invoiced its U.S. customers for certain expenses. *Id.* at 81-82. Petitioners argue that Hyosung failed to report deductions to the gross-unit price for these expenses. *Id.* These expenses, as well as any profit earned, Petitioners argue, are directly related to the sale of the large power transformer in question. *Id.* at 82-83.

In failing to report these selling expense deductions, Petitioners contend, Hyosung has inflated its U.S. price which leads to an understatement of Hyosung's dumping margin. *Id.* Petitioners cite to *Certain Orange Juice From Brazil: Final Results of Antidumping Duty Administrative Review and Notice of Intent Not To Revoke Antidumping Duty Order in Part*, 75 FR 50999 (August 18, 2010) (*OJ from Brazil*) as evidence that the Department finds it "inappropriate to increase the gross-unit price for subject merchandise as a result of profits earned on the provision or sale of services (such as brokerage services); such profits should be attributable to the sale of the service, not the subject merchandise." *Id.* at 81.

Therefore, Petitioners argue that the Department should make an adjustment based on facts available on the record. *See* Petitioners' Case Brief at 83-83. Specifically, Petitioners argue that the Department should (1) find that Hyosung has not provided a "usable U.S. sales database and proceed on the basis of AFA or (2) at a minimum, reduce the reported gross-unit price for each U.S. sale based on sales trace evidence discovered at verification." *Id.*

Hyosung contends that it accurately reported gross-unit prices and expenses related to individual sales. *See* Hyosung's Rebuttal Brief at 38-41. For example, Hyosung argues that certain costs are recognized as production costs and have been included in its reported cost of production. *Id.* at 38. Hyosung states that it "takes all of its costs into account when establishing prices for its LPTs" but that certain customers require "costs to be itemized separately, which is why these costs were invoiced separately." *Id.* at 39. Despite the multiple invoices, Hyosung contends, "it is clear that these costs were part of the overall price of the {large power transformers} negotiated with and paid for by the customer and that these costs were included in Hyosung's reported cost of production." *Id.*

Hyosung reiterates that certain customers have "specific preferences regarding the separate itemization of various components of a sale" and that Petitioners "focus on the multiple invoices to these customers' sales transaction is misplaced." *See* Hyosung's Rebuttal Brief at 40. Despite the multiple invoices, Hyosung argues, "it is clear that all of the separate charges were part of the overall price of the {large power transformer} negotiated with and paid for by the customer and that all of the relevant expenses have been reported by Hyosung." *Id.*

Department's Position:

We have continued to rely upon Hyosung's U.S. gross unit prices as reported. Contrary to Petitioners' assertion, the Department was able to verify Hyosung's claim that all of the charges itemized on a given invoice were part of the overall price of the large power transformer, as negotiated with and paid for by the customer. *See* Hyosung's CEP Verification Report at section X, "Verification of Reported Transaction-Specific Data for Selected U.S. Sales," and specifically at 35, where we reconciled large power transformer prices to reported gross-unit prices and noted no discrepancies. Furthermore, the Department verified that all of the relevant expenses have been properly reported by Hyosung. *Id.* at sections X, "Verification of Reported Transaction-Specific Data for Selected U.S. Sales," and XI, "Other Expenses and Adjustments." As the record demonstrates, certain of HICO America's customers require that certain costs be itemized separately, which is why these costs were invoiced separately. *See* Hyosung's January 19, 2012, supplemental questionnaire response at Exhibit 2 where such a requirement is specified in an alliance agreement between HICO America and its customer. Additionally, during verification, Department officials reconciled the total amount the customer was invoiced (and subsequently paid) to the price specified in the related PO for numerous sales (including those sales identified by Petitioners) and found no discrepancies. *See, e.g.,* Hyosung's Home Market Verification Report) at 51-54 and Exhibit 21; *see also* Hyosung's CEP Verification Report at 30-33 and Exhibit 7. Regardless of the fact that certain customers were issued multiple invoices, the record demonstrates that these items were part of the overall price of the large power transformer, as negotiated with and paid for by the customer and that these costs were included in Hyosung's reported cost of production.

Consequently, Petitioners' citation to *OJ from Brazil*, as evidence that the Department finds it "inappropriate to increase the gross-unit price for subject merchandise as a result of profits earned on the provision or sale of services..." is misplaced. Whereas in *OJ from Brazil* we set net revenue to zero where certain of the respondent's reimbursed expenses exceed the amount that it actually paid, in this instant proceeding, as noted above, it has been verified that these costs were part of the overall price of the large power transformer as opposed to separately incurred expenses. *See OJ from Brazil* and accompanying Issues and Decision Memorandum at Comment 2. As a result, we did not make any changes or adjustments to Hyosung's reported U.S. gross unit prices.

Comment 13: The Understatement of U.S. Selling Expenses

Petitioners state that the Department should correct Hyosung's understatement of expenses on U.S. sales, as discovered at verification. *See* Petitioners' Case Brief at 84-85. Specifically, Petitioners cite to the Department's CEP Verification Report which notes a discrepancy regarding the amounts Hyosung reported for expenses related to commissions, installation, and oil. *Id.*²⁵ Petitioners argue that the Department should replace certain reported expenses with the amounts Petitioners provide in their case brief. *Id.* at 85.

Hyosung contends that the Department has the necessary information on the record to correct for estimates that had inadvertently been removed by Hyosung from its U.S. sales databases

²⁵ *See* Hyosung's CEP Verification Report at 34 and Exhibit 10 (page 25A).

submitted subsequent to December 12, 2011. *See* Hyosung’s Rebuttal Brief at 41-43. Hyosung cites to its CEP Verification Report at Exhibit 10. Hyosung also argues that the Department should disregard Petitioners’ suggested corrections because they contain “multiple errors.” *Id.* Additionally, although Petitioners “omitted from their suggested corrections the corresponding changes to duty drawback,” Hyosung contends, “to the extent that the Department corrects these errors, the corrections should be made to all four categories of expenses: duty drawback, commissions, installation, and oil.” *Id.* at 43.

Department’s Position:

We continue to find it appropriate to rely upon the estimates Hyosung provided in its December 12, 2011, sales database, “hsus03” with respect to duty drawback, commissions, installation, and oil. As explained, during verification we noted a discrepancy regarding estimates reported for certain expenses (*i.e.*, duty drawback, commissions, installation, and oil). In certain instances, company officials explained, these four expenses may have been incurred after a sale was invoiced. *See* Hyosung CEP Verification Report at 34. Company officials explained that once a sale is invoiced, the sale is considered “complete” and all estimates are removed. *Id.* Because these four expenses may not have been incurred by the time the sale was invoiced, company officials explained, the estimated amounts reported in these fields were inadvertently removed. *Id.* We noted that the original estimated amounts are, in fact, on the record and were submitted in Hyosung’s December 12, 2011, sales database, “hsus03.”

During verification, we requested Hyosung provide a chart identifying those instances where estimated amounts for expenses related to duty drawback, commissions, installation, and oil were removed upon the invoicing of the sale. *See* Hyosung’s CEP Verification Report at Exhibit 10, page 25A. We requested supporting documentation for certain of these expenses. We noted that this chart also identifies the originally reported estimated amount for these expenses which tie to U.S. sales database “hsus03.”

In a letter, we requested that Hyosung replace the expenses that were inadvertently removed with the amounts we collected at verification. *See* Hyosung’s CEP Verification Report at Exhibit 10, page 25A; *see also* Department letter to Hyosung, entitled, Antidumping Duty Investigation of Large Power Transformers from the Republic of Korea: Request for Revised Home Market and U.S. Sales Databases, dated June 4, 2012. As these estimated expenses were examined and verified during verification, we have relied upon these expenses for purposes of this final determination rather than the proxy suggested by Petitioners.

Comment 14: The Use of Actual Data in Margin Calculation

Hyosung states that the “majority” of its sales used by the Department in the *Preliminary Determination* contained estimated data for many of the reported expenses because these sales remained “incomplete” as of the end of the end of 2011.²⁶ *See* Hyosung’s Case Brief at 21. The inclusion of these “incomplete” sales in the analysis at the *Preliminary Determination*, Hyosung

²⁶ Hyosung notes that the Department instructed Hyosung to update both the home market and U.S. sales databases to reflect actual data available through December 31, 2011. *See* Hyosung’s Case Brief at 20.

argues, “unfairly penalized the company” for the fact that Hyosung had not completed the sales by the time it was required to submit its responses to the Department’s questionnaires. *Id.*

Hyosung identifies several reasons why the Department should include only “completed” home market and U.S. sales with actual expense data in the Department’s final determination. *See* Hyosung’s Case Brief at 21-34.

- (1) First, Hyosung argues that “the law” requires the Department to rely on actual expenses in calculating U.S. prices and NV. *See* Hyosung’s Case Brief at 22-24. Specifically, Hyosung cites to (1) *Lasko Metal Prods. Inc. v. United States*, 43 F.3d at 1442, 1446 (Fed. Cir. 1994) (quoting *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1991)) and (2) *NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1208 (Fed. Cir. 1995) as evidence that the statute mandates that the Department’s calculations should use actual expenses and costs incurred by the respondent for the sale and production of the merchandise under questions. *Id.* at 22.

Regarding the U.S. price element of the calculation, Hyosung cites to (1) 19 USC 1677a(d) which, Hyosung states, requires reductions to CEP by “the amount of...expenses generally incurred by...the affiliated seller in the United States, in selling the subject merchandise...” (emphasis in original) to the U.S. purchaser and (2) 19 USC 1677a(a)(6) which, Hyosung states, “mandates parallel adjustments to the home market price.” *See* Hyosung’s Case Brief at 22.

Hyosung also refers to the SAA (at 827), the Antidumping Agreement (Article 2.4), *TRW Inc. v. Andrews*, 534 US 19, 31 (2001), and *Warner-Lambert Co. v. United States*, 407 F.3d 1207, 1209 (Fed. Cir. 2005) for further clarification on the word “incur” which, Hyosung states, relates to “liabilities (*e.g.*, expenses) that have been realized.” *See* Hyosung’s Case Brief at 22-23.

Hyosung also cites to 19 CFR 351.102(b)(38) as evidence that the Department’s own regulations do not “contemplate adjustments for expenses that have not yet been ‘charged’ or incurred.” *See* Hyosung’s Case Brief at 23-24.

Finally, Hyosung cites to (1) *LNPPs from Germany* and (2) *Enriched Uranium from France* and accompanying Issues and Decision Memorandum at Comment 5 as further evidence that it is the Department’s practice to rely on actual data. *See* Hyosung’s Case Brief at 24.

- (2) Second, Hyosung argues that the Department has used estimated data only in limited circumstances that are distinguishable from the instant case. *See* Hyosung’s Case Brief at 24-27. Specifically, Hyosung cites to *Stainless Steel Bar from Germany: Final Less Than Fair Value Determination*, 67 FR 3159 (January 23, 2002) and accompanying Issues and Decision Memorandum at Comment 9 and *Enriched Uranium from France* where the Department, Hyosung states, used historical data to estimate the expense (*i.e.*, warranty expenses that are not known at the time of sale and are often not fully known until after the period of review) that is likely to be incurred during the review period. *Id.*

at 24-25. Hyosung also cites to *Preliminary Determination of Sales at Not Less Than Fair Value: Oil Tubular Goods from Mexico*, 60 FR 6510, 6511 (February 2, 1995) and *Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Oil Tubular Goods from Argentina*, 60 FR 6503, 6504 (February 2, 1995) where, Hyosung states, the Department used facts otherwise available to fill in “minor gaps” involving completed sales with “virtually all of the expense data reported.” *Id.* at 25.

Hyosung argues that the Department has “only on rare occasions” included “undelivered” sales in its margin calculations and “adjusted gross-unit prices using estimates for certain expenses.”²⁷ *See* Hyosung’s Case Brief at 25. In these cases, Hyosung argues, the Department could “reasonably rely” on actual expenses incurred on shipped units to estimate similar expenses for units not yet shipped with “a fair degree of confidence.” *Id.* at 26.

The Department, Hyosung states, has consistently maintained that estimates must be accurate and that in those instances where accuracy was in question, the Department rejected the use of estimates. *See* Hyosung’s Case Brief at 26 where Hyosung cites to several cases where the Department rejected the use of estimates. Furthermore, Hyosung argues that the facts regarding the instant proceeding are “analogous” to those cases where the Department rejected the use of estimates. *Id.* Hyosung claims that shipment arrangements, as well as their respective costs, can vary significantly from transaction to transaction. *Id.* at 27. Additionally, Hyosung argues that sales of large power transformers involve many expensive post-shipment services which “represent a significant portion of Hyosung’s sales value. *Id.*

- (3) Third, Hyosung argues that the Department’s methodology in the *Preliminary Determination* “distorts” Hyosung’s margin calculation. *See* Hyosung’s Case Brief at 27-31. Hyosung argues that although it strives to report estimated amounts as accurately as possible, due to the time from which an order is placed until it is delivered (typically a few months to several years), movement and direct selling expenses can fluctuate due to market conditions or post-delivery services required by customers. *See* Hyosung’s Case Brief at 28. Hyosung references the Department’s verification reports for examples of “drastic” differences between estimated and actual expenses, specifically differences related to freight/transportation. *Id.* at 28-30. Furthermore, Hyosung explains that customers may request that Hyosung provide installation services, oil insulation, or cancel these services, at any time up through delivery. *Id.* at 29. These changes, Hyosung states could also differ drastically from the estimated expenses. Therefore, Hyosung claims, estimated expenses for sales not yet delivered or invoiced are not accurate representations of the selling expenses ultimately incurred. *Id.*

²⁷ Hyosung cites to (1) *Stainless Steel Butt-Weld Pipe Fittings from Malaysia*, and accompanying Issues and Decision Memorandum at Comment 13, (2) *Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Bar from Italy*, 67 FR 3155 (January 23, 2002) and accompanying Issues and Decision Memorandum at Comment 28, and (3) *Notice of Final Determination of Sales at Less Than Fair Value: Coated Groundwood Paper from Finland*, 56 FR 56363 (November 4, 1991).

Finally, Hyosung cites to *Ceramica Regiomontana, S.A. de C.V. v. United States*, 636 F. Supp. 961, 966 (CIT 1986) as evidence that the Department's methodology to calculate accurate dumping margins must be "reasonable" and supported by substantial evidence. See Hyosung's Case Brief at 30. Hyosung argues that the Department's methodology at the *Preliminary Determination* contradicts the Department's statutory mandate. *Id.* at 31.

- (4) Fourth, Hyosung argues that the record in the instant case contains sufficient sales with actual reported expenses for the Department to use for analysis. See Hyosung's Case Brief at 31-32. Hyosung argues that the inclusion of a larger number of sales many of which contained estimated data) does not necessarily make an antidumping calculation any more accurate. *Id.* at 31. Furthermore, Hyosung states, selecting an "arbitrary cut-off date is not a rational way to delineate the number of sales that should be included in the antidumping analysis." *Id.* The record, Hyosung argues contains "complete and verified" information for a sufficient number of delivered and invoiced sales.
- (5) Finally, Hyosung argues that if the Department finds that there are not sufficient sales with actual reported expenses to use for analysis, the Department can include, in its margin calculation, Hyosung's reported home market and U.S. sales that were invoiced during the POI but ordered prior to the POI. See Hyosung's Case Brief at 32-34. Hyosung states that it provided complete and actual data for all sales invoiced during the POI in order to provide the Department with a larger set of data in the event that the Department determined it necessary to include a greater number of sales in its analysis. *Id.* at 32-33. The inclusion of these sales that were invoiced during the POI but ordered prior to the POI, Hyosung argues, will provide the Department with a larger set of completed sales that can be used to determine a more accurate dumping margin. *Id.* at 32. Hyosung cites to *LNPPs from Germany, Notice of Preliminary Determination of Sales at Less than Fair Value and Postponement of Final Determination: Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, from Japan*, 61 FR 8029 (March 1, 1996), as well as several other investigations, as evidence that the Department has "recognized the need to expand the universe of sales for which to calculate margins in order to capture a significant number of sales." *Id.* at 33-34. Based on this legal precedence, Hyosung argues, the Department has the authority to include all sales that were invoiced during the POI.

Petitioners argue that the Department should continue to (1) calculate Hyosung's margins using sales shipped by December 31, 2011, and (2) rely on estimated expenses for several reasons. See Petitioners' Hyosung Rebuttal Brief at 16-31. First, Petitioners contend that Hyosung's argument requires the Department to "ignore the 'date of sale' issue, and rely on 'invoice' date for date of sale, since those are the sales for which 'actual' expenses have been reported. *Id.* at 16-17. Second, Petitioners argue that Hyosung calculated "conservative" estimated expenses in the ordinary course of business. *Id.* at 18-19. Third, Petitioners assert that Hyosung's argument that it is "unfairly penalized" by the Department's use of its own (*i.e.*, Hyosung's) expense estimates is "unpersuasive and undermined by case precedent." *Id.* at 19-21. The Department, Petitioners claim, "cannot be said to have 'unfairly penalized' Hyosung by relying on Hyosung's own, estimated expenses that it claims to be the most accurate data available." *Id.* at 20 (emphasis in original).

Fourth, Petitioners contend that contrary to Hyosung's assertion, there is no "statutory bar to Commerce's use of allocations and estimates that are reasonable, prepared in the ordinary course of business, and based on historical data." See Petitioners' Hyosung Rebuttal Brief at 21-23. The case precedence offered by Hyosung, Petitioners claim, is misdirected. *Id.* Fifth, Petitioners assert the Department regularly, uses reliable, estimated data, when actual data is not available. *Id.* at 23-26. Petitioners state that Hyosung's citations to cases where the Department did not rely on estimated data (*e.g.*, *LNPPs from Japan* and *Offshore Platform Jackets and Pilings from the Republic of Korea*) are misguided. *Id.* at 25. Finally, Petitioners contend that contrary to Hyosung's assertion, the Department's use of estimated expenses does not "distort" Hyosung's margins. *Id.* at 26-28. Specifically, Hyosung cites to several examples where Hyosung's estimated expenses understate the actual charges incurred. *Id.* at 27-28.

In addition to these arguments, and contrary to Hyosung's claims, Petitioners contend that the record contains "sufficient sales" within the POI for the Department to use in calculating a margin and that the Department should continue to exclude all sales with a date of sale outside the POI from the final determination. See Petitioners' Hyosung Rebuttal Brief at 29-31.

For the above-mentioned reasons, Petitioners argue, the Department should reject Hyosung's argument and continue relying on Hyosung's estimated expenses for certain sales unshipped through December 31, 2011.

Department's Position:

In cases where the merchandise under consideration are large, complex, capital intensive custom made products that take many months to produce and install, the Department often is faced with the decision to balance the use of actual costs in their entirety with maximizing the population of sales to use to calculate a dumping margin. In the instant case, we recognize that if we followed our preferred approach of using only actual costs in their entirety, and excluded those POI sales which were not fully produced, shipped and fully installed by the end of the POI, we would end up excluding a significant quantity of home market and U.S. sales from the margin calculation. Therefore, to increase the population of useable sales, we extended the period for reporting actual costs incurred to cover six months beyond the end of the POI. This way, we allowed for more time for the respondents to complete production and installation of those sales made during the POI. We reasonably limited the extended cost reporting period to 6 months after the POI because, as those unfinished sales continued to be produced, the data on the record continued to change, and we necessarily needed a cutoff point to allow sufficient time for the Department and outside parties to obtain and analyze the data.

In addition, we decided to use in our analysis only those POI sales that have been completed and shipped as of December 31, 2011, because for those sales all the reported manufacturing costs and the majority of selling expenses reflect actual costs. While this approach still requires the use of some estimated costs in order to capture more sales, it results in a significant increase in the number of usable sales. In addition, the vast majority of costs reflect actual and only minimal estimates for selling and installation expenses will be used in the margin calculation. The use of same estimates here results in a more representative data pool, does not systematically

over- or underestimate expenses, and does not distort the overall margin calculation. The exclusion of the incomplete and unshipped sales does not adversely affect our analysis, as we still have a robust population of remaining home market and U.S. sales to use in our calculation, with the added benefit of using predominantly actual costs incurred which will not change, can be reconciled to the company's books, and provide for a more accurate results.

Hyosung argues that if the Department finds that there are not enough sales with all actual expenses reported, the Department should also include sales with a PO date prior to the POI but that were invoiced during the POI. We disagree with Hyosung's recommendation as this would result in a margin calculation based on sales that occurred outside the POI. Hyosung's citations to *LNPPs from Japan*, *LNPPs from Germany* and *Certain Granite Products from Italy*²⁸ where the Department extended the reporting period due to a limited number of reported sales (*i.e.*, one sale for each respondent in *LNPPs from Japan* and *LNPPs from Germany* sale during the POI), are misplaced. In the instant case, we have a much larger pool of potential of sales to examine in both the home and U.S. markets.

Therefore, for the above-mentioned reasons, we continue to rely on estimated data for this final determination and limit the use of estimates by including only POI sales completed and shipped by December 31, 2011, in our analysis. *See also* Comment 10, above.

Comment 15: General and Administrative and Indirect Selling Expense Ratios

Hyosung's income statement includes all selling, general, and administrative (SG&A) expense accounts under one line item. For reporting, Hyosung classified all the individual accounts and the associated amounts to the following categories: G&A, indirect selling expenses (ISE), direct selling expenses (DSE), or common expenses (*i.e.*, not specific to any functions). Common expenses were then allocated between G&A and ISE based on relative head counts (*i.e.*, the number of employees). Hyosung summed the amounts classified as specific to G&A and the common expenses allocated to G&A and calculated the total reported G&A expense amount. Hyosung used the reported G&A expense amount as the numerator and the cost of goods sold amount as the denominator to calculate the reported G&A expense ratio. *See* Hyosung's January 6, 2012, supplemental section D questionnaire response at 19 and Exhibit 17.

For the *Preliminary Determination*, we reclassified certain items from common to G&A because they appeared to support the overall operations of the company and there was no apparent relationship between the expense and head count. The common items that appeared to relate to the number of employees, we continued to allocate the amounts to G&A and ISE using head count. We used the same denominator used by Hyosung to calculate the revised G&A expense ratio. *See* the Memorandum to Neal M. Halper, Director, Office of Accounting, through Michael P. Martin, Lead Accountant, from Sheikh M. Hannan, Senior Accountant, entitled "Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Determination – Hyosung Corporation" dated February 9, 2012 (Hyosung Preliminary Cost Memo) at page 1 and attachment 1.

Hyosung contends that the Department for the preliminary determination improperly reclassified

²⁸*Final Determination of Sales at Less Than Fair Value; Certain Granite Products From Italy*, 53 FR 27187 (July 19, 1988).

certain common items to G&A. According to Hyosung, the Department classified all the travel expenses as G&A but these travel expenses are incurred by both selling and administrative personnel. Hyosung states that it relied on its accounting records to classify all the individual accounts included in SG&A as specific to G&A, ISE, DSE or common expenses. Hyosung maintains that it records common expenses related to administrative and selling functions in a single cost center which was verified by the Department. *See* Memorandum to Neal M. Halper, Director, Office of Accounting, through Michael P Martin, Lead Accountant from Ernest Z. Gziryman, Senior Accountant, entitled “Verification of the Cost Response of Hyosung Corporation in the Antidumping Duty Investigation of Large Power Transformers from the Republic of Korea” dated May 3, 2012 (Hyosung Cost Verification Report) at pages 2, 29, 30 and Cost Verification Exhibit 12. Hyosung asserts that it appropriately allocated the common expenses to G&A and ISE based on head counts and cites to *Notice of Final Results of the Antidumping Duty Administrative Review: Circular Welded Non-Alloy Steel Pipe from the Republic of Korea*, 63 FR 32833, 32846 (June 16, 1998) and accompanying Issues and Decision Memorandum at Comment 38. Hyosung concludes that for the final determination the Department should not reclassify the common expenses to G&A because these common expenses are incurred for both administrative and selling functions. Instead, the Department should use Hyosung’s reported G&A expense ratio corrected for the minor error at the cost verification.

Petitioners argue that the Department should not accept Hyosung’s headcount allocation methodology because it is inconsistent with the Department’s long standing practice for calculating the G&A expense ratio. Moreover, Hyosung failed to demonstrate that headcount is an appropriate basis for allocating G&A expenses. Petitioners contend that it is the Department’s long standing practice is to calculate the G&A expense ratio by dividing the G&A expense by cost of goods sold and cites to *Notice of Final Determination of Sales at Less Than Fair Value: Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Japan*, 64 FR 24329, 24354 (May 6, 1999) and accompanying Issues and Decision Memorandum at Comment 25. Petitioners assert that the Department has specifically rejected the head count as a basis of allocating G&A expenses and cite to *LNPPs from Japan* and accompanying Issues and Decision Memorandum at Comment 5.

Department’s Position:

We agree with the respondent. Hyosung allocated the common expenses to G&A and selling based on head counts. Hyosung did not allocate G&A expenses to products based on head counts as Petitioners seem to contend. In fact, Hyosung allocated the G&A expenses based on cost of sales. At the cost verification, we noted that Hyosung used the information recorded in its normal accounting system to identify individual accounts within SG&A expense that contain both G&A and selling expenses (*i.e.*, common expenses). We also noted that the “cost driver” for the common expenses (*i.e.*, number of employees) appeared reasonable given that the expenses in question arise directly from its employees. As such, we determined that head count was an appropriate base to allocate common expenses to G&A and selling functions. Therefore, for the final determination we used Hyosung’s reported G&A expense ratio corrected for the minor error at the cost verification.

Comment 16: Clerical Error

Hyosung argues that in its *Preliminary Determination*, the Department inadvertently divided Hyosung's total bank charges by subject merchandise revenue, rather than the total revenue of all merchandise, when calculating a per-unit bank charge. *See* Hyosung's Case Brief at 37.

Petitioners contend that the Department's calculation of the bank charge expense ratio is correct. *See* Petitioners' Hyosung Rebuttal Brief at 38-40. Specifically, Petitioners claim that the sales revenue amount Hyosung asks the Department to use as the denominator for calculating the bank charge expense ratio is significantly overstated. *Id.* at 40. Hyosung, Petitioners argue, provided no evidence that it incurred certain charges on its U.S. sales of non-subject merchandise.

Department's Position:

In the *Preliminary Determination*, we intended to allocate HICO America's total bank charges over the total revenue of its sales of all merchandise. *See* Memorandum to the File, from Brian Davis, titled "Analysis of Data Submitted by Hyosung Corporation in the Preliminary Determination of the Antidumping Duty Investigation of Large Power Transformers from the Republic of Korea," dated February 9, 2012, at 13. Instead, we inadvertently allocated HICO America's total bank charges over the total revenue of sales of subject merchandise. Therefore, for purposes of this final determination and consistent with what we intended at the *Preliminary Determination*, we are revising our calculation of the per-unit U.S. bank charge. *See* memorandum to the file, entitled, "Analysis of Data Submitted by Hyosung Corporation in the Final Determination of the Antidumping Duty Investigation of Large Power Transformers from the Republic of Korea," dated July 2, 2012, and Attachment 4 for the relevant programming language and recalculation, respectively.

RECOMMENDATION:

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

Agree ✓

Disagree _____

Paul Piquado
Paul Piquado
Assistant Secretary
for Import Administration

2 July 2012
Date