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MEMORANDUM TO: Paul Piquado
Assistant Secretary
for Import Administration

FROM: Gary Taverman *ST*
Acting Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decisions for the Final Results of the 17th
Administrative Review of the Antidumping Duty Order on Certain
Corrosion-Resistant Carbon Steel Flat Products from the Republic
of Korea (2009-2010) (Final Results)

Summary

We have analyzed arguments presented by petitioners and respondents.¹ As a result of our analysis, we have made changes from the preliminary results in the margin calculations. We recommend that you approve the positions described in the Discussion of Interested Party Comments, sections II.A and II.B, *infra*. Outlined below is the complete list of the issues in this review for which we have received comments from the interested parties.

I. Background

On August 19, 1993, the Department published the antidumping duty (AD) order on certain corrosion-resistant carbon steel flat products (CORE) from Korea.² The Department of Commerce (the Department) initiated this administrative review of the AD order on CORE from

¹ On January 9, 2012, United States Steel Corporation (U.S. Steel), Nucor Corporation (Nucor), ArcelorMittal USA Llc (Arcelor) (collectively, petitioners), Hyundai HYSCO (HYSCO), Pohang Iron & Steel Co., Ltd. (POSCO) and Pohang Coated Steel Co., Ltd. (POCOS) (collectively, the POSCO Group), Union Steel Manufacturing Co., Ltd. (Union), LG Hausys, Ltd., and LG Hausys America, Inc. (collectively, LG Hausys), and Dongbu Steel (Dongbu) (collectively, respondents), filed case briefs (respectively, US Steel's Case Brief, Nucor's Case Brief, ArcelorMittal's Case Brief, HYSCO's Case Brief, POSCO's Case Brief, Union's Case Brief, LG Hausys's Case Brief and Dongbu's Case Brief.) On January 17, 2012, petitioners and respondents, except LG Hausys, filed rebuttal briefs (US Steel's Rebuttal Brief, Nucor's Rebuttal Brief, ArcelorMittal's Rebuttal Brief, HYSCO's Rebuttal Brief, POSCO's Rebuttal Brief, Union's Rebuttal Brief, and Dongbu's Rebuttal Brief). On January 25, 2012 and January 27, 2012, respectively, POSCO and HYSCO re-submitted their rebuttal briefs redacting new factual information. On January 30, 2012, U.S. Steel re-submitted their case brief with respect to HYSCO redacting new factual information.

² See Antidumping Duty Orders on Certain Cold-Rolled Carbon Steel Flat Products and Certain Corrosion-Resistant Carbon Steel Flat Products from Korea, 58 FR 44159 (August 19, 1993) (CORE Order).



the Republic of Korea (Korea) on September 22, 2009, for each of the aforementioned respondents.³ On September 6, 2011, the Department published the preliminary results of the AD administrative review for CORE from Korea.⁴

In this review, we individually examined four manufacturers/exporters of the subject merchandise: HYSCO, the POSCO Group, Dongbu and Union. On November 30, 2011, and December 1, 2011, respectively, the Department released cost and sales verification reports for POSCO.⁵ On December 5 and 6, 2011, respectively, the Department released cost and sales verification reports for Dongbu.⁶

II. List of Comments

A. General Issues

Comment 1: Treatment of “Negative Dumping Margins” (Zeroing)

Comment 2: Collapsing Union and POSCO

B. Company-Specific Issues

Hyundai HYSCO

Comment 3: Treatment of Non-temper Rolled Merchandise

Comment 4: Date of Sale for U.S. Sales

The POSCO Group

Comment 5: Revocation from the Order

³ See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part, 75 FR 60076, 60077 (September 29, 2010).

⁴ See Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Notice of Preliminary Results of the Seventeenth Antidumping Duty Administrative Review, 76 FR 55004 (September 6, 2011) (Preliminary Results).

⁵ See Verification of the Cost Response of Pohang Iron & Steel Co., Ltd. and Pohang Coated Steel Co., Ltd. in the Antidumping Review of Corrosion-Resistant Carbon Steel Flat Products from Korea, from Heidi K. Schreiber, Senior Accountant, to the File (November 30, 2011)(POSCO’s Cost Verification Report); Verification of the Sales Response of the POSCO Group in the Antidumping Review of Corrosion Resistant Carbon Steel Flat Products (CORE) from the Republic of Korea from Victoria Cho, International Trade Compliance Analyst, to the File (December 1, 2011) (POSCO’s Sales Verification Report).

⁶ See Verification of the Cost Response of Dongbu Steel Co., Ltd. in the Antidumping Review of Corrosion-Resistant Carbon Steel Flat Products from Korea, from Robert B. Greger, Senior Accountant to the File (December 5, 2011)(Dongbu’s Cost Verification Report); Verification of the Sales Response of Dongbu Steel Co. Ltd. in the Antidumping Review of Certain Corrosion-Resistant Carbon Steel Flat Products (CORE) from the Republic of Korea, from Cindy Robinson, Senior International Trade Compliance Analyst, to the File (December 6, 2011) (Dongbu’s Sales Verification Report).

Comment 6: Date of Sale for U.S. Sales

Union

Comment 7: Date of Sale for U.S. Sales

Comment 8: Missing Payment Dates

Dongbu

Comment 9: Treatment of Home Market Billing Adjustments

III. Discussion of Interested Party Comments

A. General Issues

Comment 1: Treatment of “Negative Dumping Margins” (Zeroing)

Dongbu, Union, and LG Hausys state that in the Preliminary Results, the Department unlawfully continued to zero negative comparison results when calculating Dongbu and Union’s weighted-average dumping margin.⁷ Dongbu, Union, and LG Hausys assert that the Department’s current interpretation of 19 U.S.C. § 1677(35) as providing for zeroing in reviews, but not in investigations, is not reasonable.⁸ Further, Dongbu, Union, and LG Hausys claim that the court has found that there is no basis for interpreting section 1677(35) differently in investigations and reviews.⁹ Dongbu, Union, and LG Hausys argue that the Department must either explain why its statutory interpretation with respect to zeroing is reasonable or harmonize the use of zeroing in reviews and investigations.

HYSCO and the POSCO Group state that the World Trade Organization’s (WTO) Dispute Settlement Body has held that the Department’s practice to set to zero negative comparison results in administrative reviews is inconsistent with the WTO Antidumping

⁷ See Memorandum to the File from Christopher Hargett through James Terpstra entitled “Calculation Memorandum for Union Steel; Preliminary Results in the 17th Administrative Review on Corrosion-Resistant Carbon Steel Flat Products from Korea” (August 29, 2011) (Union Preliminary Calculation Memorandum); Memorandum to File from Cindy Robinson through James Terpstra Re: Calculation Memorandum for Dongbu Steel; Preliminary Results in the 17th Administrative Review on Corrosion-Resistant Carbon Steel Flat Products from Korea (August 30, 2011) (Dongbu Preliminary Calculation Memorandum); *Dongbu Steel Co., Ltd. v. United States*, 635 F.3d 1363 (Fed. Cir. 2011) (Dongbu Steel).

⁸ See *Chevron U.S.A., Inc. v. Natural Res. Def Council, Inc.*, 467 U.S. 837, 842-43 (1984) (Chevron)

⁹ See Dongbu Steel; *Corus Staal BV v. US. Dep’t of Commerce*, 395 F.3d 1343, 1347 (Fed. Cir. 2005) (Corus I)

Agreement.¹⁰ HYSCO, the POSCO Group, Union and Dongbu state that the Department has eliminated the practice of zeroing in investigations.¹¹

HYSCO, the POSCO Group, Union, and Dongbu contend that the Department should not engage in the practice of zeroing for calculating HYSCO, the POSCO Group, Union and Dongbu's final dumping margins in the instant review, and should allow negative comparison results to offset positive comparison results for the final calculations of each respondent's weighted-average dumping margin.

U.S. Steel and Nucor maintain that the Department properly used zeroing to calculate the weighted-average dumping margin for each respondent, and that it should continue to do so for the final results of this review. U.S. Steel and Nucor assert that the Department's use of zeroing has been its long-standing, judicially-affirmed methodology. U.S. Steel maintains that there is no discrepancy between the Department's treatment of zeroing in investigations and administrative reviews. U.S. Steel states that the Department modified its zeroing policy to address adverse WTO dispute settlement reports that only pertained to zeroing in investigations using the average-to-average comparison method. U.S. Steel maintains that this modification for investigations was adopted pursuant to the statutory requirements for such modifications set forth in Section 123(g) of the Uruguay Round Agreements Act, and the Department's notice expressly stated that the Department would continue to use zeroing in all other situations.¹² Nucor further asserts that WTO Agreements and the rulings made pursuant to them are not binding under U.S. law.¹³

U.S. Steel claims that an agency may properly interpret the same statutory provision or term differently depending on the context.¹⁴ U.S. Steel maintains that different interpretations of a statutory term are not unreasonable so long as an agency adequately explains why it is interpreting such language in a different manner in each context, and that the Department has now fully provided such an explanation in its decisions. Nucor maintains that in Dongbu Steel, and JTEKT Corp., the court required that the Department explain why it is permissible to zero in administrative reviews but not in investigations.¹⁵ Nucor maintains that the Department has satisfied that requirement in the instant review.

¹⁰ See United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of DSU by Japan, WT/DS322/AB/RW (August 21, 2009) (US-Zeroing (Japan)).

¹¹ See Antidumping Proceedings: Calculation of the Weighted-Averaged Dumping Margin During an Antidumping Investigation; Final Modification, 71 FR 77722 (December 27, 2006) (Final Modification of Dumping Margin Calculation).

¹² See Antidumping Proceeding: Calculation of the Weighted Average Dumping Margin During an Antidumping Investigation; Final Modification, 71 Fed. Reg. 77722 (December 27, 2006).

¹³ See 19 U.S.C. § 3512(a)(1); Statement of Administrative Action accompanying the Uruguay Round Agreements Act, 1994 U.S.C.C.A.N. at 4318.

¹⁴ See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 864 (1984); FAG Kugelfischer Georg Schafer AG v. United States, 332 F.3d 1370, 1373 (Fed. Cir. 2003).

¹⁵ See JTEKT Corp. v. United States, 642 F.3d 1378 (Fed. Cir. 2011) (JTEKT Corp.)

Department Position:

We have not changed our calculation of the weighted-average dumping margin, as suggested by the respondents, in these final results.

Section 771(35)(A) of the Tariff Act of 1930, as amended (the Act) defines “dumping margin” as the “amount by which the normal value exceeds the export price or constructed export price of the subject merchandise” (emphasis added). The definition of “dumping margin” calls for a comparison of normal value (NV) and export price (EP) or constructed export price (CEP). Before making the comparison called for, it is necessary to determine how to make the comparison.

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

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

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

In light of the comparison methods provided for under the statute and regulations, and for the reasons set forth in detail below, the Department finds that the offsetting method is appropriate when aggregating the results of average-to-average comparisons, and is not similarly appropriate when aggregating the results of average-to-transaction comparisons, such as were applied in this administrative review. The Department interprets the application of average-to-

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

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

The difference between "zeroing" and "offsetting" reflects the ambiguity the Federal Circuit has found in the word "exceeds" as used in section 771(35)(A) of the Act. Timken Co. v. United States, 354 F.3d 1334, 1341-45 (Fed. Cir. 2004) (Timken). The courts repeatedly have held that the statute does not speak directly to the issue of zeroing versus offsetting.¹⁶ For decades the Department interpreted the statute to apply zeroing in the calculation of the weighted-average dumping margin, regardless of the comparison method used. In view of the statutory ambiguity, on multiple occasions, both the Federal Circuit and other courts squarely addressed the reasonableness of the Department's zeroing methodology and unequivocally held that the Department reasonably interpreted the relevant statutory provision as permitting zeroing.¹⁷ In so doing, the courts relied upon the rationale offered by the Department for the continued use of zeroing, *i.e.*, to address the potential for foreign companies to undermine the antidumping laws by masking dumped sales with higher priced sales: "Commerce has interpreted the statute in such a way as to prevent a foreign producer from masking its dumping with more profitable sales. Commerce's interpretation is reasonable and is in accordance with law."¹⁸ The Federal

¹⁶ See PAM, S.p.A. v. United States, 265 F. Supp. 2d 1362, 1371 (CIT 2003) (PAM) ("{The} gap or ambiguity in the statute requires the application of the *Chevron* step-two analysis and compels this court to inquire whether Commerce's methodology of zeroing in calculating dumping margins is a reasonable interpretation of the statute."); Bowe Passat Reinigungs-Und Waschereitechnik GmbH v. United States, 926 F. Supp. 1138, 1150 (CIT 1996) (Bowe Passat) ("The statute is silent on the question of zeroing negative margins."); Serampore Indus. Pvt. Ltd. v. U.S. Dep't of Commerce, 675 F. Supp. 1354, 1360 (CIT 1987) (Serampore) ("A plain reading of the statute discloses no provision for Commerce to offset sales made at {less than fair value} with sales made at fair value. . . . Commerce may treat sales to the United States market made at or above prices charged in the exporter's home market as having a zero percent dumping margin.").

¹⁷ See, e.g., Koyo Seiko Co. v. United States, 551 F.3d 1286, 1290-91 (Fed. Cir. 2008) (Koyo 2008); NSK Ltd. v. United States, 510 F.3d 1375, 1379-80 (Fed. Cir. 2007) (NSK); Corus Staal BV v. United States, 502 F.3d 1370, 1375 (Fed. Cir. 2007) (Corus II); Corus Staal BV v. Department of Commerce, 395 F.3d 1343, 1347 (Fed. Cir. 2005) (Corus I); Timken, 354 F.3d at 1341-45; PAM, 265 F. Supp. 2d at 1370 ("Commerce's zeroing methodology in its calculation of dumping margins is grounded in long-standing practice."); Bowe Passat, 926 F. Supp. at 1149-50; Serampore, 675 F. Supp. at 1360-61.

¹⁸ Serampore, 675 F. Supp. at 1361 (citing Certain Welded Carbon Steel Standard Pipe and Tube From India; Final Determination of Sales at Less Than Fair Value, 51 FR 9089, 9092 (March 17, 1986)); see also Timken, 354 F.3d at

Circuit explained in Timken that denial of offsets is a “reasonable statutory interpretation given that it legitimately combats the problem of masked dumping, wherein certain profitable sales serve to mask sales at less than fair value.”¹⁹ As reflected in that opinion, the issue of so-called masked dumping was part of the policy reason for interpreting the statute in the manner applied by the Department. No U.S. court has required the Department to demonstrate “masked dumping” before it is entitled to invoke this interpretation of the statute and deny offsets to dumped sales.²⁰

In 2005, a panel of the World Trade Organization (WTO) Dispute Settlement Body found that the United States did not act consistently with its obligations under Article 2.4.2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 when it employed the zeroing methodology in average-to-average comparisons in certain challenged antidumping duty investigations.²¹ The initial WTO Dispute Settlement Body Panel Report was limited to the Department’s use of zeroing in average-to-average comparisons in antidumping duty investigations.²² The Executive Branch determined to implement this report pursuant to the authority provided in Section 123 of the Uruguay Round Agreements Act (URAA) (19 U.S.C. § 3533(f), (g)) (Section 123).²³ Notably, with respect to the use of zeroing, the Panel found that the United States acted inconsistently with its WTO obligations only in the context of average-to-average comparisons in antidumping duty investigations. The Panel did not find fault with the use of zeroing by the United States in any other context. In fact, the Panel rejected the European Communities’ arguments that the use of zeroing in administrative reviews did not comport with the WTO Agreements.²⁴

Without an affirmative inconsistency finding by the Panel, the Department did not propose to alter its zeroing practice in other contexts, such as administrative reviews. As the Federal Circuit recently held, the Department reasonably may decline, when implementing an adverse WTO report, to take any action beyond that necessary for compliance.²⁵ Moreover, in Corus I, the Federal Circuit acknowledged the difference between antidumping duty investigations and administrative reviews, and held that section 771(35) of the Act was just as ambiguous with respect to both proceedings, such that the Department was permitted, but not required, to use zeroing in antidumping duty investigations.²⁶ In light of the adverse WTO Dispute Settlement Body finding and the ambiguity that the Federal Circuit found inherent in the statutory text, the Department abandoned its prior litigation position – that no difference between antidumping duty investigations and administrative reviews exists for purposes of using zeroing

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

¹⁹ See Timken, 354 F.3d at 1343.

²⁰ See, e.g., Timken, 354 F.3d at 1343; Corus I, 395 F.3d at 1343; Corus II, 502 F.3d at 1370, 1375; and NSK, 510 F.3d at 1375.

²¹ See Panel Report, United States – Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing), WT/DS294/R (October 31, 2005) (EC-Zeroing Panel).

²² See EC-Zeroing Panel, WT/DS294/R.

²³ See Final Modification for Investigations, 71 FR at 77722; and Antidumping Proceedings: Calculation of the Weighted – Average Dumping Margin During an Antidumping Investigation; Change in Effective Date of Final Modification, 72 FR 3783 (June 26, 2007) (together, Final Modification for Investigations).

²⁴ See EC-Zeroing Panel at 7.284, 7.291.

²⁵ See Thyssenkrupp Acciai Speciali Terni S.p.A. v. United States, 603 F. 3d 928, 934 (Fed. Cir. 2010).

²⁶ See Corus I, 395 F. 3d at 1347.

in antidumping proceedings – and departed from its longstanding and consistent practice by ceasing the use of zeroing. The Department began to apply offsetting in the limited context of average-to-average comparisons in antidumping duty investigations.²⁷ With this modification, the Department’s interpretation of the statute with respect to non-dumped comparisons was changed within the limited context of investigations using average-to-average comparisons. Adoption of the modification pursuant to the procedure set forth in section 123(g) of the URAA was specifically limited to address adverse WTO findings made in the context of antidumping investigations using average-to-average comparisons. The Department did not, at that time, change its practice of zeroing in other types of comparisons, including average-to-transaction comparisons in administrative reviews.²⁸ See id., 71 FR at 77724.

The Federal Circuit subsequently upheld the Department’s decision to cease zeroing in average-to-average comparisons in antidumping duty investigations while recognizing that the Department limited its change in practice to certain investigations and continued to use zeroing when making average-to-transaction comparisons in administrative reviews.²⁹ In upholding the Department’s decision to cease zeroing in average-to-average comparisons in antidumping duty investigations, the Federal Circuit accepted that the Department likely would have different zeroing practices between average-to-average and other types of comparisons in antidumping duty investigations.³⁰ The Federal Circuit’s reasoning in upholding the Department’s decision relied, in part, on differences between various types of comparisons in antidumping duty investigations and the Department’s limited decision to cease zeroing only with respect to one comparison type.³¹ The Federal Circuit acknowledged that section 777A(d) of the Act permits different types of comparisons in antidumping duty investigations, allowing the Department to make average-to-transaction comparisons where certain patterns of significant price differences exist.³² Federal Circuit also expressly recognized that the Department intended to continue to address targeted or masked dumping through continuing its use of average-to-transaction comparisons and zeroing.³³ In summing up its understanding of the relationship between zeroing and the various comparison methodologies that the Department may use in antidumping duty investigations, the Federal Circuit acceded to the possibility of disparate, yet equally reasonable interpretations of section 771(35) of the Act, stating that “[b]y enacting legislation that specifically addresses such situations, Congress may just as likely have been signaling to

²⁷ See Final Modification for Investigations, 71 FR at 77722.

²⁸ On February 14, 2012, in response to several WTO dispute settlement reports, the Department adopted a revised methodology which allows for offsets when making average-to-average comparisons in reviews. Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification, 77 FR 8101 (February 14, 2012). (Final Modification for Reviews). The Final Modification for Reviews makes clear that the revised methodology will apply to antidumping duty administrative reviews where the preliminary results are issued after April 16, 2012. Because the preliminary results in this administrative review were completed prior to April 16, 2012, any change in practice with respect to the treatment of non-dumped sales pursuant to the Final Modification for Reviews does not apply here.

²⁹ See U.S. Steel Corp., 621 F. 3d. at 1355 n.2, 1362-63.

³⁰ See id., at 1363 (stating that the Department indicated an intention to use zeroing in average-to-transaction comparisons in investigations to address concerns about masked dumping).

³¹ See id., at 1361-63.

³² See id., at 1362 (quoting sections 777A(d)(1)(A) and (B) of the Act, which enumerate various comparison methodologies that the Department may use in investigations); see also section 777A(d)(1)(B) of the Act. The

³³ See U.S. Steel Corp., 621 F. 3d at 1363.

Commerce that it need not continue its zeroing methodology in situations where such significant price differences among the export prices do *not* exist.”³⁴

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

The Department’s interpretation of section 771(35) of the Act reasonably resolves the ambiguity inherent in the statutory text for multiple reasons. First, outside of the context of average-to-average comparisons,³⁶ the Department has maintained a long-standing, judicially-affirmed interpretation of section 771(35) of the Act in which the Department does not consider a sale to the United States as dumped if normal value does not exceed export price. Pursuant to this interpretation, the Department treats such a sale as having a dumping margin of zero, which reflects that no dumping has occurred, when calculating the aggregate weighted-average dumping margin. Second, adoption of an offsetting methodology in connection with average-to-average comparisons was not an arbitrary departure from established practice because the Executive Branch adopted and implemented the approach in response to a specific international obligation pursuant to the procedures established by the Uruguay Round Agreements Act for such changes in practice with full notice, comment, consultations with the Legislative Branch, and explanation. Third, the Department’s interpretation reasonably resolves the ambiguity in section 771(35) of the Act in a way that accounts for the inherent differences between the result of an average-to-average comparison and the result of an average-to-transaction comparison.

The Department’s Final Modification for Investigations to implement the WTO Panel’s limited finding does not disturb the reasoning offered by the Department and affirmed by the Federal Circuit in several prior, precedential opinions upholding the use of zeroing in average-to-transaction comparisons in administrative reviews as a reasonable interpretation of section

³⁴ See id. (emphasis added).

³⁵ See SKF v. United States, 630 F.3d 1365 (Fed. Cir. 2011).

³⁶ The Final Modification for Reviews adopts this comparison method with offsetting as the default method for administrative reviews, however, as explained in note 4 this modification is not applicable to these final results.

771(35) of the Act.³⁷ In the Final Modification for Investigations, the Department adopted a possible construction of an ambiguous statutory provision, consistent with the Charming Betsy doctrine, to comply with certain adverse WTO dispute settlement findings.³⁸ Even where the Department maintains a separate interpretation of the statute to permit the use of zeroing in certain dumping margin calculations, the Charming Betsy doctrine bolsters the ability of the Department to apply an alternative interpretation of the statute in the context of average-to-average comparisons so that the Executive Branch may determine whether and how to comply with international obligations of the United States. Neither section 123 nor the Charming Betsy doctrine require the Department to modify its interpretation of section 771(35) of the Act for all scenarios when a more limited modification will address the adverse WTO finding that the Executive Branch has determined to implement. Furthermore, the wisdom of Commerce's legitimate policy choices in this case – *i.e.*, to abandon zeroing only with respect to average-to-average comparisons – is not subject to judicial review. Suramerica de Aleaciones Laminadas, C.A. v. United States, 966 F. 2d 660, 665 (Fed. Cir. 1992). These reasons alone sufficiently justify and explain why the Department reasonably interprets section 771(35) of the Act differently in average-to-average comparisons relative to all other contexts.

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

The Department may reasonably interpret section 771(35) of the Act differently in the context of the average-to-average comparisons to permit negative comparison results to offset or reduce positive comparison results when calculating "aggregate dumping margins" within the meaning of section 771(35)(B) of the Act. When using an average-to-average comparison methodology, see, e.g., section 777A(d)(1)(A)(i) of the Act, the Department usually divides the export transactions into groups, by model and level of trade (averaging groups), and compares an average export price or constructed export price of transactions within one averaging group to an average normal value for the comparable merchandise of the foreign like product. In calculating the average export price or constructed export price, the Department averages all prices, both high and low, for each averaging group. The Department then compares the average EP or CEP for the averaging group with the average normal value for the comparable merchandise. This comparison yields an average result for the particular averaging group because the high and low prices within the group have been averaged prior to the comparison. Importantly, under this

³⁷ See, e.g., SKF USA, Inc. v. United States, 537 F. 3d 1373, 1382 (Fed. Cir. 2008); NSK, 510 F. 3d at 1379-1380; Corus II, 502 F. 3d at 1372-1375; Timken, 354 F. 3d at 1343.

³⁸ According to Murray v. Schooner Charming Betsy, 6 U.S. 64, 118 (1804), "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country." The principle emanating from the quoted passage, known as the *Charming Betsy* doctrine, supports the reasonableness of the Department's interpretation of the statute in the limited context of average-to-average comparisons in antidumping duty investigations because the Department's interpretation of the domestic law accords with international obligations as understood in this country.

comparison methodology, the Department does not calculate the extent to which an exporter or producer dumped a particular sale into the United States because the Department does not examine dumping on the basis of individual U.S. prices, but rather performs its analysis “on average” for the averaging group within which higher prices and lower prices offset each other. The Department then aggregates the comparison results from each of the averaging groups to determine the aggregate weighted-average dumping margin for a specific producer or exporter. At this aggregation stage, negative, averaging-group comparison results offset positive, averaging-group comparison results. This approach maintains consistency with the Department’s average-to-average comparison methodology, which permits EPs above normal value to offset EPs below normal value within each individual averaging group. Thus, by permitting offsets in the aggregation stage, the Department determines an “on average” aggregate amount of dumping for the numerator of the weighted-average dumping margin ratio consistent with the manner in which the Department determined the comparison results being aggregated.

In contrast, when applying an average-to-transaction comparison methodology, see, e.g., section 777A(d)(2) of the Act, as the Department does in this administrative review, the Department determines dumping on the basis of individual U.S. sales prices. Under the average-to-transaction comparison methodology, the Department compares the EP or CEP for a particular U.S. transaction with the average normal value for the comparable merchandise of the foreign like product. This comparison methodology yields results specific to the selected individual export transactions. The result of such a comparison evinces the amount, if any, by which the exporter or producer sold the merchandise at an EP or CEP less than its normal value. The Department then aggregates the results of these comparisons – *i.e.*, the amount of dumping found for each individual sale – to calculate the weighted-average dumping margin for the period of review. To the extent the average normal value does not exceed the individual EP or CEP of a particular U.S. sale, the Department does not calculate a dumping margin for that sale or include an amount of dumping for that sale in its aggregation of transaction-specific dumping margins.³⁹ Thus, when the Department focuses on transaction-specific comparisons, as it did in this administrative review, the Department reasonably interprets the word “exceeds” in section 771(35)(A) of the Act as including only those comparisons that yield positive comparison results. Consequently, in transaction-specific comparisons, the Department reasonably does not permit negative comparison results to offset or reduce other positive comparison results when determining the “aggregate dumping margin” within the meaning of section 771(35)(B) of the Act.

Put simply, the Department interprets the application of average-to-average comparisons to contemplate a dumping analysis that examines the pricing behavior, on average, of an exporter or producer with respect to the subject merchandise, whereas under the average-to-transaction comparison methodology the Department continues to undertake a dumping analysis that examines the pricing behavior of an exporter or producer with respect to individual export transactions. The offsetting approach described in the average-to-average comparison

³⁹ As discussed previously, the Department does account, however, for the sale in its weighted-average dumping margin calculation. The value of any non-dumped sale is included in the denominator of the weighted-average dumping margin while no dumping amount for non-dumped transactions is included in the numerator. Therefore, any non-dumped transactions results in a lower weighted-average dumping margin.

methodology allows for a reasonable examination of pricing behavior, on average. The average-to-average comparison method inherently permits non-dumped prices to offset dumped prices before the comparison is made. This offsetting can reasonably be extended to the next stage of the calculation where average-to-average comparison results are aggregated, such that offsets are (1) implicitly granted when calculating average export prices and (2) explicitly granted when aggregating averaging-group comparison results. This rationale for granting offsets when using average-to-average comparisons does not extend to situations where the Department is using average-to-transaction comparisons because no offsetting is inherent in the average-to-transaction comparison methodology.

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

Regarding other WTO reports cited by the respondent(s) finding the denial of offsets by the United States to be inconsistent with the Antidumping Agreement, the Federal Circuit has held that WTO reports are without effect under U.S. law, "unless and until such a {report} has been adopted pursuant to the specified statutory scheme" established in the URAA.⁴⁰ As is clear from the discretionary nature of this scheme, Congress did not intend for WTO reports to trump automatically the exercise of the Department's discretion in applying the statute.⁴¹ Moreover, as part of the URAA process, Congress has provided a procedure through which the Department may change a regulation or practice in response to WTO reports.⁴²

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

Comment 2: Collapsing Union and POSCO

Nucor argues that Department should collapse Union and POSCO for the final results. Nucor maintains that POSCO owns 9.8 percent of Union's shares, and that the companies are affiliated pursuant to 19 U.S.C. § 1677(33). Union and POSCO are both respondents in this review and both produce a broad range of CORE products on similar machinery. Nucor claims that Dongkuk Steel Mill (DSM), Union's parent company, states in its financial statements that

⁴⁰ See Corus I, 395 F.3d at 1347-49; accord Corus II, 502 F.3d at 1375; and NSK, 510 F.3d 1375.

⁴¹ See 19 USC 3538(b)(4) (implementation of WTO reports is discretionary).

⁴² See 19 U.S.C. 3533(g).

POSCO and it have a “strategic partnership,”⁴³ and that this “strategic partnership” represents affiliation. Furthermore, Nucor claims that the “strategic partnership” demonstrates a real and significant potential for manipulation of price or production. As such, the Department’s test for collapsing the two companies as been met.

Union states that in the Preliminary Results, the Department did not collapse Union and POSCO. Union and POSCO maintain that the Department has addressed this issue in the 15th review of this order, and again on remand at the Court of International Trade in case number 09-00156, and concluded that while Union and POSCO were affiliated, there is no significant potential for manipulation of price or production. Union contends that DSM controls a significant majority of Union’s shares, and therefore only DSM is in a position to control Union’s policies. Union agrees that POSCO is a supplier of substrate to Union, but that the supplier relationship reflects that fact that POSCO accounts for the vast majority of all hot-rolled steel produced in Korea, and is a significant domestic supplier to all Korean purchasers of hot-rolled steel products. Union asserts that the Department should not collapse Union and POSCO for the final results.

POSCO maintains that POSCO and Union only had minimal ownership in each other’s companies during the POR. POSCO claims that POSCO and Union have no common directors, officers or managers, and the Department has previously found that POSCO and Union share no board members or employees. POSCO maintains that POSCO and Union had no involvement in each other’s production or pricing decisions, share no facilities or employees, and have no joint ventures.

POSCO argues that Nucor’s reference to a “strategic partnership” does not justify the finding of a significant potential for manipulation between the two companies. POSCO further argues that the finding of business transactions between two companies does not warrant the collapsing the two companies.

POSCO maintains that the Department is defending its decision not to collapse Union and POSCO in the 14th administrative review of the CORE Order at the CIT,⁴⁴ and reasons that the Department should continue to not collapse POSCO and Union in the instant administrative review.

Department Position:

The Department’s regulations provide that the Department will collapse two affiliated producers if it makes the following two findings of fact: (1) the producers have production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities, and (2) there is a significant potential for

⁴³ See Response of Union Steel to the Department’s Supplemental Questionnaire, dated July 14, 2011, at exhibit A-52, notes 4(A)(1) and 13(I).

⁴⁴ See Final Results of Redetermination Pursuant to Remand, United States Steel Corp. v. United States (Court No. 09-00156, Slip Op. 11-19 (CIT 15,2011)), dated July 15,2011.

the manipulation of price or production.⁴⁵ The regulations further provide that to conclude “significant potential for manipulation,” the Department will consider (1) the level of common ownership, (2) the extent to which managerial employees or board members of one firm sit on the board of directors of an affiliated firm, and (3) whether operations are intertwined, such as through the sharing of sales information, involvement in production and pricing decisions, the sharing of facilities or employees or significant transactions between the affiliated producers.⁴⁶

The POSCO Group and Union are both “exporter(s) or producer(s)” of subject merchandise, as defined by section 771(28) of the Act. Thus, the Department finds that POSCO and Union would not have to retool their facilities to make similar merchandise. However, the Department finds that there is no evidence on the record to suggest that POSCO and Union have production facilities in common that have been created to align their manufacturing priorities.⁴⁷

On April 27, 2007, DSM purchased 9.8 percent of POSCO’s shares, and on May 2, 2007, the POSCO Group purchased 9.8 percent interest in Union from DSM.⁴⁸ The Department finds that the level of ownership between POSCO and DSM is not significant enough for either to control the actions of the other. The POSCO Group submitted a list of its affiliated companies through stock ownership, its ten largest shareholders, and a list of directors.⁴⁹ We find that there are no common shareholders or directors between POSCO and DSM, and neither DSM nor the POSCO Group are the largest shareholders in either Union or POSCO.

The Department finds that the POSCO Group and Union’s operations are not intertwined, such as through common ownership, sharing of board members, sharing of sales information, involvement in production and pricing decisions, the sharing of facilities or employees, or significant transactions between affiliated producers. In addition, there is no evidence that the POSCO Group and Union share sales information, production and pricing decisions, facilities, or employees.

The Department finds that Union purchased substrate from the POSCO Group during the POR for the production of subject merchandise.⁵⁰ However, record evidence shows that

⁴⁵ See 19 C.F.R. § 351.401(f)(1).

⁴⁶ See 19 C.F.R. § 351.401(f)(2).

⁴⁷ See POSCO’s Response to Section A of the Department’s October 29, 2010, questionnaire, dated December 20, 2010, (POSCO’s QRA) at page A – 4 and 5; Union’s response to Section A of the Department’s October 29, 2010, questionnaire, dated December 20, 2010, (Union’s QRA), at exhibit A – 3.

⁴⁸ See POSCO’s QRA at footnote 12. The Department notes that the percentage shares purchased by POSCO and Union were bracketed as business proprietary in POSCO’s QRA. However, the same information is on the public record of United States Steel Corp. v. United States, Final Results of Redetermination Pursuant to Remand, Court Number 09-00156, Slip. Op. 11-19, (CIT February 15, 2011) at page 15.

⁴⁹ See POSCO’s QRA at exhibits 4 – 6; Union’s Response to Section A of the Department’s October 29, 2010, questionnaire, dated December 20, 2010, (Union’s QRA) at exhibits A – 4 through A – 9.

⁵⁰ See Union’s Response to Section D of the Department’s October 29, 2010, questionnaire, dated January 25, 2011, (Union’s QRD) at exhibit D – 9.

POSCO was one of several suppliers of substrate to Union, and that POSCO's prices to Union of substrate do not demonstrate that POSCO and Union's operations are intertwined.⁵¹

Finally, there is no evidence on the record that defines Nucor's claim of a "strategic partnership" between POSCO and Union, if or when any "strategic activities" have taken place, or if such "strategic partnership" is related to the manufacture or sale of subject merchandise. The Department notes that POSCO has subsidiaries whose activities range from electronic control device manufacturing to athletic facilities operations to construction and engineering services.⁵² Likewise, Union has multiple subsidiaries that engage in activities like transportation, or are located outside Korea, such as Brazil and Mexico.⁵³ The Department finds that there is no direct evidence that a strategic partnership between POSCO and Union exists with respect to CORE. Nucor's statement that there is a "strategic partnership" does not warrant the finding that POSCO and Union are affiliated.

For these reasons, the Department concludes that evidence on the record does not support a finding that POSCO and Union should be collapsed under 19 C.F.R. 351.401(f).

B. Company-Specific Issues

HYSCO

Comment 3: Treatment of Non-temper Rolled Merchandise

U.S. Steel states that HYSCO classified a portion of its home market sales as non-temper rolled merchandise. U.S. Steel asserts that, with the exception of order sheets from its internal computer system, there is no evidence on the record that HYSCO produced and sold non-temper rolled merchandise during the POR. U.S. Steel claims that the order sheets are uncorroborated, and cannot be tied to any other documents in HYSCO's normal books and records because non-temper rolling does not show up in any other document. U.S. Steel further claims that the order sheets themselves were never shown to the customers, and the non-temper rolling designation was not tied to, or corroborated by any other record evidence, including production documents, sales documents, or accounting or financial documents. U.S. Steel claims that HYSCO has acknowledged that even after the orders are inputted in to its computer system, the terms of the orders, including products specifications, can and do change. U.S. Steel asserts that the Department's decision to accept a reported product characteristic must be supported by substantial corroborated evidence, and that the internal order sheets submitted by HYSCO do not meet that standard with respect to non-temper rolled merchandise. U.S. Steel argues that HYSCO's non-temper rolled classification should be rejected and all of HYSCO's home market sales should be considered temper rolled for calculating the margin in the final results. Barring that, U.S. Steel maintains that the Department should find the non-temper rolled merchandise

⁵¹ See Memorandum to the File, from Christopher Hargett, Senior International Trade Compliance Analyst, entitled "Corrosion-Resistant Carbon Steel Flat Products from Korea: 17th Antidumping Administrative Review (CORE from Korea): POSCO and Union Business Activities," dated March 5, 2012.

⁵² See POSCO's QRA at exhibit A – 18 pages 11 and 12.

⁵³ See Union's QRA at exhibit A – 4.

outside the ordinary course of trade and should exclude them from the margin calculation for the final results.

U.S. Steel further argues that the Department should find HYSCO's home market sales of non-temper rolled merchandise outside the ordinary course of trade. U.S. Steel maintains that the Statement of Administrative Action (SAA) states that the Department may consider sales to be outside the ordinary course of trade "when such sales or transactions have characteristics that are not ordinary as compared to sales or transactions generally made in the same market," including unusual product specifications, unusual prices or profit margins, and unusual terms of sale.⁵⁴ U.S. Steel maintains that home market sales of non-tempered merchandise have an unusual production process, sales process, number of customers, average quantity per sale and profit margins. U.S. Steel further maintains that failing to exclude the home market sales of non-tempered merchandise would violate the intent of the statute because their inclusion in the margin calculation leads to irrational and unrepresentative results.

U.S. Steel claims that HYSCO's arguments that home market sales of non-tempered merchandise should not be considered outside the ordinary course of trade are without merit. U.S. Steel asserts that the Department can find merchandise with a certain characteristic outside the ordinary course of trade even if the characteristic is included in the Department's model match hierarchy. U.S. Steel maintains that the standard of assessing whether merchandise is outside the ordinary course of trade is whether the sales in question have characteristics that are not ordinary as compared to sales or transactions generally made in the same market. U.S. Steel maintains that the evidence on the record show that all of HYSCO's home market merchandise is temper rolled.

Nucor concurs with U.S. Steel's position that the Department should reject HYSCO non-tempered classification for its home market sales.

HYSCO urges the Department to continue to include home market sales of non-temper rolled merchandise. HYSCO states that the Department develops criteria that are consistent with industry standards that have commercial significance and play a role in establishing price, and maintaining those criteria in all reviews. HYSCO maintains that the Department has consistently included temper rolling as a defining characteristic in every segment of the CORE Order, as well as other flat-rolled carbon steel cases. HYSCO claims that they have reported temper rolled products consistent with the Department's instructions, and has done so in prior reviews.

HYSCO argues that the bills of materials do not show any production processes and are not appropriately used to determine whether an individual product underwent a particular production process. HYSCO further argues that the Department frequently encounters situations in which a company's internal product codes do not reflect certain product characteristic that the Department has included in its model matching hierarchy. HYSCO maintains that the product brochures contain flowcharts that clearly identify the skin pass machines and show that they are located within a larger production line, and that "temper rolling" or "no temper rolling" are

⁵⁴ See Statement of Administrative Action Accompanying the Uruguay Round Agreements Act (SAA) H.R. Rep. No. 403-316 at 834, reprinted in 1994 U.S.C.C.A.N. 4040, 4171.

equally viable options for its customers. HYSCO contends that it is very typical that various product characteristics that the Department uses to define a CONNUM are not reflected on commercial invoices, tax invoices, or mill certificates, and that companies may not account for all of the Department's product characteristics in their normal accounting records. HYSCO maintains that the Department has never found an instance in which the product characteristics were inaccurate.

HYSCO contends that U.S. Steel has merely implied that HYSCO personnel can arbitrarily change a customer's order and maintains that there is no evidence on the record that any home market customer's order changed with respect to any product characteristic. HYSCO states that if a customer changes its order, the order is cancelled and a new order is generated.

HYSCO maintains that the Department has recognized temper rolling as a relevant product characteristic in this and numerous other flat-rolled carbon steel product cases in previous reviews of the CORE Order. HYSCO asserts that the Department has recognized that companies may not account for all of the product characteristics in their normal accounting records or that there may be no appreciable cost differences associated with products characteristics that are nonetheless commercially significant. HYSCO claims that in this case, the production process for temper rolling is very simple, located within a larger production process, and that HYSCO does not track the cost difference in the normal course of business.

HYSCO asserts that there is no basis to classify HYSCO home market sales of non-tempered rolled products as outside the ordinary course of trade. HYSCO claims that the Department considers home market sales to be outside the ordinary course of trade when based on an evaluation of all the circumstances particular to the sales in question, they have characteristics that are extraordinary for the market in question.⁵⁵ HYSCO contends that the factors that U.S. Steel claims render non-temper rolled merchandise outside the ordinary course of trade are not unique to non-temper rolled products. Rather, HYSCO argues that those factors reflect normal business circumstances and variances in HYSCO's home market and are representative of the products at issue.

HYSCO argues that U.S. Steel's analysis of sales of non-tempered merchandise is distortive. HYSCO claims that non-tempered merchandise home market sales were significant, and that the Department has long held that a small quantity of sales does not render such sales outside the ordinary course of trade. HYSCO maintains that the number of customers for non-temper rolled merchandise is significant, that the customers also purchased tempered-rolled merchandise, and that the non-temper rolled merchandise sales took place throughout the POR. HYSCO further maintains that the non-temper rolled merchandise is sold in similar quantities as temper-rolled merchandise. HYSCO argues that U.S. Steel's profit calculations for non-tempered merchandise are incorrect.

⁵⁵ See 19 C.F.R. §351.102(b)(35).

Department Position:

The Department agrees with HYSCO. In the questionnaire, the Department required HYSCO to report all its home market sales as either ‘temper rolled’ or ‘non-temper rolled.’⁵⁶ HYSCO provided domestic order sheets for observations they reported as non-temper rolled, which shows domestic orders of non-temper rolled merchandise.⁵⁷ HYSCO reported that their normal cost accounting system does not account for differences in temper rolling or yield strength, and that they believe that the incremental cost associated with this process is minimal.⁵⁸

The Department previously verified, and found that HYSCO has appropriately reported temper and non-temper rolled products.⁵⁹ Consistent with CORE 16, the Department finds that HYSCO has appropriately reported the production and sales of temper and non-temper rolled products. There is no evidence on the record that changes have been made to an order from the time the order was entered into HYSCO’s order system to the time of invoice.⁶⁰ Thus, the Department finds that HYSCO has both produced and sold non-tempered merchandise in the home market during the POR.

The Department further finds that HYSCO’s sales of non-tempered merchandise in the home market are not outside the ordinary course of trade. 19 C.F.R. § 351.102(b)(35) states that:

“The Secretary may consider sales or transactions to be outside the ordinary course of trade if the Secretary determines, based on an evaluation of all of the circumstances particular to the sales in question, that such sales or transactions have characteristics that are extraordinary for the market in question. Examples of sales that the Secretary might consider as being outside the ordinary course of trade are sales or transactions involving off-quality merchandise or merchandise produced according to unusual product specifications, merchandise sold at aberrational prices or with abnormally high profits, merchandise sold pursuant to unusual terms of sale, or merchandise sold to an affiliated party at a non-arm’s length price.”

In NSK Ltd. v. United States, 416 F. Supp. 2d 1334, 1343 (CIT 2006), the Court explained that “the party requesting a price adjustment bears the evidentiary burden ‘of proving whether sales used in Commerce’s calculations are outside the ordinary course of trade . . .’” 416 F. Supp. 2d at 1343 citing Nachi-Fujikoshi Corp. v. United States, 798 F. Supp. 716, 718 (CIT 1992). The Court also stated that “absent adequate evidence to the contrary, Commerce will treat sales as within the ordinary course of trade.” Id. citing Torrington Co. v. United States, 127 F.3d 1077, 1081 (CAFC 1997). Here, we find that the petitioners did not provide sufficient evidence lending credence to their argument that the sales in question possess

⁵⁶ See HYSCO’s Response to Section B – D of the Department’s October 29, 2010 Questionnaire, dated January 18, 2011, (HYSCO’s QRB-D) at B – 17.

⁵⁷ See HYSCO’s Response to the Department’s March 4, 2011, Section A – D supplemental Questionnaire, dated April 22, 2011, (HYSCO’s SQRA-D) at page 12 and Exhibit S – 17 and S – 18.

⁵⁸ See HYSCO’s QRB-D at D – 27.

⁵⁹ See Certain Corrosion-Resistant Carbon Steel Flat Products From the Republic of Korea: Notice of Final Results of the Sixteenth Administrative Review, 76 FR 15291 (March 21, 2011)(CORE 16) at Comment 5.

⁶⁰ See HYSCO’s QRA at Exhibit A – 9; HYSCO’s SQRA-D at Exhibit S – 18.

characteristics that are “extraordinary” for the home market as described in 19 C.F.R. § 351.102(b)(35).

The petitioners argue that the sales in question are not representative of the market under consideration because home market sales of non-tempered merchandise have an unusual production process, sales process, number of customers, average quantity per sale and profit margins. As discussed *supra*, the Department has previously found, and verified that HYSCO has appropriately reported temper and non-temper rolled products, and did not have reason to find that the production of non-tempered rolled products is outside the ordinary course of trade. The Department finds that temper-rolling is only one of several options available on the line.⁶¹ Based on a review of the data, the Department agrees with HYSCO’s analysis that the number of customers that purchase non-temper rolled merchandise is significant, and that none of those customers were otherwise unique in their purchases of home market sales of subject merchandise from HYSCO.⁶² Likewise, the average purchase quantities for non-temper rolled merchandise do not suggest that they were being sold in quantities that are unusual.⁶³ Finally, there is no information on the record that would suggest that HYSCO’s sales of non-tempered rolled merchandise were made through different channels of distribution, to different customer categories, or with different terms of sale than sales of temper rolled merchandise.

The Department agrees with HYSCO that U.S. Steel’s calculations of the profit rate for HYSCO’s home market sales are inconsistent with the Department’s methodology for calculating the profit rate for home market sales. U.S. Steel calculated HYSCO’s home market profit rates as the average profit above variable cost.⁶⁴ The Department’s methodology for calculating the profit rate is the average profit above total cost.⁶⁵ The Department agrees with HYSCO and finds that the profit ratio for non-temper rolled does not suggest that those sales were made outside the ordinary course of trade.

For these reasons, the Department determines not to consider non-temper rolled sales as outside the ordinary course of trade.

Comment 4: Date of Sale for U.S. Sales

U.S. Steel states that HYSCO reported the date of shipment from its factories in Korea as the date of sale for its U.S. sales. U.S. Steel maintains that the invoice date is the regulatory presumptive date of sale unless the party advocating for another date provides sufficient evidence on the record establishing such other date as the date when the material terms of sale were established. U.S. Steel contends that HYSCO did not establish that the material terms of sale were set on the shipment date. U.S. Steel maintains that as long as the material terms of sale are “subject to change” between the shipment date and the invoice date, the Department will still

⁶¹ See HYSCO’s QRA at Exhibit A – 17, Galvanized Steel Sheet & Coil Brochure, at pages 4 and 5.

⁶² See HYSCO’s Rebuttal Case Brief at 17.

⁶³ See *id.*

⁶⁴ See U.S. Steel’s Case Brief at 14.

⁶⁵ See Memorandum from Christopher Hargett to the File, entitled “Preliminary Results in the 17th Administrative Review on Corrosion-Resistant Carbon Steel Flat Products from Korea: Calculation Memorandum for Hyundai HYSCO,” dated August 29, 2011, at Appendix 2, part 11.

use the invoice date as the date of sale. U.S. Steel claims that HYSCO reported that the terms of sale, including price and quantity, “can and do change after the initial agreement with the customer up until shipment from HYSCO’s factory.” U.S. Steel maintains that there is no document establishing that the material terms of sale for HYSCO’s U.S. sales are fixed at the time of shipment. U.S. Steel further argues that the long periods of time between the shipment and invoice dates for HYSCO’s U.S. sales provided opportunity to change the price, delivery, and payment terms well after shipment from the factory occurred. U.S. Steel claims that the only document on record that establishes the material terms of sale is the invoice from Hyundai HYSCO USA (HHU) to the unaffiliated U.S. customer. Thus, U.S. Steel reasons that there is no basis to select the shipment date as the date of sale for HYSCO’s U.S. sales, and that the Department should treat the invoice date as the date of sale for HYSCO’s U.S. sales in the final results.

HYSCO argues that the Department’s practice recognizes that the date of sale cannot occur after the date of shipment, and that this practice has been followed in all prior administrative reviews with respect to HYSCO’s sales. HYSCO states that it reported shipment date as date of sale because price and quantity can and do change after the initial agreement with the customer up until the merchandise is shipped from HYSCO’s factory. HYSCO maintains that in this circumstance, the Department’s practice is to use the shipment date as the date of sale when the shipment date precedes the invoice date. HYSCO claims that the Department has found that the date of shipment is the appropriate date of sale despite arguments that the terms of sale may, or did, change after the date of shipment but prior to the issuance of the commercial invoice.

HYSCO maintains that U.S. Steel’s reliance on Light-Walled Rectangular Pipe and Tube from Korea is misguided.⁶⁶ HYSCO argues that the facts in Light-Walled Rectangular Pipe and Tube from Korea are distinguishable from the instant case. First, HYSCO claims that Light-Walled Rectangular Pipe and Tube from Korea is an aberrational case with respect to date of sale. Further, HYSCO argues that in Light-Walled Rectangular Pipe and Tube from Korea, the respondent’s U.S. sales were strictly EP sales to local companies, unlike the CEP sales that HYSCO has reported. Finally HYSCO claims that Light-Walled Rectangular Pipe and Tube from Korea was an investigation in which the Department was examining the company’s selling practices for the first time, whereas this is the seventeenth review of the instant case.

HYSCO maintains that the Department has previously determined that HYSCO’s date of shipment from the factory in Korea is the appropriate date of sale for its direct CEP sales to the United States. HYSCO argues that the documents on the record support the conclusion that price and quantity are fixed at the time of shipment from the factory in Korea.⁶⁷

⁶⁶ See Light-Walled Rectangular Pipe and Tube from Korea, 73 FR 5794 (January 31, 2001)(Light-Walled Rectangular Pipe and Tube from Korea).

⁶⁷ See HYSCO’s Rebuttal Brief at page 29.

Department Position:

19 C.F.R. § 351.401(i) states that the Department “normally will use the date of invoice” as the date of sale, unless “the Secretary is satisfied that a different date better reflects the date on which the exporter or producer established the material terms of sale.” If the Department determines that another date better reflects the date on which the exporter or producer establishes the material terms of sale, the Department may use this date. In cases where the shipment date precedes the invoice date, the Department has consistently used the date of shipment as the date of sale.⁶⁸ The Department has previously found that shipment date is the correct date of sale for HYSCO.⁶⁹

It is the Department’s normal practice to *not* consider dates subsequent to the date of shipment from the factory as appropriate for date of sale because once merchandise is shipped, the material terms of sale are established.⁷⁰ Thus, we agree with HYSCO that Light-Walled Rectangular Pipe and Tube from Korea is not analogous to this case. First, in the instant case, we see that the quantity is fixed at the time of shipment. HYSCO provided documentation showing the booking of the sale price and quantity, *i.e.*, the material terms of sale, on the date of shipment, before issuing an invoice to the customer.⁷¹ Further, HYSCO provided documentation showing that, for certain sales, the terms of sale were established at the time of the original purchase order.⁷² Thus, in the instant case, we find that the date of shipment is the most appropriate date of sale for HYSCO’s U.S. sales.

THE POSCO GROUP

Comment 5: Revocation from the Order

Arcelor, Nucor, and U.S. Steel argue that the Department should not revoke POSCO from the CORE Order. Arcelor and Nucor maintain that POSCO has failed to provide an accurate certification with its request for revocation as required under 19 C.F.R. § 351.222(e)(1)(i). Arcelor asserts that the regulations required a certification that the company has sold the subject merchandise at not less than normal value in the current review period. Arcelor states that although POSCO certified that it has sold subject merchandise subject to the

⁶⁸ See Stainless Steel Bar From Japan: Final Results of Antidumping Administrative Review, 65 Fed. Reg. 13,717 (Mar. 14, 2000)(Stainless Steel Bar from Japan), and accompanying Issues and Decision Memorandum at Comment 1; Granular Polytetrafluoroethylene Resin from Italy, 73 FR 54557, 54557 (September 22, 2008); Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Notice of Final Results of the Fourteenth Administrative Review and Partial Rescission, 74 FR 11082 (March 16, 2009)(CORE 14) at comment 18; Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Notice of Final Results of the Fifteenth Administrative Review, 75 FR 13490 (March 22, 2010)(CORE 15), and accompanying Issues and Decision Memorandum at Comment 5.

⁶⁹ See CORE 15 at comment 5; CORE 14 at comment 18.

⁷⁰ See Notice of Final Determination of Sales at Less Than Fair Value:: Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From Brazil, Part III, 64 FR 38756, 38768 (July 19, 1999)(Hot-Rolled from Brazil), and accompanying Issues and Decision Memorandum at Comment 5.

⁷¹ See Response of HYUNDAI Hysco to the Department’s March 4, 2011, Supplemental Sections A – D Questionnaire, dated April 22, 2011, at exhibit S – 42.

⁷² See *id.*

antidumping duty order “at not less than normal value during the current period of review,” POSCO preliminarily received a *de minimis* margin in the instant review. Arcelor reasons that the *de minimis* margin demonstrates that POSCO has had sales of subject merchandise at less than normal value during the current period despite being under the discipline of the antidumping duty order. Arcelor further maintains that the practice of waiving the collection of *de minimis* duties on entries, to which POSCO will remain entitled under the regulation, is not tantamount to finding that less than normal value sales did not exist during the POR.

Arcelor and U.S. Steel maintain that the Department’s regulations provide that the Department must make a determination as to whether “the continued application of the order is otherwise necessary to offset dumping” prior to revoking the order. Arcelor and U.S. Steel assert that the record in the instant case supports a finding that continuation of the order is necessary to prevent dumping. Arcelor claims that even though POSCO is under the CORE Order, the *de minimis*, not zero, weighted-average dumping margins for the current and two prior reviews shows that POSCO has been unable to eliminate dumping. Arcelor and Nucor further reason that the Department found a similar conclusion in the most recent sunset review finding regarding POSCO, in which the Department determined that revocation of the order against POSCO would be likely to lead to recurrence of dumping at margins of 17.70 percent.⁷³ Arcelor maintains that it would be inconsistent to find that POSCO would be likely to resume dumping in the sunset context, but find that it is not necessary to continue the order to prevent dumping in the context of this proceeding. U.S. Steel claims that POSCO has been making sales at dumped prices in the instant review. U.S. Steel argues that POSCO will likely ramp up its shipments of subject merchandise to the U.S. and will do so at dumped prices.

Nucor asserts that the Department was not able to conduct a complete verification of the information placed on the record by POSCO in the instant case, and therefore cannot be assured that the data which preliminarily resulted in a *de minimis* margin is complete and accurate. Nucor reasons that POSCO’s pricing practices in the three most recent review periods are not indicative of its future pricing behavior. Nucor maintains that POSCO will resume dumping subject merchandise.

Arcelor and Nucor argue that the Department should not revoke the antidumping duty order against POSCO in light of the Department’s proposed elimination of the company-specific revocation regulations.⁷⁴ Arcelor maintains that the Department is entirely free to implement its proposal to eliminate company-specific revocations. Arcelor and Nucor urge the Department to adopt the proposed modification to the revocation regulations, which would eliminate company-specific revocations and would not permit revocation of the CORE Order with respect to POSCO.

⁷³ See Final Results of Expedited Sunset Reviews: Corrosion-Resistant Carbon Steel Flat Products from Australia, Canada, France, Germany, Japan, and South Korea, 71 FR 32508, 32513 (June 6, 2006)(CORE Sunset), and accompanying Issues and Decision Memorandum at 9.

⁷⁴ See Proposed Modification to Regulation Concerning the Revocation of Antidumping and Countervailing Duty Orders, 76 FR 15233 (March 21, 2011)(Proposed Modification to Regulation Concerning Revocation).

U.S. Steel claims that if the Department were to use invoice date as date of sale for POSCO, POSCO's antidumping duty margin would be above *de minimis*, and POSCO would not be entitled to revocation.

POSCO urges the Department to determine that the CORE Order should be revoked with respect to POSCO. POSCO claims that they have provided accurate certification as required by 19 C.F.R. §351.222(e)(1)(I). POSCO maintains that it has satisfied the revocation criteria pursuant 19 C.F.R. §351.222(b)(2). POSCO asserts that they have demonstrated three consecutive years of sales above normal value by receiving a *de minimis* rate in the previous two administrative reviews of CORE from Korea and receiving a *de minimis* rate in the instant review. POSCO maintains that the Department deems a company not to have sold subject merchandise at not less than normal value if its weighted average dumping margin is less than 0.5 percent, *i.e.*, zero or *de minimis* pursuant 19 C.F.R. § 351.106(c)(1). POSCO maintains that it has appropriately certified that it will not sell subject merchandise at less than normal value in the future, and that it has sold subject merchandise to the United States in commercial quantities in each of the last three administrative reviews.

POSCO claims that the Department's practice is to presume that the order is not necessary to offset dumping unless petitioners provide evidence that rebuts this presumption. POSCO maintains that the Department considers prices, costs, investment, currency movement, production capacity as well as other market and economic factors in determining whether an order may not be revoked with respect to a specific producer.⁷⁵ POSCO contends that petitioners have not submitted evidence to challenge the POSCO's revocation from the CORE Order. POSCO maintains that the rate assigned to POSCO in the last complete sunset review has nothing to do with the Department's analysis of whether POSCO is entitled to revocation.

POSCO states that in this review, due to resource constraints, the Department conducted a simultaneous sales and cost verification in one week.⁷⁶ POSCO maintains that the Department conducted a thorough examination of POSCO sales and cost records, and the verification reports do not reflect any discrepancies or issues that call into question the integrity of POSCO's submissions.

POSCO argues that the relevance of its relationship with Union is unsubstantiated, and that U.S. Steel has not stated how or why the relationship is relevant to the instant case. POSCO maintains that U.S. Steel's allegations that POSCO should not be revoked due to sales activities, steel capacity and production, and profitability rates are not persuasive.

POSCO states that the Department has not adopted the Proposed Modification to Regulation Concerning Revocation. POSCO maintains that even if the Department adopted the Proposed Modification to Regulation Concerning Revocation now, it would unfairly penalize POSCO in the instant case. POSCO maintains that the Department's proposed regulations

⁷⁵ See Certain Hot-Rolled Carbon Steel Flat Products from Thailand, 70 FR 73197 (December 9, 2005).

⁷⁶ See Memorandum to the File from Victoria Cho and Heidi K. Schriefer, "Verification of the Sales Response of the POSCO Group in the Antidumping Review of Corrosion Resistant Carbon Steel Flat Products (CORE) from the Republic of Korea," dated December 1, 2011.

provided no guidance as to whether they would apply to ongoing administrative reviews. POSCO states that it is not aware of any instance in which the Department has applied a modification to a regulation or practice to administrative reviews that were in their final stages, as is the instant case. Rather, POSCO asserts that modifications to past regulations have applied to cases initiated on or after the effective date. Thus, POSCO reasons that even if the Department adopted the Proposed Modification to Regulation Concerning Revocation, it would not apply to POSCO in the instant case.

Department Position:

The Department's regulations specify three requirements for requesting revocation in an antidumping proceeding.⁷⁷ As part of its revocation request, POSCO submitted a written certification that for this review period, the company: 1) sold the subject merchandise at not less than NV and that the company will not sell subject merchandise at less than NV during the future; 2) sold the subject merchandise in commercial quantities; and 3) agreed to reinstatement of the Order if the Department concludes that POSCO, subsequent to revocation, sold subject merchandise at less than NV, pursuant to 19 C.F.R. § 351.222(e)(1)(i)-(iii).⁷⁸ The Department is satisfied that POSCO has met the requirements to request revocation of the Order.

Under section 751(d)(1) of the Act, the Department "may revoke, in whole or in part" an antidumping duty order upon completion of a review. Under 19 C.F.R. § 351.222(b)(2), the Department may revoke an antidumping duty order in part if it concludes that (A) an exporter or producer has sold the merchandise at not less than normal value for a period of at least three consecutive years, (B) the exporter or producer has agreed in writing to its immediate reinstatement in the order if the Secretary concludes that the exporter or producer, subsequent to the revocation, sold the subject merchandise at less than normal value, and (C) the continued application of the antidumping duty order is no longer necessary to offset dumping.

We disagree with the petitioners' argument that POSCO does not qualify for revocation in this review based on the fact that it received *de minimis* rates in this, and the previous two reviews. It is the Department's longstanding practice to find that 19 CFR 351.222(b)(2)(i)(A) is satisfied where the Department has calculated zero or *de minimis* margins for a company for three consecutive years.⁷⁹ For instance, in *Shrimp from India*, the Department determined that the application of the antidumping duty order on a company was no longer warranted because, along with satisfying the other criteria, the company had *de minimis* margins for three

⁷⁷ See 19 C.F.R. 351.222(e).

⁷⁸ See Letter to the Department from POSCO, dated August 31, 2010.

⁷⁹ See Stainless Steel Bar from India: Final Results of the Antidumping Duty Administrative Review, and Revocation of the Order, in Part, 76 FR 56401 (Sept. 13, 2011), and accompanying Issues and Decision Memorandum at Comment 1; Certain Frozen Warmwater Shrimp From India: Final Results of Antidumping Duty Administrative Review, Partial Rescission of Review, and Notice of Revocation of Order in Part, 75 FR 41813 (July 19, 2010) at comment 3 (*Shrimp from India*); Certain Polyester Staple Fiber From Korea: Final Results of Antidumping Duty Administrative Review and Final Determination To Revoke the Order in Part, 69 FR 61341, 61342 (Oct. 18, 2004).

consecutive years.⁸⁰ Our examination is focused on the totality of the respondent's overall pricing experience for the periods of review at issue. The Department applies this same principle when considering whether to reinstate the antidumping duty order to a previously-revoked company, by considering whether the weighted-average dumping margin for a period of time, such as a year-long period, is above *de minimis*, rather than considering whether each sale was made at not less than normal value.⁸¹

In addition, the Department considers the weighted-average dumping margin to be the appropriate basis for determining whether a company sold the subject merchandise at not less than NV because the weighted-average dumping margin is representative of an exporter's experience as a whole and is a sufficient basis to find that continued application of the order is not necessary to offset dumping, without additional evidence. As noted in the explanation of the final rule governing our revocation regulation, the Department is directed to presume that, in situations where there has been an absence of dumping for three consecutive years, "an order is not necessary in the absence of additional evidence."⁸² Specifically, the preamble states:

All parties may be in a position to provide information concerning trends in prices and costs, currency movements, and other market and economic factors that may be relevant to the likelihood of future dumping. If no party provides information addressing these issues, we rest with the presumption that an order is not necessary in the absence of dumping. If the petitioner comes forward with information demonstrating that the maintenance of the order is necessary, that initial presumption is rebutted, and the burden of production shifts to the respondents. . . The Department must weigh all the evidence on the record and determine whether the continued application of the order is necessary to offset dumping (or subsidization). Each revocation determination must be based upon substantial, positive evidence and be otherwise in accordance with law.⁸³

Given this presumption, the Department's practice has been to require that petitioners must provide evidence showing that continued application of the antidumping duty order is otherwise necessary to offset dumping.⁸⁴ As the CIT has observed, "the regulations require

⁸⁰ Shrimp from India, 75 FR at 41814 (calculating a *de minimis* margin in the administrative review, and citing the previous two administrative reviews, in which the company received *de minimis* dumping margins).

⁸¹ See, e.g., Certain Hot-Rolled Carbon Steel Flat Products from Thailand: Final Results of Antidumping Duty Changed Circumstances Review and Reinstatement in the Antidumping Duty Order, 74 FR 22885 (May 15, 2009), and accompanying Issues and Decision Memorandum at Comment 1.

⁸² See Amended Regulation Concerning the Revocation of Antidumping and Countervailing Duty Orders, 64 FR 51236 (September 22, 1999).

⁸³ See *id.*

⁸⁴ See Certain Hot-Rolled Carbon Steel Flat Products from Thailand: Final Results of Antidumping Duty Administrative Review, Partial Revocation of Antidumping Duty Order and Partial Rescission of Antidumping Duty Administrative Review, 71 FR 28659 (May 17, 2006), and accompanying Issues and Decision Memorandum at Comment 1.

positive evidence that the order is ‘otherwise necessary.’”⁸⁵ Thus, we find that the mere existence of above-*de-minimis* assessment rates does not meet this evidentiary threshold.

The Department disagrees with petitioners’ contention that rekoking the CORE Order, in part, in the instant case is contrary to the Department’s finding in the most recent sunset review of CORE Korea. The Department notes that the publication of the sunset review occurred on June 6, 2006, and considered final results of reviews covering entries through July 31, 2004, which is before the first of the three reviews in which POSCO received a *de minimis* rate.⁸⁶ Thus, using the CORE Sunset is not informative in the instant case. Moreover it is important to note that the findings in the CORE Sunset are order wide, while POSCO’s calculated rates are company-specific, which is the basis for our revocation findings in this case.

19 C.F.R. § 351.307(a) and (b) states that “Prior to making a final determination in an investigation or issuing final results of review, the Secretary may verify relevant factual information,” and that the Department will conduct a verification in the case of a revocation under section 751(a) of the Act. In the instant case, the Department conducted verification of information relevant to POSCO’s revocation.⁸⁷ The court has found that Congress has afforded the Department a degree of latitude in implementing its verification procedures, and that the Department is not required to verify each item submitted in respondents’ questionnaire.⁸⁸ Rather, verification is an audit process that selectively tests accuracy and completeness of a respondent’s submissions.⁸⁹ Thus, the Department is satisfied that the information placed on the record by POSCO in the instant review is complete and accurate.

Arcelor and Nucor argue that the Department may implement the Proposed Modification to Regulation Concerning Revocation at any time, and should do so to prevent POSCO from being revoked from the CORE Order. The Department agrees that it may implement the Proposed Modification to Regulation Concerning Revocation, however, the effective date will apply to administrative reviews initiated after implementation, not before. Thus, because the implementation of the Proposed Modification to Regulation Concerning Revocation is after the initiation of the instant case, the Proposed Modification to Regulation Concerning Revocation will have no effect on the instant review of CORE from Korea.

Therefore, we conclude that POSCO has met the requirements for revocation from the order.

Comment 6: Date of Sale for U.S. Sales

Nucor and U.S. Steel argue that the Department should use invoice date as the date of POSCO’s U.S. sales. U.S. Steel and Nucor state that POSCO reported the date of shipment from the factory in Korea as the date of sale for its U.S. sales. Nucor and U.S. Steel maintain that the

⁸⁵ See Feili Group (FUJIAN) Co. v. United States, 724 F. Supp. 2d 1358, 1370 (Ct. Int’l Trade 2010).

⁸⁶ See CORE Sunset.

⁸⁷ See POSCO’s Sales Verification Report; POSCO’s Cost Verification Report.

⁸⁸ See Floral Trade Council v. United States, 822 F. Supp. 766, 771 (CIT 1993).

⁸⁹ See Bomont Indus. v. United States, 733 F. Supp 1507, 1508 (CIT 1990).

Department favors invoice date as the date of sale unless a different date would better reflect the date on which the material terms of sale are established. Nucor and U.S. Steel claim that a party seeking to establish a date of sale other than invoice must produce 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. Further, Nucor maintains that the Department did not explain how respondents satisfied their burden to warrant the use of a date of sale other than invoice date.

Nucor maintains that the Department must rely upon written evidence to establish a date of sale other than invoice date, and based POSCO's written descriptions of its sales process and other narrative responses the Department must use invoice dates as date of sale for POSCO's U.S. sales. U.S. Steel argues that POSCO has not provided evidence showing that the material terms of sale were fixed on the date of shipment. Nucor and U.S. Steel argue that there is no evidence that establishes the material terms of sale other than the commercial invoice between POSCO's U.S. subsidiary, POSCO America Corporation (POSAM) and the unaffiliated U.S. customer. U.S. Steel maintains that documentation obtained at verification shows that the material terms of sale were not established until the date an invoice was issued by POSAM.

Nucor and U.S. Steel claim that the Department has used invoice date as the date of sale even where the shipment date preceded the invoice date. Nucor further argues that using shipment date is not a valid option because it does not represent a milestone between the contracting parties, rather it is a transaction between POSCO and the shipping company.

POSCO states that the Department's practice recognizes that the date of sale cannot occur after the date of shipment. POSCO contends that U.S. Steel has interpreted the sales documentation examined at verification incorrectly. POSCO maintains that at the time the customer places an order, all of the elements that will be used in the calculation of the final price are agreed upon. POSCO asserts that the evidence on the record from verification shows when prices and quantities were established, and that the Department found no discrepancies in the documents.⁹⁰

POSCO argues that Nucor's presumption that the invoice date is the date of sale is incorrect. POSCO maintains that the Department regulations provide that the Department may use a date other than the date of the invoice if the Department is satisfied that a different date better reflects the date on which the material terms of sale are established.⁹¹ POSCO states that they reported the earlier of shipment date or the date of invoice as the appropriate date of sale, where applicable, because price and quantity can and do change after the initial agreement with the customer up until the merchandise is shipped from POSCO's factory. POSCO maintains that the Department has a well established practice using shipment date as the date of sale.

POSCO maintains that U.S. Steel's reliance on Light-Walled Rectangular Pipe and Tube from Korea is misguided.⁹² POSCO argues that the facts in Light-Walled Rectangular Pipe and

⁹⁰ See POSCO's Sales Verification Report at Exhibit 9 page 2.

⁹¹ See 19 C.F.R. §351.401(i)

⁹² See Light-Walled Rectangular Pipe and Tube from Korea.

Tube from Korea are distinguishable to the instant case. First, POSCO claims that Light-Walled Rectangular Pipe and Tube from Korea is an aberrational case with respect to date of sale. Further, POSCO argues that in Light-Walled Rectangular Pipe and Tube from Korea, the respondent's U.S. sales were strictly EP sales to local companies, unlike the CEP sales that POSCO has reported. Finally POSCO claims that Light-Walled Rectangular Pipe and Tube from Korea was an investigation in which the Department was examining the company's selling practices for the first time, whereas this is the seventeenth review of the instant case.

POSCO urges the Department to continue to use shipment date as the U.S. date of sale in the instant case.

Department Position:

We agree with POSCO. The factual record of this case shows that material terms of sale were set at the time of shipment. 19 C.F.R. § 351.401(i) states that the Department "normally will use the date of invoice" as the date of sale, unless "the Secretary is satisfied that a different date better reflects the date on which the exporter of producer established the material terms of sale." The Department has consistently used the date of shipment as the date of sale when the shipment date is before the invoice date.⁹³

It is the Department's normal practice to *not* consider dates subsequent to the date of shipment from the factory to the customer as appropriate for date of sale because once merchandise is shipped, the material terms of sale are established.⁹⁴ In the instant case, POSCO reported shipment date as the date of sale.⁹⁵ POSCO provided documentation showing that the material terms of sale we established before issuing an invoice to the customer.⁹⁶

Moreover, the underlying commercial transactions for POSCO in this review are consistent with a clear and long standing business practice in this industry.⁹⁷ All four respondents in this review produce CORE in Korea and ship it directly to U.S. customers. Each of these companies has a U.S. subsidiary that deals directly with the customer and issues the commercial invoice, even though in all instances the material terms are established by a variety of means at the time of shipment.⁹⁸ In addition, HYSCO has reported ship date as date of sale consistently in previous reviews which the Department has accepted.⁹⁹

Thus, in the instant review, we find that the date of shipment is the most appropriate date of sale for POSCO's U.S. sales.

⁹³ See Stainless Steel Bar from Japan at comment 1; CORE 15 at comment 5; CORE 14 at comment 18.

⁹⁴ See Hot-Rolled from Brazil at Comment 5.

⁹⁵ See Response of POSCO to Section A of the Department's October 29, 2010 Questionnaire, dated December 20, 2010, (POSCO's QRA), at page A – 23.

⁹⁶ See POSCO's Response to the Department's April 6, 2011, Supplemental Sections A – C Questionnaire, dated May 4, 2011, at exhibit 4.

⁹⁷ See CORE 15 at comment 5; CORE 14 at comment 18.

⁹⁸ See e.g. POSCO's QRA at A – 18; HYSCO's QRA at A – 21; Union's QRA at 15; Response of Dongbu to Section A of the Department's October 29, 2010 Questionnaire, dated December 20, 2010, at 16.

⁹⁹ See CORE 15 at comment 5; CORE 14 at comment 18.

UNION

Comment 7: Date of Sale for U.S. Sales

U.S. Steel argues that the Department should use the invoice date as the date of sale for Union's back-to-back CEP sales in the United States. U.S. Steel states that under the Department's regulations, the invoice date is the presumptive date of sale.¹⁰⁰ U.S. Steel further argues that a party proposing to use a different date as the date of sale must show that its proposed date better reflects the date on which the material terms of sale are established.¹⁰¹ U.S. Steel states that in the Preliminary Results, the Department used the date of shipment from Korea as the date of sale for Union's back-to-back CEP sales. U.S. Steel asserts that frequently, there were significant changes to the material terms of sale for Union's back-to-back sales between the date of shipment from Korea and the date on which the invoice was issued to the customer. U.S. Steel asserts that in cases where the material terms of sale are established after the shipment date, the Department has consistently determined the date of sale to be after the shipment date. In this particular instance, U.S. Steel asserts that the Department should use Union's U.S. sales affiliate, Dongkuk International, Inc. (DKA) invoice date as the date of sale for all CEP sales.

Although Union's initial response to the Department's questionnaire indicate the material terms are set at time of shipment, U.S. Steel argues that Union's response to the Department's July 9, 2011, supplemental questionnaire show that the material terms of sale change after the shipment for a particular sale. (U.S. Steel description is primarily proprietary in nature in which they reference Union's July 14, 2011 supplemental response in their case brief at pages 3-5). Therefore, U.S. Steel contends that if the material terms changed for this sale, then it is likely that more changes to the material terms occurred for additional back-to-back sales. U.S. Steel cites to Comment 1 of the Issues and Decision Memorandum in Circular Welded Carbon Steel Pipes and Tubes From Taiwan: Final Results of Antidumping Duty Administrative Review, 75 FR 62366 (October 8, 2010) (Steel Pipe and Tubes from Taiwan).

U.S. Steel contends that the circumstances surrounding Union's U.S. sales from inventory further support using the date of DKA's invoice as the date of sale for Union's back-to-back sales. U.S. Steel maintains that every one of Union's sales from inventory was originally a back-to-back sale where the material terms of sale changed after Union shipped the merchandise to the U.S. Therefore, it is appropriate to use the invoice date as the date of sale for Union's back-to-back CEP sales to the U.S. market.

Furthermore, U.S. Steel argues that the Department should not assume that the date of shipment is the date on which the material terms of sale are established. U.S. Steel argues that the Department flatly rejected comments to use shipment date as the presumptive date of sale.¹⁰² In particular, U.S. Steel cites to a review where the Department found that there were instances where after the merchandise had been shipped from the home country, the U.S. affiliate would

¹⁰⁰ See 19 C.F.R. §351.401(i).

¹⁰¹ See Allied Tube & Conduit Corp. v. United States, 127 F.Supp. 2d 207, 219 (CIT 2000).

¹⁰² See Antidumping Duties: Countervailing Duties: Final Rule, 62 FR 27296, 27349 (May 19, 1997) (Final Rule).

sell merchandise that had been ordered by one customer to a completely different customer.¹⁰³ Therefore, U.S. Steel reasons that it is appropriate to use the date that DKA issued the invoice to the U.S. customer.

Union states that the Department correctly used the date of shipment from Korea as the date of sale for Union's back-to-back CEP sales. Union maintains that the record evidence that U.S. Steel cites to showing that there were changes to the material terms of sale after shipment is a single sale, and not indicative of Union's longstanding and typical practice. Union urges the Department to use the date of the amended sales contract as the date of sale for the particular sale referenced by U.S. Steel, because the material terms of sale are established on a date other than the date of invoice.¹⁰⁴ Furthermore, Union maintains that consistent with previous reviews, record evidence shows that it is Union's standard business practice that the material terms of sale do not change after shipment of the finished goods from Union's factory in Korea. Union asserts that the Court of International Trade has found that the Department's date of sale analysis does not and should not hinge on a single change in price or quantity without regard for other relevant facts.¹⁰⁵

Union contends that the circumstances behind their back-to-back sales were generally consistent with the exception of this single example. For this one instance, Union explains that the U.S. customer amended the order when the shipment was delayed, reducing the quantity for one item, and adding a new item, and the prices for the three original items in the order were changed. However, Union asserts that this was a highly unusual event and cannot be considered typical of Union's back-to-back CEP sales. Moreover, Union points out that the material terms of sale are fixed in examples provided to the Department in Exhibits C-50 and C-52 of the July 14, 2011, supplemental response. In addition, Union argues that the Department recognized this practice, in previous reviews, of using shipment date from Korea rather than invoice date of the U.S. affiliate for Union's back-to-back CEP sales.¹⁰⁶

Union argues that the CIT's decision in Nucor Corp. is relevant to Union's point that a single sale should not result in a change in the long-standing date of sale methodology.¹⁰⁷ Union reasons that this situation is similar as in Nucor Corp. and that the one aberrational sale identified by U.S. Steel does not warrant a wholesale change to the date of sale for all of Union's sales.¹⁰⁸ Union contends that "the date of sale determination should not be changed from review to review

¹⁰³ See Carbon and Alloy Steel Wire Rod From Trinidad and Tobago: Final Results of Antidumping Duty Administrative Review, 72 FR 62824 (November 7, 2007) at pages 5-6 of the Issues and Decision Memorandum (Wire Rod from Trinidad and Tobago).

¹⁰⁴ See Final Rule, 62 FR 27296, 27349 (May 19, 1997); See also Nucor Corp. v United States, 612 F. Supp 2d 1264, 1304 (CIT 2009). (Nucor Corp.).

¹⁰⁵ See Nucor Corp.

¹⁰⁶ See Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products From Korea: Final Results of Antidumping Duty Administrative Reviews, 63 FR 13170, 13172-13173 (March 18, 1998); see also Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products From Korea: Final Results of Antidumping Duty Administrative Reviews, 64 FR 12927, 12935 (March 16, 1999) at Comment 4.

¹⁰⁷ See Nucor Corp. v United States, 612 F. Supp 2d 1264, 1304 (CIT 2009).

¹⁰⁸ See id.

without evidence of changes in a company's business or marketing practice.”¹⁰⁹ For the particular sale identified by U.S. Steel, Union contends that the Department should use the date of the amended contract as the date of sale because that is the date when the price was formally fixed., while the quantity was set when the merchandise was shipped from Korea.

Union maintains that the circumstances surrounding their U.S. sales from inventory do not support using DKA's invoice date as date of sale for its back-to-back sales. Union claims that in each of those cases, the U.S. customers refused to take delivery of previously confirmed orders when the merchandise reached the U.S. Union contends that DKA was forced to warehouse this merchandise and sell it at a later date. Union asserts that they were cancelled back-to-back sales that were subsequently sold pursuant to new sales contracts under a different sales channel. Thus, Union maintains that it properly reported DKA's invoice date as date of sale for its CEP inventory sales, and shipment date for its back-to-back sales.

Department Position:

Although the Department typically uses the invoice date as the date of sale, the regulations permit the Department to use other dates where the material terms of sale are established at a different point in time.¹¹⁰ In this instance, we have used the shipment date as the date of sale for Union's back-to-back CEP sales because it is Union's standard business practice that the material terms of sale do not change after shipment of the finished goods from Union's factory in Korea.¹¹¹ Furthermore, as noted in Union's rebuttal brief, the Department began to use the shipment date as the date of sale for the back-to-back sales in the third review.¹¹² In addition, we provided additional explanation as to why the Department used the shipment date as the date of sale in the fourth review.¹¹³

Although we have made decisions to use the invoice date as the date of sale in reviews, such as in Steel Pipe and Tubes from Taiwan, this is not always the case. In Steel Pipe and Tubes from Taiwan, the material terms of sale were changing not only after the reported initial contract dates, but also after the reported final contract dates.¹¹⁴ Therefore, in those cases, we decided to use the invoice date as the date of sale.¹¹⁵ In Union's case, we did not use the sales contract date but instead used the shipment date which is sometimes two or three months after the date of the sales contract and is the date that best reflects when the material terms were established.¹¹⁶ Therefore, we decided to use the shipment date as the date of sale because this is the point in time where the material terms of sale are established.

¹⁰⁹ See Oil Country Tubular Goods From Korea; Final Results of Antidumping Duty Administrative Review, 65 FR 13364 (March 13, 2000), and accompanying Issues and Decision Memorandum at Comment 1.

¹¹⁰ See 19 C.F.R. §351.401(i).

¹¹¹ See July 14, 2011, Supplemental Response at 5 and Exhibits C-50 and C-52.

¹¹² See Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products From Korea: Final Results of Antidumping Duty Administrative Reviews, 63 FR 13170, 13172-13173 (March 18, 1998).

¹¹³ See Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products From Korea: Final Results of Antidumping Duty Administrative Reviews, 64 FR 12927, 12935 (March 16, 1999) at Comment 4.

¹¹⁴ See Steel Pipe and Tubes from Taiwan at Comment 1.

¹¹⁵ See id.

¹¹⁶ See Union's July 14, 2011, Supplemental Response at 5 and Exhibits C-50 and C-52.

In Union's Section A Response, Union explains, "The contracted quantity tends to be in round numbers and never precisely equals the quantity that is ultimately shipped. In fact, there can be significant differences between the contracted quantities and the quantities actually shipped for U.S. sales." As noted above, the Department uses the shipment date as the date of sale for the back-to-back sales, because this is when the material terms of sale are set for the back-to-back sales. In addition, we requested documentation which supports Union's normal practice of making back-to-back sales.¹¹⁷ These documents indicate that the price and quantity of merchandise remain the same from the time of shipment to the time of issuance of the invoice by Union's U.S. affiliate. Moreover, the sale questioned by U.S. Steel is a small portion of the total back-to-back sales.¹¹⁸ Furthermore, the record evidence demonstrates that all of the other sales had no changes after shipment and were reported consistent with their normal selling practices.

For these reasons, we have used shipment date as the date of sale for Union's back-to-back sales. As for the particular sale questioned by U.S. Steel, we agree with Union that the sale in question is unique. We have addressed the unique details of this sale in the proprietary version of the final calculation memo which is dated concurrently with this notice.

Therefore, we find that it is appropriate to change the date of sale for the sale in which the sales contract was amended for this particular situation. However, we do not find that it is appropriate to use DKA's invoice date as the date of sale as suggested by U.S. Steel or to change the date of sale methodology for all of the other back-to-back sales to the date of DKA's invoice. For this particular sale, the amended contract was issued shortly after the shipment was made. At the time the amended contract was issued, the material terms of sale were established which makes it the appropriate date of sale for this particular sale.

Comment 8: Missing Payment Dates

U.S. Steel asserts that there are sales in Union's U.S. sales dataset for which no date of payment is reported. U.S. Steel maintains that the Department's practice, where no date of payment is reported, is to assign the latest possible date that the respondent could have submitted information regarding the date that payment was made. U.S. Steel cites to the Notice of Final Results of Antidumping Duty Administrative Review: Carbon and Certain Alloy Steel Wire Rod From Mexico, 70 FR 25809, 25811 (May 16, 2005) (Steel Wire Rod From Mexico). U.S. Steel states that Union submitted its last supplemental questionnaire response to the Department on July 21, 2011. Thus, U.S. Steel reasons that the Department should assign the date of July 21, 2011 as the date of payment, and use this date to calculate the credit expense, for those sales which are missing a date of payment in Unions U.S. sales dataset.

Department Position:

We agree with U.S. Steel and are recalculating credit expense where there is a missing payment date. In the Department's March 24, 2011, supplemental questionnaire, we requested

¹¹⁷ See Exhibits C-50 and C-52 of Union's July 14, 2011, Supplemental Response at Exhibits C-50 and C-52.

¹¹⁸ See Union's Rebuttal Brief, January 17, 2012, at 4.

Union to report the payment dates for the sales where payment was not reported. In Union's April 21, 2011, supplemental response, Union stated that certain sales were still unpaid. In instances where there are missing payment dates, we have used the date the Union submitted its last supplemental questionnaire response to calculate credit expense for sales with missing payment dates. Use of this date is consistent with Steel Wire Rod From Mexico, and Chlorinated Isocyanurates From Spain: Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination, 69 FR 75902 (December 20, 2004) (Chlorinated Isocyanurates From Spain). In Chlorinated Isocyanurates From Spain, we stated, "we recalculated credit expense for two home market sales by assigning the date of the Delsa's last supplemental response (December 2, 2004) as the payment date for these unpaid sales." This decision was unchanged in the final determination.¹¹⁹ Therefore, for this review, we are assigning July 21, 2011, as the date of payment for missing payment dates and recalculating credit expense for these sales.

DONGBU

Comment 9: Treatment of Home Market Billing Adjustments

Dongbu claims that the Department inadvertently added the per-ton amount reported in field BILLADJH to field GRSUPR1H in the Preliminary Results.¹²⁰ Dongbu states that their reported billing adjustments were made to certain home market sales to correct errors to the prices printed on the original invoices.¹²¹ Dongbu states that the billing adjustments were taken into account in their reported gross price in field GRSUPR1H.¹²² Dongbu states that they reported the amount of the adjustment in field BILLADJH for reference purposes only.¹²³ Dongbu reasons that because the reported GRSUPR1H already accounts for the billing adjustments, the Department should recalculate Dongbu's dumping margin for the final results without adding field BILLADJH to field GRSUPR1H.

Nucor argues that the Department should continue to add the field BILLADJH to field GRSUPR1H for the purposes of the final results. Nucor maintains that pursuant to 19 U.S.C. §1677f(a)(2) the Department may decline to take into account adjustments which are insignificant in relation to the price or value of the merchandise. Nucor claims that the effect of recalculating Dongbu's margin without adding BILLADJH to GRSUPR1H is an insignificant adjustment pursuant 19 C.F.R. § 351.413.

¹¹⁹ See Chlorinated Isocyanurates From Spain: Notice of Final Determination of Sales at Less Than Fair Value, 70 FR 24506 (May 10, 2005).

¹²⁰ See Dongbu Preliminary Calculation Memorandum at 5 and section 4-B-ii of the comparison market program.

¹²¹ See Dongbu's Section B Antidumping Duty Questionnaire Response, dated January 14, 2011 (Dongbu QRB), at 28.

¹²² See id.

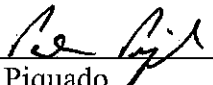
¹²³ See Dongbu QRB at 29.

Department Position:

We agree with Dongbu. Our verification findings confirm that Dongbu's reported GRSUPR1 has already accounted for the billing adjustments¹²⁴ and therefore, we have recalculated Dongbu's dumping margin for the final results by setting the field BILLADJH to "0" to nullify its impact on fields CMGUPADJ and CMNETPRI.¹²⁵

Recommendation:

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



Paul Piquado
Assistant Secretary
for Import Administration

MARCH 2012

Date

¹²⁴ See Dongbu's Sales Verification Report at 16 and Verification Exhibit SV-7.

¹²⁵ See Memorandum to File from Cindy Robinson through James Terpstra Re: Calculation Memorandum for Dongbu Steel; Final Results in the 17th Administrative Review on Corrosion-Resistant Carbon Steel Flat Products from Korea (March 4, 2012) (Dongbu Final Calculation Memorandum), sections 4-B-i and 4-B-ii of the comparison market program.