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February 10, 2011

MEMORANDUM TO: Ronald K. Lorentzen
Deputy Assistant Secretary
for Import Administration

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

SUBJECT: Issues and Decision Memorandum for the Final Results of the Antidumping Duty Administrative Review of Light-Walled Rectangular Pipe and Tube from Mexico

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SUMMARY:

We have analyzed the case briefs and rebuttal briefs of interested parties in the administrative review of the antidumping duty order on light-walled rectangular pipe and tube (LWRPT) from Mexico. As a result of our analysis, we have made changes to the margin calculation as discussed below. We recommend that you approve the Department of Commerce's positions described in the "Discussion of Interested Party Comments" section of this Issues and Decision Memorandum. Below is the complete list of the issues in this administrative review on which we received comments and rebuttal comments from parties:

1. Offsetting of Negative Margins
2. Inclusion of Sales Entered After Review Period
3. Revenue Offset to General and Administrative Expenses for a Special Project
4. Clarification to Draft Liquidation Instructions for First Review Period
5. Clerical Errors
    A. Currency Conversion of Movement Expenses
    B. Capping of Sales-Related Revenues
    C. Indexing of the Department's Cost Adjustments and Scrap Cost and Revenue on a Quarterly Basis

BACKGROUND:

On September 13, 2010, the Department of Commerce (the Department) published the preliminary results of the first administrative review of the antidumping duty order on LWRPT from Mexico. *See Light-Walled Rectangular Pipe and Tube from Mexico: Preliminary Results of Antidumping Duty Administrative Review*, 75 FR 55559 (September 13, 2010) (*Preliminary*

Results). The merchandise covered by the order is LWRPT from Mexico, as described in the "Scope of the Order" section in the *Federal Register* notice of the final results. The period of review (POR) is January 30, 2008, through July 31, 2009. This review covers nine manufacturers/exporters but only two companies, Regiomontana de Perfiles y Tubos S.A. de C.V. (Regiopytsa) and Maquilacero S.A. de C.V. (Maquilacero), were selected for examination of their individual sales.

In the *Preliminary Results*, we invited parties to comment. *See Preliminary Results* at 55567. In response, Nacional de Acero S.A. de C.V. (Nacional) submitted a case brief on October 13, 2010. *See* Letter from Nacional titled, "Light-Walled Rectangular Pipe and Tube from Mexico: Case Brief of Nacional de Acero S.A. de C.V." (Nacional's Case Brief). Also on October 13, 2010, Regiopytsa submitted a case brief, *see* Letter titled, "Light-Walled Rectangular Pipe and Tube from Mexico: Case Brief of Regiomontana de Perfiles y Tubos S.A. de C.V." (Regiopytsa's Case Brief)). On October 13, 2010, Maquilacero submitted a case brief, *see* Letter titled, "Light-Walled Rectangular Pipe and Tube from Mexico; Case Brief of Maquilacero S.A. de C.V." (Maquilacero's Case Brief) and on October 18, 2010, Atlas Tube, Bull Moose Tube Company, and Searing Industries, Inc. (domestic interested parties) submitted a letter to the Department requesting that the Department reject the case brief filed on behalf of Regiopytsa on the basis of improper service. *See* Letter from domestic interested parties dated October 18, 2010. Also on October 18, 2010, the domestic interested parties filed a brief rebutting Maquilacero's Case Brief, as did Ternium Mexico S.A. de C.V. (Ternium) and its affiliates Hylsa S.A. de C.V. (Hylsa), Galvak S.A. de C.V. (Galvak), and Industrias Monterrey S.A. de C.V. (IMSA) (Ternium's Rebuttal Brief). *See* Letter from Ternium dated October 18, 2010. On October 25, 2010, the Department notified all interested parties of its acceptance of Regiopytsa's Case Brief and provided them with additional time to submit rebuttal comments to the brief (*i.e.*, by the close of business on Monday, November 1, 2010). On October 27, 2010, domestic interested parties submitted a rebuttal brief.

DISCUSSION OF INTERESTED PARTY COMMENTS:

1. Offsetting of Negative Margins

Comment 1: Maquilacero comments that the preliminary results disclosed several instances where the comparison of its net U.S. prices to the most contemporaneous, monthly-average normal value resulted in negative dumping margins, which the margin-calculation program set to zero before calculating the overall weighted-average dumping margin for the company. Maquilacero adds that employing the "zeroing" practice in administrative reviews is not required by statute and has been found to be inconsistent with the World Trade Organization (WTO) Anti-Dumping Agreement. It notes that both the U.S. Court of Appeals of the Federal Circuit (Federal Circuit) and the U.S. Court of International Trade (CIT) have found that the relevant provisions of the Tariff Act of 1930, as amended (the Act), do not compel the practice, citing *United States Steel Corp. v. United States*, No. 2009-1572, 2010 WL 3835098, at *8 (Fed Cir. 2010); *Timken Co. v. United States*, 354 F.3d 1334, 1341-42 (Fed. Cir. 2004) (*Timken*); and *SNR Roulements v. United States*, 341 F. Supp. 2d 1334, 1345 (CIT 2004). The respondent also observes that zeroing has been found to be inconsistent with WTO rules as interpreted in several decisions issued by the WTO Appellate Body; Maquilacero cites *European Communities –*

Antidumping Duties On Imports of Cotton-Type Bed Linens From India, WT/DS141/AB/R (March 1, 2001); *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R, AB-2004-2 (August 31, 2004); *United States – Laws, Regulations and Methodology for Calculating Dumping Margins*, WT/DS294/AB/R (May 9, 2006) (*U.S. Zeroing (EC)*); and *United States – Measures relating to Zeroing and Sunset Reviews,* WT/DS322/AB/R (January 9, 2007) (*U.S. Zeroing (Japan)*).

Maquilacero asserts that, in *U.S. Zeroing (EC),* the WTO Appellate Body specifically found that zeroing is not permissible in administrative reviews and that, in *U.S. Zeroing (Japan),* the Appellate Body found the practice as applied in investigations, administrative reviews, new shipper reviews, and sunset reviews to be inconsistent with WTO rules. *See U.S. Zeroing (Japan)* at paragraph 190. It notes that, more recently, the Appellate Body determined that the U.S.'s zeroing practice in administrative reviews is inconsistent with its WTO obligations in *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R (May 20, 2008) (*U.S. Stainless Steel (Mexico)*). Maquilacero argues that, because the methodology described in *U.S. Zeroing (Japan)* and *U.S. Stainless Steel (Mexico)* is the identical methodology used by the Department in the preliminary results of the current review, the Department acted in a manner that was inconsistent with the United States' obligations under the WTO Anti-Dumping Agreement.

Maquilacero recognizes that the Department has refused to reconsider its position on zeroing in a number of decisions. It notes, however, that the Department has adopted a new methodology which substantially limits zeroing in investigations. It adds that, at the February 20, 2007, meeting of the WTO Dispute Settlement Body with regard to *U.S. Zeroing (Japan)*, the United States agreed to implement that decision and that, on numerous other occasions the United States has publicly stated its intention to implement the WTO decisions but that WTO proceedings against the United States on zeroing remain ongoing.

In its October 13, 2010, case brief, Nacional endorses and incorporates Maquilacero's arguments with respect to the use of zeroing in calculating Maquilacero's aggregate margin for the final results.

Domestic interested parties rebut that, as on numerous occasions, the Department recently affirmed its zeroing practice for administrative reviews in *Certain Welded Carbon Steel Pipe and Tube From Turkey: Notice of Final Antidumping Duty Administrative Review,* 75 FR 64250 (October 19, 2010), and accompanying Issues and Decision Memorandum at Comment 1. Domestic interested parties assert that Maquilacero provided no reason in its case brief as to why the practice should be altered in the current review; they counter that the phrase "the amount by which the normal value exceeds export price," of section 771(35)(A) of the Act, does indeed require the dumping margin to be a positive number. Domestic interested parties add that, even though the statute does not require the zeroing of individual margins, it does require the Department to exclude any negative margins and that, as an alternative to zeroing, the Department could simply drop negative margins from consideration in the numerator of the weighted-average dumping margin ratio.

Department's Position: We have not changed our methodology of calculating Maquilacero's weighted-average dumping margin for these final results.

Section 771(35)(A) of the Act defines "dumping margin" as the "amount by which the normal value exceeds the export price and constructed export price of the subject merchandise." Outside the context of antidumping investigations involving average-to-average comparisons, the Department interprets this statutory definition to mean that a dumping margin exists only when normal value is greater than export price (EP) or constructed export price (CEP). As no dumping margins exist with respect to sales where normal value is equal to or less than EP or CEP, the Department will not permit these non-dumped sales to offset the amount of dumping found with respect to other sales. The Federal Circuit has also held that this is a reasonable interpretation of the statute. *See Timken*, 354 F.3d at 1334, 1342; *see also Corus Staal v. United* States, 395 F.3d 1343, 1347 (Fed. Cir. 2005) (*Corus Staal I*), 395 F.3d at 1347, *cert*. *denied*; 123 S. Ct. 1023, 163 L. Ed. 2d 853 (January 9, 2006).

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 Department applies these sections by aggregating all individual dumping margins, each of which is determined by the amount by which normal value exceeds EP or CEP, and dividing this amount by the value of all sales. The use of the term aggregate dumping margins in section 771(35)(B) of the Act is consistent with the Department's interpretation of the singular "dumping margin" in section 771(35)(A) of the Act as applied on a comparison-specific level and not on an aggregate basis. At no stage of the process is the amount by which EP or CEP exceeds the normal value permitted to offset or cancel out the dumping margins found on other sales.

This does not mean that non-dumped sales are disregarded in calculating the weighted-average dumping margin. It is important to note that the weighted-average margin will reflect any non-dumped merchandise examined during the POR; the value of such sales is included in the denominator of the weighted-average dumping margin, while no dumping amount for non-dumped merchandise is included in the numerator. Thus, a greater amount of non-dumped merchandise results in a lower weighted-average margin.

The Federal 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." *See Timken*, 354 F.3d at 1343. As reflected in that opinion, the issue of so-called masked dumping was part of the policy reason for interpreting the statute in the manner interpreted 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. *See, e.g., Timken*, 354 F.3d at 1343; *Corus Staal I*, 395 F.3d 1343; *Corus Staal BV v. United States*¸ 502 F.3d 1370, 1375 (Fed. Cir. 2007) (*Corus Staal II*); and *NSK Ltd. v. United States*, 510 F.3d 1375 (Fed. Cir. 2007) (*NSK*).

Maquilacero has cited WTO dispute-settlement reports (WTO reports) finding the denial of offsets by the United States to be inconsistent with the WTO Antidumping Agreement. As an initial matter, 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 Uruguay Round Agreements Act (URAA). *See Corus Staal I*, 395 F.3d at 1347-49; *accord Corus Staal II*, 502 F.3d at 1375; *NSK*, 510 F.3d at 1375. Congress has adopted an explicit statutory scheme in the URAA for addressing the implementation of WTO reports. *See*, *e.g.*, 19 U.S.C. 3538. As is clear from the discretionary nature of this scheme, Congress did not intend for WTO reports to automatically trump the exercise of the Department's discretion in applying the statute. *See* 19 U.S.C. 3538(b)(4) (implementation of WTO reports is discretionary). Moreover, as part of the URAA process, Congress has provided a procedure through which the Department may change a regulation or practice in response to WTO reports. *See* 19 U.S.C. 3533(g); *see, e.g., Antidumping Proceedings: Calculation of the Weighted-Averaged Dumping Margin During an Antidumping Investigation; Final Modification* (*Zeroing Notice*), 71 FR 77722, 77724 (December 27, 2006). With regard to the denial of offsets in administrative reviews, the Department has proposed the adoption of a new methodology.[1]

With respect to *US-Zeroing* (*EC*), the Department has modified its calculation of weighted-average dumping margins when using average-to-average comparisons in antidumping investigations. *See Zeroing Notice*. In doing so, the Department declined to adopt any other modifications concerning any other methodology or type of proceeding, such as administrative reviews. *Id.* at 71 FR 77724.

With respect to *US-Zeroing* (*Japan*), the steps taken in response to these reports do not require a change to the Department's approach of calculating weighted-average dumping margins in the instant administrative review.

Maquilacero's reliance upon the NAFTA panel in *U.S. Stainless Steel (Mexico)* panel is misplaced. The Department notes that this decision is not final and that NAFTA decisions are not precedential. Additionally, this panel fundamentally misinterpreted U.S. law and failed to follow binding Federal Circuit precedent on the issue of zeroing. Furthermore, the CIT, in *NSK Ltd. v. United States*, Slip Op. 10-117 *7 (October 15, 2010) recently addressed this panel's decision (where the CIT did not consider that there exists any "split" within Federal Circuit

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[1] We note that the United States has initiated the process set forth in section 123 of the URAA for responding to the WTO findings cited by Maquilacero. *See Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings – Proposed Rule; Proposed Modification; Request for Comments*, 75 FR 81533 (December 28, 2010). Section 123(g) specifies that the regulation or practice that the WTO panel or Appellate Body has found inconsistent with the WTO Agreements "*may not* be amended, rescinded, or otherwise modified . . . unless and until" the elaborate procedures detailed in the subsection have been complied with. 19 U.S.C. 3533(g)(1) (emphasis added). The statute requires the United States Trade Representative to consult with the appropriate congressional committees, agency and department heads and private sector advisory committees, and to provide an opportunity for public comments, before determining whether or how to respond to a WTO report. 19 U.S.C. 3533(g)(1)(A)-(E). In addition to these requirements, Congress provides that no regulation or practice may be amended, rescinded or otherwise modified unless and until, the final rule or other modification has been published in the *Federal Register*. 19 U.S.C. 3533(g)(1)(F). Accordingly, the United States is responding to the WTO reports pursuant to a specific statutory process under section 123 of the URAA. The Department, therefore, declines Maquilacero's invitation in the context of this administrative review to short-circuit or otherwise prejudge the outcome of that statutory process.

jurisprudence that would have enabled it to depart from the well-established precedent that is the binding law of the United States on the question of whether zeroing is permitted in administrative reviews) and declined to follow the panel's decision in light of a clear binding Federal Circuit precedent to the contrary.

For all these reasons, the various WTO Appellate Body reports regarding "zeroing" do not establish whether the Department's denial of offsets in this administrative review is consistent with U.S. law. Accordingly, and consistent with the Department's interpretation of the Act described above, in the event that any of the export transactions examined in this review are found to exceed normal value, the amount by which the price exceeds normal value will not offset the dumping found in respect of other transactions.

2. Inclusion of Sales Entered After Review Period

Comment 2: Regiopytsa alleges that in calculating the preliminary margin for this review, the Department included fourteen sales of subject merchandise that entered the United States *after* the conclusion of the review period (*i.e.*, August 3, 2009, three days after the POR concluded). Regiopytsa contends that in section C of its antidumping duty questionnaire, the Department instructed that Regiopytsa report only sales that *entered* the United States during the POR. Regiopytsa cites part III of the Department's section C questionnaire which pertained to the submission of the U.S. sales file which stated that Regiopytsa was to, "{r}eport each U.S. sale of merchandise *entered for consumption during the POR*." Because these fourteen sales entered the United States after July 31, 2009, Regiopytsa argues, they are outside the scope of this review and thus should not have been included in the Department's analysis.

In its Case Brief, Nacional endorses and incorporates Regiopytsa's arguments with respect to the inclusion of "post-review" sales for the final results.

Department's Position: We agree with Regiopysta and have excluded the aforementioned fourteen sales from our analysis. The Act states that "the administering authority shall determine (i) the normal value and export price (or constructed export price) of each entry of the subject merchandise, and (ii) the dumping margin for each such entry." *See* section 751(a)(2)(A) of the Act.

Where entry data are available and the entries can be linked to the export sales, it is the Department's practice to base the universe of sales on the entry date in order to determine the normal value, the EP (or CEP), and the dumping margin for each entry. *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 the accompanying Issues and Decision Memorandum at Comment 2. *See also Certain Welded Carbon Steel Standard Pipes and Tubes From India: Final Results of Antidumping Duty Administrative Review*, 75 FR 69626 (November 15, 2010), and the accompanying Issues and Decision Memorandum at Comment 2.

Where entry data are not available, we have determined the universe of sales in another manner. Section 351.213(e)(1)(i) of the regulations permits the Department to define the universe of transactions examined during an administrative review using "entries, exports or sales of the subject merchandise" during the review period. However, evidence on the record of this administrative review indicates that the entry data are available for all sales made during the POR and that the entries can be linked with the export sales. Therefore, for the above-mentioned reasons, we are no longer including the fourteen sales of subject merchandise sold during the review period but entered in the United States after the conclusion of the review period in our margin calculations for the final results.

3. Revenue Offset to General and Administrative Expenses for a Special Project

Comment 3: Maquilacero argues that the Department erred in its preliminary results by adjusting its reported general and administrative (G&A) expense rate. According to Maquilacero, the Department should not have limited the revenue it earned from a construction project as an offset to its G&A expenses. *See* Memorandum on "Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Results – Maquilacero S.A. de C.V." from Frederick W. Mines, Accountant, to Neal M. Halper, Director, Office of Accounting, dated September 7, 2010. Maquilacero argues that the Department should allow the total revenue it earned from the construction project to offset the G&A expenses because the construction project expenses were included in the numerator of the G&A-expense rate. Maquilacero claims that the construction project was an activity which reasonably relates to its core business of manufacturing and selling pipe and tube and argues that it is the Department's practice to include, in the G&A-expense rate, expenses which relate to a company's general operations. Maquilacero cites *U.S. Steel Group a Unit of USX Corp. v. United States*, 998 F. Supp. 1151, 1154 (CIT 1998) (*U.S. Steel Group*); *Certain Frozen and Canned Warmwater Shrimp from India: Final Determination of Antidumping Duty Investigation*, 69 FR 76916 (December 23, 2004) and accompanying Issues and Decision Memorandum at Comment 16 (*Shrimp from India*); and *Rautaruukki Oy v. United States*, 19 CIT 438, 444 (1995), as evidence of this practice.

In its Case Brief, Nacional endorses and incorporates Maquilacero's arguments with respect to its claimed revenue offset for G&A expenses.

The domestic interested parties argue that no change from the *Preliminary Results* is necessary. They point out that, contrary to Maquilacero's claim, the construction project expenses were not included in the numerator of the G&A-expense rate but rather were included in the costs-of-sales (COS) denominator used in the G&A expense ratio. The domestic interested parties argue that the construction project expenses were treated as COS in Maquilacero's own books and records. They cite Maquilacero's response to its first section D supplemental questionnaire, dated June 14, 2010, at 24-25, where Maquilacero states that the cost of Maquilacero's own materials was recorded in the COS. The domestic interested parties further argue that the expenses and revenue associated with the construction project do not relate to Maquilacero's general operations but, rather, are attributable to a specific revenue-generating project. Finally, the domestic interested parties claim that the G&A-expense rate is diluted because the COS denominator includes the construction project expenses in question.

Department's Position: The Department adds the company's cost of manufacturing for the merchandise under consideration (TOTCOM) with G&A expenses, interest expenses, and shipment expenses to arrive at the product-specific cost of production (COP) and constructed value. The Department compares this COP with the home-market net sales price to determine if the merchandise is sold at below the COP (*i.e.*, the cost test).

We disagree with Maquilacero's claim that the construction project's costs are included in the numerator of G&A expense rate. Maquilacero reported the expenses and revenues of the construction project as follows: it included, in the TOTCOM of merchandise under consideration, a portion of the expenses for the construction project[2] and the entire revenue for the construction project in the numerator of the G&A expense rate.[3] In order to neutralize the effect of the construction project revenue and expenses on the cost calculation, in the *Preliminary Results*, the Department adjusted the G&A expenses reported by Maquilacero by limiting the construction project revenue in the G&A calculation to the amount of the construction project expenses Maquilacero included in the TOTCOM. For the final results, we are making a more precise calculation of this adjustment by removing all of the construction project expenses and revenues from the calculation ensuring that those expenses and revenues have no effect on the cost calculation. The construction project expenses and revenues are properly excluded from the cost calculation for the merchandise under consideration because they are neither related to the production of that merchandise nor the general operations of the company as a whole.

4. Clarification to Draft Liquidation Instructions for First Review Period

Comment 4: Maquilacero opines that the draft liquidation instructions that the Department issued for the company in its preliminary results of review should be clarified to fully reflect the detailed assessment instructions contained in the notice of those results (*see Preliminary Results* at 55568). Maquilacero notes that, in the preliminary results, the Department correctly determined that the "provisional-measures cap," set forth under section 737(a) of the Act, applied to some of Maquilacero's reviewed entries and that the antidumping duty liability for these entries should be capped at no more than the cash-deposit rate established in the preliminary determination of the less-than-fair-value (LTFV) investigation. Specifically, Maquilacero asserts that, for entries made during the cap period from January 30, 2008, through July 27, 2008, it should be entitled to a refund of the difference between the cash deposits paid on the entries, based on the cash-deposit rate set in the preliminary determination, and the amount of duties to be assessed on the entries, based on the lower assessment rate established in the antidumping duty order. In support of its claim, Maquilacero cites *Thai Pineapple Canning Indus. Corp. v. United States*, 273 F.3d 1077, 1082 (Fed. Cir. 2001) (*Thai Pineapple)*, and *Yantai Oriental Juice Co. v. United States*, 26 CIT 605, 622 (June 18, 2002) (*Yantai)*. The respondent suggests that the Department modify its draft liquidation instructions in order to clarify that this lower assessment rate is to be applied to the subject merchandise that entered during the provisional-measures period.

[2] *See* Memorandum on "Cost of Production and Constructed Value Calculation Adjustments for the Final Results – Maquilacero S.A.de C.V.", from Frederick W. Mines, Accountant, to Neal M. Halper, Director, Office of Accounting, dated February 10, 2011.
[3] *See* exhibits 13 and 15 of Maquilacero's supplemental response to section D, dated December 14, 2009.

In addition, Maquilacero suggests that the instructions be modified with respect to the "gap" period between July 28, 2008, through August 3, 2008, so that the instructions clearly state that any suspended entries of subject merchandise from this period are liquidated without regard to antidumping duties pursuant to section 703(d) of the Act. Finally, Maquilacero proposes that the draft instructions be modified to reflect the assessment language included in the *Preliminary Results* as it pertains to the period following the gap period. It observes that, on page 55568 of the notice of the results, we stated that, for entries made on or after August 4, 2008, through July 31, 2009, we would instruct CBP to assess the lesser amount of duties owed by the application of importer- or customer-specific assessment rates calculated in the final results or the estimated duties rate applied to the entries, in accordance with 19 CFR 351.212(d). Maquilacero suggests that this instruction be included in the draft liquidations instructions that the Department issues with its final results of review.

In its Case Brief, Nacional endorses and incorporates Maquilacero's arguments with respect to the clarifications of the draft liquidation instructions for the final results.

In its Rebuttal Brief, Ternium requests that, in the event the Department accepts the changes to the instructions proposed by Maquilacero, the Department applies the changes to the liquidation instructions of all respondents, including Ternium and its affiliates, Hylsa, Galvak, and IMSA. Ternium adds that, at a minimum, the instructions for itself and its affiliates should be amended to reflect Maquilacero's proposed changes with respect to the provisional-measures period and the gap period.

Department's Position: We agree with Maquilacero in part and disagree with Maquilacero in part. We agree that our instructions should be modified with respect to the "gap" period from July 28, 2008, through August 3, 2008. In the LTFV investigation, the provisional-measures period expired on July 27, 2008, pursuant to section 703(d) of the Act. We published an amended final determination for the investigation and the antidumping duty order for LWRPT from Mexico on August 5, 2008. *See Notice of Amended Final Determination of Sales at Less Than Fair Value: Light-Walled Rectangular Pipe and Tube From Mexico*, 73 FR 45400 (August 5, 2008) and *Light-Walled Rectangular Pipe and Tube From Mexico, the People's Republic of China, and the Republic of Korea: Antidumping Duty Orders; Light-Walled Rectangular Pipe and Tube from the Republic of Korea: Notice of Amended Final Determination of Sales at Less Than Fair Value*, 73 FR 45403 (August 5, 2008). Accordingly, we will add a paragraph in the draft instructions of all selected and non-selected companies where we will clarify that, for entries made during the gap period covering July 28, 2008, through August 3, 2008, CBP should terminate the suspension of liquidation and liquidate the entries without regard to antidumping duties.

We disagree, however, with Maquilacero's interpretation of section 737(a) of the Act, because it is contrary to the plain meaning of this statutory provision. Section 737 of the Act is entitled "Treatment of difference between deposit of estimated antidumping duty and final assessed duty under antidumping duty order." Subsection (a) of section 737 of the Act is entitled "Deposit of Estimated Antidumping Duty Under Section 733(d)(1)(B)." In relevant part, it provides:

> If the amount of a cash deposit, or the amount of any bond or other security, required as security for an estimated antidumping duty under section 733(d)(1)(B) is different from the amount of the antidumping duty determined under an antidumping duty order published under section 736, then the difference for entries of merchandise entered, or withdrawn from warehouse, for consumption before notice of the affirmative determination of the Commission under section 735(b) is published shall be--
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> (1) disregarded, to the extent that the cash deposit, bond, or other security is lower than the duty under the order, or
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> (2) refunded or released, to the extent that the cash deposit, bond, or other security is higher than the duty under the order.

737(a) of the Act (19 U.S.C. § 1673f(a)).

As it is clear from its title, the provision addresses the "treatment of *difference* between *deposit of estimated antidumping* duty and *final assessed duty under antidumping duty order*." (emphasis added). In this provision, the term "amount of antidumping duty determined under an antidumping duty order" refers to the "final assessed duty under antidumping duty order." In other words, this provision addresses how to treat the difference between the amount of cash deposits of estimated antidumping duty required as a security pursuant to section 733(d)(1)(B) of the Act (19 U.S.C. 1673b(d)(1)(B)) (*i.e.*, the amount based upon the Department's preliminary affirmative determination) and the final assessed duty under the antidumping duty order, which in this case, is the duty determined in this administrative review of the antidumping duty order pursuant to section 751(a)(1)(B). The cap on the assessment of antidumping duties is the amount of cash deposited (or bond posted) as security for an estimated antidumping duty. If the amount of the final antidumping duty is greater than the amount of the cash deposit, bond or other security, required under section 733(d)(1)(B) of the Act (19 U.S.C. 1673b(d)(1)(B)), the excess is disregarded or if it is less than the security deposit, the excess is refunded. In interpreting this statutory provision, the Federal Circuit reached the same conclusion as we do here:

> In other words, *the cap on the assessment of antidumping duties is the amount of cash deposited* (or bond posted) as a security for an estimated antidumping duty. (For convenience, we use the words "cash deposit" to include a bond, *see Daewoo Electronics Co. Ltd*., 6 F.3d 1511). If the *final antidumping duty* exceeds the cash deposit, the excess is disregarded; if it is less than the security deposit, the excess is refunded.

See Koyo Seiko Co, v. United States, 95 F.3d 1094, 1098 (Fed. Cir. 1996) (emphasis added). The Federal Circuit further explained that Congress by a clear and unambiguous language "provided a cap conditioned and based upon the amount of the 'cash deposit collected as security for an estimated antidumping duty.'" *Id*. Accordingly, the provisional duty cap equals the amount of the cash deposit *collected* as security for an estimated antidumping duty.

The legislative history of this provision also supports the view that "the duty under the order" refers to "final assessed duty" and the provision addresses the treatment between the cash deposits collected and the amount of final assessed duty. The House Report explains that:

> Section 737 changes the present law to conform it to the international agreement by requiring that the difference between a cash deposit *collected* as a security on an entry of merchandise subject to a notice of suspension of liquidation under 733(d) and *the amount of the duty finally assessed* must be disregarded if the deposit is less, and refunded if the deposit is greater, than the amount finally assessed.

H.R. Rep. No. 317, 96th Cong., 1st Sess. 70 (1979) (emphasis added).

This interpretation is also reflected in the Department's regulations, 19 C.F.R. 351.212(d), which provides in relevant part:

> If the amount of duties that would be assessed by applying the rates included in the Secretary's affirmative preliminary determination or affirmative final antidumping or countervailing duty determination ("provisional duties") is different than the amount of duties that would be assessed by applying the assessment rate under paragraphs (b)(1) and (b)(2) of this section ("final duties"), the Secretary will instruct the Customs Service to disregard the difference to the extent that the provisional duties are less than the final duties, and to assess antidumping or countervailing duties at the assessment rate if the provisional duties exceed the final duties.

In turn, paragraphs (b)(1) and (b)(2) of section 351.212 of the Department's regulations govern the assessment of antidumping and countervailing duties in reviews of antidumping or countervailing duty orders. Accordingly, the Department would normally examine whether the rates included in the affirmative preliminary determination or affirmative final antidumping duty determination ("provisional duties") are different than the amount of final duties that would be assessed in a subsequent review of the antidumping duty order under section 351.212(b)(1) of the Department's regulations. The Preamble also confirms this view:

> Section 733(d)(2) of the Act provides that an importer of merchandise subject to an AD investigation must post bonds, cash deposits, or other security for entries of the subject merchandise between the Department's affirmative preliminary determination of sale at less than fair value and the Commission's final injury determination.
>
> Assuming that an AD order is imposed, a manufacturer or importer may request an administrative review under section 751(a) of the Act to determine the actual amount of the antidumping duties due on the sales during this period. Section 737(a)(1) of the Act provides that, if the amount of a *cash deposit collected* as security for an estimated antidumping duty is different from the amount of the antidumping duty determined in the first section 751 administrative review, then the difference shall be disregarded, to the extent that the *cash deposit collected* is

> lower than the duty determined to be due under a section 751 administrative review. This is called the provisional measures deposit cap, and applies to entries between publication of the Department's preliminary determination and the Commission's final determination of injury.

See Antidumping Duties; Countervailing Duties; Final Rule, 62 Fed. Reg. 27295, 27316 (May 19, 1997) (emphasis added).

Courts have affirmed the Department's interpretation. For example, in *Daewoo Electronics Co., Ltd. v. United States*, 13 CIT 253, 712 F.Supp. 931 (April 3, 1989) (*Daewoo*), the respondent, having received a lower rate in the preliminary determination than in the final determination of the investigation or in the final results of the first review, argued that section 737(a) limited the duties that could be assessed on entries made in the provisional-measures period to the rate it received in the preliminary determination. Some of the entries in *Daewoo* fell in between the period after the publication of our final determination and before the publication of the affirmative determination of the U.S. International Trade Commission (ITC). Thus, in keeping with our practice, we had instructed CBP to assess estimated duties for these entries at the rate established in the final determination. The CIT held that our position with regard to the application of section 737(a) was reasonable and otherwise in accordance with the law. *Daewoo* at 276. In doing so, it found that:

> . . . The Court does not agree, therefore, that Section 737(a) of the Act limits the actual assessment of antidumping duty to the preliminary rates of estimated duty. If the merchandise was entered prior to the final determination, the rates established in the ITA preliminary determination would serve as an assessment cap. Conversely, if the merchandise is entered after the preliminary rate was raised as a result of the final determination, that higher rate would serve as the limit of the actually assessed duties for all those entries which have been made prior to the final injury determination of the ITC pursuant to Section 737(a) of the Act.

Id. at 277. In later discussion, the Court noted, "the provisional nature of duties which are imposed as a result of the final determination and which also serve merely as estimated duty until the actual assessment rates are established as a result of the administrative review" and commented that the respondent's interpretation of the section 737(a) "would render meaningless the meticulous calculations required under the Act in both the final determinations of LTFV investigations and final results of the first administrative review." *Id.* at 278. *See also Koyo Seiko Co, v. United States*, 95 F.3d at 1098 (explaining that the cap on the assessment of antidumping duties is *the amount of cash deposited* (or bond posted) as a security for an estimated antidumping duty).

We agree with the courts that if the merchandise was entered prior to the final determination in the antidumping investigation, the rates established in the preliminary determination would serve as the assessment cap. We also agree with the Court that, if the merchandise is entered after the final determination by the Department but prior to the final affirmative determination by the ITC, the rate from the final determination would serve as the limit of the actually assessed duty, which have been made prior to the final injury assessment by the ITC. This view is consistent with the plain meaning of the antidumping statute, legislative history, the Department's regulations, and the case law.

We also find that *Thai Pineapple* and *Yantai* decisions do not support Maquilacero's arguments. The issue in *Thai Pineapple* was different than the issue in this case. In that case, the court addressed the issue whether or not to calculate separate dumping margins for the provisional-measures and remaining review periods. In that decision, the court mentioned that ". . . the cap provision prohibits the collection of the difference between the duty determined by the investigation and the deposited amount." *Thai Pineapple* 273 F.3d at 1086 (citing citing *Koyo*, 95 F.3d at 1098-99). In the same paragraph, however, the Federal Circuit explained what this language means: "Thus, when Commerce determines a new duty as the result of the administrative review that is higher than the deposit of the estimated duty, the difference cannot be collected, and the duty for entries during the cap period is still capped in compliance with 1673f(a)." *Thai Pineapple* 273 F.3d at 1087. This is exactly what the Department has done in this review by determining the final assessed duty and capping it at the amount of the cash deposits posted by Maquilacero.

We find that *Yantai* likewise provides no support to Maquilacero's arguments. There, the CIT found that the capping provision was not a basis for finding that the Department was legally obligated to amend a preliminary determination for correction of ministerial errors – the decision is silent as to the implementation of the capping provision. Moreover, in interpreting the antidumping statute, the Court explained that "there is a *cap on liability for payment of duties, equal to the amount of the cash deposit rate provided for by the preliminary determination*, on merchandise entered between a preliminary determination and a final determination." *Yantai*, 26 C.I.T. at 622 (emphasis added). Accordingly, we find that *Yantai* undermines Maquilacero's contention that for entries made between a preliminary determination and a final determination in the investigation, the cap should equal to something other than the amount of the cash deposit provided for by the preliminary determination.

Finally, we do not find it necessary to modify the instructions as they pertain to the entries that occurred after the publication of the affirmative injury determination by the ITC and publication of the antidumping duty order. The provisional duties cap does not apply to entries that occurred after the ITC made its final affirmative determination and the antidumping duty order was imposed. Section 737(b) of the Act unambiguously directs the Department to collect the difference between an estimated antidumping duty deposited pursuant to Section 736 of the Act and the final assessed duty under the antidumping duty order, for entries of the merchandise, or withdrawn from the warehouse, for consumption after the notice of affirmative determination of the ITC is published, to the extent that the deposit under section 736 of the Act is lower than the final assessed duty under the antidumping duty order. *See* section 737(b) of the Act. Further, upon closer review, we find that the provisions of 19 CFR 351.212(d), which we referenced in the *Preliminary Results*, do not apply to subject merchandise entered, or withdrawn from the warehouse, for consumption *after* the date of publication by the ITC of the affirmative final injury determination. *See* 19 C.F.R. 351.212(d) ("This paragraph applies to subject merchandise entered, or withdrawn from the warehouse, for consumption *before* the date of publication of the Commission's notice of an affirmative final injury determination . . . .") (emphasis added).

Accordingly, consistent with section 737(b) of the Act, the CBP will be instructed to liquidate these entries by application of the importer- or customer-specific rates calculated for the final results of review. The language in the draft instructions released with the preliminary results was appropriate as it related to these entries that occurred on and after the date when the ITC published its affirmative injury determination and should not be modified for the final results.

5. Clerical Errors

A. Currency Conversion of Movement Expenses

Comment 5: Maquilacero argues that the *Preliminary Results* contained a ministerial error in the calculation of export price for its U.S. sales. It notes that the Department adjusted export price for these sales by an amount for movement expenses that were incurred by the company in Mexico – specifically, inland freight expenses for movement of the merchandise from the plant to the border and brokerage and handling expenses incurred in the home market – but that, in doing so, the Department neglected to convert these expenses from Mexican pesos to U.S. dollars (USD) in its calculation of export price.

Maquilacero observes that it was clear from the record that existed prior to the *Preliminary Results* that the two expenses at issue had been reported in Mexican pesos. In support of its statement, it cites its narrative descriptions of the expenses in its December 8, 2009, response to section C of the Department's antidumping duty questionnaire (MCQR), an inland freight invoice that appears in exhibit 7 of that submission, a calculation worksheet of Mexican broker fees that appears in exhibit 8 of the response and, lastly, database summaries that appear in exhibit 1 of the response. Maquilacero adds that, although the Department stated its intent to convert foreign-currency amounts to USD in its *Preliminary Results* at 55567, it did not convert the amounts reported for domestic inland freight and domestic brokerage and handling in the margin-calculation program for Maquilacero, resulting in an error that caused an exponential increase in the company's dumping margin. Maquilacero thus requests that, for the final results, the Department modify the margin-calculation program so that the two expenses are correctly converted to USD amounts and the margin is recalculated using these amounts.

In its case brief, Nacional concurs that the Department's failure to convert the domestic movement expenses to USD in Maquilacero's preliminary margin-calculation program resulted in the calculation of inaccurate U.S. net prices and, consequently, an inaccurate dumping margin for that company. Like Maquilacero, Nacional cites the database summaries, provided in exhibit 1 of Maquilacero's MCQR, as an indicator that the two domestic movement expenses had been reported in Mexican pesos. It asserts that, although the Department should have converted the expenses to USD amounts in its preliminary calculations, the Department did not do so in its margin-calculation program for Maquilacero. Nacional avers that the Department should correct this programming error for the final results, so as to ensure the accurate calculation of Maquilacero's margin, which should then be applied to all companies for which sales were not individually examined.

Department's Position: We agree with Maquilacero and Nacional that the Department erred by failing to convert the amounts for domestic inland freight and domestic brokerage and handling from Mexican pesos to USD in the margin-calculation program for Maquilacero. As a result, the peso amounts for these expenses were subtracted from the U.S. price of each sale, which impacted on the calculation of Maquilacero's dumping margin.

A review of Maquilacero's MCQR shows that, in exhibit 7, the company provided the supporting documentation for its reported inland freight expenses for U.S. sales related to two invoices. This documentation consisted of an invoice from an inland freight provider, which documents that Maquilacero incurred the expense for the freight services in Mexican pesos. It also confirms that Maquilacero correctly indicated the currency in which the expense was reported in its calculation worksheet in exhibit 7, its database summary in exhibit 1 of its MCQR and its narrative description of the expense in that response. *See* Maquilacero's MCQR at 35. Maquilacero did not provide invoices for domestic brokerage and handling fees in exhibit 8 of its MCQR. However, it provided a calculation worksheet for the fees in exhibit 8 and indicated on the worksheet that the fees had been incurred in Mexican pesos. Additionally, it indicated that it had reported the fees in pesos on the database summary in exhibit 1 and in its narrative description of the expense in the response. *Id.* at 36-37. Thus, as asserted by Maquilacero and Nacional, the record does support the finding that the domestic inland freight expenses and the domestic brokerage and handling expenses were accurately reported in pesos.

In light of the record and the relevant provisions of the law, we find that a clerical error was made in the calculation of the preliminary margin for Maquilacero and, consequently, we have modified Maquilacero's margin-calculation program for the final results, so that these two domestic movement expenses are converted to USD amounts before being deducted from the U.S. price of a product. Maquilacero's revised margin will be averaged with Regiopytsa's revised margin in order to obtain the final margin for Nacional and all other companies for which sales were not individually examined in this review.

B. Capping of Sales-Related Revenues

Comment 6: Regiopytsa states that the Department has followed a practice of capping sales-related revenues to offset directly associated sales expenses. Regiopytsa claims that, due to an apparent programming error however, the Department failed to cap either interest or insurance revenue in the home market to offset their directly-related expenses. *See* Regiopytsa's Case Brief at 5-7. Regiopytsa submits that with respect to interest revenue (reported in field INTREVH), those returns correspond directly to credit expenses (reported in field CREDITH) incurred on sales and thus should be capped by such expenses. *Id*. at 5. Concurrently, Regiopytsa contends that the Department's accepted capping methodology requires that insurance revenues for home market sales (reported in field HANDCHGH) be capped by the actual insurance expenses (reported in field INSUREH) for those sales.[4] *Id*. Regiopytsa notes that, as discussed in its responses to the Department (*i.e.*, Regiopytsa's November 24, 2009, response to section B of the Department's antidumping duty questionnaire (RBQR)), it used field HANDCHGH solely to report an insurance charge[5] that customers may pay Regiopytsa to have

[4] Regiopytsa notes that the Department noted in its September 7, 2010, verification report (*see* Regiopytsa Sales Verification Report at pages 3 and 49) that the "associated field" for HANDCHGH is INSUREH.
[5] Regiopytsa notes that although the fee was reported in field HANDCHGH as a "handling charge," it in fact represents insurance revenue received by Regiopytsa. Additionally, this information was made public at page 6 of

merchandise insured during transportation from the plant to the specified place of delivery (*i.e.*, Regiopytsa permits its customers to pay a fee to receive insurance coverage under Regiopytsa's insurance policy for deliveries from the plant to the home market customer (or, in the case of U.S. sales, to the U.S. border)). *Id*.

In its Case Brief, Nacional endorses and incorporates Regiopytsa's arguments with respect to the capping of the sales-related revenues.

Department's Position: We agree with Regiopytsa. First, in order to be consistent with the Department's normal practice, we have revised our calculation to cap sales-related revenues to offset directly associated sales expenses (*i.e.*, with respect to fields INTREVH/CREDITH and INSUREH/ HANDCHGH). *See Purified Carboxymethylcellulose From the Netherlands; Preliminary Results of Antidumping Duty Administrative Review*, 75 FR 48310 (August 10, 2010), unchanged in *Purified Carboxymethylcellulose from the Netherlands: Final Results of Antidumping Duty Administrative Review*, 75 FR 77829 (December 14, 2010) (where the Department capped the amount of freight revenue permitted to offset gross unit price at no greater than the amount of corresponding inland freight expenses). In the Regiopytsa's Comparison Market Program from the *Preliminary Results*, the Department calculated the comparison-market adjusted gross unit price (CMGUPADJ) by summing all appropriate price adjustments (*i.e.*, billing adjustments (BILLADJH), HANDCHGH, and INTREVH. *See* line 1170 of the *Preliminary Results* Comparison Market Program. In doing so, we unintentionally failed to cap sales-related revenues to offset directly-associated sales expenses (*i.e.*, with respect to fields INTREVH/CREDITH and INSUREH/ HANDCHGH) by omitting certain programming language. *See* Memorandum to the File from John Drury, International Trade Compliance Analyst, through Angelica Mendoza, Program Manager, regarding "Analysis of Data Submitted by Regiomontana de Perfiles y Tubos S.A. de C.V. for the Final Results of the Antidumping DutyAdministrative Review of Light-Walled Rectangular Pipe and Tube from Mexico (A-201-836)" at 2-3 for the Department's revised programming language. For the final results of review, we have added the omitted language in order to cap these revenues.

C. Indexing of the Department's Cost Adjustment and Scrap Cost and Revenue on a Quarterly Basis

Comment 7: For the *Preliminary Results*, the Department adjusted Regiopytsa's costs to account for an unreconciled difference between the cost of manufacturing (COM) recorded in the financial statements and the costs reported to the Department. In addition, the Department revised Regiopytsa's reported scrap offset ratio. *See* Memorandum on "Cost of Production and Constructed Value Adjustments for the Preliminary Results – Regiomontana de Perfiles y Tubos S.A. de C.V.," from Stephanie C. Arthur, Senior Accountant, to Neal M. Halper, Director, Office of Accouting, dated September 7, 2010. The Department applied these adjustment ratios prior to indexing Regiopytsa's reported material coil costs.[6] Regiopytsa argues, however, that the Department should instead calculate scrap revenue, the reconciliation adjustment, and scrap cost

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Regiopytsa's Case Brief.

[6] For the *Preliminary Results*, due to the significant change in the cost of steel coil inputs, the Department employed a quarterly costing methodology and calculated an indexed, annual, weighted-average material coil cost for the POR, and then restated that annual, average material cost to each respective quarter on an equivalent basis.

(a cost field reported by respondent but not revised by the Department for the preliminary results) based on coil costs that have already been indexed in the margin program. Respondent notes that that the Department based other cost elements (*e.g.*, G&A and financial expenses) on indexed, quarterly costs and concludes that the Department should similarly base the reconciliation adjustment, scrap cost, and scrap revenue on the indexed COMs to ensure consistency.

Regiopytsa also argues that, as a consequence of applying the reconciliation adjustment and the revised scrap revenue ratio to unindexed costs in the program, control numbers (CONNUMs) that were not produced in all six quarters had scrap cost, scrap revenue, and reconciliation adjustment calculations incorrectly derived from amounts reported for that CONNUM in the earliest quarter of production, rather than from the indexed cost the Department used for quarters in which there were no production.

In its Case Brief, Nacional endorses and incorporates Regiopytsa's arguments with respect to the indexing of the cost adjustment and the scrap cost and revenue.

Domestic interested parties argue that the Department indexed costs for raw steel material inputs but appropriately did *not* index other elements of costs, including the reconciliation adjustment for the COM, scrap cost and scrap revenue, because there is no evidence that these other cost elements varied significantly during the POR.

Department's Position: Because the scrap cost, revised scrap revenue, and reconciliation adjustment ratios were calculated on the basis of historical, unindexed values from Regiopytsa's accounting records, the Department appropriately applied the ratios to the company's reported costs prior to indexing. However, while we have continued to apply the ratios to pre-indexed values, we have modified our programming language to ensure that, for CONNUMs not produced in all six quarters, the TOTCOMs properly reflect quarterly values for scrap cost, scrap revenue, and the reconciliation adjustment, rather than values from the earliest quarter of production. Specifically, we created a new net direct materials variable that is inclusive of scrap cost and the reconciliation adjustment and net of scrap revenue, all of which are based on our pre-indexed values. We subsequently indexed the new variable in the comparison-market program. For a detailed description of the programming changes, *see* Memorandum on "Cost of Production and Constructed Value Adjustments for the Final Results – Regiomontana de Perfiles y Tubos S.A. de C.V.," from Stephanie C. Arthur, Senior Accountant, to Neal M. Halper, Director, Office of Accounting, dated February 10, 2011.

RECOMMENDATION:

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

Agree____________ Disagree_____________

____
Ronald K. Lorentzen
Deputy Assistant Secretary
for Import Administration

____
Date