

DATE: June 23, 2014

MEMORANDUM TO: Paul Piquado
Assistant Secretary
for Enforcement and Compliance

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 Seamless Refined
Copper Pipe and Tube from Mexico; 2011-2012

Summary

We analyzed the case and rebuttal briefs of interested parties in the 2011-2012 administrative review of the antidumping duty order on seamless refined copper pipe and tube from Mexico. This review individually examined two mandatory respondents: GD Affiliates S. de R.L. de C.V. (Golden Dragon)¹ and Nacional de Cobre, S.A. de C.V. (Nacobre). As a result of our analysis, we have made changes to our calculation methodology from the Preliminary Results.² We recommend that you approve the positions described in the “Discussion of the Issues” section of this memorandum. Below is a complete list of the issues for which we have received comments and rebuttal comments from the interested parties.

Background

On December 24, 2013, the Department of Commerce (the Department) published the Preliminary Results of the 2011-2012 administrative review of the antidumping duty order on seamless refined copper pipe and tube from Mexico. The period of review (POR) is November 1, 2011, through October 31, 2012.

¹ The Department has previously treated GD Affiliates S. de R.L. de C.V. as part of a single entity including: 1) GD Copper Cooperatief U.A.; 2) Hong Kong GD Trading Co. Ltd.; 3) Golden Dragon Holding (Hong Kong) International, Ltd.; 4) GD Copper U.S.A. Inc.; 5) GD Affiliates Servicios S. de R.L. de C.V.; and 6) GD Affiliates S. de R.L. de C.V., which is collectively referred to as Golden Dragon. See, e.g., Seamless Refined Copper Pipe and Tube From Mexico: Final Results of Antidumping Duty New Shipper Review, 77 FR 59178 (Sept. 26, 2012), and accompanying Issues and Decision Memorandum.

² See Seamless Refined Copper Pipe and Tube From Mexico: Preliminary Results of Antidumping Duty Administrative Review; 2011-2012, 78 FR 77651 (December 24, 2013) (Preliminary Results) and accompanying Preliminary Decision Memorandum.

Margin Calculations

We calculated constructed export price (CEP) and normal value (NV) using the same methodology stated in the Preliminary Results, except as follows:

- We revised the calculation of Nacobre’s assessment rate to remove from the denominator the value of an entry which was misclassified as “type 1” (i.e., not subject to antidumping duties). See Comment 8; and
- We adjusted Nacobre’s raw material costs to account for copper hedging, tolling income, and dross recovery. See Comment 9.

Scope of the Order

For purposes of the order, the products covered are all seamless circular refined copper pipes and tubes, including redraw hollows, greater than or equal to 6 inches (152.4 mm) in length and measuring less than 12.130 inches (308.102 mm) (actual) in outside diameter (OD), regardless of wall thickness, bore (e.g., smooth, enhanced with inner grooves or ridges), manufacturing process (e.g., hot finished, cold-drawn, annealed), outer surface (e.g., plain or enhanced with grooves, ridges, fins, or gills), end finish (e.g., plain end, swaged end, flared end, expanded end, crimped end, threaded), coating (e.g., plastic, paint), insulation, attachments (e.g., plain, capped, plugged, with compression or other fitting), or physical configuration (e.g., straight, coiled, bent, wound on spools).

The scope of the order covers, but is not limited to, seamless refined copper pipe and tube produced or comparable to the American Society for Testing and Materials (ASTM) ASTM-B42, ASTM-B68, ASTM-B75, ASTM-B88, ASTM-B88M, ASTM-B188, ASTM-B251, ASTM-B251M, ASTM-B280, ASTM-B302, ASTM-B306, ASTM-359, ASTM-B743, ASTM-B819, and ASTM-B903 specifications and meeting the physical parameters described therein. Also included within the scope of the order are all sets of covered products, including “line sets” of seamless refined copper tubes (with or without fittings or insulation) suitable for connecting an outdoor air conditioner or heat pump to an indoor evaporator unit. The phrase “all sets of covered products” denotes any combination of items put up for sale that is comprised of merchandise subject to the scope.

“Refined copper” is defined as: (1) Metal containing at least 99.85 percent by weight of copper; or (2) metal containing at least 97.5 percent by weight of copper, provided that the content by weight of any other element does not exceed the following limits:

<u>ELEMENT</u>	<u>LIMITING CONTENT PERCENT BY WEIGHT</u>
Ag - Silver	0.25
As - Arsenic	0.5
Cd - Cadmium	1.3
Cr - Chromium	1.4
Mg - Magnesium	0.8
Pb - Lead	1.5

S - Sulfur	0.7
Sn - Tin	0.8
Te - Tellurium	0.8
Zn - Zinc	1.0
Zr - Zirconium	0.3
Other elements (each)	0.3

Excluded from the scope of the order are all seamless circular hollows of refined copper less than 12 inches in length whose OD (actual) exceeds its length. The products subject to the order are currently classifiable under subheadings 7411.10.1030 and 7411.10.1090 of the Harmonized Tariff Schedule of the United States (HTSUS). Products subject to the order may also enter under HTSUS subheadings 7407.10.1500, 7419.99.5050, 8415.90.8065, and 8415.90.8085. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of the order is dispositive.

Discussion of the Issues

Comment 1: *Legal Authority to Consider an Alternative Comparison Method in an Administrative Review*

In the Preliminary Results, the Department applied a “differential pricing” analysis to determine whether to make average-to-average (A-to-A) or average-to-transaction (A-to-T) comparisons in its margin calculations. As a result of this analysis, we found that 70.33 percent of Golden Dragon’s U.S. sales, and 49.53 percent of Nacobre’s U.S. sales, passed the “Cohen’s *d*” test, which confirmed the existence of a pattern of prices for comparable merchandise that differ significantly among purchasers, regions, or time periods for both respondents. We further determined that the A-to-A method could not appropriately account for such differences because the difference in the weighted-average dumping margins computed using the A-to-A method and the appropriate alternative method³ was meaningful. Accordingly, to calculate the weighted-average dumping margins, we used the A-to-T method for all U.S. sales for Golden Dragon, and we used the A-to-T method as an alternative to the A-to-A method for a portion of Nacobre’s U.S. sales.

The respondents characterize the above analysis as a targeted dumping analysis, which, they argue, the Department has no statutory authority to conduct. Specifically, the respondents contend that section 777A(d)(1) of the Tariff Act of 1930, as amended (the Act), the statutory provision governing the selection of a comparison method, including the option to use an alternative comparison method (which the respondents refer to as the “targeted dumping” or “differential pricing” provision), pertains only to investigations. The respondents state that the Department acknowledges this limitation in the Preliminary Determination Memorandum.⁴

³ When the percentage of U.S. sales passing the Cohen’s *d* test is between 33 and 66, the Department considers whether it is appropriate to apply a “mixed” methodology, consisting of using the A-to-T method for those U.S. sales which passed the Cohen’s *d* test and the A-to-A method for the remaining U.S. sales. When the percentage of U.S. sales is 66 or greater, the Department considers whether it is appropriate to use the A-to-T methodology for all sales.

⁴ See Golden Dragon’s case brief at 12 (quoting the Preliminary Determination Memorandum at 5).

According to the respondents, the Act’s failure to provide a parallel provision for administrative reviews was intentional⁵ and, thus, the Department’s actions are limited by the authority expressly granted by Congress. As a consequence, the respondents maintain that the Department should respect Congress’ intent until Congress itself chooses to modify the Act and permit the use of the “exception” in administrative reviews.

The respondents contend that the Department’s regulations likewise provide no authority to adopt an investigation methodology in reviews. Although 19 CFR 351.414(c)(1) authorizes the Department to consider alternatives to its standard A-to-A methodology, Golden Dragon maintains that this regulation cannot trump the plain language of the Act, a fact recognized by both the Supreme Court and the Court of Appeals for the Federal Circuit (Federal Circuit) (albeit related to other circumstances).⁶ Further, Golden Dragon asserts that the Courts have held that an agency must rely on the text of the statute as enacted by Congress.⁷ Golden Dragon claims that, because the plain language of the statute is clear, the Department’s reading of 19 CFR 351.414(c) to consider an alternative comparison method and permit the use of a differential pricing analysis is unlawful.⁸

The petitioners disagree with the respondents’ contention that the Act only permits the Department to consider an alternative comparison method in investigations, not administrative reviews. The petitioners note that the Department has considered and addressed this argument in numerous other proceedings, determining that it is appropriate to analyze patterns of prices that differ significantly, and apply an alternative price comparison methodology in administrative reviews.⁹ The petitioners point out that section 777A(d)(2) of the Act is silent as to comparison methods in administrative reviews; as such, a “gap” exists in the Act regarding the appropriate comparison methods applied in administrative reviews.¹⁰ According to the petitioners, the Courts have held that the Department is permitted to fill such statutory gaps.¹¹ Therefore, the petitioners maintain that the Department promulgated 19 CFR 351.414, determining that it will

⁵ While Nacobre notes that the Department has previously held that these statutory provisions may be applied to administrative reviews by analogy (see, e.g., Ball Bearings and Parts Thereof From France, Germany, and Italy: Final Results of Antidumping Duty Administrative Reviews; 2010-2011, 77 FR 73415 (December 10, 2012) (Ball Bearings), and accompanying Issues and Decision Memorandum at Comment 1; Circular Welded Carbon Steel Pipes and Tubes From Turkey: Final Results of Antidumping Duty Administrative Review; 2010 to 2011, 77 FR 72818 (December 6, 2012) (Pipe and Tube from Turkey 2012), and accompanying Issues and Decision Memorandum at Comment 1), it disagrees that the Department’s position is plausible. Further, according to Golden Dragon, the Department does not identify or attempt to fill a “gap” in the Act governing administrative reviews.

⁶ See FAG Italia S.p.A. v. United States, 291 F.3d 806, 816 (Fed. Cir. 2002).

⁷ See Ali v. Federal Bureau of Prisons, 552 U.S. 214, 218 (2008).

⁸ As support for this statement, Golden Dragon cites Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984).

⁹ See Ball Bearings at Comment 1; Pipe and Tube from Turkey 2012 at Comment 1; and Stainless Steel Plate in Coils From Belgium: Antidumping Duty Administrative Review, 2010-2011, 77 FR 73013 (December 7, 2012), and accompanying Issues and Decision Memorandum (SSPC from Belgium) at Comment 2.

¹⁰ See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification, 77 FR 8101, 8104 (February 14, 2012) (Final Modification for Reviews).

¹¹ See United States Steel Corp. v. United States, 621 F.3d 1351,1357 (Fed. Cir. 2010) (U.S. Steel).

use the A-to-A methodology in both investigations and administrative reviews unless it determines another method is more appropriate.

Department's Position:

We disagree with the respondents' claim that the Department does not have the statutory authority to employ an alternative comparison method in administrative reviews. Section 771(35)(A) of 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." The definition of "dumping margin" calls for a comparison of NV and export price (EP) or CEP. Before making the comparison called for, it is necessary to determine how to make the comparison.

The respondents argue that the Department has no statutory authority to consider the application of an alternative comparison method in administrative reviews. The respondents also state that Congress made no provision for the Department to apply an alternative comparison method in an administrative review under section 777A(d) of the Act. Indeed, section 777A(d)(1) of the Act applies to "Investigations" and section 777A(d)(2) of the Act applies to "Reviews." Section 777A(d)(1) of the Act discusses, for investigations, the standard comparison methods (*i.e.*, the A-to-A method and the transaction-to-transaction or T-to-T method), and then provides for an alternative comparison method (*i.e.*, the A-to-T method) that may be applied as an exception to the standard methods when certain criteria have been met. Section 777A(d)(2) of the Act discusses, for administrative reviews, the maximum length of time over which the Department may calculate weighted-average NVs when using the A-to-T method. Section 777A(d)(2) has no provision specifying the comparison method to be employed in administrative reviews.

To fill the gap in the statute, the Department has promulgated regulations to specify how comparisons between NV and EP or CEP would be made in administrative reviews. With the implementation of the Uruguay Round Agreements Act (URAA), the Department promulgated regulations in 1997, in which 19 CFR 351.414(c)(2) stated that the Department would normally use the A-to-T comparison method in administrative reviews. In 2010, the Department published its Proposed Modification for Reviews¹² pursuant to section 123(g)(1) of the URAA. This proposal was in reaction to several World Trade Organization (WTO) Dispute Settlement Body panel reports which found the denial of offsets for non-dumped sales in administrative reviews to be inconsistent with the WTO obligations of the United States. When considering the proposed revisions to 19 CFR 351.414, the Department gave proper notice and opportunity to comment to all interested parties. Pursuant to section 123(g)(1)(D) of the URAA, in September 2011, the U.S. Trade Representative (USTR) submitted a report to the House Ways and Means and Senate Finance Committees which described the proposed modifications, the reasons for the modifications, and a summary of the advice which the USTR had sought and obtained from relevant private sector advisory committees pursuant to section 123(g)(1)(B) of the URAA. Also in September 2011, pursuant to section 123(g)(1)(E) of the URAA, the USTR, working with the

¹² See Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings: Proposed Rule; Proposed Modification; Request for Comment, 75 FR 81533 (December 28, 2010) (Proposed Modification for Reviews).

Department, began consultations with both congressional committees concerning the proposed contents of the final rule and the final modification. As a result of this process, the Department published the Final Modification for Reviews.¹³ These revisions were effective for all preliminary results of review issued after April 16, 2012, as is the situation for this administrative review.

19 CFR 351.414(b) describes the methods by which NV may be compared to EP or CEP in LTFV investigations and administrative reviews (*i.e.*, A-to-A, T-to-T, and A-to-T). These comparison methods are distinct from each other. When using T-to-T or A-to-T comparisons, a comparison is made for each export transaction to the United States. When using A-to-A comparisons, a comparison is made for each group of comparable export transactions for which the EPs, or CEPs, have been averaged together (*i.e.*, for an averaging group¹⁴). The Department does not interpret the Act or the Statement of Administrative Action (SAA) to prohibit the use of the A-to-A comparison method in administrative reviews, nor does the Act or the SAA mandate the use of the A-to-T comparison method in administrative reviews. 19 CFR 351.414(c)(1) (2012) fills the gap in the statute concerning the choice of a comparison method in the context of administrative reviews. In particular, the Department determined that in both LTFV investigations and administrative reviews, the A-to-A method will be used “unless the Secretary determines another method is appropriate in a particular case.”¹⁵

The Act, the SAA, and the Department’s regulations do not address the circumstances that could lead the Department to select a particular comparison method in an administrative review. Indeed, whereas the statute addresses this issue specifically in regards to investigations, the statute conspicuously leaves a gap to fill on this same question in regards to administrative reviews.¹⁶ In light of the statute’s silence on this issue, the Department indicated that it would use the A-to-A method as the default method in administrative reviews, but would consider whether to use an alternative comparison method on a case-by-case basis.¹⁷ At that time, the Department also indicated that it would look to practices employed by the Department in LTFV investigations for guidance on this issue.¹⁸

In LTFV investigations, the Department examines whether to use the A-to-T method consistent with section 777A(d)(1)(B) of the Act:

The administering authority may determine whether the subject merchandise is being sold in the United States at less than fair value by comparing the weighted average of the normal values to the export prices (or constructed export prices) of individual transactions for comparable merchandise, if:

¹³ See Final Modification for Reviews, 77 FR 8101.

¹⁴ See 19 CFR 351.414(d)(2).

¹⁵ See 19 CFR 351.414(c)(1).

¹⁶ See section 777A(d)(1)(B) of the Act; SAA at 842-43; and 19 CFR 351.414.

¹⁷ See Final Modification for Reviews, 77 FR at 8107.

¹⁸ Id., 77 FR at 8102.

- (i) there is a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time, and
- (ii) the administering authority explains why such differences cannot be taken into account using a method described in paragraph (1)(A)(i) or (ii).¹⁹

Although section 777A(d)(1)(B) of the Act does not strictly govern the Department's examination of this question in the context of an administrative review, the Department nevertheless finds that the issue arising under 19 CFR 351.414(c)(1) in an administrative review is analogous to the issue in LTFV investigations. Accordingly, the Department finds the analysis that has been used in LTFV investigations instructive for purposes of examining whether to apply an alternative comparison method in this administrative review. In LTFV investigations, the Department considered an alternative comparison method to unmask dumping consistent with section 777A(d)(1)(B) of the Act.²⁰ Similarly, the Department considered an alternative comparison method to unmask dumping under 19 CFR 351.414(c)(1).²¹ For this administrative review, the Department continues to find the consideration of an alternative comparison method to be a reasonable extension of the statute where the statute contains no provision for the Department to follow.

The SAA does not demonstrate that the Department may consider the application of an alternative comparison method in investigations only. The SAA does discuss section 777A(d)(1)(A)(i) of the Act, concerning the types of comparison methods that the Department may use in investigations. That provision, however, is silent on the question of choosing a comparison method in administrative reviews. Section 777A(d)(1)(A) of the Act does not require or prohibit the Department from adopting a similar or a different framework for choosing a comparison method in administrative reviews as compared to the framework required by the statute in investigations. The SAA states that "section 777A(d)(1)(B) provides for a comparison of average normal values to individual export prices or constructed export prices in situations where an average-to-average or transaction-to-transaction comparison methodology cannot account for a pattern of prices that differ significantly among purchasers, regions or time periods."²² Like the statute, the SAA does not limit the Department to undertake such an examination in investigations only.²³

¹⁹ See section 777A(d)(1)(B) of the Act.

²⁰ See, e.g., Polyethylene Retail Carrier Bags From Indonesia: Final Determination of Sales at Less Than Fair Value, 75 FR 16431 (April 1, 2010); Certain Stilbenic Optical Brightening Agents From Taiwan: Final Determination of Sales at Less Than Fair Value, 77 FR 17027 (March 23, 2012); and Xanthan Gum From the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 78 FR 33351 (June 4, 2013) (Xanthan Gum from the PRC), and accompanying Issues and Decision Memorandum at Comment 3.

²¹ See, e.g., Ball Bearings and Parts Thereof From France, Germany, and Italy: Final Results of Antidumping Duty Administrative Reviews; 2010–2011, 77 FR 73415 (December 10, 2012); SSPC From Belgium, 77 FR 73013 (December 7, 2012); Circular Welded Carbon Steel Pipes and Tubes From Thailand: Final Results of Antidumping Duty Administrative Review; 2011-2012, 78 FR 65272 (October 31, 2013).

²² See SAA at 843.

²³ Id.

The silence of the statute with regard to the application of an alternative comparison method in administrative reviews does not preclude the Department from applying such a practice in this situation. Indeed, the Federal Circuit stated that the “court must, as we do, defer to Commerce’s reasonable construction of its governing statute where Congress leaves a gap in the construction of the statute that the administrative agency is explicitly authorized to fill or implicitly delegates legislative authority, as evidenced by the agency’s generally conferred authority and other statutory circumstances.”²⁴ Further, the court stated that this “silence has been interpreted as ‘an invitation’ for an agency administering unfair trade law to ‘perform its duties in the way it believes most suitable’ and courts will uphold these decisions ‘{s}o long as the {agency}’s analysis does not violate any statute and is not otherwise arbitrary and capricious.”²⁵ The Department filled a gap in the statute with a logical, reasonable and deliberative comparison method for administrative reviews.

Comment 2: *Withdrawal of the Regulatory Provisions Governing Targeted Dumping in LTFV Investigations*

Nacobre notes that the Department attempted to withdraw the regulatory provision on targeted dumping in 2008.²⁶ However, Nacobre also notes that the Court of International Trade (CIT) recently found that the withdrawal was invalid²⁷ and, thus, the targeted dumping regulations remain in effect. Nacobre argues that, because the Department failed to follow its regulations, its differential pricing analysis is unlawful.

Specifically, Nacobre notes that the targeted dumping regulations provided that the Department would conduct a targeted dumping analysis: 1) only in response to a timely allegation by the petitioners; 2) using standard and appropriate statistical techniques in determining whether there is a pattern of prices that differs significantly; and, 3) limiting the application of the A-to-T price comparisons to those sales where targeted dumping was found.²⁸ Nacobre points out that the petitioners did not submit a targeted dumping allegation, and it alleges that the statistical tools the Department used in its analysis were not “appropriate” as required by 19 CFR 351.414(f)(3), adopted in 1997. As a result, Nacobre claims that the Department cannot sustain its differential pricing analysis in the Preliminary Results for Nacobre in this administrative review.

²⁴ See U.S. Steel, 621 F.3d at 1357.

²⁵ See Mid Continent Nail Com. v. United States, 712 F. Supp. 2d 1370, 1376-77 (CIT 2010), citing U.S. Steel Group v. United States, 96 F.3d 1352, 1362 (Fed. Cir. 1996).

²⁶ See Withdrawal of the Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations, 73 FR 74930, 74931 (December 10, 2008) (2008 Withdrawal); and Final Modification for Reviews, 71 FR at 8107. Nacobre notes that the Department has repeatedly declared that it was not adopting any rules regarding “targeted dumping” that would be applied uniformly in all cases, but rather has stated that its “targeted dumping” analysis will be applied on a case-by-case basis.

²⁷ See Gold East Paper (Jiangsu) v. United States, 918 F. Supp. 2d 1317, 1327 (CIT 2013) (Gold East). Nacobre recognizes that the Department does not agree with the CIT’s decision in Gold East and is continuing to challenge it.

²⁸ See Antidumping Duties; Countervailing Duties: Final rule, 62 FR 27296, 27416 (May 19, 1997) (Preamble).

The petitioners disagree that the Department's differential pricing analysis is unlawful. According to the petitioners, when the Department withdrew its targeted dumping regulations, it complied with the Administrative Procedures Act (APA) by providing "general notice of proposed rulemaking" and allowing the opportunity for public comment prior to withdrawing the targeted dumping regulations.²⁹ The petitioners maintain that neither the statute nor any court requires an agency to present every possible variation of a rule for notice and public comment.³⁰

The petitioners also disagree with the CIT's analysis in Gold East. Specifically, the petitioners argue that, had the Court in Gold East applied the "logical outgrowth" test, it could not but have concluded that the withdrawal of the targeted dumping regulations was the "logical outgrowth" of the Department's request for comments. The petitioners note that the Department requested comment on the application of the A-to-T method and the conditions under which such a methodology should be applied to all sales in Proposed Methodology for Identifying and Analyzing Targeted Dumping in Antidumping Investigations; Request for Comment, 73 FR 26371, 26372 (May 9, 2008) (Proposed Methodology). The petitioners point out that, in response to this notice, the Department received 15 comments, six of which concerned the application of the A-to-T method, including comments on which sales should be compared using this methodology when targeted dumping is found. According to the petitioners, these results demonstrate that a meaningful number of the comments that the Department received in response to its Proposed Methodology addressed the precise issue which the Court in Gold East determined had not been subject to notice and comment.

In any event, the petitioners assert that on December 28, 2010, the Department also provided notice of proposed rulemaking in its proposal to change the text of 19 CFR 351.414, which did not include targeted dumping.³¹ The petitioners note that, when the Department published its final rule, it adopted the regulatory changes proposed in this notice effective in the preliminary results issued after April 16, 2012.³² The petitioners maintain that, because the preliminary results here occurred after April 16, 2012, the targeted dumping regulations do not apply to this administrative review.

Department's Position:

²⁹ See 5 U.S.C. § 553.

³⁰ See First Am. Discount Corp. v. CFTC, 222 F.3d 1008, 1015 (D.C. Cir. 2000). The petitioners note that the D.C. Circuit Court, which regularly reviews questions of rulemaking under the APA, requires such notices to be adequate for parties to comment "meaningfully." See Connecticut Light & Power Co. v. Nuclear Regulatory Com., 673 F.2d 525, 530 (D.C. Cir.1982). Further, in evaluating the adequacy of the notice and opportunity to comment, the petitioners state that the Court considers the number and level of detail of comments on the proposed rule, as well as whether the final rule is a "logical outgrowth" of the proposed rule. See Florida Power & Light Co. v. United States, 846 F. 2d 765 (D.C. Cir. 1988); and Shell Oil Co. v. EPA, 950 F.2d 741,750-51 (D.C. Cir. 1991). According to the petitioners, the Court determines that an agency has satisfied this "logical outgrowth" test if the affected party should have anticipated the agency's final course of action in light of its initial notice. See Small Refiner Lead Phase-Down Task Force v. EPA, 705 F .2d 506, 548-49 (D.C. Cir. 1983).

³¹ See Proposed Modification for Reviews, 75 FR 81533.

³² See Final Modification for Reviews, 77 FR at 8101.

We disagree that the now-withdrawn targeted dumping regulations are applicable to this administrative review. As a general matter, we disagree with Nacobre that the withdrawal of the targeted dumping regulations was unlawful. The targeted dumping regulations only applied in LTFV investigations, not administrative reviews.³³ Likewise, the ongoing Gold East judicial proceeding involves a LTFV investigation, not an administrative review. Therefore, the Department's use of a differential pricing analysis in this administrative review contradicts no applicable regulations.

Even assuming, arguendo, that the 2008 Withdrawal was relevant to administrative reviews, we would nonetheless disagree with Nacobre that the 2008 Withdrawal was improper. The targeted dumping regulations were properly withdrawn pursuant to the APA. During the withdrawal process, the Department engaged the public to participate in its rulemaking process. Further, the Department stated in the 2008 Withdrawal that notice and an opportunity for public comment are not required under the APA's "good cause" exception. In fact, the Department's withdrawal of its regulations in December 2008 came after two rounds of soliciting public comments on the appropriate targeted dumping analysis. The Department solicited the first round of comments in October 2007, more than one year before it withdrew the regulation, by posting a notice in the Federal Register seeking public comments on what guidelines, thresholds, and tests it should use in conducting an analysis under section 777A(d)(1)(B) of the Act.³⁴ As the notice explained, because the Department had received very few targeted dumping allegations under the regulations then in effect, it solicited comments from the public to determine how best to implement the remedy provided under the statute to address masked dumping. The notice posed specific questions, and allowed the public 30 days to submit comments, which various parties did.³⁵

After considering those comments, the Department published a proposed new methodology in May 2008 and again requested public comment.³⁶ Among other things, the Department specifically sought comments "on what standards, if any, {it} should adopt for accepting an allegation of targeted dumping."³⁷ Several of the submissions³⁸ received from parties explained that the Department's proposed methodology was inconsistent with the statute and should not be adopted.³⁹ Moreover, several entities explicitly stated that the Department should not establish

³³ See 2008 Withdrawal, 73 FR at 74931.

³⁴ See Targeted Dumping in Antidumping Investigations; Request for Comment, 72 FR 60651 (October 25, 2007).

³⁵ Id.; see also Public Comments Received December 10, 2007, Department of Commerce, <http://enforcement.trade.gov/download/targeted-dumping/comments-20071210/td-cmt-20071210-index.html> (December 10, 2007) (listing the entities that commented).

³⁶ See Proposed Methodology, 73 FR at 26372.

³⁷ Id.

³⁸ The public comments received on June 23, 2008, and submitted on behalf of several domestic parties can be accessed at: <http://enforcement.trade.gov/download/targeted-dumping/comments-20080623/td-cmt-20080623-index.html>.

³⁹ See, e.g., Letter from AK Steel Corp., et al. to the Department: "Comments on Targeted Dumping Methodology, Comments," (AK Steel Comments) (June 23, 2008) at 2.

minimum thresholds for accepting allegations of targeted dumping because the statute contains no such requirements.⁴⁰

These comments suggested that the regulation was impeding the development of an effective remedy for masked dumping. Indeed, after considering the parties' comments the Department explained that because "the provisions were promulgated without the benefit of any experience on the issue of targeted dumping, the Department may have established thresholds or other criteria that have prevented the use of this comparison methodology to unmask dumping."⁴¹ For this reason, the Department determined that the regulation had to be withdrawn.⁴² Although this withdrawal was effective immediately, the Department again invited parties to submit comments, and gave them a full 30 days to do so.⁴³ The comment period ended on January 9, 2009, with several parties submitting comments.⁴⁴

The course of the Department's decision-making demonstrates that it actively sought to engage the public. This type of public participation is fully consistent with the APA's notice-and-comment requirement.⁴⁵ Moreover, various courts have rejected the idea that an agency must give the parties an opportunity to comment before every step of regulatory development.⁴⁶ Rather, where the public is given the opportunity to comment meaningfully, consistent with the statute, the APA's requirements are satisfied. The touchstone of any APA analysis is whether the agency, as a whole, acted in a way that is consistent with the statute's purpose.⁴⁷ Here, similar to the agency in Mineta, the Department provided the parties more than one opportunity to submit comments before issuing the final rule. As in Mineta, the Department also considered the comments submitted and based its final decision, at least in part, upon those comments. Just as the court in Mineta found all of those facts to indicate that the agency's actions were consistent with the APA, so too the Department's actions here demonstrate that it fulfilled the notice and comment requirements of the APA.

⁴⁰ See, e.g., letter from Committee to Support U.S. Trade Laws, to the Department: "Comments on Targeted Dumping Methodology" at 25; see also AK Steel Comments at 29.

⁴¹ See 2008 Withdrawal.

⁴² Id.

⁴³ Id.

⁴⁴ See Public Comments received January 23, 2009, available at <http://enforcement.trade.gov/download/targeted-dumping/comments-20090123/td-cmt-20090123-index.html> (January 23, 2009) (listing the entities that commented).

⁴⁵ See, e.g., Arizona Pub. Serv. Co. v. EPA, 211 F.3d 1280, 1299–1300 (D.C. Cir. 2000), cert denied 532 U.S. 970 (U.S. 2001) (holding that the Environmental Protection Agency's decision to not implement a rule upon which it had sought comments did not violate the APA's notice and comment requirements because the parties should have understood that the agency was in the process of deciding what rule would be proper).

⁴⁶ See Fed. Express Corp. v. Mineta, 373 F.3d 112, 120 (D.C. Cir. 2004) (Mineta) (holding that the Department of Transportation's promulgation of four rules, each with immediate effect, only after the issuance of which the public was given the opportunity to comment, afforded proper notice and comment).

⁴⁷ Id.

The APA does not require that a final rule that the agency promulgates must be identical to the rule that it proposed and upon which it solicited comments.⁴⁸ Here, the Department actively engaged the public in its rulemaking process; it solicited comments, and considered the submissions it received. In fact, that the numerous comments prompted the Department to withdraw the regulation demonstrates that the Department provided the public with an adequate opportunity to participate. In doing so, the Department fully complied with the APA.

Further, even if the two rounds of comments that the Department solicited before the withdrawal of the regulation were insufficient to satisfy the APA's requirements, the Department properly declined to solicit further comments pursuant to the APA's "good cause" exception. This exception provides that an agency is not required to engage in notice and comment if it determines that doing so would be "impracticable, unnecessary, or contrary to the public interest."⁴⁹ The Federal Circuit recognized that this exception can relieve an agency from issuing notice and soliciting comment where doing so would delay the relief that Congress intended to provide.⁵⁰ In National Customs Brokers, the Federal Circuit rejected a plaintiff's argument that the U.S. Customs Service failed to follow properly the APA in promulgating certain interim regulations when it had published these regulations without giving the parties a prior opportunity to comment. Moreover, although the U.S. Customs Service solicited comments on the published regulations, it stated that it "would not consider substantive comments until after it implemented the regulations and reviewed the comments in light of experience" administering those regulations.⁵¹ The U.S. Customs Service explained that "good cause" existed to bypass the APA's usual notice and comment requirements because the new requirements did not impose new obligations on parties, and emphasized its belief that the regulations should "become effective as soon as possible" so that the public could benefit from "the relief that Congress intended."⁵² The Court recognized that this explanation was a proper invocation of the "good cause" exception and explained that soliciting and considering comments was *both* unnecessary *and* contrary to the public interest because the public would benefit from the amended regulations."⁵³ For this reason, the Court affirmed the regulation against the plaintiff's challenge.⁵⁴

The regulation at issue may have had the unintentional effect of preventing the Department from employing an appropriate remedy to unmask dumping. Such effect would have been contrary to congressional intent. The Department's revocation of such a regulation without additional notice and comment was based upon a recognized invocation of the "public interest" exception.

⁴⁸ See, e.g., First Am. Discount Corp. v. CFTC, 222 F.3d 1008, 1015 (D.C. Cir. 2000).

⁴⁹ See 5 U.S.C. 553(b)(B).

⁵⁰ See, e.g., National Customs Brokers and Forwarders Ass'n of Am., Inc. v. United States, 59 F.3d 1219, 1223 (Fed. Cir. 1995) (National Customs Brokers).

⁵¹ Id., 59 F.3d at 1220–21.

⁵² Id., 59 F.3d at 1223.

⁵³ Id., 59 F.3d at 1224 (emphasis added).

⁵⁴ Id.

However, as noted above, the regulation applied to LTFV investigations and not to administrative reviews. Therefore, its withdrawal is not relevant to this review.⁵⁵

Comment 3: *Differential Pricing Analysis: Establishment of Thresholds under the APA*

Nacobre argues that, because differential pricing has not been promulgated as a regulation under the APA, it may only be used in a particular case to the extent that the Department explains how its application and any numerical thresholds it uses are justified by the specific facts of that case.⁵⁶ According to Nacobre, in the absence of a properly promulgated regulation, the courts generally have held that a rule may be applied in a particular case only if: 1) the Department explains the basis for its decision; and, 2) the record contains substantial evidence supporting the application of the rule.⁵⁷ Thus, Nacobre states that the various thresholds used in the differential pricing analysis⁵⁸ cannot be applied as bright-line rules without the Department first explaining why its methodological choices in the analysis are appropriate here and then supporting those explanations with record evidence.

The petitioners disagree with Nacobre's contention that the Department is not permitted to rely on the thresholds set forth in its differential pricing analysis unless it engages in rulemaking that satisfies the requirements of the APA. According to the petitioners, as discussed above, Nacobre's argument is moot because the Department engaged in such rulemaking.⁵⁹ Moreover, the petitioners disagree with Nacobre that the thresholds used in the Department's differential pricing analysis are arbitrary. The petitioners point out that the 33 percent threshold (used to determine whether the volume of sales passing the Cohen's *d* test is meaningful) has been used by the Department in other contexts such as the "standard deviation" test portion of the Nails

⁵⁵ As a result of the withdrawal of the targeted dumping regulation, we note that the Department no longer requires the petitioners to submit an allegation of targeted dumping before conducting its analysis.

⁵⁶ For example, Nacobre argues that this principle has been recognized by the courts in cases addressing the de minimis standard applied in investigations, as both the CIT and the Federal Circuit have held that because the de minimis standard had not at that time been promulgated as a regulation in accordance with the APA, the Department was not permitted to apply it automatically in each case. See Carlisle Tire v. United States, 634 F. Supp. 419, 423 (CIT 1986) (Carlisle Tire); and Washington Red Raspberry Commn. v. United States, 859 F. 2d 898, 903 (Fed. Cir. 1988) (Washington Raspberry).

⁵⁷ Id.; and IPSCO v. United States, 687 F. Supp. 614, 630-631 (CIT 1988).

⁵⁸ Nacobre points out that the Department's differential pricing analysis uses various thresholds including: 1) a Cohen's *d* value greater than 0.8, used as evidence of the sale's "passing" the Cohen's *d* test; 2) the 33 and 66 percent ratios of sales passing the Cohen's *d* test to all sales, used to determine which comparison methodology to apply; and 3) a 25 percent relative change in the weighted-average dumping margin between an "alternative" comparison methodology and the A-to-A methodology, used to determine if there is a meaningful difference in the results of the different methodologies. Nacobre notes that the Department first set forth its differential pricing methodology, including these thresholds, in the investigations of xanthan gum from Austria and the People's Republic of China. See Xanthan Gum From Austria: Final Determination of Sales at Less Than Fair Value, 78 FR 33354 (June 4, 2013), and accompanying Issues and Decision Memorandum; and Xanthan Gum from the PRC at Comment 3. According to Nacobre, while these thresholds are precise, they are also completely arbitrary.

⁵⁹ Id., 77 FR at 8104.

test⁶⁰ and in determining when to use market economy purchase prices to value an entire input.⁶¹ According to the petitioners, the court has upheld 33 percent as constituting a “meaningful” quantity.⁶² The petitioners also note that the thresholds the Department uses to determine whether to apply the A-to-A method or the A-to-T method in the differential pricing analysis (i.e., a 25 percent relative change in the weighted-average dumping margin or a change in the margin from zero or de minimis to above de minimis) are the same thresholds the Department uses to define a “significant” ministerial error pursuant to the Act.⁶³ The petitioners contend that this definition is sufficient to constitute rulemaking in accordance with the APA.

Department’s Position:

We disagree with Nacobre’s argument. We note the notice and comment requirements of the APA do not apply “to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.”⁶⁴ Further, as the Department has noted, we normally make these types of changes in practice (e.g., the change from the targeted dumping analysis, including the Nails test, to the current differential pricing analysis) in the context of our proceedings, on a case-by-case basis.⁶⁵ As the Federal Circuit has recognized, the Department is entitled to make changes and adopt a new approach in the context of its proceedings, provided it explains the basis for the change, and the change is a reasonable interpretation of the statute.⁶⁶ As with the Department’s prior interpretation of the provision at issue, the Department adopted the targeted dumping analysis, including the Nails test, in the context of its proceedings.⁶⁷ There, the Department explained the basis for its interpretation and provided parties with an opportunity to comment. Similarly, with respect to the Department’s differential pricing analysis, the Department has explained the basis for the change in practice and provided Nacobre with an opportunity to comment on the Department’s interpretation and methodology. Moreover, as the Department noted, as it “gains greater experience with addressing potentially hidden or masked dumping that can occur when the Department determines weighted-average dumping margins using the average-to-average comparison method, the Department expects to continue to develop its approach with respect to the use of an alternative comparison method.”⁶⁸

⁶⁰ See Certain Steel Nails from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances, 73 FR 33977 (June 16, 2008) (Nails from the PRC), and accompanying Issues and Decision Memorandum at Comment 3.

⁶¹ See Antidumping Methodologies: Market Economy Inputs, Expected Non-Market Economy Wages, Duty Drawback; and Request for Comments, 71 FR 61716, 61718 (October 19, 2006).

⁶² Id.

⁶³ See 19 CFR 351.224(g).

⁶⁴ See 5 U.S.C. § 553(b)(3)(A).

⁶⁵ See Differential Pricing Analysis; Request for Comments, 79 FR 26720, 26722 (May 9, 2014) (Differential Pricing Comment Request).

⁶⁶ See Saha Thai Steel Pipe Company v. United States, 635 F.3d 1335, 1341 (Fed. Circ. 2011); Washington Raspberry, 859 F. 2d at 902-03. See also Carlisle Tire, 634 F. Supp. at 423 (discussing exceptions to the notice and comment requirements of the APA).

⁶⁷ See Nails from the PRC, 73 FR 33977.

⁶⁸ See Differential Pricing Comment Request, 79 FR at 26722.

Further developments and changes, along with further refinements are expected in the context of its proceedings based upon an examination of the facts and the parties' comments in each case. Accordingly, the Department's development of the differential pricing analysis and its application in this case are consistent with established law.

Comment 4: *Differential Pricing Analysis: Identification of a Pattern of Prices that Differs Significantly and a Meaningful Difference in the Results*

Nacobre argues that the Department's differential pricing analysis is inherently flawed because the Cohen's *d* test yields results which are not statistically valid. Nacobre contends that, as a result, this analysis cannot identify whether there exists a pattern of prices for comparable merchandise that differ significantly among purchasers, regions, or periods of time, as required by the language of the Act.

Nacobre provides examples which it claims demonstrate that a positive finding of a pattern in the Department's differential pricing analysis may only reflect the variability of data within the target and base groups, rather than a meaningful pattern of price differences between the groups. Nacobre argues that if the Department's differential pricing analysis purports to find patterns of prices by either time period or region in random data, there is something wrong either with: 1) the differential analysis in general and it should not be used; or, 2) the structure of the data in this case (*i.e.*, the distribution of the sales themselves, and not their prices). Nacobre insists that such results invalidate the use of the differential pricing analysis here.

Nacobre contends that there are a number of aspects of the Department's Cohen's *d* test which make it unreliable and invalid. Nacobre claims that the Department's use of the Cohen's *d* test assumes that the distribution of U.S. prices follows a normal (or "Gaussian") distribution. According to Nacobre, random data will follow a Gaussian distribution only with a sufficiently large sample that is mutually independent and identically distributed. Nacobre contends that there are statistical tests that can be used to determine if a dataset is Gaussian, and these tests demonstrate that Nacobre's U.S. sales data are not. As a result, Nacobre claims that tests which depend on the calculation of means and standard deviations from these data should not be used because they are not valid.

Nacobre argues that, even if its U.S. sales data followed a Gaussian distribution, the nature of the Department's Cohen's *d* test would render the results unreliable because it is only appropriate to use the Cohen's *d* test to compare two independent samples of roughly equal size. Nacobre notes that in the Department's analysis, a single data point (*e.g.*, the average price to one customer) is compared against the rest of the data (*e.g.*, the average prices to all other customers). Nacobre argues that, as a mathematical matter, at least 42 percent of observations would pass the Cohen's *d* test purely by chance. Consequently, Nacobre contends that the Cohen's *d* test is almost certain to yield a passing rate above the 33 percent threshold used by the Department.⁶⁹

⁶⁹ Nacobre argues that instances where analysis of a respondent's data resulted in less than 33 percent of the observations passing the Cohen's *d* test represent proof that such data did not follow a Gaussian distribution and, as a consequence, the results of tests like Cohen's *d* are invalid for such data.

As another example of observations that would “pass” the Cohen’s *d* test by chance, Nacobre points to prices for commodities, like the copper used to produce the subject merchandise, which follow a “random walk.” According to Nacobre, in a “random walk” the prices for any given day depend on the prices for the previous day plus or minus a random amount. Moreover, Nacobre maintains that, by definition, data that follow a random walk do not follow a Gaussian distribution. While Nacobre argues that any pattern seen in “random walk” data is simply an illusion, it contends that when such data are tested using the Department’s differential pricing analysis, they nonetheless will “pass” the Cohen’s *d* test 55 percent of the time.

Moreover, Nacobre contends that the variability of prices in the “target” and the “base” comparison groups used in the Cohen’s *d* test have an inverse impact on the results of the test.⁷⁰ Because of this, Nacobre claims that the Cohen’s *d* test will fail to identify patterns of price differences in some cases, while exaggerating such differences in others. Nacobre also argues that the Department’s Cohen’s *d* test fails to address potential distortions that may be caused by co-linearity in the data, creating the risk that spurious correlations will generate false positive results.⁷¹

According to Nacobre, the failures of the Department’s Cohen’s *d* test can be seen clearly when applied to its U.S. sales data. Nacobre argues that the Cohen’s *d* test does not yield robust results when it is used to compare: 1) small sample sizes (*i.e.*, under 20 to 30 observations); or, 2) samples that are substantially unequal in size. However, Nacobre contends that, not only are the total number of U.S. sales observations by product control number small, but also the Department’s division of these observations into separate “test” and “base” groups for purposes of the Cohen’s *d* test resulted in groups of different sample sizes. As a result, Nacobre contends that the Cohen’s *d* test values calculated using its POR U.S. sales data are not statistically valid.

Finally, Nacobre argues that the different results the Department calculated using the A-to-A method or the A-to-T method are primarily a function of the different treatment of non-dumped sales. According to Nacobre, the Department’s analysis of price differences by customer and region ignores the possibility that prices may vary by month (due to, for example, fluctuations in raw materials prices) and that different average prices for different customers and regions may reflect nothing more than different monthly purchase patterns. Because dumping margins are determined by the level of U.S. price in comparison to NV in the same month (as long as there are sales to be compared), Nacobre hypothesizes that it is possible for the highest-priced U.S.

⁷⁰ Nacobre provides numerical examples of such scenarios in its January 23, 2014, case brief. Nacobre states that its examples illustrate scenarios where the pattern of price differences is the same, while the movement of prices within each group is not. Nacobre asserts that, as a result, sales “pass” the Cohen’s *d* test in one scenario (where price variability is low), but not the other (where price variability is high).

⁷¹ For example, Nacobre claims that crime and ice cream consumption may appear positively correlated, when, in fact, these factors are actually correlated with temperature. According to Nacobre, in a dumping context, there are many characteristics of a sale that may be correlated with price and unevenly distributed among customers, time periods, and regions (*e.g.*, where prices are a function of quantity or level of trade); Nacobre maintains that the differential pricing analysis may find false correlations where the prices for sales in the same quantities or at the same level of trade were consistent across these groups. Nacobre argues that the use of quantity-weighted prices exacerbates this problem (especially where sales in larger quantities are not evenly distributed among the groups), and it notes that section 773(a)(6)(C)(i) of the Act prohibits the Department from making a finding of dumping solely due to the fact that different quantities have different prices.

sales to also have the highest dumping margins. Thus, Nacobre claims that, while there may be cases where the Department can demonstrate that the price differences shown as a result of the Cohen's *d* test actually affected its monthly A-to-A comparisons, there is no reason to believe that this is automatically the case. According to Nacobre, if the monthly A-to-A comparisons are not affected by alleged quarterly price differences, then the Department cannot possibly explain why such quarterly price differences cannot be taken into account using its normal A-to-A comparison, as the Act requires. Consequently, Nacobre argues that the Department should base its weighted-average dumping margin in the final results on the A-to-A method.

The petitioners assert that Nacobre's objections to the Cohen's *d* test are without merit. According to the petitioners, the Department has considered and rejected similar arguments in the past, broadly finding that they have no grounding in the language of the statute.⁷² The petitioners point out that the Cohen's *d* test is a generally recognized statistical measure of the extent of the difference between the mean of a test group and the mean of a comparison group. The petitioners find it significant that section 777A(d)(1)(B)(i) of the Act does not require the Department to adopt a specific statistical measure or test when determining whether there exists a pattern of prices that differ significantly and, thus, the Department's use of the Cohen's *d* test is well within its discretion. Further, the petitioners assert that the examples Nacobre provided do not undermine this conclusion and, in fact, the Department has recently rejected similar contentions.⁷³ Regarding Nacobre's claim that the use of the Cohen's *d* test is inappropriate because it always results in affirmative findings, the petitioners contend that Nacobre is wrong; petitioners reject Nacobre's assertion that the Department's finding of a pattern is prejudicial to the respondents. According to the petitioners, there have been several cases where the Department found the existence of a pattern of prices that differs significantly but also determined that such a pattern did not merit the use of the A-to-T method for any sales.⁷⁴ Moreover, the petitioners point out that, while the frequency with which individual respondents engage in pricing behavior which exhibits significant differences has no bearing on evaluating the adequacy of the test used to identify whether a pattern of price differences exists, there have been two recent cases in which the Department found no U.S. sales which passed the Cohen's *d* test.⁷⁵ Thus, while the Cohen's *d* test may find the existence of a pattern of prices that differ

⁷² See, e.g., Xanthan Gum from the PRC at Comment 3.

⁷³ See Welded Carbon Steel Standard Pipe and Tube Products From Turkey: Final Results of Antidumping Duty Administrative Review; 2011-2012, 78 FR 79665 (December 31, 2013), and accompanying Issues and Decision Memorandum at Comment 9 (Pipe and Tube from Turkey 2013).

⁷⁴ See e.g., Certain Frozen Warmwater Shrimp From Thailand: Final Results of Antidumping Duty Administrative Review, Partial Rescission of Review, and Revocation of Order (in Part); 2011-2012, 78 FR 42497 (July 16, 2013); and Polyethylene Terephthalate Film, Sheet, and Strip From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2010-2011, 78 FR 35245 (June 12, 2013).

⁷⁵ See Certain Small Diameter Carbon and Alloy Seamless Standard, Line and Pressure Pipe From Romania: Preliminary Results of Antidumping Duty Administrative Review; 2011-2012, 78 FR 41369 (July 10, 2013), and accompanying Preliminary Decision Memorandum at 11, unchanged in Certain Small Diameter Carbon and Alloy Seamless Standard, Line and Pressure Pipe From Romania: Final Results of Antidumping Duty Administrative Review; 2011-2012, 78 FR 63164 (October 23, 2013); and Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review and New Shipper Reviews; 2011-2012, 78 FR 40692 (July 8, 2013) and accompanying Preliminary Decision Memorandum at 12, unchanged in Tapered Roller Bearings and Parts Thereof, Finished and

significantly, the petitioners note that only if there are dumped sales is it possible for the Department to employ the A-to-T method. Consequently, if Nacobre does not engage in dumping, the petitioners assert that the Department's finding that a pattern of prices that differs significantly exists for it will be ultimately irrelevant.

Department's Position:

We disagree with Nacobre that the Cohen's *d* test is flawed because it cannot distinguish between patterns and random fluctuations in data. Section 777A(d)(1)(B)(i) of the Act provides that there be "a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time." The statute does not direct the Department how the determination of such a pattern should be accomplished and left this to the Department's discretion. The statute simply states that a pattern of prices is one in which the prices "differ significantly," and the Department has reasonably demonstrated that such a pattern exists in its application of the Cohen's *d* and ratio tests in this administrative review.

The Cohen's *d* coefficient is a statistical measure which gauges the extent (or "effect size") of the difference between the means of two groups. In the final determination for Xanthan Gum from the PRC, the Department stated "{e}ffect size is a simple way of quantifying the difference between two groups and has many advantages over the use of tests of statistical significance alone."⁷⁶ In addressing Deosen's comment in Xanthan Gum from the PRC, the Department continued:

Effect size is the measurement that is derived from the Cohen's *d* test. Although Deosen argues that effect size is a statistic that is "widely used in meta-analysis," we note that the article also states that "{e}ffect size quantifies the size of the difference between two groups, and may therefore be said to be a *true measure of the significance of the difference*." The article points out the precise purpose for which the Department relies on Cohen's *d* test to satisfy the statutory language, to measure whether a difference is significant.⁷⁷

Accordingly, the Department disagrees with Nacobre's claim that the Cohen's *d* test is not an appropriate and reasonable approach to examine whether there exists a pattern of prices that differ significantly.

As a general matter, we disagree with Nacobre's claim that in applying the Cohen's *d* test in a manner and to data for which, Nacobre contends, it was not designed, the test systematically results in affirmative findings. The Cohen's *d* coefficient for each pair of test and comparison

Unfinished, From the People's Republic of China: Final Results of the 2011-2012 Antidumping Duty Administrative Review and New Shipper Reviews, 79 FR 4327 (January 27, 2014).

⁷⁶ See Xanthan Gum from the PRC at Comment 3, quoting from Coe, Robert, "It's The Effects Size, Stupid: What effect size is and why it is important," paper presented at the Annual Conference of British Educational Research Association (September 12-14, 2002).

⁷⁷ Id.; footnote omitted; quotation from Coe, emphasis included in the Issues and Decision Memorandum.

groups determines whether the weighted-average sales price to a particular test group is significantly different from the weighted-average sale price to the comparison group measured against the variances observed in both the test and comparison groups. The fact that any one comparison for a respondent meets the threshold for determining that those sales in the test group have significantly different prices is not unexpected. However, this is only the first step of the Department's differential pricing analysis. As described in the Preliminary Results, the Department next aggregates the results of the Cohen's *d* test to confirm whether a pattern of prices that differ significantly exists for the respondent. If a pattern is found to exist such that an alternative comparison method should be considered, then the Department will determine whether the A-to-A method can account for the observed pattern. Additionally, the parameters used for each of these steps for a given respondent are open for comments from interested parties, which the Department will consider in its analysis. Further, the Department will continue to evaluate its practice with respect to identifying and addressing masked dumping and implement changes as warranted.

Moreover, for the Department's application of the Cohen's *d* test, it is unnecessary to consider sampling size, randomness of the sample, or to include a measure of the "statistical significance" of its results, as this analysis includes all data in the "statistical population" of the respondent's sales in the U.S. market. The Cohen's *d* test "is a generally recognized *statistical measure* of the extent of the difference between the mean of a test group and the mean of a comparison group."⁷⁸ Within the Cohen's *d* test, the Cohen's *d* coefficient is calculated based on the means and variances of the test group and the comparison group. The test and comparison groups include all of the U.S. sales of comparable merchandise reported by the respondent. As such, the means and variances calculated for these two groups are the actual values for both the test and comparison groups, and are not estimates which include sampling errors. Statistical significance is used to evaluate whether the results of an analysis rises above sampling error (*i.e.*, noise) present in the analysis and is dependent on the sampling technique and sample size. The Department's application of the Cohen's *d* test is based on the mean and variance calculated using the entire population of the respondent's sales in the U.S. market and, therefore, these values contain no sampling error. Accordingly, sampling technique, sample size, and statistical significance are not a relevant consideration in this context.

Further, Nacobre claims that the Cohen's *d* test is flawed because of the "suggest{ion} that the prices for commodities – like the copper used in the production of seamless refined copper tubing – follow a 'random walk'"⁷⁹ with the result that the Department has not considered the changes in material input costs as a cause for the observed pattern of prices that differ significantly. The Department disagrees with Nacobre that it must account for some kind of causality for any observed price differences, such as changes in raw material costs or declines in market demand. No such requirement exists in the statute. Congress did not speak to the intent of the producers or exporters in setting export prices that exhibit a pattern of significant price differences. Consistent with the statute and the SAA, the Department has determined whether a pattern of significant price differences exists. Neither the statute nor the SAA requires the

⁷⁸ See Preliminary Results and accompanying Preliminary Decision Memorandum at 6 (emphasis added).

⁷⁹ See Nacobre's January 23, 2014, case brief at 28.

Department to conduct an additional analysis as argued by Nacobre to account for potential reasons that the observed price differences exist.

The Department also disagrees with Nacobre that the Cohen's *d* test exaggerates insignificant price differences when price variability is low, and conversely may miss significant price differences when price variability is high. The idea behind the Cohen's *d* coefficient is that it indicates the degree by which distribution of prices within the test and comparison groups overlap, or conversely how significant the difference is between the prices in the test and comparison groups. This measurement is made as the difference between the means of the test and comparison groups relative to the variances within the two groups, *i.e.*, the pooled standard deviation. As Nacobre correctly recognizes, when the variance of prices is small within these two groups, then a small difference between the weighted-average sale prices of the two groups may represent a significant difference, but when the variance within the two groups is larger (*i.e.*, the dispersion of prices within one or both of the groups is greater), then the difference between the weighted-average sale prices of the two groups must be larger in order for the difference to be significant. When the difference in the weighted-average sale prices between the two groups is measured relative to the pooled standard deviation, then this value is expressed in standardized units based on the dispersion of the prices within each group, and quantity of the overlap, or conversely the significance of the differences, in the prices within the two groups.

The Department finds Nacobre's concerns regarding the potential "co-linearity" of other characteristics of the sale (*e.g.*, LOT) and sale prices which may distort the results of the Cohen's *d* test as meritless. As noted by Nacobre, the statute directs the Department to take into account factors which may influence prices, such as LOT. In our view, the purpose of the differential pricing analysis is to determine whether the A-to-A method is a meaningful tool to measure whether, and if so to what extent, dumping is occurring. As a result,

For purposes of analyzing sales transactions by purchaser, region and time period, comparable merchandise is considered using the product control number and any characteristics of the sales, other than purchaser, region and time period, that the Department uses in making comparisons between EP (or CEP) and NV for the individual dumping margins.⁸⁰

Consequently, the Cohen's *d* test does take into account these other characteristics of the sale such as LOT or differences in quantities.

Finally, we disagree with Nacobre that the Department's explanation of why the A-to-A method cannot account for the observed pattern of prices that differ significantly is insufficient to satisfy the requirements of the Act. As explained in the Preliminary Results, if the difference in the weighted-average dumping margins calculated using the A-to-A method and an appropriate alternative comparison method is meaningful, then this demonstrates that the A-to-A method cannot account for such differences and, therefore, an alternative method would be appropriate. The Department determined that a difference in the weighted-average dumping margins is considered meaningful if: 1) there is a 25 percent relative change in the weighted average

⁸⁰ See Preliminary Results and accompanying Preliminary Decision Memorandum at 6.

dumping margin between the A-to-A method and the appropriate alternative method when both margins are above de minimis; or 2) the resulting weighted-average dumping margin moves across the de minimis threshold. Here, such a meaningful difference exists for Golden Dragon and Nacobre because when comparing the respondents' weighted-average dumping margins calculated pursuant to the A-to-A method and an alternative comparison method based on applying the A-to-T method to all U.S. sales which passed the Cohen's *d* test, both respondents' weighted-average dumping margins move across the de minimis threshold. This threshold is reasonable because comparing the weighted-average dumping margins calculated using the two comparison methods allows the Department to quantify the extent to which the A-to-A method cannot take into account different pricing behaviors exhibited by the exporter in the U.S. market. Therefore, for these final results, we continue to find that the A-to-A method cannot take into account the observed differences, and to apply the A-to-T method for all U.S. sales which passed the Cohen's *d* test to calculate Nacobre's weighted-average dumping margin.

Comment 5: Differential Pricing Analysis: Prices Set by Contractual Formula

In its differential pricing analysis for Golden Dragon in the Preliminary Results, the Department found that 70.33 percent of Golden Dragon's export sales passed the Cohen's *d* test. To calculate the weighted-average dumping margin for Golden Dragon in the Preliminary Results, the Department used the A-to-T method for all U.S. sales.

For the final results, Golden Dragon argues that the Department must alter its analysis to take into account the company's U.S. pricing structure; according to Golden Dragon, once the Department considers how prices are set, it will find that there exists no pattern of prices which differed significantly among purchasers, regions, or time period. Specifically, Golden Dragon contends that its U.S. prices during the POR are set by a contractual formula which includes a fixed base price (fabrication charge) and a floating price for copper pegged to the London Metals Exchange (LME), an independent commodity exchange.⁸¹ Golden Dragon argues that this pricing scheme is merely a "pass through" of the materials costs, which constitute a large portion of the total cost. Golden Dragon provided a graph to demonstrate that there is a close correlation between the LME closing price and the gross and net U.S. prices,⁸² and it uses this graph to show that the selling prices of its U.S. affiliate, U.S. Golden Dragon (USGD), move in tandem with the metal price.

Golden Dragon contends that the Department has not explained how prices determined by the market price for copper could satisfy a test of differential pricing over a period of time. Golden Dragon maintains that, although the Department recently concluded that it need not account for causality when evaluating price differences,⁸³ it cannot ignore the impact of the LME-set prices.

⁸¹ See Golden Dragon's February 21, 2013, section A Response at Exhibit A-6 ("Supply Agreement").

⁸² Golden Dragon provides a graph of the gross and net U.S. prices and the LME sale specific prices for each month of the POR for the largest volume control number sold in the United States during the POR at page 9 of its January 23, 2014, case brief. Golden Dragon asserts that the graph for the largest volume control number is a fair representation of its sales throughout the POR.

⁸³ See Pipe and Tube from Turkey 2013 at Comment 9. Golden Dragon contends that, unlike the respondent in Pipe and Tube from Turkey 2013, it is not requesting that the Department discern its intent in setting prices.

Golden Dragon contends that the Department's differential pricing policy analysis directs the Department to assess the facts on the record case by case. Golden Dragon maintains that here, without the contractually-determined LME-induced fluctuations, there is no basis to move to the second step of its differential pricing analysis (i.e., considering an alternative comparison method).

Golden Dragon asserts that, in light of the above facts, the Department's preliminary analysis cannot withstand judicial scrutiny. As a result, Golden Dragon argues that the Department should apply the A-to-A method to all of its U.S. sales to calculate its weighted-average dumping margin in the final results.

The petitioners disagree that the Department must account for LME-related price fluctuations in its differential pricing analysis. According to the petitioners, although the statute requires the Department to find a pattern of prices which differ significantly before resorting to an alternative comparison method, the Department is not required discern a respondent's intent in setting price.⁸⁴ The petitioners note that, while Golden Dragon attempts to distinguish Pipe and Tube from Turkey 2013 from the instant case, the Department in Pipe and Tube from Turkey 2013 addressed Golden Dragon's main argument that changes in raw material costs contributed to the price variation across time periods, finding that the Act does not require the Department to discern why such patterns arise. Specifically, the petitioners maintain that the market prices of raw materials are not relevant, given that section 777A(d)(1)(B) of the Act simply requires the Department to determine whether there is a pattern of prices that differ significantly.⁸⁵

Finally the petitioners assert that Golden Dragon's argument is self-serving because it limits its correlation analysis to a comparison of the LME prices and its gross unit prices. However, the petitioners argue that there is no correlation when the LME prices are compared to net U.S. price. Therefore, the petitioners contend that the Department has properly conducted its differential pricing analysis for the Preliminary Results, and it should not change it for the final results.

Department's Position:

We disagree with Golden Dragon. Golden Dragon essentially argues that the Department's analysis should account for causal links for price patterns in a respondent's U.S. sales. However, section 777A(d)(1)(B) of the Act states that the Department should consider different comparison methods if:

- (i) there is a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time, and

⁸⁴ See Pipe and Tube From Turkey 2012 at Comment 1.

⁸⁵ Id.; see also Notice of Final Determination of Sales at Less Than Fair Value and Negative Critical Circumstances Determination: Bottom Mount Combination Refrigerator-Freezers From the Republic of Korea, 77 FR 17413 (March 26, 2012) (Refrigerators from Korea), and accompanying Issues and Decision Memorandum at Comment 1.

- (ii) the administering authority explains why such differences cannot be taken into account using a method described in paragraph (1)(A)(i) or (ii).

There is no language in section 777A(d) of the Act that requires the Department to engage in the kind of analysis Golden Dragon requests. If Congress had intended to require that the Department demonstrate a certain causal link for the price differences that constitute a pattern of prices that differ significantly or which explain away price differences as a condition for applying an alternative comparison method, as Golden Dragon suggests, then Congress presumably would have used language more precise than “differ significantly.” In our view, the purpose of the differential pricing analysis is to determine whether the A-to-A method is a meaningful tool to measure whether, and if so to what extent, dumping is occurring. We do not interpret the statute to mean a pattern of prices that differ significantly after controlling for external factors such as LME prices, causal links between LME prices and U.S. prices, or the intentions or motivations of the producer or exporter. The statute includes no such directive. The analysis employed by the Department, including the use of the Cohen’s *d* and ratio tests, reasonably informs the Department whether a pattern of prices that “differ significantly” exists. On this basis, the Department will continue to apply the Cohen’s *d* and ratio tests, regardless of whether Golden Dragon’s prices are based on a combination of contractually-fixed fabrication charges and copper prices which are set contractually by a formula. Consequently, we have not altered the differential pricing analysis performed for Golden Dragon in these final results.

Comment 6: *AFA for Golden Dragon*

During the course of this review, Golden Dragon submitted three worksheets which reconciled USGD’s reported sales data to the company’s financial statements. These “reconciliations” are contained in the company’s March 7, 2014, original sales response at Exhibit B-3, May 1, 2013, supplemental sales response, at Exhibit SB-2, and the May 10, 2013, supplemental section D response at Exhibit SB-15.

According to the petitioners, Golden Dragon’s May 10 reconciliation raises serious concerns about the completeness and accuracy of the data used to calculate net U.S. price and NV, including: 1) USGD’s monthly trial balance figures do not tie to its monthly trial balance detail, and the observed differences are not explained by the timing of the recognition of the sales in the company’s accounting records; 2) the reconciliation worksheet contains a reference to sizeable “book” value which does not appear in the reconciliation itself; 3) Golden Dragon failed to report U.S. sales which it recognized in its trial balance; and, 4) Golden Dragon significantly over-reported the value, and under-reported the quantity, of home market sales, both in total and for individual customers.

The petitioners contend that Golden Dragon was afforded ample opportunity to cooperate by submitting complete and accurate data and it failed to do so, thereby precluding the Department from calculating an accurate weighted-average dumping margin.⁸⁶ As a consequence, the

⁸⁶ See Wooden Bedroom Furniture from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review, Preliminary Results of New Shipper Reviews and Notice of Partial Rescission, 72 FR 6201, 6212 (February 9, 2007).

petitioners argue that the Department should find that Golden Dragon failed to cooperate to the best of its ability in this review⁸⁷ and should apply AFA to address the concerns identified above.⁸⁸ The petitioners do not comment on how to apply AFA.

Golden Dragon argues that there is no basis to apply AFA in this review, given that: 1) it has participated completely by fully responding to the Department's original and supplemental questionnaires; and 2) the petitioners did not identify any deficiencies in USGD's sales reconciliations at the time that they were submitted. Further, Golden Dragon notes that the Department tacitly deemed Golden Dragon's sales reconciliations reliable by issuing no further factual questions after its second supplemental questionnaire and by accepting the submitted data in the Preliminary Results. Golden Dragon contends that the petitioners' effort to question one of its reconciliations is untimely and unsupported by the facts on the record.

Golden Dragon maintains that it has fully reconciled its reported sales to the sales ledger and trial balance and explained all differences and adjustments. According to Golden Dragon, the petitioners' argument is based on a misreading of the record, and had the petitioners reviewed the company's original sales reconciliation package,⁸⁹ they would have found a full explanation of all differences between the reported sales data and the sales ledger (many of which were, in fact, attributable to timing differences).⁹⁰ Further, Golden Dragon notes that it properly excluded the "book" value from its reconciliation because this transaction related to an intra-group financial transaction among affiliates, rather than a sale of copper pipe and tube.⁹¹ Golden Dragon asserts that it properly reported all home market and U.S. sales.⁹² In any event, Golden Dragon maintains that the examples cited by the petitioners represent only 0.05 percent of the company's sales and thus the differences are so small as to be immaterial.

Golden Dragon disagrees that it has met any of the statutory conditions for the application of either facts available (per section 776(a) of the Act) or AFA (per section 776(b) of the Act) because the necessary information is on the record. Golden Dragon insists that it has not withheld requested information from the Department, missed a deadline, or otherwise impeded the proceeding. Further, Golden Dragon contends that the Department may not apply AFA to it

⁸⁷ See Section 776(b) of the Act. See also Nippon Steel Corp. v. United States, 337 F.3d 1373, 1384 (Fed. Cir. 2003) (Nippon Steel).

⁸⁸ See e.g., Notice of Final Results and Partial Rescission of Antidumping Duty Administrative Reviews: Heavy Forged Hand Tools From the People's Republic of China, 65 FR 43290 (July 13, 2000), and accompanying Issues and Decision Memorandum at Comment 2 (Hand Tools from the PRC) (where the Department applied facts available due to the respondent's "inability to reconcile the quantity and value of U.S. sales reported to the Department to the quantity and value recorded in [its] accounting records.")

⁸⁹ See Golden Dragon's March 7, 2013, section B response at Exhibit B-3.

⁹⁰ Golden Dragon notes that other reconciliation differences were related to discounts or adjustments that are reflected in the sales ledger amounts but not in the gross revenue figures calculated by the petitioners.

⁹¹ See Note D to Golden Dragon's 2011 financial statements, contained in the February 21, 2013, submission at Exhibit A-9. Golden Dragon notes that it is clear from the reconciliation package that this transaction is not included in the profit and loss statement and trial balance.

⁹² For a point-by-point refutation of the petitioners' allegations, see Golden Dragon's rebuttal brief at 7-11.

on procedural grounds, claiming that the CIT has held that the Department must make a specific finding of a respondent's failure prior to application of AFA.⁹³

Finally, Golden Dragon notes that the petitioners only cite to one case in which the CIT and the Federal Circuit upheld the use of facts available (i.e., Nippon Steel), and it argues that this precedent does not apply here because the facts were dissimilar (i.e., unlike here, the respondent in Nippon Steel submitted contradictory information on the record which it attempted to correct only after the application of AFA). Golden Dragon argues that the citation to Hand Tools from the PRC is similarly not on point, because in that case the respondent failed verification.

Department's Position:

After reviewing the information on the record of this review, we disagree that Golden Dragon's U.S. sales reconciliation is inaccurate, incomplete, or inadequate and, thus, we find no basis to apply facts available, adverse or otherwise, to Golden Dragon in the final results. In this review, the necessary information is on the record; moreover, Golden Dragon did not: 1) withhold information requested by the Department; 2) fail to provide requested information by the deadline or in the form and manner requested; 3) significantly impede the proceeding; or, 4) provide information that could not be verified. Thus, none of the conditions for facts available set forth in section 776(a) of the Act has been met.

In its March 7, 2013, questionnaire response, Golden Dragon submitted a complete sales reconciliation, as requested by the Department, and provided a narrative explanation of this reconciliation.⁹⁴ On April 10, 2013, the Department requested Golden Dragon to respond to additional questions concerning its sales reconciliation, including an instruction to reconcile its sales to Mexico Golden Dragon's (MXGD's) and USGD's 2011 and 2012 financial statements. On May 1, 2013, Golden Dragon provided most of the requested information,⁹⁵ including a reconciliation of USGD's 2012 U.S. and Mexico sales data to USGD's financial statements. The company explained that it would submit the balance of the reconciliation in a supplemental response.

In Golden Dragon's May 10, 2013, section D supplemental response, Golden Dragon submitted a final revision of its sales reconciliation in Exhibit S-15, which included the balance of the reconciliation referenced in Golden Dragon's May 1, 2013 response. On May 21, 2013, the Department issued another supplemental sales questionnaire which contained one additional question concerning the sales reconciliation. Golden Dragon responded on June 4, 2013.

Although the petitioners have questioned the reliability of USGD's sales reconciliation, we find no merit in any of the examples cited to support this claim. As noted above, Golden Dragon filed its final revision to USGD's sales reconciliation on May 10, 2013. Golden Dragon's first step of its reconciliation was to tie USGD's monthly trial balance for 2011 and 2012 to USGD's audited profit and loss statement. Golden Dragon further reconciled USGD's sales ledger to the

⁹³ See SKF USA, Inc. v. United States, 675 F. Supp. 2d 1264, 1275, 1277 (CIT 2009).

⁹⁴ See Golden Dragon's March 7, 2013, submission at page B-7 and Exhibit B-3.

⁹⁵ See Golden Dragon's May 1, 2013, submission at page 10 and Exhibit SB-2.

trial balance in Exhibit SB-15 of its May 10, 2013, supplemental response; the sales ledger was broken down by market, customer, and origin country, with the totals matching those in the company's trial balance.

Where Golden Dragon's reconciliation was not clear, Golden Dragon provided additional information at the Department's request, and it fully explained all adjustments made to the trial balance in order to tie it to the audited profit and loss statements.⁹⁶ Specifically, Golden Dragon explained the reconciling differences which tie the sales ledger to the trial balance and to the sales data found in its May 10, 2013, supplemental response.⁹⁷ For example, Golden Dragon excluded one transaction because it was neither a sale nor related to subject merchandise; this particular adjustment is shown in Exhibit SB-15 and addressed in Footnote D in USGD's 2011 financial statements. In addition, as noted by Golden Dragon, other differences in the reconciliation were due to timing, discounts, or various adjustments commonly made in the ordinary course of business.⁹⁸ Therefore, because we are satisfied that Golden Dragon's reported sales data properly reconcile to USGD's financial statements, we have continued to rely on these data for purposes of the final results.

Comment 7: LOT for Golden Dragon

During the POR, Golden Dragon made home market sales via two selling agents: MXGD, located in Mexico, and USGD, located in the United States. In the preliminary results, we determined that home market sales made by these entities were at different LOTs because they were made at two different stages in the marketing process and that the selling functions were greater for sales made by USGD.⁹⁹ With respect to the U.S. market, we found that Golden Dragon made sales in one LOT, which was less advanced than either of its home market LOTs. We further found that home market sales made by MXGD were at the closest LOT to the U.S. LOT. Because we were unable to make an LOT adjustment under 19 CFR 351.412(e) for Golden Dragon, we preliminarily granted it a CEP offset pursuant to 773(a)(7)(B) of the Act and 19 CFR 351.412(f).

Golden Dragon agrees that there is one LOT in the U.S. market which is distinct from the home market LOT, and it supports the decision to grant it a CEP offset. However, it disagrees that: 1) it made sales at two LOTs in Mexico during the POR; and, 2) USGD's home market sales are at a more advanced stage than MXGD's sales.¹⁰⁰ As a result, Golden Dragon argues that the Department should either compare USGD's U.S. sales to all sales in the home market without regard to sales agent, or (at a minimum) compare these sales only to USGD's home market sales alone.

⁹⁶ See Golden Dragon's June 4, 2013, supplemental questionnaire response, at 1.

⁹⁷ See Golden Dragon's May 10, 2013, submission at 15 and Exhibit SB-15.

⁹⁸ See Golden Dragon's March 7, 2013, submission at Exhibit B-3, the May 1, 2013, submission at Exhibit SB-2, and the June 4, 2013, submission at 2.

⁹⁹ See Preliminary Results and accompanying Preliminary Decision Memorandum at 18.

¹⁰⁰ Golden Dragon notes that the Department's calculation memorandum indicates that there is a single LOT in the home market, but this statement appears to be in error. See Calculation Memo at 2.

With respect to the first argument, Golden Dragon notes that the Department’s regulations direct it to analyze a given respondent’s reported selling activities and distribution system to determine whether that company made sales at different marketing stages or LOTS.¹⁰¹ Golden Dragon contends that the record supports a single home market LOT because of the similarities in the categories of selling activities offered in the home market by USGD and MXGD; while Golden Dragon acknowledges that differences in these activities exist, it characterizes these differences as minor.

With respect to the second argument, Golden Dragon maintains that the Department should closely examine the two affiliates’ “Channel 1” sales (i.e., sales shipped directly to the customer) because the relevant comparison U.S. sales were shipped directly to the customer. According to Golden Dragon, the Department misunderstood the level of selling activity reported in its response for Channel 1 sales, considering that MXGD performs a number of additional activities for sales in this channel which USGD does not (i.e., packing, sales promotion, inventory maintenance, freight and delivery, and provision of direct sales personnel). Although Golden Dragon concedes that there are more selling activities performed by USGD in some home market channels, it maintains that this fact does not undermine its argument. Golden Dragon notes that the courts have upheld the determination of a single home market LOT where a respondent’s home market selling activities served different groups of customers, even where some selling activities were performed solely or principally for one of those groups.¹⁰²

Golden Dragon contends that the Department’s decision to match U.S. sales first to sales by MXGD led to distorted results, primarily because the preliminary margin was “driven” by dumping found on two U.S. sales. Specifically, Golden Dragon notes that the Department compared two April U.S. sales of a particular product to a single Channel 1 May sale of the same product by MXGD, despite the fact that USGD also sold that product in May in Channel 1. Golden Dragon argues that the fact that it performs fewer selling activities in Channel 1 than does MXGD renders the USGD home market sale a better comparison than the MXGD one, and the failure to make this comparison (or to compare the U.S. sale to both identical home market sales) inflated the company’s dumping margin.¹⁰³ Thus, Golden Dragon requests that the Department find only one home market LOT for purposes of the final results, or failing that, compare USGD’s sales in the United States to its sales in Mexico. According to Golden Dragon, because it operates in the same manner for all of its U.S. sales, the Department’s selection of sales by MXGD as more comparable is, on its face, illogical.

The petitioners assert that the Department does not need to address this issue if it bases the final margin for Golden Dragon on facts available (see Comment 5, above). However, they argue that, in the event that the Department continues to calculate a weighted-average dumping margin, then it properly compared Golden Dragon’s U.S. and home market sales in the preliminary results. According to the petitioners, this decision was consistent with the requirements of the

¹⁰¹ See 19 CFR 351.412(c)(2).

¹⁰² See *Pasta Zara SpA v. U.S.*, 781 F. Supp. 2d 1297, 1302 (CIT 2011) (*Pasta Zara*).

¹⁰³ Golden Dragon further contends that the MXGD sale in question had an “errant price.”

Act, the Department's established practice, and the LOT information reported by Golden Dragon itself.

The petitioners contend that the Department's regulations¹⁰⁴ recognize that sales are made at different LOTs "if they are made at different marketing stages," and this analysis needs to take account of differences in selling functions as well as class of customer or customer category.¹⁰⁵ The petitioners point out that Golden Dragon reported its MXGD and USGD home market sales as separate LOTs (i.e., LOT 2 and LOT 1, respectively),¹⁰⁶ and it reported its CEP sales through USGD as yet another LOT (i.e., LOT 3, which it characterized as a less advanced LOT than either home market LOT)¹⁰⁷ The petitioners note that these LOT designations are consistent with Golden Dragon's information reporting in the prior administrative review, as well as in accordance with the statutory framework.¹⁰⁸ Further, the petitioners maintain that Golden Dragon was well aware that the Department compares U.S. sales to home market sales at the numerically-closest LOT code, and had it, in fact, believed that all home market sales were at the same LOT, it would not have made the conscious decisions to assign: 1) separate LOT codes to home market sales; and, 2) a closer LOT code to MXGD's sales.

The petitioners note that Golden Dragon concedes that there are differences in the activities performed by USGD and MXGD with respect to home market sales and that it further concedes that home market sales by USGD involve a greater level of selling activity than sales by MXGD. The petitioners disagree with Golden Dragon's current characterization of these differences as minor, arguing that Exhibit A-4 of Golden Dragon's section A response clearly indicates that there are significantly more home market selling functions performed by USGD than MXGD. In addition, the petitioners contend that the Department should also take note of the qualitative differences in home market customers between MXGD and USGD, as shown in Golden Dragon's section B sales listing. According to the petitioners, Golden Dragon's attempt to re-write its questionnaire response and distort its margin calculation should be rejected for the final results.

¹⁰⁴ See 19 CFR 351.412(c)(2).

¹⁰⁵ See Certain Carbon Steel Butt-Weld Pipe Fittings from Thailand: Preliminary Results of Antidumping Duty Administrative Review, 67 FR 51178, 51181 (August 7, 2002).

¹⁰⁶ See Golden Dragon's March 7, 2013, section B questionnaire response, at B-31.

¹⁰⁷ See Golden Dragon's March 7, 2013, section C questionnaire response, at C-28.

¹⁰⁸ See section 773(a)(1)(A)-(B) of the Act.

Department's Position:

After analyzing this issue, we continue to find that Golden Dragon made sales at two LOTs in the home market during the POR, and at a third, less-advanced LOT in the U.S. market.¹⁰⁹ Further, we continue to find that the U.S. LOT is the most similar in terms of selling activities to the LOT of MXGD's home market sales.

In making these determinations, we based our analysis on the information contained on the administrative record, including Golden Dragon's response to the Department's questionnaire and supplemental questionnaire. As we noted in our preliminary results:¹¹⁰

With respect to the home market, Golden Dragon reported that it made sales to home market customers by Golden Dragon in Mexico through five channels of distribution (*i.e.*, sales shipped directly to the customer (Channel 1), sales picked up by the customer from Golden Dragon in Mexico (Channel 2), consignment sales (Channel 3), sales picked up from warehouse (Channel 4), and sales shipped directly to the customer after storage (Channel 5)). In addition, Golden Dragon reported that it made sales to home market customers by its U.S. affiliate, in the United States through two channels of distribution (*i.e.*, sales shipped directly to the customer (Channel 1) and sales picked up by the customer from Golden Dragon in Mexico (Channel 2)). Golden Dragon also reported two customer types (*i.e.*, OEMs and distributors). According to Golden Dragon, the selling functions it performed did not vary by the channel of distribution.

We found that Golden Dragon performed the following selling functions for all sales by Golden Dragon in Mexico in the POR: sales forecasting, strategic/economic planning, engineering services, sales promotion, packing, inventory maintenance, order input/processing, employment of direct sales personnel, sales/marketing support, technical assistance, provision of after-sales services, sales negotiations, and collection of payment; we also found that Golden Dragon in Mexico also provided freight and delivery to its home market customers in Channels 1, 3, and 4. In addition, Golden Dragon performed the same selling functions for the activity performed by Golden Dragon in Mexico for sales through its U.S. affiliate, plus its U.S. affiliate also performed sales forecasting, strategic/economic planning, engineering services, order/input processing, sales/marketing support, technical assistance, provision of cash discounts, payment of commissions, provision of after-sales services, sales negotiations, collection of payment, and warranty service. Accordingly, based on the four selling function groups listed above, we find that Golden Dragon performed sales and marketing, freight and delivery, inventory maintenance and warehousing, and warranty and technical support for home market sales. Because the sales in the home market are made at two different stages in the marketing

¹⁰⁹ We note that the discrepancy in the Calculation Memo pointed out by Golden Dragon was the result of an inadvertent error.

¹¹⁰ See [Preliminary Results](#) and accompanying Preliminary Decision Memorandum at 11 and 12.

process and the selling functions are greater for sales made by the U.S. affiliate, we preliminarily determine that there are two different LOTs in the home market (*i.e.*, sales made by Golden Dragon in Mexico and sales made by its U.S. affiliate).

The above analysis is consistent with the information that Golden Dragon itself reported in its original questionnaire responses. In its February 21, 2013, section A response, Golden Dragon states, “{a}s the Department will see in our Section B response, Golden Dragon is requesting a CEP offset because its home market sales are at a different level of trade and a level of trade adjustment cannot be calculated.”¹¹¹ Furthermore, in its March 7, 2013, section B response, Golden Dragon states, “{s}ales in Mexico are made by USGD or MXGD directly to the customers. As in the previous review, we are reporting LOT code of ‘2’ for all of Golden Dragon’s sales made in the home market by MXGD and the LOT code of ‘3’ for all home market sales made by USGD.”¹¹²

Moreover, Golden Dragon reported that its home market sales through USGD and its home market sales through MXGD were at a more advanced LOT than its CEP sales through USGD. In its May 1, 2013, supplemental response Golden Dragon states, “{a}s shown in the selling activity charts, Golden Dragon performs a greater range of selling activities on Mexican sales. The selling activities chart, included as Exhibit SA-2, makes clear that all U.S. sales involve the same selling activities. However, those selling activities are different from those involved in home market sales. As stated, the selling activities with respect to home market sales are more extensive than those related to U.S. sales.”¹¹³

Golden Dragon’s response with regard to LOT is consistent with its stance in the previous review, where it also reported home market sales at two LOTs; in that review, as here, we found that Golden Dragon’s sales through USGD were at a more advanced LOT than its sales through MXGD or USGD in the U.S. market, and Golden Dragon did not challenge this finding.¹¹⁴

With respect to the merits of Golden Dragon’s first argument (*i.e.*, that there is only one home market LOT), we disagree with Golden Dragon that the differences in the selling activities between sales made by USGD and MXGD in the home market are minor. In the course of this review, we requested that Golden Dragon separately report the selling functions performed by USGD and MXGD. The tables which Golden Dragon submitted in response to this request clearly indicate that the selling activity was significantly greater for sales made by USGD, which required the involvement of two entities.¹¹⁵ For instance, Golden Dragon reports that, for its home market sales via USGD, both USGD and MXGD performed sales forecasting, strategic

¹¹¹ See Golden Dragon’s February 21, 2013, section A questionnaire response, at A-16.

¹¹² See Golden Dragon’s March 7, 2013, section B questionnaire response, at B-31.

¹¹³ See Golden Dragon’s May 1, 2013, supplemental questionnaire response, at 2.

¹¹⁴ See Seamless Refined Copper Pipe and Tube From Mexico: Preliminary Results of Antidumping Duty Administrative Review; 2010-2011, 77 FR 73422 (December 10, 2012) and accompanying Preliminary Decision Memorandum at 10, unchanged in Seamless Refined Copper Pipe and Tube from Mexico: Final Results of Antidumping Duty Administrative Review; 2010-2011, 78 FR 35244 (June 12, 2013).

¹¹⁵ See Golden Dragon’s May 1, 2013, supplemental questionnaire response, at Exhibit SA-2.

and economic planning, engineering services, order input and processing, sales and marketing support, technical assistance, and after-sales services; for its sales via MXGD, only MXGD performed these selling functions. In addition, Golden Dragon reported that USGD provides warranty service for home market sales, whereas MXGD does not.

With respect to Golden Dragon's second argument (*i.e.*, that the USGD home market LOT is less advanced than the MXGD LOT), this argument is premised on the misplaced assumption that the Department does not consider all selling activities which occur prior to the sale of the foreign like product to a home market customer. While USGD may, in fact, perform fewer selling activities than MXGD for its Channel 1 sales, this statement is not meaningful. Golden Dragon did pack the merchandise, hold it in inventory, and employ personnel who sold it to USGD; thus, it is simply incorrect that Golden Dragon did not perform these selling activities on its USGD Channel 1 sales.^{116,117} In any event, Golden Dragon appears to argue that the Department should conduct a separate LOT analysis for its Channel 1 sales for each sales agent; however, there is no basis to find that the Channel 1 selling activities are so different from the selling activities in other sales channels that they should be viewed in isolation. Thus, contrary to Golden Dragon's request, there is no basis to find that they represent a separate marketing stage in and of themselves (which is the regulatory prerequisite for finding separate LOTs, pursuant to 19 CFR 351.412(c)(2)).

Based on the foregoing, we disagree that the LOT analysis led to distorted results because two U.S. sales were compared to an identical product sold at the most similar LOT in the home market. Although Golden Dragon reported the sale of an identical product in the same channel of distribution as the U.S. sales in question, the Department matches sales based on LOT 'to the extent practicable' and not based on the channel of distribution. Further, the additional sale is at a more advanced LOT (which involves more selling activities), making it a less desirable match.

Although Golden Dragon's argument is directed at the Department's LOT methodology, this argument appears to be a vehicle by which the company attempts to alter the NV calculated for the two U.S. sales noted above. However, beyond the passing mention of an "errant price," Golden Dragon does not argue that there is anything unusual with MXGD's sales transaction. Golden Dragon does not argue that this sale is outside the ordinary course of trade, nor does it argue that the sale is not an appropriate match in general (*i.e.*, its preferred outcome would be to average the price of this sale with the price of the USGD sale for the same product in the same month). Thus, Golden Dragon has provided no legitimate reason to depart from our normal

¹¹⁶ See Preliminary Results and accompanying Preliminary Decision Memorandum at 12, which states that MXGD "performed the same selling functions . . . for sales through its U.S. affiliate, plus its U.S. affiliate also performed" a number of activities (emphasis added).

¹¹⁷ We also disagree with Golden Dragon that, because USGD makes both U.S. and home market sales, it is illogical to find that USGD's home market sales are less comparable to its own U.S. sales than are MXGD's home market sales. Golden Dragon fails to take into account the fact that the LOT analysis is performed only after the deduction of selling expenses under section 772(d) of the Act from U.S. price. After making these deductions, the most comparable LOT is the one which is the least remote from the CEP LOT, which in this case is MXGD's LOT. In other words, the Department is effectively comparing a sale by MXGD to home market customers to a sale by MXGD to USGD.

methodology of comparing sales of U.S. products to sales of contemporaneous products in the comparison market at the closest LOT.

Finally, we find that Golden Dragon's reliance on Pasta Zara is misplaced. In Pasta Zara, the Department found one LOT in the comparison market when selling activities in that market were similar in nature. There, the Court noted, "{s}ignificant to the Department's determination were the findings that Zara did not perform separate storage, handling, or loading activities for its traditional local customers."¹¹⁸ However, in this particular review, the record evidence indicates that the selling activity was greater for home market sales made by USGD which required the involvement of two entities (i.e., USGD and MXGD), and thus Pasta Zara does not apply here.

Therefore, for the final results, we have continued to treat the home market sales by MXGD and USGD as made at two separate LOTs, and we have continued to match the company's U.S. sales in the first instance to the most similar of these LOTs (i.e., sales by MXGD).

Comment 8: CBP Documentation for Nacobre

Nacobre maintains that the dumping margin calculated in the final results will be significantly lower than the cash deposit rate in effect at the time of entry for the U.S. sale in question. As a result, Nacobre argues that it should be entitled to a refund of most of the payment it made to CBP in December 2013, and it requests that the Department require CBP to refund its payment. Nacobre further argues that, in the event that CBP is unable to refund this payment, the Department should adjust the rates in the liquidation instructions to ensure that the total amount of antidumping duties Nacobre paid (including the December payment) does not exceed the total antidumping duty liability calculated for Nacobre in the final results.

The petitioners did not comment on this issue.

Department's Position:

In its U.S. sales listing, Nacobre reported a U.S. sale which was not originally classified as an entry of subject merchandise.¹¹⁹ In December 2013 and January 2014, Nacobre submitted information at the Department's request related to this U.S. sale, including documentation demonstrating that it submitted payment to CBP to cover deposits of estimated antidumping duties for this entry. Also in January 2014, we placed information from CBP related to this sale on the record of this administrative review.

We disagree with Nacobre that it is appropriate to adjust our liquidation instructions to account for its December payment to CBP. The entry in question has not been reclassified as a type 3 entry (i.e., one subject to antidumping duties) by CBP. Because the liquidation instructions cover only type 3 entries, they cannot apply to this sale, contrary to Nacobre's contention.

¹¹⁸ See Pasta Zara, at 1302.

¹¹⁹ See the December 18, 2013, memorandum from Elizabeth Eastwood to the file entitled, "Calculations Performed for Nacional de Cobre, S.A. de C.V. (Nacobre) for the Preliminary Results of the 2011-2012 Antidumping Duty Administrative Review of Seamless Refined Copper Pipe and Tube from Mexico" at page 4.

Further, CBP has a formal process for protesting duties posted by importers and, thus, the appropriate agency for Nacobre's request is CBP, not the Department.

Because Nacobre has claimed business proprietary treatment for the circumstances related to this U.S. sale, we are unable to discuss it further here. Therefore, for additional discussion, see the June 23, 2014, memorandum from Elizabeth Eastwood to the file entitled, "Calculations Performed for Nacional de Cobre, S.A. de C.V. (Nacobre) for the Final Results of the 2011-2012 Antidumping Duty Administrative Review of Seamless Refined Copper Pipe and Tube from Mexico."

Comment 9: *Nacobre's Raw Material Cost Adjustment*

In the preliminary results, we found that Nacobre's reported material costs were significantly lower than both the average per-unit consumption value of the materials recorded in the company's books and its purchase price for the materials. While our analysis indicated that Nacobre reduced its cost of materials by certain items, the company was unable to provide an explanation as to what these items represented and how they relate to the calculated cost of production.¹²⁰ Therefore, we adjusted Nacobre's reported material costs to bring them in line with the average per-unit cost of materials recorded on the company's books.

Nacobre claims that the Department's adjustment to Nacobre's reported copper billet and cathode costs was unjustified, excessive, and partially based on a submission which was later updated. Nacobre claims that the per-unit standard cost for billets and cathodes is comparable to the actual per-unit billet and cathode cost as shown on the inventory movement schedule, the document on which the Department relied when making its adjustment to reported costs.¹²¹ Nacobre argues that this comparison reveals a difference which is much smaller than the adjustment the Department made to the reported cathode and billet costs.

Nacobre acknowledges that it experienced problems during the POR in implementing a new accounting system. Nacobre points to a worksheet on the record which it claims shows the reconciliation of the cost of manufacturing (COM) recorded in the financial statements to the standard costs;¹²² and Nacobre claims that this worksheet identifies five adjustments¹²³ which are either added to or subtracted from the standard costs of raw materials to calculate a figure which reconciles to the raw material costs shown in the financial statements. While Nacobre acknowledges that one of the five items is an unreconciled difference (Nacobre refers to it as a

¹²⁰ See Nacobre's September 12, 2013, response at 1-12.

¹²¹ Nacobre's explanation contains business proprietary information which cannot be discussed here. See Nacobre's January 23, 2014, case brief at 5 for Nacobre's comparison.

¹²² See Nacobre's September 12, 2013, response at Exhibit S3D-3.

¹²³ Specifically, Nacobre identifies the five adjustments as copper hedging, tolling income, dross recovery, physical inventory, and an unreconciled difference. Nacobre argues that comparing the reported billet and cathode costs to prices is an unfair comparison because the prices used by the Department do not take into account four of these adjustments (*i.e.*, copper hedging, tolling income, dross recovery and a physical inventory adjustment).

“plug”), it also claims that this unreconciled difference is insignificant.¹²⁴ Nacobre argues that each adjustment is identified on the record and, other than the unreconciled difference adjustment, each is a valid component of the reported costs.

In its case brief, Nacobre offered an alternative adjustment for use in the event that the Department continues to feel that an adjustment is necessary. Nacobre asserts that the Department’s calculation is incorrect because certain components of this calculation (*i.e.*, billet and cathode costs as percentages of the COM) were based on a submission which was later updated. Nacobre points to a later submission which shows a different figure for the COM, and it argues that the Department should use this figure instead of the one used in the preliminary results.

The petitioners maintain that the Department’s adjustment is straightforward and based on the facts on the record, while Nacobre’s proposed adjustment is without merit and makes no sense. Specifically, the petitioners point out that Nacobre’s proposed alternative adjustment relies, in part, on an estimation of the percentage of the cost of billets and cathodes in the raw material cost which exceeds 100 percent. Moreover, the petitioners claim that Nacobre mischaracterizes the Department’s calculation by confusing the cost of materials with the COM. Therefore, the petitioners assert that the Department should continue to rely on Nacobre’s materials costs, as adjusted in the preliminary results, in its calculations for the final results.

Department’s Position:

For the reasons set forth below, we disagree with Nacobre that the Department’s adjustment to Nacobre’s copper billet and cathode costs in the preliminary results was excessive, based on outdated information or otherwise unjustified. However, we agree that the copper hedging, tolling income, and dross recovery adjustments are valid offsets to the material costs. Therefore, for the final results, we revised our adjustment to Nacobre’s costs to account for the copper hedging, tolling income, and dross recovery.

Nacobre argues that the Department’s adjustment to its costs in the preliminary results was excessive. While Nacobre attempts to show that its standard costs for billets and cathodes are comparable to prices it paid for purchased billets and cathodes,¹²⁵ Nacobre incorrectly characterizes the Department’s adjustment as an adjustment to the standard costs. However, in the preliminary results, we did not adjust Nacobre’s standard costs; rather, we adjusted the reported costs because they did not accurately reflect the actual prices paid for purchased billets and cathodes and Nacobre was unable to explain the difference.¹²⁶

¹²⁴ See Nacobre’s January 23 case brief at 8. Nacobre shows each item in a table as a percentage of the standard cost of raw materials.

¹²⁵ See Nacobre’s January 23 case brief at 5.

¹²⁶ See December 18, 2013, Memorandum to Neal Halper, Director, Office of Accounting, entitled “Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Results: Nacional de Cobre, S.A. de C.V.” (Preliminary Cost Calculation Memo).

Nacobre reported that the raw material component of the merchandise under consideration is comprised of copper billets, copper cathodes and other indirect material inputs (lubricants, gases and chemicals).¹²⁷ Information on the record shows a large discrepancy between the prices Nacobre paid for consumed billets and cathodes and the reported raw material costs.¹²⁸ Nacobre acknowledged that it had problems in the implementation of a new accounting system and that the system did not provide a reliable cost of goods sold figure for 2011.¹²⁹ Thus, Nacobre departed from its books records and explained that, for reporting purposes, it developed a methodology based on its old standard cost accounting system.¹³⁰ Nacobre's methodology, however, has a flaw in that the reported cost of raw materials per kilogram of finished copper pipe and tube produced is substantially lower than the prices Nacobre actually paid per kilogram for its purchases of copper billets and cathodes.¹³¹ Since the finished pipe and tubes are made entirely of copper, it is not feasible for the reported cost of the copper per kilogram of finished pipe to be substantially less than that per-kilogram cost of the input copper billet and cathode purchases. In two separate detailed supplemental questionnaires, we asked numerous questions addressing this fundamental discrepancy;¹³² however, Nacobre never provided a clear explanation. Instead, to justify this discrepancy, Nacobre refers to its "SAP inventory adjustment" and an "unreconciled difference" in its calculation of reported material costs.¹³³ However, simply referring to these adjustments without further explanation does not satisfy our concerns regarding Nacobre's reported material costs. We disagree with Nacobre that these differences are insignificant; rather, these items represent large reductions to the standard raw material costs from its normal books and records which vastly understate Nacobre's reported costs. Accordingly, we increased Nacobre's reported costs to reflect the actual prices paid for the consumed billets and cathodes.

Regarding how the Department calculated the adjustment in the preliminary results, we disagree with Nacobre that the adjustment was partially based on a submission which was later updated. In its case brief, Nacobre refers to two different figures on the record for COM: one from its original March 14, 2013, submission and the other from its September 12, 2013, supplemental response.¹³⁴ Nacobre claims for the first time in its case brief that the COM in the September submission "updates" the COM from the March submission.¹³⁵ In addition, for the first time in

¹²⁷ See Nacobre's March 14, 2013, response at page 6.

¹²⁸ See Nacobre's July 29, 2013, response at Exhibit SSD-10A and Nacobre's September 12, 2013, cost data.

¹²⁹ See Nacobre's June 4, 2013, response at page 32.

¹³⁰ See Nacobre's March 14, 2013, response at page 37.

¹³¹ See Nacobre's July 29, 2013, response at Exhibit SSD-10A and Nacobre's September 12, 2013, cost data.

¹³² See the Department's July 1, 2013, and August 22, 2013, supplemental questionnaires issued to Nacobre.

¹³³ See Nacobre's September 12, 2013, response at Exhibit S3D-3.

¹³⁴ See Nacobre's March 14, 2013, response at Exhibit 4 and the September 12, 2013, response at Exhibit S3D-3.

¹³⁵ The relevance of the COM figure is that it was used to estimate the portion of the reported COM that the value of copper billets and cathodes represents.

its case brief, Nacobre recalculates the copper billet and cathode percentages using the COM from the September submission. The COM from the September submission, however, suffers from the same inaccuracies as the reported costs, in that it relies on the same unsupported reconciling items discussed above (i.e., “SAP inventory adjustment” and “unreconciled difference”). Moreover, it is clear that Nacobre’s alternate calculation adjustment is inappropriate, as it results in an estimated cost of copper billets and cathodes which is greater than 100 percent of the total cost of raw materials, a result which defies logic.

In its case brief, Nacobre asserts that the Department used the percentage that billets and cathodes represented of cost of materials instead of the percentage that these items represented of COM. In fact, we used the percentage of billets and cathodes as a percentage of COM. We also note that Nacobre incorrectly identified the estimated percentage that the Department calculated that copper cathode and billet represents of cost of materials. The figure Nacobre cites as a percentage is in fact an estimated per-unit cost of copper, not a percentage.

Finally, we agree with Nacobre that comparing the reported billet and cathode costs to prices is an unfair comparison because the prices used by the Department do not take into account adjustments for copper hedging, tolling income, or dross recovery. Therefore, for the purposes of the final results we have modified our adjustment to account for those items.¹³⁶

RECOMMENDATION:

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

Agree

Disagree



Paul Piquado
Assistant Secretary
for Enforcement and Compliance

23 JUNE 2014

Date

¹³⁶ We noted errors in the percentage adjustments for copper hedging, tolling income, and the dross recovery as presented in Nacobre’s case brief. Therefore, for the final results, we calculated the adjustment by relying on the September 12, 2013, response at Exhibit S3D-3. For further discussion, see the Memorandum dated June 23, 2014, to Neal Halper, Director, Office of Accounting, entitled “Cost of Production and Constructed Value Calculation Adjustments for the Final Results: Nacional de Cobre, S.A. de C.V.”