

31 August 2018

The Director  
Operations 3  
Anti-Dumping Commission

EMAIL [investigations3@adcommission.gov.au](mailto:investigations3@adcommission.gov.au)

Dear Director,

**Review of Measures No. 465 concerning *Hot Rolled Structural Steel Sections (HRS) Exported from Korea***

OneSteel Manufacturing Pty Ltd, trading as *Liberty OneSteel*, seeks to further clarify its claims in relation to the most comparable goods for fair comparison in Review of Measures 465 and address the lack of clarity on price differentials raised in ADRP Report 20 that reviewed the issue following the conclusion of Dumping Investigation No. 223.

Liberty OneSteel also provides a response to the date of sale claims raised by Hyundai Steel Company (**Hyundai**) in their submission dated 24 August 2018.

**1. Price Comparability**

For clarity, Liberty OneSteel agrees with both the Commission and the ADRP that the like goods sold by Hyundai on their domestic market and the goods that are exported to Australia are non-identical. In circumstances where identical goods are not sold on both the domestic and export markets, the Commission has a responsibility under S269TAC (8) to make adjustment for differences in physical characteristics where the differences can be quantified to ensure a fair price comparison. Relevant differences include quality, chemical composition, structure, or design.

During both Investigation No. 223 and at its recent presentation to the Commission on 22 August 2018, Liberty OneSteel presented evidence that:

- the goods exported to Australia by Hyundai that meet AS/NZS 3679.1:2016 have chemistry restrictions imposed that mean they are prequalified for welding.
  - Grades that are prequalified for welding represent a significant time and cost saving (no need to develop the necessary welding procedures) to fabricators looking to construct a welded steel structure over grades that are not prequalified for welding.
- The like goods sold by Hyundai on the Korean domestic market are not all prequalified for welding as they are sold to either:

- The Korean Standard KS D 3503 (2014 or 2016) Rolled Steel for General Structures does not require the chemistry control for welding, so no maximum CE requirement is imposed. These grades are denoted by the prefix SS, eg. SS400, SS275, SS490 etc.

or

- The Korean Standard KS D 3515 (2014 or 2016) Rolled Steel for Welded Structures does require the chemistry controlled to enable known weld performance to defined welding procedures, so a maximum CE requirement is imposed. These grades are denoted by the prefix SM, eg. SM400, SM275, SM490, SM355 etc.

It is important to note that a steel certified to have been produced to a Standard absent a CE requirement cannot be assessed to comply with another Standard which has a CE requirement simply by substituting a batch test certificate chemistry result into the CE equation. Appendix B to AS/NZS 3679.1 which deals with establishing product conformity warns against the use of this approach ie. “testing and inspection of one or two samples” on the basis that it is a statistically invalid representation of the actual variability in a batch of steel.

Liberty OneSteel acknowledges that the Commission has made an adjustment based on cost differences identified between the domestic models and the models exported to Australia.

*The verification team quantified a small difference in the cost of production between the selected Korean grades for model matching purposes falling within the 400<=Mpa<450 minimum tensile strength range and the cost of production for the grade exported to Australia.*

*This cost difference has been adjusted by applying the gross margin of profit on the relevant goods to estimate the price effect of that cost difference. The verification team considers that an adjustment to normal value is warranted for the merchandise difference observed. The calculation for the merchandise difference applied is contained in Confidential Appendix 4.*

However, Liberty OneSteel notes that under the S269TAC (8) it is preferable to determine comparability based on price differences rather than cost differences.

Liberty OneSteel provides the following evidence of such a price differential that applies to “welded structure” grades versus “general structure” grades in the Korean domestic market:

- In INV No. 223, OneSteel provided evidence (from [REDACTED]) of price extras applicable to both readily/prequalified weldable grades and higher strength grades relative to Grade SS400 (base grade) sold in the Korean market. That evidence is again provided as Confidential Attachment A.
- An update from the same source, dated 30 August 2018, is provided as Confidential Attachment B.
- The latest update again shows that when comparing the SM400 grade for welded structures with the SS400 grade for general structures, a price premium of [REDACTED] applies – these grades both have minimum yield strength requirements (as per their respective Standards) of 215-245MPa and tensile strengths of 400-510MPa so the price premium relates to the chemistry control (CE) for weldability required for grade SM400.



As such Liberty OneSteel requests that the Commission consider that price adjustments are preferable to cost adjustments for Korean domestic models that are not prequalified for welding.

Liberty OneSteel respectfully submits that the Commission ought to be able to calculate the size of the weldability price adjustment by comparing the price difference between the welded structure (SM) grades and the general structure (SS) grades of a similar yield strength verified as sold by Hyundai during the review period. For grades sold to the 2014 versions of KS D 3503 and KS D 3515, the price difference between the grades SS400 and SM400 provide the best opportunity for comparison given their identical mechanical property requirements.

For grades sold to the 2016 versions of KS D 3503 and KS D 3515 (given both 2014 and 2016 were concurrently applicable in Korea during the period of review), the best grades to compare are grades SS275 and SM275(A-D) as these grades provide a very close match on mechanical property requirements and any premium for the SM grades are likely attributable to the chemistry control requirement for welding.

In summary, it remains Liberty OneSteel's view that for grades produced to the 2014 version of KS D 3515 (for Welded Structures), Grade SM490A is the closest match for Grade 300, both in terms of clearly defined CE requirement for chemistry control for welding and a close match on minimum yield strength requirement. For grades produced to the 2016 version of KS D 3515, applying the same comparison criteria, the current grades that most closely match Grade 300 exported to Australia are grades SM275A-D. In the absence of sufficient domestic sales of SM490A or SM275 A-D, an adjustment ought to be made applying the price differential observed between the SS and SM grades of similar Standard yield strength requirements to ensure comparability to the readily weldable export Grade 300. For Grade SM490A, the adjustment (for strength and weldability) relative to SS400 ought to be [REDACTED] – refer Confidential Attachment B. For grade SM275 A-D the adjustment ought to be the price differential between SS275 and SM275 (A-D).

## 2. Date of Sale

Liberty OneSteel supports the Commission's finding that in establishing the date of sale, the invoice date best establishes the material terms of sale and that Hyundai's claim for a downward adjustment for sales occurring at different times has not been substantiated. The evidence provided the Commission to support this finding is summarised in Hyundai's Exporter Verification Visit Report<sup>1</sup>.

- *The sales order is an entry in Hyundai Steel's accounting system intended to reflect the terms of the purchase order received from the customer, however for a certain number of the selected transactions the sales order date preceded the date of the purchase order.*
- *Hyundai Steel recognises a transaction as a sale in its accounting system, i.e. posts it to the sales ledger, on 'shipment' date, i.e. date the truck leaves the plant for delivery to the port for export. Hyundai Steel didn't provide shipment dates in the export sales listing, only sales order date and invoice date, however the verification team was able to identify the shipment date for the selected transactions. Analysis of the dates for these transactions shows that the invoice date is much closer to the date when Hyundai Steel recognises exports as sales in its accounting system than the sales order date.*

<sup>1</sup> EPR Folio No. 465/010



- *The delivery date by which the customer requires the goods to be exported to Australia is a material term of sale included on the purchase order and reflected in the sales order. The verification team was able to identify these dates for the selected transactions and analysis shows that a not insignificant percentage of the goods by volume were exported after the date requested by the customer on the purchase order. This analysis indicates that the terms of the sales order were not met on a significant number of occasions and the discrepancy between the sales order terms and the actual terms of the sales was substantial.<sup>2</sup>*

Further, the Commission's own observations that Hyundai has completely reversed their position from the original investigation in relation to the date of sale,

*Specifically, Hyundai Steel stated that during the original investigation period the price could be varied after an export order was made and so the sales order date was not the final 'date of sale'<sup>3</sup>;*

together with Hyundai's own claims in a recent US steel investigation supporting the date of invoice as the date of sale:

*In its questionnaire responses and accompanying sales data files, Hyundai Steel reported the earlier of shipment date or the date of invoice as the appropriate date of sale. Invoices are generally issued after shipment so the date of shipment is the appropriate date of sale for Hyundai Steel's U.S. sales. Hyundai Steel issues invoices at this time because price and/or quantity remains subject to change up until shipment. [emphasis added]*

*Hyundai Steel submitted documentation for sales in which the material terms of sale changed following receipt of the customer's order and estimated that this occurs in a good percentage of sales. [emphasis added]<sup>4</sup>*

exposes the following statement by Hyundai's Australian representative as both contrary to their earlier claims and disingenuous:

*It is wrong to claim that the material terms of Hyundai Steel's Australian sales have not been established until the point that the invoice is issued..... Any view to the contrary would defy real world commercial practices and basic principles of contract law<sup>5</sup>*

Liberty OneSteel supports the Commission's finding in establishing the date of sale as the invoice date, the date that best establishes the material terms of sale and acknowledges that a downwards adjustment for sales occurring at different times has not been substantiated.

FOR AND ON BEHALF OF THE AUSTRALIAN INDUSTRY APPLICANT

ONESTEEL MANUFACTURING PTY LTD (trading as LIBERTY ONESTEEL)

<sup>2</sup> EPR Folio No. 465/010 p14

<sup>3</sup> EPR Folio No. 465/010 p13

<sup>4</sup> Non-Confidential Attachment C - Issues and Decision Memorandum for the Final Affirmative Determination in the Antidumping Duty Investigation of Certain Hot-Rolled Steel Flat Products from the Republic of Korea p27


<sup>5</sup> EPR Folio No. 465/016 – Submission Moulis Legal on behalf Hyundai 24th August 2018 p 2



A-580-883  
Investigation  
Public Document  
E&C/V: MR JB

DATE: August 4, 2016

MEMORANDUM TO: Ronald K. Lorentzen  
Acting 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 Affirmative  
Determination in the Antidumping Duty Investigation of Certain  
Hot-Rolled Steel Flat Products from the Republic of Korea

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## I. SUMMARY

We analyzed the comments of the interested parties in the antidumping duty investigation of certain hot-rolled steel flat products (hot-rolled steel) from the Republic of Korea (Korea). As a result of our analysis, and based on our findings at verification, we made changes to the margin calculations for Hyundai Steel Company (Hyundai Steel) and POSCO, the two mandatory respondents in this case.<sup>1</sup> We recommend that you approve the positions described in the “Discussion of the Issues” section of this memorandum. Below is the complete list of the issues in this less than fair value (LTFV) investigation for which we received comments from interested parties:

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<sup>1</sup> We collapsed POSCO and Daewoo International Corporation (DWI) in the preliminary determination. *See Certain Hot-Rolled Steel Flat Products from the Republic of Korea: Affirmative Preliminary Determination of Sales at Less than Fair Value and Postponement of Final Determination*, 81 FR 15228 (March 22, 2016) (*Preliminary Determination*), and accompanying March 14, 2016, memorandum to Paul Piquado, Assistant Secretary for Enforcement and Compliance, entitled “Decision Memorandum for the Preliminary Determination in the Less-than-Fair-Value Investigation of Certain Hot-Rolled Steel Flat Products from the Republic of Korea” (*Preliminary Decision Memorandum*). No parties commented on the decision to collapse these two entities, and we continue to consider them to be a single entity for the final determination. We also found in the *Preliminary Determination* that POSCO was affiliated with the following companies involved with the sale or further manufacture subject merchandise: POSCO Processing & Service (POSCO P&S), Daewoo International (America) Corp. (DWA), POSCO America (POSAM), and USS-POSCO Industries (UPI). Where necessary, we have used “POSCO\*” to refer to the POSCO company alone.

## Company-Specific Comments

### *POSCO*

1. Correction of Errors in the Margin Calculation
2. The Correct Code for Prime Merchandise to Use in the Margin Calculation
3. CEP Offset
4. Treatment of Side-Trimming Costs Accepted as a Minor Correction
5. Foreign Brokerage and Handling Expense for Channel 5 Sales
6. Revision of Further Manufacturing Costs for Non-Prime Channel 5 Sales
7. Date of Sale

### *Hyundai Steel*

8. Reporting of Inland Freight, International Freight, Marine Insurance and Other Services Provided by Affiliated Companies
9. CEP Offset
10. Date of Sale
11. Differential Pricing
12. Hyundai Steel Calculation Issues
13. Certain Home Market Customers
14. Hyundai Steel America Channel 5 Issues
15. Affiliated Home Market Resales

## **II. BACKGROUND**

On March 22, 2016, the Department of Commerce (Department) published the *Preliminary Determination* of sales at LTFV of hot-rolled steel from Korea. During January, April, and June 2016, the Department conducted sales, cost, and further manufacturing verifications at the offices of POSCO and Hyundai Steel and certain of their U.S. affiliates, in accordance with section 782(i) of the Tariff Act of 1930, as amended (Act).

We invited parties to comment on the *Preliminary Determination*. On July 13, 2016, ArcelorMittal USA LLC (a petitioner),<sup>2</sup> POSCO, and Hyundai Steel submitted case briefs. On July 18, 2016, the same parties submitted rebuttal briefs. Based on our analysis of the comments received, as well as our findings at verification, we recalculated the weighted-average dumping margins for POSCO and Hyundai Steel from the *Preliminary Determination*, which in turn resulted in a recalculation of the estimated all-others rate.

## **III. PERIOD OF INVESTIGATION**

The period of investigation (POI) is July 1, 2014, through June 30, 2015.

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<sup>2</sup> ArcelorMittal USA LLC, along with AK Steel Corporation, Nucor Corporation, Steel Dynamics, Inc., and United States Steel Corporation, are collectively referred to as "Petitioners."

#### IV. SCOPE COMMENTS

In the *Preliminary Determination*, we did not modify the scope language as it appeared in the *Initiation Notice*.<sup>3</sup> No interested parties submitted scope comments in case or rebuttal briefs; therefore, the scope of this investigation remains unchanged for this final determination.

#### V. SCOPE OF THE INVESTIGATION

The products covered by this investigation are certain hot-rolled, flat-rolled steel products, with or without patterns in relief, and whether or not annealed, painted, varnished, or coated with plastics or other non-metallic substances. The products covered do not include those that are clad, plated, or coated with metal. The products covered include coils that have a width or other lateral measurement (width) of 12.7 mm or greater, regardless of thickness, and regardless of form of coil (*e.g.*, in successively superimposed layers, spirally oscillating, *etc.*). The products covered also include products not in coils (*e.g.*, in straight lengths) of a thickness of less than 4.75 mm and a width that is 12.7 mm or greater and that measures at least 10 times the thickness. The products described above may be rectangular, square, circular, or other shape and include products of either rectangular or non-rectangular cross-section where such cross-section is achieved subsequent to the rolling process, *i.e.*, products which have been “worked after rolling” (*e.g.*, products which have been beveled or rounded at the edges). For purposes of the width and thickness requirements referenced above:

- (1) where the nominal and actual measurements vary, a product is within the scope if application of either the nominal or actual measurement would place it within the scope based on the definitions set forth above unless the resulting measurement makes the product covered by the existing antidumping<sup>4</sup> or countervailing duty<sup>5</sup> orders on Certain Cut-To-Length Carbon-Quality Steel Plate Products From the Republic of Korea (A-580-836; C-580-837), and
- (2) where the width and thickness vary for a specific product (*e.g.*, the thickness of certain products with non-rectangular cross-section, the width of certain products with non-rectangular shape, *etc.*), the measurement at its greatest width or thickness applies.

Steel products included in the scope of this investigation are products in which: (1) iron predominates, by weight, over each of the other contained elements; (2) the carbon content is 2 percent or less, by weight; and (3) none of the elements listed below exceeds the quantity, by weight, respectively indicated:

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<sup>3</sup> See Preliminary Decision Memorandum at “Scope Comments.”

<sup>4</sup> *Notice of Amendment of Final Determinations of Sales at Less Than Fair Value and Antidumping Duty Orders: Certain Cut-To-Length Carbon-Quality Steel Plate Products From France, India, Indonesia, Italy, Japan and the Republic of Korea*, 65 FR 6585 (February 10, 2000).

<sup>5</sup> *Notice of Amended Final Determinations: Certain Cut-to-Length Carbon-Quality Steel Plate From India and the Republic of Korea; and Notice of Countervailing Duty Orders: Certain Cut-To-Length Carbon-Quality Steel Plate From France, India, Indonesia, Italy, and the Republic of Korea*, 65 FR 6587 (February 10, 2000).

- 2.50 percent of manganese, or
- 3.30 percent of silicon, or
- 1.50 percent of copper, or
- 1.50 percent of aluminum, or
- 1.25 percent of chromium, or
- 0.30 percent of cobalt, or
- 0.40 percent of lead, or
- 2.00 percent of nickel, or
- 0.30 percent of tungsten, or
- 0.80 percent of molybdenum, or
- 0.10 percent of niobium, or
- 0.30 percent of vanadium, or
- 0.30 percent of zirconium.

Unless specifically excluded, products are included in this scope regardless of levels of boron and titanium.

For example, specifically included in this scope are vacuum degassed, fully stabilized (commonly referred to as interstitial-free (IF)) steels, high strength low alloy (HSLA) steels, the substrate for motor lamination steels, Advanced High Strength Steels (AHSS), and Ultra High Strength Steels (UHSS). IF steels are recognized as low carbon steels with micro-alloying levels of elements such as titanium and/or niobium added to stabilize carbon and nitrogen elements. HSLA steels are recognized as steels with micro-alloying levels of elements such as chromium, copper, niobium, titanium, vanadium, and molybdenum. The substrate for motor lamination steels contains micro-alloying levels of elements such as silicon and aluminum. AHSS and UHSS are considered high tensile strength and high elongation steels, although AHSS and UHSS are covered whether or not they are high tensile strength or high elongation steels.

Subject merchandise includes hot-rolled steel that has been further processed in a third country, including but not limited to pickling, oiling, levelling, annealing, tempering, temper rolling, skin passing, painting, varnishing, trimming, cutting, punching, and/or slitting, or any other processing that would not otherwise remove the merchandise from the scope of the investigation if performed in the country of manufacture of the hot-rolled steel.

All products that meet the written physical description, and in which the chemistry quantities do not exceed any one of the noted element levels listed above, are within the scope of this investigation unless specifically excluded. The following products are outside of and/or specifically excluded from the scope of this investigation:

- Universal mill plates (*i.e.*, hot-rolled, flat-rolled products not in coils that have been rolled on four faces or in a closed box pass, of a width exceeding 150 mm but not exceeding 1250 mm, of a thickness not less than 4.0 mm, and without patterns in relief);



- Products that have been cold-rolled (cold-reduced) after hot-rolling;<sup>6</sup>
- Ball bearing steels;<sup>7</sup>
- Tool steels;<sup>8</sup> and
- Silico-manganese steels;<sup>9</sup>

The products subject to this investigation are currently classified in the Harmonized Tariff Schedule of the United States (HTSUS) under item numbers: 7208.10.1500, 7208.10.3000, 7208.10.6000, 7208.25.3000, 7208.25.6000, 7208.26.0030, 7208.26.0060, 7208.27.0030, 7208.27.0060, 7208.36.0030, 7208.36.0060, 7208.37.0030, 7208.37.0060, 7208.38.0015, 7208.38.0030, 7208.38.0090, 7208.39.0015, 7208.39.0030, 7208.39.0090, 7208.40.6030, 7208.40.6060, 7208.53.0000, 7208.54.0000, 7208.90.0000, 7210.70.3000, 7211.14.0030, 7211.14.0090, 7211.19.1500, 7211.19.2000, 7211.19.3000, 7211.19.4500, 7211.19.6000, 7211.19.7530, 7211.19.7560, 7211.19.7590, 7225.11.0000, 7225.19.0000, 7225.30.3050, 7225.30.7000, 7225.40.7000, 7225.99.0090, 7226.11.1000, 7226.11.9030, 7226.11.9060, 7226.19.1000, 7226.19.9000, 7226.91.5000, 7226.91.7000, and 7226.91.8000. The products subject to the investigation may also enter under the following HTSUS numbers: 7210.90.9000, 7211.90.0000, 7212.40.1000, 7212.40.5000, 7212.50.0000, 7214.91.0015, 7214.91.0060, 7214.91.0090, 7214.99.0060, 7214.99.0075, 7214.99.0090, 7215.90.5000, 7226.99.0180, and 7228.60.6000.

The HTSUS subheadings above are provided for convenience and U.S. Customs purposes only. The written description of the scope of the investigation is dispositive.

## **VI. CHANGES SINCE THE PRELIMINARY DETERMINATION**

Based on our review and analysis of the comments received from parties, minor corrections presented at verifications, and various errors identified during verifications, we made certain changes to the margin calculations for both respondents' margin calculations. Specifically:

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<sup>6</sup> For purposes of this scope exclusion, rolling operations such as a skin pass, levelling, temper rolling or other minor rolling operations after the hot-rolling process for purposes of surface finish, flatness, shape control, or gauge control do not constitute cold-rolling sufficient to meet this exclusion.

<sup>7</sup> Ball bearing steels are defined as steels which contain, in addition to iron, each of the following elements by weight in the amount specified: (i) not less than 0.95 nor more than 1.13 percent of carbon; (ii) not less than 0.22 nor more than 0.48 percent of manganese; (iii) none, or not more than 0.03 percent of sulfur; (iv) none, or not more than 0.03 percent of phosphorus; (v) not less than 0.18 nor more than 0.37 percent of silicon; (vi) not less than 1.25 nor more than 1.65 percent of chromium; (vii) none, or not more than 0.28 percent of nickel; (viii) none, or not more than 0.38 percent of copper; and (ix) none, or not more than 0.09 percent of molybdenum.

<sup>8</sup> Tool steels are defined as steels which contain the following combinations of elements in the quantity by weight respectively indicated: (i) more than 1.2 percent carbon and more than 10.5 percent chromium; or (ii) not less than 0.3 percent carbon and 1.25 percent or more but less than 10.5 percent chromium; or (iii) not less than 0.85 percent carbon and 1 percent to 1.8 percent, inclusive, manganese; or (iv) 0.9 percent to 1.2 percent, inclusive, chromium and 0.9 percent to 1.4 percent, inclusive, molybdenum; or (v) not less than 0.5 percent carbon and not less than 3.5 percent molybdenum; or (vi) not less than 0.5 percent carbon and not less than 5.5 percent tungsten.

<sup>9</sup> Silico-manganese steel is defined as steels containing by weight: (i) not more than 0.7 percent of carbon; (ii) 0.5 percent or more but not more than 1.9 percent of manganese, and (iii) 0.6 percent or more but not more than 2.3 percent of silicon.

## POSCO

1. We corrected the language in the margin calculation program for DWA's indirect selling expenses.
2. We corrected the denominator used for certain material purchases from affiliated suppliers.
3. We used the correct code, PRIME1U, to designate prime merchandise in the margin calculation program.
4. We used the revised edge-trimming costs accepted as a minor correction at verification.
5. We used the corrected foreign brokerage and handling expense for Channel 5 sales as observed at verification, including the small additional amount for the customs brokerage services that POSCO performed internally.
6. We revised the further manufacturing costs for non-prime merchandise so that they are the same as for prime merchandise.

## Hyundai Steel

1. We used the updated transfer price to calculate domestic indirect selling expenses based on the minor corrections from verification.
2. We used the updated the invoice number for a U.S sales transaction based on minor corrections from verification.
3. We used the updated the bank charges for some U.S sales transactions based on the minor corrections from verification.
4. We used the updated the gross unit price for two sales, which affected the indirect selling expenses for these sales, based on the minor corrections from verification.
5. We used the updated U.S. short-term interest rate in calculating certain costs based on the minor corrections from verification.

## **VII. DISCUSSION OF ISSUES**

### **POSCO Issues**

#### **Comment 1: Correction of Two Errors in the Margin Calculation**

##### *POSCO*

- In implementing a change to the indirect selling expenses pertaining to DWA, the Department mistakenly applied the change to all U.S. sales, rather than just those in Channel 4 (the channel involving DWA).<sup>10</sup>
- The Department miscalculated the adjustment made in the *Preliminary Determination* for affiliated party transactions. POSCO asserts that the error in the calculation is the use of the cost of manufacturing (COM) for the subject hot-rolled products alone instead of the COM for all flat-rolled products, as the purchases of the affiliated materials were included in all flat rolled products.

Petitioners did not comment on this issue.

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<sup>10</sup> See POSCO Case Brief at 3-4.

**Department Position:** Regarding the indirect selling expenses for DWA, we agree, and have implemented the change in the margin calculation program for this final determination.<sup>11</sup> Also, upon further review of the record evidence, we agree with POSCO that the adjustment for the transactions with affiliated parties should be calculated using the COM of all flat-rolled products instead of the COM of the subject hot-rolled coil because the materials purchased from affiliated suppliers were used to produce all flat-rolled products. Accordingly, we have corrected our adjustment from the *Preliminary Determination* for this final determination.<sup>12</sup>

## **Comment 2: The Correct Code for Prime Merchandise to Use in the Margin Calculation**

### *POSCO*

- During the application of differential pricing, the Department mistakenly took into account further processing of merchandise that occurred after importation into the United States by using the incorrect grade field in the database.<sup>13</sup>
- The first prime grade field is used to report the hot-rolled coil under investigation as all prime grade material, and the second is used to report the condition of the further processed merchandise sold by UPI. The second prime field was provided to “identify the basis on which to link the cost of further manufacturing to specific products.”<sup>14</sup>
- While there is a difference in the condition of the merchandise imported and sold, the statutory adjustments account for those differences. As a result, there is no reason for a second prime grade field to play a part in the calculation of the dumping margin (including differential pricing).<sup>15</sup>

### *Petitioners*

- POSCO incorrectly dismisses the statutory requirement that the starting point for net U.S. prices is the sale to first unaffiliated U.S. customer, including those made through an affiliated reseller or further manufacturer. The differential pricing test must be run parallel to, and on the same methodological premises, as the net price calculation.<sup>16</sup>
- Neither the condition of incoming raw material coil, nor the transfer price between POSCO and UPI, determine the market value of the sales. Thus, the prime/non-prime nature of such transfer pricing is not an appropriate basis of comparison in the differential pricing test, as shown by the sample scenarios. The Department’s preliminary differential pricing tests are correct and should remain unchanged.<sup>17</sup>

**Department Position:** We agree with POSCO and have used the prime code for the hot-rolled coils it produced and exported to the United States (PRIME1) during the POI. POSCO correctly asserts that the statutory deductions account for any differences in the condition merchandise between the time it is imported and the time it is sold (*i.e.*, for purposes of the antidumping duty

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<sup>11</sup> See POSCO Final Analysis Memorandum.

<sup>12</sup> See POSCO Final Cost Memorandum.

<sup>13</sup> See POSCO Case Brief at 6.

<sup>14</sup> *Id.* at 6-7.

<sup>15</sup> *Id.* at 7.

<sup>16</sup> See Petitioners’ POSCO Rebuttal Brief, at 2-3.

<sup>17</sup> *Id.* at 3-4.

calculation, the first sale to an unaffiliated party in the U.S. market), including any further manufacturing. Contrary to Petitioners' portrayal, the transfer price between POSCO and UPI plays no part in the differential pricing analysis; the prices used in that analysis are the net U.S. prices of the further-manufactured products sold to the first unaffiliated customer, which for this investigation were produced from POSCO's hot-rolled coils, all of which were prime grade merchandise at the time of importation into the United States.

### **Comment 3: CEP Offset**

#### *POSCO*

- The Department's position in the *Preliminary Determination* that POSCO did not qualify for a constructed export price (CEP) offset is unreasonable. It is unreasonable "with respect to sales through UPI, where merchandise is being further processed", turned into different products, and then sold to entirely different customers as those found in the other CEP channels.<sup>18</sup>
- The Department should consider U.S. manufacturers that process subject merchandise into downstream products to be at a different level of trade than home market sales. Because POSCO performed a greater number of selling functions and at a higher level of intensity in the home market than for its sales to affiliates in the United States, its home market sales are at a more advanced level of trade.<sup>19</sup>
- POSCO identified eight categories of selling activities in its home market. However, in the *Preliminary Determination*, the Department wrongfully concluded that POSCO performed these services for its U.S. customers. The Department incorrectly concluded that the fact that POSCO is pursuing a strategy to grow sales means that POSCO is engaging in strategic and economic planning with regard to U.S. sales. Additionally, the Department cannot conclude from the Korean Securities and Exchange Commission (KSEC) report that POSCO is engaging in such strategic and economic and planning with respect to UPI.<sup>20</sup>
- In its *Preliminary Determination*, the Department concluded, based on the fact that POSCO has an English-language brochure, that there was no basis to distinguish the level of advertising activity between the home market and the U.S. market. This conclusion, however, overlooks information provided in POSCO's selling functions chart, and similarly provides no support for the idea that POSCO engages in advertising activities for UPI.<sup>21</sup>
- The Department's denial of the CEP offset contradicts the record of this investigation and the Department's prior determinations regarding POSCO. As a result, the Department should grant a CEP offset in the final determination.<sup>22</sup>

#### *Petitioners*

- The Department properly denied a CEP offset in the *Preliminary Determination* and should continue to do so for the final determination. The burden lies with POSCO to submit

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<sup>18</sup> *Id.* at 7-8.

<sup>19</sup> *Id.* at 8.

<sup>20</sup> *Id.* at 9.

<sup>21</sup> *Id.* at 9-10.

<sup>22</sup> *Id.* at 10-11.

evidence that its home market selling functions are greater than those required to support sales to its U.S. affiliates, and it failed to do so.<sup>23</sup>

- The Department’s analysis correctly found that the six selling functions that POSCO reported performing for both home market and CEP sales were at an equivalent level of intensity, a finding that POSCO did not dispute in its case brief.<sup>24</sup>
- For the eight functions that POSCO claimed it performed for home market sales but not for CEP sales, the Department again analyzed the record evidence with respect to each and did not find that there was a substantially greater level of activity to warrant a CEP offset.<sup>25</sup>
- POSCO’s arguments for the two selling functions it discusses in detail in its case brief, strategic planning and advertising, are unavailing. The available evidence indicates that POSCO performs strategic planning for U.S. sales.<sup>26</sup>
- Similarly, for advertising, the Department correctly took into account the analysis from the contemporaneous cold-rolled investigation, and did not rely solely on the presence of an English-language brochure. The Department correctly found a similarity of functions across markets.<sup>27</sup>
- The selling functions chart is merely a collection of one-word claims, and the Department’s verification did nothing to contradict its preliminary finding that a CEP offset was not warranted.<sup>28</sup>
- The Department makes decisions whether or not to grant a CEP offset based on the record of each case, and past determinations in other cases involving POSCO have no bearing on this investigation.<sup>29</sup>
- If the Department does grant a CEP offset, it should correct certain clerical errors.<sup>30</sup>

**Department Position:** We agree with Petitioners, and for this final determination, continue not to grant a CEP offset for POSCO. As an initial matter, POSCO’s references to other cases in which the Department granted it a CEP offset are inapposite. Given that each segment of an antidumping duty case contains its own independent record and constitutes a separate, distinct proceeding,<sup>31</sup> this same principle is even more true when applied across entirely separate antidumping duty cases.

While POSCO states that the Department incorrectly concluded that it performed certain of the eight certain functions for U.S. customers that it reported as performing in the home market, it focuses its arguments on two selling functions in particular, strategic/economic planning and advertising, and does not touch upon the others. We address these two functions below.

First, regarding strategic/economic planning, the record does not support POSCO’s arguments. POSCO argues that the statement in its KSEC report about a strategy for growing sales is generic

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<sup>23</sup> See Petitioners’ POSCO Rebuttal Brief at 5-6.

<sup>24</sup> *Id.* at 7-9.

<sup>25</sup> *Id.* at 9-12.

<sup>26</sup> *Id.* at 12-14.

<sup>27</sup> *Id.* at 13-14.

<sup>28</sup> *Id.* at 14-15.

<sup>29</sup> *Id.* at 16-18.

<sup>30</sup> *Id.* at 18-19.

<sup>31</sup> See *Shandong Huarong Mach. Co. v. United States*, 29 CIT 484, 491 (2005) (*Shandong Huarong*).

in nature and does not mean that POSCO engages in this activity with regard to U.S. sales. Indeed, such a notion would have one believe that, as a matter of course, a foreign parent/affiliate would not involve itself in this function for CEP sales. The record evidence patently contradicts this notion, given the plethora of cost centers POSCO identified relating to business strategy, global coordination, and overseas subsidiary support.<sup>32</sup> Additionally, the record evidence also indicates that POSCO involves itself in this function even for Channel 5<sup>33</sup> further-manufactured sales.<sup>34</sup>

Second, regarding advertising, the record contains very little detail regarding what advertising activities were performed, or the intensity of those activities. We note, however, that both POSCO\* and DWI have accounts pertaining to advertising; POSCO\* does not have separate domestic and international accounts, while DWI does.<sup>35</sup> Additionally, both POSCO\* and DWI have expenses related to advertising and marketing reported in their indirect selling expenses.<sup>36</sup> In both instances, there is nothing to distinguish the relative level of activity *vis-à-vis* domestic sales and U.S. CEP sales. Additionally, the presence of an English-language brochure, and the absence of any Korean-language ones, is illustrative of a similarity of functions across markets. Given the lack of detail on the record, we remain unpersuaded as to meaningful differences in this selling function.

In sum, it is the respondent's burden to build an accurate record to support its position, and POSCO failed to sufficiently do so here.<sup>37</sup> Furthermore, while the Department discussed POSCO's reporting of its selling functions at verification, there is nothing in the verification reports that would lead us to change our decision from the *Preliminary Determination*. Given that we found no evidence to suggest that the selling functions performed by the respondent at the CEP level of trade and the home market level of trade are significantly different to warrant a finding that the home market level of trade is at a more advanced stage of distribution than the CEP level of trade, there is no basis for concluding that there are differences in levels of trade between home market sales and U.S. CEP sales, and no CEP offset is warranted.<sup>38</sup>

#### **Comment 4: Treatment of Side-Trimming Costs Accepted as a Minor Correction**

##### *Petitioners*

- The Department should find that the correction POSCO/UPI reported for the edge-trimming expenses is not minor, and should not use the submitted correction. As submitted, the correction has a large downstream impact on the margin calculation.<sup>39</sup>

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<sup>32</sup> See POSCO Verification Report at Exhibit 7.

<sup>33</sup> Channel 5 refers to POSCO's sales through its U.S. affiliate UPI. UPI processes the hot-rolled coils from POSCO into downstream products.

<sup>34</sup> *Id.* See also POSCO's October 26, 2015, Section A response at A-12-13.

<sup>35</sup> See POSCO Verification Report at Exhibit 5.

<sup>36</sup> *Id.* at Exhibits 7 and 34.

<sup>37</sup> See *Ad Hoc Shrimp Trade Action Comm. v. United States*, 616 F. Supp. 2d1354 (CIT 2009), aff'd 596 F.3d 1365 (CAFC 2010).

<sup>38</sup> See, e.g., *Silicomanganese From Australia: Final Determination of Sales at Less Than Fair Value*, 81 FR 8682 (February 22, 2016), and accompanying Issues and Decision Memorandum at comment 2.

<sup>39</sup> See Petitioners' POSCO Case Brief at 3-4, 6-7.

- If the Department agrees that the edge-trimming expenses apply only to a single black plate product, it should apply partial adverse facts available (AFA) to the sales of the affected product, using the highest calculated margin for non-black plate products.<sup>40</sup>
- Otherwise, if the Department finds that the edge-trimming expenses apply to other products, it should adjust total further manufacturing expenses upward by the specified percentage.<sup>41</sup>

### *POSCO*

- The submitted correction is clearly minor and stemmed from an inadvertent error in reporting one element of the further manufacturing costs for a single black plate product.<sup>42</sup>
- Petitioners' call for partial AFA is without merit given the nature of the error and the fact that the Department accepted it as a minor correction, and performed an overall reconciliation of the further manufacturing costs.<sup>43</sup>
- The potential downstream impact of the correction has no bearing on whether or not it is "minor," especially given the functioning of the various thresholds and cut-offs that dictate how various data are considered in the margin calculation.<sup>44</sup>

**Department Position:** We agree with POSCO. First, the Department accepted the information presented by UPI as a minor correction,<sup>45</sup> and requested that it submit a revised further manufacturing database reflecting the revision, which it did.<sup>46</sup> The Department also successfully performed an overall reconciliation of UPI's further manufacturing costs, thus ensuring the accuracy of the data incorporative of the minor correction.<sup>47</sup> Second, the Department's practice is not to analyze the potential downstream impact of every item submitted as a minor correction; such a routine would be impracticable. Instead, the Department analyzes the nature of the error(s) and whether it affects the overall reliability of the information.<sup>48</sup> Here, the correction submitted by UPI was due to an inadvertent error, pertained to a miniscule percentage of overall further manufacturing costs, and affected only a single type of product, which are all indicators of a correction that is indeed minor.

### **Comment 5: Foreign Brokerage and Handling Expense for Channel 5 Sales**

#### *Petitioners*

- The Department should use the correct, higher amount for the DBROKU expense it observed at verification (pertaining to the loading portion of the expense), and should also add in the additional amount it found for the customs brokerage portion.<sup>49</sup>

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<sup>40</sup> *Id.* at 4.

<sup>41</sup> *Id.* at 4-6, 8.

<sup>42</sup> See POSCO Rebuttal Brief at 4-10.

<sup>43</sup> *Id.* at 4-6.

<sup>44</sup> *Id.* at 10-12.

<sup>45</sup> See UPI Verification Report at 2 and Exhibit 1.

<sup>46</sup> See Letter from POSCO regarding submission of updated databases, dated July 14, 2016.

<sup>47</sup> See UPI Verification Report at 15-16 and Exhibit 11.

<sup>48</sup> See *Tatung Co. v. United States*, 18 CIT 1137, 1141 (1994).

<sup>49</sup> See Petitioners' POSCO Case Brief at 8-9.

*POSCO*

- POSCO itself identified the the correct, higher amount when it noticed an inadvertent error in the Excel sheet for the expense calculation, and does not disagree with the correction. POSCO contends, however, that there is no basis for including the additional amount, 2.1 won/MT, for the customs brokerage portion, stating that it was reported in its cost of manufacturing.<sup>50</sup>

**Department Position:** We agree with Petitioners and also acknowledge that POSCO itself brought to our attention the error in the calculation of this expense for Channel 5 sales. While POSCO contends that the small additional amount pertaining to customs brokerage was included in its COM, POSCO cites to no specific record evidence demonstrating as such. Therefore, we have included this additional amount to the corrected domestic brokerage and handling expense for Channel 5 sales in the final margin calculation.<sup>51</sup>

**Comment 6: Revision of Further Manufacturing Costs for Non-Prime Channel 5 Sales**

*Petitioners*

- POSCO/UPI's further manufacturing cost of production of non-prime products should be the same as the further manufacturing cost of production reported for prime products.<sup>52</sup>
- The record shows that the use of the non-prime products was the same as generally intended for prime products, *i.e.*, the non-prime products were used as the same class of product, but in a modified (or the same) application method based on the quality level.<sup>53</sup>
- In *Welded Line Pipe from Korea*<sup>54</sup> the Department clarified that even if a secondary quality product cannot be used in the same application as its prime quality equivalent, so long as it can be used as generally intended, *i.e.*, as subject merchandise, it should bear the actual cost of production of the prime product. POSCO/UPI's non-prime products did not change their nature, or their general application.<sup>55</sup>

*POSCO*

- POSCO argues that Petitioners brought this issue up too late in the proceeding for the Department to address their specific concerns regarding the reported costs of non-prime merchandise, and for the final determination, the Department should use the reported further manufacturing cost for the non-prime merchandise, as it takes into account the lower value of the merchandise sold.<sup>56</sup>

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<sup>50</sup> See POSCO Rebuttal Brief at 12-13.

<sup>51</sup> See POSCO Final Analysis Memorandum.

<sup>52</sup> See Petitioners' POSCO Case Brief at 9-12.

<sup>53</sup> *Id.* at 9-10.

<sup>54</sup> See *Welded Line Pipe from the Republic of Korea: Notice of Final Determination of Sales at Less Than Fair Value*, FR 61,366 (October 5, 2015) and accompanying Issues and Decision Memorandum at Comment 9 *Welded Line Pipe from Korea*.

<sup>55</sup> See Petitioners' POSCO Case Brief at 10-11.

<sup>56</sup> See POSCO Rebuttal Brief at 13-14.



- POSCO contends that Petitioners are essentially arguing that the non-prime products be treated as co-products of the prime products, which, POSCO asserts, the non-prime products are not.<sup>57</sup>
- POSCO argues that in *Welded Line Pipe from Korea*, the Department made a distinction between merchandise that can be used for the same intended use as prime grade production and merchandise that cannot. POSCO asserts that in that case, only when the non-prime merchandise was sold for the same application as the prime grade material and “at prices similar to that of ‘prime’ line pipe” did the Department assign a full cost to the non-prime merchandise. When the merchandise was truly non-prime, that is, unable to be sold for the originally intended application, the Department agreed that the cost for the non-prime product should be lower because the value of the product is lower and the product cannot be used for its intended purposes.<sup>58</sup>
- POSCO cites *OCTG from India*,<sup>59</sup> asserting that the Department has adopted the reasonable practice of examining whether the downgraded product can still be used in the same applications as its prime counterparts, and it is reasonable to assign costs to non-prime products that cannot be used as such based on their market value.<sup>60</sup>
- POSCO asserts that its explanation of the non-prime products at verification indicates that UPI sold its non-prime products as downgraded product or scrap, and there is no record information that suggests that UPI’s sales of non-prime product are sold for the same use as prime grade products.
- POSCO notes that it is unclear from *Welded Line Pipe from Korea* what method the respondent used to value the non-prime material in the normal course of business, but that in the instant case it valued the non-prime products at zero in the normal course of business and sold them at a lower price.<sup>61</sup>

**Department Position:** We agree with Petitioners and have assigned the non-prime, further-manufactured products the same further manufacturing costs as those of prime further-manufactured products, given that: 1) all of the input material is prime subject merchandise;<sup>62</sup> 2) they undergo the same processing;<sup>63</sup> and 3) the products are used in the same general applications.<sup>64</sup> Accordingly, we have determined that it is appropriate to include such sales in the total population of CEP sales used to calculate the final margin for POSCO. Indeed, because the non-prime merchandise did not change its nature or general application, assigning it the same further-manufacturing cost is consistent with *Welded Line Pipe from Korea*. Moreover, the facts of this investigation are distinct from those POSCO references from *OCTG from India*. In that case, the non-prime merchandise was no longer suitable for use as OCTGs; in contrast, as noted above, the non-prime merchandise here can still be used in the same general applications.

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<sup>57</sup> *Id.* at 14.

<sup>58</sup> *Id.* at 14-16.

<sup>59</sup> See *Final Determination of Sales at Less Than Fair Value and Final Negative Determination of Critical Circumstances: Certain Oil Country Tubular Goods From India*, 79 FR 41987 (July 10, 2014) (*OCTG from India*), and accompanying Issues and Decision Memorandum at Comment 8.

<sup>60</sup> See POSCO Rebuttal Brief at 16.

<sup>61</sup> *Id.* at 17.

<sup>62</sup> See, e.g., Comment 2 above.

<sup>63</sup> See UPI Verification Report at 7.

<sup>64</sup> See POSCO’s January 29, 2016, supplemental Section E response at 14-15.

Because the further manufacturing data, as submitted by POSCO, do not reasonably reflect the cost of producing the non-prime merchandise, we must use facts available. Section 776(a)(1) of the Act provides that the Department shall, subject to section 782(d) of the Act, apply facts otherwise available if necessary information is not on the record. The information which POSCO did not provide was necessary, so therefore in accordance with section 776(a)(1) the application of facts available is warranted. However, given that no party previously raised this issue, and that we did not request POSCO to revise its further manufacturing data for non-prime merchandise, we are not applying an adverse inference under section 776(b) of the Act. Therefore, given the information on the record, we are applying the further manufacturing costs for prime merchandise, as reported by POSCO, to the corresponding non-prime merchandise. For a full explanation of the methodology used to revise the further manufacturing costs, *see* the POSCO Final Cost Memorandum.

### **Comment 7: Date of Sale**

#### *Petitioners*

- For the *Preliminary Determination*, the Department used the earlier of the shipment or invoice date as the date of sale for POSCO. Sales information provided by POSCO, however, does not support the use of this method. Therefore, the Department should use POSCO's purchase order or date of order confirmation as the sale date for the final determination.<sup>65</sup>
- The Department's regulations allow for the use of dates other than the invoice date or date of sale where the other date better reflects the date on which the exporter or producer establishes the material terms of the sale. The Department's practice is to confirm a sale as completed when the essential terms, *i.e.*, usually price and quantity, are definite and firm. Additionally, it is the Department's policy to use the earliest document that establishes the material terms of sale when determining the date of sale.<sup>66</sup>
- Examples provided by POSCO in support of its reported date of sale are not reliable. First, POSCO only provided examples where the sales terms changed between the date of order and date of invoice, therefore not demonstrating the changes that occurred between the order confirmation and invoice dates. POSCO's examples also failed to address the range of quantity tolerance accepted by customers and included unrepresentative sales.<sup>67</sup>
- POSCO's documentation indicates that, in practice, the quantity tolerance accepted between POSCO and its customers are much wider than the nominal tolerance claimed by POSCO.<sup>68</sup>
- POSCO submitted two examples to show a change in the terms of sale of a U.S. order. The first example should not be considered as it was sold to a foreign company and then to a US company, which does not represent a typical sale. The second example should also not be considered because it includes a different, unrepresentative category of sale and does not provide any documentation to support the claimed changes, nor any explanation about the nature and significance of the changes.<sup>69</sup>

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<sup>65</sup> See Petitioners' POSCO Case Brief at 12.

<sup>66</sup> *Id.* at 13-14.

<sup>67</sup> *Id.* at 14.

<sup>68</sup> *Id.* at 15.

<sup>69</sup> *Id.* at 15-16.

- POSCO’s claim about Channel 5 sales, that pricing is only finalized after shipping, does not establish a change in price from order to invoicing.<sup>70</sup>
- For the reasons listed above, the Department should use the purchase order/confirmation order date as the date of sale for POSCO’s U.S. sales instead of the shipment or invoice date.<sup>71</sup>

*POSCO*

- There is no basis for the conclusion that the Department should use the purchase order or confirmation order as date of sale. The Department determined that the sales processes for POSCO are identical for both hot- and cold-rolled steel; however, Petitioners did not challenge the invoice date as the date of sale in the cold-rolled investigation.<sup>72</sup>
- There is no reason in this investigation for the Department to use another date, as it is standard practice to use the date of invoice. Finally, the Department has firmly established that, when there are changes to a material term, such as quantity or price, after the order date, deviation from the presumptive date of sale is not appropriate.<sup>73</sup>
- Petitioners’ assertion that the “material terms of sale are set at the time of purchase order is contradicted by POSCO’s submissions to the Department.<sup>74</sup>
- Petitioners’ argument, that the change of quantity outside the specified nominal quantity tolerance is not a valid example of a change in sales terms, has no merit.<sup>75</sup> Quantities are finalized at the time of invoice; changes in quantity larger than that established and listed on the order sheet establish new terms of sale. This is precisely why it is appropriate to use invoice date as the date of sale.<sup>76</sup>

**Department Position:** We agree with POSCO, and continue to use the earlier of invoice or shipment date as the date of sale, as we did in the *Preliminary Determination*. 19 CFR 351.401(i) states that, in identifying the date of sale of the merchandise under consideration or foreign like product, the Department normally will use the date of invoice, as recorded in the exporter or producer’s records kept in the ordinary course of business. Additionally, the Secretary may use a date other than the date of invoice if the Department is satisfied that a different date better reflects the date on which the exporter or producer establishes the material terms of sale.<sup>77</sup>

For its home market sales, whether made by POSCO\* or POSCO P&S, POSCO reported the earlier of shipping or invoice date as the date of sale.<sup>78</sup> For the purposes of this final

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<sup>70</sup> *Id.* at 16.

<sup>71</sup> *Id.* at 17.

<sup>72</sup> See POSCO Rebuttal Brief, at 17-18.

<sup>73</sup> *Id.* at 18-19.

<sup>74</sup> *Id.* at 22.

<sup>75</sup> *Id.* at 22-23.

<sup>76</sup> *Id.*

<sup>77</sup> See 19 CFR 351.401(i); see also *Allied Tube & Conduit Corp. v. United States*, 132 F. Supp. 2d 1087, 1090-1092 (CIT 2001) (“As elaborated by Department practice, a date other than invoice date ‘better reflects’ the date when ‘material terms of sale’ are established if the party shows that the ‘material terms of sale’ undergo no meaningful change (and are not subject to meaningful change) between the proposed date and the invoice date.”).

<sup>78</sup> See POSCO’s November 20, 2015, section B response at B-20.

determination, we continue to use the reported date of sale for POSCO's home market sales, consistent with the Department's normal methodology regarding date of sale to use an earlier date if appropriate. Petitioners do not contest POSCO's reporting of its date of sale for the home market.

For the U.S. market, POSCO reported the following dates of sale, indicating that price and/or quantity is subject to change until then: for Channel 1 (EP- sales through unaffiliated trading companies), the date of sale is the earlier of the shipment date from POSCO's factory (reported in field SHIPDATU) or POSCO's invoice date to its customer; for Channel 2 (EP- sales through DWI), the date of sale is the earlier of the shipment date from POSCO's factory or DWI's invoice date; for Channels 3 (CEP Back-to-Back Transactions through POSAM) and 4 (CEP Back-to-Back Transactions through DWI and DWA), the date of sale is reported as the earlier of the date of shipment from Korea or the invoice date issued by POSAM or DWA to the unaffiliated customer; and for Channel 5, the date of sale is the earlier of the date of shipment from UPI's facility or UPI's invoice date.<sup>79</sup>

At verification, we collected sample contracts, orders and invoice summaries detailing price or quantity tolerance changes following the purchase order/order confirmation for POSCO's various sales channels.<sup>80</sup> While the Department verified that there were no changes subsequent to the order in Channel 1, the Department found meaningful material changes following the purchase order/confirmation date in each of the other four sales channels verified.<sup>81</sup> Indeed, Petitioners' argument particularly strains credulity given the large overall percentages of sales in Channels 2-5 that had price and/or quantity changes.<sup>82</sup> While Petitioners attempt to cast certain examples POSCO provided as somehow unrepresentative due to their nature, we did not find indications that the sales at issue were atypical in any way. Lastly, Channel 5 sales through UPI represent POSCO's largest sales channel. For that channel, using a sale date other than that reported (*i.e.* the earlier of the invoice or shipment date) would be particularly unwarranted, given that ". . . there is no price on the UPI order acknowledgement, and company officials stated that there is no price until the product is shipped."<sup>83</sup>

For the final determination, because the material terms of sale (*e.g.*, price quantity) are still subject to change when orders are confirmed (a fact which we verified),<sup>84</sup> we continue to use POSCO's reported date of sale for its U.S. market sales, consistent with the Department's normal methodology regarding date of sale that the date of sale is normally the date of invoice (or the shipment date, if earlier). This is in accordance with 19 CFR 351.401(i), as noted above.<sup>85</sup>

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<sup>79</sup> See POSCO's November 20, 2015, section C response at C-18 to C-19.

<sup>80</sup> See POSCO Verification Report at 8-9 and Exhibit 9.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at Exhibit 9, page 8.

<sup>83</sup> *Id.* at 9.

<sup>84</sup> *Id.* at 8-9 and Exhibit 9.

<sup>85</sup> See also, *e.g.*, *Non-Oriented Electrical Steel From the Republic of Korea: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Negative Preliminary Determination of Critical Circumstances, and Postponement of Final Determination*, 79 FR 29426 (May 22, 2014) and accompanying Decision Memorandum at 16, unchanged at *Non-Oriented Electrical Steel From the Republic of Korea: Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances*, 79 FR 61612 (October 14, 2014)

## Hyundai Steel Issues

### **Comment 8: Reporting of Inland Freight, International Freight, Marine Insurance and Other Services Provided by Affiliated Companies**

#### *Hyundai Steel*

- Hyundai Steel did not have control over and could not compel its affiliated companies to provide information the Department asked for at verification, which were its affiliates' logistical and marine insurance prices for the same services to unaffiliated customers. However, such data are a fallback, second best benchmark for determining the arm's-length nature. Thus, Petitioners' calls for AFA are unwarranted.
- The arm's-length measurement—prices paid by the respondent to unaffiliated parties versus affiliated parties—is the exact first-line comparison the Department prefers. Only if this measure is unavailable does the Department look to second-line measures (*i.e.*, prices charged by its affiliated party to unaffiliated customers). However, the Department has this first-line information on the record.
- Regarding inland freight, Hyundai Steel provided Hyundai Steel's contracts with its affiliate, the contracts its affiliate maintained with the affiliates' sub-contractors, and an analysis comparing the freight rates paid by Hyundai Steel to its affiliate versus those paid by its affiliate to the subcontractor. This information shows that its affiliate made a profit on the transportation services it provided for Hyundai Steel.
- Regarding ocean freight, in its supplemental questionnaire, the Department did not ask for documentation concerning its affiliate's transactions with unaffiliated customers – the Department requested only information concerning its affiliate's contracts with its subcontractors. In any event, documentation provided at verification shows that rates charged by an unaffiliated carrier versus those provided by its affiliate, to the same port/destination combinations, were comparable.
- Moreover, Hyundai Steel was able to obtain this supplier's cost of acquiring the service in question—on a transaction-specific basis—and so the record already contained an analysis showing that its affiliate's charges exceeded the cost of acquiring the transportation services, in amounts that covered all operating costs and provided a profit to the company.
- Regarding marine insurance, documentation from verification shows that the marine insurance expense paid to its affiliate was higher than the rate charged by an unaffiliated supplier.
- Thus, Hyundai Steel complied with the Department's instructions to demonstrate that its affiliated companies provide movement services on an arm's-length basis. The only piece of information its affiliated companies refused to provide was one additional (fallback, second best) arm's-length measure.
- To the extent that an adjustment is necessary, the adjustment can be achieved through a simple formula. In the event the Department adjusts these transaction prices to state them on

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("As the information on the record indicates that the material terms of sale...could change until the date of shipment or invoice, where applicable, for both U.S. and comparison market sales, for purposes of this preliminary determination, we used the date of shipment (if earlier than the date of invoice) or the date of invoice as the date of sale for POSCO's reported U.S. and comparison market sales.").

an arm's-length basis, any adjustment must be designed so that the result reflects market-based transaction amounts.

#### *Petitioners*

- Because Hyundai Steel used affiliates to provide various home market and U.S. sales movement services, it was obligated to demonstrate at verification the arm's-length nature of these prices.
- When the Department requested that Hyundai Steel obtain certain inland freight, ocean freight, and marine insurance information between its affiliates and their unaffiliated customers, Hyundai Steel stated that its affiliates refused to provide the data.
- Even though Hyundai Steel argues that the record contains examples demonstrating the arm's-length nature of these services, the documentation is either incomplete, not comparative, or is not what the Department requested.
- Regarding ocean freight, Hyundai Steel submitted neither its contracts with its affiliate, nor the contracts that its affiliate maintained with its subcontractors. The only worksheet submitted does not demonstrate that: 1) its affiliate's contract price covered all of its direct costs (including that paid to the subcontractor), and its affiliate's overhead, selling, general, and administrative (SGA), and interest expenses; or 2) the prices its affiliate charged to Hyundai Steel were at arm's-length.
- Even though Hyundai Steel submitted rates charged by the unaffiliated provider compared to that of its affiliate, without the actual contracts, the Department does not know what services were actually provided and if it would be making an apples-to-apples comparison. In addition, the sample comparison prices are from different time periods.
- Regarding marine insurance, the rate comparisons proffered by Hyundai Steel are not similar as they differ by: 1) type of product shipped; 2) very different destination ports; and 3) the time period the products were insured. Further, the contracts for these two sample sales were not submitted, preventing a full comparison of the terms.
- The Department should find that Hyundai Steel's refusal to provide data requested by the Department amounts to a failure to cooperate to the best of its ability, and should thus apply partial AFA for the transportation and insurance services provided by its affiliates.

**Department Position:** We agree with Petitioners. At the verification of Hyundai Steel, we had the opportunity to thoroughly examine the relationship between Hyundai Steel and its affiliated companies. When the Department specifically requested that Hyundai Steel obtain certain freight and insurance information between its affiliate and other unaffiliated parties, Hyundai Steel stated that such information had been requested during the verification for the cold-rolled investigation,<sup>86</sup> and that, as was the case then, Hyundai Steel could not obtain it.<sup>87</sup> Hyundai Steel stated that while the two companies were related, it was not within Hyundai's Steel's capability to obtain such data (*i.e.*, Hyundai Steel could not compel the companies to provide it).<sup>88</sup>

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<sup>86</sup> Hyundai Steel was also chosen as a mandatory respondent in the recent investigation of cold-rolled steel flat products from Korea. *See Certain Cold-Rolled Steel Flat Products From the Republic of Korea: Final Determination of Sales at Less Than Fair Value*, 81 FR 49953 (July 28, 2016) (*Cold-Rolled from Korea*).

<sup>87</sup> *See* Hyundai Steel's Verification Report at 14-15.

<sup>88</sup> *Id.*

We examined the record and requested Hyundai Steel's affiliated company's shareholder list at verification.<sup>89</sup> We reviewed the list of companies that are part of the Hyundai Motor Group and the company presented us with a list board of directors of the Hyundai Motor Group Companies.<sup>90</sup> However, the names given had initials for the first and middle names, and as such, we asked the company to provide us a revised list with the full names of these individuals, including their relationship to the Chung family.<sup>91</sup>

After Hyundai Steel provided this information, the Department was able to confirm that, of Hyundai Steel's affiliated freight provider's two largest shareholders, one shareholder is a part owner of Hyundai Steel and the other shareholder is the Vice Chairman of Hyundai Steel.<sup>92</sup> We further verified that these two individuals are father and son, respectively.<sup>93</sup> We performed a similar exercise with regard to the affiliated insurance provider, and found that Hyundai Steel and this company were affiliated.<sup>94</sup> When the Department raised these overlapping roles/ownership positions in Hyundai Steel and the affiliated companies, Hyundai Steel officials continued to indicate that they could not obtain the affiliated companies' information requested by the Department.<sup>95</sup>

Thus, we find, as confirmed at verification, that Hyundai Steel and the affiliated companies were held and commonly controlled by the same family members during the POI. Hyundai Steel defined the companies that are members of the Hyundai Motor Group and/or held by the Chung family as being affiliated parties via control by a "group," which has the ability to directly or indirectly control its group members, and are expected to cooperate with the Department's antidumping investigation.

We also find that Hyundai Steel failed the completeness portion at verification with regard to this issue, *i.e.*, failed to demonstrate the arm's-length nature of these services provided by the affiliated companies.<sup>96</sup> Accordingly, we find that we are unable to determine the arm's-length nature of transactions provided by these affiliates. As the necessary information to make this determination is not on the record due to Hyundai Steel's failure to provide it, we are relying on facts otherwise available under Section 776(a) of the Act for the final determination. Furthermore, we find that Hyundai Steel failed to cooperate by not acting to the best of its ability to provide this requested information. Accordingly, we are applying facts available with an adverse inference under Section 776(b) to these transactions. For the final determination, we will apply AFA to Hyundai Steel's home market inland freight, home market warehousing expenses, international freight, marine insurance, and domestic inland freight for U.S. sales. For home market inland freight and warehousing, we will apply Hyundai Steel's lowest reported values for its home inland freight and warehousing fields for the final determination. For marine insurance and international freight (including wharfage), we will apply the highest reported

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<sup>89</sup> See Hyundai Steel's Verification Reports at 2-3.

<sup>90</sup> *Id.* at 3

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 14.

<sup>93</sup> *Id.* at Verification Exhibit 4.

<sup>94</sup> *Id.* at 15.

<sup>95</sup> *Id.* at 14-15.

<sup>96</sup> *Id.*

values for the final determination. For domestic inland freight for U.S. sales, we have selected the highest value as AFA.

### **Comment 9: CEP Offset**

#### *Hyundai Steel*

- The record demonstrates that the selling functions performed by Hyundai Steel in selling to home market customers are greater in number and intensity than in selling to its affiliates in the United States. Therefore, Hyundai Steel's home market is at a more advanced level of trade and the Department must grant a CEP offset for Hyundai Steel's CEP sales for the final determination.
- With regard to the first sales category (sales and marketing activities) the Department analyzes between the home and U.S. markets, Hyundai Steel described that in the home market Hyundai Steel engages in significant selling activities in dealing directly with its numerous customers for thousands of transactions. Hyundai Steel explained that these activities were greater than its sales activities to U.S. distributor customers and that this logic also applies to Hyundai Steel's affiliated customers as Hyundai Steel is only required to deal with the affiliated reseller directly.
- While Hyundai Steel did explain that it plays a supporting role to its affiliates, these activities are necessarily performed to a lesser degree than with respect to its home market sales, where Hyundai Steel alone coordinates the sales process from start to finish.
- For example, while Hyundai Steel supports its U.S. affiliates Hyundai Steel America (HSA) and Hyundai Corporation USA (HCUSA), these affiliates engage in significant selling functions, as demonstrated in HCUSA CEP Sales Verification. Therein, the Department collected documentation regarding sales forecasting and strategic economic planning, and HCUSA's role in direct sales, marketing and promotion. While Hyundai Steel supports these activities, the bulk of the legwork is performed by the U.S. affiliates for U.S. sales. In contrast, these activities are performed solely by Hyundai Steel in the home market.
- This documentation collected at verification establishes that the U.S. affiliates perform significant selling functions in the United States and, thus, there is no need for Hyundai Steel in Korea to duplicate these functions for its sales to the United States. In contrast, for its sales to the Korean market, Hyundai Steel performs all of these functions and activities itself.
- Moreover, the sheer size of Hyundai Steel's home market mandates significant marketing and sales activities. During the POI, Hyundai Steel's home market consisted of a substantial amount of sales of the foreign like product to many unaffiliated customers. Maintaining these customer relationships and sales volume requires significant market presence and sales activity.
- With respect to the second category (freight and delivery activities), while Hyundai Steel delivers its products to both the home market and the U.S. market, Hyundai Steel submits that the volume of home market shipments, variation in shipment quantity, and number of home market customers indicates that this function is performed at a more intense level in the home market than in the U.S. market, which involves bulk shipments.
- With respect to the third category (inventory maintenance and warehousing), Hyundai Steel incurred warehousing expenses for some of its home market sales but incurred no such expenses for its U.S. sales. Thus, this function was performed to a greater degree in the home market than for sales to the United States.



- With respect to the fourth selling function category (warranty and technical support), while Hyundai Steel guarantees its products in all markets, Hyundai Steel managed warranty expenses in the home market. For U.S. sales, Hyundai Steel itself only incurred warranty expenses for its EP sales while HCUSA managed warranty issues with U.S. customers for CEP sales. Thus, the record confirms that Hyundai Steel performed a greater degree of warranty and technical support activities for its home market sales than it did for sales to the United States.
- Accordingly, because Hyundai Steel performed significantly more selling functions for its home market sales than U.S. sales, the Department should grant a CEP offset for Hyundai Steel's CEP sales.
- Such a determination would also be consistent with other prior cases, where the Department analyzed Hyundai Steel's selling functions (and those of the former Hyundai HYSCO which has since been merged into Hyundai Steel).
- In the Department's concurrent investigation concerning corrosion resistant steel – involving similar sales channels and facts – the Department determined that Hyundai Steel qualified for a CEP offset.<sup>97</sup> Thus, there is no justification for the Department to reach a different conclusion regarding the same sales channels and similar products in these two investigations.
- The Department likewise consistently granted a CEP offset to Hyundai HYSCO based on similar facts in prior proceedings involving corrosion resistant steel from Korea.<sup>98</sup>
- Accordingly, because the record demonstrates that Hyundai Steel's home market sales were at a more advanced level of trade than its U.S. sales, and consistent with prior determinations, in the final determination the Department should grant Hyundai Steel a CEP offset in this investigation.

#### *Petitioners*

- The record evidence does not support Hyundai Steel's request for a CEP offset. The Department properly determined that Hyundai Steel's home market sales during the POI were “not made at a more advanced stage of distribution than its EP/CEP LOT through Channels 1, 2, and 3” and that the selling functions performed in its home market were “virtually the same as those performed for its U.S. customers at the same relative level of intensity.”
- With regard to sales and marketing activities, Hyundai Steel's selling functions chart and record evidence shows that it engaged in sales and marketing activities at the same or higher level of intensity for its CEP sales as compared to its home market sales.
- For example, although Hyundai Steel reported that it expended the same “high” level of effort for order input/processing to its home market customers and its U.S. customers, this is

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<sup>97</sup> See *Certain Corrosion-Resistant Steel Products From the Republic of Korea: Affirmative Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 81 FR 78 (Jan. 4, 2016), and Accompanying Issues & Decision Memorandum at p. 23.

<sup>98</sup> See *Certain Corrosion-Resistant Carbon Steel Flat Products From the Republic of Korea: Preliminary Results of the Seventeenth Antidumping Duty Administrative Review*, 76 FR 55004, 55009 (September 6, 2011), unchanged for the final results 77 FR 14501 (March 12, 2012); see also *Certain Corrosion-Resistant Carbon Steel Flat Products From the Republic of Korea: Notice of Preliminary Results of the Sixteenth Antidumping Duty Administrative Review*, 75 FR 55769, 55775 (September 14, 2010), unchanged for the final results 76 FR 15291 (March 21, 2011).

incorrect. For its U.S. sales, Hyundai Steel not only prepares sales orders, it also prepares contracts/order confirmations for its CEP sales – a task not undertaken by Hyundai Steel for its home market sales.

- In addition, Hyundai Steel prepares additional sales documents, such as Korean customs documents, Korean export permit documents, bills of lading, etc., for its U.S. sales that are not required for home market sales. Thus, the order input/processing for its U.S. sales are at a higher level of intensity than for its home market sales.
- Moreover, Hyundai Steel argues that the bulk of the sales forecasting and strategic economic planning activities are performed by its U.S. affiliates for the U.S. sales, while it performs all of these functions and activities for its sales to the Korean market. While Hyundai Steel would like the Department to believe that it leaves these functions to its U.S. affiliates, it is fully responsible for its sales forecasting and strategic economic planning for Channel 1 sales.
- Furthermore, for all other channels of distribution, Hyundai Steel and Hyundai Corporation Korea still must perform sales forecasting activities in order to determine the production needs of the U.S. market. They certainly must remain in contact with their U.S. affiliates in order to forecast and plan their activities. This level of effort is no different, but more complex, than its home market sales.
- Hyundai Steel’s assertion that it “engages in significant selling activities in dealing directly with its numerous customers for thousands of transactions” in its home market is also unavailing. First, contrary to Hyundai Steel’s claim, the number of customers and number of sales transactions have no impact on the type of selling functions performed or the level of intensity incurred on those selling functions.<sup>99</sup> Second, the record demonstrates that Hyundai Steel has “long-standing relationships” with a few home market customers and, therefore, it is unlikely that Hyundai Steel engages in significant selling activities for such customers. Given the customers’ long-term relationship with Hyundai Steel, it is unlikely that “maintaining these customer relationships and sales volumes requires significant market presence and sales activity.”
- With regard to freight and delivery activities, Hyundai Steel reported the same “high” level of effort in both the home market and Channel 2 U.S. sales, but argues that because of the volume of home market shipments, variation in sales quantity, and number of home market customers, this function is performed at a more intense level in the home market than in the U.S. market. By its own admission, however, Hyundai Steel stated that it arranges for domestic freight, domestic brokerage services, and international freight for its U.S. sales, while it only arranges for domestic freight for home market sales. Hyundai Steel failed to indicate in the selling chart that it also arranges for marine insurance to cover ocean freight and U.S. brokerage and handling. Thus, the U.S. level of freight and delivery activity is much higher than that of the home market, in contrast to Hyundai Steel’s claim.
- Similarly, Hyundai Steel reported that it incurs the same “low” level of inventory maintenance/warehouse for its home market sales as it does for its U.S. sales, but claims that the inventory maintenance/warehouse function was performed to a greater degree in the

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<sup>99</sup> See *Notice of Final Results of Antidumping Duty Administrative Review: Furfuryl Alcohol from the Republic of South Africa*, 62 FR 61,084, 61,090 (November 14, 1997). (“While it is our preference to examine selling functions on both a qualitative and quantitative basis, our examination is not contingent on the number of customers nor on the number of sales for which the activity is performed.”)

home market than for sales in the United States. Specifically, it claims that it incurred warehousing expenses for some of its home market sales, while it incurred no such expenses for its U.S. sales. First, the Department cannot verify that the claimed home market warehousing expenses were made at arm's-length prices and, therefore, the Department cannot consider Hyundai Steel's warehousing expenses in its analysis. In addition, Hyundai Steel would have had to hold finished goods for a longer period for U.S. sales until it has the export shipment fully produced and ready for shipment, which is a requirement that would not exist for home market sales.

- Finally, with regard to the warranty and technical support category, Hyundai Steel reported a higher level of effort for its U.S. sales than for its home market sales. Hyundai Steel, however, claims that although it “guarantees its products in all markets,” it managed warranty expenses in the home market. Specifically, it claims that for U.S. sales, “Hyundai Steel itself only incurred warranty expenses for its EP sales (Channel 1) while HCUSA managed warranty issues with U.S. customers for CEP sales.” It therefore concludes that it performed a greater degree of warranty and technical support activities for its home market sales than it did for sales to the United States.
- While HCUSA may “manage warranty issues with U.S. customers for CEP sales,” it is not the one that is ultimately responsible for the warranty expense.
- As the manufacturer of the steel, only Hyundai Steel can investigate and determine if its production resulted in a defective product and Hyundai Steel's U.S. affiliates may only assist in managing the communications with the U.S. customer on warranty issues. In the same fashion, Hyundai Steel is the only party that could advise a customer how and whether it can meet the technical needs of a customer.
- Regarding granting CEP offsets in past proceedings, the U.S. Court of International Trade (CIT) has held that “whether the Department has granted a CEP offset to {a respondent} in a different proceeding with a different factual record . . . does not necessarily bind the Department in determining whether to grant or deny an offset adjustment to NV” in another proceeding.<sup>100</sup>
- The CIT has also upheld that the Department's decisions in one segment of a proceeding do not dictate its decision in subsequent segments.<sup>101</sup>
- Accordingly, if the law does not bind the Department to an administrative determination made in an earlier segment of the same proceeding, it does not bind the Department to an administrative determination made in a prior segment involving a different product and a different investigation. Rather, each proceeding should be treated new, and therefore, the Department must weigh the facts presented on the record at issue in determining whether, in this case, substantial evidence exists to permit a CEP offset.<sup>102</sup>
- The facts of record in this investigation are also distinguishable from previous cases in which the Department treated Hyundai Steel's (or Hyundai HYSCO's) request for a CEP offset. In

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<sup>100</sup> See, e.g., *Certain Circular Welded Non-Alloy Steel Pipe From Mexico: Final Results of Antidumping Duty Administrative Review*, 80 FR 19633 (April 13, 2015), and accompanying Issues and Decision Memorandum at 3 (CWP from Mexico); see also *Shandong Huarong*.

<sup>101</sup> See e.g., *Pakfood Public Co. v. United States*, 724 F. Supp. 2d 1327, 1342 (CIT 2010); *Timken U.S. Corp. v. United States*, 434 F.3d 1345, 1352 (Fed. Cir. 2006) (*Pakfood*).

<sup>102</sup> See *Ad Hoc Shrimp Trade Action Comm. v. United States*, 616 F. Supp. 2d 1354, 1373-74 (CIT 2009), and affirmed upon appeal, 596 F.3d 1365 (Fed Cir. 2010) (*Ad Hoc Shrimp*).

this case, there is no record evidence that Hyundai Steel performs selling functions in the home market at a more advanced stage of distribution compared to the U.S. market.

- In summary, a review of Hyundai Steel's claimed selling functions and levels of activity show that Hyundai Steel's U.S. sales and its home market sales of the foreign like product were made at the same level of trade. Hyundai Steel simply has not presented a factual basis for reversing the preliminary decision on this issue. Accordingly, the Department should disregard Hyundai Steel's claimed differences in levels of trade and continue to deny a CEP offset in the final determination.

**Department Position:** We agree with Petitioners that no CEP offset is warranted. The Department will grant a CEP offset under section 773a(a)(7)(B) of the Act if sales in the home market are at a more advanced level of trade than CEP sales in the United States and there is no basis for determining whether the differences in levels of trade affects price comparability. In the *Preliminary Determination*<sup>103</sup> and again at verification,<sup>104</sup> we analyzed the various selling functions Hyundai Steel indicated it performed for sales in the home market versus those performed with respect to its U.S. affiliates for its CEP sales.

In the home market, Hyundai Steel reported that it made sales through two channels of distribution (*i.e.*, direct shipments to end-users or distributors). Hyundai Steel reported that it performed the following selling functions for sales to all home market customers: sales forecasting; strategic/economic planning; personnel training/exchange; advertising; sales promotion; packing; inventory maintenance; order input/processing; direct sales personnel; sales/marketing support; market research; technical assistance; provide cash discounts; provide warranty services; provide guarantees; and freight and delivery arrangement.<sup>105</sup>

Selling activities can be generally grouped into four selling function categories for analysis: 1) sales and marketing; 2) freight and delivery services; 3) inventory maintenance and warehousing; and 4) warranty and technical support.<sup>106</sup> Based on these selling function categories, we find that Hyundai performed sales and marketing, freight and delivery services, inventory maintenance, and warranty and technical support for its reported sales to affiliated and unaffiliated customers in the home market. Because Hyundai Steel performed the same selling functions at the same relative level of intensity for all of its home market sales, we determine that all home market sales are at the same LOT.

With respect to the U.S. market, Hyundai Steel reported that it made sales through three main channels of distribution: EP sales through unaffiliated Korean distributors (Channel 1); CEP sales through its affiliates Hyundai Corporation, Hyundai Corporation China and HCUSA to unaffiliated processors (Channel 2); and CEP sales through its affiliate HSA to unaffiliated processors and affiliated processors (Channel 3).<sup>107</sup>

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<sup>103</sup> *Preliminary Determination* at 16-19.

<sup>104</sup> See Hyundai Steel's Verification Report at 9.

<sup>105</sup> See Hyundai Steel's section A response at exhibit A-13.

<sup>106</sup> See Hyundai Steel's section A response at exhibit A-13.

<sup>107</sup> See Hyundai Steel's section A response at A17-18 and exhibit A-13. Hyundai Steel and Hyundai Corporation are affiliated through familial relationship. During the POI Hyundai made some sales of subject merchandise to a U.S.

With respect to all LOT channels, Hyundai Steel reported these functions: sales forecasting; strategic/economic planning; personnel training/exchange; order input/processing; direct sales personnel; sales/marketing support; market research; technical assistance; provide warranty services; and freight and delivery arrangement. For advertising and sales promotion, all LOT channels reported these functions except Hyundai Steel Company-Channel 2. For packing and inventory maintenance, all LOT channels reported these functions except Hyundai Steel U.S. affiliates in Channel 2. For Engineering Services, Procurement/Sourcing Services and Post Sale Warehousing, only HSA Channel 3 provided these services.<sup>108</sup>

Based on the selling function categories noted above, we find that with respect to all Channels, Hyundai Steel performed sales and marketing, freight and delivery services, inventory maintenance and warehousing for its U.S. sales, and that Channel 3 sales included a few more (three out of 24) more sub-activities. Because Hyundai Steel performed the same selling functions at the same relative level of intensity (same or low/medium or medium/high) for its U.S. sales in these channels (with the exception of sales/marketing support, which is provided with different intensity in Channel 1 and Channel 3), we find the differences between these channels are too insignificant to warrant three different LOTs. Thus, we determine that Hyundai Steel's U.S. sales through all its channels are made at the same LOT.

We compared the EP (Channel 1) and the CEP (Channels 2 and 3) LOT to the home market LOT and found that the selling functions Hyundai Steel performed for its home market customers are virtually the same as those performed for its U.S. customers at the same relative level of intensity. The only difference is that Hyundai Steel provides cash discounts and guarantees for home market customers and does not provide this service for EP/CEP sales.<sup>109</sup> This difference is not sufficient to determine that Hyundai Steel's EP/CEP LOT is different from the home market LOT. Therefore, based on the totality of the facts and circumstances, we determine that sales to the home market during the POI were made at the same LOT as Hyundai Steel's EP/CEP sales through all channels and determined no LOT adjustment was warranted.

Given the above, we agree with Petitioners that Hyundai Steel should not receive a CEP offset in the final determination. Petitioners assert that Hyundai Steel reported a level of effort that is too high for its home market sales, as compared with all levels of trade for U.S. sales, thus, wrongly claims a CEP offset. We find that Hyundai Steel's home market sales are not at a more advanced level of trade than its U.S. sales. We disagree with Hyundai Steel that it engages in significant selling activities in dealing directly with its numerous customers for thousands of transactions and on behalf of its U.S. affiliates. We agree with Petitioners that the number of customers and number of sales transactions have no impact on the type of selling functions performed or the level of intensity incurred on those selling functions. Therefore, there is no evidence of variation across markets and a CEP offset for is unwarranted for Hyundai Steel. As to Hyundai Steel's arguments about the Department's decisions regarding a CEP offset for other cases involving it (or its affiliate, Hyundai HYSCO), Petitioners correctly assert that the record

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customer through these companies.

<sup>108</sup> *Id.*

<sup>109</sup> See Hyundai Steel's section A response at A17-18 and exhibit A-13.

of each proceeding or segment presents a different factual record.<sup>110</sup> Additionally, Hyundai Steel's arguments regarding Hyundai HYSCO relate to an organizational structure predating the POI. Lastly, as Petitioners also point out, the Department is not bound by its decisions regarding the same company in other proceedings and must evaluate the current record evidence; thus, Hyundai Steel's reliance on past proceedings here is inapposite.<sup>111</sup>

Therefore, analysis of the relevant selling functions under the rubric of the four general categories of selling functions yields the conclusion that there is no basis for concluding that a significant variation in overall selling activity exists for home market sales versus U.S. CEP sales. Here, there is no variation across both markets and for all four of those categories—warranty and technical support, freight and delivery, inventory maintenance and warehousing, and sales and marketing activities—there is no basis on the record for concluding Hyundai Steel's level of activity is greater for home market sales than for U.S. CEP sales, which was also verified at the Hyundai Steel's and HCUSA's sales verifications.<sup>112</sup>

Because of the totality of the facts and circumstances, we determine that Hyundai Steel's home market sales during the POI were made at the same LOT as its EP/CEP sales. Also, Hyundai Steel's home market LOT is not at a more advanced stage of distribution than its EP/CEP LOT through Channels 1, 2, and 3, and thus, no LOT adjustment is necessary. Consequently, there is no basis for considering a CEP offset with respect to Hyundai Steel. Accordingly, we have not granted a CEP offset, pursuant to section 773(a)(7)(B) of the Act.

#### **Comment 10: Date of Sale**

##### *Petitioners*

- In determining the appropriate date of sale, the key factor the Department must consider is which date better reflects the date on which Hyundai Steel established the material terms of sale. The record demonstrates that there were no material changes to the essential terms of sale after the order confirmation date. Accordingly, the Department should conclude that the first moment that the essential terms of sale are set for U.S. sales is the date of order confirmation.
- For Channel 1 U.S. sales, Hyundai Steel presented the same documentation as it had previously provided on the record. In its initial submission, Hyundai Steel claimed that the “total quantity shipped and sold to the customer was outside the quantity tolerance established in the sales contract with the customer.” An examination of this documentation suggests that Hyundai Steel has not provided all pertinent documents for this sale and could be explained by other sales in and around the same time or that parties simply changed the terms of the contract. Without a complete accounting of the data, the Department cannot draw any conclusion regarding a change in quantity for Channel 1 U.S. sales.
- Second, Hyundai Steel provided other documents that purport to show a change in the terms for Channel 1 customers. However, changes to the contract would require certain formalities, while invoicing errors would require certain corrections. Because Hyundai Steel

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<sup>110</sup> See *CWP from Mexico and Shandong Huarong*.

<sup>111</sup> See *Pakfood and Ad Hoc Shrimp*.

<sup>112</sup> See Hyundai Steel's Verification report at 9, and Exhibits HS-14 and HC-10.

has not presented either type of document regarding the alleged change to this contract, the Department cannot credit these alleged changes without rendering the terms of the contract meaningless.

- For U.S. Channel 2, Hyundai Steel presented a single quantity change. However, such a small and insignificant change is immaterial under the normal terms of sale. As such, this quantity variance cannot be reasonably considered as a change in the essential terms of sale.
- For U.S. Channel 3, the documentation presented at verification relate to pre-POI sales, and they therefore offer no insight to the establishment of the essential terms of sales during the POI. As a result, there is no evidence that there were any material changes to the terms of sale after the order confirmation date for U.S. Channel 3 sales.
- For Channel 4 U.S. customers, Hyundai Steel submitted documentation regarding a sale that had addendums. However, certain conflicts raise questions about the authenticity of the addendums. Under these circumstances, the Department should disregard Hyundai's proffered evidence and find that the date of contract to the U.S. customer best represents the date of sale for Channel 4.
- The Department's verification therefore only served to confirm that the record evidence filed by Hyundai Steel regarding its U.S. sales demonstrates that the essential terms of sale are set at the date of order confirmation and not at the date of invoice or shipment. Accordingly, the Department should rely on the order confirmation date as the data of sale for Hyundai Steel's U.S. sales in the final determination.

#### *Hyundai Steel*

- Petitioners are simply recycling their date of sale argument it has previously raised in detail (and the Department had fully analyzed).
- The Department's verification confirmed Hyundai Steel's reporting and confirmed that the Department's preliminary determination was correct. Petitioners, however, do not address the Department's preliminary determination on this issue and provides no new rationale for why the Department should reach a determination contrary to its standard practice. Thus, Petitioners are simply asking the Department to reverse its preliminary determination on this issue in the face of the same record evidence.
- It is the Department's longstanding practice to use the shipment date, rather than invoice date, as the date of sale when shipment precedes invoicing.<sup>113</sup>
- In its questionnaire responses and accompanying sales data files, Hyundai Steel reported the earlier of shipment date or the date of invoice as the appropriate date of sale. Invoices are generally issued after shipment so the date of shipment is the appropriate date of sale for Hyundai Steel's U.S. sales. Hyundai Steel issues invoices at this time because price and/or quantity remains subject to change up until shipment.
- Hyundai Steel submitted documentation for sales in which the material terms of sale changed following receipt of the customer's order and estimated that this occurs in a good percentage of sales.

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<sup>113</sup> See *Stainless Steel Bar From Japan*, 65 FR 13717 (March 14, 2000), and accompanying Issues and Decision Memorandum at Comment 1 ("Although invoice date would ordinarily be the appropriate date of sale in this instance, the invoice date occurs after both shipment dates for all sales in this review... Therefore, we have used shipment date as the date of sale, in accordance with our practice.")

- This reporting is consistent with law and the Department’s practice in both prior cases involving Hyundai Steel and unrelated parties. In particular, in addressing similar facts involving Hyundai Steel, the Department has now twice confirmed that Hyundai Steel’s date of sale reporting is correct.<sup>114</sup>
- In conducting its thorough review at verification, the Department concluded that there were changes in the material terms of sale subsequent to the order in a significant proportion of Hyundai Steel’s sales in each sales channel.
- The Department also reviewed several home market sales transactions where there were price changes for sales under the same order.
- With respect to U.S. channel 1 sales, Petitioners discount the record evidence showing a change in quantity reasoning that there are other sales to the customer with the same order date. Petitioners concede that “it is possible” that there were multiple orders on the same day (in which case the quantity difference necessarily demonstrates that the quantity was changed between the order and sale). Nonetheless, Petitioners speculate that there are other explanations which may account for the various sales and orders to the customer. Needless to say, Petitioners’ speculation on this issue does not detract from the record evidence showing that the quantity was in fact changed subsequent to the initial order.
- Petitioners also allege that price changes in this channel are not possible, pointing to contract language in Hyundai Steel’s contract with a customer. However, Petitioners cannot reasonably claim that the price was not actually changed. Again, Petitioners’ speculation cannot overcome the verified record evidence showing actual price changes subsequent to the contract.
- Regarding U.S. channel 2, Petitioners state that sales in this channel do not evidence quantity changes outside of the tolerance. However, Petitioners concede that the quantity of the shipment was outside of tolerance, as it was less than the ordered quantity. Petitioners essentially argue that the shipment was not sufficiently outside of tolerance to qualify as outside of tolerance. Again, this argument cannot overcome the fact that the quantity shipped was outside of the ordered tolerance demonstrating that the essential terms of sale changed subsequent to the initial contract.
- As to Petitioners’ “outside POI” U.S. Channel 3 argument, first, the product was shipped during the POI, establishing it as a POI sale and showing that material terms of sale did in fact change for POI sales. Second, Petitioner’s claim that the documentation is irrelevant because it relates to an order made prior to the POI misses the point. At issue in a date of sale analysis is whether prices and/or quantities (or other material terms of sale) can change. Whether the specific documents are within the POI is not relevant to this analysis, as these documents demonstrate that it is possible for the material terms of sale to change after the initial order.
- Concerning Channel 4, Petitioners simply take issue with the timing of the documents as issued and arranged with the customer. However, the record evidence confirms that there was a contract addendum and invoice that reflected a change in the price. Despite Petitioners’ insulting claim that it has “questions about the authenticity” of the documents,

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<sup>114</sup> See *Certain Cold Rolled Steel Flat Products from the Republic of Korea*, 81 FR 11757 (March 7, 2016), Issues and Decision Memorandum at 11-12, and *Certain Corrosion-Resistant Steel Products From the Republic of Korea: Affirmative Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 81 FR 78 (Jan. 4, 2016), and accompanying Issues & Decision Memorandum at 14-15 (unchanged in final).



there is nothing on the record to question the documents to indicate that the price was not actually changed subsequent to the initial contract.

**Department's Position:** We agree with Hyundai Steel. Section 351.401(i) of the Department's regulations states that, in identifying the date of sale of the merchandise under consideration or foreign like product, the Secretary normally will use the date of invoice, as recorded in the exporter or producer's records kept in the ordinary course of business. Additionally, the Secretary may use a date other than the date of invoice if the Secretary is satisfied that a different date better reflects the date on which the exporter or producer establishes the material terms of sale.<sup>115</sup> We note for Hyundai Steel that the material terms of the sales (*i.e.*, quantity and value) in both markets are subject to change up to the earlier of either shipment or invoice date, so as a result the order/order confirmation date does not set the material terms of sales for either company.

For its home market sales, Hyundai Steel reported the earlier of shipment date (*i.e.*, the date the merchandise leaves the factory or warehouse), or invoice date in the field SALEDATH. Hyundai Steel normally recognizes a sale at the time of shipment from the factory. However, in some limited instances, customers requested that Hyundai Steel delay shipments to a later date. Consequently, certain home market sales that were invoiced during the POI had not yet shipped from Hyundai Steel's factory. In these instances, because Hyundai Steel had issued invoices for these sales, and ownership of the merchandise was transferred to the customer when the tax invoices were issued, Hyundai Steel reported these sales in its sales database.<sup>116</sup>

For its U.S. sales, Hyundai Steel reported the shipment date from Hyundai Steel's factory as the date of sale for its sales through unaffiliated distributors in Korea and those sales through Hyundai Corporation. For its U.S. sales through HCUSA and HSA to unaffiliated processors, Hyundai Steel reported the earlier of shipment or invoice date as the date of sale. For both home market and U.S. sales, Hyundai Steel issues its commercial invoices (U.S. market) or tax invoices (home market) at or after the time of shipment.<sup>117</sup>

Hyundai Steel also reported that for home market sales all material terms of sale (*e.g.*, quantity and value) can change up to the point of shipment.<sup>118</sup> For U.S. sales, Hyundai Steel reported the shipment date from Hyundai Steel's factory as the date of sale, consistent with Department's practice of using the earlier of shipment or invoice date as the date of sale.<sup>119</sup>

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<sup>115</sup> See 19 CFR 351.401(i); *see also Allied Tube & Conduit Corp. v. United States*, 132 F. Supp. 2d 1087, 1090-1092 (CIT 2001) ("As elaborated by Department practice, a date other than invoice date 'better reflects' the date when 'material terms of sale' are established if the party shows that the 'material terms of sale' undergo no meaningful change (and are not subject to meaningful change) between the proposed date and the invoice date.").

<sup>116</sup> See Hyundai Steel's Verification Report at 9-10; *see also* Hyundai Steel's November 23, 2015, section B response (Hyundai Steel's section B response) at B-20-21.

<sup>117</sup> See Hyundai Steel's Verification Report at 9-10; *see also* Hyundai Steel's November 2, 2015, section A response (Hyundai Steel's section A response) at A-22-23.

<sup>118</sup> See Hyundai Steel's Verification Report at 9-10; *see also* Hyundai Steel's Section A response at A-27.

<sup>119</sup> See Hyundai Steel's Verification Report at 9-10; *see also* Hyundai Steel's January 19, 2016, supplemental sections A-C response ("Hyundai Steel's Supplemental A-C Response") at 1-2.

At verification, we collected sample contracts, orders and invoice summaries detailing price or tolerance quantity changes from the contract/purchase order for Hyundai steel's direct export sales, export sales by Hyundai Corporation (HC), export sales by Hyundai Corporation China (HCC), and sales through HCUSA.<sup>120</sup> Therein, the Department found meaningful material changes from the contract/purchase order date in each sales channel verified.<sup>121</sup> For the home market, the company performed a similar exercise and presented us with 50 examples of price changes per the same order number.<sup>122</sup>

Thus, for the final determination, we used the earlier of shipment date or invoice date as the date of sale as indicated above for Hyundai Steel's home market and U.S. sales, consistent with the Department's normal methodology regarding date of sale because the material terms of sale (*e.g.*, quantity) are still subject to change when orders are confirmed.<sup>123</sup>

### **Comment 11: Differential Pricing**

#### *Hyundai Steel*

- The Department erred in calculating the weighted-average dumping margins using the average-to-transaction (A-to-T) method, and even if the Department continues to use the A-to-T method in its final determination, the Department should not use zeroing, as a matter of law.
- Zeroing is unlawful under the World Trade Organization (WTO) Antidumping Agreement, as most recently confirmed by a WTO dispute settlement panel finding that the Department's latest zeroing methodology, the differential pricing test used in this and other recent investigations, violates that agreement.
- In *US-Washers (Korea)*, the dispute settlement panel found the differential pricing test was not in accordance with the WTO Antidumping Agreement because it inappropriately identified "patterns" of price differences based on "random and unrelated price variations."<sup>124</sup>
- The panel also found resorting to zeroing in the context of the differential pricing test and resulting average-to-average (A-to-A) transaction comparison methodology likewise violated the WTO Antidumping Agreement because "individual pattern transactions priced above normal value would not be properly taken into account."<sup>125</sup>
- The Department's differential pricing test does not establish a "pattern" of price differences exist but rather, simply measures price variations measured against arbitrary statistical benchmarks.
- The Department has not identified or described any particular "pattern" with respect to their pricing, as required by 19 U.S.C. § 1677f-1(d)(1)(B)(i), and having failed to do so, the Department cannot resort to alternate calculations, let alone zeroing.

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<sup>120</sup> See Hyundai Steel's Verification Report at 9-10 and Exhibits HS-13 and HC-13.

<sup>121</sup> *Id.*

<sup>122</sup> See Hyundai Steel's Verification Report at 9-10 and Exhibits HS-12.

<sup>123</sup> See 19 CFR 351.401(i) and *Allied Tube & Conduit Corp. v. United States*.

<sup>124</sup> See *United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea*, WT/DS464/R (March 11, 2016) ("*US-Washers (Korea)*"), at para 7.147.

<sup>125</sup> See *US-Washers (Korea)* at para 7.206.

- The differences in margins generated based on the A-to-A methodology and those based on the A-to-T methodology are due solely to zeroing.
- Hyundai Steel states that had the Department not applied zeroing, its preliminary margin would have been *de minimis*, and as such the differential pricing test did not yield any meaningful different results.
- Zeroing is unlawful under the WTO Antidumping Agreement-Article 2.4.2, which prohibits the Department from calculating the antidumping margin by applying the A-to-T methodology to all U.S. sales when it finds differential pricing exists.
- The first sentence of Article 2.4.2 indicates that normally the comparisons will either be based on an A-to-A methodology or on a transaction-to-transaction basis for all transactions, and the second sentence contemplates using an A-to-T methodology where differential pricing is found, but not for “all” transactions because that second sentence, unlike the first one, does not use the word “all” when referencing export transactions.
- In *U.S. – Zeroing (Japan)* the Appellate Body of the WTO confirmed this understanding of the second sentence of Article 2.4.2 of the Antidumping Agreement, limiting any application of an A-to-T calculation methodology to just those sales for which differential pricing was found to occur.<sup>126</sup>
- This Appellate Body interpretation of an A-to-T methodology rendered irrelevant the United States’ argument that the second sentence of Article 2.4.2 becomes “inutile” if it is interpreted to prohibit zeroing.<sup>127</sup> The United States conceded this latter point in *US – Stainless Steel (Mexico)*.<sup>128</sup>
- The Department’s current interpretation of the statute to allow its application of the A-to-T methodology to all transactions, rather than just those for which differential pricing was found to occur, is also in violation of U.S. law.
- The Department’s interpretation was first expressed in *Polyethylene Retail Carrier Bags from Taiwan*, but that the Department has provided no rationale for its reversal of its prior interpretation that the A-to-T methodology would only be used for differential pricing transactions.<sup>129</sup>
- Even if the Department was justified in applying an A-to-T comparison methodology to all transactions rather than just to those for which differential pricing had been found to occur, it still is prohibited from employing zeroing as part of such a methodology.
- The Appellate Body of the WTO found, in *U.S. – Softwood Lumber V (Article 21.5 – Canada)*, that the Department may not utilize zeroing under either of the methodologies referenced in the first sentence of Article 2.4.2 of the WTO Antidumping Agreement, which pertains to the A-to-A and transaction-to-transaction methodologies.
- Moreover, the Appellate Body’s rationale for that ruling applies with equal force to the second sentence of Article 2.4.2., which pertains to the A-to-T methodology.<sup>130</sup>

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<sup>126</sup> See *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R (January 23, 2007) at paragraph 135 (“*US – Zeroing (Japan)*”).

<sup>127</sup> See *US – Zeroing (Japan)* at paragraphs 130-136.

<sup>128</sup> See *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R (May 20, 2008) (“*US – Stainless Steel (Mexico)*”) at paragraph 126.

<sup>129</sup> See *Polyethylene Retail Carrier Bags from Taiwan: Final Determination of Sales at Less Than Fair Value*, 75 FR 14569 (March 26, 2010) and accompanying Issues and Decision Memorandum at comment 1.

<sup>130</sup> See *United States – Final Dumping Determination on Softwood Lumber from Canada Recourse to Article 21.5 of*

- Additional support for this conclusion flows from the Appellate Body’s decisions in various cases in which it has considered the appropriateness of zeroing in administrative reviews, citing for example its statement in *U.S. – Zeroing (Japan)* that the concepts under which the margin of dumping is determined “do not vary with the methodologies followed for a determination made under the various provisions of the {WTO} Anti-Dumping Agreement.”<sup>131</sup>
- Furthermore, the principles of interpretation that the Appellate Body has applied cannot be distinguished from the principles that apply to the second sentence of Article 2.4.2, especially when read in the context of the objective of every dumping margin calculation, which the Appellate Body has found is to determine the margin of dumping on an exporter-specific basis “for the product as a whole.”<sup>132</sup>
- As such, the second sentence of Article 2.4.2 of the WTO Antidumping Agreement says that a finding of differential pricing authorizes the administering authority to use the A-to-T methodology, but not to use zeroing as part of that methodology.
- Finally, if the Department for some reason resorts to A-to-T comparisons in the final determination, it would be inconsistent with Article 2.4.2 of the WTO Antidumping Agreement for the Department to zero negative dumping margins when computing its weighted-average dumping margin.

#### *Petitioners*

- The Department, in its *Preliminary Determination*, found a pattern of prices that differed significantly among purchasers, regions, or time periods, for Hyundai Steel, at a CONNUM-specific level.
- The price variations generated by the differential pricing test for Hyundai Steel constitute a statistically significant pattern.
- Hyundai Steel misconstrues the Department’s differential pricing analysis when it claims the differences in margins it identified are solely attributable to zeroing.
- Under the differential pricing analysis, if both the Cohen’s *d* test and the ratio test show the existence of a pattern of export prices that differ significantly, as it did for Hyundai Steel, the Department will then determine whether the A-to-A method accounts for such differences by comparing the margin from the A-to-A method with the margin from the A-to-T method.
- If the difference is found to be meaningful (either a 25 percent relative change between the margins determined from the two methods) or if the resulting weighted-average margin moves across the de minimis threshold (as it did for Hyundai Steel), the Department will rely on the alternative method. Hyundai Steel’s objection to the Department’s differential pricing analysis is nothing other than a complaint about the Department using a standard pricing differential test.
- Hyundai Steel’s claim that the Department’s test “simply measures price variations” ignores the fact that “variations” that are statistically significant constitute a pattern. In the

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*the DSU by Canada*, WT/DS264/AB/RW (September 1, 2006) (“U.S. – Softwood Lumber V (Article 21.5 – Canada)”) at paragraphs 87 and 88.

<sup>131</sup> See *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R (January 23, 2007) (“U.S. – Zeroing (Japan)”), at paragraph 114.

<sup>132</sup> See *United States – Laws, Regulations and Methodology for Calculating Dumping Margins*, WT/DS294/AB/R (April 18, 2006) (“U.S. – Zeroing (EC)”).

*Preliminary Determination*, the Department found that 80.12 percent of U.S. sales passed the Cohen’s *d* test by value for Hyundai Steel, which is a statistically significant pattern.<sup>133</sup>

- The Department has confirmed that its denial of offsets with regard to the A-to-T method is consistent with the United States’ international obligations.<sup>134</sup>
- The Department correctly noted in *Washers from Korea* that it acted in accordance with U.S. law by denying offsets under the A-to-T method, and that the Federal Circuit “has held that WTO reports are without effect under U.S. law unless and until such a report has been adopted pursuant to the specified statutory scheme established in the URAA.”<sup>135</sup>
- The United States has not adopted the WTO report in *Washers from Korea*, and the United States notified the WTO Dispute Settlement Body of its decision to appeal certain issues in that report.<sup>136</sup>
- The reliance by Hyundai Steel upon *U.S. – Stainless Steel (Mexico)* is misplaced, given the steps taken in response to that report do not require change to the Department’s approach of calculating weighted-average margins in this investigation.<sup>137</sup>

**Department Position:** As an initial matter, we note that there is nothing in section 777A(d) of the Act that mandates how the Department measures whether there is a pattern of prices that differs significantly or explains why the A-to-A method or the transaction-to-transaction (T-to-T) method cannot account for such differences. On the contrary, carrying out the purpose of the statute here is a gap filling exercise properly conducted by the Department.<sup>138</sup> As explained in the *Preliminary Determination*, as well as in various other proceedings,<sup>139</sup> the Department’s differential pricing analysis is reasonable, including the use of the Cohen’s *d* test as a component in this analysis, and it is in no way contrary to the law.

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<sup>133</sup> See Hyundai Steel Analysis Memo at 7.

<sup>134</sup> See *Large Residential Washers From the Republic of Korea: Final Results of the Antidumping Duty Administrative Review; 2012-2014*, 80 FR 55595 (September 16, 2015) and accompanying Issues and Decision Memorandum at comment 6 (*Washers from Korea*).

<sup>135</sup> See *Washers from Korea* that in turn cites *Corus Staal BV v. Department of Commerce*, 395 F.3d 1343, 1347 (CAFC 2005) *cert. denied*, 126 S. Ct. 1023 (2006), and also referencing Statement of Administrative Action, H.R. Doc. 103-316 (I) (1994) at 659 (“WTO dispute settlement panels will not have any power to change U.S. law or order such a change.”) and *NSK Ltd. v. United States*, 510 F.3d 1375, 1379-80 (CAFC 2007) (“{W}e...refuse to overturn Commerce’s zeroing practice based on any ruling by the WTO or other international body unless and until such ruling has been adopted pursuant to the specific statutory scheme.”)

<sup>136</sup> See *United States – Antidumping and Countervailing Measures on Large Residential Washers from Korea*, Dispute Settlement: Dispute DS464 (April 19, 2016).

<sup>137</sup> See *Certain Polyester Staple Fiber from the Republic of Korea*, 75 FR 64252 (October 19, 2010) and accompanying Issues and Decision Memorandum at comment 1.

<sup>138</sup> See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) (*Chevron*) (recognizing deference where a statute is ambiguous and an agency’s interpretation is reasonable); see also *Apex*, 37 F. Supp. 3d at 1302 (applying *Chevron* deference in the context of the Department’s interpretation of section 777A(d)(1) of the Act).

<sup>139</sup> See, e.g., *Welded Line Pipe From the Republic of Korea: Final Determination of Sales at Less Than Fair Value*, 80 FR 61366 (October 13, 2015) (*Lipe Pipe from Korea*) and the accompanying Issues and Decision Memorandum at comment 1; *Circular Welded Non-Alloy Steel Pipe From the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2012-2013*, 80 FR 32937 (June 10, 2015) (*CWP from Korea*), and the accompanying Issues and Decision Memorandum at comments 1 and 2, and *Welded ASTM A-312 Stainless Steel Pipe From the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2013-2014*, 81 FR 46647 (July 18, 2016) at comment 4; and *Cold-Rolled from Korea* at Comment 1.

With Congress' enactment of the Uruguay Round Agreements Act (URAA), section 777A(d) of the Act states:

(d) Determination of Less Than Fair Value.—

(1) Investigations.—

(A) In General. In an investigation under subtitle B, the administering authority shall determine whether the subject merchandise is being sold in the United States at less than fair value--

- (i) by comparing the weighted average of the normal values to the weighted average of the export prices (and constructed export prices) for comparable merchandise, or
- (ii) by comparing the normal values of individual transactions to the export prices (or constructed export prices) of individual transactions for comparable merchandise.

(B) Exception. 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--

- (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).

(2) Reviews.--In a review under section 751, when comparing export prices (or constructed export prices) of individual transactions to the weighted average price of sales of the foreign like product, the administering authority shall limit its averaging of prices to a period not exceeding the calendar month that corresponds most closely to the calendar month of the individual export sale.

The Statement of Administrative Action (SAA) expressly recognizes that:

New 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 A-to-A or transaction-to-transaction methodology cannot account for a pattern of prices that differ significantly among purchasers, regions, or time periods, *i.e.*, where targeted dumping may be occurring.<sup>140</sup>

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<sup>140</sup> See Uruguay Round Agreement Act, Statement of Administrative Action (SAA), H.R. Doc. No. 103-316 at 843 (1994), reprinted in 1994 U.S.C.C.A.N. 4040, 4161.

The SAA further discusses this new section of the statute and the Department's change in practice to using the A-A method:

In part the reluctance to use the A-to-A methodology had been based on a concern that such a methodology could conceal “targeted dumping.” In such situations, an exporter may sell at a dumped price to particular customers or regions, while selling at higher prices to other customers or regions.”<sup>141</sup>

With the enactment of the URAA, the Department's standard comparison method in an LTFV investigation is normally the A-to-A method. This is reiterated in the Department's regulations, which state, “the Secretary will use the A-to-A method unless the Secretary determines another method is appropriate in a particular case.”<sup>142</sup> As recognized in the SAA, the application by the Department of the A-to-A method to calculate a company's weighted-average dumping margin has raised concerns that dumping may be masked or hidden. The SAA states that consideration of the A-to-T method, as an alternative comparison method, may respond to such concerns where the A-to-A method, or the T-to-T method, “cannot account for a pattern of prices that differ significantly among purchasers, regions, or time periods, *i.e.*, where targeted dumping *may* be occurring.”<sup>143</sup> Neither the Act nor the SAA state that this is the only reason why the Department could resort to the A-to-T method, simply that this *may* be a situation where the A-to-T method would be appropriate or that the U.S. sales which constitute a pattern are the only sales where “targeted dumping” may be occurring or masked. As stated in the Act, the requirements for considering whether to apply the A-to-T method are that there exist a pattern of prices that differ significantly and that the Department explains why either the A-to-A method or the T-to-T method cannot account for such differences.

Accordingly, the Department finds that the purpose of section 777A(d)(1)(B) of the Act is to evaluate whether the A-to-A method is the appropriate tool to measure whether, and if so to what extent, a given respondent is dumping the subject merchandise at issue in the U.S. market.<sup>144</sup> While “targeting” and “targeted dumping” may be used as a general expression to denote this provision of the statute,<sup>145</sup> these terms impose no additional requirements beyond those specified in the statute for the Department to otherwise determine that the A-to-A method is not appropriate based upon a finding that the two statutory requirements have been satisfied.

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<sup>141</sup> See SAA at 842.

<sup>142</sup> See 19 CFR 351.414(c)(1). This approach is also now followed by the Department in administrative and new shipper reviews. See *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification*, 77 FR 8101 (February 14, 2012) (*Final Modification for Reviews*) (where the Department explained that it would now “calculate weighted-average margins of dumping and antidumping duty assessment rates in a manner which provides offsets for non-dumped comparisons while using monthly average-to-average (“A-A”) comparisons in reviews, paralleling the WTO-consistent methodology that the Department applies in original investigations”).

<sup>143</sup> See SAA at 843 (emphasis added).

<sup>144</sup> See 19 CFR 351.414(c)(1).

<sup>145</sup> See, e.g., *Samsung v. United States*, Slip Op. 15-58, p. 5 (“Commerce may apply the A-to-T methodology ‘if (i) there is a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or period of time, and (ii) the administering authority explains why such differences cannot be taken into account using’ the A-to-A or T-to-T methodologies. Id. § 1677f-1(d)(1)(B). Pricing that meets both conditions is known as ‘targeted dumping.’”).

Furthermore, “targeting” implies a purpose or intent on behalf of the exporter to focus on a subgroup of its U.S. sales. The court has already found that the purpose or intent behind an exporter’s pricing behavior in the U.S. market is not relevant to the Department’s analysis of the statutory provisions of section 777A(d)(1)(B) of the Act.<sup>146</sup> The Court of Appeals for the Federal Circuit (CAFC) has stated:

Section 1677f-1(d)(1)(B) does not require Commerce to determine the reasons why there is a pattern of export prices for comparable merchandise that differs significantly among purchasers, regions, or time periods, nor does it mandate which comparison methods Commerce must use in administrative reviews. As a result, Commerce looks to its practices in antidumping duty investigations for guidance. Here, the CIT did not err in finding there is no intent requirement in the statute, and we agree with the CIT that requiring Commerce to determine the intent of a targeted dumping respondent “would create a tremendous burden on Commerce that is not required or suggested by the statute.”<sup>147</sup>

As stated in section 777A(d)(1)(B) of the Act, the requirements for considering whether to apply the A-to-T method are that there exists a pattern of prices that differ significantly and that the Department explains why either the A-to-A method or the T-to-T method cannot account for such differences. The Department’s application of a differential pricing analysis in this investigation provides a complete and reasonable interpretation of the language of the statute, regulations and SAA to identify when pricing cannot be appropriately taken into account when using the normal A-to-A methodology, and it provides a remedy for masked dumping when the conditions exist.

As described in the *Preliminary Determination*, the differential pricing analysis addresses each of these two statutory requirements. The first requirement, the “pattern requirement,” is addressed using the Cohen’s *d* test and the ratio test. The pattern requirement will establish whether conditions exist in the pricing behavior of the respondent in the U.S. market where dumping may be masked or hidden, where higher-priced U.S. sales offset lower-priced U.S. sales. Consistent with the pattern requirement, the Cohen’s *d* test, for comparable merchandise, compares the mean price to a given purchaser, region or time period to the mean price to all other purchasers, regions or time periods, respectively, to determine whether this difference is significant. The ratio test then evaluates the results of these individual comparisons from the Cohen’s *d* test to determine whether the extent of the identified differences in prices which are found to be significant is sufficient to find a pattern and satisfy the pattern requirement, *i.e.*, that conditions exist which may result in masked dumping.

When the respondent’s pricing behavior exhibits conditions in which masked dumping may be a problem – *i.e.*, where there exists a pattern of prices that differ significantly – then the Department considers whether the standard A-to-A method can account for “such differences” – *i.e.*, the pattern or conditions found pursuant to the pattern requirement. To examine this second

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<sup>146</sup> See *JBF RAK LLC v. United States*, 991 F. Supp. 2d 1343, 1355 (CIT 2014); *aff’d JBF RAK LLC v. United States*, 790 F.3d 1358 (Fed. Cir. 2015) (“*JBF RAK*”).

<sup>147</sup> See *JBF RAK*, 790 F.3d at 1368 (internal citations omitted).



statutory requirement, the “explanation requirement,” the Department considers whether there is a meaningful difference between the weighted-average dumping margin calculated using the A-to-A method and that calculated using the appropriate alternative comparison method based on the A-to-T method. Comparison of these results summarize whether the differences in U.S. prices mask or hide dumping when normal values are compared with average U.S. prices (the A-to-A method) as opposed to when normal values are compared with sale-specific U.S. prices (the A-to-T method). When there is a meaningful difference in these results, the Department finds that the extent of masked dumping is meaningful to warrant the use of an alternative comparison method to quantify the amount of a respondent’s dumping in the U.S. market, thus fulfilling the language and purpose of the statute and the SAA.

#### 1. The Department’s Differential Pricing Analysis Allegedly Fails to Identify a “Pattern”

As stated in the *Preliminary Determination*, the purpose of the Cohen’s *d* test is to evaluate “the extent to which the net prices to a particular purchaser, region, or time period differ significantly from the net prices of all other sales of comparable merchandise.”<sup>148</sup> The Cohen’s *d* coefficient is a recognized 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 explained that “{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.” 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 the Cohen’s *d* test to satisfy the statutory language, to measure whether a difference is significant.<sup>149</sup>

The Cohen’s *d* coefficient is based on the difference between the means of the test and the comparison groups relative to the variances within the two groups, *i.e.*, the pooled standard deviation. 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, and is based on the dispersion of the prices within each group. In other words, the “significance” of differences between the average prices of the test group and the comparison group (*i.e.*, between a specific purchaser, region or time period and all other purchasers, regions or time periods, respectively) is measure by how widely the individual prices differ within these two groups. When there is little variation in prices within each of these groups (*i.e.*, not between the two groups), then a small difference in the mean prices of the test and comparison groups will be found to be significant. Conversely, when there are wide variations in prices within each

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<sup>148</sup> See Preliminary Decision Memo at page 9-10.

<sup>149</sup> See *Xanthan Gum from the PRC* at comment 3 (emphasis in original, internal citations omitted).

of these groups, then a much larger difference in the mean prices of the test and comparison groups will be necessary in order to find that the difference is significant.

The Department thus relies on the Cohen's  $d$  coefficient as a measure of effect size to determine whether the observed price differences are significant. In this application, the difference in the weighted-average (*i.e.*, mean) U.S. price to a particular purchaser, region or time period (*i.e.*, the test group) and the weighted-average U.S. price to all other purchasers, regions or time periods (*i.e.*, the comparison group) is measured relative to the variance of the U.S. prices within each of these groups (*i.e.*, all U.S. prices).

Subsequently, the ratio test aggregates the sales value for each U.S. sale whose price has been found to differ significantly among purchasers, regions or time periods. As described in the *Preliminary Determination*, when 66 percent or more of the U.S. sales value are represented by U.S. prices which differ significantly, then the Department finds that the "pattern" requirement of the statute has been met and that the Department should consider that the appropriate alternative comparison method is the application of the A-to-T method to all U.S. sales. When between 33 percent and 66 percent of the U.S. sales value are represented by U.S. prices which differ significantly, then the Department also finds that the "pattern" requirement of the statute has been met and that the Department should consider that the appropriate alternative comparison method is the application of the A-to-T method to those U.S. sales which exhibit prices that differ significantly (*i.e.*, which pass the Cohen's  $d$  test) and the application of the A-to-A method to those sale which do not exhibit prices that differ significantly.

Contrary to the general statement submitted by Hyundai Steel, the Department continues to find that this approach reasonably fills the gap in the statute in how to identify whether there exists a pattern of prices that differ significantly.<sup>150</sup>

## 2. The Department's Differential Pricing Analysis Allegedly Fails to Address Why the A-to-A Method Cannot Account for Such Differences

The Department disagrees, in part, with Hyundai Steel that the difference in the weighted-average dumping margins, calculated using the A-to-A method and the appropriate alternative comparison method based on the A-to-T method, "are not the result of the difference between the A-to-A and the A-to-T methodology; the differences are solely attributable to zeroing." Indeed, the difference in the calculated results for the two comparison methods are directly attributable to the differences in these two methods.

To consider the extent of the masking under the A-to-A method, as opposed to an alternative comparison method based on the A-to-T method,<sup>151</sup> the Department uses a "meaningful

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<sup>150</sup> See *Apex Frozen Foods Pvt. Ltd. v. United States*, 144 F. Supp.3d 1308, 1330, (CIT 2016), *appeal pending* (*Apex Frozen Foods*) ("Commerce is not restricted in what type of sales it may consider in assessing the existence of such a pattern so long as its methodological choice enables Commerce to reasonably determine whether application of A-T is appropriate.")

<sup>151</sup> See *Koyo Seiko Co., Ltd. v. United States*, 20 F.3d 1156, 1159 (Fed. Cir. 1994) ("The purpose of the antidumping statute is to protect domestic manufacturing against foreign manufacturers who sell at less than fair market value. Averaging U.S. prices defeats this purpose by allowing foreign manufacturers to offset sales made at less-than-fair

difference” test where it compares the weighted-average dumping margin calculated using the A-to-A method and the weighted-average dumping margin calculated using the appropriate alternative comparison method. A meaningful difference in these two results is caused by higher U.S. prices offsetting lower U.S. prices where the dumping, which may be found on lower priced U.S. sales, is hidden or masked by higher U.S. prices, such that the A-to-A method would be unable to account for such differences.<sup>152</sup> Such masking or offsetting of lower prices with higher prices may occur implicitly within the averaging groups or explicitly when aggregating the A-to-A comparison results. Therefore, in order to understand the impact of the unmasked “targeted dumping,” the Department finds that the comparison of each of the calculated weighted-average dumping margins using the standard and alternative comparison methodologies exactly quantifies the extent of the unmasked “targeted dumping.”

The simple comparison of the two calculated results belies all of the complexities in calculating and aggregating individual dumping margins (*i.e.*, individual results from comparing export prices, or constructed export prices, with normal values). It is the interaction of these many comparisons of export prices or constructed export prices with normal values, and the aggregation of these comparison results, which determine whether there is a meaningful difference in these two calculated weighted-average dumping margins. When using the A-to-A method, lower-priced U.S. sales (*i.e.*, sales which may be dumped) are offset by higher-priced U.S. sales. Congress was concerned about offsetting and that concern is reflected in the SAA which states that “targeted dumping” is a situation where “an exporter may sell at a dumped price to particular customers or regions, while selling at higher prices to other customers or regions.”<sup>153</sup> The comparison of a weighted-average dumping margin based on comparisons of weighted-average U.S. prices that also reflects offsets for non-dumped sales, with a weighted-average dumping margin based on comparisons of individual U.S. prices without such offsets (*i.e.*, with zeroing) precisely examines the impact on the amount of dumping which is hidden or masked by the A-to-A method. Both the weighted-average U.S. price and the individual U.S. prices are compared to a normal value that is independent from the type of U.S. price used for comparison, and the basis for normal value will be constant because the characteristics of the individual U.S. sales<sup>154</sup> remain constant whether weighted-average U.S. prices or individual U.S. prices are used in the analysis.

Consider the simple situation where there is a single, weighted-average U.S. price, and this average is made up of a number of individual U.S. sales which exhibit different prices, and the two comparison methods under consideration are the A-to-A method with offsets (*i.e.*, without

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value with higher priced sales. Commerce refers to this practice as ‘masked dumping.’ By using individual U.S. prices in calculating dumping margins, Commerce is able to identify a merchant who dumps the product intermittently—sometimes selling below the foreign market value and sometimes selling above it. We cannot say that this is an unfair or unreasonable result.” (internal citations omitted)).

<sup>152</sup> See *Union Steel v. United States*, 713 F.3d 1101, 1108 (Fed. Cir. 2013) (“{the A-to-A} comparison methodology masks individual transaction prices below normal value with other above normal value prices within the same averaging group.”).

<sup>153</sup> See SAA at 842.

<sup>154</sup> These characteristics include may include such items as product, level-of-trade, time period, and whether the product is considered as prime- or second-quality merchandise.

zeroing) and the A-to-T method with zeroing.<sup>155</sup> The normal value used to calculate a weighted-average dumping margin for these sales will fall into one of five scenarios with respect to the range of these different, individual U.S. sale prices:

- 1) the normal value is less than all of the U.S. prices and there is no dumping;
- 2) the normal value is greater than all of the U.S. prices and all sales are dumped;
- 3) the normal value is nominally greater than the lowest U.S. prices such that there is a minimal amount of dumping and a significant amount of offsets from non-dumped sales;<sup>156</sup>
- 4) the normal value is nominally less than the highest U.S. prices such that there is a significant amount of dumping and a minimal amount of offsets generated from non-dumped sales;
- 5) the normal value is in the middle of the range of individual U.S. prices such that there is both a significant amount dumping and a significant amount of offsets generated from non-dumped sales.

Under scenarios (1) and (2), either there is no dumping or all U.S. sales are dumped such that there is no difference between the weighted-average dumping margins calculated using offsets or zeroing and there is no meaningful difference in the calculated results. Under scenario (3), there is a minimal (*i.e.*, *de minimis*) amount of dumping, such that the application of offsets will result in a zero or *de minimis* amount of dumping (*i.e.*, the A-to-A method with offsets and the A-to-T method with zeroing both results in a weighted-average dumping margin which is either zero or *de minimis*) and which also does not constitute a meaningful difference. Under scenario (4), there is a significant (*i.e.*, non-*de minimis*) amount of dumping with only a minimal amount of non-dumped sales, such that the application of the offsets for non-dumped sales does not change the calculated results by more than 25 percent, and again there is not a meaningful difference in the weighted-average dumping margins calculated using offsets or zeroing. Lastly, under scenario (5), there is a significant, non-*de minimis* amount of dumping and a significant amount of offsets generated from non-dumped sales such that there is a meaningful difference in the weighted-average dumping margins calculated using offsets and zeroing.

Only under scenarios (3), (4) and (5) are the granting or denial of offsets relevant to whether dumping is being masked, as there are both dumped and non-dumped sales. Under scenario (3),

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<sup>155</sup> The calculated results using the average-to-average method with offsets (*i.e.*, no zeroing) and the calculated results using the average-to-transaction method with offsets (*i.e.*, no zeroing) will be identical. See Memorandum to the File, “Final Determination Calculation for Hyundai Steel Company in the Antidumping Duty Investigation of Certain Hot-Rolled Steel Flat Products from Republic of Korea,” dated August 4, 2016 (“Hyundai Steel Final Analysis Memorandum”) at Attachment 2, (pages 109-111 of the SAS output), where the calculation results of the average-to-average method and each of the alternative comparison methods are summarized. The sum of the “Positive Comparison Results” and the “Negative Comparison Results” for each of the three comparison methods (*i.e.*, the average-to-average method, the “mixed” method, and the average-to-transaction method, are identical, *i.e.*, with offsets for all non-dumped sales (*i.e.*, negative comparison results), the amount of dumping is identical. As such, the difference between the calculated results of these comparison methods is whether negative comparison results are used as offsets or set to zero.

<sup>156</sup> As discussed further below, please note that scenarios 3, 4, and 5 imply that there is a wide enough spread between the lowest and highest U.S. prices so that the differences between the U.S. prices and normal value can result in a significant amount of dumping and/or offsets, both of which are measured relative to the U.S. prices.

there is only a *de minimis* amount of dumping such that the extent of available offsets will only make this *de minimis* amount of dumping even smaller and have no impact on the outcome. Under scenario (4), there exists an above-*de minimis* amount of dumping, and the offsets are not sufficient to meaningfully change the results. Only with scenario (5) is there an above-*de minimis* amount of dumping with a sufficient amount of offsets such that the weighted-average dumping margin will be meaningfully different under the A-to-T method with zeroing as compared to the A-to-T / A-to-A method with offsets. This difference in the calculated results is meaningful in that a non-*de minimis* amount of dumping is now masked or hidden to the extent where the dumping is found to be zero or *de minimis* or to have decreased by 25 percent of the amount of the dumping with the applied offsets.

This example demonstrates that there must be a significant and meaningful difference in U.S. prices in order to resort to an alternative comparison method. These differences in U.S. prices must be large enough, relative to the absolute price level in the U.S. market, where not only is there a non-*de minimis* amount of dumping, but there also is a meaningful amount of offsets to impact the identified amount of dumping under the A-to-A method with offsets. Furthermore, the normal value must fall within an even narrower range of values (*i.e.*, narrower than the price differences exhibited in the U.S. market) such that these limiting circumstances are present (*i.e.*, scenario (5) above). This required fact pattern, as represented in this simple situation, must then be repeated across multiple averaging groups in the calculation of a weighted-average dumping margin in order to result in an overall weighted-average dumping margin which changes to a meaningful extent.

Further, for each A-to-A comparison result which does not result in set of circumstances in scenario (5), the “meaningfulness” of the difference in the weighted-average dumping margins between the two comparison methods will be diminished. This is because for these A-to-A comparisons which do not exhibit a meaningful difference with the A-to-T comparisons, there will be little or no change in the amount of dumping (*i.e.*, the numerator of the weighted-average dumping margin) but the U.S. sales value of these transactions will nonetheless be included in the total U.S. sales value (*i.e.*, the denominator of the weighted-average dumping margin). The aggregation of these intermediate A-to-A comparison results where there is no “meaningful” difference will thus dilute the significance of other A-to-A comparison results where there is a “meaningful” difference, which the A-to-T method avoids.

Additionally, the extent of the amount of dumping and potential offsets for non-dumped sales is measured relative to the total export value (*i.e.*, the denominator of the weighted-average dumping margin) of the subject merchandise. Thus, the “targeted dumping” analysis accounts for the difference in the U.S. prices relative to the absolute price level of the subject merchandise. Only under scenario (5) above will the Department find that the A-to-A method is not appropriate – where there is an identifiable above *de minimis* amount of dumping along with an amount of offsets generated from non-dumped sales such that the amount of dumping is changed by a meaningful amount when those offsets are applied. Both of these amounts are measured relative to the total export value (*i.e.*, absolute price level) of the subject merchandise sold by the exporter in the U.S. market.

With respect to Hyundai Steel’s claims that the differences in the calculated rates are solely attributable to so called zeroing, we do not disagree that the use of zeroing aids the Department’s analysis, but Hyundai Steel over speaks when they claim that it is solely attributable to zeroing. As we have explained, zeroing addresses masked “targeted dumping” which is created when offsets are granted for non-dumped sales. In this situation, Congress’s intent of addressing “targeted dumping,” when the requirements of section 777A(d)(1)(B) of the Act are satisfied,<sup>157</sup> would be thwarted if the A-to-T method without zeroing were applied since this produces the same results (a mathematical equivalence) when the standard A-to-A method without zeroing is applied. Under that scenario, both methods would inherently mask dumping. It is for this reason that the Department finds that the A-to-A method cannot take into account the pattern of prices that differ significantly for Hyundai Steel, *i.e.*, the conditions where “targeted” or masked dumping “may be occurring.” Thus, the Department continues to find that application of the A-to-T method, with zeroing, is an appropriate tool to address masked “targeted dumping.”<sup>158</sup>

For Hyundai Steel, based on the results of the differential pricing analysis, the Department finds that 82.23 percent of the value of U.S. sales pass the Cohen’s *d* test,<sup>159</sup> and confirms the existence of a pattern of prices that differ significantly among purchasers, regions, or time periods. However, the Department determines that the A-to-A method can account for such differences because the relative change in the weighted-average dumping margin between the A-to-A method and the appropriate alternative method (*i.e.*, the A-to-T method) is less than 25 percent. Thus, for this final determination, the Department finds that there is not a meaningful difference between using the different comparison methods, and is applying the A-to-A method to all U.S. sales to calculate the weighted-average dumping margin for Hyundai Steel.

### 3. Application of the A-to-T Method to All U.S. Sales

The Department disagrees with Hyundai Steel’s claim that the Act prohibits the application of the A-to-T method to all U.S. sales. As noted above, the statute is silent on how the Department address the requirements provided for under section 777A(d)(1)(B) of the Act, and thus it has used its discretion to fill the gap in the statutory language. As part of that gap, Congress has not set forth a prescription on how the A-to-T method must be applied as an alternative comparison method to either of the standard comparison methodologies (*i.e.*, the A-to-A method or the T-to-T method). The Department has reasonably filled that gap. Likewise, this discretion has been affirmed by the court.<sup>160</sup>

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<sup>157</sup> See SAA at 842-843.

<sup>158</sup> See *Apex Frozen Foods*. The CIT in *Apex Frozen Foods* held that the “purpose” of applying the average-to-transaction method is to “reveal those cases where offsetting masks dumping, and that purpose is achieved by zeroing.” *Apex Frozen Foods* at 44. The Court explained that without zeroing the results of the average-to-average and average-to-transaction comparisons would be mathematically equivalent, obviating any benefit derived from the provision of a statutory alternative. *Id.* The Court therefore held that “The zeroing characteristic of A-T is inextricably linked to the comparison methodology and its effect in the meaningful difference analysis does not render the approach unreasonable.” *Id.*, at 44-45.

<sup>159</sup> See Hyundai Steel Final Analysis Memorandum at SAS Output page 84.

<sup>160</sup> See, *e.g.*, *Apex Frozen Foods*, 144 F. Supp. 3d at 1319; see also *Timken v. United States*, 2016 WL 2765448 at \*5 (CIT May 10, 2016).

#### 4. The WTO Antidumping Agreement Prohibits the Application of the A-to-T Method to All U.S. Sales and the Use of Zeroing

The Department disagrees with Hyundai Steel, both on its interpretation of the Antidumping Agreement and on the requirement that it and the reports issued by WTO panels and the Appellate Body impose on this final determination. The CAFC has held that WTO reports are without effect under U.S. law, “unless and until such a {report} has been adopted pursuant to the specified statutory scheme” established in the URAA.<sup>161</sup> In fact, Congress adopted an explicit statutory scheme in the URAA for addressing the implementation of WTO reports.<sup>162</sup> As is clear from the discretionary nature of this scheme, Congress did not intend for WTO reports to automatically trump the exercise of the Department’s discretion in applying the statute.<sup>163</sup>

To date, the United States has fully complied with all adverse panel and Appellate Body reports adopted by the Dispute Settlement Body with regards to Article 2.4.2 of the Antidumping Agreement. With regard to the A-to-T method, specifically, as an alternative comparison method and the use of zeroing under the second sentence of Article 2.4.2 of the WTO Antidumping Agreement, the Department has issued no new determination and the United States has adopted no change to its practice pursuant to the statutory requirements of sections 123 or 129 of the URAA.

#### **Comment 12: Hyundai Steel Calculation Issues**

##### ***A. General and Administrative Expenses***

###### *Petitioners*

- The Department should include the losses on the disposal of land in the G&A expense calculation, since holding land for possible future use would be in the norm for Hyundai Steel’s general operations.
- The Department should omit the miscellaneous gains from the G&A expense calculation, as Hyundai Steel is not in that line of business.

###### *Hyundai Steel*

- The G&A calculations were computed fully in accordance with Department practice.
- Assets held for trading are related to the company’s investment activities, which the Department excludes.
- Further, the Department checked during its cost verification the locations of the land and confirmed they were not located near any of Hyundai Steel’s facilities.
- Expenses associated with these supplies and building depreciation are part of the manufacturing overhead or SG&A, as applicable, therefore the income related to these miscellaneous items should be included.

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<sup>161</sup> See *Corus Staal BV v. U.S. Dep’t of Commerce*, 395 F.3d 1343, 1347-49 (Fed. Cir. 2005), *cert. denied* 126 S. Ct. 1023 (2006); *accord Corus Staal BV v. United States*, 502 F.3d 1370, 1375 (Fed. Cir. 2007).

<sup>162</sup> See, e.g., 19 U.S.C. § 3533, 3538 (sections 123 and 129 of the URAA).

<sup>163</sup> See, e.g., 19 U.S.C. § 3538(b)(4) (implementation of WTO reports is discretionary).

**Department Position:** With regard to Hyundai Steel’s G&A expense ratio calculation, we agree with Hyundai Steel. Hyundai Steel excluded the loss on the disposal of land for the final determination. The Department considers the nature, significance and relationship of an activity when determining whether it is related to the general operations of the company.<sup>164</sup> In this case, we note that Hyundai Steel is in the business of manufacturing and selling merchandise and is not in the real estate business. Generally, we consider purchase and sales of one parcel of real estate to be more akin to an investment activity rather than a general operating activity of the company. Accordingly, we have adjusted Hyundai Steel’s G&A expense calculation to exclude the losses on sale of land.

Regarding the miscellaneous gains, we found at verification that these gains related primarily to the accounts “miscellaneous income no draft supplies,” “rent revenue,” and “gain on disposal of useless goods.”<sup>165</sup> We noted that the sold items were used in production and that the rent was related to leasing out excess space in its headquarters buildings.<sup>166</sup> As the expenses related to these revenue items were included in reported costs, we consider it reasonable to include the revenue offset in the G&A expense ratio calculation.

## ***B. Interest Expense***

### *Petitioners*

- In its reported interest expenses, Hyundai Steel wrongly included long-term interest income on loans and reversal of finance guarantee liabilities, thereby understating the interest expenses.
- The Department’s policy is to exclude long-term interest income from interest expenses.

### *Hyundai Steel*

- The Department's cost verification report notes that it may be appropriate to exclude these two line items from the interest calculation and the impact of this adjustment would be minor.

**Department Position:** In calculating a respondent’s cost of production and constructed value, it is the Department’s well-established practice to allow a respondent to offset financial expenses with short-term interest income generated from a company's current assets and working-capital accounts.<sup>167</sup> We agree with Petitioners that two of the financial income accounts that Hyundai Steel claimed as short-term interest income offsets should be disallowed.

Specifically, the interest income on loan amount account includes loans that Hyundai Steel made to its employees which have a maturity date greater than a year, which is not short-term in

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<sup>164</sup> See *Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Frozen and Canned Warmwater Shrimp From India*, 69 FR 76916 (December 23, 2004).

<sup>165</sup> See Hyundai Steel Cost Verification Report at Exhibit E1.

<sup>166</sup> *Id.*

<sup>167</sup> See, e.g., *Certain Frozen Warmwater Shrimp from Thailand: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 74 FR 47551 (September 16, 2009) (*Thailand Shrimp*), and accompanying issues and decision memorandum at comment 7.



nature. In addition, the reversal of finance guarantee liabilities account is related to financial guarantees that Hyundai Steel maintained, acting as a guarantor for other companies.<sup>168</sup> As this amount was a reversal of a portion of the financial guarantee liability amount, it is not an interest income item.<sup>169</sup> We adjusted Hyundai Steel's financial expense ratio to exclude these items in our preliminary determination.<sup>170</sup> We continued to exclude these items from Hyundai Steel's financial expense rate for our final determination.

### C. *Warranty Expenses*

#### *Petitioners*

- The Department directed Hyundai Steel to provide its warranty expenses on a model-specific basis and to update the sales database accordingly. Despite two opportunities to correct its reported warranty expenses, Hyundai Steel, instead, provided reasons why it preferred its customer-specific allocation basis.
- At verification, the Department discovered that Hyundai Steel maintained the coil numbers on each inspection report, demonstrating that Hyundai Steel could have reported the home and U.S. warranty expenses by model number but chose not to do so.
- Given that Hyundai Steel was asked twice to provide model-specific warranty expenses (WARRH and WARRU), had the data necessary to respond to this request, but nonetheless withheld the data from the Department, the Department should find that Hyundai Steel failed to cooperate to the best of its ability and apply partial adverse facts available.

#### *Hyundai Steel*

- Hyundai Steel calculated its reported warranty expense on a customer-specific basis for the product group, *i.e.*, the “hot-rolled” or “cold-rolled” division, dividing total warranty expenses by total shipment weight to the customer for the POI.
- Hyundai Steel states that its cold-rolled division includes both subject and non-subject products (*e.g.*, pickled and oiled products (hot-rolled) and galvanized products (corrosion-resistant). That is, Hyundai Steel contends that it reported a customer-specific average unit expense for flat-rolled steel products, which the Department verified. Hyundai Steel maintains that the Department identified no discrepancies or issues for further consideration.

**Department's Position:** For warranty expenses, Hyundai Steel argues that it calculated its reported warranty expense on a customer-specific basis for the product group, *i.e.*, from either the “hot-rolled” or “cold-rolled” division, dividing total warranty expenses by total shipment weight to the customer for the POI. Hyundai Steel states that its cold-rolled division includes some subject products (*i.e.*, pickled and oiled hot-rolled steel), as well as non-subject products such as corrosion-resistant steel. That is, Hyundai Steel contends that it reported a customer-specific average unit expense for flat-rolled steel products, which the Department verified. We agree with Hyundai Steel that it submitted its information as intended and that the Department

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<sup>168</sup> *Id.*

<sup>169</sup> See Hyundai Steel Cost Verification Report at 2.

<sup>170</sup> See Preliminary Cost Calculation Memo.

identified no discrepancies or issues for further consideration.<sup>171</sup> Thus we find no adjustment or application of partial adverse facts available is necessary.

#### ***D. Direct Selling Expenses***

##### *Petitioners*

- Hyundai Steel was directed by the Department to provide information demonstrating how it “was able to allocate the cost for the overhead cranes to pack ready-for-shipment coils that were moved onto a truck, as these cranes are used ‘to move coils throughout the factory.’”
- Hyundai Steel failed to submit the information requested by the Department, and instead, offered argument regarding its methodology.
- The Department should find that Hyundai Steel withheld the information requested by the Department and therefore has failed to cooperate to the best of its ability, and apply partial adverse facts available.

##### *Hyundai Steel*

- Petitioners raised the same issue in their pre-preliminary comments and the Department declined to make any adjustment in the preliminary determination.
- Hyundai Steel explained that there was no need to segregate or allocate the expenses in any way because the expenses related only to the movement of finished goods.
- As shown, in the verification materials, Hyundai Steel aggregated all costs within the relevant accounts, segregated them by product divisions, and divided the expenses by the relevant sales amount.
- As such, the Department fully verified Hyundai Steel’s reported direct selling expenses, and noted no discrepancies with the reporting. Thus, no adjustment is necessary.

**Department Position:** For direct selling expenses, Hyundai Steel argues that it explained that there was no need to segregate or allocate the expenses in any way because the expenses related only to the movement of finished goods. That is, Hyundai Steel contends that it submitted this expense in the databases as it explained in the response. We agree with Hyundai Steel that it submitted its information as intended and that the Department identified no discrepancies or issues for further consideration.<sup>172</sup> Thus, we find no adjustment or application of partial adverse facts available is necessary.

#### ***E. Indirect Selling Expenses***

##### *Petitioners*

- While Hyundai Steel was asked in a supplemental questionnaire to document why certain expense elements were included in the domestic, export or common expenses files, but failed to do so and did not provide the requested documentation.
- Because it chose to withhold the information from the Department, Hyundai has impeded the Department’s investigation and failed to cooperate to the best of its ability. As a result, the

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<sup>171</sup> See Hyundai Steel’s Verification Report at 22.

<sup>172</sup> See Hyundai Steel’s Verification Report at X and XI.

Department should not make any deduction from normal value for the incorrectly reported indirect selling expenses.

- If the Department nonetheless uses the reported expenses, it should correct for the illogical allocations in its indirect selling expense calculation.
- The assignment of the indirect selling expenses by Hyundai expenses into either domestic, export or common expenses was not done in an appropriate or logical manner.
- For example, Hyundai Steel assigned certain expenses for home market sales, export sales, or common selling expenses for certain expenses (these expenses were only allocated to G&A). It is not credible that the sales groups responsible for home market sales, export sales, or common selling expenses incurred such expenses.
- In addition, without explanation or documentation, Hyundai Steel assigned certain other expenses to the home market sales, but none to export sales. Again, it is not credible that the Hyundai Steel export sales team would not incur any of these for its export sales.
- To correct for these illogical allocations, the Department should divide the total indirect selling expenses (the sum of domestic, export and common) by total sales and apply this rate to recalculate the home and U.S. indirect selling expenses in the final determination.

#### *Hyundai Steel*

- Hyundai Steel's reporting was fully in line with the Department's normal reporting requirements which seek market-specific indirect selling expense ratios.
- Hyundai Steel explained, in its responses, that the majority of the expenses in question related primarily to G&A expenses and the "common" indirect selling expense category (*i.e.*, allocated equally to both domestic and export selling). Moreover, the remaining expenses allocated to domestic indirect selling expenses are minimal.
- The Department did not question Hyundai Steel's reporting further through supplemental questions on the issue and noted no discrepancies with Hyundai Steel's reporting at verification.
- Accordingly, there is no basis to recalculate Hyundai Steel's indirect selling expenses, as the reported amounts are accurate and consistent with Hyundai Steel's books and records.
- In the event the Department seeks to adjust Hyundai Steel's reported expenses, the Department should limit its adjustment to the five minor expenses items noted.

**Department Position:** For indirect selling expenses, Hyundai Steel argues that the majority of the expenses in question related primarily to G&A expenses and the "common" indirect selling expense category (*i.e.*, allocated equally to both domestic and export selling). Moreover, the remaining expenses allocated to domestic indirect selling expenses are minimal. That is, Hyundai Steel contends that it submitted this expense in its databases as it explained in the response. We agree with Hyundai Steel that it submitted its information as intended and that the Department identified no discrepancies or issues for further consideration.<sup>173</sup> Thus, we find no adjustment is necessary.

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<sup>173</sup> See Hyundai Steel's Verification Report at X and XI.

### **Comment 13: Certain Home Market Customers**

#### *Petitioners*

- A significant percentage of Hyundai Steel’s home market sales are sold to certain home market customers.
- Petitioners outlined and provided independent, third-party documentation that demonstrates that Hyundai Steel is affiliated with these home market companies via close supplier relationships, and that these relationships have the potential to impact decisions concerning the production, pricing, and the cost of the foreign like product.
- While these affiliations are not based on standard stock ownership, the dumping law and regulations recognizes these types of relationships as a basis for a finding of affiliation.
- Hyundai Steel claims ignorance to its affiliation with these home market customers by simply speculating that these companies wanted to impress their clients by using Hyundai Steel’s name.
- The Department should find that independent, third-party information confirms that Hyundai Steel has a close supplier relationship with these home market customers, and that Hyundai's Steel’s denials are unconvincing and simply self-serving statements.
- This is just another attempt by Hyundai Steel to mislead the Department (as it attempted to do on several occasions at verification), and warrants the application of partial adverse facts available.

#### *Hyundai Steel*

- Hyundai Steel simply has no affiliation relationship with these customers.
- In as much as that the alleged affiliations are “not based on standard stock ownership,” Petitioners claim that Hyundai Steel is nonetheless affiliated with these home market companies via close supplier relationship pursuant to 19 USC 1677(33).
- With regard to Petitioners’ “independent third-party documentation,” these materials do not establish affiliation, nor do they overcome the Department’s extensive verification of this topic, which confirmed that these companies are not affiliated with Hyundai Steel. This “documentation” comprises little more than company websites, which, as the Department is aware, have a largely promotional purpose.
- Petitioners recycle their prior claims with utter disregard for the extensive verification exercise the Department conducted on this topic.
- For example, without citation, Petitioners claim that the materials “in Hyundai Steel's Shareholder Communication” establish that Hyundai Steel is affiliated with a certain customer.
- However, as explained in the Department’s verification report, the publication at issue is a “shareholder communication,” and that the publication was a promotional piece published in 2009 related to the United Nation’s Global Compact’s report on sustainability.
- Petitioners ignore the Department’s thorough verification of these issues which establishes that Hyundai Steel is not affiliated with these companies as they do not have any common business interests aside from that typical of buyer and seller relationships. Moreover, the Department’s verification established that these relationships were not “exclusive” as Petitioners speculate.
- Petitioners’ comments focus on the general term “service center” and on public statements made by Hyundai Steel’s customers to promote the high quality of their offerings to argue

that the Department find that “control” exists between Hyundai Steel and its customers. However, the term “steel service center” is a common term in the steel industry simply meaning that the company processes steel coils into sheet, skelp, or any other product at its own facility, and does not mean that the processor provides these services for a particular company.

- Moreover, it is not uncommon for smaller companies to advertise the fact that they have a business relationship with Hyundai Motor Group in order to enhance their brand image, given the high regard and status of the Hyundai Motor Group in Korea.
- Neither Petitioners, nor the Department, can legitimately hold Hyundai Steel responsible for explaining general statements that its unaffiliated customers make on their own websites.
- The Department has a self-described “history of recognizing that exclusivity arrangements that arise either through contractual provisions or market conditions do not automatically result in a finding of affiliation.”<sup>174</sup>
- The Department further noted that even where sole supplier situations exist through exclusivity contracts or other means, it does not normally indicate control of one party over another.<sup>175</sup>
- These self-serving arguments that Petitioners set forth fall far short of the facts required to satisfy the high threshold of “control” that the Department has traditionally required in order to find affiliation based on a close supplier relationship.
- Accordingly, the Department should reject these arguments outright in its final determination.

**Department Position:** We disagree with Petitioners that the information provided is sufficient to result in a determination that Hyundai Steel has various close supplier relationships with the home market customers identified by Petitioners. Petitioners claim that Hyundai Steel is affiliated with certain home market customers via a close supplier relationship pursuant to Section 771(33) of the Act and 19 CFR 351.102(a)(3), because these relationships have the potential to affect decisions concerning the production, pricing, and the cost of the foreign like product, and that “independent third party documentation” demonstrates the companies’ affiliation.<sup>176</sup> However, the Department verified each of these claims at verification,<sup>177</sup> and found that while Hyundai Steel may have long-standing relationships with certain home market

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<sup>174</sup> See *Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Wire Rod From Korea*, 63 FR 40404 (July 29, 1998) and accompanying Issues and Decision Memorandum at comment 2.

<sup>175</sup> See e.g., *Notice of Final Determination of Sales at Less Than Fair Value: Melamine Institutional Dinnerware Products From Indonesia*, 62 FR. 1719, (January 13, 1997) and accompanying Issues and Decision Memorandum at comment 17 (finding the Indonesian producer not affiliated with its sole U.S. customer); *Notice of Final Results of Antidumping Duty Administrative Review: Furfuryl Alcohol From the Republic of South Africa*, 62 FR 61084 (November 14, 1997) at comment 2 (finding that respondent is the sole supplier of furfuryl alcohol to the home market is insufficient to demonstrate control of, and affiliation with, domestic purchasers); *Certain Pasta From Turkey: Notice of Final Results of the 14th Antidumping Duty Administrative Review*, 76 FR 68399 (November 4, 2011) and accompanying Issues and Decisions Memorandum at comment 1 (finding no affiliation despite sole supplier relationship); and also see *Chlorinated Isocyanurates From Spain: Final Results of Antidumping Duty Administrative Review*, 72 FR 64194 (November 15, 2007 and accompanying Issues and Decision Memorandum at comment 4 (finding no affiliation with the sole supplier of packaging services and the producer of chlorinated isocyanurates).

<sup>176</sup> *Id.*, at 35.

<sup>177</sup> See Hyundai Steel’s Verification Report at 15-16.

customers, the information reviewed at verification did not reflect a potential to affect decisions concerning the production, pricing, or the cost of the home market sales to these customers. Furthermore, we agree that the “independent third party documentation” does not substantiate Petitioners’ claim of affiliation or overcome the Department’s findings at verification. We also do not find that Hyundai Steel’s relationship with these customers has the potential to affect decisions concerning its production, pricing, or cost of subject merchandise.

We therefore have determined that applying adverse facts available is unwarranted, as Hyundai Steel provided sufficient information to demonstrate that it has no affiliation relationship with these customers.<sup>178</sup> Even when supplier situations exist through exclusivity contracts or other means, it does not necessarily indicate control of one party over another, and no evidence of such control relationships emerged during the course of this investigation.<sup>179</sup> We therefore agree with Hyundai Steel that the information provided by Petitioners fails to satisfy the high threshold of “control” that the Department has traditionally required in order to find affiliation based on a close supplier relationship.<sup>180</sup> Therefore, AFA is unwarranted for this issue.

#### **Comment 14: Hyundai Steel America Channel 5 Issues**

##### **A. Further Manufactured Sales**

###### *Petitioners*

- Although Hyundai Steel twice asked to be exempted from reporting HSA’s U.S. further manufactured sales, no exemption was granted by the Department.
- In addition, Hyundai Steel failed to submit any analysis to confirm that its further manufactured products meet the value-added threshold of 65 percent required to be excluded from reporting these U.S. sales and the associated further manufacturing costs.
- Hyundai Steel had an obligation to submit its U.S. further manufactured sales and the associated further manufacturing costs to the Department, but it chose to withhold this data from the Department. Thus, the Department should assign as partial adverse facts available to HSA’s unreported U.S. further manufactured sales.

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<sup>178</sup> *Id.*

<sup>179</sup> See, e.g., *Notice of Final Determination of Sales at Less Than Fair Value: Melamine Institutional Dinnerware Products From Indonesia*, 62 FR 1719 (January 13, 1997) and accompanying Issues and Decision Memorandum at comment 17 (finding the Indonesian producer not affiliated with its sole U.S. customer); *Notice of Final Results of Antidumping Duty Administrative Review: Furfuryl Alcohol From the Republic of South Africa*, 62 FR 61084 (November 14, 1997) at comment 2 (finding that respondent is the sole supplier of furfuryl alcohol to the home market is insufficient to demonstrate control of, and affiliation with, domestic purchasers); *Certain Pasta From Turkey: Notice of Final Results of the 14th Antidumping Duty Administrative Review*, 76 FR 68399 (November 4, 2011) and accompanying Issues and Decisions Memorandum at comment 1 (finding no affiliation despite sole supplier relationship). See also *Chlorinated Isocyanurates From Spain: Final Results of Antidumping Duty Administrative Review*, 72 FR 64194 (November 15, 2007) and accompanying Issues and Decision Memorandum at comment 4 (finding no affiliation with the sole supplier of packaging services and the producer of chlorinated isocyanurates).

<sup>180</sup> *Id.*

### *Hyundai Steel*

- Hyundai Steel requested an exclusion for reporting all sales, whether processed or not, through HSA, given the very small quantity at issue.
- The Department subsequently clarified that Hyundai Steel should report, at the time, sales of unprocessed coil products, which Hyundai Steel did, and only reported these types of sales.
- The Department did not further revise its request or otherwise require Hyundai Steel to expand its reporting.
- Thus, Petitioners not only ignore Hyundai Steel's open and reasonable request for a minor exclusion, but also forgets the fact that the Department granted the request and never required Hyundai Steel to report data for further manufactured sales.

### **B. U.S Inland Freight**

#### *Petitioners*

- Hyundai Steel confirmed that it was affiliated with its U.S. freight provider. Hyundai Steel also stated that this freight provider provided inland freight services in the United States for sales through HSA.
- While Hyundai Steel initially stated that it "will demonstrate in its forthcoming Sections B and C responses that transactions with affiliated service providers are at arm's length," it did not submit any documentation to substantiate its claim.
- Hyundai Steel's only relevant comment was that it reported such expenses and that it followed the same calculations and reporting methodologies used in the ongoing cold-rolled steel case which has an identical period of investigation to the instant investigation.
- Because Hyundai Steel has not demonstrated that the inland freight services provided by its affiliate were at arm's-length prices, the Department cannot rely on the reported data, and must apply partial adverse facts available.

#### *Hyundai Steel*

- While Hyundai Steel believes these transactions were arm's-length transactions, the Department did not require Hyundai Steel to report HSA's sales data until late in the proceeding.
- The Department did not ask any follow up questions concerning this sales channel and did not verify on site at HSA.
- The Department's investigative approach was entirely reasonable in this regard given the miniscule sales volume of this sales channel.
- Hyundai Steel would have provided any additional arm's-length materials concerning these precise shipping channels had the Department sought further information or documentation

### **C. Indirect Selling Expenses Calculation**

#### *Petitioners*

- HSA's indirect selling expense calculation is wrong and should be corrected because: 1) of a transposing error from one worksheet to another; 2) of an addition error, when segregating direct and indirect selling expenses; 3) of a classification error, when classifying certain expenses as direct selling expenses instead of as indirect selling expenses; and 4) Hyundai Steel erroneously applied seven different rates instead of just one.

- The Department should simply divide HSA’s POI total indirect selling expenses by HSA’s U.S. sales and apply this ratio.

*Hyundai Steel*

- Regarding the “transposition” and “addition” alleged errors, the full expenses are carried over to the relevant page. The Department simply needs to sum the “POI Amounts” column with the interest income/loss amount to tie the figures back to the figure shown on the first page).
- Regarding the “classification” alleged error, HSA followed the same calculation logic as it applied in the cold-rolled investigation. As such, a portion of the expenses are allocated to financial and G&A expenses compliant with the Department’s practice relating to companies with manufacturing operations such as HSA’s.
- That is, a portion of HSA’s expenses are not related to selling activities, but rather are manufacturing expenses. As such, consistent with its reporting in the cold-rolled investigation, HSA included only selling expenses in its calculations. Thus, HSA’s calculation is reasonable and accurate and no adjustment is necessary.

**D. Inventory Carrying Cost**

*Petitioners*

- According to HSA’s inventory carrying cost calculation, HSA calculated an average inventory carrying days. However, according to documents provided for a sample HSA sale, the date from which the hot-rolled coils arrived from Korea, until the date of the commercial invoice is significantly more than HSA’s calculated average inventory carrying days.
- Given that this U.S. sale accounts for a sizeable percentage of HSA’s sales, that would mean the remaining U.S. sales were only held in inventory for an unlikely average of a few days. As a result, HSA’s inventory carrying costs appear to be significantly understated and should be adjusted for the final determination.

*Hyundai Steel*

- Hyundai Steel used a standard calculation methodology that the Department routinely accepts and verifies based on the average inventory turnover for the company.
- Petitioners do not question this methodology or the calculation but points to a single shipment and alleges that the single transaction was not consistent with the calculated inventory turnover period.
- Indeed, one would expect some variation among shipments and the time products actually are held in inventory, and nevertheless, Petitioners have pointed to no case precedent supporting its position that a single sale can form the basis of the overall inventory carrying period.
- Moreover, the Department did not question Hyundai Steel’s methodology or issue any supplemental questionnaires on this aspect of the reporting. As such, it would be unreasonable for the Department in the final determination to simply disregard Hyundai Steel’s reporting (again, based on the standard methodology the Department routinely accepts) in favor of an aberrational adjustment based on one transaction and Petitioners’ own speculation.



**Department Position:** We agree with Hyundai Steel. As an initial matter, each of Petitioners' allegations relate only to the very small quantity of sales made through HSA, and relate only to minor aspects of the reporting. In particular, sales through this sales channel account for only 0.6 percent of the total reported sales through all channels. Moreover, while Petitioners now raise these issues in its case brief, Hyundai Steel confirmed to the Department that it had used similar reporting methodologies as it had used in the parallel cold-rolled investigation.<sup>181</sup> Furthermore, and most importantly, the Department did not verify this sales channel in the United States.

With regard to further manufactured sales, the Department clarified to Hyundai Steel that it should only report sales of unprocessed coil products through this channel, which Hyundai Steel did.<sup>182</sup> The Department neither asked for any more information, nor did it verify the status of the further-processed merchandise sales through this channel. Thus, Hyundai Steel followed the Department's instructions with regard to the reporting of sales in this channel, and has not failed to cooperate to the best of its ability in this regard. As such, we find that no partial adverse facts available is warranted.

With regard to U.S. inland freight, as noted above, the Department did not verify HSA nor did it ask for further information regarding its affiliated U.S. inland freight provider(s). Thus, Hyundai Steel has not failed to cooperate to the best of its ability in this regard and we find that no partial adverse facts available is warranted.

With regard to indirect selling expenses we find that Hyundai Steel reported these expenses as it stated and the Department did not find any discrepancy with that submitted in its U.S. sales database.

With regard to inventory carrying cost, we also find that Hyundai Steel reported these expenses as it stated and the Department did not find any discrepancy with that submitted in its U.S. sales database. Furthermore, Petitioners did not submit any case precedent on why the Department should deviate from its normal practice in calculating this expense as it has in the past.

Thus, as discussed above, HSA's reported expense information is reasonable and accurate, and thus, no adjustment is necessary.

### **Comment 15: Affiliated Home Market Resales**

#### *Petitioners*

- Hyundai Steel failed to submit certain home market resales sales by one of its affiliates Company A.<sup>183</sup> While Hyundai Steel was affiliated with this company for a portion of the POI, it did not report these home market resales for that period.

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<sup>181</sup> See *Cold-Rolled from Korea*.

<sup>182</sup> See Memorandum to the File: Hyundai Steel Supplemental Questionnaire Response Extension, dated February 22, 2016.

<sup>183</sup> See Hyundai Verification Report at 5, Business Proprietary Information ("BPI") version, for the BPI name of this company.

- At verification, the Department noted that Hyundai Steel sold subject merchandise to affiliate, Company A, for resale and consumption in the home market. In addition, the Department noted that Hyundai Steel has *not submitted* these home market resales with the Department, as Hyundai Steel claimed that Company A refused to give this information to Hyundai Steel.
- There is no legitimate reason that Hyundai Steel could not have obtained these resales from Company A, as it and Hyundai Steel were affiliated for a part of the POI. Thus, Hyundai Steel should have provided these home market resales to the Department, but failed to do so.
- Hyundai Steel has failed to cooperate to the best of its ability by withholding information requested by the Department and should apply partial adverse facts available to these sales.

#### *Hyundai Steel*

- Petitioners raised this issue in their pre-preliminary comments to the Department, and the Department declined to make any adjustment or fault Hyundai Steel for Company A's refusal to provide the data. Nothing has changed since the preliminary determination. In any event, Company A was affiliated with Hyundai Steel until the end of 2014, but it is no longer an affiliated party since that time.
- Petitioners have provided no explanation of why an unrelated company would provide sensitive sales data to a company with which it has not been affiliated for more than a calendar year, much less why Hyundai Steel would already have such documentation (*i.e.*, including downstream sales and expense data) in its possession.
- Hyundai Steel has attempted to contact its former affiliate numerous times, both in connection with this proceeding and others before the Department, and has been rebuffed every time. Far from being uncooperative, Hyundai Steel has gone above and beyond in its efforts to obtain data from a now unaffiliated company, but Company A has simply exercised its right to refuse Hyundai Steel's requests.
- Consistent with the Department's preliminary determination, the now verified record in this case supports the Department's decision not to apply any adverse adjustment or in any way fault Hyundai Steel for its former affiliate's refusal to provide its confidential sales data.

**Department Position:** We agree with Hyundai Steel. Even though at verification we confirmed that Company A was affiliated with Hyundai Steel for half of the POI, we did not ask for further information regarding Company A's downstream sales before verification, or at verification, other than confirm that it did have sales with this company during the first half of the POI.<sup>184</sup> Moreover, Hyundai Steel confirmed that it made phone calls and email inquiries to this customer requesting its downstream sales data, to which that company (now unaffiliated) refused.<sup>185</sup> Thus, Hyundai Steel has not failed to cooperate to the best of its ability in this regard and we find that no partial adverse facts available is warranted.


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<sup>184</sup> See Hyundai Verification Report at 5

<sup>185</sup> See Hyundai Steel's January 19, 2016, submission at 25.

### VIII. RECOMMENDATION

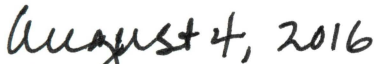
Based on our analysis of the comments received, we recommend adopting the above positions. If this recommendation is accepted, we will publish the final determination in the investigation and the final weighted-average dumping margins in the *Federal Register*.

  
\_\_\_\_\_  
Agree

\_\_\_\_\_  
Disagree



\_\_\_\_\_  
Ronald K. Lorentzen  
Acting Assistant Secretary  
for Enforcement and Compliance

  
\_\_\_\_\_  
(Date)