



A-201-838

AR: 11/22/2010 - 10/31/2011

Public Document

AD/CVD O2: DM

DATE: June 5, 2013

MEMORANDUM TO: Paul Piquado
Assistant Secretary
for Import Administration

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

SUBJECT: Issues and Decision Memorandum for the Final Results of the
Antidumping Duty Administrative Review of Seamless Refined
Copper Pipe and Tube from Mexico; 2010-2011

Summary

We have analyzed the case and rebuttal briefs of interested parties in the 2010-2011 administrative review of the antidumping duty order on seamless refined copper pipe and tube from Mexico. As a result of our analysis, we have not changed our calculation methodology from the Preliminary Results.¹ We recommend that you approve the positions described in the “Discussion of the Issues” section of this memorandum. Below is a complete list of the issues for which we have received comments and rebuttal comments from the interested parties.

Background

On December 10, 2012, the Department of Commerce (the Department) published the Preliminary Results of the 2010-2011 administrative review of the antidumping duty order on seamless refined copper pipe and tube from Mexico. This review covers two producers/exporters of the subject merchandise, GD Affiliates S. de R.L. de C.V. and its affiliate Hong Kong GD Trading Co., Ltd. (collectively, Golden Dragon) and Nacional de Cobre, S.A. de C.V. (Nacobre). The period of review (POR) is May 1, 2011, through October 31, 2011, for Golden Dragon and November 22, 2010, through October 31, 2011, for Nacobre.

Scope of the Order

For purposes of the order, the products covered are all seamless circular refined copper pipes and tubes, including redraw hollows, greater than or equal to 6 inches (152.4 mm) in length and

¹ See Seamless Refined Copper Pipe and Tube From Mexico: Preliminary Results of Antidumping Duty Administrative Review; 2010-2011, 77 FR 73422 (December 10, 2012) (Preliminary Results), and accompanying Issues and Decision Memorandum (Preliminary Decision Memorandum).



measuring less than 12.130 inches (308.102 mm) (actual) in outside diameter (OD), regardless of wall thickness, bore (e.g., smooth, enhanced with inner grooves or ridges), manufacturing process (e.g., hot finished, cold-drawn, annealed), outer surface (e.g., plain or enhanced with grooves, ridges, fins, or gills), end finish (e.g., plain end, swaged end, flared end, expanded end, crimped end, threaded), coating (e.g., plastic, paint), insulation, attachments (e.g., plain, capped, plugged, with compression or other fitting), or physical configuration (e.g., straight, coiled, bent, wound on spools).

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

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

<u>ELEMENT</u>	<u>LIMITING CONTENT PERCENT BY WEIGHT</u>
Ag - Silver	0.25
As - Arsenic	0.5
Cd - Cadmium	1.3
Cr - Chromium	1.4
Mg - Magnesium	0.8
Pb - Lead	1.5
S - Sulfur	0.7
Sn - Tin	0.8
Te - Tellurium	0.8
Zn - Zinc	1.0
Zr - Zirconium	0.3
Other elements (each)	0.3

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

List of the Issues

- Comment 1: Targeted Dumping Analysis
- Comment 2: Date of Sale for Nacobre's "Fixed Price" Sales
- Comment 3: Nacobre's Indirect Selling Expenses
- Comment 4: Nacobre's General and Administrative (G&A) Expenses
- Comment 5: Adjustment to U.S. Price for Golden Dragon

Discussion of the Issues

Comment 1: Targeted Dumping Analysis

In this review, the petitioners alleged that Nacobre was engaged in targeted dumping during the POR because its U.S. sales listing shows a pattern of U.S. sales prices for comparable merchandise that differ significantly among time periods and regions. As a consequence, the petitioners requested that the Department employ the average-to-transaction (A-to-T) comparison method to calculate Nacobre's weighted-average dumping margin in this review. To analyze this allegation in the Preliminary Results, we performed a targeted dumping analysis using the Nails² test. We found that the percentage of Nacobre's U.S. sales that were targeted by either time period or region was insufficient to determine that a pattern of prices that differ significantly existed. Therefore, we determined that the requirement under section 777A(d)(1)(B)(i) of the Tariff Act of 1930, as amended (the Act), had not been met. Accordingly, pursuant to 19 CFR § 351.414(c)(1), we calculated Nacobre's preliminary weighted-average dumping margin using the average-to-average (A-to-A) method.

The petitioners disagree with the Department's application of the Nails test, arguing that the Department improperly added a third element to the test. According to the petitioners, the Department until recently has consistently applied a two-part test to determine if a respondent has engaged in targeted dumping³ - the first part of which addresses the "pattern" requirement (requiring at least 33 percent of the alleged targeted sales to be at prices of more than one standard deviation below the weighted-average price) and the second part of which addresses the "significant difference" requirement (requiring that more than five percent of the alleged targeted

² See Certain Steel Nails from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances, 73 FR 33977 (June 16, 2008) and Certain Steel Nails from the United Arab Emirates: Notice of Final Determination of Sales at Not Less Than Fair Value, 73 FR 33985 (June 16, 2008) (collectively, Nails).

³ See Certain Oil Country Tubular Goods from the People's Republic of China: Final Determination of Sales at Less Than Fair Value, Affirmative Final Determination of Critical Circumstances and Final Determination of Targeted Dumping, 75 FR 20334, 20337 (Apr. 19, 2010), and accompanying Issues and Decision Memorandum at Comment 2; Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 75 FR 59217 (September 27, 2010), and accompanying Issues and Decision Memorandum at Comment 3 (Coated Paper from Korea); Multilayered Wood Flooring From the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 76 FR 64318 (October 18, 2011), and accompanying Issues and Decision Memorandum at Comment 4 (Wood Flooring from the PRC); and High Pressure Steel Cylinders From the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 77 FR 26739 (May 7, 2012), and accompanying Issues and Decision Memorandum at Comment IV.

sales pass the “price gap test”). The petitioners assert that the Department finds targeted dumping if both prongs of the Nails test are satisfied; however, they note that the Department only applies the alternative calculation methodology where there is a meaningful difference between the weighted-average dumping margins calculated using the A-to-A method and the A-to-T method, thus demonstrating that such differences cannot be taken into account using the A-to-A method.⁴

According to the petitioners, the Department’s preliminary margin calculations for Nacobre demonstrate that Nacobre’s U.S. sales data satisfy the requirements of the two-step Nails test, both by time period and by region.⁵ Moreover, the petitioners contend that the difference in the preliminary weighted-average dumping margins calculated for Nacobre using the A-to-A and the A-to-T methods demonstrates that the observed price differences cannot be taken into account using the A-to-A method. The petitioners claim that, instead of applying the A-to-T method, however, the Department arbitrarily added a third step to the test when it determined that the percentage of U.S. sales passing the test was insufficient to determine that a pattern of prices existed for the allegedly targeted groups. The petitioners argue that, in effect, the Department used this percentage to redetermine the price pattern already determined by the first part of the test, contrary to its longstanding practice.

The petitioners acknowledge that the Department has previously applied the third step in other cases, including Optical Brightening Agents from Taiwan.⁶ However, the petitioners find it noteworthy that this third step is not included in the Department’s public announcement of its intent to use monthly A-to-A comparisons in administrative reviews (except in instances where it is more appropriate to use a World Trade Organization (WTO)-consistent alternative comparison method),⁷ nor was it addressed in the recent targeted dumping analysis performed in the Washers from Korea investigation.⁸ Given these inconsistencies, combined with the fact that the first

⁴ See Certain Steel Nails From the United Arab Emirates: Final Determination of Sales at Less Than Fair Value, 77 FR 17029, 17031 (March 23, 2012) (Nails from the UAE).

⁵ See the December 3, 2012, Memorandum to the File from Elizabeth Eastwood, Senior Analyst, entitled Calculations Performed for Nacional de Cobre, S.A. de C.V. (Nacobre) for the Preliminary Results of the Antidumping Duty Administrative Review of Seamless Refined Copper Pipe and Tube from Mexico (Nacobre Sales Calculation Memo) at page 7.

⁶ See Certain Stilbenic Optical Brightening Agents from Taiwan: Final Determination of Sales at Less Than Fair Value, 77 FR 17027 (March 23, 2012) (Optical Brightening Agents from Taiwan); Ball Bearings and Parts Thereof from France, Germany, and Italy: Final Results of Antidumping Duty Administrative Reviews; 2010-2011, 77 FR 73415 (December 10, 2012) (Ball Bearings), and accompanying Issues and Decision Memorandum at Comment 1; and Circular Welded Carbon Steel Pipes and Tubes From Turkey: Final Results of Antidumping Duty Administrative Review; 2010 to 2011, 77 FR 72818 (December 6, 2012) (Pipe and Tube from Turkey), and accompanying Issues and Decision Memorandum at Comment 1.

⁷ See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification, 77 FR 8101, 8106-7 (February 14, 2012) (Final Modification for Reviews).

⁸ See Notice of Final Determination of Sales at Less Than Fair Value: Large Residential Washers From the Republic of Korea, 77 FR 75988 (December 26, 2012) (Washers from Korea).

stage of the Nails test already addresses the “pattern” requirement,⁹ the petitioners argue that the Department should abandon the third step.

The petitioners recognize that the Department may reverse an established practice or policy. However, they maintain that the Courts will only grant deference to such a reversal if the Department’s decision is based upon a reasoned analysis,¹⁰ and the Department has failed to put forth such an analysis here. The petitioners further claim that in fact, the Department explicitly rejected the inclusion of a third step to the Nails test in Wood Flooring from the PRC, where the Department declined to find targeted dumping only where a minimum of ten percent of the U.S. sales quantity or value is targeted. The petitioners note that in that case, the Department stated that it would apply instead the A-to-T method after finding any instance of targeted dumping in order to fully analyze the extent of that dumping.¹¹ Similarly, the petitioners claim that, in Nails from the UAE, the Department also rejected setting a volume threshold when determining the existence of targeting.¹²

The petitioners disagree that the Department’s reliance on Borden as justification for its change in practice is sufficient.¹³ While the petitioners acknowledge that in Borden, the Court of International Trade (CIT) upheld the Department’s discretion not to apply the A-to-T method even after finding targeted dumping, they note that Borden was decided before the Nails test was announced, judicially affirmed, and applied in numerous cases. The petitioners argue that Department’s discretion cannot be applied in an arbitrary manner, and where the Department chooses to exercise its discretion and add an additional step to an existing test, the courts have held that it may not do so without explaining its rationale based upon the industry and respondent.

The petitioners argue that if the Department persists in adding the third step to the Nails test, it must, at a minimum, specify the percentage of targeted U.S. sales required to find that a pattern of prices exists, as this information has yet to be disclosed in any of the Department’s decisions. According to the petitioners, it is not appropriate to shroud this determination in secrecy by relying on the business proprietary nature of the underlying facts, as they claim the Department did in Ball Bearings.¹⁴

⁹ As an example of a case where the Department addressed the “pattern” requirement in the first stage of the Nails test, the petitioners cite Circular Welded Carbon-Quality Steel Pipe From the United Arab Emirates: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination, 77 FR 32539, 32546 (June 1, 2012), unchanged in Circular Welded Carbon-Quality Steel Pipe From the United Arab Emirates: Final Determination of Sales at Less Than Fair Value, 77 FR 64475 (October 22, 2012), and accompanying Issues and Decision Memorandum at Comment 38.

¹⁰ See e.g., Mantex, Inc. v. United States, 841 F. Supp. 1290 (CIT 1993); Micron Technology v. United States, 893 F. Supp. 21, 28 (CIT 1995) (citing Rust v. Sullivan, 500 U.S. 173, 186-87 (1991)); see also Motor Vehicle Mfrs. Ass’n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42-43 (1983).

¹¹ See Wood Flooring from the PRC at Comment 4.

¹² See Nails from the UAE at Comment 3.

¹³ See Borden, Inc. v. United States, 4 F. Supp. 2d 1221, 1228 (Ct. Int’l Trade 1998) (Borden).

¹⁴ See Ball Bearings at Comment 1.

Notwithstanding the transparency issue, however, the petitioners claim that the percentage of Nacobre's targeted U.S. sales should be deemed sufficient to use the A-to-T method. According to the petitioners, the Department regularly relies upon lower percentage thresholds in similar contexts.¹⁵ Therefore, the petitioners assert that the Department should employ an A-to-T method when calculating Nacobre's weighted-average dumping margin for purposes of the final results.

Nacobre contends that applying the Nails test in the manner proposed by the petitioners would constitute plain legal error because the Nails test has not been promulgated as a regulation under the Administrative Procedure Act (APA), and thus the Nails test may only be used in a particular case to the extent that its assumptions and numerical thresholds are justified by the specific facts of that case.¹⁶ According to Nacobre, in the absence of a properly-promulgated regulation, the Courts generally have held that a rule may be applied in a particular case only if: 1) the Department explains the basis for its decision; and 2) the record contains substantial evidence supporting the application of the rule.¹⁷ Thus, Nacobre states that the various thresholds used in the Nails test cannot be applied as bright-line rules without the Department first explaining why the methodological choices in the test are appropriate here and then supporting those explanations with record evidence. Similarly, Nacobre asserts that the petitioners' suggestion to establish an additional bright-line "sufficiency" test must also be rejected because no rationale has been provided for why the proposed threshold percentage makes sense in the context of this case.

Nacobre disagrees with the petitioners that the Department's practice in Ball Bearings, Pipe and Tube from Turkey, and Optical Brightening Agents from Taiwan was inconsistent with the analysis in Washers from Korea. Nacobre notes that in Washers from Korea the Department considered whether the volume of U.S. sales passing the Nails test was sufficient before determining whether the A-to-A method could take into account the observed price differences, and in fact, identical language can be found in every recent investigation and administrative review involving targeted dumping.¹⁸ Nacobre notes that the Department rejected

¹⁵ Although the petitioners cite specific examples in their case brief, they treat these examples as proprietary information because their disclosure would reveal the approximate percentage of Nacobre's targeted U.S. sales.

¹⁶ Nacobre notes that, in its statement of policy concerning targeted dumping, the Department has declared that it was not adopting rules that would be applied uniformly in all cases, but instead has repeatedly indicated that its analysis of targeted dumping must be made case by case. See Withdrawal of the Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations, 73 FR 74930, 74931 (December 10, 2008). See also Final Modification for Reviews, 77 FR at 8107. For example, Nacobre argues that this principle has been recognized by the courts in cases addressing the de minimis standard applied in investigations, as both the CIT and the Court of Appeals for the Federal Circuit have held that because the de minimis standard had not at that time been promulgated as a regulation in accordance with the APA, the Department was not permitted to apply it automatically in each case.

¹⁷ See Carlisle Tire v. United States, 634 F. Supp. 419, 423 (CIT 1986); and Washington Red Raspberry Commn. v. United States, 859 F. 2d 898, 903 (Fed. Cir. 1988).

¹⁸ Nacobre recognizes that the petitioners interpret this language to refer only to the "gap" test; however, Nacobre disagrees, noting that the Nails test comprises both the "standard deviation" test and the "gap" test. Nacobre asserts that if the Department's statement were specific only to the "gap" test, it would have been identified as such. See Ball Bearings at Comment 1; Polyethylene Terephthalate Film, Sheet, and Strip From the People's

identical arguments in a December 2012 decision in Ball Bearings, and the petitioners have not explained why the Department's rationale there should not also apply in this case.

In addition to disagreeing with the petitioners' arguments on procedural grounds and precedent, Nacobre raises the larger question of whether the Department should use the Nails test at all, given that, in Nacobre's view, this test is fundamentally flawed. Nacobre claims that, prior to the Preliminary Results, it provided evidence that the Nails test routinely generates positive findings of targeted dumping when applied to purely random pricing data, and it insists that such results invalidate the use of the Nails test here.¹⁹ According to Nacobre, if the Nails test finds patterns of prices by time period or region in random data, there is something wrong either with: 1) the Nails test in general (and thus it should never be used); or 2) as with Nacobre's sales, the structure of the data in the case (i.e., the distribution of the sales themselves, and not their prices) (and thus it should not be used here). Nacobre disagrees with the Department's response to a similar argument in Pipe from Vietnam, claiming that this decision rested on the illogical conclusion that, if the Nails test finds patterns in random data, it must be flawed.²⁰ In any event, Nacobre asserts that the Department's rationale in Pipe from Vietnam is particularly inapplicable in this proceeding because the movement of commodity prices (including the price of copper) is random. As a result, because Nacobre generally sets its prices by adding a fabrication charge to the market price of copper, its price-setting mechanism is, in effect, a "random number generator." Nacobre argues that under these conditions, the Nails test generates false results and as such, the Department may not rely on it.

Nacobre argues that the Nails test also is flawed in the following respects: 1) it assumes that the distribution of U.S. prices follows a Gaussian distribution (i.e., a symmetrical bell-shaped curve), despite the fact that random data will follow a Gaussian distribution only with a sufficiently large sample that is mutually independent and identically distributed²¹; 2) the Department has not

Republic of China: Preliminary Results of Administrative Review; 2010-2011, 77 FR 73428 (December 10, 2012) and accompanying Preliminary Results Decision Memorandum at page 18; Circular Welded Non-Alloy Steel Pipe From the Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review; 2010-2011, 77 FR 73015 (December 7, 2012) and accompanying Preliminary Results Decision Memorandum at page 5; Stainless Steel Plate in Coils From Belgium: Antidumping Duty Administrative Review, 2010-2011, 77 FR 73013 (December 7, 2012) and accompanying Issues and Decision Memorandum at Comment 2; Pipes and Tubes from Turkey at Comment 1; and Carbon and Certain Alloy Steel Wire Rod From Mexico: Preliminary Results of Antidumping Duty Administrative Review; 2010-2011, 77 FR 66954 (November 8, 2012), and accompanying Preliminary Results Decision Memorandum at page 5.

¹⁹ In August 2012, Nacobre submitted ten separate randomized databases in which it replaced its actual U.S. sale prices with random numbers (without altering any other sales data). Nacobre claims that when it applied the Nails test to these ten randomized databases, nine of them generated a positive finding of targeted dumping for one or more months, and seven of them generated a positive finding of targeted dumping for one or more regions. See Nacobre's August 15, 2012, submission at page 11.

²⁰ See Circular Welded Carbon-Quality Steel Pipe from the Socialist Republic of Vietnam: Final Determination of Sales at Less Than Fair Value, 77 FR 64483 (October 22, 2012) (Pipe from Vietnam), and accompanying Issues and Decision Memorandum at Comment 4 (where the Department disagreed that random data provide a useful yardstick by which to assess the merits of the Nails test because "exporters will generally have a more regularized price-setting mechanism than a random number generator").

²¹ Nacobre notes that there are statistical tests to determine if a dataset is Gaussian and statistical procedures to render non-Gaussian data more "Gaussian." However, Nacobre asserts that the Nails test employs no such tests or procedures. Moreover, Nacobre asserts that statistics show that the standard deviation is not a useful

provided a substantive explanation for any of the thresholds in the Nails test (i.e., the one standard deviation cut off, the 33 percent cut off, or the five percent cut off), despite the fact that these cut offs neither bear an obvious relationship to a Gaussian distribution nor result from an analysis of the statistical properties of Nacobre's actual data; and 3) by using weighted-average prices in the Nails test, the Department obscures differences within the targeted and non-targeted groups that may be greater than the differences between these groups,²² and creates the risk that spurious correlations will generate false positive results.²³

According to Nacobre, the inherent flaws in the Nails test can be seen clearly when the test is applied to Nacobre's U.S. sales data. Nacobre asserts that most of its product control numbers have less than 30 U.S. sales observations (i.e., the minimum of number of data points considered to be statistically significant), and the number of observations within the allegedly targeted and non-targeted groups is even smaller. Thus, Nacobre argues that the poor statistical design of the Nails test alone renders it virtually impossible to avoid a positive Nails test result.

More broadly, Nacobre argues that the Department does not have the legal authority to conduct a targeted dumping analysis in administrative reviews because the provisions in the Act authorizing this analysis pertain only to investigations. Nacobre acknowledges that the Department disagrees with this assessment.²⁴ However, Nacobre maintains that the Act's failure to authorize a targeted-dumping analysis in administrative reviews was intentional, and thus, the Department should respect Congress's intent until Congress itself chooses to modify the Act. Nacobre contends that refusal to comply with this congressional intent constitutes legal error.

However, if the Department continues to disagree regarding the applicability of the Nails test, then Nacobre claims that the Department must recognize the differences in the way dumping margins are calculated between investigations and administrative reviews. Specifically, Nacobre points out that time-based targeting claims may be valid in an investigation because the Department normally uses six- or 12-month period-wide averages in its calculations.²⁵ Nacobre

measure in instances where a data distribution is not symmetrical (like Nacobre's data here) and therefore, the standard deviation calculated in the Nails test cannot determine whether there is a pattern of targeted dumping for Nacobre.

²² Nacobre disagrees with the Department's justification that it looks for patterns of differences between the two groups (and not patterns of differences within a particular group; see Washers from Korea at Comment 3), claiming that the existence of price outliers at the high end of one group may mask a pattern of outliers at the low end within the same group.

²³ For example, Nacobre claims that crime and ice cream consumption may appear positively correlated, when in fact these factors are actually correlated with temperature. According to Nacobre, in a dumping context, there are many characteristics of a sale that may be correlated with price and unevenly distributed among customers, time periods, and regions (e.g., where prices are a function of quantity or level of trade); Nacobre maintains that the Nails test may find false correlations where the prices for sales in the same quantities or at the same level of trade were consistent across these groups. Nacobre argues that the use of quantity-weighted prices exacerbates this problem (especially where sales in larger quantities are not evenly distributed among the groups), and it notes that section 773(a)(6)(C)(i) of the Act prohibits the Department from making a finding of dumping solely due to the fact that different quantities have different prices.

²⁴ See Ball Bearings at Comment 1.

²⁵ See 19 CFR § 351.414(d)(3).

contends that similar claims in an administrative review are unnecessary because review calculations use monthly-average U.S. prices.²⁶ In this review, Nacobre finds the petitioners' time period allegation duplicative because it is based solely on differences in monthly-average U.S. sales prices. Thus, because the petitioners' time period allegation does not provide a basis for the Department to depart from its normal methodology, Nacobre argues that at a minimum, the Department should reject the time period allegation and limit its analysis to the petitioners' region allegation.

Finally, Nacobre argues that in any targeted region analysis, it would be inappropriate for the Department to depart from the A-to-A methodology for those sales which were not targeted. Nacobre points out that the Department's initial regulation on targeted dumping in investigations proposed such a calculation for sales not part of the "targeted" group, although Nacobre recognizes that the Department subsequently withdrew the regulation.²⁷ Nacobre disagrees with the Department's current investigation practice, whereby the Department uses the A-to-T method to calculate the weighted-average dumping margin for all sales, arguing that the Department's explanation for this practice is insufficient given the purpose underlying the targeted dumping provisions of section 777A(d)(1)(B)(ii) of the Act (authorizing the Department to use the A-to-T method in investigations only when it finds that the price differences giving rise to the finding of targeted dumping cannot be taken into account using the A-to-A method).²⁸ Consequently, Nacobre contends that the Department should limit its application of the A-to-T method to only the specific U.S. sales for which: 1) the Department finds a pattern of prices that vary by targeting group; and 2) these differences cannot be taken into account using the A-to-A method.

Department's Position:

We continue to find that a pattern of prices for comparable merchandise that differ significantly among time periods or regions does not exist for Nacobre. Therefore, we calculated Nacobre's final margin using the Department's standard A-to-A comparison methodology.

Legal Framework for the Application of an Alternative Methodology

We disagree with Nacobre's claim that the Department does not have the statutory authority to employ an alternative comparison method based on a targeted dumping allegation in administrative reviews. Section 771(35)(A) of Act defines "dumping margin" as the "amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." The definition of "dumping margin" calls for a comparison of NV and export price (EP) or CEP. Before making the comparison called for, it is necessary to determine how to make the comparison.

²⁶ Id.; see also Final Modification for Reviews, 77 FR at 8102.

²⁷ See Antidumping Duties; Countervailing Duties: Final Rule, 62 FR 27296, 27375 and 27416 (May 19, 1997) (Preamble).

²⁸ 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, where the Department explained that its decision to apply the A-to-T methodology to all sales, not just those in the targeted group, is a reasonable interpretation of section 777A(d)(1)(B) of the Act.

Section 777A(d)(1) of the Act describes three methods by which the Department may compare NV and EP (or CEP) and places certain restrictions on the Department's selection of a comparison method in antidumping duty investigations. The Act places no such restrictions on the Department's selection of a comparison method in an administrative review. Section 351.414(b) of the Department's regulations describes the methods by which NV may be compared to EP or CEP: A-to-A, transaction-to-transaction, and A-to-T. These comparison methods are distinct from one other. When using transaction-to-transaction or A-to-T comparisons, a comparison is made for each export transaction to the United States. When using A-to-A comparisons, a comparison is made for each group of comparable export transactions for which the export prices or constructed export prices have been averaged together (*i.e.*, for an averaging group). Section 351.414(c)(1) of the Department's regulations fills the gap in the Act on the choice of comparison method in the context of administrative reviews. In particular, the Department has determined that in both antidumping duty investigations and administrative reviews, the A-to-A method will be used "unless the Secretary determines another method is appropriate in a particular case."

The Act, the Statement of Administrative Action (SAA), and the Department's regulations do not address directly whether the Department should use an alternative comparison method in an administrative review pursuant to section 777A(d)(1)(B) of the Act.²⁹ In light of the Act's silence on this issue, the Department recently indicated that it would consider whether to use an alternative comparison method in administrative reviews on a case-by-case basis, but declined to "speculate as to either the case-specific circumstances that would warrant the use of an alternative methodology in future reviews, or what type of alternative methodology might be employed."³⁰ At that time, the Department also indicated that it would look to practices employed by the agency in antidumping duty investigations for guidance on this issue.³¹

In antidumping duty investigations, the Department examines whether to use an A-to-T method by using a targeted dumping analysis consistent with section 777A(d)(1)(B) of the Act. Although section 777A(d)(1)(B) of the Act does not strictly govern the Department's examination of this question in the context of an administrative review, the Department nevertheless finds that the issue arising under 19 CFR § 351.414(c)(1) in an administrative review is, in fact, analogous to the issue in antidumping duty investigations. Accordingly, the Department finds the analysis that has been used in antidumping duty investigations instructive for purposes of examining whether to apply an alternative comparison method in this administrative review.

The SAA does not demonstrate that the Department should conduct a targeted dumping analysis in investigations only. The SAA does discuss section 777A(d)(1)(A)(i) of the Act, concerning the types of comparison methods that the Department may use in investigations. That provision, however, is silent on the question of choosing a comparison method in administrative reviews. Section 777A(d)(1)(A) of the Act does not require, or prohibit, the Department from adopting a similar or a different framework for choosing a comparison method in administrative reviews as

²⁹ See section 777A(d)(1)(B) of the Act, the SAA at 842-43, and 19 CFR § 351.414.

³⁰ See Final Modification for Reviews, 77 FR at 8107.

³¹ Id. at 8102.

compared to the framework required by the Act in investigations. The SAA states that “section 777A(d)(1)(B) provides for a comparison of average NVs to individual EPs or CEPs 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.” Like the Act, the SAA does not limit the proceedings in which the Department may undertake such an examination.

We disagree with Nacobre that the Act’s silence with regard to application of an alternative comparison method in administrative reviews precludes the Department from applying such a practice. Indeed, the Court of Appeals for the Federal Circuit (Federal Circuit) has stated that the “court must, as we do, defer to Commerce’s reasonable construction of its governing statute where Congress leaves a gap in the construction of the statute that the administrative agency is explicitly authorized to fill or implicitly delegates legislative authority, as evidenced by the agency’s generally conferred authority and other statutory circumstances.”³² Further, the Federal Circuit has stated that this “silence has been interpreted as ‘an invitation’ for an agency administering unfair trade law to ‘perform its duties in the way it believes most suitable’ and courts will uphold these decisions ‘{s}o long as the {agency}’s analysis does not violate any statute and is not otherwise arbitrary and capricious.”³³ We find that the above discussion of the extension of the Act with respect to investigations is a logical, reasonable and deliberative method to address the silence with regard to administrative reviews.

Further, the Department’s revision of its practice in administrative reviews to mirror its WTO-consistent practice for investigations was a deliberate decision on the part of the Executive Branch pursuant to the authority provided in section 123 of the Uruguay Round Agreements Act (URAA). Specifically, the Executive Branch solicited public comments, consulted with the appropriate congressional committees, and issued a proposed and final announcement of the modification. This decision was made in order to implement several adverse WTO reports in which it was found that the United States was acting in a manner that was inconsistent with its WTO obligations. As such, the Department’s legitimate and reasonable policy decisions in this situation are not subject to judicial review.³⁴

Analysis of the Targeted Dumping Allegation

In recent antidumping duty investigations and administrative reviews where the Department has addressed targeted dumping allegations, the Department has employed the Nails test for each respondent subject to an allegation to determine whether a pattern of EPs or CEPs for comparable merchandise that differ significantly among purchasers, regions or time periods existed within the U.S. market. The Nails test involves a two-step process, as described below, that determines whether the Department should consider whether the A-to-A method is appropriate in a particular situation.

In the first stage of the test, the “standard-deviation test,” we determined the volume of the allegedly targeted group’s (i.e., purchaser, region or time period) sales of subject merchandise

³² See U.S. Steel Corp. v. United States, 621 F.3d 1351, 1357 (Fed. Cir. 2010) (citations omitted).

³³ See Mid Continent Nail Corp. v. United States, 712 F.Supp. 2d 1370, 1376 (CIT 2010) (Mid Continent Nail) quoting U.S. Steel Group v. United States, 96 F.3d 1352, 1362 (Fed. Cir. 1996).

³⁴ See Suramerica de Aleaciones Laminadas, C.A. v. United States, 966 F.2d 660, 665 (Fed. Cir. 1992).

that are at prices more than one standard deviation below the weighted-average price of all sales under review, targeted and non-targeted. We calculated the standard deviation on a product-specific basis (i.e., by CONNUM) using the weighted-average prices for the allegedly targeted groups and the groups not alleged to have been targeted. If that volume did not exceed 33 percent of the total volume of the respondent's sales of subject merchandise for the allegedly targeted group, then we did not proceed to the second stage of the Nails test. However, if the volume exceeded 33 percent of the total volume of the respondent's sales of subject merchandise for the allegedly targeted group, we then proceeded to the second stage of the Nails test.

In the second stage, the "gap test," we examined all sales of identical merchandise (i.e., by CONNUM) sold to the allegedly targeted group which passed the standard-deviation test. From those sales, we determined the total volume of sales for which the difference between the weighted-average price of sales for the allegedly targeted group and the next higher weighted-average price of sales for a non-targeted group exceeds the average price gap (weighted by sales volume) between the non-targeted groups. We weighted each of the price gaps between the non-targeted groups by the combined sales volume associated with the pair of prices for the non-targeted groups that defined the price gap. In doing so, the allegedly targeted group's sales were not included in the non-targeted groups; the allegedly targeted group's weighted-average price was compared only to the weighted-average prices for the non-targeted groups. If the volume of the sales that met this test exceeded five percent of the total sales volume of subject merchandise to the allegedly targeted group, then we determined that targeting occurred and that these sales passed the Nails test.

As explained in the Preliminary Results, if we determined that a sufficient volume of U.S. sales were found to have passed the Nails test, then we considered whether the A-to-A method could take into account the observed price differences. To do this, the Department evaluated the difference between the weighted-average dumping margin calculated using the A-to-A method and the weighted-average dumping margin calculated using the A-to-T method. Where there is a meaningful difference between the results of the A-to-A method and the A-to-T method, we determined that the A-to-A method would not be able to take into account the observed price differences, and the A-to-T method would be used to calculate the weighted-average margin of dumping for the respondent in question. Where there is not a meaningful difference in the results, the A-to-A method would be able to take into account the observed price differences, and the A-to-A method would be used to calculate the weighted-average dumping margin for the respondent in question.

Regarding Nacobre's contentions that the Nails test is flawed because it: 1) assumes that the respondent's price data follows a normal distribution; and 2) uses weighted-average prices, we disagree. As to the former issue, we note that in Mid Continent Nail, where the respondent challenged the Department's implicit assumption regarding the distribution of its data when performing the Nails test, the CIT upheld the Department's use of standard deviation in the Nails test.³⁵ In so doing, the CIT rejected arguments that the Nails test arbitrarily assumed a normal distribution of data.³⁶ Thus, consistent with the CIT's decision in Mid Continent Nail, we find

³⁵ See Mid Continent Nail, 712 F.Supp. 2d 1370 at 1377-78.

³⁶ See id. at 1380 ("...the court concludes that utilization of the 'nails test' for the targeted dumping analysis was reasonable and Commerce's determinations were supported by substantial evidence, and in accordance with law."); see also Memorandum of Law in Support of Plaintiffs' Rule 56.2 Motion for Judgment on the Agency

that there is no requirement for the Department to first find that a respondent's data is normally distributed before applying the Nails test. Moreover, the issue of weighted-average prices in the Nails test has been addressed in previous proceedings including Coated Paper from Korea at Comment 3, Wood Flooring from the PRC at Comment 4, and Washers from Korea at Comment 3. As we explained in those proceedings, in exercising our discretion, we interpret EP (as well as CEP) in section 777A(d)(1)(B)(i) of the Act to mean a weighted average of the individual sales prices. In the context of testing to see whether purchasers, time periods, or regions have been targeted, the relevant price variance, in the Department's view, is the variance in price across purchasers, time periods, and regions, not across transactions. For this reason, the Department approaches the problem by analyzing the variance of the weighted-average sales prices paid by each group.

The focus of the statute is not on the variation of transaction-specific sales prices *per se*, or even on a difference between individual transactions to a particular group. Rather, the Act is explicitly concerned with EPs that "differ significantly among purchasers, regions, or periods of time."³⁷ As we noted in Coated Paper from Korea, "{i}n the context of testing to see whether customers have been targeted, the relevant price variance . . . is the variance in prices across customers, not transactions."³⁸ Using weighted averages allows the Department to disregard meaningless variations and focus instead on uncovering a pattern of prices among groups, as required under section 777A(d)(1)(B)(i) of the Act.

Moreover, averaging is a well-recognized tool in the Department's dumping analyses. Section 777A(d)(1)(A) of the Act expressly provides for the use of both average-to-average comparisons and transaction-to-transaction comparisons in investigations without favoring one method over the other as more accurate. In the absence of such guidance, the Department has discretion to select a reasonable methodology and discretion to change it, provided there is a reasoned explanation for the change.³⁹ Given that the statute focuses on variation among purchasers, among regions, and among time periods, rather than variations between individual transactions, Nacobre has not demonstrated that weight-averaging individual sales prices for each group is unreasonable.

We also disagree with Nacobre's final argument that the Department should reject the petitioners' time period targeted dumping allegation because it is based solely on differences in monthly-average U.S. sales prices, thus duplicating the monthly average U.S. prices calculated using the A-to-A method in reviews. The Act and the Department's regulations do not provide detailed guidance on comparing different sets of U.S. prices for purposes of determining the existence of targeted dumping. The only obligations imposed on the Department in its analysis appear in section 777A(d)(1)(B) of the Act, which requires the Department to determine whether a pattern of significant price differences exists. The Act does not require the Department to

Record, Mid Continent Nail Corporation v. United States, CIT Ct. No. 08-225, Docket No. 36 (February 20, 2009) at 25, 32-33.

³⁷ See section 777A(d)(1)(B)(i) of the Act.

³⁸ See Coated Paper from Korea, at Comment 3 (emphasis added).

³⁹ See Huvis Corp. v. United States, 570 F.3d 1347, 1354-55 (Fed. Cir. 2009) (holding that the Department may change its past practice when there are good reasons for the new policy).

discern why such patterns arise. As we stated in Nails from the UAE, the Department is not required to determine:

...“why” an exporter’s pricing behavior may differ significantly as between different customers, regions or time periods. Indeed, inserting this kind of standard into a targeted dumping analysis is nowhere found in the Act and it would likely create an unmanageable standard for the Department. Instead, the Act requires the Department to determine whether a pattern of export price differences exists without regard to “why.” When such a pattern exists, the Act indicates that export prices may not be appropriate for application of the A-A comparison methodology.⁴⁰

We also disagree with the petitioners’ contention that the Department has changed its practice by creating an additional threshold to use the A-to-T method under section 777A(d)(1)(B) of the Act. In Optical Brightening Agents from Taiwan, Ball Bearings, and Pipe and Tube from Turkey, as in this review, despite finding sales that passed the Nails Test, the Department determined that this finding was not sufficient to satisfy the pattern requirement of the first prong of the targeted dumping analysis, pursuant to section 777A(d)(1)(B)(i) of the Act.⁴¹

We disagree with the petitioners that it is beneficial to specify a percentage of targeted U.S. sales required to find a pattern of prices. In the Final Modification for Reviews, the Department stated that it “will determine, on a case-by-case basis, whether it is appropriate to use an alternative comparison methodology by examining the same criteria the Department examines in original investigations pursuant to sections 777A(d)(1)(A) and (B) of the Act.”⁴² Further, 19 CFR 351.414(c)(1) states that the Department will use the A-to-A method in administrative reviews “unless the Secretary determines another method is appropriate in a particular case.”⁴³ Accordingly, instead of specifying a particular percentage of targeted U.S. sales required, the Department examines the results of the Nails test as described above and determines, on a case-by-case basis, whether the volume of sales found to be targeted are sufficient to justify a finding that the pattern requirement has been satisfied.

⁴⁰ See Nails from the UAE, at Comment 1.

⁴¹ See Certain Stilbenic Optical Brightening Agents From Taiwan: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination, 76 FR 68154, 68156 (November 3, 2011) (“As a result of our analysis, we preliminarily determine that the overall proportion of TRM’s U.S. sales during the POI that satisfy the criteria of section 777A(d)(1)(B)(i) of the Act and our practice as discussed in Nails is insufficient to establish a pattern of EPs for comparable merchandise that differ significantly among certain customers or regions. Accordingly, the Department has determined that criteria established in 777A(d)(1)(B)(i) of the Act have not been met.”), unchanged in Certain Stilbenic Optical Brightening Agents From Taiwan: Final Determination of Sales at Less Than Fair Value, 77 FR 17027, 17027-28 (March 23, 2012) and Certain Stilbenic Optical Brightening Agents From Taiwan: Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order, 77 FR 27419 (May 10, 2012) (correcting a ministerial error); see also Ball Bearings at Comment 1; Pipe and Tube from Turkey at Comment 1 (“...if the Department determined that a sufficient volume of U.S. sales were found to have passed the two-step Nails test, then the Department considered whether the average-to-average method could take into account the observed price differences.”).

⁴² See Final Modification for Reviews, 77 FR at 8102.

⁴³ Id. at 8114.

Even if the petitioners' argument that the Department had changed its practice by creating an additional threshold were accurate, it would not be unreasonable, and therefore not unlawful, for the Department to explain that in some cases, the results of the Nails test are simply insufficient to make the necessary finding contemplated by section 777A(d)(1)(B)(i) of the Act.

Moreover, even if the Department did not consider it necessary for a sufficient volume of sales to be found targeted using the Nails test as part of the pattern requirement, the CIT has opined on this issue in Borden, stating:

Under the appropriate circumstances Commerce has the discretion to not apply the targeted dumping exception to its normal methodology, even upon a finding of targeted dumping.⁴⁴

In that regard, section 777A(d)(1)(B) of the Act states that the Department “may” determine whether to use the A-to-T method to calculate the weighted-average dumping margin if the two criteria, (i) and (ii), are satisfied. Therefore, even if both prongs are met, the Act does not obligate the Department to use the A-to-T method, or any alternative method, to calculate the weighted-average dumping margin.

The petitioners contend that the difference between the weighted-average dumping margins calculated using the A-to-A method and the A-to-T method demonstrates that the observed price differences cannot be taken into account using the A-to-A method. We continue to find that it is appropriate to apply the same targeted dumping analysis in this administrative review as we applied in the context of antidumping duty investigations, where section 777A(d)(1)(B) of the Act first requires the Department to find that there exists a pattern of export prices that differ significantly. The fact that differences in the results of the margin calculations exist, in and of itself, is not sufficient to abandon the usual A-to-A method provided for in the Department's regulations. For Nacobre in this review, we have not identified a pattern of export prices that differ significantly, and, therefore, have continued to use the A-to-A method to calculate the weighted-average dumping margin for Nacobre.⁴⁵ As explained above, this determination is consistent with recent Department determinations.

Comment 2: Date of Sale for Nacobre's "Fixed Price" Sales

In this administrative review, Nacobre reported that it made certain home market and U.S. sales pursuant to “fixed price” quotes. Because Nacobre stated that the price for these sales was fixed at the time of the customer's order, it reported as the date of sale the date Nacobre entered the order into its computer system. In the Preliminary Results, we determined that Nacobre did not set the essential terms of sale for its “fixed price” sales on the date of order entry because the actual shipment quantity at times changed by more than a ten percent tolerance from the original order quantity. Therefore, we determined it was appropriate to use invoice date as the date of

⁴⁴ See Borden, 4 F. Supp. 2d at 1228.

⁴⁵ Regarding Nacobre's claim that the Department should only apply the A-to-T method to those sales which passed the Nails test (rather than all sales), we note that this issue is moot because we have used only the A-to-A method to calculate Nacobre's margin in this administrative review.

sale for all of Nacobre's home market and U.S. sales, except in those instances where shipment occurred prior to the invoice date.⁴⁶

Nacobre disagrees that the invoice date is the appropriate date of sale for its "fixed price" sales. According to Nacobre, the Department's date of sale practice does not focus on the changes in shipment quantities to the exclusion of all other terms.⁴⁷ Nacobre contends that the Department's past decisions indicate that the Department will use the date of an initial order or contract as the date of sale despite evidence of changes to the material terms of sale after the initial agreement, as long as such changes occur infrequently enough that buyers and sellers have no expectation that the final terms of sale will differ from the terms agreed to in the contract.⁴⁸ In addition, Nacobre claims that the CIT has affirmed the Department's use of a date of sale prior to invoice date even in cases where there were some changes to the material terms of sale between order date and invoice date.⁴⁹

Nacobre maintains that, as in Thai Pipe and Nucor, the actual shipment quantity of the company's "fixed price" sales here differed from the original order quantity by more than the tolerance in only a small number of cases. Further, Nacobre points out that it made these shipments only after it received the customer's agreement to the modification of the order, thus demonstrating that both Nacobre and its customer considered the initial order to be a binding agreement. In these circumstances, Nacobre claims that there is no basis for the Department to conclude that Nacobre's shipment quantities were fixed at the time of invoice, rather than at the time of the initial order. Therefore, Nacobre argues that the Department should follow its normal practice and use the date of the initial order as the date of sale for Nacobre's "fixed price" sales.

The petitioners disagree, asserting that the Department properly found that the material terms of sale were not set as of the order date for Nacobre's "fixed price" sales.⁵⁰ According to the petitioners, the Department's regulations at 19 CFR 351.401(i) direct the Department to use the date of the invoice as the date of sale unless it is satisfied that a different date better reflects the date on which the material terms of sale are established. The petitioners note that the

⁴⁶ See Preliminary Decision Memorandum, at 7-8.

⁴⁷ See Certain Welded Carbon Steel Pipes and Tubes From Thailand: Final Results of Antidumping Duty Administrative Review, 65 FR 60910 (October 13, 2000) (Thai Pipe), and accompanying Issues and Decision Memorandum at Comment 1 (where the Department stated that it is appropriate to place a stronger emphasis on price when analyzing the date of sale issue; this rationale explained the Department's reasons for using the date of the purchase order as the date of sale despite the fact that there were changes to the quantity of some sales beyond the agreed-upon tolerance level).

⁴⁸ See Circular Welded Non-Alloy Steel Pipe From the Republic of Korea; Final Results of Antidumping Duty Administrative Review, 63 FR 32833, 32836 (June 16, 1998) (Korean Pipe).

⁴⁹ See Nucor v. United States, 612 F. Supp. 2d 1264, 1306 (CIT 2009) (Nucor).

⁵⁰ While the petitioners note that the Act does not specify the manner in which the Department shall determine the date of sale, they point out that the SAA the URAA states that the date of sale is the "date when the material terms of sale are established." See SAA, H.R. Doc. No. 103-316, vol. 1 (1994) at 810.

Department has defined the material terms of sale as “price, quantity, delivery terms, payment terms, and tolerances.”⁵¹

The petitioners contend that Nacobre did not set the material terms of sale of price and quantity for its POR sales until shipment. Specifically, the petitioners maintain that the quantity term was not set until both Nacobre determined the actual shipment quantity and (if the quantity was revised after order) the customer agreed to accept the revised quantity. With respect to price, the petitioners note that Nacobre invoiced the customer a price based on the different quantity, and thus overall price also was not established until shipment. Therefore, the petitioners maintain that appropriate date of sale here is the earlier of the shipment or invoice date.

The petitioners note that the CIT has upheld the Department’s discretion in determining the date of sale so as to accurately reflect the date on which the material terms of sale are established.⁵² According to the petitioners, the CIT has also held that a party seeking to use a date of sale other than the invoice date has the burden of demonstrating: 1) that such a date better reflects the establishment of the material terms of sale; and 2) these terms undergo no meaningful change between the proposed date of sale and the invoice date.⁵³

The petitioners disagree that Thai Pipe lays out the Department’s date of sale practice because this case was decided prior to an evolution in the Department’s analysis which increased its complexity. Moreover, the petitioners maintain that contrary to Nacobre’s contention, Thai Pipe stands for the proposition that the Department will use contract date as the date of sale where “the changes for all products shipped were within the tolerance that both the seller and the buyer had agreed upon at the time of the contract,” and Nacobre’s sales do not even satisfy that standard.

The petitioners argue that a better precedent is Hornos Electricos, in which the CIT affirmed the use of invoice date as the date of sale after the Department found at verification that “either the price or quantity (or both) changed after the date of contract, but prior to the invoice date.”⁵⁴ According to the petitioners, in the instant case Nacobre admits that: 1) the quantity changed after the order date; and 2) Nacobre invoiced the customer for that revised quantity at a different overall price. Thus, the petitioners assert that consistent with Hornos Electricos, the order date cannot be the appropriate date of sale for Nacobre when two key material terms of sale remained subject to change and subject to ratification by the customer before shipment.

⁵¹ See United States Steel Corp. v. United States, Slip Op. 12-48 at 12 (CIT 2012); see also Nakornthai Strip Mill Pub. Co. v. United States, 614 F. Supp 2d 1323, 1333-4 (CIT 2009) (Nakornthai) (where the Department considered delivery and payment terms to be among the material terms of sale).

⁵² See Allied Tube & Conduit Corp. v. United States, 127 F. Supp 2d 207, 219 (CIT 2000) (Allied Tube I); and Sahaviriya Steel Indus. Pub. Co. v. United States, 714 F. Supp. 2d 1263, 1280 (CIT 2010) (Sahaviriya Steel).

⁵³ See, e.g., Allied Tube I; Antidumping Duties: Countervailing Duties: Final Rule, 62 FR 27296, 27349 (May 19, 1997) (Preamble); Sahaviriya Steel; Nakornthai; Allied Tube & Conduit Corp. v. United States, 132 F. Supp. 2d 1087, 1090 (Ct. Int’l Trade 2001) (Allied Tube II).

⁵⁴ See Hornos Electricos de Venezuela, S.A. v. United States, 285 F. Supp. 2d 1353, 1367 (CIT 2003) (Hornos Electricos).

According to the petitioners, the Department's date of sale regulation conforms to the practical realities of commercial business, recognizing that the date on which the terms of a sale are first agreed is not necessarily the date on which the terms of sale are actually established. See Preamble, 62 FR at 27348-49. Given that the CIT has held that changes in the quantity of a sale indicate that this material term of sale was not finally established on the contract date,⁵⁵ and the change in this instance also affected the overall price of the sale, the petitioners assert that the Department should continue to base the date of sale for Nacobre's fixed price sales on the earlier of shipment date or invoice date.

Department's Position:

We disagree with Nacobre that order date is the appropriate date of sale for its "fixed price" sales during the POR. The Department's regulations at 19 CFR § 351.401(i) direct the Department to determine the date of sale as follows:

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

Further, according to the Preamble to the Department's regulations, the Department may choose a date other than invoice date only if there is evidence that another date better reflects when the material terms of sale are established.⁵⁶ Consistent with this guidance, it is the Department's practice to treat the invoice date as the presumptive date of sale.

We disagree that the record of this proceeding shows that the material terms of sale were established as of the order date for Nacobre's "fixed price" sales. Contrary to Nacobre's assertions, information on the record demonstrates that there were, in fact, changes to the quantity and price of Nacobre's orders subsequent to the order date. For example, in response to section A of the Department's questionnaire, Nacobre stated the following:

Nacobre estimates that the price changed between order and shipment, or the quantity shipped differed from the original order quantity by more than the normal tolerance, for less than two percent of the orders received for home-

⁵⁵ See Allied Tube I at 220.

⁵⁶ See Preamble, 62 FR at 27349 ("If the Department is presented with satisfactory evidence that the material terms of sale are finally established on a date other than the date of invoice, the Department will use that alternative date as the date of sale. For example, in situations involving large custom-made merchandise in which the parties engage in formal negotiation and contracting procedures, the Department usually will use a date other than the date of invoice. However, the Department emphasizes that in these situations, the terms of sale must be firmly established and not merely proposed. A preliminary agreement on terms, even if reduced to writing, in an industry where renegotiation is common does not provide any reliable indication that the terms are truly "established" in the minds of the buyer and seller. This holds even if, for a particular sale, the terms were not renegotiated.").

market sales. Nacobre also estimates that the price changed between order and shipment, or the quantity shipped differed from the original order quantity by more than the normal tolerance, for less than two percent of the orders received for U.S. sales.⁵⁷

Because the price and quantity of Nacobre's orders were not only subject to change, but they did in fact change for a number of sales during the POR, we do not find that Nacobre established the material terms of sale for its "fixed price" sales at the order date. This conclusion is consistent with the Department's long-standing date of sale practice.⁵⁸

We find Nacobre's reliance on Thai Pipe and Nucor as support for its position is misplaced. In Thai Pipe, the Department stated:

In reviewing the information on the record and our verification results, we found that the price terms did not change between the contract date and invoice date for any subject merchandise that was shipped...based on the terms of the contracts, the quantity changes were not changes to the terms of the contract, because the changes for all products shipped were within the tolerance that both the seller and the buyer had agreed upon at the time of the contract.⁵⁹

Thus, the situation in Thai Pipe (where the Department found no changes to price and that any changes to quantity were within the tolerances specified in the contracts) differs markedly from that of Nacobre in the present proceeding (where Nacobre made changes to price as well as changes to quantity outside the tolerance specified in its orders).

As for Nucor, the CIT required the Department to provide a more complete explanation of its decision to use invoice date, rather than contract date, as date of sale. In that case, the CIT held that the Department is "required to undertake a factual analysis of the expectations and conduct of the contracting parties, to ascertain when they reached a true meeting of the minds on the material terms of sale" when faced with a single change to a material term of sale in a contract.⁶⁰ However, this decision also does not support Nacobre's position because: 1) the CIT ultimately upheld the Department's use of invoice date in Nucor; and 2) here, the changes to Nacobre's terms of sale are far more extensive than the changes contemplated by the CIT there.⁶¹

Consequently, because we find that Nacobre did not establish the material terms of its "fixed price" sales on the order date, we find that order date is not the appropriate date of sale. Rather,

⁵⁷ See Nacobre's April 10, 2012, response at pages 32-33; see also Nacobre's June 8, 2012, submission at page 27.

⁵⁸ See Certain Steel Concrete Reinforcing Bars From Turkey; Final Results of Antidumping Duty Administrative Review and New Shipper Review and Determination To Revoke in Part, 72 FR 62630 (November 6, 2007) (Rebar from Turkey) and accompanying Issues and Decision Memorandum at Comment 2.

⁵⁹ See Thai Pipe, at Comment 1.

⁶⁰ See Nucor, 612 F. Supp. 2d at 1309.

⁶¹ See Nucor Corp. v. United States, Consolidated Court No. 05-00616, Slip Op. 2010-6 (CIT January 19, 2010) (sustaining the Department's remand results).

we have continued to use the invoice date as the date of sale for all of Nacobre's home market and U.S. sales, in accordance with the Department's practice, except in those instances where shipment occurred prior to the invoice date.⁶² In those instances, also consistent with the Department's practice, we used the shipment date as the date of sale because the price and quantity are fixed at the time of shipment.⁶³

Comment 3: Nacobre's Indirect Selling Expenses

During the POR, Nacobre made two types of home market sales: those sold directly from its own offices in Mexico and sales through an affiliated party named Productos Nacobre S.A. de C.V. (Pronaco). Nacobre reported a single indirect selling expense percentage which covered both types. Therefore, in the Preliminary Results, we recalculated Nacobre's home market indirect selling expense ratio to separate the rates into percentages which pertained to each entity.

Nacobre argues that the Department did not explain its decision to calculate these separate ratios. Nacobre notes that, although Pronaco ceased to exist as a separate entity in September 2011 (i.e., it became a division of Nacobre itself), the nature of the combined Nacobre-Pronaco sales operations did not change; further, after September 1, 2011, Pronaco's operations were performed by Nacobre using the same Pronaco personnel and offices. Therefore, Nacobre argues that it makes no sense to calculate separate indirect selling expense ratios based merely on which corporate entity owned the personnel and offices. Consequently, Nacobre contends that the Department should rely on Nacobre's reported home market indirect selling expense ratio in its calculations for the final results.

The petitioners agree with the Department's recalculation. According to the petitioners, because the Department's methodology is as specific as possible and Nacobre has not alleged that the Department made a mathematical error in its calculations, the Department should continue to calculate separate indirect selling expense ratios for the final results. The petitioners assert that doing so is consistent with the Department's mandate to calculate dumping margins as accurately as possible.⁶⁴ Finally, the petitioners assert that Nacobre's argument is unavailing because the Department's methodology is not adding expenses where expenses were not incurred; rather, the Department simply allocated the total indirect selling expenses of Nacobre and Pronaco during the POR on the basis of the selling activities performed by each company.

⁶² See, e.g., Hornos Electricos, 285 F. Supp. 2d at 1367; Certain Steel Concrete Reinforcing Bars From Turkey; Final Results and Final Partial Rescission of Antidumping Duty Administrative Review, 74 FR 45611 (September 3, 2009) and accompanying Issues and Decision Memorandum at Comment 3; and Rebar from Turkey at Comment 2.

⁶³ See, e.g., Stainless Steel Sheet and Strip in Coils from the Republic of Korea; Final Results and Rescission of Antidumping Duty Administrative Review in Part, 72 FR 4486 (January 31, 2007), and accompanying Issues and Decision Memorandum at Comments 4 and 5.

⁶⁴ See Rhone Poulenc, Inc. v. United States, 899 F. 2d 1185, 1191 (Fed. Cir. 1990).

Department's Position:

We have not revised our calculation of home market indirect selling expenses for purposes of the final results. At the time of the Preliminary Results, we provided the following explanation of our recalculation of Nacobre's home market indirect selling expense ratio:

Nacobre reported one home market indirect selling expense ratio, combining the expenses incurred during the POR by both Nacobre and Pronaco. Because Pronaco ceased to exist {sic} an entity separate from Nacobre on September 1, 2011, we have revised the calculation of Nacobre's home market indirect selling expenses to calculate separate ratios for Nacobre and Pronaco. We applied the Pronaco ratio to the reported net prices contained in the home market sales listing for all sales prior to September 1, 2011, because Nacobre stated that almost all of its home market sales prior to this date were made by Pronaco. See Nacobre's November 9, 2012, response at page 43. We applied the Nacobre ratio to the reported net prices contained in the home market sales listing for all home market sales dated on or after September 1, 2011.⁶⁵

We disagree with Nacobre that this calculation is unnecessary. Nacobre made home market sales in two channels during the POR: 1) direct from its factory; and 2) via Pronaco. Each of these entities incurred indirect selling expenses for its own account prior to Nacobre's change in organizational structure. The calculation described above merely matches these expenses with the selling office incurring them, and thus they are more accurate than Nacobre's own calculation. Indeed, in computing a single ratio, Nacobre improperly assigned Pronaco expenses to Nacobre's direct sales, a result which is clearly distortive.

Because our methodology simply assigns the home market indirect selling expenses incurred by Nacobre or Pronaco during the POR based on the entity which incurred these expenses and applies the resulting expense ratios to the sales made by each entity, it is as specific as possible. Consequently, we have continued to use these ratios in our calculations for the final results.

Comment 4: Nacobre's G&A Expenses

In the cost of production data Nacobre reported to the Department, it reduced its G&A expenses by a portion of its "other income and expenses." However, in the Preliminary Results we recalculated Nacobre's G&A expense ratio to include these expenses. Nacobre agrees with the Department's recalculation, noting that it had inadvertently made a mathematical error in its calculation.

The petitioners did not comment on this issue.

⁶⁵ See the December 3, 2012, Memorandum from Elizabeth Eastwood, Senior Analyst, to the File entitled, "Calculations Performed for Nacional de Cobre, S.A. de C.V. (Nacobre) for the Preliminary Results of the Antidumping Duty Administrative Review of Seamless Refined Copper Pipe and Tube from Mexico" at page 4.

Department's Position:

We have continued to use the G&A ratio for Nacobre recalculated in the Preliminary Results in our calculations for the final results.

Comment 5: Adjustment to U.S. Price

Previously, the Department conducted a new shipper review for Golden Dragon covering the period November 2010 through April 2011. In that new shipper review, we adjusted Golden Dragon's gross unit price to account for an amount determined by agreement with the company's U.S. customers.⁶⁶ However, in the Preliminary Results of this proceeding, we determined that a similar adjustment was not warranted in this POR, based on information contained on the record of this review. Because the circumstances surrounding this adjustment are business proprietary in nature, we were unable to disclose them in our Preliminary Decision Memorandum.⁶⁷

For the final results, the petitioners argue that the record has not changed from the results of the new shipper review, and thus the Department should make the same adjustment to U.S. price. In contrast, Golden Dragon argues that the Department should continue to make no price adjustment consistent with our decision in the Preliminary Results. We are unable to provide a detailed summarization of the parties' arguments in this memorandum because of the proprietary nature of this issue. Therefore, we have created a detailed summarization of this comment in a separate memorandum released under administrative protective order.⁶⁸ For further discussion, see the Golden Dragon Price Adjustment Memo.

Department's Position:

After analyzing the evidence on the record with respect to this issue, we continue to find that no adjustment to Golden Dragon's prices is warranted in these final results. Because the basis for this conclusion is business proprietary in nature, we are unable to disclose it here. For further discussion, see the Golden Dragon Price Adjustment Memo.

⁶⁶ See Seamless Refined Copper Pipe and Tube from Mexico: Final Results of Antidumping Duty New Shipper Review, 77 FR 59178 (September 26, 2012), and accompanying Issues and Decision Memorandum (New Shipper Review) at Comment 2 (business proprietary version).

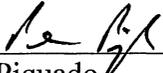
⁶⁷ For further discussion, see the December 3, 2012, Memorandum from Dennis McClure, Senior Analyst, to the File entitled, "Calculations Performed for GD Affiliates S. de R.L. de C.V. and its affiliate Hong Kong GD Trading Co., Ltd. (collectively, Golden Dragon) for the Preliminary Results of the Antidumping Duty Administrative Review of Seamless Refined Copper Pipe and Tube from Mexico" (Golden Dragon Calculation Memo).

⁶⁸ See Memorandum from Christian Marsh, Deputy Assistant Secretary, to Paul Piquado, Assistant Secretary for Import Administration entitled, "Memorandum Regarding Golden Dragon's Alleged Price Adjustment," dated concurrently with the final results of this review (Golden Dragon Price Adjustment Memo).

RECOMMENDATION:

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

Agree Disagree



Paul Piquado
Assistant Secretary
for Import Administration

5 JUNE 2013
Date