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

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

SUBJECT: Issues and Decision Memorandum for the Antidumping Duty
Administrative Review of Solid Urea from the Russian Federation
for the Period of Review July 1, 2009, through June 30, 2010

Summary

We have analyzed the case and rebuttal briefs of interested parties in the administrative review of the antidumping duty order on solid urea from the Russian Federation (Russia) for the period of review (POR) July 1, 2009, through June 30, 2010. The sole respondent is MCC EuroChem (EuroChem). We recommend that you approve the positions described in this memorandum. Below is the complete list of the issues in this administrative review for which we received comments and rebuttal comments from parties:

1. Affiliation of EuroChem's Franchisees
2. Freight and Transportation Revenue
3. Imputed Credit Expenses
4. Publication of Final Results
5. Zeroing

Background

On June 17, 2011, the Department of Commerce (the Department) published its *Preliminary Results* of this review in the *Federal Register*. See *Solid Urea From the Russian Federation: Preliminary Results of Antidumping Duty Administrative Review*, 76 FR 35405 (June 17, 2011) (*Preliminary Results*).

We invited parties to comment on the *Preliminary Results*. On August 9, 2011, we received case briefs from the Ad Hoc Committee of Domestic Nitrogen Producers and its individual urea-producing members, CF Industries, Inc., and PCS Nitrogen (the petitioners), and from EuroChem. On August 18, 2011, we received rebuttal briefs from the petitioners and EuroChem. No hearing was requested for this review.

Other Abbreviations

The Act -	The Tariff Act of 1930, as amended
CAFC -	Court of Appeals for the Federal Circuit
CEP -	Constructed Export Price
CIT -	Court of International Trade
EP -	Export Price
I&D Memo -	Issues and Decision Memorandum
SAA -	Statement of Administrative Action Accompanying the Uruguay Round Agreements Act, H.R. Rep. 103-316, at 870, reprinted in 1994 U.S.C.C.A.N. 4040
URAA -	The Uruguay Round Agreements Act
WTO -	World Trade Organization

Discussion of the Issues

1. Affiliation of EuroChem's Franchisees

Comment 1: The petitioners argue that there is insufficient record evidence to support the Department's conclusion in the *Preliminary Results* that EuroChem and its home market franchisees are unaffiliated. The petitioners argue that EuroChem is affiliated with its home market franchisees by virtue of a close-supplier relationship.

The petitioners refer to 19 U.S.C. § 1677(33), which, the petitioners claim, states that the Department shall find affiliation if a controlling relationship exists between entities whereby one is in a position to legally or operationally exercise restraint or direction over the other. According to the petitioners, actual control is not required for an affiliation finding; instead, the capacity to control demonstrates affiliation, citing *Ferro Union, Inc. v. United States*, 44 F. Supp. 2d 1310, 1324 (CIT 1999). The petitioners define the ability to control as the power to restrain or direct a company's activities. Further, the petitioners maintain, the Department's regulations clarify that control will exist any time corporate relationships have the potential to impact decisions concerning the pricing, production, or cost of the subject merchandise or foreign like product, citing 19 CFR 351.102(b)(3). The petitioners contend that the potential to control, not proof of control, establishes affiliation, citing *Antidumping Duties; Countervailing Duties*, 62 FR 27296 (May 19, 1997) (*ITA Preamble Final Rule*). Furthermore, the petitioners continue, the *ITA Preamble Final Rule* also specifies that control need not be all-encompassing for the Department to find affiliation but rather it may find affiliation by virtue of the possibility that one entity may exert some level of control over another entity's operations with respect to production and/or sales of subject merchandise or the foreign like product.

The petitioners also refer to the SAA at 838 to explain that the ability to control need not be exhibited solely through corporate ownership but also will manifest through franchising relationships when the supplier or buyer becomes reliant upon the other.

According to the petitioners, the administrative record of this segment is incomplete due to what the petitioners perceive to be EuroChem's reporting failures and, therefore, must be supplemented with relevant information. The petitioners explain that, according to the record, EuroChem sold through twenty-five distributors during the POR, seven of which are wholly-owned subsidiaries and which EuroChem identifies as affiliates. Of the remaining 18 distributors, the petitioners continue, EuroChem has denied affiliation but the record evidence does not support EuroChem's position. To the contrary, the petitioners assert, the franchise agreement (or, as EuroChem references, "concession agreement") on the record of this review that governs EuroChem's relationship with its franchisees grants EuroChem substantial control over distributors' sales of EuroChem's urea products. See EuroChem's October 27, 2010, questionnaire response at Exhibit 8 (franchise agreement).

According to the petitioners, they filed comments on November 23, 2010, February 1, 2011, and March 8, 2011, alerting the Department of their allegation that EuroChem likely controls its franchisees' sales, which may amount to affiliation under the antidumping laws. Specifically, the petitioners contend, in their November 23 letter, they alleged that the franchise agreement, at paragraphs 2.2.11 and 2.2.12, prohibits the franchisee from competing with EuroChem in the territory covered by the agreement and bars its franchisee from conducting business with EuroChem's competitors, respectively. Additionally, the petitioners assert, they informed the Department that EuroChem ensures that it remains its franchisees' sole supplier of urea, citing EuroChem's Section B Response at Exhibit 8.

In response to the Department's February 1, 2011, supplemental questionnaire, the petitioners explain, EuroChem responded on February 11, 2011, denying involvement in setting prices of its franchisees' products. According to the petitioners, EuroChem claimed that the preamble to the franchise agreement, where it states that the franchisor "determines its marketing and pricing policy" applies to the EuroChem group of companies, and not its relationship with its franchisees. Furthermore, the petitioners continue, EuroChem claimed that Chapter 54 of the 1996 Russian Civil Code prohibits a franchisor from interfering with a franchisees' pricing. According to the petitioners, EuroChem's response did not illustrate whether EuroChem did or had the potential to *de facto* affect pricing decisions of its franchisees. To the contrary, the petitioners contend that it appears Russia amended its civil code as of November 2010 to eliminate inconsistency between the Civil Code and the competition law on the issue of price limitations, citing EuroChem's February 11, 2011, supplemental response at Exhibits 1 and 3. Thus, the petitioners argue that the competition law does not prohibit the franchisor and franchisee from voluntarily agreeing to establish minimum/maximum commodity prices.

The petitioners assert that EuroChem stretched various franchise clauses beyond their meaning in order to assert that it is not affiliated with its franchisees. According to the petitioners, EuroChem's assertion in its February 11 response that clause 2 of the agreement, for example, does not bar the franchisees from selling other suppliers' urea products, is insufficient to prove that the franchisees do sell others' urea products. This, along with similar examples, the petitioners maintain, does not demonstrate that EuroChem permits its distributors to freely enter into agreements with other franchisors. Furthermore, the petitioners argue, clauses 2.2.7 and 2.2.16 limit the franchisee's ability to sell EuroChem's products by subjecting them to oversight by EuroChem. The petitioners argue that EuroChem stretched the meaning of the clauses to

suggest that they provide the franchisees with a choice, not an obligation, to comply with EuroChem's standards. Thus, the petitioners maintain, EuroChem has misrepresented the meaning of various clauses of the franchise agreement to support its position that it is not affiliated with its franchisees.

The petitioners allege that EuroChem's response did not adequately address the questions posed in the Department's April 11, 2011, supplemental questionnaire. EuroChem asserted it was unable to provide quantity and value data of its franchisees' sales because it does not have access to that information, along with letters from the franchisees denying EuroChem's request for the information. This, the petitioners contend, is contrary to clause 2.1.7 of the franchise agreement, which, according to the petitioners, allows EuroChem to receive information related to the franchisee's financial and commercial activities. Thus, the petitioners argue, the Department should have followed-up with additional probes and, because it did not, the record of the review is incomplete. Additional inquiries, the petitioners maintain, are required for the Department's affiliation determination, as the Department bears the responsibility for evaluating all factors that may evidence control, citing *Antidumping Duties; Countervailing Duties*, 61 FR 7308, 7310 (February 27, 1996) (*Proposed Rule*). Because the Department did not follow-up, the petitioners contend, the factual record is incomplete, lacking concrete evidence to support EuroChem's claim of non-affiliation. Citing *Oil Country Tubular Goods From Japan: Preliminary Results and Rescission in Part of Antidumping Duty Administrative Review*, 64 FR 48589, 48591 (September 7, 1999), unchanged in *Oil Country Tubular Goods From Japan; Final Results of Antidumping Duty Administrative Review*, 65 FR 15305 (March 22, 2000), the petitioners contend that it is incumbent on the Department to collect the necessary information to render an accurate determination that is supported by the record.

According to the petitioners, the sample franchise agreement on the record of this review demonstrates affiliation between EuroChem and its franchisees by virtue of a close-supplier relationship. The petitioners speculate that were EuroChem to end its franchise agreements, which the parties are free to terminate at any time, the franchisees would lose their ability to sell significant volumes of urea. According to the petitioners, it is presumable that the franchisees cannot afford to lose EuroChem as a supplier, so if EuroChem were to threaten to slow or stop deliveries or even threaten to increase its prices, EuroChem would presumably be able to compel the franchisees' actions. Thus, the petitioners argue, the franchisees are, to some extent, reliant on EuroChem as a source of urea.

The franchise agreements, the petitioners contend, demonstrate both *de jure* and *de facto* control. EuroChem, the petitioners allege, is entitled to nearly all operational information from the franchisee, including that related to product quality, production, financial, and commercial activities, citing clauses 2.1.6. and 2.1.7 of the agreement. Furthermore, the petitioners continue, the agreement restricts the franchisees' daily operations, citing several clauses of the agreement (clauses 2.1.2, 2.2.13, 5.3.3, 5.1-5.3, 2.2.7, 2.2.12, 2.2.11, 1.4, 2.2.8, and 4.2). The petitioners explain that while the franchisee is free to exit the agreement at any time, the franchisee must abide by the rules of the franchise agreement while it is in effect, citing paragraph 11 of the agreement. Thus, the petitioners maintain, EuroChem is able to regulate the sales operations of its franchisees by enjoying significant access to and influence over the franchisees' operations.

This ability to restrain various aspects of its franchisees' sales, the petitioners contend, directly implicates EuroChem's ability to control.

In addition, the petitioners argue that, assuming EuroChem does not have access to information relevant to the question of affiliation, the Department cannot make a presumption in its favor. The Department's longstanding practice, according to the petitioners, is that respondents must demonstrate entitlement to any of their claims, citing *NTN Bearing Corp. of America v. U.S.*, 248 F. Supp. 2d 1256, 1287 (CIT 2003); *Reiner Brach GmbH & Co. KG v. United States*, 206 F. Supp. 2d 1323, 1333 (CIT 2002); and 19 CFR 351.401(b)(1). The petitioners contend the burden of proof rests with the respondent to demonstrate that its relationship with an entity "does not have the potential to affect the...foreign like product," citing *ITA Preamble Final Rule*, 62 FR at 27298. Thus, the petitioners argue, if affirmative evidence is needed to establish that control relationships do not have the potential to impact home market sales, then in the absence of such evidence, the Department *must* presume that the relationship *will* have the potential to impact home market sales. Therefore, the petitioners assert, the record evidence is insufficient to prove or disprove affiliation but, given the above, the Department *must* make an inference of affiliation, or else it is encouraging respondents to selectively withhold or claim an inability to obtain information in order to secure a favorable outcome.

According to the petitioners, *Steel Rod From Korea* provides very similar circumstances as here, where, the petitioners explain, the Department found affiliation through a close-supplier relationship where the respondent was the sole supplier of subject merchandise and the supplier had been unable to develop an alternate source of the merchandise, citing *Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Wire Rod From Korea*, 63 FR 40404 (July 29, 1998) (*Steel Rod from Korea*). There, the petitioners maintain, the Department found that the relationship between the parties in question was significant and not easily replaced. The petitioners also explain that in *OCTG from China*, the Department found Chinese respondent TPCO to be affiliated with its customer because it had several joint ventures with that customer, citing *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 20335 (April 19, 2010) (*OCTG from China*) and the accompanying I&D Memo at Comment 10. Additionally, the petitioners explain, the Department found in *Steel Pipe from Taiwan*, that control exists through a close-supplier relationship based on evidence that the distributor only sold the respondent's product in the United States; the respondent had the ability to monitor the accounts payable, accounts receivable, and inventory; and that the respondent's U.S. subsidiary had custody of the distributor's signature stamp, citing *Certain Welded Stainless Steel Pipe From Taiwan; Final Results of Administrative Review*, 62 FR 37543, 37545-50 (July 14, 1997) and *Ta Chen Stainless Steel Pipe Ltd. v. United States*, 23 CIT 804, 811 (1999) (*Steel Pipe from Taiwan*). While EuroChem asserts that its franchising agreements reflect common business practices, the petitioners argue they establish EuroChem's access to and influence over the franchisees' operations. The *ITA Preamble Final Rule*, 62 FR at 27298, the petitioners explain, states that the Department recognizes that "common business practices" may still give rise to control.

Because EuroChem is affiliated with its franchisees, the petitioners argue, the Department must obtain data for its franchisees' downstream sales of EuroChem's urea products, in compliance

with the Department's questionnaire, unless EuroChem can demonstrate its sales to the franchisees were made at arm's-length prices. Furthermore, the petitioners continue, the Department must conduct its own arm's-length analysis and, in compliance with 19 U.S.C § 1677(b)a, only use those sales made at arm's-length.

Otherwise, the petitioners propose the Department use facts available where EuroChem has not or cannot provide the downstream sales data, which, according to the petitioners, is supported by legislative history, citing H.R. Rep. No. 103-316 at 869; *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1381 (Fed. Cir. 2003); and *Nucor Corp. v. United States*, 612 F. Supp. 2d 1264, 1293 (CIT 2009). The petitioners suggest that the Department derive a ratio based on record evidence to estimate a markup to apply as facts available.

EuroChem counters that the Department correctly found that EuroChem is not affiliated with its franchisees. According to EuroChem, the Department's decision must be supported by substantial evidence and the evidence supports the Department's determination that EuroChem is not affiliated with its franchisees. EuroChem contends that the petitioners have misrepresented the language and meaning of the statute and regulations.

According to EuroChem, the petitioners' argument is essentially requesting that EuroChem "prove the negative" and if there is any deficiency in proving the negative, then the Department must determine that affiliation exists. According to EuroChem, the petitioners wrongly twist *ITA Preamble Final Rule*, 62 FR at 27298 to say that respondents must prove that no control or potential to control relationship exists.

Furthermore, EuroChem argues, the standard for affiliation the petitioners are insisting upon is so low that any buyer would be "reliant" on its supplier, thus constituting affiliation. According to EuroChem, the petitioners define "reliant on" as "purchasing from." EuroChem argues that the petitioners expect EuroChem to prove the non-existence of voluntary price control mechanisms, which, according to EuroChem, is not only impossible to prove but runs counter to Departmental practice. Furthermore, EuroChem continues, the petitioners rely on speculation to bolster their argument.

EuroChem continues that the petitioners misstate the SAA, which does not say that franchise agreements "will" constitute affiliation, as the petitioners stated, but actually states "may" constitute affiliation where there is substantial evidence of control or potential to control.

According to EuroChem, the Department found affiliation in *OCTG from China* through several joint ventures involving mutually owned companies, which is not analogous to the instant proceeding. Additionally, EuroChem counters, *Steel Pipe from Taiwan* does not compare as the Department found affiliation between parties for several reasons, such as one controlling all expenditures and disbursements of the other, management and owners of one formerly being the management and owners of the other, one party making the sales for the other, and an exclusive buy-sell relationship. Furthermore, *Steel Rod from Korea* is not analogous as the Department found affiliation because of relationships that were not easily replaced due to the special nature of the purchased product. Here, EuroChem contends, solid urea is a widely available commodity product and, thus, relationships are easily replaced.

According to EuroChem, the petitioners are misrepresenting the provisions of the franchise agreements. EuroChem argues that these agreements are standard contracts enabling EuroChem to protect its name, reputation, and trademark, which do not indicate a potential to control. EuroChem argues that the petitioners' argument that such protection indicates the potential to control pushes toward broad affiliation findings beyond prior precedent. EuroChem maintains that the franchise agreements give no potential to control because they are temporary contracts which the franchisee is free to cancel at any time without terminating normal sales contracts.

Furthermore, EuroChem argues, the Department has long recognized that exclusivity contracts are common commercial arrangements that do not in and of themselves give rise to affiliation, citing *Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products From Korea: Final Results of Antidumping Duty Administrative Reviews*, 62 FR 18404, 18441 (April 15, 1997) (*Steel Products from Korea*), *Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Melamine Institutional Dinnerware Products From Indonesia*, 61 FR 43333, 43335 (August 22, 1996), unchanged in *Notice of Final Determination of Sales at Less Than Fair Value: Melamine Institutional Dinnerware Products From Indonesia*, 62 FR 1719, 1726 (January 13, 1997) (*Dinnerware from Indonesia*), *Notice of Final Results of Antidumping Duty Administrative Review: Furfuryl Alcohol From the Republic of South Africa*, 62 FR 61084, 61086 (November 14, 1997) (*Alcohol from South Africa*). The Department, EuroChem continues, holds that this is true *a fortiori* when parties are also able to buy from others but choose not to.

EuroChem refers to its original questionnaire response where it explained that franchisees independently determine their own selling practices without EuroChem's interference. According to EuroChem, the petitioners' interpretation of the clauses of the franchise agreement in this respect is wrong and the petitioners, in making their argument, misstate the language and meaning of the clauses.

EuroChem also reiterates that Russian law prohibits a franchisor from controlling franchisees' prices. Therefore, EuroChem contends, even if the franchise agreement meant that EuroChem could control the franchisees' prices, such agreements would be null and void under contract law. EuroChem asserts that the petitioners attempt to apply Russian competition law instead of the more specific franchise law. Additionally, EuroChem adds, the petitioners argue the Russian law may have changed in November 2010, yet do not explain how this would be relevant to the instant POR, which ends in June 2010.

Additionally, EuroChem argues, the petitioners identify provisions of the agreement that address the expectations of the franchisee (*e.g.*, market studies), yet they do not explain their relevance to the antidumping affiliation standard. EuroChem maintains that while it offers training to its franchisees, the franchisees are free to accept or deny the training. Regardless, EuroChem argues, the Department found in *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan; Final Results of Antidumping Duty Administrative Reviews and Revocation in Part of an Antidumping Duty Finding*, 61 FR 57629 (November 7, 1996), and *Polyethylene Terephthalate Film, Sheet, and Strip From the Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review and Termination in Part*, 62 FR

10527, 10529 (March 7, 1997), that a respondent merely providing training to its customers is not indicium of affiliation. EuroChem argues that the petitioners did not explain how providing training services means EuroChem has the potential to control franchisee pricing.

EuroChem argues that adverse inferences are only permitted against a respondent if there is a failure by the respondent to cooperate. EuroChem has fully cooperated, it argues, and therefore adverse inferences are inappropriate and impermissible. EuroChem maintains that the petitioners expect adverse inferences to be imposed anytime a third party does not provide desired information. EuroChem, it explains, has no authority to compel their franchisees to provide confidential information to a third party. Furthermore, EuroChem argues, if the franchisees were to provide requested confidential information, the petitioners would allege that fact as proof of control.

Department's Position:

Section 771(33) of the Act states that "a person shall be considered to control another person if the person is legally or operationally in a position to exercise restraint or direction over the other person." Section 771(33)(G) of the Act defines an affiliated party as "any person who controls any other person and such other person."

Section 351.102(b) of the Department's regulations provides that, in finding affiliation based on control, the Department will consider, among other factors, the following: (i) corporate or family groupings; (ii) franchise or joint venture agreements; (iii) debt financing; and, (iv) close supplier relationships, while also explaining that the Department will consider the temporal aspect of a relationship. The SAA at 838 defines a close supplier relationship as one where "the supplier or buyer becomes reliant upon the other." *See also Notice of Preliminary Determination of Sales at Less Than Fair Value: Solid Fertilizer Grade Ammonium Nitrate From the Russian Federation*, 65 FR 1139, 1142-1143 (January 7, 2000), unchanged in *Notice of Final Determination of Sales at Less Than Fair Value; Solid Fertilizer Grade Ammonium Nitrate From the Russian Federation*, 65 FR 42669 (July 11, 2000) (*Ammonium Nitrate from Russia*). Although the regulations contemplate franchise agreements as evidence to examine, the mere existence of a franchise agreement does not indicate affiliation exists. Instead, the agreement is examined to determine whether it demonstrates sufficient control such that affiliation exists.

In the instant case, the record evidence does not support finding affiliation within the meaning of the Act, regulations, and precedent. The Department disagrees with the petitioners' assertion that, simply because EuroChem is a supplier of the foreign like product, its franchisees are presumably reliant on EuroChem in a relationship so significant it could not be replaced. Furthermore, we do not find that the franchise agreement grants EuroChem the power to impact its franchisees' decisions concerning the production, pricing, or cost of the foreign like product.

The petitioners argue for an unreasonably low standard for a finding of affiliation; a standard that is not supported by the Act, regulations, or Departmental history. According to the petitioners, any instance where an entity has the potential to exert some measure of direction or influence, however minor, over any aspect of another entity's operations automatically results in the Department determining the two entities are affiliated unless the respondent can prove it does not exhibit any influence over the other entity. In such a situation, the idea of "influence" crosses

into the realm of subjectivity, and would allow any petitioner to allege, in any proceeding, that any supplier has the ability to possibly influence its buyers (*i.e.*, because that buyer is “reliant” on the suppliers merchandise) with the result that the respondent would have to prove it does not have the potential to exert influence over its buyers. Thus, we disagree with the petitioners that the absence of affirmative evidence demonstrating a control relationship does not exist, means the Department *must* presume that the relationship *will* have the potential to impact home market sales. This has never been the Department’s standard for a finding of affiliation. In such a situation, the respondent would be required to, as EuroChem explains, “prove the negative.” If the respondent is unable to “prove the negative,” then affiliation must exist. This, again, creates an unreasonably low standard for a finding of affiliation. While it is true that the Department must consider each affiliation allegation on a case-by-case basis, considering all factors that could give rise to control, the petitioners’ suggestion has never been the standard of the Department.

Regarding the preamble to the franchise agreement, it appears that the petitioners have misinterpreted the meaning of the phrase, “determines its marketing and pricing policy.” The preamble states, “Whereas the franchiser...” and lists several of the franchiser’s (*i.e.*, EuroChem) responsibilities. Among those responsibilities is “determin(ing) its market and pricing policy” so that “its” refers to the franchiser, *i.e.*, EuroChem. At this point in the agreement, the franchisee has not been mentioned. This reading is consistent with the explanation EuroChem provided in its February 11, 2011 response, where it stated that the preamble describes the EuroChem group of companies as a solid commercial organization with unified corporate policies, which include marketing and pricing policy within the EuroChem group of companies and that EuroChem in no way influences the franchisees’ pricing of the foreign like product. Despite the precision given to each party’s respective function in the agreement, nowhere is there any mention of EuroChem exercising control over the franchisees’ prices. Further, the record supports EuroChem’s contention that Russian law prohibits pricing controls over franchisees. Whether the law changed in November 2010 is not relevant to the discussion, as it is outside of the POR. For these reasons, along with the letters from the franchisees confirming EuroChem’s explanation, the Department has reasonable grounds to conclude that the agreement’s preamble refers to the unified group of EuroChem companies.

We also disagree that exclusivity provisions in and of themselves should lead to a finding of affiliation. The Department explained in *Steel Products from Korea* that:

The standard is not...whether one company might be in a position to become reliant upon another by means of their supplier-buyer relationship; rather, the Department must find that a situation exists where the buyer has, in fact, become reliant on the seller, or vice versa. Only if we make such a finding can we address the issue of whether one of the parties is in a position to exercise restraint or direction over the other.¹

There is nothing on the record that demonstrates the franchisees have become reliant on EuroChem. As explained above, 19 CFR 351.102(b)(3) states that the Department will also consider the temporal nature of any relationship. The agreements between EuroChem and its franchisees are temporary arrangements, *i.e.*, effective in two-year increments where either party

¹ See *Steel Products from Korea*, 62 FR at 18417.

is free to terminate the agreement at any time. See Section 11 of the franchise agreement. Therefore, any exclusivity is applicable only for the period of the contract. Nevertheless, the Department determined in *Steel Products from Korea* that where parties enter into exclusive selling relationships voluntarily and are free to terminate their participation at regular intervals, a controlling relationship does not exist. See *Steel Products from Korea*, 62 FR at 18441. Thus, the temporal nature of the franchise arrangements supports the Department's conclusion that EuroChem is not affiliated with its franchisees.

The petitioners argue that EuroChem is affiliated by nature of a close-supplier relationship, yet do not demonstrate how the nature of the franchise clauses satisfies the Department's standards for affiliation by virtue of a close-supplier relationship. As explained above, the SAA at 838 defines a close supplier relationship as one where the supplier or buyer becomes reliant upon one another. To establish a close-supplier relationship, the party must demonstrate that the "relationship is so significant that it could not be replaced." See *Steel Products from Korea*, 62 FR at 18417, see also *Ammonium Nitrate from Russia*, 65 FR at 1143. Further, 19 CFR 351.102(b)(3) states that such a relationship must have the potential to impact decisions concerning the production, pricing or cost of the subject merchandise or foreign like product. The petitioners seem to be suggesting that the mere existence of a franchise agreement has created a "relationship so significant it could not be replaced." Although the regulations contemplate franchise agreements as evidence to examine, the mere existence of a franchise agreement does not indicate affiliation exists. Instead, the agreement is examined to determine whether it demonstrates sufficient control such that affiliation exists. In the instant case, the franchise agreement does not give rise to control. The petitioners repeatedly emphasize that the agreement allows EuroChem access to its franchisees' financials, yet does not explain how this would relate to a close supplier relationship, except in reference to *Steel Pipe from Taiwan*, where the Department found affiliation by virtue of a close supplier relationship because, *inter alia*, the respondent had access to the distributor's financials. In that case, however, we stated that it is common for a creditor to obtain reports regarding the status of a debtor's business activities. See *Steel Pipe from Taiwan*, 62 FR at 37550. Additionally, in that case, we stated that informing our decision that Ta Chen behaved as a close supplier was the uncommon situation of Ta Chen having a direct computer connection to the debtor, allowing Ta Chen full-time, unlimited access to the debtor's computer system for financial monitoring. *Id.* That, we stated, was a far more invasive mechanism for monitoring than would be expected between unaffiliated parties. *Id.* at 37549. Also differentiating that case from the instant case is that Ta Chen also shared common employees with the affiliate, and Ta Chen possessed the affiliate's signature stamp.

The petitioners also compare the instant case to *OCTG from China*. The Department, in that case, found affiliation based on the joint ventures between parties, which is not the situation in this case. See *OCTG from China* and accompanying I&D Memo at Comment 10. As stated above, the regulations provide for the Department to consider franchise arrangements and joint ventures in its affiliation analyses, yet we disagree with the petitioners that the provisions of the contract they identify indicate control by virtue of a close supplier relationship. The petitioners also draw parallels between this case and *Steel Rod from Korea*. The facts of that case were such that we found affiliation between parties because of, *inter alia*, an interdependent production process between POSCO, the supplier, and Dongbang, the buyer, where Dongbang would be

unable to operate without POSCO's input and there were no other suppliers of the product. *See Steel Rod from Korea*, 63 FR at 40410 and accompanying I&D Memo at Comment 2. Again, that case does not compare to the instant case. EuroChem is responsible for the production of solid urea through the end product and its franchisees are not reliant upon EuroChem's input to complete manufacturing of the product. *See EuroChem's October 27 response at A-62 through A-67.*

As for the petitioners' assertions that the Department's determination in the *Preliminary Results* was premature and based on an incomplete record, we disagree. As the Department explained in the *Proposed Rule*:

{S}ome indicia of the ability to exercise restraint or direction over another party's pricing, cost, or production decisions may not lend themselves to the use of simple, black-and-white thresholds. Therefore, the Department intends to apply this new definition on a case-by-case basis, considering all relevant factors, including the indicia included in the regulatory definition. Mere identification of the presence of one or more of these or other indicia of control does not end our task. We will examine these indicia, in light of business and economic reality, to determine whether they are, in fact, evidence of control.²

The Department examined the record in its totality, including EuroChem's original response and multiple supplemental responses. We thoroughly considered the petitioners' arguments but, because we did not find indicia of control consistent with the statute, regulations, or departmental practice, we were satisfied that it was not necessary to pursue the issue any further. As discussed above, the petitioners do not convey exactly how the clauses they identify indicate EuroChem has become a close supplier to its franchisees. Although the petitioners identify certain clauses that they see as troubling, they do not explain how those provisions grant EuroChem the potential to control the production, pricing, or cost of its franchisees' sales as required by 19 CFR 351.102(b). Neither do the petitioners offer anything other than their own assertions that EuroChem has created a relationship with its franchisees so significant that it could not be replaced. To the contrary, the letters from the franchisees that were included in EuroChem's May 3 response support EuroChem's assertion that there are other sources of urea available to these customers. *See EuroChem's May 3, 2011 response at Exhibit 2.*

The petitioners argue that EuroChem's assertions on their own were not enough for the Department's conclusion in the *Preliminary Results* and that, without any more information from EuroChem, the Department should determine EuroChem's franchisees are affiliates and calculate a margin based on facts available. EuroChem has thoroughly responded to each of our inquiries in a timely manner and, based on our examination of the record, we have not found evidence that EuroChem has concealed, withheld, or otherwise misrepresented any of the requested information. As to the petitioners' allegation that EuroChem has access to its franchisees' quantity and value data but failed to provide the Department with the requested information, the record demonstrates that EuroChem attempted to retrieve those data, but the franchisees denied EuroChem's request. *See EuroChem's April 13 response at Exhibit 2.* Clause 2.1.7 of the franchise agreement states that EuroChem is entitled to receive truthful information on the franchisee's production, financial, and commercial activities. We agree with EuroChem,

² *Proposed Rule*, 61 FR at 7310.

however, that the agreement does not state that EuroChem is entitled to *all* of the franchisees' confidential information. Nevertheless, even if the franchisees provided their quantity and value data to EuroChem and the data indicated that the franchisees receive a vast majority or all of the foreign like product from EuroChem, the Department has a history of recognizing that exclusivity arrangements that arise either through contractual provisions or market conditions do not automatically result in a finding of affiliation. Indeed, in *Steel Products from Korea*, the Department explained that exclusivity contracts are common commercial arrangements all over the world, which normally do not indicate control of one party over another. *See Steel Products from Korea*, 62 FR at 18441. *See also Dinnerware from Indonesia*, 62 FR at 1725-1726, *Alcohol from South Africa*, 62 FR at 61086, where we explained that a sole supplier relationship does not give rise to affiliation where there is no evidence of control. Thus, the petitioners' inference that franchise agreements grant EuroChem exclusive rights as a supplier of urea to its franchisees does not, on its own and under the Department's practice, automatically indicate control exists. The statute does not provide for the application of facts available when a respondent has provided complete and timely responses to the Department's request for information and the necessary information is on the record. *See* section 776(a) of the Act.

As for EuroChem's argument that an adverse inference is not acceptable in this review, at no point has the Department or the petitioners suggested an adverse inference be applied. The petitioners suggested that if the Department finds that EuroChem is affiliated with its franchisees but EuroChem cannot or does not provide the downstream sales data of the franchisees, the Department should rely on facts otherwise available on the record to calculate the franchisees' downstream sales prices. Because the Department has not determined affiliation exists, the point is moot.

For these reasons, the Department finds that our decision in the *Preliminary Results* was not premature or based on an incomplete record, contrary to the petitioners' assertions and the Department is satisfied that EuroChem is not affiliated with its franchisees.

2. Freight and Transportation Revenue

Comment 2: According to EuroChem, all revenue received for freight and transportation for sales of urea is related to the specific urea sales. Therefore, EuroChem argues, all freight and transportation revenue should be recognized in the dumping margin calculation.

The petitioners counter that EuroChem's position is unsupported. The Department's longstanding practice, the petitioners assert, is to treat freight-related revenues as offsets to movement expenses under section 773(c)(2)(A) of the Act, citing *2009-2010 Administrative Review of the Antidumping Duty Order on Solid Urea From Russia - Preliminary Results Analysis Memorandum for EuroChem* at 2. The petitioners explain that section 772(c)(1) of the Act permits the Department to increase U.S. price for three types of revenue: packing expenses, duty drawback, and U.S. countervailing duties imposed on the subject merchandise to offset export subsidies. Additionally, the petitioners explain, the Department's regulations require that it calculate U.S. price using a price that is net of any price adjustment that may be reasonably attributable to the subject merchandise. Citing *Certain Orange Juice from Brazil: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 73 FR 46584 (August 11,

2008) (*Orange Juice from Brazil*) and accompanying I&D Memo at Comment 7, and *Polyethylene Retail Carrier Bags from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 74 FR 6857 (February 11, 2009) (*PRCBs from the PRC*) and accompanying I&D Memo at Comment 6, the petitioners claim that the Department's long-standing practice has been to treat freight-related revenues as offsets to movement expenses under 773(c)(2)(A) of the Act because they relate to the movement of subject merchandise. Thus, the petitioners conclude, the Department's calculation was correct, as its practice is to treat freight revenue as an offset to movement expenses.

Department's Position:

We disagree that freight and transportation revenue items should be treated as price adjustments and added to U.S. price for purposes of calculating the net U.S. price. Section 772(c)(1) of the Act provides that the Department may increase the price used to establish EP or CEP in only the following three instances:

- (A) when not included in such price, the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the subject merchandise in condition packed ready for shipment to the United States,
- (B) the amount of any import duties imposed by the country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the subject merchandise to the United States, and
- (C) the amount of any countervailing duty imposed on the subject merchandise under subtitle A to offset an export subsidy.

Further, 19 CFR 351.401(c) directs the Department to use in calculating U.S. price a price which is net of any price adjustment that is reasonably attributable to the subject merchandise. The term "price adjustments" is defined under 19 CFR 351.102(b) as a "change in the price charged for subject merchandise or the foreign like product, such as discounts, rebates and post-sale price adjustments, that are reflected in the purchaser's net outlay."

In past cases, we have declined to treat freight-related revenues as additions to U.S. price under section 772(c) of the Act or as price adjustments under 19 CFR 351.102(b). Rather, we have incorporated freight-related revenues as offsets to movement expenses because they all relate to the movement and transportation of subject merchandise. See *Polyethylene Retail Carrier Bags From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review*, 73 FR 52282, 52285 (September 9, 2008), unchanged in *PRCBs from the PRC* and accompanying I&D Memo at Comment 6; *Orange Juice from Brazil* and accompanying I&D Memo at Comment 7; *Stainless Steel Wire Rod from Sweden: Preliminary Results of Antidumping Duty Administrative Review*, 72 FR 51411, 51415 (September 7, 2007), unchanged in *Stainless Steel Wire Rod from Sweden: Final Results of Antidumping Duty Administrative Review*, 73 FR 12950, 12952 (March 11, 2008); *Certain Steel Concrete Reinforcing Bars From Turkey: Preliminary Results of Antidumping Duty Administrative Review*, 67 FR 21634, 21636 (May 1, 2002), unchanged in *Certain Steel Concrete Reinforcing Bars From Turkey: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 67 FR 66110 (October 30, 2002).

Therefore, we have continued to treat the revenues in question as offsets to movement expenses in our calculations for the final results.

3. Imputed Credit Expenses

Comment 3: EuroChem argues that the calculated CEP profit rate should fully consider imputed expenses (e.g., credit) in determining the true profit rate because imputed costs are true costs, as the Department acknowledges in its calculation of net price and U.S. expenses.

The petitioners counter that EuroChem's argument is inconsistent with sections 772(d)(1)(B), 772(d)(3), and 772(f)(1) of the Act and the Department's long-standing practice, which is to calculate the CEP profit ratio based on actual, not imputed, expenses. The petitioners contend that the Department has stated that it relies on normal accounting principles to calculate "actual profit," which do not allow for inclusion of imputed expenses and explain that including imputed expenses would result in double counting and overstating the cost of the merchandise in question, citing *Notice of Final Determination of Sales at Less Than Fair Value: Live Swine From Canada*, 70 FR 12181 (March 11, 2005) (*Live Swine from Canada*).

Department's Position:

It is appropriate to base the CEP profit ratio on actual expenses, consistent with section 772(f)(1) of the Act. This provision directs the Department to calculate CEP profit based on "total actual profit." As stated in *Live Swine from Canada*, section 772(f)(1) of the Act directs the Department to calculate CEP profit based on "total actual profit." The Department relies on basic accounting principles to calculate "actual profit," and these principles do not allow for the inclusion of imputed expenses. See *Live Swine from Canada* and accompanying I&D Memo at Comment 65. In addition, because the Department includes in the cost of the U.S. and home market merchandise an amount for interest expenses, the inclusion of imputed interest amounts would result in double counting and overstate the cost attributable to sales of the merchandise under investigation. This overstatement of cost would understate the ratio of U.S. selling expenses to total expenses and, consequently, understate the amount of actual profit allocated to selling, distribution, and further manufacturing activities in the United States.

The Federal Circuit has upheld the Department's methodology with respect to the calculation and application of CEP profit. See *U.S. Steel Group v. United States*, 225 F.3d 1284, 1290 (CAFC August 20, 2000). Specifically, the Federal Circuit ruled that the statute "does not require or even vaguely suggest symmetry between the definitions of 'U.S. expenses' and 'total expenses.'" *Id.* Further, the Federal Circuit stated that the statutory definitions themselves "undercut symmetrical treatment of 'total U.S. expenses' and 'total expenses.'" *Id.* Further, the CIT "accepted the government's avoidance-of-double-counting theory." See *Ausimont S.p.A v. United States*, Slip Op. 01-92 at 21-22 (CIT August 2, 2001), citing *Thai Pineapple Canning Industry Corp., Ltd. v. United States*, Slip Op. 00-17 at 19-20 (CIT February 10, 2000).

Therefore, for the final results, we have continued to calculate the CEP profit rate based on actual revenues and expenses. Further, we have continued to apply this rate to the total CEP selling expenses to arrive at the per-unit amount of profit deducted from U.S. price.

4. Publication of Final Results

Comment 4: EuroChem explains that the final results of the 2008/2009 administrative review were published in August 2010. The final results of this review, EuroChem asserts, should be issued in a timely manner – if not August 2011 then as soon as possible thereafter.

The petitioners counter that there is no legal basis for EuroChem's argument as each review is a distinct segment and the Department's decision to extend the schedule of any review is based on the facts and issues specific to that review. Additionally, the petitioners explain, the Department should take as much of the statutorily permitted time it requires to complete the investigation and analysis of EuroChem's relationship with its home market distributors.

Department's Position:

The Department intends to adhere to the statutory and regulatory deadlines established by section 751(a)(3) of the Act and 19 CFR 351.213(h), which require the Department to complete its final results of review within 120 days of the date of publication of the *Preliminary Results*. Because the *Preliminary Results* were published on June 17, 2011, and the Department did not extend the deadline between the preliminary and final results, the Department is within its deadline for completing these *Final Results*.

5. Zeroing

Comment 5: EuroChem argues that the Department erroneously zeroed sales with negative dumping margins for the *Preliminary Results*. According to EuroChem it is inconsistent and contrary to the statute to continue zeroing in administrative reviews while abandoning the practice in investigations. EuroChem claims that two Federal Circuit decisions have found zeroing in administrative reviews unlawful.

The petitioners counter that the United States has not changed its policy with respect to zeroing in administrative reviews and, therefore, the Department correctly applied its zeroing policy. Furthermore, the petitioners maintain, even if the Department changed its zeroing policy with respect to reviews prior to these final results, it would have no impact on this review, citing *Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings*, 75 FR 81533 (December 28, 2010), where the Department stated that any proposed change would apply to all reviews pending before the Department for which the preliminary results are issued more than 60 business days after the date of publication of the Department's Final Rule and Final Modification. Therefore, the petitioners assert, any zeroing change would not apply to this review because the *Preliminary Results* have already been issued. Additionally, the petitioners cite Section 123(g) of the Uruguay Round Agreements Act (URAA), 19 U.S.C. § 3533(g), which states that a United States policy that is inconsistent with the URAA may not be amended, rescinded, or otherwise modified in implementation until the steps of the Section 123 process have been implemented. Because the Department has not issued its final rule, it may not modify its zeroing practice until that period is complete, the petitioners argue.

Furthermore, the petitioners contend, the Federal Circuit has not found zeroing unlawful, contrary to EuroChem's argument, but has simply remanded two cases to the Department for further explanation, referencing *Dongbu Steel Co, Ltd. v. United States*, 635 F.3d 1363, 1373 (Fed. Cir. 2011) and *JTEKT Corporation v. United States*, 642 F.3d 1378, 1384-1385 (Fed. Cir. 2011). Although the Department has not yet submitted its redetermination on remand, the petitioners point out that the Department explained its interpretation of section 771(35)(A) of the Act in *Certain Frozen Warmwater Shrimp From India: Final Results of Antidumping Duty Administrative Review, Partial Rescission, and Final No Shipment Determination*, 76 FR 41203 (July 13, 2011) and accompanying I&D Memo at Comment 1 and should continue to apply its zeroing methodology in these final results:

Department's Position:

In the underlying administrative review, the Department applied its normal methodology in administrative reviews of using average-to-transaction comparisons of normal value and EP or CEP and "zeroing" the results of such comparisons that show the weighted-average normal value did not exceed the transaction-specific EP or CEP.

Notwithstanding the fact that the Federal Circuit has squarely addressed the reasonableness of the Department's zeroing methodology in administrative reviews and has unequivocally held that zeroing is reasonable, the Department provides the following explanation concerning its interpretation of the statute to allow zeroing with respect to average-to-transaction comparisons in the underlying administrative review, while also allowing the Department not to zero with respect to average-to-average comparisons in antidumping duty investigations.

A. Background of Zeroing Methodology and Disputes

Section 771(35)(A) of the Act, which is the provision authorizing the Department to apply zeroing in antidumping duty proceedings, states that "{t}he term 'dumping margin' means the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." The Federal Circuit has held repeatedly that section 771(35)(A) of the Act is ambiguous as to whether the statute *requires* zeroing, stating that "Congress's use of the word 'exceeds' {in section 771(35) of the Act} does not unambiguously require that dumping margins be positive numbers." *Timken Co. v. United States*, 354 F.3d 1334, 1342 (Fed. Cir. 2004) (*Timken*) (emphasis added); *United States Steel Corp. v. United States*, 621 F.3d 1351, 1361 (Fed. Cir. 2010) (*US Steel*) ("the statute is silent as to what to do when the 'amount' calculated by Commerce pursuant to {section 771(35)(A) of the Act} is negative"). The Department has interpreted section 771(35) of the Act to permit zeroing in both administrative reviews and antidumping duty investigations. *See, e.g., Timken*, 354 F.3d at 1340. (in a challenge to the Department's use of zeroing in an administrative review the United States argued that "the plain meaning of the antidumping statute calls for Commerce to zero negative-margin transactions, and that the legislative history confirms this reading"), and *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification*, 71 FR 77722, 77722 (December 27, 2006) (*Final Modification For Investigations*) (demonstrating that, prior to changing its practice in

Department zeroed in average-to-average comparisons in investigations). The Federal Circuit has upheld this interpretation separately in the context of both antidumping duty investigations and administrative reviews as a reasonable resolution of statutory ambiguity concerning the treatment of comparison results that show normal value does not exceed EP or CEP. *See, e.g., Timken* (upholding the use of zeroing in an administrative review), *Corus Staal BV v. Dep't of Commerce*, 395 F.3d 1343 (Fed. Cir. 2005) (upholding the use of zeroing in an investigation), and *SKF USA Inc. v. United States*, 630 F.3d 1365, 1375 (Fed. Cir. 2011) (upholding the use of zeroing in an administrative review for which the final results were issued after the *Final Modification For Investigations* came into effect).

In 2005, a WTO dispute settlement panel found that zeroing in average-to-average comparisons³ in certain challenged antidumping duty investigations was inconsistent with the obligations of the United States under Article 2.4.2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994. *See United States - Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")* (WT/DS294/R) (circulated October 31, 2005) (*EC-Zeroing Panel*). In light of the adverse WTO decision and the ambiguity that the Federal Circuit found to exist in the statute, the Department abandoned its prior litigation position that there was no difference between antidumping duty investigations and administrative reviews for purposes of using zeroing in antidumping proceedings and departed from its long-standing and consistent zeroing practice by ceasing the use of zeroing in the limited context of average-to-average comparisons in antidumping duty investigations. *See Final Modification For Investigations*. The Department did not change its practice of zeroing with respect to other types of comparisons, including average-to-transaction comparisons in administrative reviews.⁴ *See Final Modification For Investigations*, 71 FR at 77724.

The Federal Circuit subsequently upheld the Department's decision to cease zeroing in average-to-average comparisons in antidumping duty investigations even while recognizing that the Department limited this change to certain investigations and continued to use zeroing when making average-to-transaction comparisons in administrative reviews. *See US Steel*, 621 F.3d at 1355 and n.2, 1362-1363. In upholding the Department's decision to cease zeroing in average-to-average comparisons in antidumping duty investigations, the Federal Circuit recognized that the Department likely would have different zeroing practices even between average-to-average and other types of comparisons in antidumping duty investigations. *Id.* at 1363 (stating that the Department indicated its intention to use zeroing in average-to-transaction comparisons in investigations to address concerns about masked dumping). The Federal Circuit's reasoning in upholding the Department's decision relied, in part, on differences between various types of comparisons in antidumping duty investigations and the Department's limited decision to cease zeroing only with respect to one comparison type. The Federal Circuit recognized that section 777A(d) of the Act permits different types of comparisons in antidumping duty investigations, allowing the Department to make average-to-transaction comparisons where certain patterns of

³ An average-to-average comparison is a comparison of "the weighted average of the normal values to the weighted average of the export prices (and constructed export prices) for comparable merchandise." Section 777A(d)(1)(A)(i) of the Act.

⁴ An average-to-transaction comparison is a comparison of "export price{ } (or constructed export price{ }) of individual transactions to the weighted average price of sales of the foreign like product." Section 777A(d)(2) of the Act.

significant price differences exist. *See US Steel*, 621 F.3d at 1362 (quoting sections 777A(d)(1)(A) and (B) of the Act, which enumerate various comparison methodologies that may be used in investigations), and section 777A(d)(1)(B) of the Act. Also, the Federal Circuit expressly recognized that the Department intended to continue to address targeted or masked dumping through continuing its use of average-to-transaction comparisons and zeroing. *US Steel*, 621 F.3d at 1363. Considering the statutory exception that permits the Department to use an average-to-transaction comparison methodology in antidumping duty investigations and, thereby, address targeted or masked dumping, the Federal Circuit addressed possible different interpretations of section 771(35) of the Act in stating that, “[b]y enacting legislation that specifically addresses such situations, Congress may just as likely have been signaling to Commerce that it need not continue its zeroing methodology in situations where such significant price differences among the export prices do *not* exist.” *See US Steel*, 621 F.3d at 1363 (emphasis added).

Therefore, to the extent that the Department interprets section 771(35)(A) of the Act differently for antidumping duty investigations using average-to-average comparisons than for investigations using other comparison methodologies and administrative reviews using average-to-transaction comparisons, the Department did not create the “inconsistency” in administrative reviews but, rather, when it adopted its *Final Modification For Investigations*.

B. The Department Reasonably Interpreted Section 771(35) of the Act

The Department’s interpretation of section 771(35) of the Act is a reasonable resolution of statutory ambiguity for multiple reasons. First, the Department has maintained, with one limited exception, a long-standing, judicially affirmed interpretation of section 771(35) of the Act pursuant to which the Department does not consider EP to be a dumped price where normal value is less than EP. Pursuant to this interpretation, the Department includes no (or zero) amount of dumping, rather than a negative amount of dumping, in calculating the aggregate weighted-average dumping margin. Second, the limited exception to this interpretation was not adopted as an arbitrary departure from established practice but was adopted, instead, in response to a specific international obligation the Executive Branch determined to implement pursuant to the procedures established by the URAA for such changes in practice with full notice, comment, and explanation thereof. Third, the Department’s interpretation reasonably resolves the ambiguity in section 771(35) of the Act in a way that accounts for the inherent differences between the result of an average-to-average comparison on the one hand and the result of an average-to-transaction comparison on the other.

1. The Department Used a Reasonable and Judicially-Affirmed Interpretation of Section 771(35) of the Act

For decades, the Department and the Courts have considered the use of zeroing an appropriate basis for determining antidumping duty margins. *See, e.g., PAM, S.p.A. v. U.S. Dept. of Commerce*, 265 F. Supp. 2d 1362, 1370 (CIT 2003) (*PAM*) (“Commerce’s zeroing methodology in its calculation of dumping margins is grounded in long-standing practice.”); *Timken; Bowe Passat Reinigungs-Und Waschereitechnik GmbH v. United States*, 926 F. Supp. 1138 (CIT 1996) (*Bowe Passat*); *Serampore Industries Pvt. Ltd. v. U.S. Dep’t of Commerce*, 675 F. Supp. 1354

(CIT 1987) (*Serampore*). During that time, the Courts held repeatedly that the statute does not speak directly to the issue of zeroing. See *Serampore*, 675 F. Supp. at 1360 (“A plain reading of the statute discloses no provision for Commerce to offset sales made at {less than fair value} with sales made at fair value . . . Commerce may treat sales to the United States market made at or above prices charged in the exporter’s home market as having a zero percent dumping margin.”); *Bowe Passat*, 926 F. Supp. at 1150 (“The statute is silent on the question of zeroing negative margins.”); *PAM*, 265 F. Supp. 2d at 1371 (The “gap or ambiguity in the statute requires the application of the *Chevron* step-two analysis and compels this court to inquire whether Commerce’s methodology of zeroing in calculating dumping margins is a reasonable interpretation of the statute.”). Time after time, the Courts have upheld as reasonable the Department’s interpretation of the statute to permit the use of zeroing. In doing so, the Courts have relied on the reason behind the Department’s use of zeroing, *i.e.*, to address the potential for foreign companies to undermine the antidumping laws by masking dumped sales with higher-priced sales. “Commerce has interpreted the statute in such a way as to prevent a foreign producer from masking its dumping with more profitable sales. Commerce’s interpretation is reasonable and is in accordance with law.” *Serampore*, 675 F. Supp. at 1361 (quoting *Certain Welded Carbon Steel Standard Pipe and Tube From India; Final Determination of Sales at Less Than Fair Value*, 51 FR 9089, 9092 (March 17, 1986)). See also *Timken*, 354 F.3d at 1343, and *PAM*, 265 F. Supp. 2d at 1371-1372.

2. Interpretation of Section 771(35) of the Act in Light of Zeroing Dispute

The WTO Settlement Body limited its initial adverse report to the Department’s use of zeroing with respect to average-to-average comparisons in antidumping duty investigations. See generally *EC-Zeroing Panel*, WT/DS294/R. The Executive Branch determined to implement this report pursuant to the authority provided in section 123 of the URAA (19 U.S.C. 3533(f) and (g)) (Section 123). See *Final Modification For Investigations*. Importantly, the Executive Branch undertook the Section 123 implementation process as a result of the Panel Report in *EC-Zeroing Panel*. See *Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin During an Antidumping Duty Investigation*, 71 FR 11189 (March 6, 2006). The Panel Report did not contain findings of WTO inconsistency with respect to the use of zeroing in any context other than average-to-average comparisons in antidumping duty investigations. In fact, the Panel Report rejected arguments by the European Communities that zeroing in administrative reviews was inconsistent with the WTO Agreements. See, *e.g.*, *EC-Zeroing Panel* at paras. 7.284 and 7.291. Without a finding of WTO-inconsistency in administrative reviews, the Department did not propose to alter its practice with respect to the use of zeroing in other contexts such as administrative reviews. As the Federal Circuit has held, when implementing an adverse WTO report, the Department has no obligation to take any action beyond that which is necessary for the Department to come into compliance. *ThyssenKrupp Acciai Speciali Terni S.p.A. v. United States*, 603 F.3d 928, 934 (Fed. Cir. 2010).

The WTO dispute settlement body’s findings with respect to the use of zeroing in average-to-average comparisons in antidumping duty investigations and the Department’s *Final Modification For Investigations* to implement those limited findings do not disturb the reasoning put forth by the Department and affirmed by the Federal Circuit in prior, precedential opinions upholding the use of zeroing when examining average-to-transaction comparisons in

administrative reviews as a reasonable interpretation of section 771(35) of the Act. *See, e.g., Timken*, 354 F.3d at 1343; *Corus Staal BV v. United States*, 502 F.3d 1370, 1372-1375 (Fed. Cir. 2007); *NSK Ltd. v. United States*, 510 F.3d 1375, 1379-1380 (Fed. Cir. 2007); *SKF USA, Inc. v. United States*, 537 F.3d 1373 (Fed. Cir. 2008). That the Department altered its interpretation of the statute in one limited context to implement a similarly limited finding supports the conclusion that the Department's alternative interpretation of an ambiguous statutory provision for that limited context should be affirmed consistent with the *Charming Betsy* doctrine.⁵ Even where the Department maintains its interpretation of the statute to permit the use of zeroing when determining antidumping margins, the *Charming Betsy* doctrine bolsters the ability of the Department to apply an alternative interpretation of the statute in the narrow context of average-to-average comparisons in antidumping duty investigations in order to come into compliance with its international obligations. Neither the provisions of Section 123 nor the *Charming Betsy* doctrine require the Department to modify its interpretation of section 771(35) of the Act for all scenarios when a more limited modification is all that is necessary to address the WTO findings that the Executive Branch has determined to implement.

These reasons alone are sufficient to justify and explain why it is reasonable for the Department to interpret section 771(35) of the Act differently for purposes of average-to-average comparisons in antidumping duty investigations compared with all other contexts.

3. *The Department's Interpretation Reasonably Accounts for Inherent Differences Between the Results of Distinct Comparison Methodologies*

Additional justifications exist, as well, to demonstrate the reasonableness of the Department's different interpretations of section 771(35) of the Act. Following the Department's *Final Modification For Investigations*, the Department interprets section 771(35) of the Act based upon the type of comparison methodology being applied in a particular type of proceeding. The Department considers that, among other things, its interpretation accounts for the inherent differences between the result of an average-to-average comparison on the one hand and the result of an average-to-transaction comparison on the other.

In particular, the Department considers that the use of the word "exceeds" in section 771(35)(A) of the Act can be interpreted reasonably in the context of the average-to-average comparisons made in antidumping duty investigations to permit negative comparison results to offset or reduce positive comparison results when calculating "aggregate dumping margins" within the meaning of section 771(35)(B) of the Act.⁶ When using an average-to-average comparison methodology, the Department usually divides the export transactions into groups, by model,

⁵ According to *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804) (*Charming Betsy*), "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country." The *Charming Betsy* doctrine supports the reasonableness of the Department's interpretation of the statute in the limited context of average-to-average comparisons in antidumping duty investigations as an interpretation of domestic law in a manner consistent with international obligations as understood in this country.

⁶ Section 771(35)(B) of the Act defines a weighted-average dumping margin as "the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer."

level of trade, or other factors⁷ (averaging groups), and compares an average EP or CEP of transactions within one group to an average normal value for the comparable model of the foreign like product at the same or most similar level of trade. In calculating the average EP or CEP and normal value for each averaging group, the Department averages together all prices, high and low, for directly comparable merchandise. The Department then compares the average EP or CEP for the averaging group with the average normal value for the comparable merchandise. This comparison results in an average amount of dumping for a particular group because the high and low prices within the group have been averaged together prior to the comparison. The Department does not calculate the extent to which any particular sales price was or was not dumped. The Department aggregates the results of these comparisons based on averaging groups to determine the weighted-average dumping margin. It is at this aggregation stage that negative comparison results offset positive comparison results; this is consistent with the Department's averaging methodology that permits prices above normal value to offset prices below normal value within each individual averaging group. Pursuant to the average-to-average comparison methodology, the determination of dumping is not made in relation to individual U.S. prices but, rather, is made "on average" for the comparison group.

In contrast, when applying an average-to-transaction comparison methodology such as the Department did in this administrative review, the determination of dumping is made necessarily in relation to individual U.S. sales prices. Under the average-to-transaction comparison methodology, the Department compares the EP or CEP for a particular U.S. transaction with the average normal value for the comparable model of foreign like product. This comparison methodology provides results that are specific to individual export transactions. The results of such a comparison demonstrate the amount, if any, by which the merchandise that was the subject of the transaction was sold at a price that is less than its normal value. The Department then aggregates the results of its comparisons, *i.e.*, the amount of dumping found for each individual sale, to calculate the weighted-average dumping margin for the POR. To the extent the average normal value does not exceed the individual EP or CEP of a particular U.S. sale, there is no dumping margin calculated for that sale and the Department does not include an amount of dumping for that sale in its aggregation of transaction-specific dumping margins.⁸ Thus, where the Department focuses on transaction-specific comparisons, as it did in this administrative review using average-to-transaction comparisons, the Department reasonably interprets the word "exceeds" in section 771(35)(A) of the Act not to permit negative comparison results to offset or reduce other positive comparison results when determining the "aggregate dumping margin" within the meaning of section 771(35)(B) of the Act.

Put simply, following the Department's *Final Modification For Investigations*, the Department has interpreted the application of average-to-average comparisons to contemplate a dumping analysis that examines the overall pricing behavior of an exporter with respect to the subject merchandise whereas, when using average-to-transaction comparisons such as in this

⁷ For example, although not a factor in this proceeding, in certain other proceedings the Department distinguishes between "prime" and "non-prime" merchandise.

⁸ The Department does account, however, for the sale in its weighted-average dumping margin calculation. The value of the sale is included in the denominator of the weighted-average dumping margin while no dumping amount for non-dumped transactions is included in the numerator. Therefore, a greater amount of non-dumped transactions results in a lower weighted-average dumping margin.

administrative review, the Department continues to undertake a dumping analysis that examines the pricing behavior of an exporter with respect to individual export transactions. Granting offsets for negative average-to-average comparison results is consistent with an examination of overall pricing behavior whereas the same reasoning does not apply to an examination of pricing behavior for individual export transactions.

With respect to how negative comparison results are treated in the calculation of the weighted-average dumping margin pursuant to section 771(35)(B) of the Act, for the reasons demonstrated above, it is reasonable for the Department to consider whether the comparison result in question is the product of an average-to-average comparison or an average-to-transaction comparison. Accordingly, the Department's interpretation of section 771(35) of the Act to allow the Department to use zeroing when making average-to-transaction comparisons, as was done in the underlying administrative review, and not use zeroing when making average-to-average comparisons, as the Department does in antidumping duty investigations, accounts for differences between comparison methodologies and, therefore, is reasonable.

Recommendation

Based on our analysis of the responses received, we recommend adopting all of the above positions. If these recommendations are accepted, we will publish the final results of reviews in the *Federal Register*.

Agree _____

Disagree _____

Ronald K. Lorentzen

Ronald K. Lorentzen
Deputy Assistant Secretary
for Import Administration

October 17, 2011

Date