

DATE: February 4, 2010

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

FROM: John M. Andersen
Acting Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

RE: Certain Lined Paper Products from India
(Period of Review: September 1, 2007, through August 31, 2008)

SUBJECT: Issues and Decisions for the Final Results of the Second
Administrative Review of the Antidumping Duty Order on Certain
Lined Paper Products from India (2007-2008) (Final Results)

Summary

We have analyzed the case and rebuttal briefs submitted by domestic interested parties and respondents.¹ As a result of our analysis, we have made changes from the preliminary results in the margin calculations. We recommend that you approve the positions described in the Discussion of Interested Party Comments, sections A and B, *infra*. Outlined below is the complete list of the issues in this review for which we have received comments from the interested parties.

I. Background

The Department of Commerce (the Department) initiated this administrative review of the antidumping duty order on certain lined paper products (CLPP) from India on October 29, 2008, for each of the aforementioned respondents. See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Deferral of Administrative Review, 73 FR 64305 (October 29, 2008). On October 7, 2009, the Department published in the Federal Register the preliminary results of the antidumping duty administrative review for CLPP from India. See Certain Lined

¹ Case briefs were filed November 20, 2009, by Navneet Publications (India) Ltd. (Navneet), and Blue Bird (India) Limited (Blue Bird); November 24, 2009, by the Association of American School Paper Suppliers (AASPS) (petitioner); and on November 25, 2009, by IScholar, Inc., (IScholar) an importer of subject merchandise from respondent Blue Bird. On December 4, 2009, petitioner and Navneet filed rebuttal briefs.

Paper Products From India: Notice of Preliminary Results of Antidumping Duty Administrative Review, 74 FR 51558 (October 7, 2009) (Preliminary Results).

In this review, we individually examined two manufacturers/exporters of the subject merchandise: Navneet and Blue Bird. As noted in the Preliminary Results, Blue Bird withheld requested information, significantly impeded the proceeding and failed to cooperate to the best of its ability. Therefore, pursuant to sections 776(a)(2)(A) and (C) and 776 (b) of the Tariff Act of 1930, as amended (the Act), the Department applied to Blue Bird an adverse facts available (AFA) rate of 72.96 percent, which was based on the highest margin preliminarily calculated for Navneet in this review. Based on changes made to the calculations between the preliminary and final results, the highest transaction-specific margin is now 72.03 percent. Although the margin itself has decreased slightly, the transaction at issue is the same in both the preliminary and final results. Our review of the individual transaction margins affirms that this rate is neither aberrational nor unusual in terms of transaction quantities or products.²

II. List of Comments

A. Blue Bird

B. IScholar

Comment 1: Whether the Transaction-Specific Margin Assigned to Blue Bird Is Aberrational

C. Navneet

Comment 2: Whether to Use the Invoice Date or Purchase Order Date for U.S. Sales

Comment 3: Navneet's Model Match Sub-Codes

Comment 4: Offset of Countervailing Duty Duties

Comment 5: Levels of Trade

Comment 6: Treatment of Merchandising Expense

Comment 7: Treatment of Negative Dumping Margins (Zeroing)

III. Discussion of Interested Party Comments

A. Blue Bird Comments

Blue Bird claims that the AFA rate chosen by the Department in the Preliminary Results is aberrational and that the Department's decision is contrary to statutory and court principles. Specifically, Blue Bird argues that the 72.96 percent AFA rate applied is actually that of another respondent, Navneet, whose confidential data was inaccessible to Blue Bird and whose margin would not have been known to Blue Bird at the time it concluded that it could no longer

² See Memo to File from The Team, International Trade Compliance Analyst, AD/CVD Operations 3, through James Terpstra, Program Manager, AD/CVD Operations 3, titled "Certain Lined paper Products from India: Notice of Preliminary Results of Antidumping Duty Administrative Review: Selection of Total Adverse Facts-Available Rate," dated September 30, 2009 (AFA Memo).

participate in this proceeding. Further, Blue Bird points out that the actual payer of the antidumping duties is the U.S. importer, to whom a 72.96 percent rate is hugely burdensome. Blue Bird argues that the 72.96 percent can be characterized as aberrational based on the following facts: (1) Navneet's period of review (POR) average dumping margin found in this review is 2.08 percent,³ which is 35 times less than the selected AFA rate; (2) the prior average non-adverse rate found in the original investigation was 3.91 percent; and (3) the highest calculated dumping margin that was previously used as an AFA rate under this antidumping order is 23.17 percent.

Blue Bird notes that the Preliminary Results cites to Magnesium Metal 2009,⁴ in which the Department used the respondent's own data for the adverse inference. However, Blue Bird contends that Magnesium Metal 2009 does not seem to support the Department's decision here to apply Navneet's highest dumping margin to Blue Bird.

Blue Bird also contends that the Department's decision in this review does not reflect its decision in the first administrative review where in order to avoid aberrational AFA dumping margins, the Department looked to the "mainstream of transactions – i.e., transactions that reflect sales of products that are representative of a broader range of models used to determine normal value."⁵ Conversely, by selecting a single sale of a specific product type with Navneet's highest dumping margin and applying it to Blue Bird, the Department's analysis does not seem to truly reflect the wide variety of subject merchandise covered in this review.

Blue Bird cites to Ta Chen,⁶ Magnesium Metal 2009, and Fresh Cut Flowers,⁷ contending that in excluding sales deemed aberrational, the Department only lists sales quantity and nature of product as factors considered in its Preliminary Results. Accordingly, Blue Bird further asserts that the Department wrongly did not consider price and cost adjustments which indicate that a sale is aberrational and that its dumping margin should not be used for AFA.

Blue Bird also cites the corroboration requirement in 19 U.S.C. § 1677e(c) and Ta Chen,⁸ arguing that Congress intended for an AFA rate to be a reasonably accurate estimate of the

³ This rate is also applied to the 22 other respondents covered in this review.

⁴ See Magnesium Metal From the Russian Federation: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 74 FR 39919 (August 10, 2009) (Magnesium Metal 2009); and Fresh Cut Flowers From Mexico: Final Results of Antidumping Duty Administrative Review, 61 FR 6812, 6814 (February 22, 1996) (Fresh Cut Flowers From Mexico).

⁵ See Certain Lined Paper Products from India: Notice of Final Results of the First Antidumping Duty Administrative Review, 74 FR 17149 (April 14, 2009), and the accompanying Issues and Decision Memorandum at Comment 2.

⁶ See Ta Chen Stainless Steel Pipe, Inc. v. United States, 298 F. 3d 1330, 1338 (Fed. Cir. 2002) (Ta Chen).

⁷ See Fresh Cut Flowers from Mexico, 61 FR at 6814.

⁸ Ta Chen, 298 F.3d at 1340.

respondent's actual rate, and not for the Department to use AFA to overreach reality in seeking to maximize deterrence.

According to Blue Bird, in selecting AFA rates based on transaction-specific margins, the Department typically considers rates that fall within a range of transaction-specific margins that include "a large portion" (e.g., a third) of the POR sales,⁹ but that in the instant case, the Department does not attempt to demonstrate that these court and statutory requirements are met. Thus, based on the aforesaid reasons, Blue Bird requests that the Department follow more closely both its own, and the court's, prior decisions regarding exclusion of aberrational sales.

Petitioner asserts that the Department's selection of the 72.96 percent rate fully comports with its prior practice, with the statute, and with applicable case law. Therefore, petitioner urges the Department to continue to assign Blue Bird the 72.96 percent rate in the final results.

Petitioner refutes Blue Bird's arguments as unpersuasive and unavailing. Specifically, petitioner disagrees with Blue Bird's claim that the AFA rate is self-evidently aberrational because it is far higher than Navneet's weighted average dumping margin. Petitioner disagrees with Blue Bird's claims that the highest transaction-specific dumping margin must be an aberration in Navneet's transaction-specific data merely because it is Navneet's highest transaction-specific dumping margin. Petitioner argues that Navneet's transaction-specific dumping margins show that the highest margin did not differ significantly from other transaction-specific margins; rather, it was simply the end-point of a basically smooth continuum of dumping margins. Therefore, petitioner maintains that the Department's selected margin is non-aberrational.

Regarding Blue Bird's argument that Navneet's highest transaction-specific margin in this review is significantly higher than the transaction-specific margin experienced by a different company in the initial investigation, petitioner refutes it as meaningless. Petitioner asserts that nothing in the Act limits the Department, in selecting an AFA rate, to the rates it has chosen before. Citing Universal Polybag,¹⁰ petitioner asserts that the Court of International Trade (CIT) finds that there is no numerical limit to the AFA rate that the Department may choose, so long as the rate is both relevant and reliable.

With respect to Blue Bird's reference to the CIT's decision in Acciai,¹¹ claiming that the rate is aberrational because it did not fall within "a large portion (e.g., a third)" of Navneet's transaction-specific margins, petitioner counters that the CIT simply found that the Department

⁹ See Hyundai Elec. Indus. Co., Ltd. v. United States, 395 F. Supp 2d 1231, 1235-36 (Ct. Int'l Trade 2005) (Hyundai).

¹⁰ See Universal Polybag Co., Ltd. v. United States, 577 F. Supp. 2d 1284, 1301 (Ct. Int'l Trade 2008) (Universal Polybag).

¹¹ See Acciai Speciali Terni S.p.A. v. United States, 142 F. Supp. 2d 969, 989-90 (Ct. Int'l Trade 2001) (Acciai), where the CIT quoted the Department's final determination, in which it explained its selection of a certain transaction-specific margin as an AFA rate because it was the highest margin of a group of data accounting for 28 percent of the respondent's sales. Petitioner claims that the Court neither approved nor disapproved this means of selecting a rate. Rather, the Court simply found that the Department must ensure that all statutorily-dictated adjustments to export price and normal value were made in calculating the transaction-specific margin.

must ensure that all statutorily-dictated adjustments to export price and normal value were made in calculating the transaction-specific margin. Accordingly, petitioner argues that Blue Bird cannot legitimately cite this case as support for its proposition that Navneet's highest transaction-specific margin is aberrational. With regard to Blue Bird's reference to the CIT decision in Hyundai, petitioner counters that the CIT simply requires that the Department not corroborate a selected AFA rate by means of an outlier (i.e., a value that deviates markedly from all other values in a given data set). Petitioner argues that in the current review, the Department chose an AFA rate with a margin that was similarly within a sequence of margins that decreased by small amounts, which is consistent with Hyundai.

Regarding Blue Bird's claims that the product involved in Navneet's highest margin are not representative of a broader range of models used to determine normal value, petitioner counters that Navneet's data show that the merchandise at issue accounts for a majority of Navneet's sales during the POR. Therefore, petitioner maintains that there is no reason to believe that the rate selected by the Department relates to a non-representative product.

With respect to Blue Bird's argument that the Department unlawfully failed to examine, pursuant to Ta Chen, whether price and cost adjustments rendered the sale generating the highest margin aberrational, petitioner counters that neither the preliminary results nor the cost memorandum for Navneet indicate that any adjustments were made that would render Navneet's data either aberrational in general or with specific reference to the sale generating the highest margin. Petitioner also refutes Blue Bird's argument that its failure to participate should not be taken as an indication that its actual dumping margin would have been as high as 72.96 percent, had it cooperated. Petitioner points out that the Department has no usable data from Blue Bird, in either this or any other segment of the proceeding, upon which to calculate a margin, or even to estimate what Blue Bird's likely dumping margin would have been had it cooperated. Because Blue Bird-specific data is lacking, petitioner argues that the Department's selection of an adverse margin based on primary information provided by a cooperative respondent in this review is a valid practice in accordance with AASPS,¹² and is fully compliant with the Act, applicable precedent, and the Department's practice. Therefore, petitioner urges the Department to continue to apply the same AFA rate for the final results.

B. IScholar Comments

IScholar also claims that the Department wrongly chose an aberrational AFA rate in the Preliminary Results. IScholar does not challenge the Department's decision of applying an AFA rate to Blue Bird. However, IScholar argues that the 72.96 percent transaction-specific margin that was assigned to Blue Bird is aberrational because it is based on an unusually low quantity.

¹² See Ass'n of Am. Sch. Paper Suppliers v. United States, CIT Slip Op. 08-122 (November 17, 2008) (AASPS), where the CIT upheld the application of a transaction-specific margin of 23.17 percent calculated for one respondent as an appropriate selection of AFA rate for a different non-responsive respondent. In its decision, CIT noted that "Commerce was exercising its discretion as permitted by the statute and was attempting to 'balance the statutory objectives of finding an accurate dumping margin and inducing compliance, rather than creat{e} an overly punitive result.'" See id. at 13. IScholar claims that the CIT also emphasized that the quantity involved in the transaction that gave rise to the rate was "representative of the broader range of models used to determine normal value." See id. at 14.

IScholar also argues that the “exorbitant” AFA rate assigned to Blue Bird not only exceeds any rate that the Department has ever assigned to any non-cooperative respondent in any segment of the proceeding, but that it is so punitive that it threatens the continued existence of IScholar, which is a small U.S. company that is not affiliated with Blue Bird.

IScholar asserts that the Department has engaged in only the most cursory and conclusory analysis possible to determine whether the transaction that gave rise to the 72.96 percent rate is aberrational. Specifically, IScholar cites the Department’s statement which indicates that it will reject a rate as aberrational “if the highest margin involves a transaction with an unusually small quantity or involves an unusual product.” Although the Department did not reject this AFA rate in the Preliminary Results because it found that “none of these factors are present for the margins in this review,” IScholar argues that evidence shows otherwise. In particular, IScholar argues that the quantity of the sale selected for the AFA rate is below the average sales quantity for the entire POR. IScholar further argues that the quantity for the five transactions with the highest margins is substantially below the average sales quantity for the entire POR. In addition, IScholar argues that the quantity for the five transactions with the lowest margins exceeds the average quantity per transaction of the five transactions with the highest margins. Therefore, IScholar contends that the Department’s conclusion that the transaction that gave rise to the 72.96 percent rate is not aberrational is highly suspect and unsupported by substantial record evidence.

Citing AASPS, IScholar urges the Department to choose a more reasonable rate, suggesting 23.27 percent as the AFA rate for the final results of this review because the rate was previously applied during a prior review, and because it was upheld by the CIT as an appropriate selection of an AFA rate.

Petitioner asserts that IScholar’s arguments are not persuasive. Petitioner further refutes IScholar’s assumption that transaction quantities are aberrational if they differ from the “average,” claiming that such an assumption is not supported by either statistics or basic logic. Petitioner also argues that the sales with the highest transaction-specific margins are clearly not an aberrational quantity of merchandise. To support its arguments, petitioner notes that Navneet’s sales data for the POR demonstrates a wide range of sales quantities, that some of the small transaction quantities generated negative dumping margins, and that all of the sales generating the five highest margins reflected typical quantities of merchandise.

In addition, petitioner contends that these smaller quantities of merchandise are not present only in the transactions with the highest dumping margins, but rather, throughout the entire data set, including the transaction generating the very lowest (negative) dumping margin. Further, petitioner points out that IScholar’s analysis relies entirely on an average quantity that is already skewed by the presence of a few very high volume sales. Petitioner also notes that IScholar’s analysis ignores the fact that Navneet sells its products not by weight, but in pieces. As a result, a low-weight sale may involve a significant number of pieces. Thus, petitioner argues that IScholar has not presented the Department with any persuasive reason to abandon the 72.96 percent margin selected in the Preliminary Results.

Department's Position:

As detailed in the Preliminary Results, because Blue Bird failed to act to the best of its ability to comply with the Department's request for information, we applied an AFA rate to Blue Bird.¹³ Neither Blue Bird nor IScholar challenges the Department's decision to resort to an AFA rate; rather, their arguments characterize the selected AFA rate of 72.96 percent as aberrational. For the reasons discussed below, we disagree with Blue Bird's and IScholar's claims that the selected AFA rate is aberrational and that the Department's selection of this particular AFA rate is contrary to statutory and court principles as well as the Department's own practice.

In the Preliminary Results, the Department indicated that Blue Bird did not submit any responses to the Department's Sections B through D questionnaire even though it received three extensions. By failing to respond to the Department's requests, Blue Bird withheld requested information and significantly impeded the proceeding. Accordingly, the Department's preliminary finding that the use of facts available for Blue Bird is appropriate remains consistent with sections 776(a)(2)(A) and (C) of the Act.¹⁴

Section 776(b) of the Act provides that if the Department finds that an interested party fails to cooperate by not acting to the best of its ability to comply with requests for information, the Department may use an inference that is adverse to the interests of that party in selecting from the facts otherwise available.¹⁵ Although the Department must establish the party's failure to cooperate before applying an AFA rate, "affirmative evidence of bad faith on the part of a respondent is not required before {it} may make an adverse inference."¹⁶ In the Preliminary Results, the Department concluded that Blue Bird failed to cooperate by not acting to the best of its ability. For the reasons stated in the Preliminary Results, the Department continues to find that Blue Bird failed to cooperate by not acting to the best of its ability.

In selecting the AFA rate, section 776(b) of the Act provides that the Department may generate the AFA rate using information from: (1) the petition; (2) the final determination in the investigation; (3) any previous review; or (4) any other information placed on the record.¹⁷

¹³ Due to a change in Navneet's margin calculations, Blue Bird's AFA rate in these final results changed. See Comment 3, below.

¹⁴ Section 776(a) of the Act provides that the Department will apply "facts otherwise available" if, inter alia, necessary information is not available on the record or an interested party: (1) withholds information that has been requested by the Department; (2) fails to provide such information within the deadlines established, or in the form or manner requested by the Department, subject to subsections (c)(1) and (e) of section 782 of the Act; (3) significantly impedes a proceeding; or (4) provides such information, but the information cannot be verified.

¹⁵ See also India Lined Paper AR1 Final; Notice of Final Results of Antidumping Duty Administrative Review: Stainless Steel Bar from India, 70 FR 54023, 54025-26 (September 13, 2005); and Notice of Final Determination of Sales at Less Than Fair Value and Final Negative Critical Circumstances: Carbon and Certain Alloy Steel Wire Rod from Brazil, 67 FR 55792, 55794-96 (August 30, 2002).

¹⁶ See Antidumping Duties; Countervailing Duties; Final Rule, 62 FR 27296, 27340 (May 19, 1997) (AD/CVD Final Rule); see also Nippon Steel Corp. v. United States, 337 F.3d 1373, 1382-83 (Fed. Cir. 2003) (Nippon).

¹⁷ See Gallant Ocean (Thailand) Co., Ltd. v. United States, 602 F. Supp. 2d 1337, 1344 (Ct. Int'l Trade 2009).

Crucially, adverse inferences are appropriate “to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.”¹⁸ Indeed, the Federal Circuit and the CIT have recognized that the adverse facts available rule serves as an incentive for respondents to participate in administrative reviews.¹⁹ Accordingly, the Department’s practice, when selecting an AFA rate from among the possible sources of information, has been to ensure that the margin is sufficiently adverse “as to effectuate the statutory purposes of the adverse facts available rule to induce respondents to provide the Department with complete and accurate information in a timely manner.”²⁰

In this case, Blue Bird did not provide any sales and cost information to the Department and therefore, the Department cannot rely on Blue Bird’s data to derive an AFA rate.²¹ While the Department generally uses the highest weighted-average margin on the record of the proceeding as total adverse facts available, the Department nonetheless has the discretion of using a transaction-specific margin of a company to establish total AFA rates where it finds it to be appropriate under section 776(b) of the Act.²² Accordingly, and consistent with AASPS, the Department has exercised its discretion here and assigned to Blue Bird the highest transaction-specific rate calculated for Navneet in this review. We believe the selection of this rate represents a more reasonable approach than selecting a transaction-specific margin calculated in a previous segment of this proceeding, *i.e.*, the investigation or previous review. Since the selected rate is not secondary information, we do not have to corroborate this rate pursuant to section 776(c) of the Act. The Department finds that this rate is sufficiently high to ensure that the respondent does not benefit from its failure to cooperate and to encourage participation in future segments of this proceeding in accordance with section 776(b) of the Act.

Pursuant to Magnesium Metal 2009, in selecting this particular transaction-specific margin to use as the AFA rate, the Department has analyzed the underlying transaction to ensure that it is not

¹⁸ See Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Rep. No. 103-316, Vol. 1, at 870 (1994) (SAA), reprinted in 1994 U.S.C.C.A.N. 4040, 4198-99; accord Ta Chen Stainless Steel Pipe Inc. v. United States, 24 CIT 841, 848, 850 (Ct. Int’l Trade 2000).

¹⁹ See, PAM, S.p.A. v. United States, 582 F.3d 1336, 1340 (Fed. Cir. 2009) (“the possibility of a high AFA margin creates a powerful incentive to avoid dumping and to cooperate in investigations”); F.lli De Cecco Di Filippo Fara S. Martino S.p.A. v. United States, 216 F.3d 1027, 1032 (“the purpose of section {776(b)} is to provide respondents with an incentive to cooperate . . .”).

²⁰ See, *e.g.*, Certain Steel Concrete Reinforcing Bars From Turkey; Final Results and Rescission of Antidumping Duty Administrative Review in Part, 71 FR 65082, 65084 (November 7, 2006).

²¹ We disagree with Blue Bird’s argument which suggests that its failure to participate should not be taken as an indication that its actual antidumping duty margin, should it have participated, would have been as high as 72.96 percent. As petitioner noted, the Department has no usable data from Blue Bird, in either this or any other segment of the proceeding, upon which to calculate a margin, or even to estimate what Blue Bird’s likely dumping margin would have been had it cooperated. Because Blue Bird-specific data is not available, the Department’s selection of an adverse margin based on primary information provided by a cooperative respondent in this review is a valid practice in accordance with AASPS.

²² See Magnesium Metal From the Russian Federation: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 74 FR 39919 (August 10, 2009), and the accompanying Issues and Decision Memorandum.

aberrational. Specifically, the Department examined the individual transaction-specific margin for the entire POR sales to the United States made by Navneet. Our review of the individual transaction margins affirms that this rate is neither aberrational nor unusual in terms of transaction quantities or products. See the AFA Memo.

Regarding Blue Bird's claim that the AFA rate can be characterized as aberrational because it is far higher than Navneet's weighted average dumping margin, we disagree. First, we note that a review of Navneet's data shows that the highest margin did not deviate significantly from other transaction-specific margins. We agree with petitioner that this particular rate was simply the end-point of relatively similar dumping margins whose pattern continues throughout the database. This is relevant in that sometimes in our analysis we find one margin that is significantly higher than all of the other calculated margins; in such instances, we may consider the transaction aberrational.²³ Therefore, the Department's selected margin cannot be characterized as aberrational on the basis of its size alone.

Second, we note that in determining whether a transaction-specific margin is aberrational, the correct focus is not on the size of the margin, but rather, on the underlying transaction resulting in that margin. In the instant case there is nothing to suggest that the selected transaction is aberrational vis-à-vis the dataset.²⁴ We disagree with Blue Bird's claims that the Department's decision in this review does not reflect its decision in the first administrative review because the product involved in Navneet's highest margin is not representative of a broader range of models used to determine normal value. Similarly, we disagree with Blue Bird's claim, which relies on Acciai and Hyundai, that the selected AFA rate is aberrational because it did not fall within "a large portion (e.g., a third)" of Navneet's transaction-specific margins. Contrary to Blue Bird's claims, we find that the highest transaction-specific rate involved the most commonly sold and therefore, the most representative product in Navneet's data base. In fact, this product accounts for a majority of Navneet's sales during the POR.

Furthermore, neither Acciai nor Hyundai stand for the proposition that the selected AFA rate must fall within a large portion of the respondent's transaction-specific margins. In Acciai, as petitioner noted, the CIT simply found that the Department must ensure that all statutorily-dictated adjustments to export price and normal value were made in calculating the transaction-specific margin. Thus, the CIT decision does not support Blue Bird's proposition that Navneet's highest transaction-specific margin is aberrational. With regard to the CIT decision in Hyundai, we note that the CIT simply requires that the Department not corroborate a selected AFA rate by means of an outlier. In the current review, the Department chose an AFA rate margin that was similarly within a sequence of margins which is therefore, consistent with Hyundai.

²³ In Hyundai, the CIT approved the Department's corroboration of an AFA rate by means of a transaction-specific margin that fell within a sequence of transaction-specific margins that decreased steadily by small amounts. See 395 F. Supp 2d at 1235-36.

²⁴ See Ta Chen Stainless Steel Pipe Inc., 24 CIT at 848-49 (quoting National Steel Corp. v. United States, 929 F. Supp. 1577, 1580 (Ct. Int'l Trade 1996) (noting that there was "nothing to indicate that the sales with {the selected} margin were not 'transacted in a normal manner.'").

We also disagree with Blue Bird's reference to Ta Chen and claim that the Department only considered sales quantity and nature of product but not the price and cost adjustments that indicate a sale is aberrational. As evidenced in the Preliminary Results and the cost memorandum for Navneet, we noted that no adjustments were made which would render Navneet's data either aberrational in general or with specific reference to the sale generating the highest margin.

In its case brief, IScholar asserts that the transaction-specific margin that was assigned to Blue Bird is aberrational because it is based on an unusually low quantity. IScholar argues that the quantity of this transaction is substantially below the average sales quantity for the entire POR. Further, IScholar points out that the average quantity of the five sales with the highest margins is also very low in comparison to the average quantity of the POR sales and therefore claims that the transactions generate higher margins which are aberrational. We disagree with IScholar's arguments, which are primarily focused on the issue of average quantity. While we often use averages as benchmarks in our analysis, we find that the average of sales quantity is not a useful indicator in this case because the sales database at issue is characterized by a small number of sales with very large quantities, and a large number of sales with medium to small quantities.

Further, we find that the quantity of the transaction with the highest margin is not aberrational because there are significant numbers of sales with similarly small quantities.²⁵ In addition, we find that these smaller quantities of merchandise are not present only in the transactions with the highest dumping margins; rather, they appear throughout the data set, including the transaction generating the very lowest (negative) dumping margin. In fact, we note that all of the sales generating the five highest margins reflect typical quantities of merchandise. In other words, we find no clear correlation in this dataset between quantity and margin. Furthermore, as noted above, the overall average sales quantity for Navneet is skewed by the presence of a few very high volume sales during the POR. After closely examining the dataset, the Department finds that IScholar's arguments are not persuasive.

Based on the foregoing, we find that our selection of a transaction-specific margin is fully compliant with the Act, applicable precedent, and the Department's practice. Neither Blue Bird nor IScholar has provided convincing arguments which warrant that the Department reject the highest transaction-specific margin as AFA. Therefore, the Department continues to apply the highest transaction-specific margin as the AFA rate for the final results.

C. Navneet Comments

Comment 2: Whether to Use the Invoice Date or Purchase Order Date for U.S. Sales

Petitioner states that Navneet's reporting of the purchase order date as the U.S. date of sale in the current review is a departure from the company's position in the original investigation, where it reported invoice date as its U.S. date of sale. However, petitioner argues that the record in the

²⁵ See Notice of Final Results of Antidumping Duty New Shipper Review: Certain Welded Carbon Steel Pipe and Tube from Turkey, 71 FR 43444 (August 1, 2006), and accompanying Issues and Decision Memorandum at Comment 1 ("single sales, even those involving small quantities, are not inherently commercially unreasonable and do not necessarily involve selling practices atypical of the parties' normal selling practices.").

instant review demonstrates that, in certain cases, Navneet's customers altered the material terms of sale after the initial purchase order by changing the quantity of certain items or by canceling certain items, both of which the Department considers to be material terms of sale. Specifically, petitioner claims that there were eight instances in which the quantity of merchandise sold changed after an initial purchase order was issued. In five of these instances, the purchase orders were canceled and documentation collected at the Department's verification showed three instances where either price changed or the quantity of a specific product was adjusted. Thus, petitioner argues that because there were changes in a material term of sale between the purchase order date and the invoice date, the invoice date better reflects the date on which all material terms of sale were established.

Moreover, petitioner asserts that these purchase orders did not establish any kind of quantity tolerance that would justify changes in the material terms of sale. Petitioner claims that in prior cases, the Department has found that changes in quantity beyond tolerances established in contracts, purchase orders, or other documentation indicates that these documents do not establish the date of sale. Petitioner cites to Hot-Rolled Carbon Steel Flat Products from Thailand,²⁶ where the Department rejected the use of contract date as the date of sale because the quantity of merchandise shipped was outside of contract tolerances. In the instant case, petitioner argues that Navneet has admitted that its purchase orders do not specify acceptable tolerances within which quantity may change. Thus, petitioner contends that Navneet's purchase orders have a quantity tolerance of zero, and that all quantity changes after the purchase order date indicate a true change in the material terms of sale. Therefore, petitioner argues that the Department should use the invoice date as the U.S. date of sale in calculating the antidumping duty margin for Navneet in the final results.

Navneet contends that in the instant case, the purchase order date for its U.S. sales better reflects the date on which the material terms of sale were established because the product, price, and quantity are agreed to at the time of the purchase order, and because there is a significant time lapse between the order date and the invoice date. Thus, Navneet argues that, under established Department precedent, the purchase order date is the appropriate date of sale for Navneet's U.S. sales.

Navneet disagrees with petitioner's argument that the five canceled sales and the three short ton shipments are modifications to the essential terms of sale. Navneet states that the one settled exception to the use of the order date pointed out by petitioner is not applicable in this case since the factual basis for the exception does not exist. Navneet states that the five canceled transactions referred to by petitioner involved a single product for which the customer had previously placed five purchase orders corresponding to five delivery locations, thus, there was in fact only a single instance of a cancellation of a product during the POR. Navneet contends that petitioner mischaracterizes the three additional instances of modification as post order-date changes. Navneet argues that the change in quantity was not a change in the ordered quantity, but was instead the result of external restraints, *i.e.*, insufficient space in the shipping container,

²⁶ Certain Hot-Rolled Carbon Steel Flat Products from Thailand: Final Results of Antidumping Duty Changed Circumstances Review and Reinstatement in the Antidumping duty Order, 74 FR 22885 (May 15, 2009) (Hot-Rolled Carbon Steel Flat Products from Thailand).

that made shipment of the full quantity impossible. Moreover, the “short” quantity did not change or breach the contract terms because the parties’ agreement accounted for such shipping contingencies by allowing for a 10 percent delivery tolerance on the customer’s entire purchase. Navneet states that in Hot-Rolled Carbon Steel Flat Products from India,²⁷ the Department found that the order date is appropriate for sales made directly to U.S. customers where the Department verified that the date of the order was the date that established the material terms of sale and there were no changes afterwards. Likewise, Navneet argues that the Department verified that there were no instances in this case where the price or the quantity of a specific product was changed. Thus, Navneet contends that the Department should confirm its preliminary finding to use the order date as the date of sale for Navneet’s U.S. sales.

Department’s Position:

The Department continues to find that the purchase order date is the appropriate date of sale for Navneet’s sales to customers in the United States. The regulation governing date of sale determinations, 19 CFR § 351.401(i), states the following:

In identifying the date of sale of the subject merchandise or foreign like product, the Secretary normally will use the date of invoice, as recorded in the exporter or producer’s records kept in the ordinary course of business. 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.

The regulation makes clear that while the date of invoice is the preferred date of sale, the Department will consider a different date if it is satisfied that the material terms of sale are established on a date other than the invoice date. In determining the date of sale, the Department considers which date best reflects the date on which the exporter/producer establishes the material terms of sale (e.g., price and quantity).

In the instant case, the ordering process for Navneet’s sales to the U.S. market has two phases: the provision of the tender by the potential customer, and the receipt of a purchase order from the customer. The questionnaire response states that after the purchase order date, changes relating to order quantity and price normally do not occur. However, during the POR there was a small percentage of the total sales volume that changed between the date of order and the date of shipment because of order cancellations and short quantity shipments. See Supplemental Questionnaire Response dated May 26, 2009 at page S-10, and Second Supplemental Questionnaire Response dated July 1, 2009 at page 2S-13. At verification, we reviewed the information in the questionnaire responses as well as documents relating to the transactions, and reported that we saw no discrepancies regarding the aforementioned statements. See Sales Verification Report.²⁸ The Department is not precluded from using the purchase order date

²⁷ Certain Hot-Rolled Carbon Steel Flat Products From India: Notice of Final Results of Antidumping Duty Administrative Review, 73 FR 31961 (June 5, 2008) (Hot-Rolled Carbon Steel Flat Products from India), and accompanying Issues and Decision Memorandum at Comment 2.

²⁸ See Memorandum to the File through Melissa Skinner and James Terpstra from Stephanie Moore and Cindy Robinson, Case Analysts Regarding Verification of the Sales Response of Navneet Publications (India) Ltd., in the

simply because Navneet reported its U.S. sales based on the date of invoice during the original investigation, which is not binding on the Department's finding in subsequent segments of the proceeding. Indeed, the Department has noted that each review is "a separate reviewable segment of the proceeding involving different sales, adjustments, and underlying facts" and that "{w}hat transpires in previous reviews is not binding precedent in later reviews."²⁹

Furthermore, we find that the facts in this case are different from those articulated in Hot-Rolled Products from Thailand case. In Hot-Rolled Products from Thailand, the Department found that a respondent, Sahavariya Steel Industries Ltd., (SSI) had multiple contracts, representing multiple sales, with final shipment quantities that fell outside of the quantity tolerance specified on the final contract terms. Given the departure from these contracts in a material term of sale, i.e., quantity, the outside-of-tolerance sales were meaningful to Commerce's date of sale analysis. Consequently, the Department relied upon the invoice date as the appropriate date of sale for SSI's U.S. sales. In the instant case, we do not consider the complete cancellation of purchase orders by the same customer to constitute change to a material term of sale. We also do not consider the three short shipments to be outside of the quantity tolerance specified on the final contract terms because proprietary documents, including invoices and other shipping documents reviewed at verification, show that such shipments were within the +/-10 percent quantity tolerance. Moreover, we also find that the overall quantity difference does not exceed the established 10 percent tolerance. We disagree with petitioner's comment that the information was not verified because the documentation was not collected. We do not collect every document that is reviewed at verification as an exhibit. Thus, based upon the aforementioned, the Department's use of the purchase order date for the U.S. sales date remains unchanged from the preliminary results.

Comment 3: Navneet's Model Match Sub-Codes

Petitioner claims that Navneet altered its responses to the Department's model match criteria by creating four new sub-codes under the COVMATH/U AND BACKMATH/U fields without explanation, description, or justification for these deviations from the accepted list of physical characteristics.

Citing the Department's rejection of its own proposed model match changes,³⁰ petitioner contends that changes to the model match criteria must be proposed at the outset of an administrative review so that all parties can review and comment on the proposed changes. Petitioner claims that in prior proceedings³¹, the Department notified the public, in the Product

Antidumping Review of Certain Lined Paper Products from India, dated August 17, 2009, at pages 8 and 9, and Exhibits VE-5 and VE-12.

²⁹ See Fresh Garlic From the People's Republic of China: Final Results of Antidumping Administrative Review and Rescission of New Shipper Review, 67 FR 11283 (March 13, 2002), and accompanying Issues and Decision Memorandum at Comment 3.

³⁰ See Preliminary Results, 74 FR at 51561 (where the Department rejected petitioners request for a change in model match methodology, which was submitted six months after the initiation of the review and less than one month before the scheduled date of the preliminary results).

³¹ See Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products from Korea: Preliminary Results of Antidumping Duty Administrative Reviews, 64 FR 48767, 48769 (September 8, 1999), Notice of Final

Comparison section of the Preliminary Results that new sub-codes had been proposed, and indicated whether the agency had preliminarily accepted those codes. In those prior proceedings, the Department conducted an analysis of the proposed sub-codes, based on comments received after the preliminary results, prior to accepting the change in the final results. In the current case, however, petitioner argues that the record lacks any information, such as price or cost differences, which would allow the Department to properly evaluate Navneet's distinctions between types of cover material and Navneet's proposed sub-codes. In addition, the record also lacks any analysis of the new sub-codes that would permit a party to understand why they have been incorporated into the Department's model match criteria.

Petitioner asserts that the documentation on the record and the documentation reviewed by the Department at verification only speaks to the accuracy with which Navneet classified items under the newly proposed sub-codes, and not to whether those proposed sub-codes should exist in the model match hierarchy. Further, petitioner argues that neither the Preliminary Results nor the Department's preliminary calculation memorandum for Navneet contain any analysis of Navneet's proposed sub-codes, despite their having been used in calculating Navneet's preliminary margin. Therefore, petitioner argues that the Department should recode these unsupported model match changes and "re-average" the reported costs.

Navneet argues that petitioner's objection to Navneet's product characteristics coding for cover materials is factually inaccurate, legally unfounded, and filed too late in the proceeding to be considered by the Department. Navneet states that the Department's questionnaire not only established a coding system for the reporting of product characteristics, but also instructed Navneet to add to the list any type of material that it used that was not on the Department's list, and to provide corresponding codes. See Department's Questionnaire to Navneet dated January 9, 2009, at B-11 and C-9. Furthermore, Navneet contends that at verification, the Department examined the product coding in detail, and noted no discrepancies with respect to these items. Thus, Navneet argues that it would be wrong for the Department to accede to petitioner's argument and reject Navneet's coding solely to obtain a higher margin.

Navneet contends that the Department's treatment of petitioner's own attempted coding change does not require rejection of Navneet's cover material codes. According to Navneet, petitioner's proposal was a unilateral attempt to change the coding ranges, and the Department rightly rejected the proposal as a substantial change that was both offered too late and uninvited. In contrast, in the instant case, Navneet complied with the Department's request to add any cover materials missing from the list of product characteristics, thereby increasing accuracy and reducing distortion by providing accurate identification of previously unidentified cover materials.

Navneet contends that Department precedent supports the acceptance of Navneet's additional cover material codes. Contrary to petitioner's assertions, Navneet asserts that the Department has the discretion to accept model-match changes without an affirmative presentation of

Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip in Coils from France, 64 FR 30820, 30821-22 (June 8, 1999), and Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, Singapore and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews, 70 FR 54711 (September 16, 2005) (Ball Bearings), and accompanying Issues and Decision Memorandum at Comment 7.

additional proof by the respondent, and without extensive notice and comment rulemaking.³² Navneet acknowledges that there are times, such as in Ball Bearings, that the Department solicits extensive comments and incorporates numerous suggestions when considering the new methodology. However, Navneet argues that the Department does not need to conduct an extensive analysis of the new codes in the instant case because the requested information was explicitly invited by the Department.

Department's Position:

In the Department's January 9, 2009, initial questionnaire to Navneet, we listed four codes with descriptions for certain types of cover material. The fifth code, "other," required that Navneet specify each type of material used, but not already listed, and that Navneet assign a new number to each. In its March 20, 2009, questionnaire response, Navneet provided four additional codes and descriptions. The codes listed in the Department's questionnaire are not considered to be all inclusive and, thus, allow respondents to report other materials that are used in the production of subject merchandise. However, in this instance, the sub-codes reported by Navneet are included in the original codes in the initial questionnaire, and do not represent other materials used. For example, one of the codes in the questionnaire for cover material is "06 – Printed paperboard", and the sub-code "07 – Printed and varnished paperboard" provided by Navneet is simply a subset of the code in the questionnaire. The "other" category was not intended to be used to break out subsets of material already listed, but rather to allow for separate coding of completely different material. The record does not support the use of the "other" category for the cover material and the back material reported by Navneet in the sub-codes. The codes for the control numbers (CONNUMs) assigned to each reported sales transaction should be based on the model match physical characteristics established in the investigation. Therefore, we have collapsed the sub-codes provided by Navneet into the appropriate codes noted in the initial questionnaire, which is consistent with the Department's practice of using the same CONNUM for products sharing identical product physical characteristics. Due to the proprietary nature of this information, further discussion is contained in the business proprietary version of Navneet's final calculation memorandum, dated February 4, 2010. See Navneet Final Sales Calculation Memorandum, dated February 4, 2009, a public version of which is available in the Central Records Unit, room 1117 of the main commerce building.

Comment 4: Offset of Countervailing Duty Duties

Navneet argues that the Department improperly imposed the full amount of the export subsidies from the companion countervailing duty (CVD) case. Navneet states that the WTO Agreements³³ mandate that the Department reduce, or offset any amount of dumping duty

³² See Metal Calendar Slides from Japan: Notice of Final Determination of Sales at Less Than Fair Value and Final Negative Determination of Critical Circumstances, 71 FR 36063 (June 23, 2006), and accompanying Issues and Decision Memorandum at Comment 1 (citing Koyo Seiko Co., Ltd. v. United States, 66 F. 3d 1204, 1209-1210 (Fed. Cir. 1995)) (“{T}he Department has broad discretion, implicitly delegated to it by Congress, to apply an appropriate model match methodology to determine which home market models are properly comparable with U.S. models under the statute.”).

³³ The WTO Antidumping Agreement, Implementing Article VI of the General Agreements on Tariffs and Trade (GATT) at paragraph 5.

attributable to export subsidies, if there is a CVD order on the same goods to ensure that a double remedy is not imposed, *i.e.*, both a CVD duty in the amount of the subsidy and an antidumping duty in the amount by which the subsidy resulted in prices at less than normal value. Navneet contends that although the Department purported to make this offset in the preliminary results, the methodology used by the Department did not have the required effect. Indeed, if the offset had been properly applied, Navneet's dumping margin would have been zero percent.

Navneet claims that the Department applied the offset to the export price rather than subtracting the CVD export subsidies rate from the calculated dumping margin. In doing so, Navneet argues that the Department's methodology did not give full credit for the CVD amount paid on export subsidies, and resulted in the Department double-counting the benefit, which is an impermissible double remedy. In support of its argument that the Department normally subtracts the CVD export subsidies rate from the calculated dumping margin, Navneet cites to Honey from Argentina, Cold- Rolled Carbon Steel Flat Products from Brazil, Carbazole Violet Pigment 23 from India,³⁴ and Chapter 18 of the Department's 1998 Antidumping Manual.

Navneet also argues that even if the Department continues to use its flawed methodology from the Preliminary Results for the final assessment rate, the Department should apply the full offset for the cash deposit rate. In support of this contention, Navneet cites to PET Film from India,³⁵ where Navneet states that the Department decided that it could not find the offset dumping duty to be *de minimis* for purposes of calculation of the dumping rate for the period of investigation. With regard to the deposit rate, the Department deducted the full export subsidy amount from the dumping duty, and imposed a zero percent deposit for future entries. According to Navneet, if the Department does not decide similarly in this case, the deposit rate imposed on its future entries will be a violation of the WTO proscription of double remedies.

Petitioner contends that Navneet's arguments ignore both the text of the Act and the Department's longstanding practice. Petitioner argues that the WTO Agreements are not binding on the Department, but that the Act is. Petitioner then states that the Act clearly requires that, where CVDs have been imposed on merchandise subject to an antidumping duty calculation, the export price portion of that calculation shall be increased by the amount of the CVD attributable to export subsidies. See 19 U.S.C. § 1677a(c)(1)(C).

Petitioner argues that the three cases cited by Navneet and the outdated Antidumping Manual are inapposite. Petitioner also argues that Honey from Argentina and Certain Cold Rolled Carbon Steel Flat Products from Brazil relate to original investigations wherein CVDs had not yet been imposed on the merchandise subject to an antidumping duty investigation. Petitioner further

³⁴ See Notice of Final Determination of Sales at Less Than Fair Value; Honey From Argentina, 66 FR 50611, 50613 (October 4, 2001) (Honey from Argentina); Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold- Rolled Carbon Steel Flat Products From Brazil, 67 FR 62134, 62135 (October 3, 2002) (Cold- Rolled Carbon Steel Flat Products from Brazil); and Carbazole Violet Pigment 23 from India: Preliminary Results of Antidumping Duty Administrative Review, 73 FR 52012, 52014 (September 8, 2008) (Carbazole Violet Pigment 23 from India), unchanged in the Final Results, 73 FR 74141 (December 5, 2008).

³⁵ See Notice of Decision of the Court of International Trade: Polyethylene Terephthalate Film, Sheet, and Strip from India, 69 FR 40352 (July 2, 2004) (PET Film from India).

contends that there is a critical distinction between investigations and reviews. According to petitioner, in investigations, where CVDs have not yet been imposed, the Department will not adjust the export price in calculating an antidumping margin, but will instead adjust the cash deposit rate going forward by reducing the rate by the amount of the CVD relating to export subsidies. However, in an administrative review, CVDs have already been imposed on the subject merchandise, thus requiring the export price adjustment.

Further, petitioner argues that the third case cited by Navneet, Carbazole Violet Pigment 23 from India, involved unusual facts that are not present in the instant case. Petitioner claims that in Carbazole Violet Pigment 23 from India the sole respondent received a preliminary margin based on total adverse inferences; accordingly, the respondent had no export price to adjust. Petitioner states that the Department chose the calculated margin from the original investigation as its AFA rate, but ordered cash deposits going forward at the reduced deposit rate from the original investigation as its AFA rate.

Petitioner rebuts Navneet's citation to PET Film from India because the case pertains to a CVD offset in an investigation and not in an administrative review. Petitioner states that the statute is silent on how, or even if, CVD offsets are to be effected where CVDs are imminent, but have not yet been imposed on subject merchandise. Petitioner thus asserts that the Department has developed a practice, approved by the CIT, of achieving an offset through an adjustment of the cash deposit rate. However, in those cases where CVDs have already been imposed, an offset may be effectuated through an upward adjustment of the export price. Petitioner contends that in the instant case, there is an export price, and there are imposed countervailing duties. Therefore, the export price must be adjusted by the amount of the CVD.

In addition, petitioner raises several challenges to Navneet's reliance on the Antidumping Manual. First, petitioner notes that an outdated version of the manual cannot be considered reflective of the Department's current practice. Second, petitioner asserts that the Antidumping Manual does not establish the Department's practices, because the Department has long held that its practices, as set forth in the manuals, are subject to change at any time. Third, petitioner argues that the section of the manual cited by Navneet does not discuss the calculation of antidumping duty margins in administrative reviews, but rather, explains the manner in which cash deposit instructions are to be written and issued.

Thus, based on the foregoing, petitioner argues that the Department should not alter its CVD offset methodology for the final results.

Department's Position:

In accordance with section 772(c)(1)(C) of the Act, the Department made an adjustment to U.S. price for the amount of the CVD duties imposed to offset export subsidies. Section 772(c)(1)(C) the Act directs the Department to increase export price or constructed export price by the amount of the CVD "imposed" on the subject merchandise "to offset an export subsidy." No further, or different, adjustment is provided for in the statute. Navneet's argument that the Department normally subtracts the CVD export subsidies rate from the calculated dumping margin and cash

deposit rates is inaccurate. The cases that Navneet cites are either investigations or administrative reviews where the rates were based on facts available.

Unlike administrative reviews, the Department calculates this offset in investigations not in the margin calculation program, but in the cash deposit instructions issued to the CBP.³⁶ The Department's practice is a result of the practical administrative difficulties in applying the results of an ongoing CVD investigation to calculations in an ongoing AD investigation. A dumping margin calculation normally will be completed before the actual export subsidies have been calculated and imposed.³⁷ Thus, the Department withholds its application of the subsidy offset until it issues its cash deposit instructions. Such problems typically do not arise in administrative reviews. The Federal Circuit has upheld the practice of adjusting the cash deposit instructions, not the AD margin, for an AD investigation.³⁸

Where the actual assessment of CVD is being made under an outstanding order, it is the Department's practice to add to the export price or constructed export price, as relevant to the respondent's transactions, the most recent CVD export subsidy assessment rate.³⁹ Therefore, the Department position remains unchanged in these final results. In addition, we agree with petitioners that Carbazole Violet Pigment 23 from India was about an AFA rate so there was no export price to adjust.

Comment 5: Levels of Trade

Navneet argues that, although it identified five domestic levels of trade (LOTs) and one export LOT, the Department improperly combined the LOTs into two groups, using the level of downstream merchandising as the defining characteristic. See Questionnaire Response dated March 3, 2009 at page A-12 through A-19. Navneet contends that there is little in common among the various conglomerated LOTs that were grouped into the new LOT 2, except that they do not benefit from Navneet's downstream merchandising efforts. Navneet agrees that merchandising is a significant factor and that its existence defines and differentiates LOT 1 from LOT 2. However, Navneet asserts that it is inaccurate to suggest that the differences between the other groups are irrelevant and do not define real LOTs. Navneet states that, while it is true that it performs similar services in some of the same LOTs, the nature of its business activities are fundamentally different.

³⁶ See Honey from Argentina, 66 FR at 50612.

³⁷ See Dupont Teijin Films USA, LP, et al. v. United States, 407 F.3d 1211, 1219 (Fed. Cir. 2005) (Dupont Teijin) ("We affirm Commerce's interpretation of the term 'imposed' as used in section {772(c)(1)(C)}, which requires the issuance of a {CVD} order before {CVD} duties can be used to offset the export price in the calculation of the dumping margin."). See also Honey from Argentina, 66 FR at 50612-13; Serampore Industries Pvt. Ltd. v. United States, 675 F. Supp. 1354, 1360 (CIT 1987).

³⁸ See Dupont Teijin, 407 F.3d at 1219. See also Notice of Final Determination of Sales at Less Than Fair Value, and Negative Determination of Critical Circumstances: Certain Lined Paper Products from India, 71 FR 45012 (August 8, 2006), and accompanying Issues and Decision Memorandum at Comment 1.

³⁹ See Certain Hot-Rolled Carbon Steel Flat Products from India: Notice of Preliminary Results of Antidumping Duty Administrative Review, 73 FR 77618 (December 19, 2008), unchanged in the Final Results, 74 FR 17951 (April 20, 2009).

Navneet contends that the Department erred in not recognizing that the level it designated as LOT2 in its questionnaire response is a very different and distinct LOT from the other four LOTs to which the Department merged it. According to Navneet, its reported LOT 2, which is the “Boss” brand, involves an entirely different product line and brand from the Navneet brand, and is sold differently. Navneet claims that, while the reported LOT 1 and the other domestic LOTs all share the Navneet brand, and thus, to some extent share the benefits of Navneet’s brand advertising, the Boss brand does not benefit from Navneet brand advertising, and otherwise is the focus of very little overall promotional activity. In that respect, the reported LOT 2 is much more like the export LOT 6, which has the lowest levels of brand promotion and marketing. Thus, Navneet suggests that if the Department decides that it must combine some of Navneet’s LOTs, it should consider LOT6 to be the most similar to LOT 2 for purposes of matching. If the remaining LOTs 3, 4, and 5 remain combined, they would rank second in similarity to LOT 6, and LOT 1 would remain the most dissimilar to export LOT 6 for purposes of priority matching.

Petitioner contends that Navneet’s arguments do not withstand scrutiny because a review of its selling functions chart shows far more commonalities than differences between LOT 2 and LOTs 3 through 5 in terms of activities performed and the levels of those activities. Petitioner argues that, even if Navneet could show significant differences in selling activities, it remains that these “are a necessary, but not sufficient, condition for determining that there is a difference in the stage of marketing. Further, petitioner argues that Navneet has failed even to show such substantial differences between its designated LOT 2 and LOTs 3 through 5. Therefore, the Department’s decision to collapse all four LOTs as a single LOT should remain unchanged in the final results.

Department’s Position:

We disagree with Navneet that it’s reported LOT 2 is a separate and distinct LOT which should be compared separately to U.S. sales. A different brand does not necessarily mean a different LOT. Section 351.412(c)(2) of the Department’s regulations provides that the Department will determine that sales are made at different LOTs if they are made at different marketing stages (or their equivalent). Substantial differences in selling activities are a necessary, but not a sufficient, condition for determining that there is a difference in the stage of marketing. Some overlap in selling activities will not preclude a determination that sales are at different stages of marketing.

We also disagree with Navneet that there are five LOTs in the home market. As stated in the Preliminary Results, our analysis of the selling activities for Navneet shows that Navneet performs similar selling activities for different customer categories– although some of the activities were at different levels of intensity. Moreover, some selling activities within the claimed LOT 1 are at a higher level of intensity than the same selling activities in the claimed LOT 2 through LOT 5. In addition, there is overlap among the channels of distribution for the different customer categories between LOT 1 and LOT 2 through LOT 5 customers. Although there are differences in intensity of selling activities among LOT 2 through LOT 5 customers, this, in and of itself, does not show a substantial difference in selling activities that would form the basis for finding distinct LOTs.

Therefore, based on the foregoing, we find that Navneet's selling activities chart show that there are two distinct LOTs in the home market: (1) LOT 1 and (2) a combined LOT 2, which is comprised of Navneet's reported LOT 2 through LOT 5. The selling activities in the combined LOT 2 in the home market are comparable to the selling activities in the LOT in the U. S. market.⁴⁰

The Department continues to find that there are two LOTs in the home market and that Navneet's home market sales in the combined LOT 2 are at the same stage of marketing as the U.S. sales. Therefore, in these final results, we continue to compare home market sales in the combined LOT 2 to the U.S. sales and determined that no LOT adjustment for Navneet's sales to the United States was necessary.

Comment 6: Treatment of Merchandising Expense

Navneet argues that the Department misconstrues Navneet's merchandising efforts as indirect selling expenses. Navneet asserts that merchandising is not selling, but rather, is advertising. Further, Navneet asserts that merchandising does not employ a sales staff and that its merchandising is a form of hands-on, direct to the consumer, retail-level advertising that is directed at Navneet's customers' downstream customers. Thus, this merchandising activity should be recognized as direct rather than an indirect selling expense.

Navneet contends that the Department has long considered advertising that is aimed not at one's own customers, but at the downstream customers of one's own customers, to be direct advertising which must be deducted from the home market price as a circumstance of sale adjustment.⁴¹ Navneet notes that the SAA⁴² states that the Department will employ the circumstance of sale adjustment to adjust for differences in direct expenses and differences in selling expenses of the purchaser assumed by the foreign seller. Navneet argues that in this case, it assumes the marketing expenses that would otherwise be the responsibility of the distributors or the individual retailers.

Navneet asserts that merchandising fully complies with the standard two-pronged test for determining whether marketing expenses are direct or indirect in that (1) Navneet's merchandising is aimed at Navneet's customers' customers, and (2) the merchandising efforts are directly related to promotion of Navneet's subject merchandise in India. Therefore, Navneet contends that its merchandising expenses are direct selling expenses, just like its other direct advertising expenses, and the Department should make this correction in the final results.

⁴⁰ Preliminary Results, 74 FR at 51563.

⁴¹ See Notice of Final Determination of Sales At Less Than Fair Value: Live Swine from Canada, 70 FR 12181 (March 11, 2005), and accompanying Issues and Decision Memorandum at Comment 6; Notice of Final Determination of Sales At Less Than Fair Value: Certain Pasta from Italy, 61 FR 30326 (June 14, 1996), and Color Television Receivers, Except for Video Monitors, From Taiwan; Final Results of Antidumping Duty Administrative Review, 58 FR 34415 (June 25, 1993).

⁴² SAA, H.R. Doc. 103-316 at 828, reprinted in 1994 U.S.C.C.A.N. at 4167.

Navneet claims that the Department has explicitly recognized the same kind of merchandising expenses as direct selling expenses in other cases, and argues that the same factual situation exists in the instant case.⁴³ Navneet claims that the merchandising efforts are within the class of expenses that the Department traditionally has recognized as direct expenses, as it is compelled to do by the Act's requirement that the Department adjust the home market price for "selling expenses of the purchaser assumed by the foreign seller." Accordingly, in the final results, the Department should treat Navneet's merchandising expenses as direct selling expenses.

Petitioner contends that Navneet's arguments are without merit and should be rejected by the Department. Petitioner states that the Department normally treats sales and marketing personnel salaries as indirect selling expenses, and that Navneet has not provided any support to the contrary. Petitioner argues that salaries, even for merchandising personnel, are not advertising, and should not be equated with advertising.

Petitioner also argues that Navneet does not cite a single case indicating that the Department equates merchandising personnel salaries with advertising expenses or that the Department has applied its two-pronged test for determining whether advertising expenses constitute direct or indirect costs to salaries of any kind. Petitioner contends that Fresh Kiwifruit from New Zealand makes no mention whatsoever of merchandising activities or to "merchandise assistance." Rather, it simply indicates that "direct advertising" expenses were deducted from the constructed export price. It does not describe these expenses as merchandising expenses, and certainly does not associate them with salaries paid to any employees.

Petitioner asserts that there is no indication that the Department treated salaries as direct selling expenses in Canned Pineapple Fruit from Thailand or Frozen Concentrated Orange Juice from Brazil. According to petitioner, in both cases, the Department made a circumstances of sale (COS) adjustment to account for "merchandising expenses," but did not describe the expenses in any way, and most particularly did not associate them with salaries of any kind. Thus, petitioner argues that there is no support for Navneet's arguments that the Department should deviate from its normal practice of treating salaries for marketing personnel as indirect selling expenses. Nor is there any support for Navneet's argument that the Department's two-pronged test to determine whether advertising expenses are direct or indirect selling expenses should be applied to such salaries.

Further, petitioner asserts that, even if the Department were to find that salaries could potentially represent a direct selling expense, the Department should continue to treat Navneet's merchandising activities as indirect selling expenses because Navneet has failed to provide documentation to demonstrate that its merchandising activities are directed at its customer's customer, consistent with the two-pronged test. Therefore, petitioner argues that the Department

⁴³ See Fresh Kiwifruit From New Zealand; Preliminary Results of Antidumping Duty Administrative Review, 61 FR 15922, 15922 (April 10, 1996) (Fresh Kiwifruit from New Zealand); Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Canned Pineapple Fruit from Thailand, 60 FR 2734, 2738 (January 11, 1995) (Canned Pineapple Fruit from Thailand); and Frozen Concentrated Orange Juice from Brazil; Preliminary Results of Antidumping Duty Administrative Review, 55 FR 1071, 1071 (January 11, 1990) (Frozen Concentrated Orange Juice from Brazil).

should reject Navneet's arguments and continue to treat these salaries as indirect selling expenses for the final results.

Department's Position:

Section 351.410 of the Department's regulations governs adjustments for differences in COS, which are specified by section 773(a)(6)(C)(iii) of the Act. COS adjustments consist of the following items: (1) direct selling expenses such as commissions, credit expenses, and warranties which result from and bear a direct relationship to the particular sale in question; (2) assumed expenses, which are selling expenses that are assumed by the seller on behalf of the buyer, such as advertising expenses; and (3) a reasonable allowance for other selling expenses when commissions are paid in one market under consideration but not the other market under consideration. See 19 CFR § 351.410.

Navneet reported that it employs retail marketing personnel, who assist retailers as merchandisers and sales facilitators at the retail/consumer level. See Questionnaire Response dated March 20, 2009, at page B-42, and Sales Verification Report at page 22. Thus, these employees are paid a salary regardless of whether or not a sale is made, and their salaries are not linked to a particular sale. The Department's policy is to treat sales expenses which are incurred regardless of whether sales are made and which are not linked to a particular sale, such as salesman's salaries, as indirect selling expenses.⁴⁴ Therefore, the Department's position in the preliminary results remains unchanged. Thus, for the final results we continue to treat Navneet's merchandising activity as an indirect selling expense.

Comment 7: Treatment of Negative Dumping Margins (Zeroing)

Navneet argues that the Department's methodology of setting negative margins to zero before calculating the average dumping margin grossly distorts the dumping margin. Navneet contends that, in this case, the Department's zeroing policy actually created the margin, since without zeroing, Navneet has no dumping margin. Navneet contends that although this "zeroing" methodology is the Department's longstanding practice, it is unfair, forbidden by recent WTO Appellate Body rulings, and is not required by the U.S. statute. Thus, Navneet asserts that the Department should revise its practice and align its interpretation of the statute with the United States' obligations under international law.

Navneet points out that in August 2009, the WTO Appellate Body specifically condemned the continued use of the zeroing methodology by the Department in administrative reviews, and called on the United States to bring its antidumping methodology into compliance with its obligations under the WTO agreements by abandoning zeroing. See, e.g., Appellate Body Report, United States-Measures Relating to Zeroing and Sunset Reviews, ¶ 213, WT/DS322/AB/RW (August 18, 2009).

Navneet argues that it is a fundamental principle of statutory construction that, where faced with competing interpretations of a statutory provision, an interpretation that is consistent with

⁴⁴ See Stainless Steel Bar from India: Notice of Final Results of Antidumping Duty Administrative Review, 73 FR 52294 (September 9, 2008), and accompanying Issues and Decision Memorandum at Comment 4.

international law is to be favored over an interpretation that constitutes a violation of international law. Therefore, Navneet contends that only by including the individual margin results from the analysis of the U.S. sales of all products, including those with negative margins, can the Department ensure that the margin calculation will apply U.S. law in conformity with WTO rules and the underlying U.S. commitments.

Petitioner counters that Navneet is incorrect that the Department may abandon its zeroing methodology in administrative reviews. Petitioner argues that the Department's power to interpret the Act is limited to areas where there is ambiguity. Petitioner claims that the Act specifies different comparison methods for calculating dumping margins in investigations and in administrative reviews. In an investigation, the Department is to calculate the margin by comparing weighted average normal values to weighted average U.S. prices. By contrast, in an administrative review, the Department is always to compare weighted average normal values to individual U.S. transaction prices. Thus, it is clear from the structure and text of 19 U.S.C. § 1677f-1(d) that Congress carefully considered the appropriate methods for calculating antidumping duty margins. Furthermore, petitioner argues that the WTO has recognized that, if zeroing is not applied, the calculation methodologies for investigations and reviews are mathematically certain to produce the same results. Therefore, petitioner argues that the Department should continue to apply zeroing in the final results.

Department's Position:

We disagree with Navneet and will continue to deny offsets for any "transactions with negative margins" that may be found in these final results.

Section 771(35)(A) of the Act defines "dumping margin" as the "amount by which the normal value exceeds the export price or constructed export price of the subject merchandise" (emphasis added). Outside the context of antidumping investigations involving average-to-average comparisons, the Department interprets this statutory definition to mean that a dumping margin exists only when normal value (NV) is greater than export or constructed export price. As no dumping margins exist with respect to sales where NV is equal to or less than export price or constructed export price, the Department will not permit these "transactions with negative margins" to offset the amount of dumping found with respect to other sales. The Federal Circuit has held that this is a reasonable interpretation of the statute.⁴⁵

Section 771(35)(B) of the Act defines weighted-average dumping margin as "the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer." The Department applies these sections by aggregating all individual dumping margins, each of which is determined by the amount by which normal value exceeds export price or constructed export price, and dividing this amount by the value of all sales. The use of the term aggregate dumping margins in section 771(35)(B) is consistent with the Department's interpretation of the singular "dumping margin" in section 771(35)(A) as applied on a

⁴⁵ See Corus Staal BV v. Department of Commerce, 395 F.3d 1343, 1347-49 (Fed. Cir. 2005), cert. denied, 546 U.S. 1089 (2006) (Corus Staal); Timken Co. v United States, 354 F.3d 1334, 1342 (Fed. Cir. 2004) (Timken); see also Koyo Seiko Co. v. United States, 543 U.S. 976 (2004).

comparison-specific level and not on an aggregate basis. At no stage of the process is the amount by which export price or constructed export price exceeds the normal value permitted to offset or cancel out the dumping margins found on other sales.

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

The Department recently modified its calculation of the weighted-average dumping margin when using average-to-average comparisons in antidumping investigations in its Final Modification.⁴⁶ In doing so, the Department declined to adopt any other modifications concerning any other methodology or type of proceeding, such as administrative reviews.⁴⁷ Thus, because the Final Modification only affected antidumping investigations involving average-to-average comparisons, the Department has continued to deny any offsets of non-dumped transactions in this administrative review.

We disagree that the Department’s interpretation of section 771(35) of the Act, with respect to zeroing, is improper. In Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) (Chevron), the U.S. Supreme Court explained that, when the language and congressional intent behind a statutory provision is ambiguous, an administrative agency has discretion to reasonably interpret that provision, and that different interpretations of the same provision in different contexts is permissible.⁴⁸

The Federal Circuit has found the language and congressional intent behind section 771(35) of the Act to be ambiguous.⁴⁹ Furthermore, antidumping investigations and administrative reviews are different proceedings with different purposes. Specifically, in antidumping investigations, the Act specifies particular types of comparisons that may be used to calculate dumping margins and the conditions under which those types of comparisons may be used.⁵⁰ The Act discusses the types of comparisons used in administrative reviews.⁵¹ The Department’s regulations further clarify the types of comparisons that will be used in each type of proceeding.⁵² In antidumping

⁴⁶ Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Duty Investigation; Final Modification, 71 FR 77722 (December 27, 2006) (Final Modification).

⁴⁷ See Final Modification, 71 FR at 77724.

⁴⁸ See Chevron, 467 U.S. at 864.

⁴⁹ See Timken, 354 F.3d at 1341-42.

⁵⁰ See section 777A(d)(1) of the Act.

⁵¹ See section 777A(d)(2) of the Act.

⁵² See 19 C.F.R. § 351.414.

investigations, the Department generally uses average-to-average comparisons, whereas in administrative reviews the Department generally uses average-to-transaction comparisons.⁵³ The purpose of the dumping margin calculation also varies significantly between antidumping investigations and reviews. In antidumping investigations, the primary function of the dumping margin is to determine whether an antidumping duty order will be imposed on the subject imports.⁵⁴ In administrative reviews, in contrast, the dumping margin is the basis for the assessment of antidumping duties on entries of merchandise subject to the antidumping duty order.⁵⁵ Because of these distinctions, the Department's limiting of the Final Modification to antidumping investigations involving average-to-average comparisons does not render its interpretation of section 771(35) of the Act in administrative reviews improper. Therefore, because section 771(35) of the Act is ambiguous, the Department may interpret that provision differently in the context of antidumping investigations involving average-to-average comparisons than in the context of administrative reviews.

Also, respondent's reliance on Corus Staal is misplaced. In Corus Staal, the Federal Circuit did not hold that section 771(35) of the Act could not be interpreted differently in antidumping investigations and administrative reviews. Rather, after acknowledging that antidumping investigations and administrative reviews were different proceedings, the court held that the Department's zeroing methodology was equally permissible in either context.⁵⁶ Moreover, we note that the Federal Circuit recently affirmed the Department's denial of offsets in the context of administrative reviews.⁵⁷ Specifically, the Federal Circuit found that the Final Modification had no effect on the Department's ability to deny offsets in administrative reviews, and that, thus, the judicial precedent upholding the Department's zeroing methodology in administrative reviews remains binding.⁵⁸

For the foregoing reasons, we have not changed our methodology with respect to offsetting "transactions with negative margins."

⁵³ See 19 C.F.R. § 351.414(c).

⁵⁴ See sections 735(a), (c), and 736(a) of the Act.

⁵⁵ See section 751(a) of the Act.

⁵⁶ See Corus Staal, 395 F.3d at 1347.

⁵⁷ See Corus Staal BV v. United States, 502 F.3d 1370 (Fed. Cir. 2007).

⁵⁸ See id., 502 F.3d at 1375; SNR Roulements v. United States, 521 F. Supp. 2d 1395, 1398 (Ct. Int'l Trade 2007) (finding that, regardless of the Final Modification, no changed circumstances have occurred with respect to zeroing in administrative reviews); see also Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Notice of Final Results of the Fourteenth Administrative Review and Partial Rescission, 74 FR 11082 (March 16, 2009), and accompanying Issues and Decision Memorandum at Comment 2.

Recommendation

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

Ronald K Lorentzen
Deputy Assistant Secretary
for Import Administration

Date