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MEMORANDUM TO: David M. Spooner
Assistant Secretary
for Import Administration

FROM: Stephen J. Claeys
Deputy Assistant Secretary
for Import Administration

SUBJECT: Issues and Decision Memorandum for the Final Results of the Administrative Review of the Antidumping Duty Order on Circular Welded Carbon Steel Pipes and Tubes from Thailand

Summary

We have analyzed the case and rebuttal briefs from interested parties in response to the preliminary results of this review of Saha Thai Steel Pipe (Public) Company, Ltd. (Saha Thai), the respondent. As a result of our analysis, we have made changes in the margin calculation which are fully addressed in the positions set forth in the "Discussion of Issues" section of this memorandum. A complete list of issues identified by the interested parties in their briefs is provided below.

Issues

Comment 1: Whether Saha Thai Has Met Both Prongs of the Department's Duty Drawback Test
Comment 2: Whether Saha Thai Should Receive an Upward Adjustment for Duty Drawback/ Exemption
Comment 3: Whether the Department Should Add a "Third" Prong to Its Eligibility Test
Comment 4: Whether the Department Should Use Saha Thai's Actual Yield Factors in Evaluating the Duty Exemption
Comment 5: Whether to Include Exempted and Unpaid Duties on Imported Raw Materials in Saha Thai's Reported Cost of Manufacture (COM)
Comment 6: Whether the Department Needs to Make Corresponding Adjustments to the G&A and Interest Ratio Calculations if Unpaid Import Duties Are Included in Saha Thai's COM
Comment 7: Whether to Deduct Ocean Freight from C&F Value to Calculate U.S. Duty
Comment 8: Level of Trade Adjustment
Comment 9: Whether Zeroing Is In Accordance with the Antidumping Statute or the International Obligations of the United States

Comment 10: Whether the Department Should Correct Alleged Errors in the Preliminary G&A and Financial Expense Ratio Calculations
Comment 11: Alleged Programming Errors

The "Analysis of Comments" section below addresses the comments submitted by the parties in their briefs. We recommend that you approve the positions described in this memorandum.

Background

On April 7, 2008, the Department of Commerce (the Department) published in the Federal Register the preliminary results of the administrative review of the antidumping duty order on circular welded carbon steel pipes and tubes from Thailand. See Circular Welded Carbon Steel Pipes and Tubes from Thailand: Preliminary Results of Antidumping Duty Administrative Review, 73 FR 18749 (April 7, 2008) (Preliminary Results). The review covers the period March 1, 2006 through February 28, 2007.

In the Preliminary Results, we stated our intention to request further information from Saha Thai regarding volume and value, direct selling expenses, and duty drawback for which the information on the record of this administrative review was not completely clear. In the Preliminary Results, we did not make an upward adjustment to export price for duty drawback or exemption. However, we stated that we would provide Saha Thai with an opportunity to explain why the documentation already on the record of this administrative review met the second prong of our two prong test and is sufficient to allow this adjustment for the final results of this review. On April 18, 2008, we issued a supplemental questionnaire for this purpose, and a response was received on May 5, 2008.

We invited parties to comment on the Preliminary Results. On April 23, 2008, we issued a memorandum, providing specific deadlines for the filing of case and rebuttal briefs. See Memorandum "Briefing Schedule for Certain Welded Carbon Steel Pipes and Tubes from Thailand," dated April 23, 2008. On May 21, 2008, we received case briefs from Saha Thai, and from the petitioners, Allied Tube and Conduit Corporation and Wheatland Tube Company (collectively petitioners). Both petitioners and Saha Thai submitted rebuttal briefs on May 28, 2008. Neither party requested a hearing. All briefs were timely filed in accordance with the deadlines established.

On June 23, 2008, we rejected Saha Thai's May 21, 2008 case brief, because we determined that it contained new factual information that was untimely filed in accordance with 19 CFR 351.301. On June 25, 2008, Saha Thai refiled its case brief without the untimely information and all references to the untimely information removed.

Discussion of the Issues

Comment 1: Whether Saha Thai Has Met Both Prongs of the Department's Duty Drawback Test

Saha Thai states that, in the Preliminary Results, the Department determined it had met the first prong of its two prong test. The first prong of the Department's two prong test requires that Saha Thai's import duties and rebates or exemptions be directly linked to, and dependent upon, one another. Saha Thai argues that it met the first prong of the two prong test due to the Government of Thailand (GOT)'s bonded warehouse regime. Saha Thai explains that all imported goods enter the bonded warehouse duty-free, and that if goods are removed for export, they are exempt from the imposition of import duties. Saha Thai explains further that the movement of imported material from its bonded warehouse is physically monitored by Thai Customs officials there. Saha Thai explains that in order to obtain the exemption from import duties on raw materials, Saha Thai must submit to Thai Customs a quarterly report that contains various tables with information on the quantity and value of raw material inventory, raw material imports, exports of finished goods, and the amount of duty exemption. According to Saha Thai, these quarterly reports are the link between the importation of hot-rolled steel coil and zinc, the exportation of pipe, and the exempted duty. Saha Thai re-states that the Thai duty drawback system as applied to Saha Thai clearly satisfies the statutory requirement that the duties be uncollected by reason of exportation of the subject merchandise.

With respect to the second prong of the test, which requires that there are sufficient imports of raw material to produce the exported merchandise, Saha Thai argues that the quarterly reports it submitted establish that it imported sufficient raw material to account for the duty exemptions it received in 2006 for exported pipe. Saha Thai states that the chart, prepared using information submitted in the February 19, 2008 supplemental questionnaire, included at Exhibit SR-3 of its May 5, 2008 supplemental questionnaire response, along with excerpts from Saha Thai's quarterly report, demonstrate that fact.

As with hot-rolled coil, Saha Thai explains that it imports zinc under the bonded warehouse program described above. Saha Thai states that it met the first prong of the Department's two prong test because its imports of zinc were used to manufacture galvanized pipe for export. Saha Thai argues that it met the second prong of the Department's two prong test for zinc because it used sufficient zinc from the bonded warehouse to manufacture galvanized pipe for export; Saha Thai maintains that selected pages from the quarterly reports that were included in Exhibit 20 of Saha Thai's February 19, 2008 supplemental response show this. Petitioners did not comment specifically on Saha Thai's argument that it met the two prong test for zinc.

Petitioners cite to the Department's explanation that Saha Thai did not meet the two prong test. Petitioners state that Saha Thai calculated and reported its upward adjustment to export price based on the amount of import duties that would apply to hot-rolled coils that were stored in its bonded warehouse. Petitioners cite Saha Thai's reported imports and exports, which show that there were sufficient exports of subject merchandise during the administrative review period to entitle Saha Thai to the duty drawback exemptions it originally reported for the 2006 imports of hot-rolled coil and zinc. Petitioners maintain that the Department's two prong test examines

whether there were sufficient imports to cover exports, because the adjustment to export price is based on the difference due to import duties, a difference which would not arise if there were insufficient imports to cover exports.

In its rebuttal brief, Saha Thai reiterates that it has provided sufficient information on the record of this proceeding to demonstrate that it has met both prongs of the Department's two prong duty drawback test. According to Saha Thai, its participation in the bonded warehouse program meets the first prong of the duty drawback test. Saha Thai contends that it has also met the second prong of the two prong test by demonstrating that there were sufficient imports of the raw material to account for the duty drawback or exemption granted for the export of manufactured product. Saha Thai argues that the Department has previously found that the type of information provided in this review satisfies the two prongs of the duty drawback test. According to Saha Thai, it is identical to the information provided in prior reviews and the Department used the information in prior reviews to grant Saha Thai a duty drawback adjustment.

Department's Position: In the Preliminary Results, we did not make an upward adjustment to export price for the duty exemptions, because Saha Thai did not clearly demonstrate how it met the second prong of our two prong test. See Wheatland Tube et. Al. v. United States, 414 F. Supp. 2d 1271 (CIT 2006) (Wheatland Tube) (setting forth a two prong test, which requires the exporter/producer to show that: (i) the import duty and rebate are directly linked to one another, and (ii) sufficient imports are made to account for the finished merchandise exported to the United States). We noted that, while Saha Thai had provided data regarding imports into its bonded warehouse, its questionnaire response did not demonstrate that this imported material was sufficient to account for the total amount of import duties exempted for the export of the manufactured product.

On April 11, 2008, we issued an additional supplemental questionnaire requesting that Saha Thai provide a chart, using the documents submitted in Exhibit SR-20 of its February 19, 2008 supplemental response, to demonstrate that the amount Saha Thai would have paid on imported hot-rolled coil or zinc in 2006 was sufficient to account for its exports of subject merchandise. On May 5, 2008, Saha Thai responded to this request. Because Saha Thai has demonstrated that it had sufficient imports of hot-rolled coil to cover its exports, we are making an upward adjustment to export price for the duty exemption for these final results. Although Saha Thai provided its quarterly bonded warehouse reports prior to the Preliminary Results, these reports on their own without a chart or any other explanation did not demonstrate the sufficiency of imports. For these final results, however, Saha Thai has shown through its chart, which is based on documentation submitted prior to the Preliminary Results, that it had sufficient imports of hot-rolled coil to cover the exports. See Exhibit SR3-3 of Saha Thai's May 5, 2008 questionnaire response. With regard to zinc, we are satisfied with the information on the record that the two prong test has been met. As such, we have made an upward adjustment to U.S. price for the duty exemption on zinc imports.

Comment 2: Whether Saha Thai Should Receive an Upward Adjustment for Duty Drawback/ Exemption

Petitioners argue that Saha Thai does not qualify for an upward adjustment to export price, because no import duties were actually imposed upon Saha Thai by the country of exportation. According to petitioners, the statute requires the actual imposition, then drawback, of import duties in order to satisfy the statutory prerequisite.

According to petitioners, the Tariff Act of 1930, as amended (the Act), at section 772(c)(1)(B) states that the price used to estimate export price is increased by the amount of import duties imposed by the country of exportation which have been rebated, or which have not been collected by reason of exportation of the subject merchandise to the United States. Petitioners noted that Saha Thai reported that the import duties were not imposed on the merchandise Saha Thai imported into its bonded warehouse and used to produce subject merchandise that was exported. Petitioners allege that for purposes of adjusting export price, because no import duties were actually imposed on the merchandise Saha Thai imported into and exported from its bonded warehouse, Saha Thai does not meet the first prong of the Department's two prong test. According to petitioners, there was never any import duty obligation imposed, as Saha Thai reported in its May 5, 2008 supplemental questionnaire response at page 7 ("Saha Thai will never actually have to pay import duties, and therefore, the duty exemptions must stay wholly outside of its financial accounting system."). Petitioners also reference the May 8, 2008 letter from Saha Thai's auditors stating that the exemptions from the payment of import duties on imports "should not be included in the company's cost of manufacturing nor accrued as a contingent liability under Thai GAAP. Petitioners state that Saha Thai did pay some import duties on imported hot-rolled coil, which was sold as hot-rolled steel. Petitioners note that Saha Thai's claimed upward adjustment to export price did not relate to the import duties that it actually paid on hot-rolled coil sold domestically, but rather to the goods entered into and released from Saha Thai's bonded warehouse.

The existence of Saha Thai's bonded warehouse, petitioners argue, does not establish a basis for finding that import duties are imposed. Petitioners allege that the Thai exemptions program at issue in the present case does not forego any actual duties because no import duties were imposed on inputs imported into or exported from Saha Thai's bonded warehouse. Petitioners argue that only the amount of actual import duties should be characterized as "the amount imposed by the country of exportation." Petitioners argue that the Department has not interpreted the word "imposed" under the duty drawback adjustment provision at section 772(c)(1)(B) of the Act, but has interpreted the word "imposed" at section 772(c)(1)(C) as requiring more than a possibility of an obligation to pay duties. Petitioners rely on Serampore Industries v. et al. v. United States Department of Commerce 675 F. Supp. 1354 (CIT 1987) (Serampore Industries) to argue that the Court of International Trade (CIT) has upheld the Department's interpretation of the word "imposed" as excluding cash deposits of countervailing duties, because countervailing (CV) duties, like antidumping (AD) duties, are not "imposed" until there is an assessment following an administrative review.

Weighing the possibility that import duties would arise on goods imported into Saha Thai's bonded warehouse, petitioners conclude that this is less likely to occur than cash deposits of antidumping duties becoming antidumping duty assessments. According to petitioners, the "possibility" that an import duty could be applied on merchandise entering into Saha Thai's bonded warehouse is not sufficient for the Department to conclude that there has been an imposition of import duties. Petitioners state that no obligation for payment of import duties occurs unless merchandise is actually released into the Thai market. In conclusion, petitioners argue that a finding that such a possibility is sufficient to constitute the imposition of import duties under 772(c)(1)(B) is not consistent with the Department's interpretation of section 772(c)(1)(C) of the Act.

Petitioners state that the upward adjustment to export price under the statute should equal actual duty costs foregone on the sale to the U.S. market. Petitioners allege that the upward adjustment does not equal "the actual duty costs foregone." None of the import duties exempted on imports into the bonded warehouse qualify as "import duties imposed by the country of exportation," according to petitioners. Further, according to petitioners, the amount of import duties rebated or not collected should be based upon import duties that would have been imposed if the subject merchandise had actually been sold as a like product in the domestic market. Finally, petitioners argue that the upward adjustment should only be the amount of any import duty imposed by the country of exportation, which rebated or did not collect the duty by reason of exportation to the United States. In conclusion, petitioners state that the amount not collected by reason of exportation to the United States is "the actual duty foregone upon sale to the U.S. market."

Saha Thai argues that both the Department and the CIT have previously rejected petitioners' argument. According to Saha Thai, petitioners argue that Saha Thai does not qualify for the upward adjustment to U.S. price, "because no import duties were imposed by the country of exportation on merchandise that entered or exited the warehouse." See Saha Thai's rebuttal brief dated May 27, 2008 at 2. Saha Thai provides a definition from Webster's Dictionary for "impose" as "to make, frame, apply (as a charge, tax, obligation, rule, penalty) as compulsory, obligatory, or enforceable." Saha Thai argues that petitioners have misinterpreted the word "impose" and that nowhere in the definition is there a reference to "pay" or "remit." Saha Thai argues that, if it participates in a Thai government-sanctioned bonded warehouse regime, the duties imposed on imported inputs are exempt (i.e., not paid) upon exportation of the finished goods that incorporate the imported input. Further, Saha Thai argues that the fact that Saha Thai does not pay the "exempted duties" does not mean that the GOT has not imposed these duties, as petitioners have argued. Saha Thai concludes that in instances when it imports hot-rolled coil for domestic consumption as it did during this POR, it does pay the import duty imposed by the GOT.

Saha Thai contests petitioners' claim that the GOT's bonded warehouse program does not qualify as an "exemption" program for the purposes of duty drawback adjustment because the import duties are not "imposed." Saha Thai notes that petitioners cite to Light-Walled Rectangular Pipe and Tube from Turkey: Notice of Final Determination of Sales at Less Than Fair Value, 69 FR 53675 (September 2, 2004) (Pipe from Turkey), in which the Department rejected the proposition for which the petitioners are arguing. Saha Thai argues that the

Department's requests for information on whether respondent paid duties should not be confused with arguments like petitioners' regarding a requirement that import duties be paid in order to qualify for a duty drawback adjustment to export price. Saha Thai emphasizes that it has provided the Department with the information on the duties it paid on imported inputs during the instant period of review (POR).

Arguing that petitioners' reliance on Serampore Industries to support their interpretation of the word "imposed" is wrong, Saha Thai explains that in Serampore Industries the CIT found that the Department acted reasonably by not providing an upward adjustment to U.S. price for deposits of estimated CV duties because the actual duty that is assessed may be significantly different than the estimated duty initially deposited. Saha Thai argues that petitioners' comparison of Saha Thai's duty exemptions to AD or CV cash deposits is inapt. Saha Thai explains that the calculation of the duty drawback adjustment, unlike AD or CV cash deposits, is based on a tariff rate that is consistent.

According to Saha Thai, petitioners have tried to undermine the statutory requirement for duty drawback or duty exemption adjustments to export price and constructed export price as outlined in section 772(c)(1)(B) of the Act; however, Saha Thai states the Department has rejected these arguments in previous administrative proceedings. See Pipe from Turkey, and Circular Welded Carbon Steel Pipes and Tubes from Thailand: Notice of Final Results of Antidumping Duty Administrative Review, 71 FR 54266 (September 14, 2006) (2004-2005 Final Results); see also Wheatland Tube. Saha Thai relies on Wheatland Tube, which states that "there is no requirement in the Statute or in Commerce's reasonable interpretation that Saha Thai prove that it paid duty on imported inputs used in the production of subject merchandise sold in the domestic market to qualify for a duty drawback adjustment." 414 F.Supp.2d at 1287.

Department's Position: Section 772(c)(1)(B) of the Act states that the price used to establish export price (EP) and constructed export price (CEP) shall be increased by 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 exportation of the subject merchandise to the United States…." (emphasis added).

Petitioners argue that because duties were not actually imposed and then rebated, but rather were exempted, the Department should deny the duty drawback adjustment. This argument is identical to arguments previously offered by petitioners in the 2004-2005 administrative review of this order. See 2004-2005 Final Results.

Petitioners' argument is not novel and does not warrant a departure from our decision in Pipe from Turkey and 2004-2005 Final Results, and the reasoning expressed therein, nor is there a reason to depart from the ruling in Wheatland Tube. Therefore, we have granted Saha Thai a duty drawback adjustment as we have determined that it has satisfied the requirements under section 772(c)(1)(B) of the Act and our two prong test.

Comment 3: Whether the Department Should Add a "Third" Prong to Its Eligibility Test

As a corollary to its prior argument, petitioners argue that the Department should add a third prong to its two prong test. The third prong, according to petitioners, should be the market difference the exporter/producer actually obtains by exporting to the United States instead of importing into the domestic market. Currently, petitioners state, the exporter/producer receives a market difference in import duty only to the extent that import duties were actually imposed upon it by the country of exportation. According to petitioners, the two prong test does not measure the amount of import duties imposed upon the producer/exporter by the country of exportation.

Petitioners argue that the adjustment for import duties imposed by the country of exportation should be calculated as are adjustments for antidumping duties, and movement, selling, and other expenses, by referencing the respondent's accounting records. According to petitioners, under the typical payment and rebate duty drawback program, the amount of duties actually imposed is the amount of duty payments on imports less the rebates on export. Petitioners further state that under a duty exemption program, the amount of duties imposed is the "obligation less the waiver." Petitioners further state for the Thai bonded warehouse program, there is no duty obligation imposed at the time of importation, and therefore, there is no waiver of duties at the time of exportation. Before granting the upward adjustment to export price, petitioners state that the Department should add a third prong to the test of eligibility, which considers the amount of import duties imposed by the country of exportation.

Petitioners note that Saha Thai calculated its reported adjustment to EP based on the amount of import duties exempted on imports of hot-rolled coil and zinc into its bonded warehouse based on the rates that Saha Thai would have paid if the imported hot-rolled coil or zinc had been sold in the domestic market or used in production of merchandise for sale into the domestic market. Petitioners contend that Saha Thai's entire upward adjustment to EP results not from its payment of import duties, but rather from its duty exemptions. Petitioners conclude that the Department should not interpret the term "import duties imposed" to include exemptions from payments of import duties for items imported into Saha Thai's bonded warehouse. Petitioners argue that "import duties imposed" should include only the import duties Saha Thai paid on hot-rolled steel that Saha Thai imported and sold in Thailand or used in the production of merchandise sold in Thailand. Petitioners conclude that the upward adjustment to U.S. price (for the duty exempted) should not exceed the per-ton amount of duty that Saha Thai actually paid.

Saha Thai argues that petitioners have confused the word "imposed" with the word "paid." Saha Thai contends that the Department has correctly interpreted the statute as requiring the satisfaction of a two prong test. Saha Thai argues that there is no requirement, implicit or explicit in the statute, that a respondent demonstrate that it paid import duties on raw materials used in the production of merchandise sold in the home market. Saha Thai quotes Pipe from Turkey in which the Department disagreed with the same argument for adding a third prong to the test for duty drawback adjustments to require a respondent to demonstrate that it paid import duties on raw materials used in the production of merchandise sold in the home market.

Department's Position: In order to implement the Act's mandate in section 772(c)(1)(B) with respect to import duties, which states that the price used to establish EP and CEP shall be increased by "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," the Department has developed and consistently applied a two prong test for duty drawback and exemption. This test requires that respondents show (1) that the import duty and rebate are directly linked to one another, and (2) that there are sufficient imports to account for the subject merchandise exported to the United States. In Wheatland Tube, the CIT affirmed the Department's decision not to add a third prong to the duty drawback test, as applied to Saha Thai. The court relied on the holding in Allied Tube & Conduit Corp. v. United States, 374 F. Supp. 2d 1257 (CIT 2005) (Allied Tube), stating that "this Court finds no reason to deviate from the court's well-reasoned decision in Allied Tube…further, this court explicitly rejects Plantiffs' 'contention that, as a prerequisite to receiving {a} duty drawback {adjustment}, a company must demonstrate payment of duties upon raw materials used to produce merchandise sold in the home market.'" Id. at 1288, quoting Allied Tube, supra at 1261.

In Pipe from Turkey, the Department explained:

> Contrary to the petitioners' assertion, the Department does not require a respondent to demonstrate that it paid import duties on raw materials used in the production of merchandise sold in the home market as a prerequisite for being granted the duty drawback adjustment.
>
> The statute provides for the adjustment without reference to whether products sold in the home market are made with imported raw materials. The only limitation placed on the duty drawback adjustment is that the adjustment to the U.S. price may not exceed the amount of duty drawback actually paid. See Laclede Steel Co. v. United States, slip op. 94-160 (1994) (citing Far East Mach. II at 311-312). Therefore, we disagree with petitioners that the Department should add a third prong to the test for drawback adjustments requiring that a respondent demonstrate that it paid import duties on raw materials used in the production of merchandise sold in the home market.

As we explained in response to the previous comments, we granted an upward adjustment for duty drawback or exemption for these final results because Saha Thai has shown that it met both prongs of the two prong test. Both the statute and the courts have been clear that there is no requirement that we examine duty actually paid for imported raw materials consumed in the production of the finished products for sale in the domestic market. Thus, there is no basis to add a third prong to the duty drawback test.

Comment 4: Whether the Department Should Use Saha Thai's Actual Yield Factors in Evaluating the Duty Exemption

According to Saha Thai, it adjusted its duty drawback exemption to account for its actual yield loss in response to the Department's third supplemental questionnaire. Saha Thai argues that the only rationale for the Department's request is that Saha Thai's yield factors have been lower than the yield factors mandated by the Thai Customs factors in the past two completed administrative reviews. Saha Thai argues that the Department provided no legal basis to explain why deviating from using the yield factors mandated by Thai Customs leads to a more accurate result. Saha Thai further argues that disregarding the Thai Customs' yield factors is methodologically incorrect because duty drawback or exemptions is an adjustment to price under the statute. Given this fact, Saha Thai argues that the adjustment should be equal to the amount of duty exempted on imports based on Thai Customs' yield factors. Saha Thai explains that the actual revenue received (for duty drawback), or actual duty not incurred (in the case of duty exemptions), in prior administrative reviews is not based on Saha Thai's actual experience, but on the usage rates determined by Thai Customs regulations. Saha Thai states that the Department had accepted government usage rates in prior administrative reviews before suddenly changing its policy.

Saha Thai states that it originally reported its duty exemptions on exported pipe in accordance with the methodology sanctioned by the Government of Thailand (GOT). The GOT, recognizing that steel is lost in transforming steel into pipe, applies a yield loss factor to determine the quantity of hot-rolled coil used in producing exported pipe. Saha Thai argues that this is what provides the link between the quantity of steel pipe exported and the quantity of hot-rolled coil used in calculating the exemptions for which Saha Thai is eligible.

Saha Thai states that it relies on the first-in first-out (FIFO) quantity of imported coil, which is reflected in quarterly reports filed with the GOT, and which was verified by the Department for the 2002-2003 administrative review.

Saha Thai reiterates that the duty exemption to which Saha Thai is entitled does not depend on the yield loss from Saha Thai's own production experience but rather is calculated based on the GOT-approved yield loss factor. Saha Thai states that its own yield loss factor may vary in different production periods, but that for the purpose of calculating duty exemptions, the GOT has reasonably determined that a constant yield factor must be used for administrative efficiency and simplicity. Saha Thai argues that the yield loss factor in other periods of review may be closer to or higher than the GOT's factor. Saha Thai further argues that the actual yield loss factor is irrelevant to the actual exemption received, which is based on GOT's yield factor. Saha Thai concludes that for the final results the Department should not make an adjustment to the yield factor it originally reported, which was based on the GOT's yield factor. Saha Thai notes that, because it does not calculate a yield factor for zinc used for galvanizing, the Department must rely on the yield loss factor established by the GOT.

Petitioners state that the GOT yield factor rates are the yield factor rates that Saha Thai originally used to calculate its duty drawback exemptions. According to petitioners, these yield factors

were used by Saha Thai to calculate the duties that Saha Thai would have paid if it had released the subject merchandise into Thailand rather than exporting it. Petitioners contend that these yield factors are purported to represent the weight of steel and zinc actually used in producing the finished pipe. Petitioners state that Saha Thai indicates that the yield factors were determined by the GOT. Petitioners note that Saha Thai's brief states that "the yield loss factor used by the Government of Thailand differs from the yield loss actually experienced by Saha Thai." According to petitioners, this is the reason the Department instructed Saha Thai to revise its calculation using its actual yield loss factors for both hot-rolled coil and zinc rather than those applied by the GOT.

Petitioners argue that the production yield loss is an important factor in determining the amount of duties that Saha Thai would have paid had it not exported the subject merchandise. The amount of import duties that would have been paid if the imported inputs were used to produce the domestic like product is a critical component of the calculation of the upward adjustment to export price. Given this fact, petitioners argue that the production yield factor should be calculated as accurately as possible. Petitioners contend that the GOT would naturally prefer to have a "robust" yield factor to decrease the quantity of merchandise remaining in Saha Thai's warehouse after exportation that is eligible for duty exemptions, so that Saha Thai does not abuse the bonded warehouse program. Petitioners argue that the difference between the GOT's preference and the yield loss experienced by Saha Thai should not be overlooked because the result would be lower dumping margins than would be established using Saha Thai's actual yield loss factor. Petitioners argue that this is the reason that Saha Thai's actual yields, rather than the GOT factors, should be used.

Department's Position: During the verification for the 2002-2003 administrative review, the Department found that the GOT yield loss factor was overstated vis-à-vis Saha Thai's actual experience. See Certain Welded Carbon Steel Pipes and Tubes from Thailand: Final Results of Antidumping Duty Administrative Review, 69 FR 61649 (October 20, 2004) and accompanying Issues and Decision Memorandum at Comment 5. In that review, as well as the most recently completed administrative review, we made an adjustment to Saha Thai's yield loss factor to more accurately tie the raw material imports with the finished product exports. See Circular Welded Carbon Steel Pipes and Tubes from Thailand: Preliminary Results of Administrative Review, 71 FR 17810 (April 7, 2006) (2004-2005 Preliminary Results) (unchanged in the final results).

We are adjusting the yield loss factor for these final results to reflect Saha Thai's experience. By using an actual yield loss factor which is a reasonable reflection of Saha Thai's actual experience, Saha Thai's raw material imports are more accurately tied to its finished product exports.

Comment 5: Whether to Include Exempted and Unpaid Duties on Imported Raw Materials in Saha Thai's Reported Cost of Manufacture (COM)

Saha Thai argues that the Department's request that it report an adjustment for exempted or unpaid duties to its COM is contrary to law. Saha Thai states that including unpaid duties in

Saha Thai's COM is not based on Saha Thai's records and is not in accordance with Thai generally accepted accounting principles (GAAP) nor are these unpaid duties reflective of the costs associated with producing and selling the merchandise under consideration.

Saha Thai cites the Act, which defines COP as the cost of materials and fabrication or other processing, an amount for selling, general, and administrative expenses, and for packing. According to Saha Thai, section 773(f)(1)(A) of the Act states that the Department will base the cost of production on the records of the exporter or producer of the merchandise if these records are kept in accordance with the GAAP of the exporting country. Further, Saha Thai argues that the Statement of Administrative Action (SAA) amplifies the Department's obligations under U.S. law and the World Trade Organization (WTO) Antidumping Agreement and directs the Department to calculate costs on the basis of the exporter/producer's records, provided that such records are in accordance with the GAAP of the exporting country and reasonably reflect the costs associated with the production and sale of the merchandise.

Saha Thai cites to the Department's practice of deviating from a company's local GAAP-compliant costs (Thai GAAP in this instance) only if the use of GAAP-compliant costs would cause distortions. Saha Thai notes that distortion is not defined in the statute, regulations, or case law. Saha Thai contends that the SAA allows the Department to look to U.S. GAAP as a guide in determining whether local GAAP-compliant costs are reasonable. Saha Thai further states that the Department has a practice of using U.S. GAAP as a benchmark in its determination of whether specific cost methodologies are reasonable.

Saha Thai reiterates that it is exempt from paying import duties when it imports hot-rolled coil under Thailand's bonded warehouse system. According to Saha Thai, it does not record the exempted duties in its books and records or in its financial accounting system in any way, because these costs will never be payable. Saha Thai states that, because these duties will never be payable, Saha Thai, according to Thai GAAP, must keep these duty exemptions wholly outside of the financial accounting system. Saha Thai states that, in the few cases where it used imported coil in its production of finished goods for the domestic market, the duties were booked as a cost at the time of entry.

According to Saha Thai, it provided a "theoretical" duty exemption adjustment to the reported COMs in response to the Department's May 5, 2008 supplemental questionnaire. Again, Saha Thai argues the addition of a "phantom" expense to the reported COMs is wholly incorrect for several reasons. The Department has a longstanding policy of including only actual costs in its cost calculations as recorded in a company's books and records, as indicated by the language of the standard section D questionnaire, which requests information "as recorded under your company's normal accounting system." Moreover, Saha Thai states that the Department has a long standing policy of excluding theoretical or imputed costs, which a respondent may calculate for the purposes of adjusting for differences in circumstances of sale, from the cost test. Saha Thai further argues that exempted import duties are identical to value added taxes (VAT) on inputs. Saha Thai explains that VAT payments on inputs are always refunded on the sale of the finished good. Saha Thai states that because VAT paid on inputs is always fully refundable, VAT is excluded in the calculation of the cost of production.

Saha Thai states that theoretical or imputed costs (e.g., credit or inventory carrying cost) are treated as circumstances of sale adjustments under section 772(c)(1)(B) of the Act rather than as a cost of production, because they are specific to one market and not to the other. Saha Thai argues that duty exemptions are "foregone costs" tied to one market. Saha Thai argues that these costs have no bearing on the home market costs. Saha Thai states that if imported steel is used to make a product sold in the home market, there is no exemption or duty drawback granted. Saha Thai further states that the reported hot-rolled coil costs include all of the actual duties paid on imports. Saha Thai explains that adding a theoretical duty to a cost that includes actual duties paid artificially inflates the cost of production. Saha Thai contends that Congress intentionally categorized duty drawback and duty exemption as an adjustment to price while leaving them out of the cost of production. Saha Thai states that because the Department has a policy of calculating only one average cost of production for each product, regardless of the market in which it is sold, those market-specific expenses, such as duty drawback, should be treated as adjustments to price.

According to Saha Thai, the Department's intention to include unpaid import duties in COM is not in accordance with U.S. GAAP. Saha Thai argues that under U.S. GAAP, items cannot generally be expensed in the financial statements until the income-generating item associated with the expenditure has been realized. In the case of a contingent expense, such as an exempted duty, a firm may accrue it and charge it to income if it is probable that an asset has been impaired or a liability has been incurred by the date of the financial statements.

Saha Thai contends that its exempted duties are unlikely to become "non-exempted" duties. According to Saha Thai, it imports coil only when it has received an export order for finished product. Saha Thai has maintained its bonded warehouse for many years and has successfully applied for, and received, duty exemptions on thousands of tons of imported coil. Saha Thai states that because it is not likely that the exempted duties will ever be revoked or payable, it cannot book them as costs either under Thai GAAP or U.S. GAAP.

Saha Thai contends that, if the addition of exempted duties to COM is inconsistent with Thai GAAP and U.S. GAAP, then the Department must have a clear and compelling reason why adhering to these principles is distortive. Saha Thai cites to Pipe from Turkey, where the Department stated that the offsetting revenues and costs should have been included to reflect the exemption of the duty. Saha Thai states that, in Pipe from Turkey, the Department provided no reason why it found such costs to be real, contrary to arguments raised by respondents that excluding such costs was consistent with its normal books and records and Turkish GAAP.

Saha Thai argues that including exempted duties in the cost of production results in double counting of the duty. According to Saha Thai, duties are designed to provide domestic producers with a measure of protection against imports. Saha Thai further argues that the domestic price of hot-rolled steel captures the cost of the duty. Saha Thai argues that this is evident by comparing domestic and imported coil purchases during the cost reporting period. Saha Thai states that the price it pays for its domestic coil consistently exceeds its pre-duty cost for imported coil. Saha Thai alleges that the higher price of domestic coil is at least partially attributable to the fact that competitive imports face an import duty. Saha Thai contends that, by adding the exempted duty

to the cost of coil that already includes a higher home market coil cost, the Department is double counting the impact of the import duty on Saha Thai's coil cost. According to Saha Thai, such a deviation from its books and records and Thai GAAP creates a distortion. Further, Saha Thai argues that that according to the statute's original intent, the Department is only allowed to deviate from a company's books and records and a country's GAAP to eliminate a distortive practice.

Petitioners agree with Saha Thai that Saha Thai's exemptions from payment of import duties should not be included in the cost of manufacturing. Petitioners, however, link this to their argument that Saha Thai is not entitled to an upward adjustment for duty drawback.

Department's Position: We disagree with Saha Thai that its raw material cost should exclude customs duties when imports are subject to duty and eligible for duty drawback or exemption when incorporated into an exported product. As the exempted duties and rebate "revenue" are real costs and revenues faced by the company, it is the Department's policy to add in the duty costs to cost of production (COP) even where the company does not record such costs in its normal books and records. As discussed above, Saha Thai participates in a duty exemption program, which enables it to import hot-rolled steel coils and zinc, without paying customs duties, as long as it satisfies the requirements of the GOT's bonded warehouse program. Although Saha Thai does not record customs duties as an expense in its normal books and records except when it actually has to pay the duties, Saha Thai explained that hot-rolled steel coil and the zinc are dutiable raw materials.

The Department's normal practice is to calculate a single average cost of production. See, e.g., Magnesium Metal from the Russian Federation: Notice of Final Determination at Sales at Less Than Fair Value, 70 FR 9041 (February 24, 2005) and accompanying Issues and Decision Memorandum at Comment 20. For purposes of CV, section 773(e)(1) of the Act requires that we use the cost of materials and fabrication or other processing of any kind employed in producing the merchandise. We are directed to use actual costs as recorded in Saha Thai's normal books and records for COP and CV. However, since we are adjusting EP for the duty exemption, we must account for the related duties that would have been incurred on Saha Thai's imported inputs. Since the Department uniformly calculates a single cost of production, which incorporates the cost of producing both exported and domestically sold finished products, that calculation must include the cost of duties. See, e.g., Pipe from Turkey. Therefore, we have increased the reported costs of raw materials to include the value of the exempted import duties. Contrary to Saha Thai's argument, the addition of the import duties does not result in double counting of the import duties. The duties were never included in the cost of production or recorded in Saha Thai's books and records.

Saha Thai is incorrect that our adjustment is contrary to U.S. GAAP. U.S. GAAP mandates that all expenses incurred during the fiscal year should be recorded in a company's accounting books and records. The duty exemption scheme simply eliminates the process of recording duty costs and the related drawback revenue. If we give the company the benefit of the drawback revenue under a duty exemption scheme, then we must also include the related exempted duty cost. We are granting an upward adjustment to EP for the duty drawback exemption claimed by Saha

Thai. Because we are granting Saha Thai a duty drawback exemption, it would be inappropriate to exclude the related import duties from COP. This treatment would be inconsistent with the basic principle of accounting theory that expenses should be matched with the benefits derived from them. In the Notice of Final Determination of Live Swine from Canada, we stated that "all expenses incurred in the generation of revenue should be recognized in the same accounting period as the related revenues are recognized. This is called the matching principle whereby expenses are 'matched' to the accounting periods that benefitted from the transaction, event, or circumstance." See 70 FR 12181 (March 11, 2005) and the accompanying Issues and Decision Memorandum at Comment 57 (Live Swine from Canada).

Because we are granting Saha Thai a duty drawback adjustment for these final results, it is appropriate to include the related expenses in the calculation of the COM. This is consistent with our practice. As we stated in Pipe from Turkey:

> We disagree with MMZ that raw material costs should exclude normal customs duties on inputs which are subject to duty drawback when incorporated in an exported product. As discussed above, MMZ participates in a duty exemption program where it is able to import steel coils without paying normal customs import duties as long as it satisfies the requirements of the duty drawback license. When MMZ completes a drawback license, the GOT {Government of Turkey} reviews the completed license and, if the requirements have been satisfied, notifies MMZ that MMZ is no longer liable for paying the exempted duties. Although MMZ does not record customs duties as an expense in its normal books and records, the Department determined during the sales verification that, as MMZ argues, the imported coils were dutiable. Since the Department uniformly calculates a single cost of production which incorporates the cost of producing both exported and domestically sold finished products, that calculation must include the cost of duties. Because the coils were dutiable, the rebate "revenue" (i.e., the official notification from the GOT that MMZ is no longer liable for the exempted duties) and duty (i.e., the cost) should have been reflected in the company's books. Even in exemption programs, these offsetting revenues and costs should have been recorded to reflect the exemption of the duty. . . . Thus, the Department increases EP by the duties which were drawn back and increases the reported costs for the same duties.
>
> For purposes of CV, section 773(e)(1) of the Act requires the Department to use "the cost of materials and fabrication or other processing of any kind employed in producing the merchandise." Since the Department is directed to use actual cost for COP and CV, it must account for the duties that should have been recorded, but which were not. The import duties which would have been

> incurred by MMZ on imported inputs but were exempted by virtue of exportation of the finished product were not included in the books and records of MMZ, but should have been. Therefore, we increased the reported cost of raw materials to include these import duties.

Pipe from Turkey, 69 FR 53675 (September 2, 2004) and accompanying Issues and Decision Memorandum at Comment 2.

We disagree with Saha Thai that the Department has a longstanding policy of excluding theoretical or imputed costs. For example, the Department has included costs, such as duties, as well as adjustments due to the application of the major input rule. Furthermore, Saha Thai's argument conflates what is done to adjust prices versus what is done to adjust costs. In order to capture the fully absorbed cost, and to be consistent with the fact that we are imputing revenue related to the duty drawback adjustment being applied to EP, we need to make an adjustment to Saha Thai's costs for the exempted duties that were not recorded in Saha Thai's books and records. Furthermore, we disagree with Saha Thai's argument on credit expenses and inventory carrying costs. These are sales-specific expenses and thus are not included in the COP analysis.

We also disagree with Saha Thai's argument concerning value added taxes (VAT). In fact, by including a duty cost in Saha Thai's material costs, we are being consistent with our treatment of VAT. That is, we treat the revenue and the cost sides of the comparison consistently. In this case we are imputing a duty drawback amount and a related duty cost amount. For VAT, we exclude the VAT revenue amount and the related VAT cost for the comparison. Thus, for the final results, we have included the import duties in the calculation of Saha Thai's cost of production.

Comment 6: Whether the Department Needs To Make Corresponding Adjustments to the G&A and Interest Expense Ratio Calculations if Unpaid Import Duties Are Included in Saha Thai's COM

Saha Thai argues that if the Department decides to adjust the reported COM to include the "phantom duty cost," the Department must make a corresponding adjustment to the general and administrative (G&A) expense and interest ratio calculations. Saha Thai states that it excluded its customs fee income from offsets to the G&A expenses, because it only reported costs on duties that were actually incurred. Saha Thai states that if the Department decides to add "exempted" duties to the COM, it should deduct these rebated customs fees from the G&A or deduct them from reported material costs. See Exhibit 5 of Saha Thai's June 25, 2008 case brief. Saha Thai further argues that the Department should make an adjustment to the denominator used in the G&A and interest calculations to reflect the "exempted" duties. Saha Thai explains that the denominator in the original calculations does not include any "phantom" costs. Saha Thai states that the Department should apply the principle of "parallel construction," which would require that the denominator also include these "phantom" costs. Petitioners did not comment on whether the Department needs to make corresponding adjustments to the G&A and interest expense ratio calculations if unpaid import duties are included in Saha Thai's COM.

Department's Position: We disagree with Saha Thai that the G&A and interest expense ratios need to be recalculated. We have calculated G&A and interest expense ratios without including the value of the exempted duties in the denominator. We have applied the G&A and interest expense ratios to a COM which also does not include the exempted duties. Contrary to respondent's argument, this application is a "parallel construction." We have not overstated or understated G&A and interest expense in the calculation of COP. As we stated in Live Swine From Canada: "{t}he Department's practice is to calculate G&A and financial expense ratios using a denominator that should approximate as closely as possible the same body of expenses as the number to which the ratios are applied (see, e.g., Notice of Final Results of Antidumping Duty Administrative Review: Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled from Germany: Final Results of Antidumping Duty Administrative Review, 66 FR 11557 (February 26, 2001) and Brass Sheet and Strip from Canada: Final Results of Antidumping Duty Administrative Review, 65 FR 37520 (June 15, 2000)." See Live Swine from Canada. In doing so, we rely on the cost of sales reported on the respondent's audited financial statements as the basis to allocate general and interest expenses, see, e.g., Elemental Sulphur From Canada; Final Results of Antidumping Duty Administrative Review**,** 64 FR 37737 (July 13, 1999) at comment 2. Because Saha Thai's cost of sales reported on its financial statements does not include the duties, Saha Thai's G&A and interest expense ratios should be applied to Saha Thai's COM exclusive of the duties. This ensures that the G&A and financial expense ratios are applied on the same basis as the reported COM. Therefore, there is no need to modify the denominator of the G&A and financial expense ratios.

Finally, we disagree with Saha Thai that the rebated customs fees should be included as an offset to G&A expense. As stated above, the COM calculated does not include the duties paid. Thus it is appropriate to apply the G&A expense ratio without the duty rebates to Saha Thai's COM exclusive of the duties. This assures that the G&A ratio is applied on the same basis as the reported COM.

Comment 7: Whether to Deduct Ocean Freight from C&F Value to Calculate U.S. Duty

Saha Thai argues that the Department artificially increased the amount of per-unit duty allocated to each observation. Saha Thai states that the Department misunderstood that the value reported as "C&F" value in the questionnaire response is Saha Thai's invoice value. Saha Thai explains that it refers to its invoice value as the "C&F" value in its normal books and records because it builds the price to its U.S. customers from three or occasionally four components: FOB price, freight, customs fees and occasionally insurance. Saha Thai further explains that the actual expense for each of these items differs from the negotiated price. Saha Thai references the U.S. sales documentation provided in Exhibit A-12 of its July 23, 2007 section A response, which shows that its invoice value is referred to as "C&F."

Saha Thai explains that it allocated U.S. duty based on invoice value and applied the resulting duty ratio to gross unit price. Saha Thai argues that the Department artificially lowered the gross unit price by erroneously deducting an amount for freight, which results in the ratio artificially inflating the amount of duty. While Saha Thai acknowledges that this correction will have a

minimal impact on the margin, it argues that, for the sake of accuracy, the Department should revise its calculations for the final results of this administrative review.

Saha Thai argues that the Department must use the gross unit price on the invoice to obtain an apples-to-apples comparison and to calculate the duty expense. Saha Thai states that it has repeatedly used this method in its administrative reviews and that its methodology has always been accepted. In addition, Saha Thai notes that the Department should apply this analysis to both insurance and other direct selling expenses for letter of credit penalties. Petitioners did not comment on these issues.

Department's Position: In the Preliminary Results, we deducted ocean freight from the reported C&F value in order to obtain a more accurate factor for each of the relevant invoices analyzed for this POR. Given that Saha Thai has clearly articulated that it both calculated and applied its U.S. duty based on invoice value, for these final results, we will use Saha Thai's U.S. price as calculated. We note that any change would have an insignificant impact on the margin according to section 777A(a)(2) of the Act and the Department's regulations at section 351.413. Thus, we are using the U.S. duty as reported by Saha Thai. However, we note that if Saha Thai participates in future administrative reviews of this order, we may re-examine the calculation of this expense. Finally, we did not make any adjustments to insurance or other direct selling expenses for letter of credit penalties in the Preliminary Results and, as such, the analysis recommended by Saha Thai is not necessary for insurance and other direct selling expenses for letter of credit penalties.

Comment 8: Level of Trade Adjustment

Saha Thai argues that the Department made a correct determination in its Preliminary Results in finding two distinct levels of trade in the home market and one level of trade in the U.S. market. Saha Thai states that the Act requires the Department to calculate normal value on the home market price at the same level of trade as the export price. According to Saha Thai, the Department's regulations state that substantial differences in selling activities are a necessary, but not sufficient condition for determining that there is a difference in marketing. Saha Thai concludes that the Department may only use home market sales made at the second level of trade if there are no home market sales in the first level of trade. In such a case, Saha Thai continues, the Department must grant a level of trade adjustment as it did in the Preliminary Results to account for price differences due to different levels of trade. Petitioners did not comment on whether or not the Department should make a level of trade adjustment for these final results.

Department's Position: As we noted in the Preliminary Results, we reviewed the information regarding the distribution system in both markets, including the selling functions and the level of selling activities for each type of sale. See Memorandum to the File, "Analysis of Saha Thai Steel Pipe (Public) Company, Ltd. for the Preliminary Results of the Antidumping Duty Administrative Review of Circular Welded Carbon Steel Pipes and Tubes from Thailand," (Preliminary Analysis Memorandum), dated March 31, 2008. In the Preliminary Results, we determined that Saha Thai sold at two distinct levels of trade in the home market and one level of trade in the U.S. market. Further, we found that Saha Thai's U.S. sales (LOTU1) are at the same

level of trade as its sales to end-user customers in the home market (LOTH1), while its sales through the affiliated resellers are at a more advanced level of trade (LOTH2). For these final results, the Department is continuing to grant a level of trade adjustment for those LOT2 sales that are used in our margin calculation program. See Preliminary Results and 2004-2005 Final Results. For these final results, we are matching U.S. sales only to merchandise at the identical level of trade except when there are no matches of identical or similar merchandise. As in the Preliminary Results, in the instances where there are no matches at the same level of trade, we matched to the other level of trade. We also determined that there was a pattern of price difference and that an LOT adjustment was warranted. For further detail, see Preliminary Analysis Memorandum, dated March 31, 2008.

Comment 9: Whether Zeroing Is In Accordance with the Antidumping Statute or the International Obligations of the United States

According to Saha Thai, in the Preliminary Results, the Department did not grant offsets for non-dumped sales, a methodology commonly referred to as "zeroing." Saha Thai argues that "zeroing" distorts the overall dumping margin by precluding the offset of positive margins by negative margins. The Department, according to Saha Thai, is essentially ignoring all sales with an export price above normal value.

Saha Thai argues that despite the "fair comparison" requirement of the statute, the Department continues to calculate dumping margins in administrative reviews by considering only those export sales priced below normal value. Saha Thai states that "zeroing" does not produce a "fair comparison," because the established sales price ignores a significant portion of sales and compares only the remaining sales prices to normal value.

According to Saha Thai, the CIT has already recognized the flaws and inherent bias in the Department's "zeroing" policy. See Bowe Passat Reingungs-Und Waschereitechnik GmbH v. United States, 926 F. Supp. 1138, 1150 (CIT 1996) (Bowe Passat). In Bowe Passat, the CIT recognized that the Department's practice of "zeroing" does not produce an absolute "apples to apples" comparison. Saha Thai argues that the Department's use of "zeroing" results in an unfair and unreasonable application and interpretation of the Act, which should be abandoned in the final results of this review. Saha Thai states that the Department is free to revise its policy for the final results of this review since "zeroing" is not mandated by the statute or the Department's regulations.

Saha Thai argues that the WTO Appellate Body has consistently ruled that zeroing violates U.S. obligations under the WTO Antidumping Agreement. See, e.g., United States-Laws Regulations, and Methodology for Calculating Dumping Margins (Zeroing), WT/DS294/AG/R (April 18, 2006) (US-Zeroing (EC)); United States-Final Dumping Determination in Softwood Lumber from Canada, WT/DS264/AB/R (August 11, 2004)) (U.S.-Softwood Lumber). Saha Thai argues that the Department has accepted the inconsistency of zeroing with the WTO's Antidumping Agreement and with the United States' internal obligations. See Antidumping Proceedings: Calculation of Weighted Average Dumping Margin During an Antidumping Investigation: Final Modification, 71 FR 77722 (December 27, 2006) (Zeroing Notice). Saha

Thai notes that the United States has publicly stated that it would comply with the decision in the of United States-Measures Relating to Zeroing and Sunset Reviews WT/DS322/AB/R (January 9, 2007) (US-Zeroing (Japan)). As such, Saha Thai argues, the Department should not use the "zeroing" methodology in the final results of this review.

Petitioners argue that the term "fair comparison" does not mean that the Department violates the AD law by not considering comparisons where the normal value (NV) does not exceed the EP. Petitioners note that the dumping margin is specifically defined in a manner that directly refutes Saha Thai's conclusion.

Petitioners argue that it is axiomatic that the Department cannot calculate the dumping margin in a way that violates U.S. law, even if the Department is directed to violate U.S. law by a WTO Appellate Body. Petitioners cite to the "Memorandum from Stephen Claeys to David Spooner regarding Final Results for Section 129 Determinations: Certain Hot-Rolled Carbon Steel from the Netherlands *et. al.*," (April 9, 2007) (Section 129 Determinations), which states that "{w}hile the Department…is taking actions to bring these investigations into conformity with an adopted WTO panel report, the Department must apply U.S. law." Petitioners state that what Saha Thai is advocating is not in accordance with U.S. law. Therefore, according to petitioners, the Department is not authorized under U.S. law to dispense with zeroing and offset the positive margins by negative margins as Saha Thai argues, even if directed to by the WTO.

Petitioners state that the Department has found that its offset practices were consistent with the statute when calculating margins in administrative reviews. Petitioners contend that for administrative reviews, subtracting the negative margins from the positive margins is inconsistent with section 771(35)(A) of the Act because the statutory definition of the dumping margin provides that the dumping margin is the amount by which the normal value exceeds export price. Petitioners cite to Carbon and Certain Alloy Steel Wire Rod from Canada: Final Results of Antidumping Duty Administrative Review (Canadian Wire Rod), where the Department states that when sales are equal to or less than export price, the Department will not permit these non-dumped sales to offset the amount of dumping found with respect to other sales. See 73 FR 29658 (May 12, 2008).

Petitioners also cite to the Section 129 Determinations, where the Department argued that, because the Federal Circuit found that the single word, "exceeds," in the dumping margin definition at section 771(35)(A) was ambiguous, the Department has discretion to remove the negative dumping margins from the margin calculation. In Canadian Wire Rod, petitioners contend, the Department stated that it interprets the statutory definition to mean that a dumping margin exists only when normal value is greater than export price or constructed export price. Petitioners contend that no other interpretation of the statute is possible. Petitioners disagree that the Department has the authority and discretion to amend its practice now to conform to international obligations by offsetting positive margins with negative margins in administrative reviews.

According to petitioners, The Timken Company v. United States, 354 F. 3d 1334, 1343 (Fed. Cir. 2004) (Timken), demonstrates that Congress intended the antidumping duty assessment to

be imposed only by the amount that NV is greater than EP, otherwise the Department would be required to pay importers the amount by which the NV is less than EP.

Department's Position: 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." Outside the context of antidumping duty investigations involving average-to-average comparisons, the Department interprets this statutory definition to mean that a dumping margin exists only when NV is greater than export price or constructed export price. As no dumping margin exists with respect to sales where NV is equal to or less than export price or constructed export price, the Department does not permit these non-dumped sales to offset the amount of dumping with respect to other sales. The Court of Appeals for the Federal Circuit has held that this is a reasonable interpretation of the statute. See, e.g., Timken; Corus Staal BV v. Department of Commerce, 395 F. 3d 1343, 1347-49 (Fed. Cir. 2005), cert. denied: 126 S. Ct. 1023, 163 L. Ed. 2d 853 (January 9, 2006) (Corus I); and, SKF v. United States, 537 F.3d 1373 (Fed. Cir. 2008).

As noted above, Saha Thai argues that the WTO Appellate Body has consistently ruled that "zeroing" violates U.S. obligations under the WTO Antidumping Agreement. As an initial matter, the Federal Circuit has held that WTO reports are without effect under U.S. law "unless and until such a {report} has been adopted pursuant to the specified statutory scheme" established in the Uruguay Round Agreements (URAA). See, 19 USC 3538. See also Corus I, 395 F. 3d 1343, 1347-49; accord Corus Staal BV. United States, 502 F. 3d, 1370, 1375 (Fed. Cir. 2007) (Corus II); and NSK v. United States, 510 F. 3d 1375 (Fed. Cir. 2007) (NSK).

With respect to US – Softwood Lumber, the WTO AB's finding only related to the denial of offsets in the antidumping investigation of softwood lumber from Canada. That report, and the Department's implementation of that report, did not address the Department's denial of offsets in other antidumping investigations or in any administrative review. See Notice of Determination Under Section 129 of the Uruguay Round Agreements Act: Antidumping Measures on Certain Softwood Lumber Products From Canada, 70 FR 22636 (May 2, 2005). Moreover, ultimate resolution of that WTO dispute was achieved through a mutually agreed solution and not through an elimination of the denial of offsets. See Notification of Mutually Agreed Solution, United States-Final Dumping Determination on Softwood Lumber from Canada, WT/DS264/29/Add.1 (March 9, 2007).

With respect to US – Zeroing (EC), the Department has modified its calculation of weighted average dumping margins when using average-to-average comparisons in antidumping investigations. See Zeroing Notice. In doing so, the Department declined to adopt any other modifications concerning any other methodology or type of proceeding such as administrative reviews. Zeroing Notice, 71 FR at 77724.

With reference to Saha Thai's discussion of US-Zeroing (Japan), Congress has adopted an explicit statutory scheme in the URAA for addressing the implementation of WTO reports. As is clear from the discretionary nature of this scheme, Congress did not intend for WTO Reports to automatically trump the exercise of the Department's discretion in applying the statute. See 19

USC 3538(b)(4) (implementation of WTO reports is discretionary). Moreover, as part of the URAA process, Congress has provided a procedure through which the Department may change a regulation or practice in response to WTO reports. See 19 USC 3533(g); see, e.g., Zeroing Notice,71 FR at 77722, 77724. With regard to the denial of offsets in administrative reviews, the United States has not employed this statutory procedure. With regard to US-Zeroing (Japan), appropriate steps have been taken in response to that report and those steps do not involve a change to the Department's approach for calculating weighted-average dumping margins in the instant administrative review. Furthermore, in response to U.S. Zeroing (Japan), the Federal Circuit has repeatedly affirmed the permissibility of denying offsets in administrative reviews. See Corus II, 502 F.3d. at 1374-75; NSK, 510 F. 3d at 1375.

For all of these reasons, the various WTO Appellate Body reports regarding "zeroing" do not establish whether the Department's denial of offsets in this administrative review is consistent with U.S. law. Accordingly, and consistent with the Department's interpretation of the Act described above, the Department has continued to deny offsets to dumping based on export transactions that exceed NV in this review.

For the foregoing reasons, we have not changed the methodology employed in calculating the respondents' weighted-average dumping margin for these final results.

Comment 10: Whether the Department Should Correct Alleged Errors in the Preliminary G&A and Financial Expense Ratio Calculations

Saha Thai states that the Department increased Saha Thai's reported financial expenses by adding to the numerator all of the "other income" items listed by Saha Thai to reduce the net financial expense calculation in its March 3, 2008 section D response. See Exhibit SDR-20. Saha Thai notes that, in its original July 23, 2007 section D response, it provided a detailed break-out of other income. Saha Thai argues that a number of items should be used to reduce G&A or financial expenses, as they are directly related to the production of the merchandise under consideration. Saha Thai notes that it provided revised G&A and financial expense ratio calculations in its May 5, 2008 supplemental questionnaire response. Petitioners did not comment on whether the Department should correct alleged errors in the preliminary G&A and financial expense ratio calculations.

Department's Position: In the Preliminary Results, we revised Saha Thai's financial expense ratio because Saha Thai had included the entire amount of the "other income" as an offset to interest expense, rather than including only the interest income and the foreign exchange losses, which were part of the other income. This resulted in double counting of the other components of other income because they had already been included as offsets to Saha Thai's G&A expense ratio. Saha Thai correctly included the foreign exchange losses in the financial expense ratio calculation, which it deducted from G&A expenses, in the numerator of the G&A ratio calculation in its March 3, 2008 section D supplemental response. However, after reviewing the financial expense ratio, we found that interest income was not included as an offset to interest expense in the Preliminary Results. The numerator of the financial expense ratio discussed by Saha Thai in its case brief includes the foreign exchange losses and the interest income, which

are components of "other income." However, the numerator of the financial expense ratio failed to include the foreign exchange losses that were excluded from the G&A expense. Thus, we have revised the financial expense ratio accordingly. For these final results, the financial expense ratio calculation is, appropriately, the sum of total interest expense, all exchange losses (i.e., both foreign exchange losses that were part of other income and those deducted from G&A expense), less short-term interest income. There was no need to recalculate the numerator of the G&A expense ratio, because all other income items were properly included as an offset to G&A expense.

Comment 11: Alleged Programming Errors

Saha Thai states that the program the Department used to calculate the margin for the Preliminary Results has a clerical error, which results in incorrect model matching and distorts the margin. Saha Thai also argues that the incorrect variable was used for wall thickness due to reformatting by the Department. According to Saha Thai, correction of these errors will result in accurate matches. Petitioners did not comment on these alleged programming errors.

Department's Position: We have reviewed the programs used to calculate the margin for the Preliminary Results and we agree that these corrections are necessary for these final results. See Memorandum to the File, "Analysis of Saha Thai Steel Pipe (Public) Company, Ltd. for the Final Results of the Antidumping Duty Administrative Review of Circular Welded Carbon Steel Pipes and Tubes from Thailand," dated concurrently with this memo.

Recommendation

Based on our analysis of the comments we received, we recommend adopting all of the above positions. If these recommendations are accepted, we will publish the final results and Saha Thai's final weighted-average dumping margin in the Federal Register.

Agree_____ Disagree _____

_____
David M. Spooner
Assistant Secretary
for Import Administration

_____
Date