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June 6, 2008

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

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

SUBJECT: Investigation of Certain Steel Nails from the People's Republic of China: Issues and Decision Memorandum

SUMMARY:
We have analyzed the comments submitted in the investigation of certain steel nails ("nails") from the People's Republic of China ("PRC"). As a result of our analysis, we have made changes from the Preliminary Determination, Amended Preliminary Determination, and Post-Preliminary Determination. See Certain Steel Nails from the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances and Postponement of Final Determination, 73 FR 3928 (January 23, 2008) ("Preliminary Determination"); Certain Steel Nails From the People's Republic of China: Amended Preliminary Determination of Sales at Less Than Fair Value, 73 FR 7254 (February 7, 2008) ("Amended Preliminary Determination"); Memorandum to David Spooner, Assistant Secretary for Import Administration entitled "Post-Preliminary Determinations on Targeted Dumping," dated April 21, 2008 ("Post-Preliminary Determinations"). We recommend that you approve the positions we have developed in the "Discussion of the Issues" section of this Issues and Decision Memorandum. Below is the complete list of the issues in this antidumping duty investigation for which we received comments on the Preliminary Determination, Amended Preliminary Determination, and Post-Preliminary Determinations:

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Comment 1: Appropriateness of Implementing New Methodology in These Investigations
Comment 2: Identifying Alleged Targets
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Comment 4: Reliance on Identical Product Comparisons for Determining Targeted Dumping
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- **C. Senco's Indirect Selling Expenses**
- **D. Application of Total AFA or an Intermediate Input Methodology to Xingya Group Due to the Misreporting of Its Production Process**
- **E. SXNC's Purchases of Collating Paper**
- **F. Partial AFA for Certain Misreported and Unreported SXNC Factors of Production**
- **G. Critical Circumstances**

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Comment 22: Misidentification of Separate Rate Recipients
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BACKGROUND:

The merchandise covered by this investigation is nails from the PRC as described in the "Scope of the Investigation" section in the Preliminary Determination. The period of investigation ("POI") is October 1, 2006, through March 31, 2007. Between February 11 and February 22, 2008, the Department conducted verifications of Paslode Fasteners (Shanghai) Co., Ltd.'s ("Paslode Shanghai") affiliated importer Illinois Tool Works Inc., Paslode Division ("ITW Paslode"),[1] (collectively, "ITW") and Xingya Group's affiliated importers Senco Products, Inc. ("Senco")[2] and Omnifast LLC ("Omnifast")[3] in Chicago and Cincinnati, respectively. Between March 7 and March 21, 2008, the Department verified Paslode Shanghai,[4] Xingya Group,[5] and Suntec Industries Co., Ltd. in the PRC.

In accordance with section 351.309(c)(i) of the Department's regulations, we invited parties to comment on our Preliminary Determination. On May 1, 2008, Petitioners,[6] ITW, Xingya Group, Jinhai and Hybest Tools,[7] Xuzhou CIP, Curvet, and Tengyu,[8] Dinglong, Shanxi Pioneer, and

[1] See Memorandum to the File through Alex Villanueva, Program Manager, Office 9, from Nicole Bankhead, Senior Case Analyst: Verification of the Sales Response of Illinois Tool Works Inc., Paslode Division in the Antidumping Investigation of Certain Steel Nails from the People's Republic of China, dated March 3, 2008 ("ITW Paslode Verification Report").

[2] See Memorandum to the File through Alex Villanueva, Program Manager, Office 9, from Matthew Renkey, Senior Case Analyst: Verification of the Sales Response of Senco Products, Inc. in the Antidumping Investigation of Certain Steel Nails from the People's Republic of China, dated April 10, 2008 ("Senco Verification Report").

[3] See Memorandum to the File through Alex Villanueva, Program Manager, Office 9, from Matthew Renkey, Senior Case Analyst: Verification of the Sales Response of Omnifast LLC in the Antidumping Investigation of Certain Steel Nails from the People's Republic of China, dated April 8, 2008 ("Omnifast Verification Report").

[4] See Memorandum to the File through Alex Villanueva, Program Manager, Office 9, from Nicole Bankhead, Senior Case Analyst: Verification of the Sales and Factors Response of Paslode Fasteners (Shanghai) Co., Ltd. in the Antidumping Investigation of Certain Steel Nails from the People's Republic of China, dated April 15, 2008 ("Paslode Shanghai Verification Report").

[5] See Memorandum to the File through Alex Villanueva, Program Manager, Office 9, from Matthew Renkey, Senior Case Analyst: Verification of the Sales and Factors Response of the Xingya Group in the Antidumping Investigation of Certain Steel Nails from the People's Republic of China," dated April 21, 2008 ("Xingya Group Verification Report").

[6] Petitioners are: Mid Continent Nail Corporation; Davis Wire Corporation; Gerdau Ameristeel Corporation (Atlas Steel & Wire Division); Maze Nails (Division of W.H. Maze Company); Treasure Coast Fasteners, Inc.; and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union.

[7] Huanghua Jinhai Hardware Products Co., Ltd. ("Huanghua") and Hybest Tools Group Co., Ltd. ("Hybest Tools").

[8] Xuzhou CIP International Group Co., Ltd. ("Xuzhou CIP"); Shanghai Curvet Hardware Products Co., Ltd. ("Curvet"); and Shanghai Tengyu Hardware Tools Co., Ltd. ("Tengyu").

Tianjing Jinghai,[9] and Hilti[10] filed case briefs. On May 8, 2008, Petitioners, ITW, and Xingya Group filed rebuttal briefs.

On January 23, 2008, the Department published in the Federal Register the preliminary determination of sales at LTFV in the antidumping duty investigations of nails from the UAE and the PRC. See Certain Steel Nails From the United Arab Emirates: Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination, 73 FR 3945 (January 23, 2008) ("UAE Preliminary Determination"), and Preliminary Determination. In these preliminary determinations, the Department accepted the petitioners' allegations that there is a pattern of export prices for comparable merchandise that differs significantly among regions or purchasers. Accordingly, for purposes of the preliminary determination, we calculated preliminary determination margins in both investigations using the targeted dumping methodology applied in Notice of Final Determination of Sales at Less Than Fair Value: Coated Free Sheet Paper from the Republic of Korea, 72 FR 60630 (October 25, 2007), and accompanying Issues and Decision Memorandum ("CFS Paper").

However, we noted in our preliminary determinations that the Department was in the process of reassessing the framework and standards for the targeted dumping analyses, and that we intended to develop a new framework in the context of these proceedings and to apply it in time for parties to have an opportunity to comment before the final determinations. To that end, the Department requested comments from interested parties on targeted dumping issues. In response to the Department's request, the petitioners and the respondents in the PRC and UAE investigations filed such comments on February 15, 2008, and rebuttals to these comments on March 10, 2008. After consideration of these comments, the Department issued a post-preliminary determination in this investigation and Nails/PRC. See Memorandum to David Spooner, Assistant Secretary for Import Administration entitled "Post-Preliminary Determinations on Targeted Dumping," dated April 21, 2008 (Post-Preliminary Determinations). As part of the Post-Preliminary Determinations, we analyzed targeted dumping using a new methodology and applied new margin calculation programs that resulted in different margins than those calculated in the UAE Preliminary Determination and the Preliminary Determination. The Department issued a clarification of its new targeted dumping methodology in a letter to all interested parties dated April 24, 2008.

We invited parties to comment on the preliminary determination and the post-preliminary determination. On May 7, 2008, Petitioners and Xingya Group submitted briefs on the Department's targeted dumping methodology and on May 14, 2008, Petitioners, Xingya Group, and ITW submitted rebuttal briefs. Additionally, Dubai Wire filed a public version of its rebuttal brief to Petitioners' targeted dumping brief on the record of this investigation.[11]

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[9] Shandong Dinglong Import & Export Co., Ltd. ("Shandong Dinglong"), Shanxi Pioneer Hardware Industrial Co., Ltd. ("Shanxi Pioneer"), and Tianjin Jinghai County Hongli Industry & Business Co., Ltd. ("Tianjin County").

[10] Hilti Inc. and Hilti (China) Ltd. ("Hilti").

[11] Dubai Wire resubmitted its rebuttal brief on May 16, 2008, as the Department rejected the original rebuttal brief because it contained arguments that did not address comments made in Petitioners' targeted dumping case brief. See Memorandum to The File entitled "Return of Dubai Wire FZE (Dubai Wire) Rebuttal Brief on Targeted

The specific calculation changes for ITW can be found in the Memorandum to the File from Nicole Bankhead, Senior Case Analyst: Program Analysis for the Final Determination of Antidumping Duty Investigation of Certain Steel Nails from the People's Republic of China: ITW, dated June 6, 2008 ("ITW Final Analysis Memorandum"). The specific calculation changes for Xingya Group can be found in the Memorandum to the File from Matthew Renkey, Senior Case Analyst: Program Analysis for the Final Determination of Antidumping Duty Investigation of Certain Steel nails from the People's Republic of China: Xingya Group, dated June 6, 2008 ("Xingya Group Final Analysis Memorandum").

DISCUSSION OF THE ISSUES:

Comment 1: Appropriateness of Implementing New Methodology in These Investigations

Petitioners contend that the Department's implementation of a new targeted dumping analysis methodology at this point in the investigations is procedurally unfair because it provides insufficient opportunity for Petitioners to comment meaningfully. According to Petitioners, the Department accepted a targeted dumping test in CFS Paper, and Petitioners filed targeted dumping allegations in the steel nails investigations based on the CFS Paper targeted dumping methodology (also referred to as the "P/2 test" or "P/2 methodology"). While Petitioners note that the Department indicated in the Preliminary Determination and the UAE Preliminary Determination that it "intended to develop a new framework in the context of this proceeding and to apply it in time for parties to have an opportunity to comment before the final determination," and the Department received comments from parties on certain targeted dumping principles, they point out that it was not until April 21, 2008, that the Department issued its Post-Preliminary Determinations utilizing a new and allegedly complicated targeted dumping methodology.

Petitioners continue that, as a result, they had only 16 days to analyze and comment on this methodology; even less time after taking into account the Department's clarification on April 24, 2008, and the release of the public version of the SAS targeted dumping programs on April 30, 2008. Petitioners contend that this short period of time to comment on such a broad and complex change in the Department's methodology has effectively denied Petitioners' right of due process by providing Petitioners with insufficient opportunity to comment in a meaningful manner. In support of this argument, Petitioners cite Barnhart v. United States Treasury Department, 588 F. Supp. 1432, 1438 (CIT 1984) ("Barnhart").

More specifically, Petitioners allege that the complexity of the methodology, the Department's failure to adequately explain the programming, calculations, and assumptions underlying the methodology, and the errors in the programming and calculations all demonstrate that the period of time to review and analyze the materials thoroughly is inadequate. Petitioners identify various

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Dumping Issues," dated May 16, 2008. Dubai filed the public version of its refilled rebuttal brief on the record of this investigation on May 16, 2008, as well.

examples of alleged methodological and programming errors in the Department's targeted dumping test applied in the Post-Preliminary Determinations. Petitioners assert that the Department has underestimated the complexity of the new targeted dumping methodology, which requires various skilled technical consultants to fully analyze it. Further, Petitioners complain that the Department has failed to explain why the new methodology is appropriate, how the new interpretation is consistent with the statute, and why the P/2 targeted dumping methodology, which the Department had previously approved, is now somehow invalid or inconsistent with the statute.

Accordingly, Petitioners claim that this complicated change in the targeted dumping methodology at a late stage in the investigations is an unfair application of the Department's discretion in administering the antidumping duty law. Petitioners state that they relied on the P/2 targeted dumping methodology in the steel nails investigations based on the Department's previous acceptance of it in CFS Paper, the Preliminary Determination, and the UAE Preliminary Determination, noting that the Department had accepted this methodology as consistent with the statutory criteria for targeted dumping. Petitioners state that they reasonably expected the Department to continue to rely on the P/2 methodology for these cases, and that the development of the new methodology would be for future cases, after allowing for the development of a statistically sound, error-free standardized test through the notice and comment process, such as that initiated in Targeted Dumping in Antidumping Investigations; Request for Comment, 72 FR 60651 (October 25, 2007) ("Targeted Dumping I"). To change the methodology at this late stage in the proceedings, Petitioners conclude, would constitute an abuse of the Department's discretion and be inconsistent with the court's holding in Shikoku Chemicals Corp. v. United States, 795 F.Supp. 417, 421-422 (CIT 1992) ("Shikoku Chemicals"), where the court found that the Department did not have adequate reasons for a last minute change in methodology.

Finally, Petitioners point to Calcium Hypochlorite from Japan: Final Results of Administrative Review and Revocation in Part, 55 FR 41259, 41260 (October 10, 1990) ("Hypochlorite from Japan"), where, according to Petitioners, the Department declined to apply a new and arguably better methodology because this methodology was "subject to misinterpretation" and thus might unfairly harm the party that had relied on it. Similarly, Petitioners contend that such a situation applies in these investigations, where the new methodology is, at best "subject to misinterpretation," as well as allegedly flawed. Petitioners maintain that they will be unfairly harmed if the Department relies on the new targeted dumping methodology for the final determination. They argue that the serious harm they would suffer, namely the potential de minimis margins and negative final determination in the UAE investigation, outweighs the potential gain in alleged accuracy achieved by applying the new methodology. Accordingly, based on the principle of administrative equity, Petitioners assert that the Department should not apply the new targeted dumping methodology for the final determination and instead rely on the P/2 methodology.

ITW, Dubai Wire, and Xingya Group respond that Petitioners' due process complaints are groundless because the Department repeatedly put all parties on notice that the methodology adopted in CFS Paper was not intended to be a standard and that the Department would be adopting a new framework within the context of these proceedings. In particular, ITW and

Dubai Wire point to CFS Paper, where the Department stated "the Department accepts the petitioner's targeting allegation {i.e., the P/2 test} without endorsing the petitioner's test standards and procedures as a general practice…" and in the Preliminary Determination and the UAE Preliminary Determination, where the Department explicitly advised all parties that: "the Department is in the process of re-assessing the framework and standards for both targeted dumping allegations and targeted dumping analyses. Accordingly, we intend to develop a new framework in the context of this proceeding and to apply it in time for parties to have an opportunity to comment before the final determination." Accordingly, ITW and Xingya Group contend that Petitioners had no basis to assume that application of the P/2 methodology would continue to the final determinations in these investigations. Xingya Group adds that further notice was given to Petitioners that the P/2 test alone was insufficient to support a finding of targeted dumping in the Department's rejection of a targeted dumping allegation in Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Affirmative Preliminary Determination of Critical Circumstances, in Part: Light-Walled Rectangular Pipe and Tube from the People's Republic of China, 73 FR 5500, 5503 (January 30, 2008) ("LWRP from the PRC")

Xingya Group specifically responds to Petitioners' citation to Barnhart, explaining that Barnhart is completely inapposite as it dealt with particular events that occurred subsequent to a final determination in a U.S. Customs administrative proceeding involving a U.S. Customs broker's license, while the Department's methodological change has been proposed in due course of antidumping duty investigations prior to the final determinations. Xingya Group also refutes Petitioners' citation to Shikoku Chemicals, where, according to Xingya Group, the Department altered an expense calculation methodology applied in the underlying investigation and several subsequent administrative reviews to a different methodology in later reviews. Xingya Group contrasts that case with the instant proceedings, where the Department is in the midst of its original investigations and has not established a prevailing methodology for the proceedings.

ITW adds that, contrary to Petitioners' contention, the Department's new targeted dumping methodology was developed based on comments from all parties in both investigations, including Petitioners, and the Department provided all parties with more than ample opportunity to comment on the new methodology after its adoption. ITW points out that the Department's methodology includes a number of elements from ITW's own suggestions submitted earlier in the PRC investigation, including the use of a standard deviation test, and that Petitioners took the opportunity to criticize them in their March 10, 2008, submission in the PRC investigation. Further, ITW notes that there is no law or regulation guaranteeing parties a specific amount of time to comment on the Department's actions and, in fact, as also noted by Dubai Wire, Petitioners' detailed analysis in their case brief contradicts Petitioners' assertion that they had insufficient time to review the Department's methodology. Dubai Wire adds that the methodology itself is not as complex as portrayed by Petitioners, as the general methodology was adequately described by the Department in three paragraphs of the Post-Preliminary Determinations.

ITW and Dubai Wire assert that Petitioners did not suffer any prejudice as a result of the Department's change in approach because the Department initiated investigations of targeted

dumping based on Petitioners' allegations and, in the PRC investigation, allowed Petitioners to revise their allegations rather than terminate the targeted dumping investigations due to the deficiencies in the original allegations. While noting the programming errors identified in the Department's Post-Preliminary Determinations programs, ITW states that the Department has already made corrections, as evidenced in Lightweight Thermal Paper from Germany: Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination, 73 FR 27498, 27500 (May 13, 2008), and it can make the same corrections, and any others that parties may identify, in finalizing the new methodology in these investigations.

With respect to Petitioners' argument that it is too late in these investigations to alter the targeted dumping analysis, ITW responds that the Department is entitled to adopt new methodologies for purposes of a final determination. ITW notes that the Court of International Trade (CIT) confirmed that the Department has the discretion to alter even fundamental aspects of the dumping margin calculation for purposes of the final determination, if circumstances warrant, as articulated in Tehnoimportexport v. United States, 766 F. Supp. 1169, 1174-75 (CIT 1991) ("Tehnoimportexport"). ITW points out that in Tehnoimportexport, the CIT stated that the purpose of a final determination is to allow the Department to make corrections and adjustments to its preliminary determination and reach a more accurate conclusion, and that the Department does not have the obligation to notify the parties beforehand that it is making a significant change from the preliminary determination. ITW adds that, in these investigations, the Department provided more notice than required by issuing the Post-Preliminary Determinations and affording the parties an opportunity to comment on them.

Department's Position:

We disagree with Petitioners' assertions that it is improper to alter the targeted dumping methodology in the course of these investigations. As Respondents note, the Department provided ample notice of its intention to revise the targeted dumping methodology in the context of these investigations, and all parties received multiple opportunities to submit written comments and an opportunity to attend a hearing. Further, Petitioners' reliance on the CFS Paper P/2 test as a Department standard to which it can readily revert for the final determinations is misplaced, as the Department did not establish the P/2 test as a precedent to be followed in cases subsequent to CFS Paper. Accordingly, we have relied on the new targeted dumping methodology set forth in the Post-Preliminary Determinations, with certain revisions and corrections noted in Comments 5 and 9 below, for the final determinations in both steel nails investigations.

Prior to CFS Paper, the Department's only experience with analyzing targeted dumping in an antidumping duty investigation was the case-specific analysis in the court remand that followed the antidumping investigation of certain pasta from Italy (see Borden, Inc., Gooch Foods,Inc., and Hershey Foods Corp. V. United States, Slip Op. 99-50, CIT, June 4, 1999), also referred to as the "Pasta Test." The petitioner's allegations of targeted dumping in CFS Paper presented the Department with a host of issues that it had not previously confronted. Given the short time available in that proceeding to address these issues, the Department stated:

> In the years since the Pasta Test was developed, the Department has had no further experience analyzing targeting and we are examining how the Pasta Test standards and thresholds could be modified in developing a standard practice for addressing targeting allegations. In view of the Department's uncertainty regarding the general applicability of the Pasta Test standards, the overall lack of case precedent on this matter, and the unique circumstances of this case, the Department accepts the petitioner's targeting allegation without endorsing the petitioner's test standards and procedures as a general practice.

See CFS Paper at General Comment 2.

At the same time, the Department signaled its intention to develop a standardized targeted dumping test to replace the P/2 test for application in subsequent investigations. Thus, while allowing the petitioner's targeted dumping allegation to proceed to conclusion in CFS Paper, the Department simultaneously announced in CFS Paper at Comment 2 that it would develop "a new, more standardized test" (i.e., a replacement for the P/2 test) through a proceeding open to public input, which we initiated simultaneously with the publication of CFS Paper. See Targeted Dumping I.

Although the Department made it clear that the P/2 test employed by Petitioners in CFS Paper was not to be considered Departmental practice, so as not to hinder Petitioners' ability to allege targeted dumping in the steel nails investigations, we accepted Petitioners' allegations based on the P/2 test for purposes of the preliminary determinations. However, as noted by ITW and Dubai Wire, we advised all parties that we intended to apply a different methodology for the final determinations:

> We note, however, that the Department is in the process of re-assessing the framework and standards for both targeted dumping allegations and targeted dumping analyses. Accordingly, we intend to develop a new framework in the context of this proceeding and to apply it in time for parties to have an opportunity to comment before the final determination.

See Preliminary Determination at 3939; see also UAE Preliminary Determination at 3977.

Thus, Petitioners were clearly on notice that the Department intended to apply a different targeted dumping methodology for the final determinations. The Preliminary Determination and the UAE Preliminary Determination took note of the parallel Targeted Dumping I process which, following the CFS Paper determination, invited the public at large to comment on the development of a methodology for determining whether targeted dumping is occurring in antidumping investigations, including the standards and tests that may be appropriate. In response to Targeted Dumping I, numerous parties, including one represented by a partner of the counsel for Petitioners, submitted comments to the Department on December 10, 2007, discussing a wide variety of targeted dumping methodology issues. These submissions were widely available to the public on the Department's Import Administration website.

In addition to the opportunity to comment through the Targeted Dumping I process, the Department specifically invited parties to the instant investigations to comment on the targeted dumping methodology in the context of these investigations. The parties submitted extensive comments on targeted dumping in their respective submissions of February 15, 2008, and March 10, 2008. After considering these comments as well as those submitted in Targeted Dumping I, the Department issued the Post-Preliminary Determinations incorporating the new targeted dumping methodology so that parties would have the opportunity to comment on that methodology for these final determinations, in accordance with our expressed statement in the Preliminary Determination and the UAE Preliminary Determination. Further, at Petitioners' request, we held an extensive disclosure conference with Petitioners to explain in detail the programming, calculations, and assumptions underlying the new methodology. Subsequently, all parties in the two investigations had the opportunity to submit case and rebuttal briefs on the new targeted dumping methodology. At Petitioners' request, we also held a public hearing on the matter on May 19, 2008. Also in response to Petitioners' request, we held a subsequent meeting with Petitioners to discuss the targeted dumping methodology, as well as similar meetings with Respondents.[12]

Thus, contrary to their claims, Petitioners, along with the other parties to these proceedings, had extensive opportunities to comment, generally, on the Department's intention to revise the targeted dumping methodology and, specifically, on the new targeted dumping methodology. The Department was explicit in signaling to parties that the P/2 test accepted in CFS Paper and in the two preliminary determinations in these investigations was unlikely to be applied for the final determinations. We note further that no other party in either of these proceedings has complained that there was inadequate opportunity to comment on the changes in the targeted dumping methodology. Therefore, we disagree with Petitioners' complaint in this regard.

Moreover, citing Barnhart, Petitioners argue that the Department denied their due process rights by providing notice of the new targeted dumping methodology too late in the proceedings for them to comment meaningfully. Petitioners' reliance on Barnhart is misplaced because the facts and circumstances underlying the CIT's opinion in that case are markedly different from those in the instant cases. In Barnhart, the CIT found that a party's due process rights were not met because the party received notice only after the administrative process had ended, thereby precluding it from any participation. See Barnhart at 1437-38. Here, as discussed above, Petitioners cannot claim that they were not given notice during the administrative process that the Department would be revising its targeted dumping methodology in the course of these proceedings.

We disagree with Petitioners that there was inadequate time to analyze the new methodology. Antidumping duty investigations are conducted under statutory time limits that often do not allow for extended periods of time between the release of the last document relevant to the final determination and the commencement of the briefing schedule. For example, the Department often establishes the deadline for case briefs as "no later than seven days after the date of the

[12] See Memoranda to the files dated May 28 and May 30, 2008, documenting separate ex parte meetings with Dubai Wire, Xingya Group, ITW, and Petitioners, respectively.

issuance of the final verification report in this proceeding." See, e.g., Preliminary Determination at 3950. Petitioners had more than twice that amount of time between the Post-Preliminary Determinations and the targeted dumping brief deadline.

Further, as Dubai Wire indicates, the new targeted dumping methodology is not as complex as portrayed by Petitioners and all parties demonstrated their understanding of it in their briefs and at the hearing. Petitioners' concerns regarding the complexity appear to relate to the execution of the methodology through the Department's computer program, rather than the methodology itself. We acknowledge that the computer program contained some errors and we have corrected them, as discussed in Comment 9 below.

Petitioners further contend that the Department, in violation of the CIT's holding in Shikohu Chemicals, abused its discretion by changing its targeted dumping methodology after Petitioners had prejudicially relied on it. However, Shikoku Chemicals does not support Petitioners' argument. In Shikoku Chemicals, the CIT held that the Department acted unreasonably in changing its allocation methodology when the facts demonstrated that Respondents had the right to rely upon the Department's consistent approach in the original investigation and four administrative reviews. See Shikoku Chemicals at 422. The facts in these investigations are distinguishable from Shikoku Chemicals, demonstrating that the reliance at issue in Shikoku Chemicals is not relevant to these cases. Moreover, we also find that the instant situation is distinguishable from Hypochlorite from Japan because in that case, the Department did not advise the respondent that its reported difference-in-merchandise adjustment data, upon which the adjustment was based in previous segments of the proceeding, was inadequate for purposes of applying a different methodology in that review. Here, however, the Department repeatedly advised all parties that a new targeted dumping methodology would be introduced during the investigations. Petitioners suffered no harm because the Department considered Petitioners' targeted dumping allegations in applying the new methodology.

We find no basis to conclude that Petitioners have been unfairly harmed by the introduction of the new targeted dumping methodology because they relied upon the P/2 test. As Respondents note, the Department accepted Petitioners' targeted dumping allegations for the preliminary determinations and applied the new methodology based on those allegations. That application of the new methodology leads to different results in the final determinations than in the preliminary determinations, including de minimis margins for Dubai Wire and ITW, are no more unfair to Petitioners, or indeed, to any other party, than other changes the Department makes between a preliminary determination and final determination based on verification findings, revised data, or the additional examination of an issue.

Finally, with respect to Petitioners' argument that the introduction of a new targeted dumping methodology that incorporates a "statistically sound, error-free standardized test" should have been introduced through a separate proceeding such as Targeted Dumping I, we disagree. The Targeted Dumping I process did not preclude the Department from examining the targeted dumping issue in the context of ongoing antidumping duty investigations. On the contrary, as a result of a series of targeted dumping allegations following CFS Paper in these investigations and

several others (e.g., LWRP from the PRC), the Department has had to address targeted dumping in the context of investigations which, unlike Targeted Dumping I, have statutory deadlines. While the Targeted Dumping I process has provided a broad range of theoretical insight into the development of the new targeted dumping methodology, it is through the application of the methodology using actual data and, as in these cases, the consideration of comments relating specifically to a test that uses such data, that we are best able to develop an appropriate test.

Moreover, we believe our decision to release the new methodology in the Post-Preliminary Determinations and to provide parties an opportunity to review the underlying computer program prior to the final determinations was justified, as it is through the receipt of comments identifying the errors and proposing corrections that we are best able to arrive at an error-free standardized test for application in subsequent investigations. We reiterate our point noted above that the programming errors identified by Petitioners and Xingya Group concern the execution of the methodology, rather than the methodology itself.

In conclusion, given the clear and explicit notice of the Department's intent to revise the targeted dumping methodology for the final determinations, and the extensive opportunities for parties to comment on that methodology, as outlined above, Petitioners' complaint that they have been denied due process in these proceedings is without merit.

Comment 2: Identifying Alleged Targets

Xingya Group argues that Petitioners' targeted dumping allegation was deficient such that the Department should have declined to examine targeted dumping. Xingya Group notes that the statute and regulations require that, in order to depart from the standard average-to-average comparison of EP to NV in an antidumping investigation, the Department must find that there is a pattern of EPs for comparable merchandise that differ significantly among averaging groups (regions/purchasers) and that these differences cannot be taken into account using the average-to-average methodology, pursuant to section 777A(d)(1)(B) of the Tariff Act of 1930, as amended ("the Act"), so that an average-to-transaction methodology may be applied. Xingya Group continues that, in order to reach this conclusion, the Department must establish that the observed price pattern is the result of a targeting effort against an averaging group rather than another aspect of the sales, such as differences in levels of trade ("LOT"), differences in sales volumes, differences between branded and generic products, or differences in sales terms. According to Xingya Group, a finding of targeted dumping cannot be based on a mere observation of a pricing pattern, as the Department explained in LWRP from the PRC at 5503. Therefore, Xingya Group asserts that the Department's analysis of targeted dumping is flawed because it was not based on observed price patterns according to purchasers, regions, or time periods, particularly with respect to Xingya Group.

Petitioners respond that, contrary to Xingya Group's claim, the statute contains no requirement that a party alleging targeted dumping, or the Department when making such a determination, undertake LOT or other adjustments within a market or make any showing as to why the targeted dumping has occurred. According to Petitioners, the statutory requirement for demonstrating targeted dumping under section 777A(d)(1)(B) of the Act is met simply by showing a pattern of

significant price differences among purchasers, regions, or periods of time, and there is no additional requirement that a finding of targeting requires any element of intent, or an explanation of "why" the patterns of price differences exist.

Petitioners explain that, in making a targeted dumping allegation, Petitioners do not have knowledge of or access to a respondent's marketing plan for identifying the potentially targeted transactions. Accordingly, Petitioners must rely on general observations and information reasonably available to them, such as the statistical analysis afforded by the P/2 test, to allege targeted dumping. When the results of such analysis show that a particular group of sales obtains average prices below the average net U.S. sales price for the same product, Petitioners assert that it is reasonable to consider those results as prima facie evidence of targeted dumping. Accordingly, Petitioners assert that the Department should continue to find targeted dumping wherever patterns of price differences exist, and as a matter of law cannot require any showing of intent or explanation for why such targeting occurred.

With respect to Xingya Group's reference to LWRP from the PRC, Petitioners contend that issues in that case were based largely on the problem that Petitioners in that case did not compare prices of identical merchandise, rather than a failure to take into account other possible reasons for the price differences. With regard to their analysis of Xingya Group's sales, Petitioners state that they provided the Department with the means to adjust the P/2 test to consider the impact of volume-based discounts or rebates, and that alternative analyses under the P/2 test demonstrated that the finding of targeted dumping was not dependent on volume-based pricing.

Department's Position:

We note as an initial matter that Xingya Group has taken issue with the Department's acceptance of Petitioners' targeted dumping allegation in the Preliminary Determination. As discussed above under Comment 1, given the Department's limited experience with targeted dumping, we accepted Petitioners' allegations based on the P/2 test for purposes of initiating an analysis as to whether Respondents engaged in targeted dumping. Given that the P/2 test was the most recently applied targeted dumping analysis employed by the Department, it was reasonable for the Department to analyze Petitioners' allegation under this standard. We did so, however, with the intention to revisit the targeted dumping analysis prior to the final determinations. Our Post-Preliminary Determinations reconsidered Petitioners' targeted dumping analysis, employing an entirely new targeted dumping methodology, thus the Preliminary Determination targeted dumping analysis for Xingya Group (as well as the other respondents in the nails investigations) has been superseded by the Post-Preliminary Determinations. It is under the new test, not the P/2 test accepted in the Preliminary Determination, that the Department finds evidence of targeted dumping with respect to Xingya Group in the final determination. For all these reasons, we disagree with Xingya Group and find that the Department properly examined targeted dumping in these investigations.[13]

[13] The Department notes that it has initiated a separate process to seek further comments from the public on its targeted dumping methodology, including what standards, if any, the Department should adopt for accepting an allegation of targeted dumping. See Proposed Methodology for Identifying and Analyzing Targeted Dumping in Antidumping Investigations; Request for Comment, 73 FR 26371, 26372 (May 9, 2008) (Targeted Dumping II).

Notwithstanding our rejection of Xingya Group's argument that the Department improperly accepted Petitioners' targeted dumping allegation, we recognize that there may be some merit to Xingya Group's argument that other factors not related to targeting, such as LOT or circumstances of sale, may have an impact on price comparability in a targeted dumping analysis. While the statute and the regulations provide considerable guidance on comparing U.S. prices to NV for determining dumping, they provide no comparable guidance in comparing different sets of U.S. prices for purposes of determining the existence of targeted dumping. The Statement of Administrative Action for the Uruguay Round Agreements Act, H. R., Doc. No. 103-316, Vol. 1 (1994) ("SAA") at 843 states that "the Administration intends that in determining whether a pattern of significant price differences exist, Commerce will proceed on a case-by-case basis, because small differences may be significant for one industry or one type of product, but not for another."

In the instant case, Xingya Group argues that a price pattern is a result of other factors such as LOT or product branding. However, the data that would allow the Department to make an LOT adjustment for Xingya Group is not on the record even if we considered it appropriate to take this factor into account. We find a similar situation for the other PRC respondent, ITW. Furthermore, based on the record, there is no reasonable manner in which the Department could employ facts otherwise available under section 776 of the Act to account for LOT. With respect to Dubai Wire, the level of trade issue is moot because we found a single LOT with respect to its U.S. sales (see UAE Preliminary Determination at 3949).

With respect to product branding, the Department already considers differences in the physical characteristics of the merchandise for establishing unique products for purposes of comparison to NV. No party identified product branding as a characteristic necessary for identifying unique products, nor do we find any basis on the record to do so now. Moreover, Xingya Group did not provide information in its U.S. sales databases so as to distinguish individual sales by brand, even though Xingya Group had multiple opportunities to do so during the course of the investigation. In addition, there is no basis to make any other type of price or circumstance-of-sale adjustment to account for product branding, as no party has demonstrated that product branding has any significance in the pricing of steel nails to U.S. customers.

With respect to the other factors that Xingya Group argues may affect a price pattern such as differences in sales volumes or differences in sales terms, we note that by using the net U.S. price in our price comparisons under the new targeted dumping methodology, we have already taken into account any volume rebates or other sales terms adjustments reported by Xingya Group and the other respondents. To the extent that Xingya Group argues that volume discounts are different from the reported volume rebates, Xingya Group has not identified and reported such discounts to the Department. As such, the Department is unable to consider the appropriateness of such adjustments in its analysis. Finally, with respect to Xingya Group's argument that the Department take into account the differences between its EP and CEP sales for considering targeted dumping, the net U.S. price calculated for the targeted dumping analysis

already takes into account the primary factors that may account for differences in prices between these sale types.

Comment 3: Statistical Validity of Standard Deviation Test

In the Department's Post-Preliminary Determinations, the Department explained that the first stage of the new two-stage targeted dumping test is a "standard deviation test," where the Department determined the share of the alleged target's (whether purchaser, region, or time period) purchases of identical merchandise, by sales value, that were at prices more than one standard deviation below the average price of that identical merchandise to all customers. The standard deviation and the average price were calculated using a POI-wide average price weighted by sales value to the alleged target, and POI-wide average price weighted by sales value to each distinct non-targeted entity of identical merchandise. If the total sales value that met the standard deviation test exceeded 33 percent of the sales value to the alleged target of the identical merchandise, then the first stage of the targeted dumping test, the pattern requirement, was met.

Petitioners argue that a standard deviation test is statistically invalid in an antidumping case because such a test is normally applied when conclusions are drawn from samples of data populations, while in an antidumping case, the Department's data consists of the entire population of prices, rather than a subset sample. Petitioners contend that relying on a standard deviation test in these circumstances introduces random and spurious results, while the P/2 test more appropriately tests the entire database to determine whether a preponderance of the sales are less than the mean price, thereby fulfilling the pattern requirement.

Petitioners continue that the Department's standard deviation test improperly limits the number of sales that could be considered targeted because no more than 16 percent of sales would typically be found to be more than one standard deviation from the mean, assuming a normal distribution of sales within the database. According to Petitioners, there is no statutory basis to limit the number of sales that the Department may find to be targeted. On the contrary, Petitioners assert that the targeted dumping provision was intended to address targeted dumping to the greatest extent possible, thus limiting the pool of sales to be considered for targeted dumping is a fundamental flaw of the methodology. Moreover, Petitioners contend that the standard deviation test is also flawed because of the necessary assumption under a standard deviation test that prices of sales follow a normal distribution that most prices are close to the mean and any targeting would occur in small sets of "outlier" sales. Petitioners state that, in fact, the distribution of sales prices should be considered unknown and where targeted dumping exists, the price distribution will not be normal. As a result, Petitioners conclude that the standard deviation test does not meet the statutory requirement for determining a pattern of targeted dumping.

To support their statistical analysis, Petitioners included economic reports in their case briefs filed in the respective investigations with respect to Dubai Wire's, ITW's, and Xingya Group's reported U.S. sales. Petitioners cite a hypothetical example from their economic report where the standard deviation test masks alleged targeted dumping because the test did not find targeted

dumping when a supplier sold its goods to a select customer at prices up to 90 percent lower than prices to other customers.

ITW and Dubai Wire dispute Petitioners' assertion that the Department's use of a standard deviation test is statistically invalid because the dataset being examined is the entire population rather than a sample. ITW considers the assertion to have no foundation in statistics, as the standard deviation is a widely used statistical measure that tells how tightly all the various data points are clustered around the mean in any given data set, regardless of whether the particular data set being used is a sample or a population, so that a standard deviation can be calculated on any data set, a sample drawn from a larger population, or the population as a whole. Dubai Wire contends that the use of the standard deviation is reasonable, as it is easy to understand and it is a reasonable indicator that, if prices are within one standard deviation of the mean, any price differences are likely the result of legitimate market factors (e.g., volume of specific orders and annual orders, agreement to more favorable financial or other terms of sale) rather than targeting.

ITW further argues that, contrary to Petitioners' assertion, the Department's standard deviation test does not limit the number of sales that can be found to be targeted. ITW points out that, in a perfectly normal distribution about 32 percent of the total number of observations, not 16 percent as claimed by Petitioners, would be found to be more than one standard deviation away from the mean, although ITW notes that the 16-percent figure probably referred to the share of the total observations that are lower than the mean only. If Petitioners thus claim that the maximum number of sales that can possibly be found to be targeted is 16 percent of the reported U.S. sales, ITW responds that that claim is incorrect because the Department's test seeks to determine whether the share of the allegedly targeted sales that is sold at prices more than one standard deviation below the population mean is markedly higher than the share observed in the population as a whole.

ITW asserts that, in the Department's test, the level at which the prices in the alleged targeted subset are considered to be unusually clustered below the population mean is set at 33 percent, or twice the level observed in the population as a whole. ITW explains further that, under the Department's test, the U.S. sales database as a whole provides the normal distribution of the prices for each discrete product (CONNUM), against which the prices for each specific allegedly targeted subset can then be tested, and it in no way limits the number of sales that can be found to be targeted.

ITW and Dubai Wire also dispute Petitioners' claim that the Department's test is flawed due to the assumption of a normal distribution of prices in the U.S. sales database. ITW states that the assumption of a normal distribution is the usual practice in statistical analysis, but that even if the distribution were not normal in a particular case, the Department could use simple, standard statistical techniques to adjust the calculation of the standard deviation to take the abnormal deviation into account.

Both ITW and Dubai Wire take issue with Petitioners' hypothetical example of masked dumping through the standard deviation test. These respondents argue that the example is based on a highly unrealistic scenario that is absurd in a free market situation. In addition, ITW provides

examples in its rebuttal brief to demonstrate that Petitioners' hypothetical example does not have a basis in "real-world" economics.

Xingya Group states that, while it does not support the application of the Department's test in these investigations due to what it considers methodological and computational errors, it agrees with the other respondents that a standard deviation test is a standard and appropriate statistical technique by which to identify potentially targeted sales within the meaning of the statute and the Department's regulations. Xingya Group continues that the use of a standard deviation test is more consistent with section 777A(d)(1)(B) of the Act and 19 CFR 351.414(f)(1)(i) with respect to the use of "standard and appropriate statistical techniques" to determine the existence of targeted dumping. Xingya Group concludes that a standard deviation is a standard and appropriate statistical technique that is more suited to identifying patterns of targeted dumping than a simple comparison of averages under the P/2 test.

Department's Position:

The Department disagrees with Petitioners. The Department is not using the standard deviation measure to make statistical inferences. Rather, we are employing the standard deviation as a relative measure of the differences between the price to the alleged target and to the non-targeted group to determine if the price to the alleged target is "low," which is consistent with the requirement under 19 CFR 351.414(f)(1)(i). To implement the statutory provisions on targeted dumping, the Department needs a definition of "pattern," because the statute requires that we identify a pattern of export prices. For this purpose, the Department defines "pattern" as prices that distinguish the alleged target from others and, further, that the prices are "low" on CONNUMs that account for at least 33 percent of sales to the alleged target. Low, for a given CONNUM, is defined to be at least one standard deviation below the average price, i.e., the weighted-average market price across all customers who purchased that CONNUM in the period of investigation ("POI").

We consider the price threshold of one standard deviation below the average market price as a reasonable indicator of a price difference that may be based on targeted dumping because (1) it is a measure of "low" relative to the spread or dispersion of prices in the market in question, and (2) it strikes a balance between two extremes, the first being where any price below the average price is sufficient to distinguish the alleged target from others (as may be the case under the P/2 test), and the second being where only prices at the very bottom of the price distribution are sufficient to distinguish the alleged target from others (as may be the case under the Pasta Test).

For the reason stated in Comment 5 below, we have revised our targeted dumping methodology to calculate the weighted-average prices and the standard deviation elements of the pattern test, as well as to aggregate the results of the pattern test, on the basis of volume, rather than value. As we discuss further under Comment 5 below, we consider the requirement that the "low" prices under the standard deviation test constitute at least 33 percent of the sales volume to the alleged target to be a reasonable threshold for establishing a pattern indicative of targeted dumping under section 777A(d)(1)(B)(i) of the Act.

Finally, with respect to Petitioners' allegation that the standard deviation test masks targeted dumping, see Comment 7 below.

Comment 4: Reliance on Identical Product Comparisons for Determining Targeted Dumping

Under the Department's standard deviation test, the Department analyzes prices to the alleged targeted entity and non-targeted entity on the basis of sales of identical products only. Petitioners contend that, by limiting the analysis to identical products (as identified by control number or CONNUM), the Department arbitrarily limits the population of sales to be analyzed and allows respondents to manipulate the results, as they can thwart comparisons by making small changes to the product characteristics between the potential targeted entities and non-targeted entities. Petitioners argue that the Department should allow for comparisons of sales of similar products, with adjustments for the costs of physical differences in merchandise (DIFMER), in order to maintain as large a sales database for analysis as possible, and to avoid potential manipulation by respondents.

Dubai Wire notes that even Petitioners' preferred P/2 test compares only identical CONNUMs and does not include DIFMERs. Further, Dubai Wire asserts that Petitioners' argument that it is possible to sell the same product with a minor change to a physical characteristic and thereby avoid a targeted dumping finding is flawed. According to Dubai Wire, assuming that one can change the CONNUM means selling a product different from what is required by the customer, leading to the assumption that a seller can sell any type of product that it wants, rather than what the market requires. Dubai Wire adds that, if it were possible to do as Petitioners suggest, it would mean that the product characteristics established as the basis for product comparisons in a proceeding, as determined by the Department with input by all parties including Petitioners, are faulty.

Department's Position:

For purposes of these final determinations, the Department continues to base its targeted dumping analysis on price comparisons between identical products (identified by CONNUMS). The statute and regulations do not require an analysis of all of the respondent's sales for a targeted dumping determination. The use of identical matches also facilitates the analysis of potentially multiple targeted dumping allegations (each of which can have multiple targets) in an investigation.

We agree with Dubai Wire regarding the role of physical characteristics in determining identical products. The Department establishes the unique products for purposes of product comparisons at the outset of an investigation with input from interested parties based on meaningful differences in physical characteristics. While a respondent may sell largely similar products that differ in less significant physical characteristics to different customers or regions, there is no evidence of manipulation with respect to product characteristics in these investigations.

However, the Department also recognizes that making price comparisons for identical merchandise may, in some cases, unduly limit the Department's analysis. For these reasons, the Department is still considering whether, and under what circumstances, to extend the scope of the targeted dumping analysis to price comparisons of similar merchandise with DIFMER adjustments in future investigations where targeted dumping allegations are made, and seeks to make such a determination after receiving public comments on the Department's targeted dumping methodology. See Targeted Dumping II.

As indicated above, for purposes of the final determinations in the instant investigations, we have continued to base our price comparisons on identical products only. Employing such a methodology in these investigations does not unduly limit our targeted dumping analysis, as it takes into account a substantial portion of sales made to the alleged target.

Comment 5: Alleged Masking of Dumping Under 33 Percent Pattern Test Threshold

As noted above, in order to determine whether or not a "pattern" indicative of targeted dumping existed, the Department's new targeted dumping methodology, as applied in the Post-Preliminary Determinations, considered whether the total sales value that met the standard deviation test exceeded 33 percent of the sales value to the alleged target of the identical merchandise.

Petitioners contend that this test is flawed because it relies on sales value as the unit of measure, an argument that Petitioners also raise in the context of alleged programming errors. Because, all else remaining equal, lower-priced sales will generate less sales value and higher-priced sales will generate greater sales value, Petitioners state that this measure will minimize the proportion of lower-priced (targeted) sales, thus masking targeted dumping. Moreover, Petitioners claim that the Department has failed to explain or support its use of a 33-percent threshold for establishing a pattern.

Xingya Group responds that, as targeted dumping is a price-based analysis, basing the weight factor upon value for this test is consistent with the analysis required under section 777A(d)(1)(B) of the Act, which requires a comparison of the sales value of comparable merchandise in order to find a significant pattern of price differences. Moreover, Xingya Group continues, Petitioners' argument to use a volume-based weighting ignores the Department's prior findings that the volume of sales may influence pricing for reasons wholly unrelated to targeting, as in, for example, LWRP from the PRC. According to Xingya Group, under Petitioners' proposal, high-volume sales would unduly influence the targeted dumping analysis without any evidence that the observed pricing pattern is actually related to targeted dumping.

Dubai Wire asserts that the Department's 33-percent threshold for determining a pattern of targeted dumping is reasonable. Dubai Wire points out that this figure is one that the Department has used elsewhere in other contexts, such as where a non-market economy producer buys over 33 percent of its inputs from a market economy and pays in a market-economy currency, then such purchases can be used to determine surrogate values. ITW states that the 33-percent threshold is statistically relevant, as discussed above under Comment 3, because it

requires that, for a pattern of low prices to be found, the prices in the allegedly targeted pool must be disproportionately concentrated in the low end of the distribution.

Department's Position:

We agree with Petitioners with respect to the method used to aggregate the pattern test results. Accordingly, we have revised our targeted dumping methodology in these investigations to aggregate the pattern test results on the basis of volume, rather than value, across different products (CONNUMs).[14] A volume-based aggregation method is free from being skewed by potentially dumped, or targeted dumped, sales values and, therefore, provides an appropriate measure. While we recognize that there may be certain cases where aggregating the pattern test results on the basis of value may be more appropriate (e.g., in cases involving custom-made merchandise with large numbers of disparate parts, components and subassemblies where units of measure in these investigations cannot be reasonably converted), in these investigations we have a consistent unit of measure for aggregation on the basis of volume.

The Department also disagrees that 33 percent is not relevant to determining whether targeted dumping has occurred. Pursuant to section 777A(d)(1)(B)(i) of the Act, the Department must establish that there is a pattern of export prices that differ significantly in order to find that targeted dumping has occurred. Thus, as discussed above under Comment 3, the Department applies the standard deviation test to determine, on a CONNUM-specific basis, which sales meet the "low price" threshold for identifying a targeted sale. Next, we must determine what level of these low-priced sales is sufficient to demonstrate a pattern of targeted dumping. We consider the requirement under our targeted dumping methodology that the "low" prices constitute at least 33 percent of the sales volume to the alleged target to be a reasonable threshold for establishing a pattern indicative of targeted dumping. Accordingly, we find this standard to be consistent with the pattern requirement of section 777A(d)(1)(B)(i) of the Act.

Comment 6: Flaws of "Gap Test"

In the second stage of the Department's new targeted dumping methodology, as applied in the Post-Preliminary Determinations, the Department examined all the sales of identical merchandise that met the standard deviation test and determined the sales value for which the difference between the average price to the alleged target and the next highest average price exceeded the average price gap (weighted by sales value) observed in the non-targeted group. For these sales, the significant difference requirement was met. If the share of these sales exceeded five percent of the sales value to the alleged target of the identical merchandise, then the Department determined that targeted dumping had occurred.

Petitioners state that the Department has failed to explain why the price gap test properly implements the statutory objectives for determining targeted dumping. Petitioners continue that the use of a five-percent threshold for this test is arbitrary. In addition, Petitioners take issue

[14] We have also applied this volume-based method to the calculation of the weighted-average prices and standard deviation elements of the pattern test, as well as the derivation of the weighted-average price gaps and the aggregation of the price gap test results.

with application of the price gap test when there is no non-target price that is higher than the alleged target price. Petitioners argue that the test was intended to calculate a positive price gap between the alleged target and the non-target group and, therefore, if there is no alleged non-target price that is higher than the alleged target, the test fails. Moreover, Petitioners listed other programming errors, several of which are summarized in more detail in Comment 9 below.

Xingya Group argues that this gap test fails to establish what constitutes a "significant" price difference in the nail industry, and in particular, why the five-percent threshold is significant. Xingya Group points to LWRP from the PRC, where the Department stated that "Petitioners failed to describe how the LWR {i.e., LWRP} market functions and did not adequately explain why a two-percent price difference should be considered to be significant for the 'commodity-like product,' LWR, given the characteristics of the LWR market." Xingya Group contends that the Department has determined observed price patterns to be significant at the five-percent threshold without explaining why these differences are significant within the context of the steel nail market, and therefore such an arbitrary standard should be rejected. Instead, Xingya Group asserts that the Department should rely upon a definition of significance that comports with established practices and policies, and to that end, Xingya Group supports a 25-percent difference threshold as a more reasonable benchmark than the five-percent threshold. Xingya Group proposes the 25-percent difference because it is consistent with 19 CFR 351.224(g), which defines a "significant" ministerial error in antidumping duty investigations as one that is not less than 25 percent of the weighted-average margin.

In addition, Xingya Group points out several of the same programming errors alleged by Petitioners. Xingya Group contends that the programming errors are so significant as to render the new targeted dumping methodology unusable in these investigations.

Neither Dubai Wire nor ITW specifically responded to these comments concerning the gap test, noting that, in the Post-Preliminary Determinations, under the Department's standard deviation pattern test, neither company had sufficient sales to which the gap test could be applied.

Department's Position:

The Department disagrees with both Petitioners and Xingya Group, as they have mischaracterized the price gap test. As with the standard deviation test, the price gap test determines whether the price gap associated with the alleged target is significant relative to the price gaps in the non-targeted group "above" the alleged target price gap. That is, using only the sales that meet the standard deviation requirement, where at least 33 percent by volume[15] of the alleged target's sales prices are lower by at least one standard deviation than the average of all sales prices, we then calculate the difference between the average price to the alleged target and the next higher average price to a non-targeted customer, region, or time period for a given

[15] As noted above under Comment 5, for the final determinations, we have revised the derivation of the weighted-average price gaps and the aggregation of the price gap test results using a volume-based methodology, rather than the value-based methodology applied in the Post-Preliminary Determinations.

CONNUM. This difference is compared to the average price gap, weighted by volume, found among the non-target prices that are above the alleged target price. If the difference exceeds the average price gap found in the group of non-target prices, then the difference in the price to the alleged target for that CONNUM is found to be significant. If the volume of sales for which the price differences are found to be significant meets the five percent threshold, then the customer, region, or time period is deemed to have been targeted.

Accordingly, the price gap test itself is not based on any bright-line standard or threshold because significance in this context is determined based on whether the price gap associated with the alleged target is greater than the average price gap in the non-targeted group. In this regard, we have not set a bright-line standard or threshold, such as a fixed percentage, for measuring the price gap.

On the other hand, we consider a five-percent share of sales to the alleged target, by volume, that are found to be at prices that differ significantly to be a reasonable indication of whether or not the alleged targeting has occurred. The use of this threshold must be considered together with the standard deviation test and the 33-percent sales volume threshold for determining whether there is a pattern as required by the statute. We believe that the combination of the pattern and gap tests meets the statutory criteria for discerning targeted dumping.

Finally, we disagree with Petitioners that when there is no non-target price that is higher than the alleged target price, the test fails. The intent of the price gap test is to measure whether the price to an alleged target differs significantly. Therefore, when there is no non-target price that is higher than the alleged target price, it is impossible to determine whether the price charged to the alleged target differs significantly within the meaning of section 777A(d)(1)(B)(i) of the Act and 19 CFR 351.414(f)(1)(i). Absent such a comparison to a higher non-target price, we cannot reasonably conclude that the alleged target is in fact paying lower prices than the non-target group, i.e., deemed to be targeted by the exporter. With respect to the programming errors raised by Petitioners, see the discussion below in Comment 9.

Comment 7: Alleged Masking of Dumping by Respondents Under the Standard Deviation Test

Petitioners contend that, not only is the Department's new targeted dumping methodology flawed on an economic and theoretical basis, as they outline in their other comments, but when applying the test to U.S. sales data submitted by the PRC and UAE respondents, the results also confirm that the test masks dumping.

For example, in the UAE investigation, Petitioners argue that the Department's new methodology fails to recognize a clear pattern of targeted dumping to Dubai Wire's largest customer ("Customer A"), as evidenced by Petitioners' economic report. According to the analysis in this report, Customer A received average monthly prices that were at least two percent lower than the prices to other customers for identical products in the large majority of comparisons. If the threshold for price differences were raised to five percent, Petitioners contend that Customer A still received lower prices relative to other customers in a substantial

number of comparisons. According to Petitioners, the statutory provisions on targeted dumping did not intend for the Department to conclude that targeted dumping was not occurring in these circumstances. That the Department's methodology failed to register Dubai Wire's targeted dumping demonstrates the fatal flaws of the new test, Petitioners conclude, while highlighting the attributes of the P/2 test, which does identify these examples of targeted dumping.

Dubai Wire disputes Petitioners' findings, contending that Petitioners' analysis lacks economic sense, and therefore the Department's test does not mask targeted dumping. Dubai Wire notes that Petitioners assert that prices for nails across customers should be nearly identical because nails are a commodity product sold in a competitive market and therefore, Dubai Wire asserts, it is not possible for Dubai Wire to charge low prices on three-quarters of its U.S. sales (i.e, sales to Customer A), and then mask those low prices through very high prices on its remaining sales. According to Dubai Wire, if it engaged in such economic behavior, it would lose its non-targeted customers and fail to earn a profit on its sales, which Dubai Wire notes, in fact, it does. Moreover, Dubai Wire cites examples in Petitioners' economic report where, in fact, the sales made at lower prices to non-targeted customers constitute a larger sales volume (by value) than the sales of the same product made to Customer A. In sum, Dubai Wire concludes that, regardless of the test employed, it has not engaged in targeted dumping.

Department's Position:
We disagree with Petitioners. Petitioners argue that the Department's targeted dumping methodology would not identify a good deal of targeted dumping. However, Petitioners' analysis is predicated on a finding of targeted dumping applying the P/2 test. As discussed elsewhere in this memorandum, particularly above under Comment 1 and below under Comment 8, the Department is not relying on the P/2 test to determine targeted dumping for these final determinations. As we note below under Comment 8, the P/2 test collapses the pattern and significant price difference requirements of the statute, and the two-percent price difference threshold does not adequately account for price variations specific to the market in question. In so doing, the P/2 test may find targeted dumping in many cases when arguably no such dumping is occurring. Thus, we do not find the results of this test to be a reliable indicator that "obvious" targeted dumping has occurred, as Petitioners claim. While we recognize that the Department's new targeted dumping methodology may require further refinement, which we seek to accomplish through Targeted Dumping II and application in subsequent investigations, we consider it to be statutorily and statistically superior to the P/2 test for identifying targeted dumping in these final determinations.

Comment 8: Statistical Validity of P/2 Test

Petitioners contend that the Department should rely on the P/2 test for the final determinations, as the Department did in the Preliminary Determination and UAE Preliminary Determination, because this test relies on standard and appropriate statistical techniques, comports with the statute, and has been available to all parties with sufficient opportunity to comment on it. Specifically, Petitioners assert that the P/2 test is a simple means to demonstrate a pattern of pricing that differs significantly among purchasers, regions, or periods of time to constitute targeted dumping. According to Petitioners, the P/2 test is superior because it does not assume a

normal distribution of prices, it is relatively simple and transparent, and has been accepted by the Department as a statistically valid test (see CFS Paper). Moreover, it detects obvious examples of targeted dumping where, as discussed above in Comment 7, the Department's new methodology does not.

All respondents contest Petitioners' portrayal of the P/2 test as statistically valid, and describe various statistical flaws in the P/2 test. ITW asserts that the P/2 test generates a "biased sample" where, after creating subsets of the database that consist of lower-priced sales than the other subsets, these sales are tested to determine whether they are lower-priced. Therefore, ITW continues, the test will simply confirm that the lower-priced sales are lower-priced, guaranteeing that the allegedly targeted sales will always be, on average, lower priced than the non-targeted sales and thus found to be targeted. In its rebuttal brief, ITW provided specific examples from its sales data to support how it believes the P/2 test is flawed. Dubai Wire agrees that the P/2 test is skewed toward findings of targeted dumping in a similar manner, as Petitioners can manipulate the comparisons by its grouping of purchasers or other alleged targets.

ITW also states that the P/2 test inappropriately relies on average-to-average comparisons, which mask the existence of higher-priced sales to the alleged target which may serve to demonstrate that a company is not engaging in targeted dumping, because these higher-priced sales are swept up with the lower-priced sales in the calculation of the average. ITW, Dubai Wire and Xingya Group further contend that the P/2 test ignores whether any observed differences can be attributed to other aspects of comparability that the Department's normal dumping margin calculations take into consideration, such as LOTs, channels of distribution, customer types, transaction volumes, and time period, rather than targeted dumping.

Xingya Group, along with Dubai Wire, challenges the P/2 test's use of a two-percent threshold for determining significant price differences that are evidence of targeted dumping. Xingya Group notes that Petitioners have supported this benchmark by reference to the definition of de minimis in the context of dumping margins in antidumping duty investigations. However, Xingya Group contends that there is no basis in the statute or regulations for applying the de minimis test for investigation margins to the price significance test for targeted dumping.

Department's Position:

As discussed in detail above under Comment 1, the Department did not fully accept the statistical validity of the P/2 test in CFS Paper. Rather, the Department accepted the P/2 test for purposes of considering the petitioner's targeted dumping allegation, but the Department emphasized that it was doing so "without endorsing the petitioner's test standards and procedures as a general practice." See CFS Paper at General Comment 2. The Department also stated that it was not establishing certain elements of the P/2 test as precedent for targeted dumping analysis. For example, with respect to the two-percent threshold for determining significant price differences, while the Department accepted that the small price differences observed were significant in the CFS paper market, "{a}s a general matter, the Department has not adopted any specific percentages suggested by parties in their contentions regarding the definition of significance." See CFS Paper at General Comment 3.

We disagree with Petitioners that the P/2 test is more accurate and reliable than the new targeted dumping methodology. The P/2 test collapses the pattern and significant difference requirements, which are analyzed separately under our new methodology. The P/2 test relies on a single, bright-line price threshold of two percent to define targeted dumping that does not account for price variations specific to the market in question. As described above under Comments 3 and 6, the standard deviation test uses a measurement common in statistical analysis to provide a more appropriate and balanced threshold for identifying a pattern and the gap test provides a more reasonable threshold for identifying significant price differences. As discussed above under Comment 7, the P/2 test is not a reliable measure for detecting "obvious" examples of targeted dumping.

Comment 9: Programming Errors

Petitioners and Xingya Group identified a number of alleged programming errors in the computer programs used in the Post-Preliminary Determinations.[16] These errors are listed below, followed by the Department's response.

- The population standard deviation and population mean are calculated on a weighted-average, blended extended-value basis, while the alleged targeted mean is calculated on a simple average. The U.S. sales are first collapsed with a simple average (with no weighting factor at all) being calculated, and are then later collapsed again using the extended value as the weighting factor

We agree and have corrected these errors. Further, as discussed above under Comment 5, we have revised the programming to apply a volume-based weighting factor.

- As part of the five-percent "gap test," the Department is comparing an alleged targeted average price to the lowest non-targeted average price, by groups. The programming, however, sorts the non-targeted prices in the wrong order. This error results in a random value (out of its group) being chosen as the lowest non-targeted average price for the five-percent test.

We agree that the program improperly selected a random value. Therefore, we corrected this error. Under the corrected programming, the lowest non-targeted price higher than the alleged targeted price is chosen for this portion of the test.

- The lowest non-targeted average price (in a group) may result in a negative price gap, when compared to the alleged targeted average price. This operation dilutes the sales value used in the five-percent test, and skews the test in favor of failure.

[16] Petitioners' list of alleged programming errors also included comments on methodological issues such as price weight-averaging based on sales value versus sales quantity, elements of the "gap test," and testing of prices between sales of identical merchandise only. These items are discussed above in the context of the respective methodological comment.

We agree and have corrected this error.

- In the Preliminary Determination and the UAE Preliminary Determination, the Department offset negative margins for non-targeted U.S. sales by setting them to zero. However, this programming was deleted from the calculations in the Post-Preliminary Determinations.

We agree that negative margins for non-targeted U.S. sales should be set to zero when combining the margins for the targeted and non-targeted U.S. sales. Therefore, we have corrected this error by including the offset programming as part of the targeted dumping program.

Comment 10: Wire Rod Surrogate Value

ITW asserts that the Department departed from its longstanding policy of using Indian import statistics and used data from the Joint Plant Committee ("JPC") to value carbon steel wire rod ("wire rod"). ITW contends that the Department should use World Trade Atlas ("WTA") Indian import data to value wire rod. ITW argues that the WTA data are not distortive, as Petitioners argued, and reflects commercial shipment quantities. ITW contends that the United Arab Emirates ("UAE") component of the import statistics is aberrational, as Petitioners' alleged. ITW and Xingya Group contend that the Department will only deem a value aberrational if it represents a small quantity that is significantly different than other values. See Sichuan Changhong Elec. Co. v. United States, 460 F. Supp. 2d 1338, 1356 (Ct. Int'l Trade 2006) ("Sichuan Changhong"). Thus, given that the UAE import data are the largest component of the wire rod import data, ITW and Xingya Group assert it cannot be considered aberrational. ITW and Xingya Group also indicate that WTA import statistics have been used to value wire rod in previous cases. See, e.g., Helical Spring Lock Washers From the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 73 FR 4,175 (January 24, 2008) and accompanying Issues and Decision Memorandum at Comment 2 ("Lock Washers 2008 Final").

ITW and Xingya Group contend that another reason not to use the JPC data are because they are flawed. ITW first argues that the JPC data are open market prices and according to ITW, the Department prefers actual transaction prices as surrogate values.[17] Jinhai and Hybest Tools[18] add that list prices are generally starting prices which are negotiated down and thus these figures would require adjustment. ITW further contends that the JPC is not an official government entity and the Department prefers to use official government information.[19] Second, ITW contends that the JPC data do not provide quantity data which therefore precludes the Department from determining the impact of different quantities and the representativeness of the

[17] See Fresh Garlic from the People's Republic of China: Final Results and Partial Rescission of the Eleventh Administrative Review and New Shipper Reviews, 72 FR 34,438 (June 22, 2007) ("2007 Garlic Final") and accompanying Issues and Decision Memorandum at Comment 5.

[18] Huanghua Jinhai Hardware Products Co., Ltd. ("Huanghua") and Hybest Tools Group Co., Ltd. ("Hybest Tools").

[19] See Fresh Garlic From the People's Republic of China: Final Results of the Eleventh New Shipper Reviews, 72 FR 54,896 (September 27, 2007) and accompanying Issues and Decision Memorandum at Comment 1.

data. Third, ITW rebuts that the JPC data are more specific to the particular wire rod used by respondents than WTA import statistics. ITW points out that the price differential between 6mm, 8mm, and 12mm wire rod during the POI was often the same and therefore using WTA import statistics for wire rod under 14mm would not decrease accuracy. ITW also argues that the volatility between sales prices of the same wire rod product in India is another indicator that the Department should not use the JPC data.

Finally, ITW and Xingya Group assert that the JPC data should not be used because the Indian steel industry is subsidized. ITW specifically notes that the Department previously found a countervailable program administered by the JPC where JPC members benefitted from long-term loans with favorable rates. See Final Affirmative Countervailing Duty Determination: Certain Hot-Rolled Carbon Steel Flat Products From India, 66 FR 49,635 (September 28, 2001) and accompanying Issues and Decision Memorandum at Comment F.[20] Xingya Group further argues that once the Department determines that the Indian steel industry received subsidies that these general subsidies would also affect the price of wire rod. See, e.g., Certain Helical Spring Lock Washers from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 70 FR 28,274 and accompanying Issues and Decision Memorandum at Comment 1. Xingya Group contends that the rebuttal presumption is that when a subsidy is found to be applicable to a specific industry, such as the steel industry, versus a specific product that the product from all producers would be affected by such subsidies. See Louyang Bearing Factory v. United States, Consol Ct. No. 99-00743, Slip Op. 03-41, Final Results of Redetermination Pursuant to Court Remand, (July 14, 2003) at 6. Xingya Group also points to the recent decision in Hot-Rolled Carbon Steel Flat Products from India,[21] where the Department found, among other subsidies, the benefit conferred by less than adequate benchmark prices paid for iron ore, which is a principal input in the production of steel wire rod. Xingya Group also points to the Department's findings that steel producers in India benefit from loans provided at advantageous rates by the Steel Development Fund. See Final Affirmative Countervailing Duty Determination: Prestressed Concrete Steel Wire Strand From India, 68 FR 68,356 (December 8, 2003).

ITW and Xingya Group assert that the Department, in accordance with its long-standing policy not to use subsidized prices that are believed to be subsidized, should not use the JPC data to value wire rod. See H.R. rep. No. 100-576, at 590 (1988) *reprinted in* 1988 U.S.C.C.A.N. 1547, 1623. ITW and Xingya Group contend that the Department has found in numerous previous cases that that Indian domestic steel industry benefits from subsidies and therefore the prices should not be used. Huanghua and Hybest Tools suggest in the alternative that the Department average the WTA and JPC figures to use as the wire rod surrogate value.

[20] The Department found that Steel Development loans funded through payments made by JPC member companies to the fund through "producer price increases that were mandated and determined by the JPC, which was itself subject to {Government of India} control are countervailable.

[21] See Final Results of Countervailing Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products from India, 71 FR 28,665 (May 17, 2006) and accompanying Issues and Decision Memorandum at Comment 2.

Petitioners rebut ITW and Xingya Groups' assertion not to use the JPC data. Petitioners contend that the data published by the JPC are no less valid that than the price reporting in Chemical Weekly. See Lock Washers 2008 Final and accompanying Issues and Decision Memorandum at Comment 4. Petitioners counter that summarized surveys of actual economic transactions, e.g. JPC price reports, Steel Chamber Weekly Newsletter price data, Chemical Weekly, etc., are superior to any one transaction or given subset of transactions that may not be representative of the whole. Petitioners assert that the JPC data are superior to other Indian national prices used by the Department in other cases. See, e.g., Honey From the People's Republic of China: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review, 73 FR 2890 (January 16, 2008).

Petitioners contend that the lack of quantified volume reported in the JPC data are normal for most published market price sources that are not quantified in the same manner as import statistics. Petitioners assert that virtually all published sources of commodity pricing around the world omit volume data. See 2007 Garlic Final.

Petitioners further rebut that the JPC data are subsidized based solely on the fact that the Department has previously found that Steel Development fund loans available in India are countervailable. Rather, Petitioners assert that the prices reflect the free market prices of steel in India. Petitioners contend that the Department could use the Steel Chamber Weekly Newsletter prices, which are market price quotes not collected by the JPC, are POI-contemporaneous, and are product specific. See Xingya Group March 18, 2008, Surrogate Value Submission at Exhibit 4. Petitioners proffer that should the Department use the Steel Chamber Weekly Newsletter the average wire rod prices should be adjusted upward to account for the average quality surcharge for high-quality wire rod used in nail production.

Petitioners reject ITW's assertion that the JPC data are not accurate by gauge because prices were the same for multiple gauges of wire rod on the same day. Petitioners aver that JPC data accurately reflect differences between the different grades of wire rod used by Respondents. Petitioners assert that the WTA data include larger diameters of wire rod and rebar and that the values of these products, which are not used by respondents to produce nails, distort the surrogate value. Petitioners argue that using the WTA data decreases the accuracy of the wire rod surrogate value.

Petitioners contend that the WTA data are aberrational due to the inclusion of misclassified imports from the UAE. Petitioners argue that the UAE imports included in the WTA data proposed by respondents are actually composed of steel scrap. Petitioners point to the true value market price of wire rod imported into the UAE, as analyzed by Middle East Steel, the primary business portal for steel trade in the Middle East, as support that UAE prices included in the WTA data are aberrational. Petitioners also compare HTS category 7213.91.90 to respondents proposed steel scrap HTS category as additional support that the dominant import data under 7213.91.90 are composed of UAE steel waste and scrap misclassified to evade export duties. Petitioners also rely on world wire rod market prices identified by the World Bank as additional support that the UAE imports into India are misclassified in the HTS category proposed by respondents.

Petitioners also contend that Xingya Group's argument that the Department only removes aberrational values that are significantly different from other values or comprise a very small percentage of total import quantity is inaccurate. Petitioners assert that the Department should remove the UAE values from the HTS category because they are unusually high. See, e.g., Notice of Final Determinations of Sales at Less Than Fair Value: Steel Wire Rope From India and the People's Republic of China; Notice of Final Determination of Sales at Not Less Than Fair Value: Steel Wire Rope From Malaysia, 66 FR 12,759 (February 28, 2001).
Petitioners also counter that Xingya Group's reliance on Lock Washers 2008 Final is misplaced. According to Petitioners, the Department's determination to use WTA data was based on different facts than the ones present in the instant investigation. See Petitioners May 8, 2008, Rebuttal Brief at 29; Lock Washers 2008 Final and accompanying Issues and Decision Memorandum at Comment 2. Petitioners assert that the Department did not reject the fundamental validity of the JPC data in Lock Washers 2008 Final, but rather evaluated the totality of circumstances and determined that the WTA data were the most appropriate in terms of specificity and greatest contemporaneity.

Petitioners also point to the cost of mild steel wire rod listed in M/S Bansidhar Granites Private Limited ("Bansidhar") financial statements ending March 2007 as additional support that the JPC and Steel Chamber Weekly Newsletter data are most accurate.

Department's Position:

We agree with Petitioners. In valuing the FOPs, section 773(c)(1) of the Act instructs the Department to use "the best available information" from the appropriate market economy country. The Department's criteria for selecting surrogate value ("SV") information are normally based on the use of publicly available information ("PAI"), and the Department considers several factors when choosing the most appropriate PAI, including the quality, specificity, and contemporaneity of the data. See, e.g., Notice of Final Determination of Sales at Less Than Fair Value and Affirmative Critical Circumstances, In Part: Certain Lined Paper Products From the People's Republic of China, 71 FR 53079 (September 8, 2006) ("CLPP"), and accompanying Issues and Decision Memorandum at Comment 3.

Moreover, it is the Department's practice to carefully consider the available evidence in light of the particular facts of each industry when undertaking its analysis of valuing the FOPs on a case-by-case basis. See Certain Preserved Mushrooms from the People's Republic of China: Final Results and Final Partial Rescission of the Sixth Administrative Review, 71 FR 40477 (July 17, 2006), and accompanying Issues and Decision Memorandum at Comment 1 ("Mushrooms"); see also Freshwater Crawfish Tail Meat from the People's Republic of China; Notice of Final Results of Antidumping Duty Administrative Review, and Final Partial Rescission of Antidumping Duty Administrative Review, 67 FR 19546 (April 22, 2002) and accompanying Issues and Decision Memorandum at Comment 2. As there is no hierarchy for applying the above-mentioned principles, the Department must weigh available information with respect to each input value and make a product-specific and case-specific decision as to what the "best" available SV is for each input. See Mushrooms.

We find that, of the options available on the record, the JPC data best satisfy the Department's surrogate value criteria, and will continue to be used to value the steel wire rod input. The JPC data are publicly available, specific to the input in question, represent a broad market average, and are tax-exclusive. With regard to specificity, we note that the JPC data are more specific than WTA data because the JPC data are reported on more specific sizes (e.g., 6mm and 8mm steel wire rod).

Additionally, we note that the JPC price data have an official nature, in that they represent national-level steel monitoring by a joint government/industry board. Additionally, the price data reflect the overall market price and are maintained on a regular basis (i.e., the data represent bi-weekly price information collected by the JPC from the steel industry). The Department finds that the JPC data are therefore representative of the Indian market, in that they contain data points for four different markets in India (Kolkata, Delhi, Mumbai and Chennai) covering all bi-weekly price reports during the POI. Respondents' argument that the JPC data are based on data analogous to price quotes is not supported on the record. Similarly, we believe that Petitioners erroneously characterized the JPC data as "price quotes" in their rebuttal brief. There is no evidence to conclude that the data represent price quotes rather than actual prices. See, e.g., Petitioners December 3, 2007, Surrogate Value Submission at Exhibit 3A. Furthermore, we note that the Department has used similar market price data (as opposed to data directly representing transactions) to value material inputs in other cases. See, e.g., 2007 Garlic Final and Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Final Results of the First Antidumping Duty Administrative Review and First New Shipper Review, 72 FR 52052 (September 12, 2007), and accompanying Issues and Decision Memorandum at Comment 1. Additionally, the Department has in past cases also used similar market price data from publications such as Chemical Weekly to value material inputs. See, e.g., Final Determination of Sales at Less Than Fair Value: Certain Activated Carbon from the People's Republic of China, 72 FR 9508 (March 2, 2007) and accompanying Issues and Decision Memorandum at Comment 18. In the instant case, Xingya Group advocates using price data from Chemical Weekly to value its hydrochloric acid input (see Comment 18 below), due in large part to that source's greater specificity.

Respondents' arguments against the JPC data further allege: 1) the data's lack of quality; and 2) that specificity is not a compelling reason since wire rod prices are similar for different gauges. We will first address the latter of these arguments. While Respondents contend that the prices for the different gauges identified in the JPC data are similar, we note that differences do exist. See, e.g., Prelim Surrogate Value Memo at Exhibit 4. Moreover, the JPC data offer data for two gauges of wire rod (6mm and 8mm) that very closely match the input used by Respondents. We further disagree with Respondents' argument about specificity not being an important consideration since the narrative description for HTS category 7213.91.90, which they advocate using, is "Bars and rods, hot-rolled, in irregularly wound coils, of iron or non-alloy steel; Of circular cross-section measuring less than 14mm in diameter; Other.[22]" Thus, this HTS category represents a non-specific basket category that includes not only iron products (both bar and rod),

[22] See the Attachment to ITW's December 20, 2007, surrogate value submission.

but also steel bars and larger gauge wire rod, none of which are used by ITW or Xingya Group to produce the subject merchandise. We therefore find that specificity is a compelling reason that supports using the JPC data to value the steel wire rod input.

Respondents challenge the quality of the JPC data on several fronts. However, based on an evaluation of these arguments, the record evidence, and case precedent, we disagree with Respondents' reasons for rejecting the JPC data. While Respondents observe that the price for 12mm wire rod varied, they provide no evidence that such price variations are outside the market norm. Additionally, while Respondents raise the issue of subsidies affecting the domestic Indian price of steel wire rod, specific information as to how any subsidy may potentially influence the price data for steel wire rod is absent. All of the CVD proceedings to which Respondents cite relate to products other than steel wire rod. Finally, we note that the Department has no CVD order on steel wire rod from India.

Respondents argue that the Department should not use JPC data because they do not contain quantity information (e.g., how many observations are included in a given price). As an initial matter, and as noted above, the Department has used similar market price data in several other cases. While we agree that the JPC data would be even more revealing if quantity information were included, for the reasons discussed herein, we find that the broad market coverage, product specificity, official governmental sourcing, and contemporaneity of this fully public source, make this the best source of data on the record for valuation purposes.

Respondents' cite the Lock Washers 2008 Final as an instance where the Department declined to use JPC data. Petitioners correctly note that the Department's reasons in that case for declining to use JPC data were clearly outlined and differ from the record of this investigation. In that case, the respondent did in fact use larger gauge wire rod in its production process, and there were limited JPC data points on the record (as opposed to full POI data in this case). See id.

Lastly, we note that Xingya Group submitted POI steel wire rod price data from the Steel Chamber Weekly Newsletter, and Petitioners stated that such data may be used to value this FOP. However, since this information contains data points for only one market (Mumbai), we find that they do not represent as broad a market average as the JPC data. Moreover, we find that the Steel Chamber Weekly Newsletter and the Bansidhar financial statement both corroborate the JPC price data.

While the Department commonly uses Indian import statistics to value inputs, we do not have a practice of always choosing that source over other sources. Rather, we seek to use the best available information for each input. See Lock Washers 2008 Final. For all of the foregoing reasons, we find that the JPC data represent the best available information for valuing the steel wire rod input in this antidumping duty investigation.

Comment 11: Surrogate Financial Companies

ITW and Xingya Group note that the Department used the financial statements of a non-nail producing company, Lakshmi Precision Screws ("Lakshmi"), an integrated company that

produces highly engineered fastners and other precision parts, in the Preliminary Determination. ITW, Xingya Group, Jinhai and Hybest Tools argue that the Department should use the financial statements of companies that produce nails, Nasco Steels Pvt. Ltd. ("Nasco") and Bansidhar Granites Pvt. Ltd. ("Bansidhar"), that were placed on the record after the Preliminary Determination. See Xingya Group March 18, 2008, Surrogate Value Submission at Exhibit 1. Xingya Group contends that the Department should follow its policy of using surrogate financial statements that are most specific to the production of the subject merchandise and now that there are financial statements of companies that produce nails on the record, these constitute the best information on the record. Xingya Group asserts that the financial statements of the nails companies are specific to the subject merchandise, contemporaneous with the POI, and obtained from the Registrar of Companies of India and thus publicly available.

ITW refutes that Lakshmi is more vertically integrated than other Indian nail producers whose audited financial statements are now on the record. ITW specifically notes that it is unclear what percentage of wire Lakshimi purchased versus drew itself. ITW and Xingya Group contend that the financial statements of Nasco and Bansidhar clearly indicate that both companies purchase wire and wire rod used to produce nails and similar products. ITW also argues that the Department should use the financial statements of Kamdhenu Wire ("Kamdhenu") because record evidence does not support that it is largely a trading company as Petitioners asserted. Xingya Group proposes that the Department apply the financial ratios of Kamdhenu to the non-wire drawing FOPs and the financial ratios of the nail companies that draw wire to the wire drawing FOPs, thus applying representative ratios to the entire production process.
ITW and Xingya Group assert that wire drawing constitutes a very small percentage of the overall cost of production and therefore the Department should not base its surrogate financial statement selection on this factor alone.[23] ITW, Jinhai, and Hybest Tools suggest, should the Department continue using Lakshmi, that it should also average in the financial statements of companies that produce nails.[24] ITW and Xingya Group also contend that the financial statements of Micron Precision Screws Ltd. ("Micron"), an integrated screw company, Agarwal Bolt, and Raajratna Fasteners, Pvt. should also be included if the Department continues to use Lakshmi. See, e.g., Tables and Chairs Final 2007, 72 FR 71,355 (December 17, 2007 and accompanying Issues and Decision Memorandum at Comment 1 (adopting the use of two financial statements when neither company had a production experience that completely matched Respondents' production).

Petitioners assert that the 2006-2007 Annual Report of Lakshmi continues to be the best surrogate financial company on the record. Petitioners contend that Lakshmi produces premium fasteners similar to those produced by respondents. According to Petitioners, the fact that Lakshmi has numerous subsidiaries and joint-ventures also supports that it is most similar to the

[23] See Superior Wire v. United States, 669 F. Supp. 472, 480 (Ct. International Trade 1987) (The court found that "the transformation from wire rod to wire to be minor rather than substantial" partly because "no complicated or expensive processing occurred.")

[24] See Folding Metal Tables and Chairs from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 72 FR 71,355 (December 17, 2007) and accompanying Issues and Decision Memorandum at Comment 1 (the Department will use more than one financial statement when no one company has a production experience that completely matches that of respondents) ("Tables and Chairs Final 2007").

operations of respondents. Moreover, Petitioners rely on the fact that Lakshmi is an integrated producer that consumes both carbon steel and stainless steel wire rod and thus most similar to the production experiences of respondents. Petitioners argue that Lakshmi is superior to the additional financial companies placed on the record for the following reasons:

Nasco

Petitioners argue that Nasco's nail production only accounted for sixteen percent of its total production and purchases while the remaining percentage is composed of hinges and agricultural equipment blades. Petitioners further argue that there is no indication that this company could produce high quality nails or that their company has advanced high-quality production equipment. Petitioners further contend that wire rod constituted less than six percent of raw materials consumed and thus Nasco does not represent the operation structure of Respondents.

Bansidhar Granites Pvt. Ltd.

Petitioners argue that Bandishar's nail production only accounted for eight percent of its total finished goods inventory and the remaining finished goods inventory percentage is composed of side cuttings, M.S. wire, bolts, and G.I. Wire. Petitioners also contend that Bansidhar mostly operates as a non-integrated manufacturer of products other than nails and therefore it does not represent the operation structure of Respondents. Petitioners further argue that there is no indication that this company could produce high quality nails or that their company has advanced high-quality production equipment.

Newtech Wire Products Pvt. Ltd.

Petitioners argue that Newtech only consumed H.B. wire to produce nails and barbed wire. Petitioners also contend that because Newtech experienced a loss during the 2006/2007 fiscal year the Department should not use it in accordance with its recent practice. See, e.g., Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Final Results of the First Antidumping Duty Administrative Review and First New Shipper Review, 72 FR 52052 (September 12, 2007) ("VN Shrimp Final").

Kamdhenu Wire

Petitioners argue that because Kamdhenu is not integrated, like respondents, it has far less factory overhead than an integrated manufacturing company producing fasteners from wire rod. Petitioners contend that the Department prefers to use the financial statements of vertically-integrated surrogate companies for financial ratios to apply to vertically integrated Chinese producers. See Notice of Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp From the People's Republic of China, 69 FR 70997 (December 8, 2004) and accompanying Issues and Decision Memorandum at Comment 9D ("PRC Shrimp"). In the alternative, Petitioners suggest that if the Department uses Indian surrogate companies that produce small amounts of products from vertically integrated wire drawing that it should value raw material steel consumption as wire instead of wire rod.

Petitioners also point out that Kamdhenu is mostly a trading company, as indicated by its resales of wire purchases. Petitioners argue that this makes Kamdhenu less like Respondents.

Raajratna Fasteners Pvt. Ltd.
Petitioners contend that Raajratna only produces stainless steel fasteners and that its financial statements provide no information pertaining to the relative volume produced, sold, or inventoried nor the level of integration. Thus, Petitioners assert that Raajratna's financial statements should not be used because its operating structure is not like either respondent.

M/S Micron Precision Screws Ltd.
Petitioners note that Micron produces screws and fasteners, such as automotive fasteners. However, Petitioners rebut ITW's assertion that Micron is similar to Lakshmi in terms of vertical integration. Moreover, Petitioners contend that there is no record evidence to support that Micron is vertically integrated and therefore, it is not possible to compare Micron with the operating structures of Respondents.

Agarwal Bolts Ltd.
Petitioners indicate that Agarwal's financial statements are not usable for several reasons. First, Petitioners argue that it is a producer of bolts, nuts, and rivets, which is a step further away from nails than the merchandise produced by Lakshmi. Second, Petitioners point out that the auditors provided a qualified report stating that certain aspects of the financial statements did not comply with mandatory accounting standards. Third, Petitioners contend that the company faced a worker rebellion at one of its units, which resulted in the shutdown of the facility and movement of operations. Finally, Petitioners argue that had it not been for an Indian government export incentive of three percent during fiscal year 2006/2007 and increased to six percent in 2007/2008, that Agarwal would not have been profitable. Petitioners assert that Agarwal should be disqualified for the same reason as Kamdhenu, e.g., zero profit. Petitioners also contend that if export subsidies do not make a material difference to profit, that they can be considered, however, as in the instant case, the export incentives distort the profit ratio significantly and therefore the Department should not use the profit from Agarwal. See Final Results of Redetermination Pursuant to United States Court of International Trade Remand Order, Goldlink Indus. Co., Ltd. Et al. v. United States at 7 (October 6, 2006).

Rajratan Global
Petitioners argue that because Rajratan only engages in the first half of integrated production of finished nails, e.g. it only produces P.C. wire and tire bead wire from wire rod, its operating structure is unlike Respondents and should therefore not be used.

Kataria Wire Private Ltd.
Petitioners argue that because Kataria produces ferrous, non-ferrous, zinc, and lead wire, and not carbon steel nail wire, its operating structure is unlike Respondents and should therefore not be used.

Intermediate Methodology
Petitioners contend that if the financial statements of a non-integrated company are used, the Department must use an intermediate methodology for valuing the wire, versus the wire rod. See Goldlink Industries Co., Ltd. v. United States, 431 F. Supp 2d 1323, 1341-42 (Ct. Intl. Trade 2006). Petitioners assert that the intermediate methodology would especially be appropriate for

Xingya Group given that it did not report in its questionnaire responses that its wire was drawn by an outside wire drawer. See Xingya Group Verification Report at 28. Petitioners therefore suggest in the alternative that the Department should use Whitworth Engineers Pvt. Ltd. because the company profile includes bulk and collated nails.

Department's Position:

In valuing FOPs, section 773(c)(1) of the Act instructs the Department to use "the best available information" from the appropriate market-economy country. In choosing surrogate financial ratios, it is the Department's policy to use data from market-economy surrogate companies based on the "specificity, contemporaneity, and quality of the data."[25] Moreover, for valuing factory overhead, SG&A, and profit, the Secretary normally will use non-proprietary information gathered from producers of identical or comparable merchandise in the surrogate country. See 19 CFR 351.408(c)(4) and section 773(c)(4) of the Act.[26]

In the Preliminary Determination the Department used the financial statements of Lakshmi as the best publically available information on the record because Lakshmi uses an integrated wiredrawing production process with steel wire rod as the main input, which closely mirrors that of the mandatory respondents, even though it produced comparable rather than identical merchandise. The Department determined that Lakshmi therefore possessed a more similar cost structure than that of a company which produces merchandise from higher value steel wire that does not undergo the wiredrawing stage.[27] See Preliminary Determination at 3937.

The Department's criteria for choosing surrogate companies are the availability of contemporaneous financial statements, comparability to the respondent's experience, and publicly available information. See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Chlorinated Isocyanurates From the People's Republic of China, 70 FR 24502 (May 10, 2005) and accompanying Issues and Decision Memorandum at Comment 3; PRC Shrimp at Comment 9F. The Department also has an established practice of rejecting financial statements of surrogate producers whose production process is not comparable to the respondent's production process when better information is available. See, e.g., Persulfates from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 70 FR 6836

[25] See Notice of Final Determination of Sales at Less Than Fair Value and Affirmative Critical Circumstances, in Part: Certain Lined Paper Products from the People's Republic of China, 71 FR 53079 (September 8, 2005) and accompanying Issues and Decision Memorandum at Comment 1.

[26] See, e.g., Final Determination of Sales at Less Than Fair Value and Final Partial Affirmative Determination of Critical Circumstances: Diamond Sawblades and Parts Thereof from the People's Republic of China, 71 FR 29,303 (May 22, 2006) and accompanying Issues and Decision Memorandum at Comment 2 ("Diamond Sawblades").

[27] See Persulfates from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 68 FR 6712 (February 10, 2003) and accompanying Issues and Decision Memorandum at Comment 9 (" the Department may also consider the representativeness of the production experience of the surrogate producers in relation to the respondent's own experience."); Notice of Final Determination of Sales at Less Than Fair Value: Bulk Aspirin From the People's Republic of China, 65 FR 33805 (May 25, 2000) and accompanying decision memorandum at Comment 4.

(February 9, 2005) ("PRC Persulfates") and the accompanying Issues and Decision Memorandum at Comment 1.

Since the Preliminary Determination, additional financial statements have been placed on the record, i.e., the financial statements of Nasco and Bandishar, that meet the Department's surrogate value criteria. Both Nasco and Bandishar produce nails and are integrated, e.g., draw wire from wire rod. We disagree with Petitioners' contention that, because Nasco's and Bandishar's respective production of nails accounts for relatively small percentages of their overall production, their financial ratios are not representative of a producer of nails. See, e.g., Persulfates from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 68 FR 68030, (December 5, 2003) and accompanying Issues and Decision Memorandum at Comment 1("Simply because the production process of the surrogate producer results in smaller production volumes does not render it unfit as a surrogate."); Aspirin at Comment 4 ("Regarding the petitioner's arguments about capacity, we do not believe that size or capacity of the surrogate producer always poses a necessary consideration."). Nasco and Bandishar have invested in equipment required to produce nails, whereas the other potential surrogate companies have not. As such, their financial ratios are more appropriate for use than the ones of companies that do not produce nails. Moreover, as they are the only producers of nails on the record, combining their ratios with those of one or more producers of comparable merchandise would dilute the extent to which the resulting ratios represent production of nails. Accordingly, we only include the financial data from Nasco and Bandishar in the calculation of the surrogate financial ratios.

With regard to the other financial statements on the record, we find that no other companies produce nails and also use an integrated wiredrawing production process using wire rod as the input to produce nails. For example, while, it is not clear whether Lakshmi is an integrated producer of comparable merchandise, it is clear that Lakshmi is not a nail producer. Also, Agarwal, Kamdhenu, Raajratna, M/S Micron, Rajratan Global, and Kataria do not produce nails. We note that Netwech does produce nails, but it did not realize a profit during fiscal year 2006/2007 and because there are other usable financial statements on the record, in accordance with Department practice, we will not use Newtech. See, e.g., VN Shrimp Final at Comment 2, section B. Finally, the Court has recognized the Department's discretion in selecting the best surrogate values on the record.[28]

Thus, we will use the financial statements of Nasco and Bandishar for calculating surrogate FOH, SG&A, and profit ratios for the final determination because their financial statements constitute the best information for approximating Respondents' actual experience.[29]

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[28] The U.S. Court of International Trade ("CIT") has upheld its previous determinations that "when Commerce is faced with the decision to choose between two reasonable alternatives and one alternative is favored over the other in their eyes, then they have the discretion to choose accordingly." See FMC Corporation v. United States, 27 CIT 240, 241 (CIT February 11, 2003) ("FMC), (citing Technoimportexport, UCF America Inc. v. United States, 783 F. Supp. 1401, 1406 (CIT 1992)), affirmed FMC Corporation v. United States, 87 Fed. Appx. 753 (Fed. Cir. 2004).

[29] ITW made certain arguments with respect to errors contained in the calculation of the surrogate financial ratios based on Lakshmi's financial statements used in the Preliminary Determination which are moot now that the Department is calculating surrogate financial ratios based upon the financial statement of Nasco and Bandishar.

Comment 12: Scrap Surrogate Value

ITW challenges the Department's use of the Indian harmonized tariff schedule ("HTS") category 7204.49.00, a basket category, in the Preliminary Determination to value steel scrap.[30] ITW and Xingya Group contend that the Department should use HTS category 7204.41.00, which includes turnings, shavings, chips, etc., because it more closely represents the type of scrap that they both generate.[31] ITW argues that the Department verified the different types of steel scrap it generated during the POI, which included higher quality scraps, whole nails, and wire. See Paslode Shanghai Verification Report at 9 and VE 21. ITW asserts that the type of scrap it generated during the production process is best described by HTS category 7204.41.00. See, e.g., Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China; Final Results of Antidumping Duty Administrative Review and Revocation in Part of Antidumping Duty Order, 62 FR 6173 (February 11, 1997) and accompanying Issues and Decision Memorandum at Comment 5 (this HTS category best describes the types of scrap created during the production of cages, i.e., turnings shavings, chips, trimmings, stampings, etc.). ITW also notes that the Department has determined, based on verification, that HTS category 7204.41.00 is not the most appropriate HTS category for valuing steel scrap. See, e.g., Heavy Forged Hand Tools From the People's Republic of China: Final Results and Partial Rescission of Antidumping Duty Administrative Review and Determination Not To Revoke in Part, 67 FR 57,789 (September 12, 2002) and accompanying Issues and Decision Memorandum at Comment 8 (The scrap offset was composed of pieces of scrap rails, billets, and rods that cannot be described as turnings or shavings and therefore the Department valued the scrap offsetting using import statistics for other waste and scrap). ITW contends that the Department verified that ITW's scrap consisted exclusively of nail shavings, whole nails, and wire, and therefore HTS category 7204.41.00 is the most accurate HTS category to value steel scrap sold by ITW during the POI.

ITW also challenges Petitioners' argument that HTS category 7204.41.00 is aberrational. According to ITW, imports from the United Kingdom constitute the largest component of HTS category 7204.41.00 and Petitioners have provided no evidence indicating that the value is not representative of the same type of waste generated by ITW or an aberrational value. ITW rebuts Petitioners' assertion that because the value of HTS category 7204.41.00 is greater than the wire rod value that it is therefore aberrational. ITW contends that it is not unreasonable for scrap prices to be sold at higher prices than wire rod given that carbon steel scrap prices are

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However, we have examined the financial statements of Nasco and Bandishar, as well as the costs obtained from these company's income statements that are included in the numerator and denominator of the surrogate financial ratio calculations.

[30] See Memorandum to the File from Matthew Renkey, through Alex Villanueva, Program Manager, AD/CVD Operations, Office 9, and James C. Doyle, Director, AD/CVD Operations, Office 9: Certain Steel Nails from the People's Republic of China: Surrogate Values for the Preliminary Determination, dated January 15, 2008 ("Prelim Surrogate Value Memo") at 11 and Exhibit 39.

[31] See Paslode Shanghai Verification Report; see also Xingya Group Verification Report.

determined based on supply and demand on the world market. ITW references the decision in Collated Roofing Nails Remand[32] and asserts that the scrap value they are advocating is only 50 percent higher than the wire rod value and therefore not distortive.

ITW suggests two alternatives for valuing scrap in the event the Department does not select HTS category 7204.41.00 as the appropriate scrap surrogate value. First, ITW proposes that the Department could average 7204.41.00 and 7204.49.00. Second, ITW offers that the Department could value scrap at the same value as wire rod. See e.g., Collated Roofing Nails Remand. ITW contends that both of these approaches yield more accurate results than only using HTS category 7204.49.00 to value the scrap it produced and sold during the POI.

Petitioners argue that HTS category 7204.41.00 is the most appropriate category for valuing steel scrap. Petitioners reason that HTS category 7204.41.00 overstates the true market value of scrap, which is evidenced by the fact it is higher than the value for wire rod. Petitioners contend that 7204.41.00 is aberrational based on a single month's shipment from the United Kingdom. Petitioners proffer that should the Department use HTS category 7204.41.00 as proposed by respondents, that the Department should remove the aberrant imports from the United Kingdom.

Petitioners also challenge respondents' arguments that scrap values higher than wire rod values is logical. Petitioners point to the financial statements of Indian companies on the record as corroboration that HTS category 7204.41.49 more accurately reflects the cost of steel scrap.

Department's Position:

We agree with Petitioners. For the final determination, we will continue to use only HTS category 7204.49.00 for the final determination.

In the Final Determination Pursuant To The Remand Order From The U.S. Court Of International Trade In Paslode Division of Illinois Tool Works, Inc. v. United States, Ct. No. 97-12-02161 (Jan. 15, 1999), the Department stated that "It is clear that our steel scrap value selection produced an unreasonable result – a value for steel wire rod scrap (0.8390 USD/kg) that exceeded the price for steel wire rod (0.3119 USD/kg) – one that cannot be explained by any notes or data…" We find that in this case, the facts match this situation closely in that one of the suggested HTS categories for the valuation of steel scrap (7204.41.00) has a value greater than the value the Department determined in Comment 10 above. While we acknowledge that HTS category 7204.41.00 includes an explicit reference to "shavings" and that "shavings" were clearly identified as among the types of scrap generated by respondents, the HTS description is is not the only relevant factor for the Department to consider in valuing steel scrap. As discussed above, reliance on this value will produce an unreasonable result. Therefore, we are using only HTS category 7204.49.00 to value steel scrap.

[32] See Paslode Division of Illinois Tool Works, Inc. v. The United States and Shenzhen Top United Steel Co., Ltd., Court No. 97-12-02161 (November 4, 1998), Remand Redetermination (the Department used a wire rod surrogate value for scrap because no better surrogate value was on the record and the Department found using a scrap surrogate value hire than the wire rod value was unreasonable.).

Comment 13: Sigma Cap for Wire Rod

ITW asserts that should the Department continue to use JPC data, it should apply the Sigma[33] cap rule to the wire rod transportation distances. ITW contends that the JPC prices are delivered prices and that the JPC prices include costs associated with moving the steel wire rod from the plant to the four delivery points. According to ITW, the Department cannot add to that price the cost of transportation from the Chinese steel wire rod plant to ITW's plant as it would result in double counting.

Department's Position:

First, we note that ITW's conclusion that the JPC prices are delivered prices based solely on the fact that prices differed between four cities in India is unsupported by evidence on the record. Because ITW makes unsupported assertions regarding the JPC prices already incorporating the cost to move wire rod from plants to delivery points, we disagree with ITW that Sigma is applicable to domestic Indian prices such as the JPC. The Department's practice is to apply the Sigma cap only to import prices because in Sigma the Department stated it would apply the distance cap to import statistics. See, e.g., Saccharin Investigation Final at Comment 4; Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Preliminary Partial Determination of Critical Circumstances: Diamond Sawblades and Parts Thereof from the People's Republic of China, 70 FR 77121, 77132 (December 29, 2005) unchanged at Diamond Sawblades Inv. Final. Therefore, we will not apply the Sigma cap to inputs valued with domestic purchase prices for either respondent. See Notice of Final Determination of Sales at Less Than Fair Value, and Affirmative Critical Circumstances, In Part: Certain Lined Paper Products From the People's Republic of China, 71 FR 53079 (September 8, 2006) and accompanying Issues and Decision Memorandum at Comment 2.

Comment 14: Carton Surrogate Value

Petitioners note that the Department used WTA HTS category 4819.10.10, "boxes of corrugated paper and paperboard," to value cartons in the Preliminary Determination. Petitioners argue that if HTS 4819.10 were the only option, then it could be considered, but HTS 4819.10 has two subcategories at the eight digit level that are more specific to the input in question. According to Petitioners, HTS 4819.10.10 contains Indian import statistics for boxes while HTS 4819.10.90 has Indian import statistics for cartons. Petitioners argue that packing containers used by ITW are not plain cardboard boxes but pre-printed commercial cartons. See ITW's November 5, 2007 Questionnaire Response at 15 ("DQR"). Therefore, Petitioners argue that, given ITW's description, the Department should rely on HTS 4819.10.90 to value ITW's cartons because it provides greater specificity. Petitioners note that in instances where the packing item was a carton, the Department used HTS 4819.10.90 to value cartons.[34] See, e.g., Notice of Final

[33] See Sigma Corp. v. United States, 117 F. 3d 1401 (Fed. Cir. 1997) ("Sigma").

[34] "Cartons & cases of corrugated paper & paperboard."

Results of New Shipper Review: Honey from the People's Republic of China, 72 FR 37713 (July 11, 2007) and accompanying Issues and Decision Memorandum at Comment 5.

ITW contends that HTS category 4819.10.10 most accurately describes the cartons it uses to pack its nails.[35] ITW asserts that the Department has examined the distinction between HTS categories 4819.10.10 and 4819.10.90 in previous cases and has determined that 4819.10.10 covers both cartons and boxes. See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Folding Metal Tables and Chairs from the People's Republic of China, 67 FR 20090 (April 24, 2002) and accompanying Issues and Decision Memorandum at Comment 9 ("Metal Tables"). Thus, ITW concludes that the Department should continue valuing its packing containers using HTS category 4819.10.10.

Xingya Group contends that the Department should continue to value its boxes using HTS category 4808.10.00, noting that it reported and the Department verified that it self-produces its boxes. Xingya Group concludes that Petitioners' argument in favor of a "carton" versus a "box" surrogate value is thus misplaced.

Department's Position:

First we note that the descriptions of the carton HTS categories reported by ITW in its brief are not found elsewhere on the record. Thus, the Department is not considering these descriptions for the final determination. Instead, the Department is examining the HTS category descriptions for cartons previously on the record and noted above. A review of HTS categories 4819.10.10 and 4819.10.90 indicates that both categories could apply to the cartons used by ITW during the POI because both categories appear to describe cardboard cartons similar to those used by ITW. See ITW DQR at 15-16. Thus, based on evidence on the record of this investigation, we will value ITW's cartons using an average of HTS categories 4819.10.10 and 4819.10.90. See Final Surrogate Value Memo. We also agree with Xingya Group that we will continue to value its boxes using HTS category 4808.10.00 given that it produces its own boxes.

Comment 15: Tape Surrogate Value

Petitioners note that the Department used HTS category 3919.10.00, "self-adhesive plates in rolls, etc., width under 20cm," to value tape in the Preliminary Determination. Petitioners argue that if HTS category 3919.10 were the only option, then it could be considered, but HTS category 3919 has a category at the eight digit level that is more specific to the input in question. According to Petitioners, HTS category 3919.90.20 contains Indian import statistics for tape used to close ready-for-retail shelf cartons (cellulose tape). Petitioners assert that color printed cartons are not closed using opaque duct tape or other self-adhesive tapes under 20 cm in width. Petitioners contend that adhesive tape used to close cartons like those used in nails is also referred to as cellulose tape – transparent or semi-transparent adhesive tape (trade names Scotch tape and Sellotape) used for sealing or attaching or mending. Therefore, Petitioners argue that

[35] See 2007 Garlic Final and accompanying Issues and Decision Memorandum at Comment 5 (The Department determined that HTS category 4819.10.10 includes cardboard cartons).

the Department should value adhesive tape using Indian trade statistics from HTS category 3919.90.20 ("cellulose adhesive tape").

Xingya Group argues that the use of a new surrogate value based on HTS category 3919.90.20 is unsupported by record evidence. Xingya Group further notes that the six-digit 3919.90 HTS category, based on the description for HTS category 3919.10.00, appears to encompass tape exceeding 20cm in width, and there is no indication that Xingya Group uses tape this wide.

Department's Position:

We agree with Xingya Group. For the final results, we will continue to use HTS category 3919.10.00, as based on the description of that HTS category it appears to match most closely the tape used Xingya Group. There is no evidence to show that Xingya Group uses tape greater than 20cm in width. In fact, the VAT invoices for its tape purchases indicate that it uses tape of a smaller width. See Xingya Group Verification Report at Exhibit 17. We note that we used this HTS category to value packing tape in another investigation. See Final Determination of Sales at Less Than Fair Value and Final Partial Affirmative Determination of Critical Circumstances: Diamond Sawblades and Parts Thereof from the People's Republic of China, 71 FR 29303 (May 22, 2006), and accompanying Issues and Decision Memorandum at Comment 31.

Comment 16: Wage Rate

Petitioners argue that the Department should apply an updated 2005 wage rate in this investigation. Petitioners also argue that a more superior value would be an amended 2005 wage rate, and superior to that amended 2005 wage rate, would be a contemporaneous 2006 wage rate. Petitioners note that although it cannot place new information on the record at this stage of the proceeding, the Department should take notice of updated 2006 International Labor Organization's ("ILO") wage rate data and 2006 World Bank Gross National Income ("GNI") data that is currently available and update the wage rate used in the Preliminary Determination.

ITW argues that the Department should continue using the labor wage rate used in the Preliminary Determination and not the currently pending revised wage rate advocated by Petitioners. ITW asserts that the Department's wage rate policy was clearly outlined in the Wage Rate FR[36] and that this policy clearly precludes the new wage rate from being used in the instant investigation.

Xingya Group notes that while Petitioners advocate that the Department use the 2005 wage rates preliminarily released by the Department, those wage rates have not been finalized and have recently been released for comment.

[36] See Expected Non-Market Economy Wages, 71 FR 19,812, 19813 (April 11, 2008); see also http://ia.ita.doc.gov/wages/05wages/05wages-041608.html ("The revised expected NME wage rates based on 2005 GNI will be used in all segments of all NME proceedings for which the deadline for submission of surrogate values is on or after the date of publication of the finalized expected NME wage rates based on 2005 GNI.") ("Wage Rate FR").

Department's Position:

As articulated in the Department's recent Federal Register notice, the "expected NME wage rates are finalized on the date of publication of this notice in the Federal Register and will be in effect for all antidumping proceedings for which the Department's final decision is due after the publication of this notice." See Correction of 2007 Expected Non-Market Economy Wage Calculation, 73 FR 27795 (May 14, 2008). Given that the final decision for the instant investigation is June 6, 2008, we are using the revised wage rate of $1.04 for China. Id. Additionally, we will not use the ILO wage rate data for 2006 as the Department has not yet calculated the wage rates based on 2006 ILO data and released this data for comment in accordance with Department practice. See, e.g., Wage Rate FR.

Comment 17: Wire Drawing Powder Surrogate Value

Xingya Group notes that in the Preliminary Determination the Department used a HTS category proposed by Petitioners (HTS 3403.99.01, "Wire Drawing Powder") to value drawing powder in the Preliminary Determination, which represents WTA data from April 2002 through March 2003, four years prior to the POI. Xingya Group notes that it proposed HTS 3824.90.90 ("Products and Residuals of the Chemical Industry, Other Chemical Products Nesoi") to value this FOP. See Xingya Group's December 3, 2007, Surrogate Value Submission at Exhibit 2. Xingya Group contends that this is the current HTS category that captures wire drawing powder and is contemporaneous with the POI, and that it should be used for the final determination.

Petitioners contest Xingya Group's argument that HTS category 3824.90.90 should be used to value wire drawing powder, stating that it represents a general category of chemical products and is not at all specific to wire drawing powder. Petitioners contend that in this instance, the specificity of HTS category 3403.99.01 clearly trumps the contemporaneity of a huge basket category, and that non-contemporaneous values can be adjusted by inflators, whereas no such comparable adjustment can be made for specificity.

Department's Position:

We agree with Petitioners. In valuing the FOPs, section 773(c)(1) of Act instructs the Department to use "the best available information" from the appropriate market economy country. The Department's criteria for selecting SV information are normally based on the use of PAI and the Department considers several factors when choosing the most appropriate PAI, including the quality, specificity, and contemporaneity of the data. See, e.g., Notice of Final Determination of Sales at Less Than Fair Value and Affirmative Critical Circumstances, In Part: Certain Lined Paper Products From the People's Republic of China, 71 FR 53079 (September 8, 2006) ("CLPP"), and accompanying Issues and Decision Memorandum at Comment 3. In the instant case, the quality of the two suggested values is the same, as they both represent Indian import data from the WTA. With regard to specificity, we find that Petitioners' suggested HTS category to be an exact match to the input in question, whereas Xingya Group's suggestion is a basket category encompassing a variety of chemicals, and there is no evidence to suggest that this basket category represents wire drawing powder. While Petitioners admit that their data are not as contemporaneous, they correctly note that the Department can adjust the data by using an

inflator to account for the difference between the source period and the POI, as we did using the Indian Wholesale Price Index in the Preliminary Determination. We therefore continue to find the Indian import data from HTS category 3403.99.01 to be the most appropriate SV for wire drawing powder.

Comment 18: Hydrochloric Acid Surrogate Value

Xingya Group notes that the Department used HTS category 2806.10.00 ("Hydrochloric Acid ("HCl")) in the Preliminary Determination. Xingya Group states that it subsequently submitted Indian Infodrive data showing that the majority of the entries used to calculate the HCL value consisted of specialty variants of HCL, such as HCl containing rare elements and HCL mixed with other chemicals and solutions. See Xingya Group May 18, 2008, Surrogate Value Submission at Exhibit 5. In the same filing, Xingya Group notes that it submitted all available Chemical Weekly prices from India for the POI. Id. Xingya Group states that it uses generic industrial HCL rather than specialty varieties, and that the Department should thus use the Chemical Weekly data for the final determination.

Petitioners do not object to Xingya Group's argument that the WTA data for HTS category 2806.10.00 contains entries that are not specific to the HCl used by Xingya Group, and that the Department should thus use HCl prices from Chemical Weekly to value its HCl input. Petitioners note that Xingya Group's argument is essentially the same as their own with respect to Indian WTA data for wire rod and bar in coils and requests equal consideration for its parallel argument.

Department's Position:

We agree with Xingya Group that Indian Chemical Weekly is the appropriate source for valuing hydrochloric acid in this case. The Department has previously found that Chemical Weekly is an appropriate for valuing HCl. See, e.g., Final Determination of Sales at Less Than Fair Value: Coated Free Sheet Paper from the People's Republic of China, 72 FR 60632, (October 25, 2007) and accompanying Issues and Decision Memorandum at Comment 17 ("Coated Free Sheet"). Given that both parties agree that the Chemical Weekly data more accurately represents Xingya Group's HCL, we will accordingly use Chemical Weekly data to value HCl in this final determination.

Comment 19: Stainless Steel Wire Rod Surrogate Value

Xingya Group notes that the Department used the HTS category 7222.00.00 ("Other Stainless Steel Bars and Rod, Angles Etc.") to value stainless steel wire rod ("SSWR") in the Preliminary Determination. Xingya Group argues that this HTS category is very general, and it submitted India Infodrive data showing that very few entries for this category were wire rod. See Xingya Group's May 18, 2008, Surrogate Value Submission at Exhibit 6D. Xingya Group states that the scope of the Department's SSWR from India proceedings (Stainless Steel Wire Rods from India) covers SSWR under HTS category 7221 ("Bars and Rods, Stainless Steel, Hot-Rolled, Irregular Coils"). See id. at Exhibit 6E. Xingya Group argues that this U.S. HTS category corresponds most closely to India's HTS category 72210019 ("Bars and Rods, Stainless Steel, Hot-Rolled,

Irregular Coils, Others"). See id. Xingya Group argues that because HTS category 7222.10.19 is the category most similar to the SSWR it uses, the Department should use Indian import for this category to value SSWR for the final determination.

Petitioners state that Xingya Group's argument that HTS category 7221.00.19 more accurately reflects its stainless steel wire rod input than HTS category 7222.00.00 is only supported by its assertion that more imports of SSWR enter under 7721.00.19, and not by any other record evidence.

Department's Position:

We disagree with both Respondents and Petitioners. As noted in the "Xingya Group Verification Report" at pages 21-23, Xingya Group uses stainless steel wire (already drawn), rather than stainless steel wire rod, to produce stainless steel nails. As such, we are valuing a stainless steel wire FOP and not a stainless steel wire rod FOP. We therefore find that data reflecting a stainless steel wire value, rather than a wire rod value, are a more accurate match for this FOP. Petitioners' December 3, 2007, SV submission contains Indian WTA data for imports under HTS category 7223.00 ("Stainless Steel Wire"). These data satisfy the SV criteria noted above in our position for Comment 9, and we will use them to value Xingya Group's stainless steel wire FOP for the final determination.

Comment 20: ITW

A. Database Use

ITW asserts that the Department should use the revised U.S. sales and FOP databases submitted on April 25, 2008. See ITW April 25, 2008, Submission. ITW contends that these databases incorporate all the minor corrections submitted during verification or identified by the Department and therefore should be used for the final determination.

Petitioners contend that the Department should apply either partial facts available or adverse facts available ("AFA") to ITW for incorrectly reporting the following in their section C questionnaire responses: early payment discounts, an incorrect sale, REBATE1U, missing rebates to a certain customer, and U.S. brokerage and handling.

Petitioners request that the Department remove a certain sale from ITW's U.S. sales database because it was improperly reported. Petitioners also request as facts available that the Department revise ITW's U.S. brokerage and handling expense. See ITW Paslode Verification Report at 2, 7, 14-15 and VEs 11 and 17. Petitioners assert that the Department should apply partial AFA to ITW's early payment discount and certain rebates because the Department found at verification that ITW had incorrectly reported these expenses. See ITW Paslode Verification Report at 2,13, 14 and VE 17 and 22E.

ITW challenges Petitioners' argument that the Department should apply partial AFA to account for minor errors discovered during the CEP verification. ITW contends that the Department did not identify a single major issue relating to ITW's reporting and that the minor errors went both

directions, e.g., ITW originally underreported its by-products sold and over-reported a packing factor. See ITW Paslode Verification Report; Paslode Shanghai Verification Report. ITW avers that it is the Department's standard practice to have respondents correct minor errors discovered at verification.[37] ITW points out that it has already submitted new databases containing corrections to all errors and minor corrections identified at verification.[38] Moreover, ITW asserts that the overall percentage of invoices that all of the above errors affected was extremely small and does not warrant the application of partial AFA.

Department's Position:

First, we note that ITW has removed the incorrect sale from its database and revised its U.S. brokerage and handling expenses in accordance with the Department's request. See ITW April 25, 2008, Submission.

Second, we agree with ITW that the three additional minor errors, early payment discounts and two rebate errors, discovered at verification identified by Petitioners do not warrant the application of partial AFA. Section 776(a)(1) of the Act mandates that the Department use the facts available if necessary information is not available on the record of an antidumping proceeding. In addition, section 776(a)(2) of the Act provides that if an interested party or any other person: (A) withholds information that has been requested by the administering authority; (B) fails to provide such information by the deadlines for the submission of the information or in the form and manner requested, subject to subsections (c)(1) and (e) of section 782; (C) significantly impedes a proceeding under this title; or (D) provides such information but the information cannot be verified as provided in section 782(i), the Department shall, subject to section 782(d) of the Act, use the facts otherwise available in reaching the applicable determination under this title.

Where the Department determines that a response to a request for information does not comply with the request, section 782(d) of the Act provides that the Department shall promptly inform the party submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that party with an opportunity to remedy or explain the deficiency. Section 782(d) further states that if the party submits further information that is unsatisfactory or untimely, the administering authority may, subject to subsection (e), disregard all or part of the original and subsequent responses. Section 782(e) of the Act provides that the Department shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements established by the administering authority if (1) the information is submitted by the deadline established for its submission, (2) the information can be verified, (3) the information is not so incomplete that it

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[37] See Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Final Results of Antidumping Duty Administrative Review and Partial Rescission, 73 FR 15,479 (March 24, 2008) and accompanying Issues and Decision Memorandum at Comments 6E and 7C (the Department found overstated consumption for certain packing materials and different by-product offsets than what was reported. The Department used the correct consumptions from verification.) ("FFF Final").

[38] See ITW April 25, 2008, Submission (in response to the Department's April 23, 2008, letter to ITW).

cannot serve as a reliable basis for reaching the applicable determination, (4) the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by the administering authority with respect to the information, and (5) the information can be used without undue difficulties.

As an initial matter, the Department notes that ITW provided corrections for all of the minor errors Petitioners identified. Therefore, there is no information absent from the record due to these errors. Furthermore, because ITW responded to all our requests for data regarding these inputs at verification, we find that the application of partial AFA is not warranted. The errors discovered at verification were not substantial and we find that they do not affect the integrity of the response. See, e.g., Final Determinations of Sales at Less Than Fair Value: Brake Drums and Brake Rotors From the People's Republic of China, 62 FR 9160, 9167 (February 28, 1997) (the Department used verified information to correct errors in the questionnaire response stating that the "errors that are not substantial do not affect the integrity of the response."). Moreover, we considered the initial inaccuracies in the data as inadvertent errors and ITW corrected the errors in a timely manner during verification and the corrected data were verified. For all of these reasons, the Department finds that, as to the minor errors identified by Petitioners, ITW cooperated to the best of its abilities. Thus, we will use the revised databases submitted by ITW on April 28, 2008, that incorporated all the minor errors identified by Petitioners found at verification.

B. Indirect Selling Expense Calculation

ITW asserts that the Department should exclude manufacturing expenses from ITW's indirect selling expense ("INDIRSU") ratio. ITW contends that the Department verified that all research and development ("R&D") and certain administrative expenses it originally reported as part of INDIRSU were in fact associated with its U.S. manufacturing, not selling. See ITW Paslode Verification Report at 17 and VE 21a. ITW argues that it is the Department's practice to only include selling and administrative expenses in the calculation of INDIRSU, not R&D and other manufacturing expenses. See, e.g., Certain Cold-Rolled Carbon Steel Flat Products From Germany; Final Results of Antidumping Duty Administrative Review, 60 FR 65264 (December 19, 1995) ("the Department does not normally consider R&D expenses to be associated with selling the merchandise") ("German Cold-Rolled").

Petitioners argue that the Department should not exclude R&D expenses associated with producing nails in the United States. Petitioners assert that because these R&D expenses consist of U.S. economic activity to benefit nail production then their inclusion as a U.S. selling expense is fully warranted. Petitioners further contend that the general and administrative expenses that ITW is trying to exclude are required to run the company as a whole and to support all functions, including selling subject merchandise. Petitioners argue that ITW should have raised these issues in its section C questionnaire responses and therefore its request to revise INDIRSU now is untimely.

Department's Position:

We find that these R&D and administrative expenses are related to manufacturing and that they would be properly reflected in the selling, general, and administrative expenses ("SG&A") of the surrogate financial ratios. Additionally, while these expenses are properly included in the surrogate financial ratios, they nevertheless do not represent selling expenses that should be included in INDIRSU. See, e.g., German Cold-Rolled at Comment 26. At verification, we conducted a thorough review of ITW Paslode's cost centers and found that ITW was able to segregate certain administrative expenses dedicated solely to U.S. manufacturing classified under one department accounting code. See ITW Paslode Verification Report at 17. Additionally, the R&D expenses cited by ITW Paslode all relate to its U.S. nail manufacturing operations. Therefore, it is appropriate not to account for either of these expenses in the INDISRU calculation. We find that it is appropriate to segregate costs between selling and manufacturing to avoid double-counting of the manufacturing-related expenses by excluding them from the U.S. indirect selling expense ratio. See, e.g., Final Determination of Sales at Less Than Fair Value: Certain Activated Carbon from the People's Republic of China**,** 72 FR 9508, March 2, 2007 and accompanying Issues and Decision Memorandum at Comment 24 ("Activated Carbon"); Antifriction Bearings and Parts Thereof From France, Germany, Italy, Japan, Singapore, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews, Rescission of Administrative Reviews in Part, and Determination To Revoke Order in Part, 69 FR 55574 (September 15, 2004) and accompanying Issues and Decision Memorandum at Comment 4. Therefore, we will use a revised INDIRSU ratio which excludes ITW's manufacturing expenses, e.g., R&D and certain administrative expenses.

C. Interest Expense

ITW asserts that the Department should calculate ITW's interest rate based on its own financial statements because it is a U.S. company. ITW contends that the Department verified that Paslode Shanghai has borrowed almost exclusively from within the ITW corporate entity. See Paslode Shanghai Verification Report at 5. ITW presents that using its actual borrowing experience would yield more accurate results than using that of an Indian company that does not have a U.S. parent company. ITW points to Magnesium from China,[39] where the Department stated that it prefers to value factory overhead, SG&A, and profit from a single source when possible, but will use an alternative source where appropriate. ITW asserts that this is a case where the Department should use an alternative source, which is the interest expense of ITW corporate, and then exclude the interest expense items when calculating the surrogate SG&A ratio.

Petitioners rebut ITW's argument that the interest expense of its parent company should be used instead of Lakshmi's. Petitioners contend that the Department is applying an interest expense based on the highest level of consolidation of Lakshmi and the ratios reflect the complete

[39] See Notice of Final Determination of Sales at Less Than Fair Value: Pure Magnesium in Granular Form From the People's Republic of China, 66 FR 49,345 (September 27, 2001) and accompanying Issues and Decision Memorandum at Comment 3.

production and sales experience of Lakshmi. Petitioners assert that the substitution of the proprietary experience of a respondent is not permitted by statutory or regulatory provisions.

Department's Position:

Section 351.408(c)(4) of the Department's regulations directs the Department to value overhead, general expenses, and profit using non-proprietary information gathered from producers of identical or comparable merchandise in the surrogate country. Use of an NME respondent's financial data, even at the corporate level of its U.S. affiliate, is inappropriate because the Department, pursuant to section 773(c)(1) of the Act, determines the normal value of the merchandise (including general and administrative expenses, overhead, and profit) of NME respondents using surrogate data from a market economy country. Moreover, the Department has previously stated its preference for information that is not provided by affiliates of interested parties in the proceeding. See Certain Cased Pencils from the People's Republic of China; Final Results and Partial Rescission of Antidumping Duty Administrative Review, 67 FR 48612 (July 25, 2002) and accompanying Issues and Decision Memorandum at Comment 4); see also Kaiyuan Group Corp. v. United States, 343 F. Supp. 2d 1289, 1314 (2004) (affirming Commerce's determination not to utilize surrogate values placed on the record by a party affiliate).

Furthermore, following ITW's recommendation would result in the use of two different sources of data being used for the calculation of SG&A, which would result in a less accurate dumping margin and is contrary to the Department's duty to determine dumping margins as accurately as possible. See, e.g., NTN Bearing Corp. v. United States, 74 F. 3d. 1204, 1208 (Fed. Cir. 1995). Specifically, the Department's preference is to use the full financial statements of the surrogate financial companies rather than combining individual component line items from separate financial statements to create SG&A. Therefore, we determine for this final determination that the SG&A calculation should continue to reflect the surrogate interest expense.

We also note that ITW's reliance on Magnesium from China is misplaced. In that case, the Department's decision to use an alternate source was based on the fact the preferred financial statement did not reflect a profit for a given period and in accordance with Department practice at the time, an alternative source for profit was sought. See, e.g., Silicomanganese from Brazil, Final Results of Antidumping Administrative Review, 62 FR 37877-37878 (July 15, 1997); Notice of Final Determination of Sales at Less Than Fair Value: Steel Concrete Reinforcing Bars from the People's Republic of China, 66 FR 33522 (June 22, 2001) and accompanying Issues and Decision Memorandum at Comment 8.[40]

D. Exclusion of Selling Expenses from SG&A Ratio

ITW contends that the Department should exclude selling expenses from the calculation of the surrogate SG&A ratio because Paslode Shanghai neither performs any selling functions nor incurs any selling expenses. See Paslode Shanghai Verification Report at 7-8, 10-11, and VE 2,

[40] We infer that Petitioners comments apply in general to whichever surrogate companies we select for the final determination, not just Lakshmi.

4, and 5. ITW contends that all selling decisions lie with ITW Paslode in the United States, not Paslode Shanghai. ITW concludes that because Paslode Shanghai does not perform selling functions that the three items relating to selling activities on Lakshmi's financial statements should be removed.[41]

Petitioners rebut that the Department should modify its surrogate financial ratios to match Paslode Shanghai's level of selling activities. See, e.g., Honey from the People's Republic of China: Final Results and Final Rescission, In Part, of Antidumping Duty Administrative Review, 70 FR 38873 (July 6, 2005) and accompanying Issues and Decision Memorandum at Comment 3 ("2005 Honey Final"). Moreover, Petitioners contend that the Department articulated in the 2005 Honey Final that "the Department is not required to 'duplicate the exact production experience of the Chinese manufacturers.'"[42] Petitioners conclude that the Department should continue relying on Lakshmi for SG&A in accordance with the Department's standard practice.

Department's Position:

First, as Petitioners noted in 2005 Honey Final, the Department's practice is to not attempt to duplicate the exact production experiences of Chinese manufacturers in the surrogate SG&A calculation. Moreover, the Department has stated in previous cases, such as Chrome-Plated Lug Nuts from China,[43] where a respondent requested the Department to exclude R&D expenses from the surrogate value for factory overhead on the ground that the respondent did not actually incur R&D expenses, the Department refused to exclude the R&D, citing the Department's policy not to make an "item-by-item evaluation of overhead components." Additionally, the Department articulated in the PVA Remand Results,[44]

> In the vast majority of the antidumping duty cases, the surrogate producers selected by the Department produce different products and incur different types of costs than Respondents. In these situations, our practice has been not to attempt to adjust the surrogate producer's overhead figures to account for potential cost differences. See Notice of Final Determination of Sales at Not Less Than Fair Value: Pure Magnesium From the Russian Federation, 66 FR 49347 (Sept. 27, 2001), and accompanying Issues and Decision Memorandum at Comment 2;

[41] "Advertisement, Publicity and Sales Promotion;" "Bad Debts, Liquidated Damages and Short Recoveries;" and "Provision for Bad and Doubtful Debts." See Prelim Surrogate Value Memo at Exhibit 45.

[42] See Nation Ford Chem Co. v. United States, 166 F. 3d 1373, 1377 (Fed. Cir. 1999).

[43] See Chrome-Plated Lug Nuts from the PRC; Final Results of Antidumping Duty Administrative Review, 61 FR 58514, 58517-18 (November 15, 1996) citing Pure Magnesium and Alloy Magnesium from the Russian Federation, 60 FR 16440 (March 30, 1995) and Tapered Roller Bearings from Hungary, 52 FR at 17428 (May 8, 1987); Final Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon Steel Plate From the People's Republic of China, 62 FR 61964-01 (November 20, 1997).

[44] See Final Results of Redetermination Pursuant to Court Remand, Court 03-00791, Slip Op. 05-45 (September 26, 2005) ("PVA Remand Results") at 20, available at http://ia.ita.doc.gov/remands/index.html.

> Chrome-Plated Lug Nuts From the People's Republic of China; Final Results of Antidumping Duty Administrative Review, 61 FR 58514, 58518 (Nov. 15, 1996); Persulfates from the People's Republic of China; Final Results of Antidumping Administrative Review, 64 FR 69494, 69497 (Dec. 13, 1999); and Notice of Final Determinations of Sales at Less Than Fair Value: Pure Magnesium and Alloy Magnesium From the Russian Federation, 60 FR 16440, 16446-7 (Mar. 30, 1995). In order to account for potential cost differences, the Department in essence would be required to evaluate whether both the surrogate company and the respondent have identical cost structures and then adjust these cost structures on a line-by-line basis to account for observed differences. However, such a requirement is not part of the Department's calculations.

Additionally, we verified that Paslode Shanghai performed sales functions such as determining transfer prices to ITW Paslode, issuing invoices to ITW Paslode, generating export documentation, and arranging for shipment of the merchandise. See Paslode Shanghai Verification Report at 7-8. Thus, the evidence on the record does not support making ITW's requested adjustment to the SG&A ratio. For all these reasons, and in accordance with Department practice, we have not removed selling expenses ITW identified from the calculation of SG&A.[45]

E. Possible Unreported Factors of Production

ITW argues that it properly treated three materials[46] used in the production process as "consumables" as opposed to material inputs. See Paslode Shanghai Verification Report at 9-11. ITW contends that because it treats these materials as overhead items in its normal accounting process that they were correct in not reporting them as FOPs. ITW points to the Department's decision in Silicomanganese,[47] where the Department concluded that consumables that are not incorporated into the finished product should be considered material inputs rather than overhead items only if "such materials constitute a significant portion of the cost of the finished product." ITW asserts that these materials constitute an insignificant portion of the overall production costs of its nails and that these items are ultimately not incorporated into the finished merchandise. ITW also indicates that in Diamond Sawblades[48] the Department chose not to treat certain inputs

[45] We infer that Petitioners comments apply in general to whichever surrogate companies we select for the final determination, not just Lakshmi.

[46] We refer to the materials as Material A, Material B, and Material C (collectively, "Unreported Materials") because ITW classified these materials as business proprietary information. See ITW Final Analysis Memo for further details on these three Unreported Materials.

[47] See Silicomanganese From the People's Republic of China: Notice of Final Results of Antidumping Duty Administrative Review, 65 FR 31,514 (May 18, 2000) and accompanying Issues and Decision Memorandum at Comment 1 ("Silicomanganese").

[48] See Final Determination of Sales at Less Than Fair Value and Final Partial Affirmative Determination of Critical Circumstances: Diamond Sawblades and Parts Thereof from the People's Republic of China, 71 FR 29,303 (May 22, 2006) and accompanying Issues and Decision Memorandum at Comment 2 ("Sawblades").

that were not replaced regularly as direct inputs. ITW contends that these materials are similar to those in Diamond Sawblades because they are not consumed in the production process or replaced regularly.

ITW further argues that treating these materials as direct inputs would result in double counting if the Department uses Lakshmi for the final determination as its financial statements specifically indicate that all inputs besides wire, wire rod, and bars are considered part of consumables. See Prelim Surrogate Value Memo at Exhibit 45, Lakshmi Schedules 11 and 12. ITW suggests in the alternative that should the Department treat these items as direct materials, that they exclude the line item for "consumables" from Lakshmi's financial statements in the surrogate overhead calculation. See, e.g., Silicomanganese and accompanying Issues and Decision Memorandum at Comment 1. ITW also indicates that if the Department treats these items as direct materials, they should be valued based on ITW's March 18, 2008, submission at attachments 1 and 2; see also Xingya Group December 3, 2007, Submission at Exhibit 2 at 10.

ITW asserts that if the Department treats these unreported materials as direct materials, it should not apply facts available. ITW contends that the Department never requested these data and ITW reported all of its data in accordance with its normal accounting records. ITW disputes that it did not report these unreported materials and points out that these unreported materials were clearly identified in its Supplemental Section A questionnaire response ("A2QR"). See A2QR, dated November 26, 2007 at Exhibit S-15. ITW also argues that the first time the Department requested these data was at verification and even though ITW provided the requested data, the Department only took the highest consumption month for each "consumable." ITW concludes that adverse facts available are not warranted.

Petitioners contend that the Department should treat these unreported materials as FOPs and use the highest usage amount observed for each unreported material as AFA.

ITW rebuts Petitioners' suggestion to apply AFA to its consumption of the unreported materials. ITW relies on its previous arguments as support for why the Department should not treat these Unreported Materials as direct materials. ITW also reiterates that because it reported these Unreported Materials in accordance with its standard accounting procedures, that treating them as direct materials is inappropriate. In addition, ITW asserts that the Department would most likely be double counting these materials by treating them as direct materials if it keep the line item from Lakshmi's financial statements that clearly includes "consumables" such as ITW's.

Petitioners again reiterate that these unreported materials should be treated as FOPs and valued using the highest reported value. Petitioners challenge ITW's reliance on Silicomanganese and Diamond Sawblades as support for not valuing these inputs. Petitioners point to the recent decisions in Bags,[49] where the Department articulated that its practice is to define inputs as direct materials if they are "process materials, materials required for a particular segment of the

[49] See Polyethylene Retail Carrier Bags from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 72 FR 12762 (March 19, 2007) and accompanying Issues and Decision Memorandum at Comment 3c ("Bags").

production process, items consumed continuously with each unit of the production process, items consumed continuously with each unit of production, and materials used regularly and in significant quantities as a necessary part of the production process, as direct materials." Petitioners argue that ITW's Unreported Materials are necessary to the production process. See Paslode Shanghai Verification Report at 9-11.

Petitioners also argue that as partial AFA, the Department should quantify and value the unreported materials without making any adjustments when calculating surrogate overhead. Petitioners assert that the line item ITW argues to remove from Lakshmi's financial ratio calculation covers more than the three inputs the Department identified at verification and therefore it is inappropriate for the Department to remove this line item from the financial ratio calculations.[50]

Petitioners also propose that the Department should not use the surrogate values that ITW placed on the record on March 18, 2008, and should instead seek and apply values that reflect an adverse inference.

Petitioners rebut ITW's argument that because the Department did not request that ITW report these unreported materials that it does not deserve an adverse inference. Petitioners state that the fact that ITW failed to report all these factors was its own decision and points out that Xingya Group did report these inputs as direct materials. Petitioners cite to NSK Ltd. v. United States, 481 F.3d 1355 (Fed. Cir. 2007) as support that it was ITW's responsibility to report these materials as consumables given it is not a respondent's right to revise the Department's reporting requirements to suit its desires.

Department's Position:

First, we have determined to value the unreported materials as FOPs for the final determination in accordance with sections 773(c)(3)(A) and (B) of the Act. In Manganese Metal from the PRC,[51] the Department valued certain chemicals, which the respondent had treated as overhead, as a direct material based on a determination that these chemicals were required for a particular segment of the production process. In Diamond Sawblades, the Department treated inputs such as machine oil, isopropyl alcohol, and acetone, which were not physically incorporated into the finished product, as direct materials because they were consumed in the production process. Alternatively, the Department did not treat grinding wheels, abrasive paper, and steel wire brush as direct inputs in Diamond Sawblades because these inputs were not replaced so regularly as to represent direct materials. However, we find that the three materials in the instant proceeding are regularly replaced and are required in the production process and therefore should be

[50] See Bags and accompanying Issues and Decision Memorandum at Comment 3c.

[51] See Notice of Final Determination of Sales at Less Than Fair Value: Manganese Metal From the People's Republic of China, 60 FR 56045, 56051 (November 6, 1995); see also Silicomanganese from the People's Republic of China: Notice of Final Results of Antidumping Duty Administrative Review, 65 FR 31514 (May 18, 2000), and accompanying Issues and Decision Memorandum ("Silicomanganese from the PRC"), at Comment 1.

considered FOPs. See Paslode Shanghai Verification Report at 9-10; ITW Final Analysis Memo at 3.

Second, we find that the application of facts available is warranted. See Comment 19a for a discussion of Section 776(a) of the Act. In accordance with sections 776(a)(2)(A) and (B) of the Act, we find that ITW did not report the consumption of Material A, Material B, or Material C despite the Department's request that ITW report all of its factors of production in its original questionnaire. See September 11, 2007, letter to ITW transmitting the antidumping questionnaire at part D of the questionnaire ("Standard NME Questionnaire"). Additionally, we note that ITW did not describe these inputs in its overview of the production process submitted in its questionnaire responses dated November 5, 2007 ("DQR"), December 27, 2007 ("D2QR"). Because ITW did not report these inputs as being used in the production process, the Department was not aware that any of the materials listed in Exhibit S-15 of ITW's A2QR were in used in a manner that would possibly cause us to classify them as FOPs. It was only at verification during the factory tour that the Department first discovered that ITW used the Unreported Materials during the production of subject nails. See Paslode Shanghai Verification Report at 10. Thus, ITW's reported FOPs also did not fully verify within the meaning of section 776(a)(2)(D) of the Act. The inclusion of these inputs is essential to the reported factors of production database because the Department's calculation of normal value is based on the valuation of all direct inputs. That is, because these inputs were not included in the factors of production database, normal value for ITW is necessarily understated.

Where the Department determines that a response to a request for information does not comply with the request, section 782(d) of the Act provides that the Department shall promptly inform the party submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that party with an opportunity to remedy or explain the deficiency. Because ITW did not inform the Department that its factors of production were not complete until the Department discovered the fact at verification, the Department did not have the opportunity to allow ITW to correct its deficient data. Therefore, section 782(d) of the Act does not apply under these circumstances. See Reiner Brach GmbH & CO. KG and Novosteel SA, Plaintiffs, v. U.S. 206 F. Supp. 2d 1323, 1332-38 (CIT 2002). For these reasons, the Department has determined to use facts otherwise available to value these three inputs, as specified under sections 776(a)(2)(A) and (B) of the Act.

Section 776(b) of the Act provides that, in selecting from among the facts otherwise available, the Department may use an inference that is adverse to the interests of the respondent if it determines that the respondent has failed to cooperate to the best of its ability. 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." See SAA at 870. In making its determination the Department must articulate its reasons for concluding that a party failed to cooperate to the best of its ability, and explain why the missing information is significant to the review. The Federal Circuit has explained that "acting to the best of its ability" means that a respondent must "do the maximum it is able to do." See Nippon Steel Corp. v. United States, 337 F. 3d. 1373, at 1382-1393 (Fed. Cir. 2003).

As stated above, ITW had multiple opportunities to inform the Department of these additional inputs - respondent Xingya Group reported Material A as a factor of production for the process materials on October 31, 2007 - but failed to do so. Despite ITW's purported confusion over "consumables" versus direct materials, the Department's request for this information was unambiguous. For example, the Department requested that "{f}or each stage of the process you must indicate the material inputs, the processing time, the types of equipment used, the number of people involved in the process, and any subsidiary products generated as a result of the production of the merchandise under consideration." See Standard NME Questionnaire at page D-2. In this case, ITW did not indicate to the Department, pursuant to section 782(c) of the Act, that it had a problem with reporting complete factors information. At a minimum, ITW should have sought clarification from the Department whether the Unreported Materials should be reported as inputs. Instead, at verification, the Department discovered that the factors of production database was not complete and was missing several inputs. The Department also discovered that ITW maintained the necessary information in its books and records, but did not "put forth its maximum efforts to investigate and obtain the information from its records." See Nippon Steel, 337 F. 3d. at 1382-1393.

Therefore, for all of the reason stated above, the Department finds, pursuant to section 776(b) of the Act, that ITW has failed to cooperate to the best of its ability with regard to its reported factors of production data for certain inputs. Because ITW failed to fully cooperate with the Department in this matter, we find it appropriate to use an inference that is adverse to the interests of ITW in selecting from among the facts otherwise available. See section 776(b) of the Act. By doing so, we ensure that ITW will not obtain a more favorable result by failing to cooperate than had it cooperated fully in this review. See SAA at 870. As AFA for ITW's Unreported Materials FOPs, we are using the highest single monthly usage rate for each material, by CONNUM, and applying this monthly usage ratio to all months of the POI. Additionally, we note that ITW's argument regarding the removal of the line item for "consumables" from Lakshmi's financial ratio calculation is moot given that we are no longer using Lakshmi. See Comment 11 above. However, we did review the financial statements of Nasco and Bansidhar and found that both companies contained line items for "Consumables." In accordance with Department practice, we are treating the surrogate companies' "consumables" as overhead (i.e., indirect expense) because we found that there was no itemization in the surrogate companies' financial statements that would permit an accurate adjustment of the financial ratios to account for ITW's unreported consumables found at verification. See Brake Rotors From the People's Republic of China: Final Results of Antidumping Duty Administrative and New Shipper Reviews and Partial Rescission of the 2005-2006 Administrative Review, 72 FR 42386 (August 2, 2007) and accompanying Issues and Decision Memorandum at Comment 3.

Regarding the surrogate valuation for those inputs which the Department previously did not value, we are using the values placed on the record by respondents. See ITW March 18, 2008, submission at attachments 1 and 2; see also Xingya Group December 3, 2007, Submission at Exhibit 2 at 10. We note that these surrogate values meet the Department's criteria and were timely placed on the record. Additionally, we reject Petitioners' request to seek additional surrogate values to value ITW's Unreported Materials because the Department lacks sufficient time to both find and vet this information.

F. Unreported Indirect Labor Hours

Petitioners argue that ITW failed to report all labor hours that should have been included as part of indirect labor ("INDIRLAB"). Petitioners aver that the Department should add an additional indirect labor field to account for these unreported indirect labor hours and use the reported value in INDIRLAB as facts available. Petitioners contend that these unreported hours should be included as part of INDIRLAB because MLE denominator of the financial ratios should include all labor costs, direct, and indirect, wage and salary and that parity requires that the labor hours to which the ratios are applied are comprised of all factory labor.

ITW rebuts Petitioners' assertion that it did not report all of its indirect labor hours. ITW asserts that its labor hours were verified and reconciled with its financial statements. See Paslode Shanghai Verification Report at VE 18B. ITW contends that the physical location of an employee is not the determinant of its classification, but rather, the employee's responsibilities should be the determinant. ITW asserts that it has accurately reported all labor hours and no adjustments should be made.

Department's Position:

The antidumping duty questionnaire issued to ITW requested that it report any direct labor which includes "all production workers, inspection/testing workers, relief workers, and any other workers directly involved in producing the merchandise" and indirect labor which includes all workers not previously reported who are indirectly involved in the production of the merchandise under consideration." See Standard NME Questionnaire, at "Direct Labor" and "Indirect Labor." Additionally, the Department requested that ITW confirm that it had "reported all the labor hours for individuals involved in any capacity with the production of subject merchandise, including technicians, sales, general, and administrative staff." See the Department's December 11, 2007, supplemental Section D questionnaire. ITW confirmed that "it has reported all labor hours for individuals involved in any capacity with the production of subject merchandise." See D2QR at 19. However, during verification we noted that ITW classified certain employees as overhead labor that work on the production floor. See Paslode Shanghai Verification Report at 19. We discussed the duties of these workers that ITW had classified as overhead with company officials, who provided the Department with the specifics regarding these workers' actual duties. Id. Thus, we find that such workers were in fact involved in the production of subject merchandise, and their labor hours should have been reported as indirect labor in ITW's questionnaire response.

The Department must first assess whether the use of facts available is justified, and then, whether the criteria for an adverse inference have been met. See section 776(a) of the Act, as discussed in Comments 19a and 19e. The Department finds that the application of facts otherwise available is warranted under sections 776(a)(2)(A) and (B) because ITW did not report its indirect labor hours despite the Department's request that ITW report all labor hours for any workers directly or indirectly involved in the production of nails. See D2QR at 19. It was only at verification that the Department found that ITW had not included certain workers in its indirect

labor calculation. Because ITW withheld these data and did not report to the Department certain labor hours for workers involved in the indirect production of nails, despite multiple opportunities to provide complete FOP data,[52] we are applying facts available for ITW's indirect labor hours pursuant to sections 776(a)(2)(A) and (B) of the Act. Moreover, because the Department discovered this labor omission at verification, ITW's reported labor did not fully verify within the meaning of section 776(a)(2)(D) of the Act.

The inclusion of these worker hours is essential to the reported factors of production database because the Department's calculation of normal value is based on the valuation of all worker hours required to produce the subject nails. Because these hours were not included in the factors of production database, normal value for ITW is necessarily understated.

The Department finds that an adverse inference is warranted due to ITW's failure to put forth sufficient efforts to report labor usage rates representative of the production experience of the subject merchandise for the entire POI. Despite ITW's purported confusion about whether the labor hours should have been reported, the Department's request for this information was unambiguous. The Department requested ITW to report, inter alia, all the labor hours for individuals involved in any capacity with the production of nails. See D2QR at 19 (emphasis added). Clearly, ITW's unreported labor hours should have been included in response to this question.

Consistent with the Department's practice in other cases where a respondent fails to cooperate to the best of its ability, and in keeping with section 776(b) of the Act, the Department finds that the use of partial AFA is warranted for ITW's failure to report all the labor in its reported labor usage rates. Therefore, for the final determination, the Department will apply, as AFA, the highest number of hours worked by an individual classified in the indirect labor category for the month of October as verified by the Department and multiply this by the number of unreported workers and then by the number of months of the POI. The Department will then determine what percentage increase in the overall indirect labor hours these total additional hours constituted and then we will multiply this percentage by the current indirect labor rate in ITW's FOP database in order to ensure that this adverse inference only affects indirect labor hours. See, e.g., FFF Final, 73 FR 15479 (March 24, 2008) at Comment 6A; ITW Final Analysis Memo at 4.

G. Unreported Market-Economy Purchases

Petitioners argue that ITW did not report all of its market-economy purchases during the POI. See ITW December 27, 2007, DQR at Exhibit S-25. Petitioners base this argument on the fact that ITW's market-economy supplier of coating materials also invoices ITW for pallets. Petitioners conclude that the Department should value all of ITW's pallets based on this market-economy purchase price.

[52] November 5, 2007, December 27, 2007, and February 4, 2008, responses to the Department's original and supplemental Section D questionnaires.

ITW rebuts Petitioners' assertions that it did not report market economy purchases of pallets. ITW points out that it received deliveries of coating materials on wooden pallets and that there is no evidence on the record that supports that these pallets were then reused to ship nails. Furthermore, ITW asserts that a handful of pallets used for the coating material purchases are insufficient to establish a price for the many pallets it purchased during the POI.

Department's Position:

We agree with ITW that there is insufficient evidence to support that ITW purchased pallets from market economy countries during the POI. See Paslode Shanghai Verification Report at 19. Moreover, even if ITW had market-economy purchases of pallets during the POI, there is no evidence on the record that ITW purchased over thirty-three percent of its pallets from a market-economy supplier. If the market-economy purchase fails to meet this thirty-three percent threshold, it is the Department's practice not to value this input based on the market-economy price. See, e.g., Antidumping Methodologies: Market Economy Inputs, Expected Non-Market Economy Wages, Duty Drawback; and Request for Comments, 71 FR 61716, 61717-18 (Oct. 19, 2006). Therefore, we will continue to value ITW's pallet purchases during the POI with the same surrogate values from the Preliminary Determination.

Comment 21: Xingya Group

A. Market Economy Ocean Freight

Xingya Group contends that the Department erred in the Preliminary Determination when it excluded ocean freight paid for shipments on Korean-based carriers from its reported market economy ocean freight expense. Xingya Group argues that no information exists on the record of this investigation that supports the conclusion that Korea maintains general export subsidies that would affect the amount of ocean freight charged by Korean carriers. Xingya Group notes that no information exists on the record to establish how an export subsidy (typically the subject of CVD investigations) could possibly affect the price of ocean freight since they affect goods[53], whereas ocean freight is a service, and not subject to AD/CVD laws.[54] Xingya Group therefore asserts that the Department should no longer exclude market economy ocean freight paid to Korean carriers for the final determination.

Petitioners contend that Xingya Group's arguments are misplaced and that the Department should continue to exclude ocean freight paid to Korean carriers from Xingya Group's market economy ocean freight. Petitioners state that Xingya Group's reliance on Eurodif is mistaken since that case only contemplates whether the purchase of services by a public entity can confer a subsidy upon the service provider. Petitioners note that the question is not whether Xingya Group subsidized its Korean ocean freight carrier by paying too much, but whether that carrier is

[53] See Asociacion Colombiana de Exportadores de Flores v. United States, 13 CIT 13, 15, 704 F. Supp. 1114, 1117, (1989), aff'd, 901 F.2d 1089 (Fed. Cir. 1990) ("{s}peculation is not support for a finding").

[54] See Eurodif S.A. et al. v United States, 506 F.3d 1051 (Fed. Cir. 2007) ("Eurodif").

likely to have benefited from subsidies. Petitioners further contend that Xingya Group has provided no support for its statement that export subsidies cannot affect service providers, and that the receipt of a subsidy, whether to a provider of goods or services, confers an unfair advantage. Petitioners note that the Department is not required to conduct any sort of formal investigation to determine whether the price paid by the Xingya Group is subsidized. See H.R. Rep. No. 576 100th Cong., 2.Sess. 590-91 (1988). Petitioners argue that the Department reasonably inferred, based on the information available, that a Korean shipping company would avail itself of any available subsidy benefits, and that this analysis is consistent with prior cases that have been affirmed by the CIT.[55] Petitioners therefore conclude that the Department was correct in excluding Korean values from Xingya Group's ocean freight calculation.

Department's Position:

We agree with Petitioners. The Korean-based ocean freight carrier that Xingya Group sourced its ocean freight from is a large conglomerate headquartered in a country that maintains broadly available, non-industry-specific export subsidies. As noted by Petitioners, Xingya Group's reliance on Eurodif is misplaced since that case discusses whether the purchase of services by a public entity can confer a subsidy upon the service provider. Moreover, there is no information on the record demonstrating that the price of the ocean freight service from a country with generally available export subsidies was not, in fact, influenced by subsidization. For a list of the numerous Korean programs found to be countervailable, see Import Administration's Subsidy Enforcement Electronic Library at http://ia.ita.doc.gov/esel/eselframes.html.[56] It is the Department's consistent practice that, where the facts developed in U.S. or third-country countervailing duty findings include the existence of subsidies that appear to be used generally (in particular, although not exclusively, broadly available, non-industry specific export subsidies), it is reasonable for the Department to consider that it has particular and objective evidence to support a reason to believe or suspect that prices from the country granting the subsidies may be subsidized. See Zhejiang and China Nat'l. Therefore, for the final determination, we will continue to exclude Korean prices from Xingya Group's market economy ocean freight calculation.

[55] See, e.g., Zhejiang Machinery, 473 F. Supp. 2d at 1372-1377 ("Zhejiang"); China Nat'l. Machinery Import & Export Corp. v. United States, 293 F. Supp. 2d 1334, 1338-39 (Ct. Int'l Trade 2003), aff'd 104 Fed. Appx. 183 (Fed. Cir. 2004) ("China Nat'l").

[56] See, e.g., Final Affirmative Countervailing Duty Determination: Dynamic Random Access Memory Semiconductors from the Republic of Korea, 68 FR 37122, (June 23, 2003); Final Results of Expedited Sunset Review of Countervailing Duty Order: Top-of-the-Stove Stainless Steel Cookware from South Korea, 70 FR 57856 (October 4, 2005); Final Results of Expedited Sunset Review of the Countervailing Duty Order: Certain Cut-To-Length Carbon-Quality Steel Plate From Korea, 70 FR 45689 (August 8, 2005).

B. Partial AFA for Certain CEP Expenses Reported by Ominfast, Partial AFA for Senco's Advertising Expenses, and Incorporation of Corrections for USBROKU, USDUTYU and EARLPYU

For Omnifast, Petitioners state that the Department should not use the corrections the Department requested for USOTHTRU, USDUTYU and USBROKU because these errors were discovered during verification. Petitioners instead argue that the Department should make an adverse inference and apply the highest reported values for these fields to all of Omnifast's POI sales. Petitioners advocate the same treatment for the expenses for certain sales observations affected by an error in the CONCOUNTU field.

For Senco, Petitioners state that the Department should not use the corrections it requested for ADVERTU based on information it obtained during verification. Petitioners instead argue that the Department should make an adverse inference and apply the highest reported values for ADVERTU to all of Senco's POI sales. Petitioners also request that the Department ensure that the corrections for USBROKU, USDUTYU and EARLPYU are properly implemented.

Xingya Group argues that Petitioners' assertion that the Department must apply partial AFA rather than accept the requested revisions to these items is contrary to record evidence, the Department's established practice, and the overarching goal of the statute, which is remedial rather than punitive in nature. See, e.g., Chaparral Steel Co. v. United States, 901 F.2d 1097, 1103-1104 (Fed. Cir. 1990). Xingya Group notes that each of the Department's requested changes has an extremely minor effect on the overall U.S. sales data, and that the changes were the result of inadvertent errors. Xingya Group further contends that Petitioners' argument for partial AFA has no rational basis and is submitted merely as a "matter of principle," rather than relying on the actual data on the record, which would produce the most accurate results. Xingya Group notes that disregarding the actual data and applying partial AFA would contravene the Department's objective of calculating antidumping margins as accurately as possible. See, e.g., NTN Bearing Corp. v. United States, 74 F.3d 1204, 1208 (Fed. Cir. 1995).

Department's Position:

We agree with Xingya Group that the additional errors discovered at verification identified by Petitioners do not warrant the application of partial AFA. Section 776(a)(1) of the Act mandates that the Department use the facts available if necessary information is not available on the record of an antidumping proceeding. In addition, section 776(a)(2) of the Act provides that if an interested party or any other person: (A) withholds information that has been requested by the administering authority; (B) fails to provide such information by the deadlines for the submission of the information or in the form and manner requested, subject to subsections (c)(1) and (e) of section 782; (C) significantly impedes a proceeding under this title; or (D) provides such information but the information cannot be verified as provided in section 782(i), the Department shall, subject to section 782(d) of the Act, use the facts otherwise available in reaching the applicable determination under this title.

Where the Department determines that a response to a request for information does not comply with the request, section 782(d) of the Act provides that the Department shall promptly inform the party submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that party with an opportunity to remedy or explain the deficiency. Section 782(d) further states that if the party submits further information that is unsatisfactory or untimely, the administering authority may, subject to subsection (e), disregard all or part of the original and subsequent responses. Section 782(e) of the Act provides that the Department shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements established by the administering authority if (1) the information is submitted by the deadline established for its submission, (2) the information can be verified, (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination, (4) the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by the administering authority with respect to the information, and (5) the information can be used without undue difficulties.

First, we note that at verification we sample the data in order to determine whether errors found in the data are representative of a trend. We find that the errors discovered at verification were not systematic, did not affect the integrity of Xingya Group's response, and were insignificant. See, e.g., Final Determinations of Sales at Less Than Fair Value: Brake Drums and Brake Rotors From the People's Republic of China, 62 FR 9160, 9167 (February 28, 1997) (the Department used verified information to correct errors in the questionnaire response stating that the "errors that are not substantial do not affect the integrity of the response."). Each of the items noted above by Petitioners represents inadvertent errors noted by the Department's verification team, and we subsequently requested that Xingya Group submit an updated U.S. sales database to correct these items.[57] As indicated in the verification reports for Omnifast and Senco, these items represented minor corrections to a few sales variables. The effect that these minor errors had on the margin program was insignificant. See "Verification of the Sales Response of Omnifast LLC in the Antidumping Investigation of Certain Steel Nails from the People's Republic of China," dated April 8, 2008, at 2, 6-7, and Exhibits 7 and 8; and "Verification of the Sales Response of Senco Products, Inc. in the Antidumping Investigation of Certain Steel Nails from the People's Republic of China," dated April 10, 2008 ("Senco Verification Report"), at 2 and 12. Petitioners also fail to cite any precedent that would support their contention for applying partial AFA. Thus, the Department finds that the application of partial AFA for these items is unwarranted. Lastly, we confirm that the corrections for USBROKU, USDUTYU and EARLPYU have been properly incorporated.

C. Senco's Indirect Selling Expenses

Petitioners contend that Senco's revision to its INDIRSU field to account for full container-load sales is not sufficient to eliminate errors in its reporting for this variable. Petitioners state that INDIRSU was calculated using only data for six months of the POI, and that the use of less than

[57] See the Department's letter "Antidumping Duty Investigation: Certain Steel Nails from the People's Republic of China: Request for Updated U.S. Sales and FOP Databases," dated April 28, 2008 ("Xingya Group Database Correction Letter"). Xingya Group submitted corrected databases on May 5, 2008.

a full fiscal year is potentially distortive. Petitioners cite to four instances for items that they contend are not normal period expenses but unique events that offset long-terms costs, not just for the full fiscal year, but also for prior periods. Petitioners argue that the Department should use Senco's indirect selling expenses for the full fiscal year based on its financial statements or recalculate the indirect selling expenses by disallowing and adding back certain offsets. Alternatively, if the Department were to continue to use six months of data, Petitioners assert that it should at a minimum remove the effects of any extraordinary year-end adjustments.

Xingya Group asserts that Senco's INDIRSU has been properly reported. Xingya Group notes that it is the Department's practice to base INDIRSU on the POI rather than the fiscal year. See e.g., Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Structural Steel Beams From Luxembourg, 66 FR 67223, 67225 (December 28, 2001) ("Beams from Luxembourg"); see also, Notice of Final Determination of Sales at Less Than Fair Value: Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, From Germany, 61 FR 38166, 38183-84 (July 23, 1996). Xingya Group further argues that Petitioners' have mischaracterized certain accounting entries as unique, and that the entries in question reflect occurrences that Senco realized in the applicable month. Regarding the gain/loss on the sale of Senco's facility for its relocation, Xingya Group cites precedent that such an entry is properly included within INDIRSU. See Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Bar from France, 67 FR 3143 (January 23, 2002), and accompanying Issues and Decision Memorandum at Comment 10 ("Bar from France") ("The Department finds that the expenses associated with closing down some of UFS/U-SF's sales offices and relocating its staff to other sales offices a selling expense, not a G&A expense, because these expenses were incurred as a result of UFS/U-SF transferring and/or relocating its selling operations to other offices still in operation."). Xingya Group concludes that its INDIRSU has thus been properly reported.

Department's Position:

We agree with Xingya Group. Xingya Group correctly notes that it is the Department's practice to base INDIRSU on the respondent's POI fiscal experience and cites prior cases. See, e.g., Beams from Luxembourg. Additionally, we note that ITW Paslode's INDIRSU was also based on the six-month POI, and Petitioners have not objected to the use of a six-month period there. We also agree with Xingya Group that the accounting entries Petitioners characterize as "unique" represent Senco's actual experience for the months in question, and therefore are properly included in INDIRSU. Furthermore, we note that the entry for the sale of its facility was correctly included in INDIRSU because this facility sale occurred during the POI. See "Senco Verification Report" at 16; see also Bar from France. The Department finds that these expenses are in fact selling expenses and not part of G&A, therefore for the final determination, we will not alter INDIRSU, and will use the figures reported in the Xingya Group's most recently submitted U.S. sales database.

D. Application of Total AFA or an Intermediate Input Methodology to Xingya Group Due to the Misreporting of Its Production Process

Petitioners note that the Department's verification of Xingya Group revealed that the respondent had misreported the production process for SXNC and had presented consumption amounts of various inputs from an outside wire-drawer,[58] while claiming them to be SXNC's own. See "Xingya Group Verification Report" at 1 and 28. Petitioner state that Xingya Group "admitted that they did not accurately present the fact that there was a toller in the questionnaire responses." See id. at 28.

Petitioners state that while the Department attempted verification of the previously unreported toll producer, they contend that wire drawing labor was unable to be verified, since the outside producer does not record or track actual labor hours, but records a standard shift length of 10 hours. Petitioners also note that the Department's following observations at verification are unsubstantiated: 1) the tolling company claimed to draw wire only for Xingya Group; 2) that it has done so for approximately seven years; and 3) that Xingya Group employees are active at the toller's premises to document the receipt of wire rod and that the companies are in frequent communication. Petitioners argue that these factors fail to overcome the company's failure to properly report its production process, and the inability to verify the labor consumption that was "reported" at verification.

Petitioners assert that Xingya Group's deliberate decision to misreport its production process and the nature of the inputs it consumes warrants the application of total AFA in that its failure to cooperate to the best of its ability was not inadvertent. Petitioners cite to NSK Ltd. v. United States, 481 F.3d 1355 (Fed. Cir. 2007) ("NSK"):

> Whether a respondent has lived up to that requirement is assessed by determining "whether {the} respondent has put forth the maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation," Id. While that standard does not require perfection, it "does not condone inattentiveness, carelessness, or inadequate recordkeeping."

See NSK, 481 F. 3d at 1361 (citing and quoting Nippon Steel Corp. v. United States, 337 F.3d 1373, 1382 (Fed. Cir. 2003)). Petitioners argue that the record and the law fully support a determination to reject the company's data and resort to total adverse facts available in this proceeding.

Should the Department not reject Xingya Group's data and apply total AFA, Petitioners suggest that the Department should value the wire consumed by Xingya Group using its intermediate input valuation methodology, using the value for wire that was placed on the record of this proceeding in Petitioners' June 7, 2007, surrogate value submission. Petitioners contend that the use of the intermediate input valuation methodology under these circumstances would accurately reflect the respondent's actual production process and is consistent with the Department's

[58] The outside wire drawing company drew 100 percent of SXNC's steel wire rod. Xingya Group reported that this accounted for 92 percent of the steel wire rod consumed by the entire group during the POI. The affected inputs are wire drawing powder, wire drawing electricity, and wire drawing labor.

practice.[59] Petitioners state that the Department has continued to use this approach in subsequent cases where calculation of normal value using an intermediate input value results in a more accurate calculation. See, e.g., Fresh Garlic from the People's Republic of China: Final Results and Partial Rescission of the Eleventh Administrative Review and New Shipper Reviews, 72 FR 34438 (June 22, 2007); Zhengzhou Harmoni Spice Co., Ltd. v. United States, Case No. 06-00189 (CIT) (oral argument held December 14, 2007). Petitioners state that the same factors that supported the use of the intermediate input methodology in prior cases support its use in this instance since the wire drawing labor was based on an estimate. Petitioners state that relying on the inputs used by the outside toller to build up an FOP normal would lead to an inaccurate dumping calculation.

Xingya Group contends that Petitioners' request to apply total AFA to it is without merit. Xingya Group states Petitioners' claim rests entirely upon claims related to the identity of the entity that performed the wire drawing operations for SXNC, and not on any discrepancies for the affected FOPs. To the contrary, Xingya Group notes that the Department successfully verified all of the wire drawing FOPs (including labor) at both SXNC's facility and the toller's facility, and furthermore conducted a cost reconciliation of its wire-drawing toller. Xingya Group states that Petitioners' contention that it had originally reported the toller's wire drawing powder usage as being used by SXMP is incorrect and seriously misrepresents the Department's verification report. Xingya Group maintains that the fact that the wire drawing process was performed by a toller rather than by SXNC itself has no impact on the FOP data necessary to calculate an accurate margin, and that Petitioners have not alleged that the Xingya Group somehow benefitted from this arrangement or that it affected the manner of its FOP reporting.

Xingya Group asserts that total AFA is an extraordinary remedy and thus can only be applied in extraordinary circumstances, of which it cites several instances. See Xingya Group's case brief at 7-8. In contrast, Xingya Group cites cases where the Department has rejected the use of total AFA when it found that a respondent had cooperated to the best of its ability.[60] Xingya Group states that there is no missing or unavailable information on the record, that it has not withheld any information or failed to provide it to the Department, that it has not significantly impeded the proceeding, and that all information provided by it (including the name of its toller and its factors of production) have been verified. Xingya Group concludes that based on the facts of this

[59] See Notice of Final Determination of Sales at Less Than Fair Value: Polyvinyl Alcohol From the People's Republic of China, 68 FR 47538 (August 11, 2003), and accompanying Issues and Decision Memorandum at Comment 1; Notice of Final Antidumping Duty Determination of Sales at Less Than Fair Value and Affirmative Critical Circumstances: Certain Frozen Fish Fillets From the Socialist Republic of Vietnam, 68 FR 37116 (June 23, 2003), and accompanying Issues and Decision Memorandum at Comment 3; Certain Preserved Mushrooms From the People's Republic of China: Final Results of First New Shipper Review and First Antidumping Duty Administrative Review, 66 FR 31204 (June 11, 2001), and accompanying Issues and Decision Memorandum at Comment 2.

[60] See Certain Steel Concrete Reinforcing Bars From Turkey; Final Results and Rescission of Antidumping Duty Administrative Review in Part, 71 FR 65082, 65086 (November 7, 2006) and accompanying Issues and Decision Memorandum at Comment 2; see also Notice of Final Determination of Sales at Not Less Than Fair Value: Certain Color Television Receivers From Malaysia, 69 FR 20592, 20594 (April 16, 2004) and accompanying Issues and Decision Memorandum at Comment 1.

investigation and precedent, there are no grounds for applying total, or even partial AFA, and that the record in this proceeding is complete with respect to Xingya's FOP data.

Xingya Group likewise argues that the application of an intermediate input methodology is unwarranted. Xingya Group states that it is a fully integrated producer, and, as noted above, its FOP reporting is complete and accurate, and was successfully verified by the Department. Xingya Group contends that the cases cited by Petitioners in support of applying an intermediate input methodology are inapposite to the instant investigation. Xingya Group contends that PVA and Mushrooms are inapplicable because the record clearly demonstrates that it is an integrated producer that uses steel wire rod, rather than drawn wire, in its production process. In Fish Fillets, Xingya Group notes that the Department explained that it valued the whole fish because: (1) doing so more closely approximated the production experience of the surrogate company financial information; (2) Respondents were not, in fact, fully integrated; and (3) the farming factors of production were not fully and properly reported. Xingya Group states that none of these reasons is applicable in the instant case. For instance, it notes that the record contains the financial statements of three fully integrated producers of steel nails; thus, discarding its wire drawing inputs would in no way enable the Department to calculate more accurately the surrogate financial ratios, as in Fish Fillets. Also, as noted above, Xingya Group states that it is a fully integrated producer, and most significantly all of its FOPs, including those for wire drawing, were reported by it and were verified by the Department.

Xingya Group states that when the Department has used an intermediate input methodology, it did so in order to achieve the most accurate result, but that doing so in this case would clearly not do so. Xingya Group notes that Petitioners themselves have cited the distortive effect of using the intermediate steel wire input:

> Publicly available information on the exporting companies identified in the Petition, which are significant producers, indicates the propriety of using a vertically integrated manufacturing model for establishing the factors of production and an FOP-based normal value.
>
> Moreover, the use of an integrated model is conservative, as the market price for an intermediate product, i.e., low-carbon steel wire, is normally higher than the constructed factor valuation beginning with the base commodity, i.e., low carbon steel wire rod.

See Petitioners' June 7, 2007, submission at 3. Xingya Group concludes that using an intermediate input methodology in this case is not supported by record evidence, and would lead to a distorted antidumping margin calculation.

Department's Position:

We agree with Xingya Group that the fact that it did not previously disclose its relationship with its toller, and that it included the toller's data in its FOP reporting methodology, do not warrant the application of total AFA or the use of an intermediate input methodology. We acknowledge that Xingya Group ideally would have reported the tolling relationship prior to verification.

However, we note that from the outset, Xingya Group had reported the wire drawing FOPs in its questionnaire responses. Additionally, the fact that a toller had performed the wire drawing process for SXNC, the largest of the Xingya Group entities, appears to have been an inadvertent omission. See "Xingya Group Verification Report" at 28. We recognize that engaging an outside toller to perform certain segments of the production can raise concerns regarding the accuracy and traceability of the reported data. If we had been unable to conduct a verification of the toller's data, or if the verification had not been successfully completed, the application of AFA may have been appropriate. In the instant case, however, our verification of the wire drawing FOP data and the cost reconciliation of the toller's data were successful. See "Xingya Group Verification Report" at 26, 28-31, and Exhibits 9, 19 and 20.

We disagree with Petitioners' assessment that verification of the toller was unsuccessful due to the methodology Xingya Group used for reporting wire drawing labor. Petitioners' argument rests on the fact that the toller records a standard shift with a length of 10 hours rather than actual hours. We first note that wire drawing labor represents an extremely minor percentage of value for the wire drawing stage, so even assuming that a discrepancy with respect to labor were to exist, this discrepancy would be minor and would not fundamentally undermine the soundness of the tolling FOP data. Second, record evidence shows that during the POI, the toller ran two shifts, one during the day, and one at night[61], so a standard shift length of 10 hours is reasonable.

Regarding the three other concerns Petitioners raise regarding the toller, we find that these concerns are either refuted by record evidence or immaterial to the Department's decision-making. Record evidence demonstrates that the toller only drew wire rod for SXNC, based both on the Department's successful verification of the tolling FOPs and cost reconciliation of the toller, and on the fact that nowhere in the toller's accounting records was there evidence of wire drawing performed for other companies. See id. at 28-31 and Exhibits 20-21. While Petitioners point out the fact that the tolling relationship has existed for seven years is based only on statements, it is clear that the relationship has existed for some time, and certainly during the POI. Moreover, the length of the relationship, in the instant case, has no bearing on the reported data. Lastly, SXNC and its toller are clearly in regular contact, based on the need to coordinate production activity, as evidenced by their joint tracking of the steel wire rod input. See Id. at Exhibits 11, 19 and 20. Based on the above discussion and record evidence, we conclude that there is no statutory reason pursuant to sections 776(a) and (b) of the Act to apply total AFA to Xingya Group.

We also find that an intermediate input methodology ("IIM") (beginning with the carbon steel wire input, as opposed to wire rod) is inappropriate since it would not lead to a more accurate result, which is the Department's stated reason for using an IIM in the other cases cited above by parties. As discussed above, the Department was able to verify the toller's FOPs, notwithstanding the minor potential discrepancy for labor. Furthermore, the record shows that it is appropriate to use the tolling FOPs since SXNC maintained ownership of the wire rod input as it was drawn and paid the toller a processing fee. As noted previously, record evidence also

[61] See "Xingya Group Verification Report" at 26.

shows that the toller only drew wire for SXNC, and that the verification of the tolling-related FOP data was successful. Moreover, the FOP reporting methodology and financial records and experience of SXNC and its toller reflect that of an integrated producer. As such, the use of an IIM is similarly not warranted.

E. SXNC's Purchases of Collating Paper

Petitioners note that the Department's verification report indicates that SXNC's market economy purchases ("MEPs") of collating paper were invoiced and paid prior to the POI. Petitioners therefore argue that the Department should value all of Xingya Group's collating paper using the MEP values for SXMP, which were verified as being applicable to the POI.

Xingya Group notes that in the Preliminary Determination, the Department valued collating paper separately for each Xingya Group producer based upon that producers own market economy purchases. While Petitioners now advocate valuing all collating paper consumed by the Xingya Group using purchases by SXMP, based on the Department's finding at verification that market economy purchases of collating paper made by SXNC were made prior to the POI, Xingya Group contends that this would be contrary to the Department's regulations and its well-established practice. Xingya Group states that since SXNC had no market economy purchases of collating paper during the POI, collating paper should not be valued using a market economy purchase price reported by another producer, but instead be valued using the Indian import statistics on the record in this proceeding. Xingya Group notes that if the Department were to apply a single value to all of the its collating paper, SXMP's MEPs would not be in volumes sufficient to support their use as a value for all of the collating paper consumed by the entire group since they do not amount to anywhere near the 33 percent threshold established by the Department. Xingya Group states that to the extent the Department finds it necessary to apply a single value for collating paper to the entire Xingya Group, it should use the Indian import statistics on the record in this investigation.

Department's Position:

We agree with Petitioners. For the final determination, we will use SXMP's MEPs of collating paper to value the collating paper FOP for all Xingya Group producers since its MEPs accounted for 100 percent of the Xingya Group's purchases of this input during the POI. That is, SXMP was the only producer within the Xingya Group that purchased collating paper during the POI, and all of its purchases were MEPs. See Xingya Group Verification Report at 23-24, and Exhibits 14 and 29. Moreover, even if the Department were to consider SXNC's MEPs outside the POI in this total, SXMP's MEPs would still account for a majority of the Xingya Group's purchases. See id. This is consistent with our policy regarding MEPs, as outlined in Antidumping Methodologies: Market Economy Inputs, Expected Non-Market Economy Wages, Duty-Drawback; and Request for Comments, 71 FR 61716, 61718. Finally, we note that the application of SXMP's MEP values to SXNC's purchases of this input is fully in accordance with our MEP regulation and practice since SXMP and SXNC are not unrelated, but rather, part of the Xingya Group.

F. Partial AFA for Certain Misreported and Unreported SXNC Factors of Production

Petitioners argue that the Department should not use the corrections the Department requested for wire drawing powder, wire drawing DIRLAB and INDLAB, and wire drawing electricity based on information it obtained during verification. Petitioners instead contend that the Department should make an adverse inference and apply the highest reported figures for these FOPs across all of Xingya Group's production. Petitioners also assert that the Department should include the following unreported items it discovered during verification as FOPs, using the highest monthly usage rate for the POI: staples for packing, chromic acid, brightener, diesel, varnish thinner oil, sawdust, sulphuric acid, oil eraser, quencher and degreaser for manufacturing.

Xingya Group contends that its inadvertent inclusion of stainless steel nail production with regard to wire drawing powder, wire drawing DIRLAB and INDLAB, and wire drawing electricity had a de minimis impact on its reported FOPs. With respect to certain other items that the Department identified at verification and that Petitioners argue should be considered as FOPs, Xingya Group asserts that they are overhead items, and not actual FOPs. Xingya Group notes that the Department's policy is not to value separately materials that are consumed in the general operation of the production facility, and whose consumption is not related to the production of an individual unit of the subject merchandise.[62] Xingya Group notes that staples, which it consumes as a packing material, are the lone exception. For all other items, Xingya Group argues that Petitioners' advocacy for applying partial AFA is unsupported and unwarranted.

Department's Position:

We agree with Petitioners, in part. The Department's position in Comment 20.B. above outlines the circumstances and reasons for when we will apply AFA. We find it appropriate to apply partial AFA only for the staples packing and sawdust FOPs. We find it appropriate to apply partial AFA for the staples packing FOP pursuant to section 776(a)(2)(A), (B), and (D) of the Act, since this packing input was not previously reported to the Department but instead discovered at verification. See "Xingya Group Verification Report" at 2. Furthermore, as Xingya Group notes, the staples packing FOP is consumed in the production of the subject merchandise. See Xingya Group Rebuttal Brief at 20. Therefore, it should have been reported as a packing FOP and is not properly treated as overhead.

[62] See Brake Rotors From the People's Republic of China: Final Results and Partial Rescission of the 2004/2005 Administrative Review and Notice of Rescission of 2004/2005 New Shipper Review, 71 FR 66304 (November 14, 2006) and accompanying Issues and Decisions Memorandum at Comment 7 (citing Final Determination of Sales at Less Than Fair Value and Final Partial Affirmative Determination of Critical Circumstances: Diamond Sawblades and Parts Thereof from the People's Republic of China, 71 FR 29303 (May 22, 2006) and accompanying Issues and Decisions Memorandum at Comment 2; and Silicomanganese from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 65 FR 31514 (May 18, 2000) and accompanying Issues and Decision Memorandum at Comment IV-1).

For sawdust, although this material was identified in Xingya Group's narrative description of the production process, this material was never previously reported as an FOP. Further, Xingya Group reported that it reused its sawdust during the production process. See Xingya Group's October 31, 2007, Section D response at Exhibit D-2-A. However, at verification, the Department determined that Xingya Group discarded sawdust. See "Xingya Group Verification Report" at 13. Thus, sawdust was consumed in the production of subject merchandise and is properly treated as an FOP rather than overhead. We find it appropriate to apply partial AFA pursuant to sections 776(a)(2)(A), (B) and (D) of the Act because Xingya Group did not report this FOP to the Department and its response related to sawdust did not verify.

Where the Department determines that a response to a request for information does not comply with the request, section 782(d) of the Act provides that the Department shall promptly inform the party submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that party with an opportunity to remedy or explain the deficiency. Because Xingya Group did not inform the Department that its factors of production were not complete until the Department discovered the fact at verification, the Department did not have the opportunity to allow Xingya Group to correct its deficient data. Therefore, section 782(d) of the Act does not apply under these circumstances. See Reiner Brach GmbH & CO. KG and Novosteel SA, Plaintiffs, v. U.S. 206 F. Supp. 2d 1323, 1332-38 (CIT 2002).

Section 776(b) of the Act provides that, in selecting from among the facts otherwise available, the Department may use an inference that is adverse to the interests of the respondent if it determines that the respondent has failed to cooperate to the best of its ability. 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." See SAA at 870. In making its determination the Department must articulate its reasons for concluding that a party failed to cooperate to the best of its ability, and explain why the missing information is significant to the review. The Federal Circuit has explained that "acting to the best of its ability" means that a respondent must "do the maximum it is able to do." See Nippon Steel Corp. v. United States, 337 F. 3d. 1373, at 1382-1393 (Fed. Cir. 2003).

Notwithstanding Xingya Group's purported confusion over these FOPs, the Department's request for this information was unambiguous. Specifically, the Department requested Xingya Group to report all of its factors of production in its original questionnaire. See September 11, 2007, letter to Xingya Group transmitting the antidumping questionnaire at part D of the questionnaire ("Standard NME Questionnaire"). In this case, Xingya Group did not indicate to the Department, pursuant to section 782(c) of the Act, that it had a problem with reporting complete factors information. At a minimum, Xingya Group should have sought clarification from the Department whether these materials should be reported as FOPs. Instead, at verification, the Department discovered that the factors of production database was not complete and was missing these inputs. The Department also discovered that Xingya Group maintained

the necessary information in its books and records, but did not "put forth its maximum efforts to investigate and obtain the information from its records." See Nippon Steel, 337 F. 3d. at 1382-1393.

Therefore, for all of the reasons stated above, the Department finds, pursuant to section 776(b) of the Act, that Xingya Group has failed to cooperate to the best of its ability with regard to its reported FOP data for these inputs. Because Xingya Group failed to fully cooperate with the Department in this matter, we find it appropriate to use an inference that is adverse to the interests of Xingya Group in selecting from among the facts otherwise available. See section 776(b) of the Act. By doing so, we ensure that Xingya Group will not obtain a more favorable result by failing to cooperate than had it cooperated fully in this review. See SAA at 870.

As partial AFA for staples and sawdust, we will use the highest monthly usage observed for the POI, information that we obtained at verification. See "Xingya Group Verification Report" at 14. As described in the Department's verification report, all other items are properly considered as overhead rather than FOPs since they relate to workshop or machinery maintenance, cleaning, or repair, rather than directly to the production of the subject merchandise. See id. at 13-14.

Regarding the correction to the denominator (the removal of stainless steel nail production) for certain wire drawing FOPs, we note that this had an extremely minor impact on the denominator, and therefore, the FOPs. See id. at Exhibit 16. Furthermore, this was an inadvertent error noted by the Department's verification team, and which did not affect the integrity of the response. We subsequently requested that Xingya Group submit an updated FOP database to correct these items. See "Xingya Group Database Correction Letter." Thus, the Department finds that the application of partial AFA for these wire drawing FOPs is unwarranted. For the final determination, we will use the revised FOPs which are based upon the corrected denominator.

G. Critical Circumstances

Xingya Group states that it is the Department's practice to examine the longest period for which data are available up to the date of the preliminary determination. See, e.g., Notice of Final Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances: Certain Orange Juice from Brazil, 71 FR 2183 (January 13, 2006). Xingya Group notes that the record contains shipment data from each month since the filing of the petition through January 2008, the month of the preliminary determination. Thus, consistent with its established practice, Xingya Group argues that the Department should use all eight months of shipment date now available for its final critical circumstances determination. Using all data from the eight months, Xingya Group contends that the Department will find that imports of subject merchandise from Xingya Group have not been massive.

Xingya Group also argues that the Department should make an adjustment in the shipment data to take into consideration abnormal import activity that it is unrelated to this dumping investigation. Xingya Group notes that the record contains evidence that the Ministry of Finance

and State Administration of Taxation ("MFSAT") announced a reduction in the export tax rebate applicable to steel products such as nails. According to Xingya Group, the date of the MFSAT notice, June 2007, corresponds to the month with the greatest increase in shipment volume. Xingya Group explains that this increase in shipments reflects a desire of exporters and U.S. importers to make shipments before the reduction in the export tax rebate became effective. Xingya Group contends that where clear evidence of unusual shipment activity unrelated to the antidumping investigation exists on the record, the Department typically considers each unusual activity in making critical circumstances determinations. See Notice of Final Determination at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Color Television Receivers from the People's Republic of China, 69 FR 20954 (April 16, 2004) and accompanying Issues and Decision Memorandum at Comment 3. Thus, Xingya Group argues that the critical circumstances analysis must consider the MFSAT notice and the June 2007 shipment levels as unrelated activities to the dumping investigation.

Petitioners did not comment on this issue.

Department's Position:

Using all shipment data now available without Xingya Group's requested adjustment, we find that critical circumstances do not exist for Xingya Group, but that critical circumstances continue to exist for the PRC-wide entity. Because Xingya Group's negative determination was reached without regard to the requested adjustment, the Department has not addressed this argument. Additionally, our preliminary determination that critical circumstances did not exist for ITW and the separate rate companies remains unchanged. See "Certain Steel Nails form the People's Republic of China: Critical Circumstances Data & Calculation for the Final Determination," dated June 6, 2008.

Separate Rates:

Comment 22: Misidentification of Separate Rate Recipients

Tianjin County notes that the Department included it as an exporter with its own combination rate in the Preliminary Determination, but was omitted from the Amended Preliminary Determination. Tianjin County requests that it be listed as a company receiving a combination rate for the final determination.

Curvet and Tengyu argue that the Department incorrectly listed their reported combination rates in the Preliminary Determination and accompanying customs instructions. Curvet and Tengyu both note that they were exporters of the subject merchandise produced by themselves and each other, e.g., Curvet exported merchandise it produced and produced by Tengyu and Tengyu exported merchandise it produced and produced by Curvet. Curvet and Tengyu request that the

Department amend the Preliminary Determination to reflect the correct combinations an also ensure that the final determination reflects the correct combinations.

Xuzhou CIP notes that it reported that it self-produced subject merchandise and also purchased from Qingdao International Fastening Systems Inc. According to Xuzhou CIP, the Department only listed that it self-produced subject merchandise; however, Xuzhou CIP also purchased subject merchandise from Qingdao International Fastening Systems Inc. Xuzhou CIP therefore requests that the Department amend the Preliminary Determination to reflect the correct combinations an also ensure that the final determination reflects the correct combinations.

Certified Products International ("CPI") notes that the Department misspelled the names of three of its producers[63] in the Preliminary Determination, but that the Department corrected these names in the Amended Preliminary Determination. CPI requests that the Department use the correct full names of its suppliers for the final determination.

Department's Position:

We agree with Tianjin County that its separate rate combination was not included in the Amended Preliminary Determination and should be properly reflected in the final determination. We agree with Curvet and Tengyu that they were each missing one of their combination rates listed in the Preliminary Determination and the Department will correctly list all of their reported combination rates for the final determination. We agree with Xuzhou CIP that one of its suppliers was not listed in the Preliminary Determination and the Department will correctly list all of its reported combination rates for the final determination. We agree with CPI that the Department inadvertently misspelled certain of its supplier names in the Preliminary Determination that were corrected in the Amended Preliminary Determination.

Furthermore, because these errors pertain to the identification of the proper separate rates recipients for this investigation, the Department is making these corrections effective as of January 23, 2008, the date of the Preliminary Determination. Any liquidation instructions for this provisional measures period would reflect these corrections.

Comment 23: Separate Rate Calculation

Huanghua and Hybest argue that the Department should include the de minimis rate for any mandatory respondent in the calculation of the separate rate in accordance with statute. According to Huanghua and Hybest, not including the de minimis rate in the calculation of the separate rate, is an impermissible adverse inference in that the Department is only applying the

[63] Shandong Dinglong Import & Export Co., Ltd. ("Shandong Dinglong"), Shanxi Pioneer Hardware Industrial Co., Ltd. ("Shanxi Pioneer"), and Tianjin Jinghai County Hongli Industry & Business Co., Ltd. ("Tianjin County").

highest calculated rate for a mandatory respondent to the separate rate companies. Huanghua and Hybest argue that both the de minimis and above de minimis rates are verified and reliable. Therefore, Huanghua and Hybest argue that the separate rate be based on an average of the two mandatory respondent rates, including de minimis rates, so long as neither is based on total facts available.

Petitioners' rebut Huanghua and Hybest's argument that the Department should include de minimis margins in the separate rate margin calculation, which they note is based on the consequences of the Department's respondent selection methodology. While Petitioners agree with Jinhai and Hybest's contention that the Department's respondent selection process was problematic, they state that the Department is statutorily prohibited from including de minimis margins according to section 735 (c)(5)(A) of the Act, and there is no evidence that the exception specified in section 735(c)(5)(B) of the Act applies.

Department's Position:

Contrary to arguments made by Huanghua and Hybest, section 735(c)(5)(A) of the Act does not allow for the inclusion of any zero and de minimis rates in the calculation of the separate rate (i.e., the rate for respondents receiving a separate rate in NME proceedings). Moreover, the exception provided in section 735(c)(5)(B) is inapplicable in this proceeding because there is a calculated rate that is not zero, de minimis, or determined entirely under section 776 of the Act. Because the circumstances necessary to apply the exception under 735(c)(5)(B) are not present in this investigation, the Department is calculating the separate rate under Section 735(c)(5)(A) and, consistent with this provision, is not including any de minimis rates in the calculation of the margin.

AGREE_____ DISAGREE_____

_____
David Spooner
Assistant Secretary
for Import Administration

_____
Date