A-520-802
Investigation
Public Document
ADCVD2: DJG

June 6, 2008

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

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

SUBJECT: Issues and Decision Memorandum for the Final Determination in the Less-Than-Fair-Value Investigation of Certain Steel Nails from the United Arab Emirates (UAE)

Summary

We have analyzed the case and rebuttal briefs submitted by the petitioners[1] and the respondent, Dubai Wire FZE/Global Fasteners Ltd. (GFL) (collectively, Dubai Wire) in this investigation, as well as the case and rebuttal briefs on targeted dumping issues submitted for the record in this investigation by the respondents in the companion investigation on certain steel nails from the People's Republic of China (PRC) (Nails/PRC). As a result of our analysis, we have made changes in the margin calculation for the final determination. We recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum. Below is the complete list of the issues in this investigation for which we received comments from the interested parties:

Comment 1: Appropriateness of Implementing New Methodology in this Investigation
Comment 2: Identifying Alleged Targets
Comment 3: Statistical Validity of Standard Deviation Test
Comment 4: Reliance on Identical Products Comparisons for Determining Targeted Dumping
Comment 5: Alleged Masking of Dumping Under 33-Percent Pattern Test Threshold
Comment 6: Flaws of "Gap Test"
Comment 7: Alleged Masking of Dumping by Respondents Under Standard Deviation Test
Comment 8: Statistical Validity of P/2 Test
Comment 9: Programming Errors

[1] The 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.

Background

On January 23, 2008, the Department published in the Federal Register the preliminary determination of sales at less than fair value (LTFV) in the antidumping duty investigations of certain steel 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 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) (PRC Preliminary Determination). In these preliminary determinations, the Department accepted the petitioners' allegations that 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 PRC 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 determinations and the Post-Preliminary Determinations. We received comments and case and rebuttal briefs from the petitioners and Dubai Wire. We also received case and rebuttal briefs on targeted dumping issues submitted for the record in this investigation by the respondents in Nails/PRC: Illinois Tool Works Inc. and Paslode Fasteners (Shanghai) Co. Ltd. (collectively, Paslode), and the Xingya Group (comprised of Suzhou Xingya Nail Co., Ltd, Senco-Xingya Metal Products (Taicang) Co., Ltd., Yunfa International Resources Inc., Senco Products, Inc., and Omnifast Inc.). Based on our analysis of the comments received, as well as our findings at verification, we have changed the weighted-average margin applicable to Dubai Wire.

Margin Calculations

We calculated export price (EP) and normal value (NV) for Dubai Wire using the same methodology described in the UAE Preliminary Determination, except as follows below:

1. Based on the analysis performed in the Post-Preliminary Determinations, as revised by the Department for the final determination, we did not find targeted dumping and, therefore, did not apply the average-to-transaction methodology to the sales made to the alleged targeted customer. For further discussion, see the Department's letter of April 24, 2008, clarifying the new targeted dumping methodology, Comments 5 and 9 below, and Memorandum to The File entitled "Dubai Wire FZE/Global Fasteners Ltd. Final Determination Margin Calculation," dated June 6, 2008.

2. Based on our verification findings, we set U.S. brokerage and handling expenses for the sales transactions listed on one U.S. sales invoice to zero because we determined that these expenses were already included in the international freight expenses reported for these transactions. See "Verification of the Sales Response of Dubai Wire FZE and Its Affiliate Global Fasteners Ltd. in the Antidumping Investigation of Certain Steel Nails from the United Arab Emirates," dated April 1, 2008 (SVR), at page 14.

3. We revised the total cost of manufacturing (COM) with regard to GFL's actual cost of heat treatment and wire drawing to reflect the minor corrections presented on the first day of the cost verification. See "Verification of the Cost Response of Dubai Wire FZE in the Antidumping Investigation of Certain Steel Nails from the UAE," dated March 31, 2008 (CVR), at page 3.

4. We revised the scrap offset only as it pertains to wire scrap to reflect the quantities actually generated rather than the quantities sold.

5. We revised the total general and administrative (G&A) expenses to reflect the assignment of selling, general and administrative (SG&A) expenses as either selling or G&A consistent with our findings at the cost verification.

6. We adjusted the denominator used in the G&A and financial expense rate calculations to reflect the revisions made to the total COM, as discussed in items 3 and 4 above.

7. We revised the constructed value (CV) profit calculation to reflect the exclusion of the actual cost of services provided to Dubai Wire rather than the transfer price.

See Memorandum to Neal M. Halper, Director, Office of Accounting, entitled "Cost of Production and Constructed Value Calculation Adjustments for the Final Determination – Dubai Wire FZE," dated June 6, 2008 (Final Cost Memo).

Discussion of the Issues

A. Targeted Dumping Issues[2]

Comment 1: *Appropriateness of Implementing New Methodology in These Investigations*

The 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 the petitioners to comment meaningfully. According to the petitioners, the Department accepted a targeted dumping test in CFS Paper, and the 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 the petitioners note that the Department indicated in the PRC 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.

The 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. The 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 the petitioners' right of due process by providing the petitioners with insufficient opportunity to comment in a meaningful manner. In support of this argument, the petitioners cite Barnhart v. United States Treasury Department, 588 F. Supp. 1432, 1438 (CIT 1984) (Barnhart).

More specifically, the 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. The

[2] As targeted dumping methodology issues are common to this investigation and Nails/PRC, we are addressing the targeted dumping comments submitted by the PRC respondents as well as those discussed by the petitioners and Dubai Wire.

petitioners identify various examples of alleged methodological and programming errors in the Department's targeted dumping test applied in the Post-Preliminary Determinations. The 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, the 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, the 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. The 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 PRC Preliminary Determination, and the UAE Preliminary Determination, noting that the Department had accepted this methodology as consistent with the statutory criteria for targeted dumping. The 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, the 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, the 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 the 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, the 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. The 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, the 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 the 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 PRC 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 the 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 the 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 the 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 the 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 the petitioners' contention, the Department's new targeted dumping methodology was developed based on comments from all parties in both investigations, including the 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 the 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, the petitioners' detailed analysis in their case brief contradicts the 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 the 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 the 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 the petitioners' allegations and, in the PRC investigation, allowed the 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 the 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 the petitioners' assertions that it is improper to alter the targeted dumping methodology in the course of these investigations. As the 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, the 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 the petitioners in CFS Paper was not to be considered Departmental practice, so as not to hinder the petitioners' ability to allege targeted dumping in the steel nails investigations, we accepted the 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 PRC Preliminary Determination at 3939; see also UAE Preliminary Determination at 3977.

Thus, the petitioners were clearly on notice that the Department intended to apply a different targeted dumping methodology for the final determinations. The PRC 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 the 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 PRC Preliminary Determination and the UAE Preliminary Determination. Further, at the petitioners' request, we held an extensive disclosure conference with the 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 the petitioners' request, we also held a public hearing on the matter on May 19, 2008. Also in response to the petitioners' request, we held a subsequent meeting with the petitioners to discuss the targeted dumping methodology, as well as similar meetings with the respondents.[3]

Thus, contrary to their claims, the 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 the petitioners' complaint in this regard.

Moreover, citing Barnhart, the 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. The 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, the 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 the 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

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

often establishes the deadline for case briefs as "no later than seven days after the date of the issuance of the final verification report in this proceeding." See, e.g., PRC Preliminary Determination at 3950. The 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 the petitioners and all parties demonstrated their understanding of it in their briefs and at the hearing. The 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.

The 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 the petitioners had prejudicially relied on it. However, Shikoku Chemicals does not support the petitioners' argument. In Shikoku Chemicals, the CIT held that the Department acted unreasonably in changing its allocation methodology when the facts demonstrated that the 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. The petitioners suffered no harm because the Department considered the petitioners' targeted dumping allegations in applying the new methodology.

We find no basis to conclude that the petitioners have been unfairly harmed by the introduction of the new targeted dumping methodology because they relied upon the P/2 test. As the respondents note, the Department accepted the 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 the 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 the 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 the 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, the petitioners' complaint that they have been denied due process in these proceedings is without merit.

Comment 2: *Identifying Alleged Targets*

Xingya Group argues that the 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.

The 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 the 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.

The petitioners explain that, in making a targeted dumping allegation, the petitioners do not have knowledge of or access to a respondent's marketing plan for identifying the potentially targeted transactions. Accordingly, the 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, the petitioners assert that it is reasonable to consider those results as prima facie evidence of targeted dumping. Accordingly, the 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, the petitioners contend that issues in that case were based largely on the problem that the 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, the 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 the petitioners' targeted dumping allegation in the PRC Preliminary Determination. As discussed above under Comment 1, given the Department's limited experience with targeted dumping, we accepted the petitioners' allegations based on the P/2 test for purposes of initiating an analysis as to whether the 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 the 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 the petitioners' targeted dumping analysis, employing an entirely new targeted dumping methodology, thus the PRC 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 PRC 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.[4]

[4] The Department notes that it has initiated a separate process to seek further comments from the public on its

Notwithstanding our rejection of Xingya Group's argument that the Department improperly accepted the 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 LOT 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

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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).

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 period of investigation (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.

The 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. The 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.

The 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 the petitioners, there is no statutory basis to limit the number of sales that the Department may find to be targeted. On the contrary, the 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, the 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. The 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, the 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, the 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. The 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 the 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 the 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 the 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 the 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 the 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 the 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 the 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 the 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 the 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. The 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. The 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 the petitioners' preferred P/2 test compares only identical CONNUMs and does not include DIFMERs. Further, Dubai Wire asserts that the 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 the 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 the 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.

The petitioners contend that this test is flawed because it relies on sales value as the unit of measure, an argument that the 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, the petitioners state that this measure will minimize the proportion of lower-priced (targeted) sales, thus masking targeted dumping. Moreover, the 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, the 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 the 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 the 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).[5] 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.

The petitioners state that the Department has failed to explain why the price gap test properly implements the statutory objectives for determining targeted dumping. The petitioners continue

[5] 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.

that the use of a five-percent threshold for this test is arbitrary. In addition, the petitioners take issue with application of the price gap test when there is no non-target price that is higher than the alleged target price. The 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, the 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 "the 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 the 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 the 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[6] of the alleged target's sales prices are lower by at least one standard deviation than the average of all

[6] 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.

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 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 the 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 the petitioners, see the discussion below in Comment 9.

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

The 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, the 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 the 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, the petitioners contend that Customer A still received lower prices relative to other customers in a substantial

number of comparisons. According to the 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, the petitioners conclude, while highlighting the attributes of the P/2 test, which does identify these examples of targeted dumping.

Dubai Wire disputes the petitioners' findings, contending that the petitioners' analysis lacks economic sense, and therefore the Department's test does not mask targeted dumping. Dubai Wire notes that the 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 the 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 the petitioners. The petitioners argue that the Department's targeted dumping methodology would not identify a good deal of targeted dumping. However, the 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 the 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*

The petitioners contend that the Department should rely on the P/2 test for the final determinations, as the Department did in the PRC 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, the 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 the 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 the 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 the 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 the 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 the 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*

The petitioners and Xingya Group identified a number of alleged programming errors in the computer programs used in the Post-Preliminary Determinations.[7] 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.

[7] The 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.

- 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.

We agree and have corrected this error.

- In the PRC 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.

B. Other Issues

Comment 10: *Addition of G&A, Financial, Selling Expenses, and Profit to GFL Processing Costs*

The petitioners argue that the reported actual costs for the wire drawing and heat treatment services provided to Dubai Wire by its collapsed affiliate, GFL, should be adjusted to include amounts for G&A expenses, financial expenses, selling expenses, and profit, in order to reflect GFL's fully-absorbed costs.

Dubai Wire contends that the Department already accounted for the G&A and financial expenses related to the wire drawing and heat treatment services provided by GFL. Regarding selling expenses, Dubai Wire argues that GFL provides these services solely to Dubai Wire and, consequently, incurs no selling expenses related to these activities. Dubai Wire likewise rejects the petitioners' claim for the inclusion of profit on top of GFL's actual cost of wire drawing and heat treatment services, stating that the statute's definition of the cost of production (COP) does not include an amount for profit. Regardless, should the Department agree with the petitioners, Dubai Wire contends that the use of GFL's selling expenses and profit in the calculation of CV already account for any such expense or profit (i.e., on GFL's wire drawing and heat treatment services).

Department's Position:

At the preliminary determination, the Department found that Dubai Wire and its affiliated screw producer, GFL, should be collapsed and treated as a single entity for purposes of this antidumping investigation (see UAE Preliminary Determination, 73 FR at 3948, and Memorandum For Stephen J. Claeys, Deputy Assistant Secretary Secretary for Import Administration, From The Team, regarding "Whether or Not to Collapse Dubai Wire FZE and Global Fasteners Ltd. in the Antidumping Duty Investigation of Certain Steel Nails from the

United Arab Emirates," dated January 15, 2008). As such, all transfer prices between the two companies were adjusted to reflect the collapsed entity's actual COP. During the POI, GFL provided wire drawing and heat treatment services to Dubai Wire. Therefore, we replaced the transfer price between the two companies with GFL's actual cost of providing these services. To the manufacturing cost of the wire drawing and heat treatment activities performed by GFL, we added amounts for GFL's G&A and financial expenses. For the final determination, we have continued to include amounts for GFL's G&A and financial expenses.

We disagree with the petitioners' argument to add selling expenses and profit to the cost of the wire drawing and heat treatment activities performed at GFL's facilities. Under 19 CFR 351.401(f)(1), affiliated parties that have been collapsed by the Department are to be treated as "a single entity." Because Dubai Wire and GFL have been collapsed in this investigation, we must treat the companies as a single entity and ignore the transfer prices between the two companies in favor of the actual costs incurred. Thus, while it is reasonable that a collapsed entity would incur G&A and financial expenses relative to its production activities, it is not logical to conclude that a single entity would incur selling expenses or profit on services or goods that are transferred to and from divisions within it. Moreover, we note that the record does not show that GFL incurred selling expenses related to these activities. Therefore, for the final determination, we have not included amounts for selling expenses or profit in the actual cost of the wire drawing and heat treatment services, as these activities constitute transfers of services within the same (collapsed) entity.

Comment 11: *Weight-Averaging of Dubai Wire and GFL Expenses for G&A and Financial Expense Ratios*

The petitioners argue that, for purposes of the preliminary determination, the Department failed to follow its standard practice for calculating a collapsed entity's COP. Citing Final Determination of Sales at Less than Fair Value: Certain Cold-Rolled Flat-Rolled Carbon-Quality Steel Products from Brazil, 65 FR 5554 (Feb. 4, 2000) (Certain Steel from Brazil), and accompanying Issues and Decision Memorandum at Comment 25, the petitioners assert that it is the Department's practice to weight-average a collapsed entity's separate costs into a single COP. However, according to the petitioners, GFL did not submit product-specific data, as defined by CONNUM, on its home market and third country sales of nails. Thus, the petitioners point out that in the preliminary determination the Department was only able to calculate a COP for Dubai Wire and that this COP included only the G&A and financial expenses of Dubai Wire. While acknowledging that in a collapsing situation the Department's practice is to separately calculate and apply each company's G&A and financial expense rate factors to its own COM prior to weight-averaging the company-specific COM, G&A, and financial amounts,[8] the petitioners argue that in this case, the Department did not obtain GFL's CONNUM-specific cost data. Therefore, because GFL's CONNUM-specific costs are not on the record, the petitioners suggest that for the final determination the Department should calculate weighted-average G&A

[8] See Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Frozen and Canned Warmwater Shrimp from Thailand, 63 FR 76918 (December 23, 2004) (Shrimp from Thailand), and accompanying Issues and Decision Memorandum at Comment 8.

and financial expense rates that incorporate both companies' fiscal-year expenses, and apply them to Dubai Wire's CONNUM-specific COMs.

However, should the Department disagree with regard to calculating a weighted-average G&A expense, the petitioners argue that, at a minimum, the Department should recalculate the financial expense rate to recognize the intertwined financial structure of the collapsed entity consistent with the Final Results of Antidumping Duty Administrative Review: Certain Cold-rolled Carbon Steel Flat Products from Korea, 63 FR 781, 803-807 (January 7, 1998) (CR from Korea), where the Department calculated a combined interest expense factor for the respondent and its sister companies using information from the respective companies' audited financial statements. The petitioners contend that the Department's decision to collapse Dubai Wire and GFL recognizes the potential for manipulation of the two companies' operations. Thus, the petitioners conclude that the significant overlaps in Dubai Wire's and GFL's financial activities could likewise lead to manipulation, and therefore calls for the calculation of a combined interest rate.

According to the petitioners, the audited financial statements of the two companies make clear that Dubai Wire and GFL's financial activities are inextricably linked. As evidence, the petitioners cite the notes to the companies' audited financial statements which disclose that Dubai Wire's term loans are used by GFL, GFL's own loans are secured by a corporate guarantee from Dubai Wire, and Dubai Wire has pledged its unencumbered assets to cover GFL's loans. As such, the petitioners argue that the funding for these companies is conducted on a combined basis by the owners of the companies. The petitioners contend that this is the very reason that the Department consistently recognizes that money is fungible and follows a practice of calculating financial expenses using the highest level of consolidation. Thus, for the final determination, the petitioners urge the Department to follow this practice and calculate a combined financial expense rate that reflects the true financing operations of both companies.

Dubai Wire disagrees with the petitioners' conclusion, that GFL's and Dubai Wire's G&A and financial expenses should be weight-averaged and applied to Dubai Wire's CONNUM-specific costs, maintaining that GFL did not produce, nor could it produce, the merchandise under consideration during the POI. Therefore, because GFL did not produce the merchandise under consideration, Dubai Wire contends that it is inappropriate to combine GFL's G&A and financial costs in the calculation of the collapsed entity's COP. While GFL performed services related to the production of the merchandise under consideration for Dubai Wire (i.e., wire drawing and heat treatment), the respondent points out, as outlined in the Notice of Final Results and Partial Rescission of Antidumping Duty Administrative Review: Certain Pasta from Italy, 64 FR 6615, 6622 (February 10, 1999), that the Department does not combine the costs of two companies simply because one of the two companies produced an input as opposed to the subject merchandise. Similarly, in the instant case, Dubai Wire asserts that GFL only provided an input (i.e., the heat treatment and wire drawing service) and GFL's G&A and financial expenses have already been included in the cost of the input.

While Dubai Wire disagrees with the Department's preliminary determination that GFL and Dubai Wire should be collapsed, the company recognizes as reasonable the Department's

concern for the potential for manipulation between the two companies. However, Dubai Wire describes the petitioners' call for the application of weight-averaged G&A and financial expense rates as a misinterpretation of the Department's collapsing practice. Instead, the Department's actual practice, according to Dubai Wire, is to first calculate producer-specific COPs, which include producer-specific COM, G&A, and financial expenses, and then weight-average those costs to calculate the collapsed entity's COPs.

Dubai Wire also argues that the petitioners' request would lead to inaccurate results because GFL did not produce the merchandise under consideration. Consequently, Dubai Wire states that the cases cited by the petitioners are inapposite because the combination of financial expense rates was performed on companies that were all producers and sellers of the merchandise under consideration, a factor that is absent in the instant case. Moreover, because GFL's G&A and financial expenses were included in the company's actual cost of wire drawing and heat treatment services provided to Dubai Wire, the combination of the companies' G&A and financial expense rates would double-count such expenses. Contrary to the petitioners' contention, Dubai Wire believes that its financial expense rate may be overstated, as it already incorporates a certain amount of interest expense on Dubai Wire loans that were used by GFL.

Dubai Wire explains further that it is the Department's practice to calculate financial expenses at the highest level of consolidated financial statements that include the producer of the subject merchandise. Dubai Wire, the producer of the merchandise under consideration in the instant case, asserts that it does not prepare consolidated financial statements, nor is it included in the consolidated financial statements of any other company. In addition, Dubai Wire argues that the petitioners' use of relative sales values in their proposed calculations of weighted-average G&A and financial expense rates leads to erroneous results and includes multiple mathematical errors. Regardless, for the final determination, Dubai Wire contends that consistent with the preliminary determination and with the Department's normal practice, the Department should continue to use only Dubai Wire's data in the calculation of the G&A and financial expense rates.

Department's Position:

We agree with Dubai Wire and have continued to calculate the G&A and financial expense rates based on Dubai Wire's company-specific information only. The issue here touches on two areas where the Department has developed a standard practice. These areas are the calculation of company-specific costs in a collapsing situation and the calculation of a consolidated financial expense rate based on the highest level of audited consolidated financial statements (i.e., the rejection of self-consolidated or combined financial statements for the purpose of reporting to the Department).

As acknowledged by both the petitioners and Dubai Wire, the Department's normal practice when calculating costs for collapsed entities is to first compute company-specific COPs, then weight-average the company-specific COPs to obtain the collapsed entity's COPs for use in the cost test and margin programs. These company-specific COPs include each producer's own weighted-average CONNUM-specific COMs plus amounts for each producer's G&A and

financial expenses. Thus, the G&A and financial expense rates are separately calculated based on each producing company's own information[9] and are then applied to each producing company's per-unit COMs. See, e.g., Shrimp from Thailand at Comment 8 and Certain Steel from Brazil at Comment 25. This approach both enables the Department to reconcile each company's reported costs to its respective audited financial statements ensuring that all costs have been captured, and allows the Department to calculate and apply company-specific adjustments should such adjustments become necessary. Because GFL did not sell the merchandise under consideration in the United States and its home market was not viable during the POI, it was not necessary to obtain U.S. and home market sales databases from the company. In addition, the nails sold by GFL in the home market were not sold by either Dubai Wire or GFL in the U.S. market and, given the fact that NV is based on CV in this case, CV data for these nails was not required. Therefore, it was not necessary to obtain a cost database from GFL.

Regarding the petitioners' request to calculate a consolidated financial expense rate due to the significant evidence of the companies' intertwined financing activities, we agree with Dubai Wire. The Department has a well-established practice of calculating the financial expense rate based on the highest level of audited consolidated financial statements that include the producer-respondent. See, e.g., Salmon from Chile at Comment 7; see also Frozen Concentrated Orange Juice from Brazil: Final Results of Antidumping Duty Administrative Review, 65 FR 60406 (October 11, 2000) (Orange Juice from Brazil), and accompanying Issues and Decision Memorandum at Comment 2. With regard to the petitioners' reliance on CR from Korea, we note that the Department has clarified its position on calculating the financial expense rate for collapsed entities since the completion of that 1998 case. For example, in Orange Juice from Brazil at Comment 2, where three collapsed producers did not prepare consolidated financial statements, the Department confirmed that its practice of using the highest level of audited consolidated financial statements extends to collapsed entities by calculating company-specific, rather than combined, financial expense rates for the three companies.

Furthermore, the Department has expressly denied respondents' attempts to provide self-consolidated financial expense rate calculations that are not based on an audited consolidated financial statement. See Notice of Final Results of First Antidumping Duty Administrative Review: Certain Softwood Lumber Products from Canada, 69 FR 75921 (December 20, 2004), and accompanying Issues and Decision Memorandum at Comment 17, where the Department rejected a respondent's request that a consolidated financial expense rate be calculated for the collapsed entity because the collapsed entity did not prepare audited consolidated financial statements. In keeping with this practice, the Department has continued to calculate Dubai Wire's financial expense rate based on the highest level of consolidated financial statements that

[9] While G&A expenses are calculated based on the producer's own company-wide audited financial statements, financial expenses are calculated based on the highest level of consolidated financial statements. See, e.g., Notice of Final Results of Antidumping Duty Administrative Review: Fresh Atlantic Salmon from Chile, 65 FR 78472 (December 15, 2000) (Salmon from Chile), and accompanying Issues and Decision Memorandum at Comment 7 and Final Results and Partial Rescission of Antidumping Duty Administrative Review: Certain Frozen Warmwater Shrimp from India, 72 FR 52055 (September 12, 2007), and accompanying Issues and Decision Memorandum at Comment 9. Because financial expenses are calculated at the highest level of consolidation, the calculation may or may not include the financial operations of all of the collapsed companies.

include the producer-respondent, i.e., Dubai Wire's audited financial statements. Finally, because we have not calculated combined G&A and financial expense rates, the parties' comments regarding the calculation of such rates are moot and have not been addressed here.

For the final determination, we have continued to include in Dubai Wire's COP the actual costs of the wire drawing and heat treatment production inputs provided by GFL to Dubai Wire, and to those amounts we have added amounts for GFL's G&A and financial expenses. In the calculation of Dubai Wire's COP, we have continued to calculate a company-specific COM, G&A expense, and financial expense.

Comment 12: *Scrap Offset Revisions*

The petitioners argue that Dubai Wire's claimed scrap offset should be corrected for two errors discovered by the Department at the cost verification. First, the petitioners contend that at verification the Department discovered that Dubai Wire's scrap offset included not only wire rod scrap sales, but also sales of miscellaneous items which are not related to the production of nails. Second, the petitioners claim that the Department discovered that the wire scrap offset was overstated as it was based on the quantity of wire scrap sold, rather than the quantity generated. Thus, for the final determination, the petitioners maintain that the Department should only allow an offset for the value of the wire scrap quantities generated in production during the POI, and all additional scrap sales should be rejected as offsets to production costs.

Dubai Wire agrees that the portion of the offset related to wire scrap should be adjusted to reflect the Department's verification findings. However, Dubai Wire disagrees with the petitioners' call for the exclusion of the sales of other items from the offset. According to Dubai Wire, the Department's CVR at page 17 shows that these other items include the sales of wire rod, consumables, zinc & miscellaneous factory items (e.g., welding rods, used bearings, etc.). Dubai Wire asserts that these sales are an appropriate offset because the related costs of these items were included in the total costs used to calculate the reported costs. Thus, Dubai Wire contends that only the wire scrap portion of the scrap offset, as calculated by the Department in the CVR at page 18, should be adjusted in the final determination.

Department's Position:

We agree with Dubai Wire. During our cost verification, we reviewed the claimed scrap offset, finding that it consisted of amounts for various types of scrap sales including zinc, wire scrap, and miscellaneous factory items, along with sales of raw materials, including wire rod and consumables. See CVR at page 17. As a result of our verification testing procedures, we found that the wire scrap element of the offset should be limited to the quantities of wire scrap actually generated in production during the POI. See CVR at page 18. Regarding the sales of raw materials, we confirmed that the related costs were included in the total pool of costs used to calculate the reported COPs. See CVR at Exhibit 13. Because these raw materials were not consumed in the production of the merchandise under consideration, it is appropriate to exclude the costs related to the sale of these items. However, because Dubai Wire used sales values rather than the actual costs of the items to offset its total costs, we compared the sales prices to

Dubai Wire's actual purchases of the items sold to ensure that the offset was not overstated (i.e., did not include profit). We found that the sales prices approximated the purchase costs of the items and were, therefore, appropriately used to net out the related cost of the items sold (i.e., the sales amounts included little or no profit). Consequently, for the final determination, we have adjusted only the portion of the scrap offset that pertains to wire scrap sales.

Comment 13: *Affiliated Party Loans and Leases*

The petitioners argue that the Department should adjust Dubai Wire's interest expense so that the interest rates charged on loans and capital leases with affiliated parties reflect arm's-length rates. According to the petitioners, the record clearly demonstrates that Dubai Wire's interest rates on the loans and leases obtained from its affiliate, The International Investor KCSC (TII), are lower than Dubai Wire's borrowings from unaffiliated lenders. The petitioners also allege that the affiliate's interest rates are lower than the 2004 rate obtained by Dubai Wire with the Bank of Muscat which relates to the same time period as the affiliated party loans and leases. Therefore, for the final determination, the petitioners urge the Department to recalculate the interest expense associated with affiliated party loans and leases based on Dubai Wire's average interest rate with unaffiliated lenders.

Dubai Wire notes that its affiliation with TII, an investment and financing company, is by virtue of an investment made by TII in Dubai Wire. As such, Dubai Wire insists that it has no control over TII and was provided financing from its investor at arm's-length rates.

Furthermore, Dubai Wire contends that in analyzing whether TII's financing was at arm's-length market terms, it is important to consider comparable time periods. According to Dubai Wire, the loans and leases at issue originated in 1996 and 1999, and then rescheduled in 2004. In contrast, the loans that the petitioners attempt to use as a benchmark were contracted in 2006 and 2007. Dubai Wire asserts that the arm's-length analysis should instead be performed by comparing the interest rate and terms of its 2004 loan with the Bank of Muscat with those of the loans/leases with TII. According to Dubai Wire, such comparison confirms that the interest rates charged by TII reflect the arm's-length market rates during the time of origination.

Department's Position:

We agree with Dubai Wire and have not adjusted the interest expense related to the TII loans and leases. We performed an analysis of the terms of Dubai Wire's loans and leases with affiliated and unaffiliated parties that originated in the same year, and found that the affiliated party interest rates were comparable to market rates. See CVR at page 26; see also December 11, 2007, supplemental questionnaire response at Exhibits S-4(a) and S-13. Thus, for the final determination, we have not adjusted the interest expense accrued on affiliated party loans and leases.

Comment 14: *Calculation of Financial Expense Offset*

For purposes of the preliminary determination, the Department excluded the interest income generated on loans extended to GFL by Dubai Wire from the calculation of the financial expense rate because we considered it to be long-term in nature. The petitioners argue that for the final determination, the Department should continue to exclude the interest income from these loans because the underlying assets (i.e., the loans extended to GFL) do not represent short-term investments of Dubai Wire's working capital. In support, the petitioners point out that Dubai Wire's auditors classified the loans as non-current assets on the audited financial statements. Furthermore, the petitioners assert that the loans cannot be short-term when the notes to Dubai Wire's audited financial statements clearly state that the loans have no fixed repayment term. As such, the petitioners conclude that the interest income generated on the loans Dubai Wire extended to GFL represent income from long-term assets, and under the Department's instructions in section D of the standard questionnaire, the amounts should not be allowed to offset Dubai Wire's financial expenses.

Dubai Wire contends that, at the cost verification, the Department found that the funds Dubai Wire extended to GFL for raw material purchases were obtained from Dubai Wire's own letters of credit with its financial institutions. Therefore, because the funds extended to GFL were made available from Dubai Wire's letters of credit, i.e., short-term financial instruments, Dubai Wire concludes that the factors outlined by the petitioners are irrelevant and that in reality the interest income accrued on the GFL loans is short-term. As such, Dubai Wire maintains that the interest income accrued on the GFL loans should be allowed as an offset to Dubai Wire's financial expense.

Department's Position:

We agree with the petitioners and have continued to disallow the interest income generated on GFL's loans as an offset to Dubai Wire's financial expense in the final determination. At the cost verification, we noted that GFL's loans with Dubai Wire were a revolving account that included a variety of transfers between the two parties and resulted in a loan balance that ultimately was not paid down over the course of the POI. See CVR at page 25. Furthermore, Dubai Wire's audited financial statements, which were prepared in accordance with International Financial Reporting Standards (IFRS), i.e., international generally accepted accounting principles (GAAP), and were given a clean opinion by the company's auditors, clearly classify the GFL loans as a non-current asset. See Dubai Wire's October 9, 2007, response to section A of the questionnaire at Exhibit A-9, and CVR at page 25. Section 773(f)(1)(A) of the Act directs the Department to rely on a respondent's normal books and records if such records are in accordance with GAAP and reasonably reflect the costs incurred in the production of the merchandise under consideration. Because we find no reason to disregard the classification assigned by the company's auditors in Dubai Wire's GAAP-compliant financial statements, we have continued to consider the interest income generated on the GFL loans as long-term in nature. Therefore, for the final determination, we have disallowed the interest income generated on GFL loans as an offset to Dubai Wire's interest expenses in the calculation of Dubai Wire's financial expense rate.

Comment 15: *Adjustment of GFL CV Profit Ratio for COM Revisions*

For purposes of the preliminary determination, the Department collapsed Dubai Wire with its affiliated screw producer, GFL, and, as a result, adjusted Dubai Wire's reported costs to reflect the actual cost of the production services performed by GFL rather than the transfer price between the two parties. For the final determination, Dubai Wire argues that GFL's CV profit calculation should likewise be revised to exclude the actual cost of the production services performed by GFL for Dubai Wire. Dubai Wire explains that, in the CV profit worksheet submitted to the Department, GFL netted out the transfer price received from Dubai Wire, as opposed to the actual cost of the services, when calculating the cost of the screws and nails sold in the home market. If revised, Dubai Wire calculates that GFL actually incurred a loss on the sale of screws and nails in the home market. Thus, for the final determination, Dubai Wire holds that the Department should exclude the actual cost rather than the transfer price of the services from the CV profit calculation, and, as a result of this revision, recognize a zero profit rate in the calculation of CV.

The petitioners urge the Department to reject Dubai Wire's proposed adjustment to the CV profit calculation. First, the petitioners note that neither Dubai Wire's own home market sales, nor Dubai Wire's and GFL's combined home market sales of nails meet the Department's viability test. Thus, the petitioners argue that the only appropriate profit data for use in the calculation of CV is GFL's home market sales of screws. As such, the petitioners conclude that the Department's adjustment to the cost of nails is not relevant to the calculation of the cost of screws. Second, the petitioners point out that the specific language of the statute at section 773(e)(2)(B)(i) of the Act states that selling expenses and profit shall be based on "the actual amounts incurred and realized by the specific exporter or producer…" As such, the petitioners interpret that any adjustment to GFL's books and records would be inappropriate. Accordingly, the petitioners urge the Department to reject Dubai Wire's proposed adjustment to GFL's profit data.

Department's Position:

We agree with Dubai Wire in part and have adjusted the CV profit calculation to exclude the actual cost of the services provided by GFL. For purposes of the preliminary determination, the Department based CV profit on GFL's "…production and sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise" in accordance with section 773(e)(2)(B)(i) of the Act. In our review of the CV profit calculation at the cost verification, which took place subsequent to the preliminary determination, we noted that the total cost of sales from GFL's books and records included the cost of the services provided to Dubai Wire. See CVR at Exhibit 24. In order to calculate the cost of its own production, GFL appropriately attempted to exclude the costs of the services that it performed on behalf of Dubai Wire because such activities and their associated costs were not related to GFL's own production. However, GFL used the transfer price received from Dubai Wire to offset its total costs, rather than the actual cost of the services. Therefore, for the final determination, we have revised the CV profit calculation to exclude the actual cost of the services performed for Dubai Wire from the total pool of costs that are allocated to GFL's production. Further, we note that Dubai Wire's revised CV profit calculation, which results in

zero profit, did not account for all of the actual costs of the services and accordingly, does not yield the same results as our revised calculation.

Comment 16: *Calculation of CV Selling Expenses and Profit Based on GFL Screw Sales*

For purposes of the preliminary determination we calculated CV profit and selling expenses based on GFL's home market sales of screws and nails under section 773(e)(2)(B)(i) of the Act because we determined that the collapsed entity, Dubai Wire/GFL did not have a viable comparison market and, therefore, we could not determine selling expense and profit under section 773(e)(2)(A) of the Act. The petitioners argue that the Department should revise its preliminary determination calculation of CV selling expenses and profit to exclude GFL's home market sales of nails. Because the collapsed entity's home market with respect to nails was found not to be viable, the petitioners assert that the Department should have calculated CV selling expenses and profit based on GFL's home market sales of nails and screws under section 773(e)(2)(B)(i) of the Act, which allows for a calculation based on the producer's or exporter's sales of merchandise in the same general category of products as the subject merchandise. However, the petitioners conclude that if the collapsed entity's home market for nails was not viable, then both Dubai Wire and GFL's home market nail sales and cost data should be excluded from the CV selling expense and profit calculations.

Dubai Wire contends that there is no statutory basis for the petitioners' proposal to exclude GFL's home market sales of nails from the CV selling expense and profit calculation. Instead, Dubai Wire believes that the Department's calculation of CV selling expenses and profit based on GFL's home market sales of nails and screws was permissible under section 773(e)(2)(B)(i) of the Act, as it is logical to conclude that subject merchandise, by definition, would fall within the same general category of products as the subject merchandise. Moreover, unlike section 773(e)(2)(A) of the Act, Dubai Wire contends that there is no requirement that such sales be made in the "ordinary course of trade," nor is there a requirement that such sales pass the viability test. Furthermore, Dubai Wire insists that if the Department were to consider the petitioners' macro-viability concerns when using option (i), then the test should not be limited to specific products, but rather take into account the viability of the entire general category of merchandise that is similar to the subject merchandise. In such case, according to Dubai Wire, even Dubai Wire's and GFL's combined sales of nails and screws are not "viable" when compared to U.S. sales. Thus, Dubai Wire asserts, option (i) under section 773(e)(2)(B) of the Act would not be available. Because option (ii) under section 773(e)(2)(B) of the Act is not available due to the fact that there are no other respondents, Dubai Wire asserts that the Department would need to resort to option (iii), any reasonable method, for calculating home market selling expenses and profit. Given the broad discretion afforded to the Department under this option, Dubai Wire maintains that the Department's calculation of CV profit and selling expenses inclusive of both screws and nails is reasonable. Consequently, Dubai Wire concludes that the Department should not adjust its home market selling expense and profit calculations for purposes of determining Dubai Wire's CV, as the Department may reach the appropriate result using either alternative (i) or (iii) under the antidumping statute.

Department's Position:

We disagree with the petitioners. Because the collapsed entity, Dubai Wire/GFL, does not have a viable home market or third country market for foreign like product, we could not rely on the preferred method under section 773(e)(2)(A) of the Act for the calculation of CV selling expenses and profit. We have, therefore, relied on section 773(e)(2)(B)(i) of the Act to calculate the selling expenses and profit, which allows us to use the same general category of merchandise. The general category of merchandise contemplated under section 773(e)(2)(B)(i) of the Act is not limited to the merchandise under consideration and, in this case, logically includes nails. Accordingly, GFL's home market sales of nails should be included in determining CV selling expenses and profit under section 773(e)(2)(B)(i). This interpretation is consistent with the guidance set out in the SAA at 840, which states, "With respect to alternative (1) {i.e., section 773(e)(2)(B)(i)}, this method is consistent with the existing practice of relying on a producer's sales of products in the same 'general class or kind of merchandise.' The 'general category of merchandise' encompasses a category of merchandise broader than the 'foreign like product.'" We note that there appears to be no case precedent addressing this specific issue that would suggest a different interpretation. Moreover, as explained in the SAA, if the Department uses alternative (i) "it will establish appropriate categories on a case-by-case basis." See SAA at 840.
Furthermore, contrary to the petitioners' suggestion, it is unclear how the Department's viability test would apply to the broader category of merchandise described in section 773(e)(2)(B)(i) of the Act, given that the broader category of merchandise includes products not subject to the investigation. Moreover, the Department's home market viability determination in this investigation implies only that there is an insufficient quantity of home market nail sales for foreign like product and price comparison purposes, not that these sales are deficient in any other respect.

Therefore, we believe it is reasonable to continue to include GFL's home market sales of nails in the calculation of CV selling expenses and profit, along with GFL's home market sales of screws. Finally, while neither party argued for the inclusion of Dubai Wire's home market sales of nails in the calculation of CV selling expenses and profit under section 773(e)(2)(B)(i) of the Act, we note that we do not have sufficient information on the record to do so.

Comment 17: *LOT Adjustment for CV Comparisons*

For purposes of the preliminary determination, we noted that when NV is based on CV, the NV LOT is that of the sales from which we derive SG&A expenses and profit, consistent with Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Fresh Atlantic Salmon from Chile, 63 FR 2664 (January 16, 1998). We also stated that, because we based the selling expenses and profit for Dubai Wire/GFL on GFL's home market sales of nails and screws, under section 773(e)(2)(B)(i) of the Act, we could not determine the LOT of the sales from which we derived selling expenses and profit for CV as there was insufficient information on the record to determine it. Therefore, we made no LOT adjustment to NV. See UAE Preliminary Determination,73 FR at 3949. Subsequent to the UAE Preliminary Determination, on February 26, 2008, Dubai Wire provided information on GFL's

selling activities associated with its home market sales of screws, claiming that GFL's home market sales were at a different LOT than Dubai Wire's U.S. sales. We examined this information at verification.

Dubai Wire argues that the Department should account for the difference in the LOT between the U.S. sales LOT and the CV LOT, which corresponds to the LOT of GFL's home market sales of screws and nails. According to Dubai Wire, GFL performed many more selling activities for its home market customers than Dubai Wire performed for its U.S. customers. Dubai Wire adds that the verifications confirmed that GFL incurred greater sales salary expenses to perform these sales services than Dubai Wire incurred for performing U.S. sales services, and that significant differences existed between the type and intensity of these selling activities. As a result, Dubai Wire contends that the Department should adjust the indirect selling expense ratio derived from GFL's data and applied to CV to account for the difference in LOT, consistent with section 773(a)(7)(A) of the Act.

Alternatively, Dubai Wire asserts that, if the Department does not make an LOT adjustment in the calculation of CV selling expenses, then the Department should adjust CV to account for the differences in the LOT between GFL's home market sales to retailers and end-users, and Dubai Wire's U.S. sales to original equipment manufacturers (OEMs). According to Dubai Wire, it has demonstrated that GFL's home market sales are at a more advanced LOT than Dubai Wire's U.S. sales, and that the former require significantly more selling activities (see, e.g., Dubai Wire's February 26, 2008, submission). To account for the difference in LOT, Dubai Wire contends that the Department should adjust CV by the weighted-average price difference between GFL's sales to home market retailers and its sales to home market end-users, as provided in Exhibit 9 of Dubai Wire's February 26, 2008, submission.

The petitioners respond first that Dubai Wire's LOT adjustment claim is based on GFL's home market sales of screws and nails, rather than sales of screws alone, and as such, for the same reasons as outlined in Comment 16 above, is inappropriate. The petitioners continue that the bases for Dubai Wire's LOT claims include customer categories and number of customers, neither of which are appropriate for determining LOT. The petitioners also take issue with Dubai Wire's claims that GFL performs more selling functions for its home market customers than Dubai Wire does for its U.S. customers, providing such examples as customer-specific packing, warranty claims, rebates, and sales promotion activities offered in support of U.S. sales. Accordingly, the petitioners assert that Dubai Wire has failed to establish a claim that Dubai Wire's sales to its U.S. customers are at a less advanced stage than GFL's sales to its home market customers and thus no LOT adjustment is warranted.

Department's Position:

Whether an LOT adjustment is warranted under section 773(a)(7)(A) of the Act in this case requires a finding that GFL's home market sales of nails and screws, on which we derive SG&A expenses and profit for CV, were made at a different LOT than Dubai Wire's sales of nails to the United States and that the difference affects price comparability. In the preliminary determination, we stated that there is only one LOT for Dubai Wire's EP sales based on the fact

that Dubai Wire made EP sales to OEMs and other distributors through the same channel of distribution, performing the identical selling functions. See UAE Preliminary Determination, 73 FR at 3949. With respect to GFL's home market sales of screws, on which CV selling expenses and profit are derived in part, we note, based on the information provided by Dubai Wire on February 26, 2008,[10] as verified by the Department, that GFL made sales to retailers through the same channel of distribution, and performed the identical selling functions for these sales. Accordingly, we determine that there is only one LOT for GFL's home market sales.

As noted by Dubai Wire, at verification we found no discrepancy with Dubai Wire's descriptions in its February 26, 2008, submission of GFL's home market selling activities. However, contrary to Dubai Wire's conclusion, our verification findings were not consistent with Dubai Wire's contention that there are significant differences between GFL's home market selling activities and Dubai Wire's U.S. market selling activities. See SVR at page 6. Rather, we found that Dubai Wire performs a number of selling activities (e.g., order input/processing, marketing/sales promotion, market research, technical assistance and advertising) for its U.S. sales that are similar in nature to those performed by GFL for its home market sales, such that we cannot conclude that Dubai Wire's U.S. sales are at a different LOT than GFL's home market sales. See SVR at page 6. In addition, while we recognize that there are certain differences between selling activities in the U.S. and home markets, these differences are not significant enough to constitute different LOTs. Based on the above analysis, we agree with the petitioners that Dubai Wire has failed to establish that GFL's home market sales were made at a different LOT than Dubai Wire's sales to the United States. Accordingly, neither an adjustment to CV selling expenses nor any other adjustment to CV, as proposed by Dubai Wire, is warranted.

[10] The respondent did not provide information on selling activities associated with GFL's home market sales of nails in its February 26, 2008, submission, nor did the Department request such information. Therefore, our NV LOT analysis is limited to GFL's home market sales of screws.

Recommendation

Based on our analysis of the comments received, we recommend adopting all of the above positions. If these recommendations are accepted, we will publish the final determination of this investigation and the final weighted-average dumping margin for the investigated firm in the Federal Register.

Agree ___ Disagree ____

_____
David M. Spooner
Assistant Secretary
for Import Administration

_____
(Date)