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October 17, 2007

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 Coated Free Sheet Paper from the People's Republic of China (PRC)

Summary

We have analyzed the case and rebuttal briefs submitted by the petitioner[1] and the respondents[2] in this investigation. 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 interested parties:

Comment 1: Whether to Reconsider China's Non-Market Economy (NME) Status and Whether to Treat Certain PRC Companies as Market Oriented Enterprises
Comment 2: Alleged Double Remedy in Concurrent NME AD and CVD Proceedings
Comment 3 The Appropriate Surrogate Financial Statements to use to Calculate Financial Ratios

[1] The petitioner in this investigation is NewPage Corporation.

[2] The PRC respondents that submitted comments are: Gold East Co. Ltd.(Gold East Paper (Jiangsu) Co. Ltd., Gold Hua Sheng Paper (Suzhou Industry Park) Co. Ltd., and the separate rates applicant, Yanzhou Tianzhang Paper Industry Co. Ltd. ("Yanzhou Tianzhang"). In the preliminary determination, we found Gold East Paper (Jiangsu) Co. Ltd., Gold Hua Sheng Paper (Suzhou Industry Park) Co., Ltd., and China Union (Macao Commercial Offshore) Co. Ltd. (collectively, "Gold East") to be affiliated with one another and treated these companies as a single PRC entity for antidumping purposes. No party objected to this preliminary determination. We have continued to treat these affiliated companies as one entity in the final determination.

Comment 4: Whether to Adjust the Financial Ratios by Allocating Wages and Salaries Between Non-manufacturing and Manufacturing Expenses
Comment 5: Whether to Adjust the Financial Ratios by Allocating "Stores and Spares" Expenses Between Direct Material Costs and Overhead Expenses
Comment 6: Whether to Value Certain Materials Claimed to be Overhead Expenses

Comment 7: Whether to Value Self-Produced Electricity Used to Produce Electricity
Comment 8: Whether to Value Steam That is a By-Product of Self-Produced Electricity
Comment 9: Whether to Value Certain Inputs used in Treating Water
Comment 10: Whether GE Incorrectly Reported the Unit Price of Certain Purchases
Comment 11: Whether the Department Erred in Calculating the Value of a Self-Produced Input
Comment 12: Whether Certain Pulp Purchases Should be Treated as Market-Economy Purchases
Comment 13: Whether it is Appropriate to Value Labor Using the Expected Wage Rate Calculated by the Department
Comment 14: The Appropriate Surrogate Value For A Ground Calcium Carbonate Input
Comments 15: The Appropriate Surrogate Value for a Proprietary Material
Comment 16: The Appropriate Surrogate Value for a Proprietary Material
Comment 17: The Appropriate Surrogate Value for Hydrochloric Acid
Comment 18: The Appropriate Surrogate Values For Other Paper Chemicals
Comment 19: The Appropriate Surrogate Value For Steam Coal
Comment 20: The Appropriate Surrogate Value for Certain PET Packing Materials
Comment 21: The Appropriate Surrogate Value for a Proprietary Material
Comment 22: How to Account for Certain Unreported Expenses
Comment 23: Whether the Department Should Base the Dumping Margin for One Unreported Sale on Total Adverse Facts Available
Comment 24: Whether to Reclassify One Sale as a CEP Sale
Comment 25: Whether to Adjust the Market-Economy Purchase Price of NBKP

Background

On June 4, 2007, the Department of Commerce ("the Department") published the preliminary determination of the less-than-fair-value antidumping duty investigation of coated free sheet paper from the PRC. See Preliminary Determination of Sales at Less Than Fair Value: Coated Free Sheet Paper from the People's Republic of China, 72 FR 30758 (June 4, 2007) ("Preliminary Determination"). The products covered by this investigation are coated free sheet paper and paperboard of a kind used for writing, printing or other graphic purposes. The period of investigation ("POI") is April 1, 2006, through September 30, 2006.

On August 20, August 28, and September 10, 2007, the petitioner requested that the Department clarify the scope of the antidumping and countervailing duty investigations of CFS paper from Indonesia, Korea and the People's Republic of China to include coated free sheet paper containing hardwood BCTMP. Because this request affected all six investigations, the Department set up a general issues file to handle this scope request. After considering the

comments submitted by the parties to these investigations, we have determined not to adopt the scope clarification sought by the petitioner. See Memorandum to Stephen J. Claeys, Deputy Assistant Secretary for Import Administration, entitled "Scope Clarification Request: NewPage Corporation" (Scope Memorandum), which is appended to the "Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Coated Free Sheet Paper from the People's Republic of China." All comments submitted by the parties to all six investigations are addressed in the Scope Memorandum. For a detailed discussion of additional events which have occurred in this investigation since the Preliminary Determination, see the "Background" section of the Federal Register notice which this memorandum accompanies.

We provided the petitioner and the PRC respondents with an opportunity to comment on our Preliminary Determination and verification findings. Based on our analysis of the comments received, we have changed the weighted-average margin applicable to the collapsed entity Gold East.

Margin Calculations

We calculated the export price, constructed exported price, and normal value ("NV") for the collapsed entity Gold East, using the same methodology described in the Preliminary Determination, except for changes including:

1. We revised our calculation of the per-unit cost of Gold East's self-produced electricity and did not value steam used in production.

2. Based on verification findings, (a) we revised the average market-economy price reported for a type of pulp; (b) recalculated the net unit price of constructed export price (CEP) sales to account for unreported selling expenses; (c) reclassified one export price sale as a CEP sale and adjusted the sale's price to reflect CEP expenses; and (d) based the dumping margin of one unreported sale on adverse facts available (AFA).

3. We did not value certain reported factors based on our finding that these factors are used in the maintenance of machines, and are properly classified as overhead items.

4. We revised surrogate values for certain factors of production.

5. We valued certain inputs used by Gold East to treat water.

6. We revised the surrogate values for factory overhead, selling, general and administrative (SG&A), and profit.

7. We corrected a ministerial error involving one of Gold East's self-produced inputs.

For a detailed analysis of Gold East's margin calculation, see Final Determination in the Investigation of Coated Free Sheet Paper from the People's Republic of China: Analysis Memorandum for Gold East, dated October 17, 2007.

Discussion of the Issues

Comment 1: Whether to Reconsider China's NME Status and Whether to Treat Certain PRC Companies as Market Oriented Enterprises

The Government of China ("GOC") argues that the Department's application of the CVD law to China should lead it to reconsider China's status as a non-market economy ("NME") under the antidumping law. In particular, GOC points to the memorandum explaining the Department's decision to apply the CVD law to China, where it notes that "market forces now determine the prices of more than 90 percent of products in China." See Memorandum to David M. Spooner, Assistant Secretary for Import Administration, "Countervailing Duty Investigation of Coated Free Sheet Paper from the People's Republic of China: Whether the analytical elements of the Georgetown Steel holding are applicable to the PRC's present-day economy," (March 29, 2007) ("Georgetown Memorandum"). GOC argues that the Department itself called for a reevaluation of China's NME status by its statement in the Georgetown Memorandum that "features and characteristics also suggest that modification of the Department's current NME methodology may be warranted."

GOC also cites various statements from the Georgetown Memorandum about the evolution in China's economy and the growth of the private sector and entrepreneurship to suggest that there is sufficient justification to warrant granting China market economy status. According to GOC, because the Department itself recognized that China's economy today is vastly different from the traditional "Soviet-style" command economy and has determined that it is now feasible to determine whether the PRC government has bestowed a countervailable benefit on a Chinese producer, there is no logical or economic sense in maintaining China's NME designation. According to GOC, China has now established a genuine market economy system and that many WTO members already recognize this fact. Lastly, GOC argues that the Department's continuing designation of China as a non-market economy proceeding in the face of this evidence violates the WTO principle of fair and non-discriminatory treatment.

At a minimum, GOC argues, the Department's recent decision to apply the CVD law to China should lead the Department to reverse its current presumption that Chinese exporters are controlled by the state. GOC cites the Department's recent analysis of China's non-market economy status to argue that the Department has itself recognized that many firms in China operate independently of the government. See Memorandum to David M. Spooner, Assistant Secretary for Import Administration, "China's Status as a Non-Market Economy," (August 30,

2006) ("August 30th Memorandum"). Accordingly, GOC argues, the factual basis for the Department's presumption of state control is undermined by the Department's own findings.

GOC argues that the Department's application of the CVD law to China requires a reversal of this presumption. One reason the Department did not apply the CVD law to Soviet-style NMEs, GOC argues, is that there was "no market process to distort or subvert." See Carbon Steel Wire from Czechoslovakia: Final Negative Countervailing Duty Determination, 49 FR 19370 (May, 7, 1984). GOC argues that the Department's recent determination to apply the CVD law to China recognizes, de facto, that the government does not supplant the market. Furthermore, the Department now uses domestic PRC sales values in CVD cases. Accordingly, GOC argues, there is no reason the Department cannot use this same data in an AD proceeding. If Chinese prices constitute meaningful measures of value, thus allowing the Department to measure benefit in a CVD case, GOC concludes, these prices must be reliable enough to calculate normal value in an AD case. Finally, GOC points out that the statute permits the Department to calculate normal value in proceedings involving NME countries when "available information" permits normal value to be determined from home market or third country prices. See Section 773(c) of the Act. GOC also notes that the Department has itself recognized that respondents in NME countries could receive market economy treatment through its "market oriented industry" ("MOI") test.

GOC argues that the same facts that favor granting China market economy status or reversing the presumption of state control also justify the adoption of a market oriented enterprise approach. GOC notes that the Department itself stated in the Georgetown Memorandum that "modification of the Department's current NME methodology may be warranted" and that one possible modification might be that "the Department might grant an NME respondent market economy treatment." See Georgetown Memorandum. If the Department maintains China's NME status, GOC argues, it should grant NME respondents market economy treatment in all AD cases against China.

In rebuttal, petitioner argues that the Department should not reconsider China's NME status in the instant investigation. As an initial matter, petitioner argues, it would be impractical to gather the data to calculate normal value using home market and/or third country price data at this point in the investigation. Moreover, GOC has not attempted to apply the Department's statutory criteria for determining whether a country should be designated as a market economy country. Petitioner notes that the Department has recently discussed in detail each of these statutory criteria in the August 30th Memorandum maintaining China's NME status, where it concluded that "market forces in China are not yet sufficiently developed to permit the use of prices in that country for purposes of the Department's dumping analysis."

Petitioner argues that the Department's recent decision to apply the CVD law to China does not impact China's status as an NME country under the AD law, noting that China explicitly agreed in its WTO accession protocol that it would be bound by the WTO Agreement on Subsidies and Countervailing Measures and also that its trading partners would have the right to apply an NME AD methodology to Chinese imports for at least 15 years. See Report of the Working Party on the Accession of China, WT/MIN(01)/3, November 10, 2001, at 34, 80. According to petitioner, China therefore accepted a simultaneous application of the NME AD methodology and CVD law upon WTO accession.

Petitioner also disputes GOC's assertion that the Department should reverse its presumption that firms in China are not market-oriented. Petitioner argues that there is no factual evidence on the record of the current proceeding to justify a determination that the PRC government no longer controls uninvestigated Chinese producers and exporters. Petitioners argue that the Department's analysis in the Georgetown Memorandum is not relevant to the question of whether individual Chinese producers and exporters operate independently of government control.

Petitioner also rejects the GOC's argument that the Department adopt a "market oriented enterprise" approach. First, petitioner argues that the Department has no statutory authority to designate individual enterprises in an NME as market oriented. Second, petitioner argues that granting market economy treatment to enterprises would contravene China's WTO accession protocol, which permits the application of market economy treatment only when market conditions prevail in an "industry or sector." See Accession of the People's Republic of China, WT/L/432, November 10, 2001, at para. 15(a) and (d). Third, individual enterprises in an NME country (or at least within a non-market industry) cannot be market oriented because the non-market conditions within an industry and the overall economy inevitably affect individual enterprises. Fourth, there is no data with which to apply market economy treatment to individual enterprises, and any such data would not be usable because of the unreliability of PRC financial statements as well as prices valued in *renminbi* (due to the undervaluation of China's currency).

Department's Position

The Department agrees with GOC that China's economy no longer resembles a Soviet-style command economy and that this evolution permits the application of the CVD law to China, but disagrees that this evolution necessitates granting China market economy status, a reversal of the presumption of state control, or automatic market oriented enterprise treatment. GOC has misconstrued two of the Department recent analyses of China's economy: the August 30, 2006, affirmation of China's non-market economy status (the August 30th Memorandum); and the March, 29, 2007 memorandum analyzing whether to apply the CVD law to China (the Georgetown Memorandum). GOC quotes extensively from these two documents but ignores their conclusion: that despite ongoing economic reforms, the government's intervention in the PRC is too significant to warrant market economy status.

In making an NME country determination under section 771(18)(A) of the Act, section 771(18)(B) requires that the Department examine an economy as a whole, as opposed to individual industries or companies, and take into account:

1. the extent to which the currency of the foreign country is convertible into the currency of other countries;
2. the extent to which wage rates in the foreign country are determined by free bargaining between labor and management;
3. the extent to which joint ventures or other investments by firms of other foreign countries are permitted in the foreign country;

4. the extent of government ownership or control of the means of production;
5. the extent of government control over the allocation of resources and over the price and output decisions of enterprises; and
6. such other factors as the administering authority considers appropriate.

In conducting its 2006 review of China's status as an NME for purposes of the U.S. antidumping law, the Department considered the totality of China's economic reforms, both as executed through changes in law and policy and as evidenced by the behavior of commercial, financial, and political actors. See August 30th Memorandum. The Department concluded that, while China has enacted significant and sustained economic reforms, the PRC government has preserved a significant role for the state in the economy. Indeed, the limits the PRC government has placed on the role of market forces are sufficient to preclude China's designation as a market economy under the U.S. antidumping law.

For example, the PRC government continues to insulate the currency from market forces, and there are still important restrictions on workers' freedom of movement, as well as on bargaining between labor and management. Id. China has attracted an enormous amount of foreign direct investment, but extensively guides and constrains this investment in line with governmental policy objectives. State-owned enterprises ("SOEs") are still a crucial part of the economy and remain many of the largest enterprises in the country. The government's stated policy is to maintain a leading role for SOEs in many important sectors of the economy. The August 30th Memorandum further found that the government no longer usually sustains such SOEs through the traditional means of direct resource allocations or price controls, but instead through a complex web of regulatory restrictions, control over the allocation of land-use rights, and the continued dominance of state-owned banks in the financial sector. Despite ongoing reforms, there is no compelling evidence that China's banks act as genuine commercial entities. After amassing huge volumes of non-performing loans to SOEs, China's banks have been repeatedly bailed out by the government and shielded from both foreign and domestic competition. The August 30th Memorandum found that despite official pronouncements to the contrary, credit in China still flows primarily to state-owned firms, large enterprises, and enterprises favored by the state for development. Moreover, the central government still imposes administrative measures to control the lending growth that had been spurred, in part, by local governments. Finally, the lack of a reliable set of laws and procedures for redress serves in part to preserve the role of the state in the economy, rather than simply being a feature of a period of transition.

Although the Act enumerates the six factors that the Department must consider in determining a country's market economy status for purposes of the U.S. antidumping law, the statute provides no direction or guidance with respect to the relative weight that should be placed on each factor in assessing the overall state of the economy. In the case of China, the Department found in the August 30th Memorandum that despite the significant progress that China has made in transition away from a traditional command economy, the extent of government control and direction over the country's economy warrants the continued designation of China as an NME.

Notwithstanding this central conclusion that prices and costs within China are still too affected by government intervention (including the 90% of prices not directly set by the government) to permit their use in the calculation of normal value, the August 30th Memorandum described many positive reforms that set China apart from traditional Soviet-style command economies. The Georgetown Memorandum compared these command economies with China's economy on how wages and prices were generated, on their treatment of private enterprise, the conduct of foreign trade, and the allocation of resources. In conducting this comparison, the Department found that while China's economy still features extensive state intervention and control, it is nevertheless more flexible than traditional command economies. For example, whereas the government directly set nearly all prices and wages in Soviet-style economies, the government in China neither directly sets prices nor wages. However, there are important institutional constraints in the impact that market forces can exert on wages and prices, given the fact that prices are formed in an economy where the state has not ceded fundamental control. Regarding currency, while the *renminbi* remains somewhat insulated from market forces, it is nevertheless convertible to a much greater extent than in traditional command economies, where access to foreign exchange was extremely limited. Whereas entrepreneurship was essentially banned in Soviet-style economies, private enterprise in China is encouraged in some areas of the economy and limited in others. The result is an economy that features both a certain degree of private initiative as well as significant government intervention, combining market processes with continued state guidance. On foreign trade, state trading enterprises controlled exports in the Soviet-style economies, whereas in China individual firms now have significant discretion in these business decisions, even if they operate in an environment of onerous administrative burdens. Regarding the allocation of resources, the governments of Soviet-style economies generally allocated resources directly, often through the central bank. In China, the banking sector is much more developed and nominally operates independently of the government, even if it remains overwhelmingly state-owned. Despite their nominal independence from the government, however, the government still maintains levers of control over the banks to guide the allocation of credit, which still flows disproportionately to the state sector.

In sum, the Georgetown Memorandum found that the PRC government has resisted a definitive break with its command-economy past, opting instead to shrink the role of the state in some areas while preserving it in others, but never ceding fundamental control over the economy to market forces. Nevertheless, China's economy, though distorted, is observably more flexible than the soviet-style economies. While traditional command economies were most notably characterized by the absence of market forces, China's economy is best characterized as one in which constrained market mechanisms operate alongside of (and sometimes, in spite of) government plans. The limits the PRC government has placed on the role of market forces are not consistent with recognition of China as a market economy under the U.S. antidumping law. However, the Georgetown Memorandum concluded that, given the substantial difference between the Soviet-style economies and China's economy in 2005, the Department's previous decision not to apply the CVD law to these Soviet-style economies does not act as bar to proceeding with a CVD investigation involving products from China.

Thus, while the August 30th Memorandum makes clear that market signals in China have not evolved sufficiently to justify granting China market economy status, the Georgetown Memorandum documents market forces operating in China (unlike in Soviet-style economies), albeit constrained by government interference. Because market forces are present in China to a limited extent and because firms have some autonomy from the government in their reactions to them, firms in China (unlike in traditional command economies) are able to respond to the incentives that subsidies provide. GOC is correct in its contention that a key element of the Department's previous decision not to apply the CVD law to Soviet-style economies was the absence of market forces in these economies, and that such forces are present, to a limited extent, in China's economy today. However, while the presence of limited market forces supports the application of the CVD law, this does not necessarily warrant market economy status in AD proceedings if these forces are significantly distorted by government intervention, as they are in China.

The fact the government may provide subsidies that further distort prices that are already distorted by the broader non-market environment also explains why the Department can use these prices in a CVD proceeding (together with a third-country or internal PRC benchmark) to measure the benefit of an alleged subsidy while rejecting their use in the calculation of normal value in an AD proceeding. Since a firm in China may have the discretion to change its export and/or production decisions in response to the incentive provided by, for example, a subsidized input price, it is possible to measure the benefit provided by this subsidy. If the price is set in an environment distorted by significant government interference, however, this price cannot form the basis of normal value in an AD proceeding.

This conclusion that China's economy has evolved sufficiently from its command economy past to justify the application of the CVD law but not enough to warrant market economy status is also consistent with the presumption that firms in China operate under state control. PRC exporters may well operate independently of the government in their export activities and these firms have a full opportunity to demonstrate this independence *via* the Department's separate rates test. Regarding firms' domestic operations, it would not be appropriate to presume that firms' business decisions and domestic prices and costs are not distorted by government inference, given the Department's extensive recent documentation of this interference in the August 30th Memorandum. However, as GOC points out, respondents already have the opportunity to demonstrate that their industry operates on a market basis through the market oriented industry analysis, an opportunity of which respondents chose not to avail themselves in the instant proceeding.

Finally, the Department disagrees with GOC that the Department should grant market oriented enterprise treatment to all PRC firms involved in AD investigations. The Department has not yet determined whether it would be appropriate to introduce a market oriented enterprise process, nor has it determined what elements should be considered in any such test. The Department may grant some form of market treatment to qualifying NME respondents in future proceedings, however. On May 25, 2007, the Department published a notice in the Federal Register requesting comments on whether it should consider granting market-economy treatment to

individual respondents in antidumping proceedings involving China, the conditions under which individual firms should be granted market-economy treatment, and how such treatment might affect our antidumping calculation for such qualifying respondents. See Antidumping Methodologies in Proceedings Involving Certain Non-Market Economies: Market-Oriented Enterprise, 72 FR 29302 (May 25, 2007). The Department will soon publish another request for comment on this issue in the Federal Register, and will address market-economy treatment of individual respondents after considering the comments submitted within that process.

Comment 2: Alleged Double Remedy in Concurrent NME AD and CVD Proceedings

The People's Republic of China, Ministry of Commerce, Bureau of Fair Trade ("BOFT") argues that the same rationale for applying CVD law to Chinese CFS exporters also supports recognizing the PRC as a market economy. BOFT argues that if market forces and sales values are appropriate for use in the CVD case, such factors should be appropriate for use as part of the AD proceeding, and the Department should apply consistent standards in both the CVD and AD proceedings. As a result, the Department should reverse its designation of the PRC as an NME, and apply the normal market economy AD methodology for calculating an AD margin.

However, BOFT argues that if the Department continues to apply NME methodology in the CFS investigation, the Department must avoid the double counting of duties that would occur through the imposition of both CVD and AD duties calculated using NME methodology, which BOFT asserts, violates World Trade Organization ("WTO") obligations. BOFT contends that Section 772(c)(1)(C) of the Act and 19 U.S.C. § 1677a(c)(1)(C), direct the Department to add the full amount of any CVDs imposed on subject merchandise to the U.S. price in order to offset export subsidies. BOFT states that this adjustment was added to the statute to implement Article VI(5) of the GATT, which provides that: "{n}o product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to both anti-dumping and countervailing duties to compensate for the same situation of dumping or export subsidization." BOFT notes that the reason for this adjustment is that export subsidies are presumed to lower export prices, pro rata, increasing dumping margins correspondingly. BOFT argues that, absent a compensating adjustment, assessing both the CVD on the export subsidy and the increase in the dumping margin attributable to the export subsidy would constitute a double remedy (i.e. effectively imposing two duties for the same unfair trade practice). See Certain Cold-Rolled Carbon Steel Flat Products from Korea: Notice of Final Determination of Sales at Less Than Fair Value, 67 FR 62124 (October 3, 2002).

BOFT presents an example of alleged double-counting as a result of domestic subsidies by comparing the effect of a subsidy on AD and CVD margins in a market economy case versus in an NME case. BOFT asserts that in a market economy case, the subsidy reduces both the home market and the U.S. market price by an equal amount, and therefore, there is no double-counting. However, BOFT asserts that in an NME case, when a non-subsidized surrogate value is used for normal value, the effect of the subsidy will not be reflected in the normal value, but the U.S. price is still reduced due to the cost savings from the subsidy. BOFT argues that because NME cases use surrogate values that are subsidy free (Sichuan Changhong Electric Co., Ltd. v. United

States, No. 04-00265, slip op. at 31 (CIT 2006)), instead of a producer's actual costs, the NME AD methodology already offsets any subsidization by the NME government. BOFT argues that the calculations on the record support the occurrence of double-counting. BOFT claims that the three categories of unfair subsidization: 1) bank lending rates; 2) duty rebates on imported production equipment; and 3) tax benefits, addressed in the preliminary CFS CVD determination, were also addressed in the preliminary CFS AD determination, supporting the occurrence of double-counting.

BOFT asserts that double counting will always be an issue where a product is subject to both CVD and NME AD methodology. BOFT argues the U.S. Government Accountability Office has stated "there is substantial potential for double counting of domestic subsidies if Commerce applies CVDs to China while continuing to use its current NME methodology to determine AD duties. See U.S.-China Trade: Commerce Faces Practical and Legal Challenges in Applying Countervailing Duties, GAO-05-474, at 27-28 (June 2005); Testimony Before the U.S. China Economic and Security Review Commission, GAO-06-608T, at 18 (April 4, 2006)("GAO Report"). BOFT provides a sample comparison calculation using actual versus surrogate costs.

BOFT claims the problem of double-counting of CVD and AD duties is recognized in the law for export subsidies, noting that the Department's practice in market economy cases of adjusting the U.S. price on the AD side for export subsidies (19 USC 1677 a(c)(1)(c)) includes a "pass-through" assumption that the full amount of the subsidy is used and reflected in the U.S. export price. BOFT argues that the same "pass-through" assumption guides the Department's practice of not granting an adjustment in market economy cases for domestic subsidies, as domestic subsidies are presumed to lower both domestic and export prices pro rata and, thus, not to increase dumping margins in market economy proceedings. BOFT posits that the same "pass-through" assumption should be applied in NME cases involving both CVD and AD analyses. BOFT notes that in NME proceedings, normal value is determined on the basis of the factors of production of the merchandise, as valued in a surrogate market economy country. Consequently, while domestic subsidies lower the export price, pro rata, they cannot lower normal value. Therefore, the same double-counting issue inherent in export subsidies exists for NME countries, and BOFT argues the Department should reduce the dumping margin by the amount of any CVDs imposed to offset domestic subsidies to the subject merchandise.

BOFT further asserts that the Department has the legal authority to adjust CVD and AD rates to avoid double-counting. See GAO Report, at 29. BOFT disagrees with the position that the statute contains a "meaningful silence," arguing that Congress did not anticipate the existence of concurrent NME AD and ME CVD cases. Rather, BOFT argues, a more reasonable interpretation is that Congress recognized the unfairness of punishing a party twice for the same act, which requires making offsets for domestic subsidies where NME AD methodology is used in concurrent AD and CVD cases.

BOFT argues that, in calculating the dumping margin, the Department should add to the U.S. price (or deduct from the final AD rate, which amounts to the same thing) the amount of any CVDs imposed to offset domestic subsidies on the subject merchandise. Alternatively, BOFT

suggests that the Department should adjust the CVD margin to zero, if it refuses to offset the AD margin. BOFT argues that if the Department does not wish to adjust either the AD or CVD margin, it should effectively treat the PRC as a market economy and allow the "subsidized" cost of production to be used in the normal value calculation.

GE argues that, if the Department imposes a CVD margin, it must also adjust the normal value in the AD margin calculation. GE notes that Section 773(a) of the Act states that a "fair comparison shall be made between the export price or constructed export price and normal value" and that Section 773(a)(6)(C) of the Act requires that the normal value be adjusted by the difference between the U.S. price and the normal value due to differences in circumstances of sale. GE argues that the Department's preliminary AD determination is inconsistent with these requirements of the Act because the normal value calculated under the NME methodology contains no adjustment for the subsidies that affect price comparability. GE argues that the Department recognizes certain economic transactions have a direct effect on price, and assert that if an alleged indirect tax or loan subsidy is found to be countervailable, it has a recognized price effect that qualifies for a circumstance-of-sale adjustment. GE asserts that such adjustment is necessary because, unlike in a market economy case (where the home market price and U.S. price are similarly affected by the subsidy, thus offsetting each other), the use of surrogate values in a NME case negates the price advantage reflected in the normal value. As a result, GE requests the Department to reduce: 1) the surrogate SG&A percentages by the percentage amount of countervailable subsidy found for any alleged program that exempts an indirect tax on the final product sold (i.e. the rebate of VAT on domestic sales by Hainan Jinhai); and 2) the surrogate financial expense percentages by the percentage amount of countervailable subsidy found for any alleged loan program.

Petitioner argues that the Department should reject BOFT's arguments and apply the standard NME AD methodology without adjustment, as an adjustment to the dumping margin to account for domestic subsidies would be contrary to the statute. Petitioner states that Congress expressly addressed the adjustment issue where there are concurrent AD and CVD investigations in section 772(c)(1)(C) of the Act, by requiring the Department only to adjust the dumping margin to account for export subsidies. See also 19 U.S.C. § 1677a(c)(1). Petitioner argues that had Congress intended the Department to adjust the dumping margin to prevent alleged double counting with respect to domestic subsidies, it would have made that intent clear. See Ad Hoc Committee of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States, 13 F.3d 398, 401 (Fed. Cir. 1994). Petitioner argues that the Department has previously reached this same conclusion. See Low Enriched Uranium from France, 69 FR 46501, 46505 (August 3, 2004).

Petitioner argues that, contrary to BOFT's arguments, the purpose of the NME AD methodology is not to adjust for subsidies, but rather to correct for price distortions in the NME country, which may or may not be the result of government subsidies. Petitioner asserts that the NME AD methodology does not attempt to replicate the manufacturing and financial experience of NME producers but to provide a market economy surrogate.

Petitioner disagrees with the premise that domestic subsidies affect prices in the same way as export subsidies, i.e., that the entire value of domestic subsidies is passed through to customers through reduced prices. Petitioner notes that the statutory rule that the amount of export subsidies must be added to EP or CEP in the dumping margin calculation is based on the theory that export subsidies are passed through to export customers. However, Petitioner argues, most domestic subsidies, unlike most export subsidies, do not depend directly on the recipient's sales. Petitioner argues that, as a result, receipt of domestic subsidies does not necessarily create an economic incentive to sell at lower prices and, thus, there is no reason to assume that the recipient will pass through the domestic subsidy to its customers.

Petitioner also argues that adjustment of dumping margins for alleged double-counting would raise difficult methodological questions, such as: 1) how should the calculation of the country-wide rate and the separate rate be changed; 2) should the Department always select the same respondents for the AD and CVD investigations and subsequent administrative reviews; and 3) should the Department also revise its market economy practice of not increasing reported costs of production to offset the distortive effect of subsidized inputs?

Petitioner claims that adjusting the standard NME methodology to address alleged double-counting would be inconsistent with U.S. obligations under the WTO. Petitioner also argues that the PRC did not negotiate in its WTO Accession Protocol what it now seeks to impose through litigation, thus, complying with its request would also be inconsistent with the PRC's accession protocol. Moreover, Petitioner argues, granting special concessions to the PRC could result in other U.S. trading partners to allege WTO violations.

Petitioner also asserts that a circumstance-of-sale adjustment to normal value in the AD margin calculation, as requested by GE, would violate the statute and must be rejected. Petitioner asserts that it is clear, under 19 U.S.C. 1677b(a)(6)(C)(iii), that circumstance-of-sale adjustments may be made only to "the price described in paragraph (1)(B)" (i.e., only when normal value is based upon home market prices for the foreign like product under 19 U.S.C. 1677b(a)(1)(B)).

Department's position:

We agree with petitioner that we cannot adjust for double-remedy in this instance. While the Department has always been determined to prevent any double remedies from arising (see, e.g. Wheatland Tube v. United States, Fed. Cir. No. 2006-1524, 25 (July 25, 2007), BOFT offers no evidence supporting its argument that domestic subsidies automatically lower prices (including export prices) pro rata. Instead, BOFT argues that U.S. law embodies the presumption that domestic subsidies lower prices pro rata. We do not agree. First, despite addressing the issue of parallel AD duties and CVDs directly, and explicitly requiring that the amount of any CVDs to offset export subsidies be added to U.S. price, Congress provided no adjustment for CVDs imposed by reason of domestic subsidies in NME proceedings. Second, we find the assertion that the AD law embodies the presumption that domestic subsidies automatically lower prices, pro rata, to be baseless.

BOFT is correct in noting that the purpose of adding CVDs to offset export subsidies to U.S. prices is to prevent AD duties from constituting a second remedy for export subsidies. BOFT is also correct that the apparent premise of this adjustment is the presumption that export subsidies automatically lower the price of exported merchandise, pro rata, increasing dumping margins accordingly. While this presumption may be debatable, it is not unreasonable, given the typically direct connection between export subsidies and exports. In any event, the statute plainly requires the Department to add the full amount of CVDs imposed to offset export subsidies to the U.S. price.

The premise of BOFT's claimed adjustment is that the AD law embodies the presumption that domestic subsidies automatically lower export prices, pro-rata (while having no effect upon normal value, as determined in NME proceedings). BOFT provides no basis for this presumption. Whereas the connection between export subsidies and export prices is direct, the connection between domestic subsidies and export price is indirect and subject to a number of variables. Consequently, presuming that domestic subsidies automatically lower export prices, pro rata, would be speculative.

More importantly, we find no indication in the statute or legislative history that Congress harbored any presumption about the effect of domestic subsidies upon export prices, let alone the presumption that they automatically reduce export prices, pro rata. The Senate Report accompanying the 1979 legislation states simply that, for domestic subsidies (where the situation with respect to the domestic and export markets is the same) no adjustment to U.S. price is appropriate. Trade Agreements Act of 1979, Report of the Committee on Finance on H.R. 4537, Senate Report No. 96-249, 96th Cong. July 17, 1979, at 79. In so stating, Congress may have presumed that domestic subsidies had no effect on prices, had the same (if uncertain) effect on domestic and export prices, or may have presumed nothing. Thus, neither the statute nor the Senate Report indicates that the statute embodies the presumption that domestic subsidies automatically lower prices (including export prices) pro rata.

BOFT asserts that the presumption that domestic subsidies lower prices, pro rata, is the whole basis for imposing CVDs upon such subsidies. That is not correct. While subsidies unquestionably benefit their recipients, it is by no means certain that those recipients automatically respond to subsidies by lowering their prices, pro rata, as opposed to investing in capital improvements, retiring debt, or any number of other uses.

BOFT also argues that the fact that the Department uses only surrogate values that are "subsidy free" demonstrates that the Department believes subsidy recipients automatically lower their prices pro rata. This is also incorrect. The House Report cited by BOFT establishes only that Congress believed that Commerce should avoid using values that may have been affected by dumping or subsidies. Similarly, the Department's compliance with Congress' direction does not establish that the Department has made any assumption about the impact of subsidies upon prices. The Department has acknowledged simply that the existence of dumping or subsidies may taint the values upon which it otherwise would rely.

BOFT also argues that the Department previously has assumed that benefits from domestic subsidies are fully passed through into home-market and export prices. This is misleading. The more accurate statement would be that, when it has considered the issue, the Department has sometimes presumed that, whatever the effect, if any, of domestic subsidies upon the prices subsequently charged by their recipients, that effect would be the same for domestic prices and export prices.

BOFT also argues that, by recognizing that subsidies may have no (or an unpredictable) effect upon prices subsequently charged by their recipients in NME countries, the Department is conceding that it is not possible to measure subsidies in a NME country. This is incorrect. In both market and NME countries, identifying subsidies involves measuring benefits received by a firm. Whether such firms respond to subsidies received by lowering their prices, pro rata, would be a completely separate inquiry in either a market or NME country.

Because we do not accept BOFT's assertion that the AD law embodies the presumption that domestic subsidies automatically lower export prices, pro rata, and that is the only basis on which BOFT has claimed an adjustment, we must deny BOFT's request.

We also disagree with GE's assertion that a double remedy would arise from the Department's assessment of CVDs for various subsidies received by GE. Like BOFT, GE asserts that these subsidies directly reduced its export prices, but (owing to the Department's use of the factors-of-production methodology), did not reduce its normal value (as they would have in a market economy case), thereby increasing GE's dumping margin. As we have explained above, we do not agree that the AD law embodies the presumption that domestic subsidies automatically lower export prices, pro rata. Therefore, we do not agree that GE has demonstrated that any adjustment is necessary to avoid a double remedy.

The subsidies in question are loans and VAT rebates on machinery used by GE to produce CFS paper. See CVD CFS Final Determination. GE claims that these are "direct expenses" under the AD law, so that GE is entitled to an adjustment to normal value to eliminate the difference in the "circumstances of sale" between the two markets.

GE is correct in stating that the Department treats credit expenses incurred in connection with sales and taxes imposed on sales of the subject merchandise as direct selling expenses. The Department's distinction between direct and indirect expenses essentially turns on whether the expenses would not have been incurred "but for" the particular sale. Conversely, indirect selling expenses are essentially fixed expenses, for example, the rent for a sales office, which are incurred regardless of whether any sales are made. The theory behind permitting adjustments for differences in direct selling expenses, but not for differences in indirect selling expenses, is that direct selling expenses affect prices, but that indirect selling expenses do not. See Consumer Products Div., SCM Corp. v. Silver Reed America, 753 F.2d 1033, 1035 (Fed. Cir. 1985); Koyo Seiko v. United States, 36 F.3d 1565, 1569 (Fed. Cir. 1994), n. 4; Torrington v. United States, 44 F.3d 1572, 1579 (Fed. Cir. 1995).

GE does not qualify for a circumstance-of-sale adjustment because the subsidies in question – the loans and VAT rebates on machinery used to produce CFS paper – are not selling expenses at all, either direct or indirect. Once received by GE, those subsidies were assets, not expenses. They existed regardless of whether any sales were made. Even if they were analogized to selling expenses, it would be impossible to conclude that they would not have been "incurred," "but for" certain sales. Therefore, the subsidies could not have the direct connection to sales required to establish an entitlement for a circumstance-of-sale adjustment.

The Department has not concluded that a double remedy could never arise as the result of parallel AD and CVD investigations in an NME country – only that neither BOFT nor GE has demonstrated that such a double remedy will result from this investigation, or that it is entitled to an adjustment under the AD law to prevent a presumed double remedy from arising. As a result, we are making no adjustments to compensate for any alleged and unsupported double remedy.

Comment 3: The Appropriate Surrogate Financial Statements to use to Calculate Financial Ratios

In the Preliminary Determination, the Department calculated the surrogate financial ratios using data from the 2005-2006 financial statements of three Indian CFS producers: Ballarpur Industries, Ltd. (Ballarpur), Seshasayee Papers and Board Ltd. (Seshasayee), and JK Paper Ltd., (JK Paper). The Department selected these "financial statements from among the financial statements placed on the record by interested parties because these companies produce subject merchandise and, like the respondents, do so by producing wood free paper and coating it." See Preliminary Determination. After the Preliminary Determination, GE submitted the 2006-2007 financial statement of Seshasayee, and petitioner submitted the 2005-2006 financial statement of the Indian company Star Paper Mills Ltd. (Star Paper).

GE argues that the Department should use only the 2006-2007 financial statement of Seshasayee to calculate the surrogate financial ratios in the final determination. GE notes that in considering which surrogate financial data are the best information available for calculating ratios, the Department considers, in accordance with section 773(c)(1) of the Act, several factors including, the quality, specificity, and contemporaneity of the source information. Additionally, GE states that where the quality and specificity of potential financial surrogate data are sufficient, the Department's practice is to choose data based on contemporaneity. In arguing that only Seshasayee's 2006-2007 financial statement is the appropriate source for surrogate financial data, GE makes three broad claims: (1) that the statements of other potential surrogate companies are distorted by subsidies; (2) Ballarpur and JK Paper are not comparable to GE in terms of level of integration; and, (3) that the fully contemporaneous financial statement of Seshasayee (which covers a period that includes the entire POI), should be selected over other surrogate statements that cover only a portion of the POI. We will address each of these claims separately, below. Additionally, we will address petitioner's claim that the financial ratios should be updated to include the data of Star Paper.

As discussed below, for the final determination, the Department finds that it is appropriate to use Seshasayee's 2006-2007 and JK Paper's 2005-2006 financial statements to derive the surrogate financial ratios.

A) Subsidies

GE argues that the financial data of Ballarpur and JK Paper should not be used to calculate surrogate financial ratios because they are distorted by significant export subsidies received by these companies.[3] Specifically, GE argues that Ballarpur received a substantial benefit from customs duties exemptions granted under India's Export Promotion Capital Goods Scheme (EPCGS), a program that the Department has found to be a countervailable export subsidy scheme in numerous countervailing duty investigations. GE further argues that Ballarpur's participation in the EPCGS program gave Ballarpur the incentive to concentrate on export sales, because its receipt of subsidies was contingent on export performance. GE states that JK Paper's financial statement also indicates that it received significant export subsidies. Specifically, GE claims that distortive subsides are reflected in its profit and loss account, which lists a project subsidy credited to capital reserve and the inclusion of export incentives in its sales figures.

GE notes that the Department has found that general export subsidies distort prices and has rejected the use of surrogate data from countries offering generally available subsidies. GE states that the Department's decision to exclude prices based on the use of export subsidies has been upheld by the U.S. Court of International Trade.[4] According to GE, Ballarpur's and JK Paper's financial statements must be excluded from the final calculation of the financial ratios because these companies received significant subsidies.

In rebuttal, petitioner argues that there is no clear evidence that Ballarpur or JK Paper received subsidies. With respect to Ballarpur, petitioner states that the financial statement reflects a contingent liability for customs duties on capital goods imported under the EPCGS ten years prior, and argues that there is no evidence that this alleged subsidy would have been above de minimis. Petitioner further notes that the Ballarpur statement indicates that the contingent liability is not ascertainable, and, therefore, had no impact on Ballarpur's income statement. With respect to JK Paper, petitioner argues that there is no indication that the "export incentives" reflected in JK Paper's financial statement were provided by the government of India, and that

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[3] See Freshwater Crawfish Tail Meat from the People's Republic of China: Notice of Final Results And Rescission, In Part, of 2004/2005 Antidumping Duty Administrative and New Shipper Reviews, 72 FR 19174 (April 17, 2007) and accompanying Issues and Decision Memorandum at Comment 1.

[4] See e.g., Certain Preserved Mushrooms from the People's Republic of China: Preliminary Results of the Antidumping Duty New Shipper Review, 72 FR 45734 (August 15, 2007), and Certain Hot-Rolled Carbon Steel Flat Products from Romania: Preliminary Results of Antidumping Duty Administrative Review, 69 FR 70644 (December 7, 2004).

the value of the incentives represents only 0.27 percent of the company's annual sales and is, therefore, de minimis.

Department's position:

We agree with GE, in part, and find that the exclusion of Ballarpur's data from the data used to calculate surrogate financial ratios is warranted. In Crawfish from the PRC, the Department discussed its practice with respect to financial statements that contain evidence of subsidization:

> {T}he statute directs Commerce to base the valuation of the factors of production on "the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate . . . ." Section 773(c)(1) of the Act. Moreover, in valuing such factors, Congress further directed Commerce to "avoid using any prices which it has reason to believe or suspect may be dumped or subsidized prices." Omnibus Trade and Competitiveness Act of 1988, H.R. Rep. No. 576, 100 nth Cong., 2 nd Sess., at 590-91 (1988). The Department calculates the financial ratios based on financial statements of companies producing comparable merchandise from the surrogate country, some of which may contain evidence of subsidization. However, where the Department has a reason to believe or suspect that the company may have received subsidies, the Department may consider that the financial ratios derived from that company's financial statements are less representative of the financial experience of that company or the relevant industry than the ratios derived from financial statements that do not contain evidence of subsidization. Consequently, {those statements that appear to reflect subsidies} do not constitute the best available information to value the surrogate financial ratios.[5]

Ballarpur's financial statement indicates that its Bigwhan Unit "imported certain Plant and Machinery at 'Nil' customs duty under the Export Promotion Capital Goods (EPCG) Scheme." India's EPCG Scheme has been found by the Department to provide a countervailable subsidy.[6] Given the record information regarding Ballarpur's use of the EPCG program, and the fact that we have other acceptable financial statements to use as surrogates, consistent with the Department's decision in Crawfish from the PRC we have not used Ballarpur's financial data in our final calculations.

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[5] See Crawfish from the PRC, and accompanying Issues and Decision Memorandum at Comment 1.

[6] See, e.g., Polyethylene Terephthalate Film, Sheet, and Strip from India: Final Results of Countervailing Duty Administrative Review, 72 FR 6530 (February 12, 2007) ("Because this {EPCGS} program is contingent upon export performance, it is specific under section 771(5A)(B) of the Act. {citation omitted}. As such, we continue to find this program countervailable").

However, consistent with Frozen Fish Filets from Vietnam, we find that there is insufficient information on the record regarding the alleged subsidy to warrant disregarding the financial statement of JK Paper.[7] In the instant investigation, the record does not indicate whether the export incentives were received by JK Paper under a subsidy program that the Department has previously found to be countervailable. Accordingly, the Department finds that exclusion of JK Paper's data from the calculation of the financial ratios due to evidence of subsidization is not supported by record evidence.

With respect to petitioner's argument that there is no evidence that the alleged subsidies received by Ballarpur and JK Paper would have been above de minimis, the Department does not find it appropriate to conduct such an analysis, particularly in this investigation when alternative financial statements are available.[8] In light of the foregoing, we find that it is appropriate to exclude Ballarpur's data from the final financial ratio calculations, but will continue to include JK Paper's and Seshasayee's data in those calculations.

B) Level of Integration

GE urges the Department to reject the financial data of Ballarpur and JK Paper because these companies are more integrated than GE. Moreover, GE claims that Ballarpur and JK Paper are no more comparable to GE than the companies whose data the Department rejected in the Preliminary Determination because the companies were less integrated than the NME respondents. Specifically, GE states that Ballarpur's financial statement reflects operational costs of a major integrated forestry and pulp operation in Malaysia, and a forestry subsidiary, BILT Tree Tech Ltd. Moreover, GE states that, unlike its own operation, both JK Paper and Ballarpur produce almost all paper from self-produced pulp. However, GE argues, Seshasayee's financial statement shows that, like GE, Seshasayee relies substantially on purchased pulp to produce CFS.

GE also claims that overhead costs incurred by highly integrated producers are greater than those incurred by GE. According to GE, Ballarpur and JK Paper incur significantly higher factory overhead, selling general and administrative (SG&A) expenses and interest expenses than GE as a result of these companies' involvement in forestry and pulping operations.

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[7] See Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results of the Second Administrative Review, 72 FR 13242 (March 21, 2007), and accompanying Issues and Decision Memorandum at Comment 9.

[8] See Crawfish from the PRC, and accompanying Issues and Decision Memorandum at Comment 1 ("The Department does not believe that an attempt to analyze the potential impact of the subsidy on the financial ratios is appropriate in most instances, and particularly in this case, where another producer's financial statement is the available alternative, rather than RBI data").

GE notes that the Department will match surrogate companies' production experience with that of a respondent to the extent that the record permits such a comparison.[9] Furthermore, GE notes that the Department may reject the financial statement of a proposed surrogate company that produces merchandise identical to the subject merchandise when differences between its production processes and those of the respondent render the proposed surrogate company's data unrepresentative of the NME respondent's data.[10] GE states that in the Preliminary Determination, the Department appears to have rejected proposed companies that produced CFS by coating base paper that was not self-produced because these companies lacked the level of integration of the NME respondents.

Petitioner, however, disagrees with GE's claim that Seshasayee is the company that is the most operationally comparable to GE. Specifically, petitioner claims that Ballarpur's financial statement does not reflect costs associated with forestry operations. Additionally, petitioner asserts that, like Ballarpur and JK Paper, Seshasayee produces the overwhelming majority of its pulp. Accordingly, petitioner argues, Seshasayee is not the only potential surrogate company that is operationally comparable to GE. Moreover, petitioner states, it is not the Department's practice to match individual respondents to their most representative surrogate companies. Rather, petitioner notes, the Department has indicated that "using the greatest number of financial statements possible will yield the most representative data from the relevant manufacturing sector to calculate accurate surrogate financial ratios."[11]

Department's position:

We disagree with GE and have not rejected Ballarpur's and JK Paper's financial data because of the companies' level of integration. Contrary to GE's assertion, Ballarpur's unconsolidated financial statement, which was used by the Department in the Preliminary Determination, does not appear to reflect the costs associated with forestry operations. GE's argument that Ballarpur has a major integrated forestry operation as a result of its 2006 acquisition of a Malaysian forestry and pulp producer, is unsupported by its citation to Ballarpur's financial statement.[12]

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[9] See e.g., Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances: Certain Polyester Staple Fiber from the People's Republic of China, 72 FR 19690 (April 19, 2007) and accompanying Issues and Decision Memorandum at Comment 12.

[10] See e.g., Persulfates From the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 71 FR 7725 (February 14, 2006) and accompanying Issues and Decision Memorandum at Comment 1.

[11] See Amended Final Results of Antidumping Duty Administrative Review and New Shipper Reviews: Wooden Bedroom Furniture From the People's Republic of China, 72 FR 46957 (August 22, 2007) and accompanying Issues and Decision Memorandum at Comment 17.

[12] See GE's case brief at 12 (citing Ballarpur's financial statement at 6).

While Ballarpur's financial statement does discuss the acquisition of "the largest integrated paper and pulp plant in Malaysia," the financial statement also indicates that the acquisition was not concluded at the time that Ballarpur released its financial statement. See Ballarpur Financial Statement at 6 ("The acquisition {of the Malaysian plant}, *when completed*, through leveraged buy-out, will have minimal impact on {Ballarpur's} balance sheet"). Additionally, the Ballarpur financial statement indicates that the company entered into the agreement to purchase the Malaysian plant during the last month its fiscal year. See id.

Moreover, GE is mistaken in its contention that the Ballarpur financial statement used by the Department in the Preliminary Determination includes the financial data of Ballarpur's forestry subsidiary, BILT Tree Tech Ltd. While Ballarpur's 2005-2006 annual report contains the company's consolidated financial statement, which includes the financial data of BILT Tree Tech Ltd., the Department did not use the consolidated financial statement in its preliminary calculation of the surrogate financial ratios. Rather, the Department used financial data from Ballarpur's unconsolidated financial statement, which is also included in Ballarpur's 2005-2006 annual report, to calculate surrogate financial ratios.[13] There is no evidence that the unconsolidated Ballarpur financial statement relied upon by the Department reflects forestry operations.

Additionally, the record does not support GE's claim that Ballarpur's and JK Paper's financial data should be rejected by the Department in favor of using Seshasayee's data because Seshasayee is the only one of the three Indian companies that, like GE, relies substantially on pulp purchases to produce CFS paper. Seshasayee's schedule of raw materials consumed does not indicate that Seshasayee relies substantially on purchased pulp to produce CFS as the quantity of purchased pulp reflected in the schedule is significantly less[14] than the quantity of other inputs consumed in the production of CFS.[15] Accordingly, we do not find it appropriate to reject Ballarpur's and JK Paper's financial statements on the basis of their pulp production.

Also, as noted by petitioner, while the Department does consider whether the production process of potential surrogate companies is comparable to that of NME respondents, it is not the

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[13] See the Preliminary Determination Analysis Memorandum for GE.

[14] Seshasayee's schedule of raw materials consumed indicates that the company consumed 116525 tons of " Wood (BD)"; 75130 tons of "Bagasse (BD); 1381 tons of "Waste Paper Cuttings"; and 37282 tons of "Purchased Pulp." The quantity of purchased pulp consumed by Seshasayee represents less than 17 percent of the total quantity of raw materials consumed in the production of paper.

[15] See Seshasayee's 2006-2007 annual report (schedule of raw materials consumed) at 60.

Department's practice to match individual companies to their potential surrogates.[16] Further, when more than one suitable potential surrogate company's financial statement is available, the Department prefers to use multiple surrogate companies in its financial ratio calculation.[17] Therefore, we have not rejected Ballarpur's and JK Paper's financial data based on the companies' level of integration.

C) Contemporaneity

GE also argues that the Department should only base the surrogate financial ratios on Seshasayee's 2006-2007 financial statement, which covers a period including the entire POI, because it is the most contemporaneous statement from an Indian surrogate producer. GE notes that Ballarpur and JK Paper's financial statements cover only the first three months of the POI, and that the Department has determined that it is not appropriate to use less contemporaneous financial statements even though they may overlap the POI.[18]

Petitioner, however, argues that the Department's practice is to use the most contemporaneous financial statement available for every company meeting the criteria used to select surrogate producers.[19] Petitioner further argues that the cases cited by GE may be distinguished from the instant investigation because the cited cases involve a selection between two financial statements from a single company that both overlap a portion of a POI, rather than a selection between different companies' financial statements that overlap with the POI.

While petitioner believes Seshasayee should not be the only source for the surrogate financial ratios used in the final determination, it does, however, agree that Seshasayee's 2006-2007

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[16] See, e.g., Nation Ford Chemical Company v. United States, 166 F. 3d. 1373, 1377 (Fed. Cir. 1999).

[17] See Amended Final Results of Antidumping Duty Administrative Review and New Shipper Reviews: Wooden Bedroom Furniture From the People's Republic of China, 72 FR 46957 (August 22, 2007) (Amended Final Results - WBF from the PRC)and accompanying Issues and Decision Memorandum at Comment 17 ("using the greatest number of financial statements possible will yield the most representative data from the relevant manufacturing sector to calculate accurate surrogate financial ratios").

[18] See e.g., Certain Preserved Mushrooms From the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 72 FR 44827 (August 9, 2007).

[19] See Final Determination of Sales at Less Than Fair Value: Wooden Bedroom Furniture From the People's Republic of China, 69 FR 67313 (November 17, 2004) and accompanying Issues and Decision Memorandum at Comment 3.

financial statement should be used by the Department in the final determination, rather than the 2005-2006 financial statement, because the latter is more contemporaneous with the POI.

Department's position:

While we agree that we should use the more recent financial statement of Seshasayee (the April 1, 2006 through March 31, 2007 statement) in calculating the surrogate financial ratios, we do not find it appropriate to exclude from the calculation, data from Ballarpur's and JK Paper's financial statements which cover the period July 1, 2005, through June 30, 2006 (the POI covers the period April 1, 2006, through September 30, 2006). Although none of the periods covered by the financial statements in question correspond exactly with the POI, a portion of all of the periods covered by these statements is contemporaneous with the POI. Weighing this fact, with the Department's preference for averaging data from several acceptable surrogate companies to obtain more representative financial ratios, it would not be appropriate to reject Ballarpur's and JK Paper's financial statements based on contemporaneity.[20] As noted by petitioner, the cases cited by GE are not on point because they involve a decision as to which financial statements from a *single* surrogate company should be used. See, e.g., Mushrooms from the PRC, at Comment 5 ("the Department has determined that simply using Agro Dutch's and Flex Foods' 2005-2006 financial reports rather than also using these two Indian companies' 2004-2005 financial reports to derive the surrogate financial ratios is more consistent with the Department's practice in this respect"). Thus, these cases do not suggest, as GE argues, that the Department will reject otherwise suitable surrogate financial statements covering a period that overlaps a portion of the POI because it has an alternative statement that covers a period that includes the entire POI from *another* suitable surrogate company.

Moreover, as noted above, in determining the best information available with which to value factors of production, the Department considers several factors in addition to contemporaneity, including the quality and specificity, of the source information.[21] Ballarpur and JK Paper are Indian producers of merchandise that is identical to subject merchandise and the record contains two sufficiently detailed financial statements from these companies. In light of these considerations, we find that the rejection of these statements because they cover a period that only overlaps the POI is not warranted.

D) Use of Star Paper's Data to Calculate the Surrogate Financial Ratios

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[20] See Notice of Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp From the People's Republic of China, 69 FR 70997 (December 8, 2004) and accompanying Issues and Decision Memorandum at Comment 9F.

[21] See, e.g., Crawfish from the PRC, and accompanying Issues and Decision Memorandum at Comment 1.

Petitioner argues that the Department should include data from the financial statement of Star Paper, which it submitted after the Preliminary Determination, in its calculation of financial ratios. According to petitioner, Star Paper is a large, integrated pulp and paper producer that manufactures coated paper for typical CFS applications such as magazine printing.

GE, however, claims that Star Paper's financial statement is not an appropriate source for financial data. Noting that Star Paper's financial statement is not contemporaneous with any months of the POI, GE argues that the Department should use contemporaneous data in calculating the surrogate financial ratios. GE further argues that Star Paper does not indicate that it is a producer of merchandise identical to subject merchandise. Specifically, GE states that Star Paper's financial statement does not explicitly state that it produces CFS, rather it indicates that Star Paper is primarily a producer of industrial and "cultural papers" (i.e., products other than CFS) GE contends that CFS is only one of several kinds of products that can be described as "coated paper" or "cultural paper" and argues that using data from a producer of non-subject industrial and cultural paper as a surrogate is not appropriate. Additionally, GE argues that the production process of Star Paper, which produces its own pulp, renders it unrepresentative of GE.

Alternatively, GE argues that if the Department uses Star Paper's data as a surrogate, it should also use data from Rainbow Papers Limited (Rainbow) and Nath Pulp & Paper Mills Ltd. (Nath), which are also companies comparable to GE. [22] With respect to Rainbow, GE states that Rainbow's financial statement indicates that it manufactures and coats paper. GE further argues that its production of CFS from purchased pulp is more similar to Rainbow's production of paper from recycled materials[23] than it is to the production of Ballarpur and JK Paper, both of which produce CFS from self-produced pulp. With respect to Nath, GE argues that Nath is a producer of CFS that, like Rainbow, produces base paper predominately from recycled materials. GE further maintains that petitioner's argument that Nath is a sick company (a claim made in a submission filed prior to the Department's Preliminary Determination) is inaccurate, and should not be the basis for rejecting Nath's financial statement. Specifically, GE claims that the auditor's report does not declare Nath to be a sick company and that the Department has found

[22] Rainbow and Nath were among the eight companies whose financial statements were submitted to the Department by interested parties prior to the Preliminary Determination for consideration. The Department did not select either company as a financial surrogate in the Preliminary Determination.

[23]GE notes that petitioner submitted an affidavit that states that Rainbow's recycled paper was not used to produce CFS. See Petitioner's August 2, 2007 submission to the Department at 2, Exhibit 1. GE argues that even if the affidavit were correct, Rainbow's financials statements would still be representative of GE's production experience because the statements reflect the cost of producing and coating base paper.

that "sick" is an official term that is assigned to a company in accordance with Indian GAAP.[24] Furthermore, GE argues that, like the financial statement of Star Paper, the financial statements of Rainbow and Nath are not contemporaneous with the POI.

Department's position:

We disagree with petitioner. Star Paper's financial statement does not cover a period that is contemporaneous with the POI. Moreover, after reviewing Star Paper's financial statement, we cannot determine whether the company produces CFS. Thus, we have not used Star Paper's financial data to calculate the surrogate financial ratios.

Additionally, we have not used Rainbow's and Nath's financial data in our calculations (we note that GE's argument to use these financial statements is predicated on the Department's use of Star Paper's financial statement, a statement that we have rejected as noted above). Neither Nath's nor Rainbow's statement cover a period that is contemporaneous with the POI. Further, notwithstanding GE's argument that Nath is not classified as a sick company under Indian law, Nath's financial statement indicates that the company realized no profit during the period covered by the statement. The Department's practice is not to calculate financial ratios using financial statements that do not show a profit when statements showing a profit are available.[25] Additionally, we find that Rainbow's financial statement lacks the level of detail contained in other financial statements on the record of this investigation.

In light of the foregoing considerations, for this final determination, we have calculated the surrogate financial ratios using data from Seshasayee's 2006-2007 financial statement and JK Paper's 2005-2006 financial statement.

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[24] See Persulfates from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 70 FR 6836 (February 9, 2005) and accompanying Issues and Decision Memorandum at Comment 3.

[25] See Certain Frozen Warmwater Shrimp from the People's Republic of China: Notice of Final Results and Rescission, in Part, of 2004/2006 Antidumping Duty Administrative and New Shipper Reviews, 72 FR 52049 (September 12, 2007) (Shrimp from the PRC) and accompanying Issues and Decision Memorandum at Comment 2 ("the Department is hereby articulating and clarifying its practice with regard to the financial statements of zero/negative profit surrogate companies being used in the calculation of surrogate financial ratios for this and future reviews. In this review and in future investigations and reviews, the Department intends to use the financial statements of companies that have earned a profit if they are available and meet the Department's surrogate value selection criteria. ... In this and future reviews, we intend to disregard financial ratios with a zero profit when there are other financial statements of other surrogate companies that have earned positive profit on the record").

Comment 4: Whether to Adjust the Financial Ratios by Allocating Wages and Salaries Between Non-manufacturing and Manufacturing Expenses

The financial statements that are being used as surrogates do not separately report manufacturing and non-manufacturing labor expenses. Rather, they list a single line item for labor expenses under expenditures in the income statement. In the Preliminary Determination, the Department calculated the SG&A expense ratio by dividing SG&A expenses from the surrogate financial statements, by the companies' total manufacturing expenses (the sum of direct material and labor costs, energy costs, and factory overhead expenses). The Department included the full amount of each surrogate companies' wages and salaries expense in the denominator of its SG&A expense ratio.

Petitioner argues that because the surrogate companies do not segregate wages paid to factory workers from salaries paid to non-manufacturing employees, the Department's calculation understates the surrogate SG&A ratio by overstating the denominator by improperly including SG&A related administrative costs, and understating the numerator of the ratio by excluding these SG&A related costs. Petitioner contends that the Department should use data from the Government of India Labor Bureau's Annual Survey of Industries (ASI), that reflects the labor expenses incurred by Indian paper manufacturers, to allocate labor costs between manufacturing and non-manufacturing costs (i.e., SG&A costs).

Petitioner asserts that the Department has acknowledged that treating salaries and wages expense in surrogate financial statements as only a direct labor cost is a distortive methodology that understates financial ratios and argues that the Department has an obligation to develop a methodology that segregates manufacturing wages from non-manufacturing salaries in order to ensure the calculation of accurate dumping margins. Petitioner claims that the ASI is reliable and provides an unbiased means of calculating a ratio that the Department should use to segregate manufacturing wages from non-manufacturing wages.

Petitioner notes that the Department did not make this proposed adjustment in the Preliminary Determination, and has declined to make adjustments to surrogate financial statements in other cases because of concerns that such adjustments may introduce unintended distortions into the data.[26] However, petitioner notes that the Department has adjusted line items of surrogate financial statements to avoid distortions in other contexts.[27]

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[26] See WBF Amended Final and accompanying Issues and Decision Memorandum at Comment 26, and Polyethylene Retail Carrier Bags from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 72 FR 12762 (March 19, 2007) (PCRBs) and accompanying Issues and Decision Memorandum at Comment 3a.

[27] See e.g., Certain Hot-Rolled Carbon Steel Flat Products From Romania: Final Results of Antidumping Duty Administrative Review, 70 FR 34448 (June 14, 2005)(Hot-Rolled Steel from Romania).

Moreover, petitioner contends that the reasoning that led the Department to reject a similar proposed adjustment in PCRBs does not apply in the instant investigation because the ASI paper industry data are more specific and accurate than the data submitted in PCRBs. Petitioner notes that in PCRBs, the Department recognized its current methodology is distortive when it stated that "SG&A is understated when salaries and staff are not included in SG&A."[28] Petitioner further argues that ASI is the best and only source of information available to disaggregate the surrogate wages expense because none of the Indian surrogate companies' financial statements segregate manufacturing from non-manufacturing labor. Additionally, petitioner contends that there is adequate information on the record concerning the methods and procedures used to compile the data in the report to conclude that the source is appropriate. Moreover, petitioner argues that the paper product industry data covered by the ASI is narrowly defined and covers a limited range of products. Further, petitioner argues that the 2003-2004 ASI report is sufficiently contemporaneous because it is the most recent report. In light of the foregoing information, petitioner contends that the Department should adjust the surrogate financial data by allocating personnel expenses between manufacturing and non-manufacturing expenses.

In rebuttal, GE asserts that the Department should continue to reject petitioner's proposed allocation of wages as it has consistently done in past cases.[29] GE notes that the courts have upheld the Department's practice of using unadjusted financial statements once it has established that a surrogate company produced merchandise that is identical or comparable to subject merchandise. Further, according to GE, the Department has acknowledged that it has neither the authority nor the ability to dissect a surrogate company's financial statement[30] and that the Department's practice is to classify financial statement line items in accordance with the surrogate company's own treatment of the line items without making arbitrary adjustments.[31] GE notes that the Department rejected a proposal to make a similar adjustment in the WBF Amended Final because uncertainty about the costs incurred by surrogate producers made it impossible to be certain of the components of various line items in the financial statement.

GE contends that the Department should continue to find that ASI is not an appropriate data source for allocating wage expenses, in accordance with PCRBs and the WBF Amended Final. GE argues that the paper industry, as defined in ASI, is too broadly defined and includes, inter

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[28] See PCRBs and accompanying Issues and Decision Memorandum at Comment at Comment 3a.

[29] See e.g., PCRBs, and accompanying Issues and Decision Memorandum at Comment 3a; WBF Amended Final and accompanying Issues and Decision Memorandum at Comment 26.

[30] See WBF Amended Final and accompanying Issues and Decision Memorandum at Comment 26.

[31] See id., citing, e.g., Honey, and accompanying Issues and Decision Memorandum at Comment 3.

alia, the types of companies that the Department has declined to use as surrogate companies. GE claims it would be inconsistent to consider certain factors, inter alia, whether a company produces CFS, in selecting surrogate financial statements, and then disregard these factors in selecting data used to adjust the surrogate financial statements. Furthermore, GE argues that application of an ASI-derived allocation factor would create a distortion by assigning a portion of contract labor to the non-manufacturing portion of the labor expense.[32] In addition, GE argues that the Department should continue to find that ASI is an inappropriate data source because the data are not contemporaneous with the POI.[33] Finally, GE argues that the proposed adjustment is unwarranted because the Department has alternative means to address instances where SG&A labor is insufficiently reflected in normal value, such as requiring respondents to report SG&A labor separately.[34]

Department's position:

We disagree with petitioner. The Department has noted its preference for using financial statements of surrogate companies that produce merchandise that is comparable or identical to subject merchandise without making adjustments to individual line items in the financial statement.[35] As the Department has explained in past cases, because it does not know all of the components that contribute to the costs of a surrogate producer, it cannot be certain of the individual components which comprise the various line items in surrogate financial statements. Therefore, adjusting those statements may not make them any more accurate and indeed may only provide the illusion of precision.[36] This reasoning was explained in Pure Magnesium 2001 at 16446-7 as follows:

> While the petitioners may argue that the magnitude of these costs is understated, we have not attempted to make an adjustment to account for this difference because we are unable to make similar and corresponding adjustments to other costs which may have been overstated. Thus, we

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[32] See WBF Amended Final and accompanying Issues and Decision Memorandum at Comment 26.

[33] See id.

[34] See Tapered Roller Bearings and Parts Thereof, Finished or Unfinished, From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review and Notice of Intent To Rescind in Part, 71 FR 40069 (July 14, 2006).

[35] See, e.g., WBF and accompanying Issues and Decision Memorandum at comment 26.

[36] See Final Determinations of Sales at Less Than Fair Value: Pure Magnesium and Alloy Magnesium From the Russian Federation, 60 FR 16440 (March 30, 1995) (Pure Magnesium 1995) at 16446-7; see also Rhodia, Inc. v. United States, 240 F. Supp. 2d 1246, 1250-1251 (CIT 2002) (Rhodia).

> disagree that making such an adjustment would yield a more accurate result and indeed could introduce unintended distortions into the data.[37]

In the instant investigation, we find no reason to depart from the Department's established practice of using surrogate companies' financial statements without making adjustments to individual line items. Although, as noted by petitioner, the Department did adjust surrogate financial statements in Hot-Rolled Steel from Romania, this appears to be an exception to the Department's practice. Prior to the Department's decision in Hot-Rolled Steel from Romania, the CIT stated, "this decision {to refrain from adjusting the Indian surrogate producers' data} is consistent with Commerce's normal practice because Commerce does not generally adjust the surrogate values used in the calculation of factory overhead."[38] As recently noted in the antidumping duty investigation involving activated carbon from the PRC, this remains the Department's practice:

> the Department has determined that it should not ... attempt to adjust the surrogate financial ratios to remove non-production electricity or labor. Although the surrogate-company ratios may contain energy consumed for factory overhead and SG&A in the MLE denominator, we do not find that making such an adjustment yields a more accurate result. Indeed, such an adjustment could introduce unintended distortions into the data. Moreover, both the CIT and the Federal Circuit have affirmed that the Department does not generally adjust the surrogate values used in the calculation of factory overhead.[39]

Moreover, in Hot-Rolled Steel from Romania, the surrogate financial statement selected by the Department had such limited details regarding the company's factory overhead that the Department could only identify one overhead expense – depreciation. Given this extreme fact pattern, the Department concluded that significant overhead costs were missing and an adjustment needed to be made. This extreme situation is not present in the instant investigation as both the factory overhead and SG&A ratios used here are based on numerous expenses.

Further, even if it were appropriate to make the adjustment proposed by petitioner, we have concerns about using ASI data to make the adjustment in this case. The ASI data, which are based on information from 3,560 Indian paper producers, are not specific to the CFS industry.

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[37] See Final Determinations of Sales at Not Less Than Fair Value: Pure Magnesium From the Russian Federation, 66 FR 49347 (September 27, 2001) (Pure Magnesium 2001) and accompanying Issues and Decision Memorandum at Comment 2.

[38] See Rhodia, 240 F. Supp. 2d 1246, 1250.

[39] See Final Determination of Sales at Less Than Fair Value: Certain Activated Carbon from the People's Republic of China, 72 FR 9508 (March 2, 2007) and accompanying Issues and Decision Memorandum at Comment 6.

The proffered ASI industrial paper producer data combines the data of, inter alia, the manufacturers of "dolls from pulp," "paper hoops and cones," "paper mache articles," "sacks and paper bags," and, "hard board including false board and chip board."[40] Given the wide range of producers reflected in the data, we cannot conclude that a wage allocation factor derived from this source would accurately reflect the experiences of CFS producers. Furthermore, petitioner's proposed use of an ASI-derived allocation factor would create a distortion by assigning a portion of contract labor to the non-manufacturing portion of the labor expense.[41] Lastly, as was the case in WBF, we find that the 2003-2004 ASI report is not an appropriate source to use to adjust surrogate financial statements in this case because it is not contemporaneous with the POI.[42] For the foregoing reasons, we have not segregated the labor costs in the surrogate financial statements between manufacturing and non-manufacturing expenses using ASI-derived ratios proposed by the petitioner in calculating the surrogate financial ratios.

Comment 5: Whether to Adjust the Financial Ratios by Allocating "Stores and Spares" Expenses Between Direct Material Costs and Overhead Expenses

Petitioner contends that while the "stores and spares" account in the surrogate companies' financial statements includes direct materials (i.e., chemicals used in producing pulp and paper and coating paper), it also includes overhead expenses. Therefore, according to petitioner, including the entire balance of this account in the denominator of the overhead ratio, as the Department did in the Preliminary Determination, understates the ratio. Petitioner requests that the Department adjust the surrogate financial statements to correct this distortion. Specifically, petitioner argues that the Department should use Star Paper's[43] ratio of "stores and components consumed" to total "chemicals and dyes consumed" as the basis for segregating direct and indirect (overhead) material costs in the "stores and spares" accounts in the financial statements used to calculate the surrogate financial ratios. Further, petitioner argues that its proposed adjustment to the surrogate financial statements is consistent with Department practice in instances where a surrogate company fails to disaggregate certain line items in its financial statements.[44] Petitioner notes that the distortion it has identified is compounded because the Department excluded certain factors of production (FOPs) from GE's database because it considered them to be overhead items. Thus, petitioner argues that if the Department does not

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[40] See petitioner's May 11, 2007 submission to the Department at Exhibit 10.

[41] See WBF, and accompanying Issues and Decision Memorandum at Comment 26.

[42] See WBF, and accompanying Issues and Decision Memorandum at Comment 26.

[43] Petitioner notes that Star Paper is the only integrated Indian company that disaggregates "chemicals and dyes consumed" from "stores and components consumed."

[44] See, e.g., Certain Hot-Rolled Carbon Steel Flat Products From Romania: Final Results of Antidumping Duty Administrative Review, 70 FR 34448 (June 14, 2005) and accompanying Issues and Decision Memorandum at Comment 7.

make the adjustment to the "stores and spares" accounts in the surrogate financial statements, it must value all of the FOPs that were reported by GE as overhead items.

GE maintains that the Department has declined to adjust surrogate financial data in the past and instead uses a surrogate company's financial statement without making further adjustments once it has established that the company produces merchandise that is identical or comparable to subject merchandise.[45] GE further argues that petitioner's proposal to allocate the "stores and spares" expenses of each surrogate company between direct and indirect (overhead) costs using Star Paper's ratio of "stores and components consumed" to total "chemicals and dyes consumed" would be distortive because much of the chemicals consumed by Star Paper were consumed in pulp production, a chemical intensive process. Also, GE points out that petitioner acknowledges that the "stores and spares" account includes raw material costs because petitioner advocates allocating only a portion of the "stores and spares" expense to overhead while allocating the remainder to raw materials. Moreover, GE notes that petitioner treated the "stores and spares" account as part of direct materials, rather than an overhead expense, in its petition in this case.

GE states that the cases cited by petitioner in which the Department adjusted the financial statement data of surrogate companies, involve instances where the Department had limited usable financial statements and the only appropriate surrogate financial statement lacked non-depreciation overhead expenses. In the instant investigation, GE asserts, the Department has adequate surrogate financial statements on the record that include non-depreciation overhead expenses, and, therefore, no adjustment to the surrogate financial statements is warranted.

Finally, GE argues that there is no indication that the FOPs which it claims are overhead items that should not be separately valued, would necessarily be the types of materials whose cost is included in the "stores and spares" account in the surrogate financial statements. According to GE, it is more likely that the cost of these FOPs is included in the maintenance expenses (which is an overhead item) listed in the surrogate financial statements. Therefore, GE urges the Department to reject petitioner's argument that it should include these FOPs in its margin calculation if it does not make the proposed adjustment to the "stores and spares" account.

Department's position:

We disagree with petitioner. As noted in our position to the previous issue, the Department avoids adjusting individual line items in surrogate financials statements because such adjustments may introduce unintended distortions into the data under the guise of increasing

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[45] See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Honey From the People's Republic of China, 66 FR 50608 (October 4, 2001) (Honey) and accompanying Issues and Decision Memorandum at Comment 3; and Amended Final Results of Antidumping Duty Administrative Review and New Shipper Reviews: Wooden Bedroom Furniture From the People's Republic of China, 72 FR 46957 (August 22, 2007) (WBF Amended Final) and accompanying Issues and Decision Memorandum at Comment 26.

accuracy.[46] Echoing this position, in a new shipper review of brake rotors from the PRC, the Department stated that "{t}he statute does not require the Department to value each individual element in a non-market economy case. As the Court of International Trade noted, the Department is not required to do an item-by-item analysis in calculating factory overhead."[47]

Further, even if it was appropriate to make the adjustment proposed by petitioner, we have concerns about using Star Paper's data to make the adjustment in this case. It is not clear that Star Paper's operational experience would reflect that of CFS producers given that we cannot determine from the record whether Star Paper produces CFS. See Comment 1in this memorandum. Therefore, in calculating surrogate financial ratios, we have not adjusted the "stores and spares" accounts in the surrogate financial statements.

With respect to petitioner's argument that the certain FOPs that were excluded from the Department's margin calculation should be valued for the final determination, we have addressed this issues in a separate comment. See Comment 6 in this memorandum.

Comment 6: Whether to Value Certain Materials Claimed to be Overhead Expenses

According to GE, certain materials that it reported as factors of production should not be valued because they are indirect materials that were used for machine maintenance and were not physically or chemically incorporated into CFS. GE alleges that diagrams presented, as well as interviews conducted, during verification support finding that these materials were used for cleaning and machine maintenance. See Verification Exhibit 18. Also, GE claims that Exhibit 1 of the Department's surrogate value memorandum supports its position because it contains information indicating, for one of the materials at issue, that it is used for machine maintenance. In addition, GE notes that in the Preliminary Determination, the Department excluded other cleaning and equipment maintenance materials from its normal value calculation because it considered such materials to be overhead items. Moreover, GE claims that in Malleable Iron Pipe Fittings from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 71 FR 37051 (June 29, 2006) and accompanying Issues and Decision Memorandum at Comment 16 (Pipe Fittings from China), the Department recognized that minor inputs should be treated as indirect materials and not separately valued because they are already captured in the overhead ratio calculated from the surrogate financial statements. Thus, GE urges

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[46] See Shrimp from the PRC and accompanying Issues and Decision Memorandum at Comment 2 ("Because the Department cannot adjust the line items of the financial statements of any given surrogate company, we must accept the information from the financial statement on an "as-is" basis in calculating the financial ratios").

[47] See Brake Rotors From the People's Republic of China: Final Results of the 12th New Shipper Review, 71 FR 4112 (January 25, 2006) and accompanying Issues and Decision Memorandum at Comment 3.

the Department to treat the materials at issue as overhead items rather than valuing them as separate, factors of production.

Not separately valuing these materials would be distortive, according to petitioner, because currently the surrogate overhead ratio does not reflect such materials. Specifically, petitioner notes that because the "stores, spares, and chemicals" account of the surrogate Indian paper producers includes direct chemicals consumed in pulp, paper, and coating operations, the Department preliminarily included the whole account in the denominator of the overhead ratio, thereby understating overhead expenses in the numerator of the ratio and lowering the surrogate overhead ratio. Thus, petitioner contends that the reasons for not valuing minor materials in Pipe Fittings from China (because they were captured in the overhead ratio) does not apply here. Therefore, petitioner contends that the Department should allocate the "stores, spares, and chemicals" account between direct and overhead materials and recalculate the overhead ratio or value the materials at issue.

Department's position:

We agree, in part, with petitioner. For the reasons noted by petitioner, in the Preliminary Determination, the Department included the entire balance of the "stores, spares, and chemicals" accounts in the surrogate financial statements in the denominator, rather than the numerator, of the factory overhead ratio. Thus, expenses for chemicals used for cleaning or machine maintenance that may have been recorded in the "stores, spares, and chemicals" accounts are not reflected in the factory overhead ratio. However, the financial statement of one of the surrogate companies used to calculate the factory overhead ratio, Seshasayee, contains a "Repairs and Maintenance - Machinery" account that the Department included in the numerator of the factory overhead ratio. This account may reflect expenses for chemicals used in maintaining machines. Based on the foregoing, unless it was clear from the record that a particular chemical was used in maintaining machines,[48] we separately valued the chemicals at issue because such chemicals do not appear to be reflected in the surrogate factory overhead expense.[49]

Comment 7: Whether to Value Self-Produced Electricity Used to Produce Electricity

During the POI, GE generated all of the electricity that it consumed. GE used a number of factors, including coal, chemicals, water, labor and *self-produced* electricity to generate electricity. In the Preliminary Determination, the Department calculated the per-unit value of

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[48] We did not, however, consider chemicals that were used to clean machines in order to facilitate production, rather than maintain machinery in good repair, to be related to machine maintenance.

[49] See Pacific Giant Inc. v. United States, 223 F. Supp 2d 1336, 1346 ("because Commerce could not know whether the respondents included water cost in their factory overhead, Commerce reasonably determined to value water separately").

GE's self-produced electricity based on the quantity and surrogate value of the inputs used to produce electricity (the Department valued the self-produced electricity consumed in producing electricity using electricity rates from the International Energy Agency).

GE maintains that in calculating the per-unit value of self-produced electricity, the Department should not assign a cost to the self-produced electricity consumed in producing electricity because the cost of this reintroduced electricity is already captured in the cost of the other factors of production used by GE to produce electricity. Thus, GE argues that valuing the electricity input in self-produced electricity inappropriately double counts the cost of self-generated electricity. In support of its argument, GE cites Mittal Steel Galati S.A. v. United States, Slip Op. 07-110 (Ct. Int'l Trade July 18, 2007) at 13-14 (quoting Department's brief) (Mittal Steel), in which the Department acknowledged that it does not typically assign a surrogate value to recycled products because the factors used in producing the recycled by-products have already been reported. GE notes that at verification, the Department found no evidence that GE used purchased electricity. Accordingly, GE argues that, consistent with the Department's practice, the amount of self-generated electricity that is reintroduced into the electricity production process should be valued at zero.

Petitioner contends that the Department should value the self-produced electricity consumed in producing electricity because to do otherwise would not account for the fact that more than one unit of electricity must be generated for every unit of electricity transferred to divisions outside of the electricity division (i.e., in effect there is a yield loss). Petitioner notes that the unit cost of the electricity that was used in paper making does not reflect the yield loss because it was calculated by dividing the total costs incurred to generate electricity (based on the consumption quantities reported for the factors used in generating electricity) by the total output of electricity (including electricity that was used to produce electricity). Thus, the full costs required to produce electricity are not all assigned to the electricity transferred to divisions outside of the electricity division (e.g., the paper making facilities). Therefore, petitioner maintains that the Department must value the self-produced electricity consumed in producing electricity. Additionally, petitioner claims the Department's practice is to value self-generated electricity used in the production of electricity.[50] Alternatively, if the Department does not value the self-produced electricity input, petitioner argues that the Department must account for the yield loss by increasing the consumption quantities reported for all of the inputs (except electricity) used to produce electricity by the yield rate or reallocate all costs incurred in producing electricity only to the electricity transferred to divisions outside of the electricity division.

Department's position:

We agree with both parties, in part. We agree with GE that using a surrogate source to value the self-produced electricity that was used to generate electricity would overvalue the cost of this input because the factors of production reported for electricity generation already include factors

[50] See PVA.

used to produce the reintroduced electricity. Thus, valuing these factors would already account for at least some of the costs of the self-produced electricity used to generate electricity. Nevertheless, we agree with petitioner that the amount of electricity reintroduced by GE in self-producing electricity amounts to a yield loss because, although this electricity has been generated, it is consumed not in producing subject merchandise, but in generating electricity. As petitioner noted, GE allocated inputs used in the production of electricity over the total amount of electricity generated, including the electricity reintroduced into the process of generating electricity. This allocation methodology does not account for the electricity yield loss, as it allocates the consumption of inputs over the total amount of electricity produced; not over the electricity consumed in the production of subject merchandise. Accordingly, to ensure that the inputs consumed in the production of electricity account for the yield loss reflected in the reintroduced electricity, for purposes of the final determination, we have allocated the quantity of each of the inputs consumed in producing electricity over the net amount of electricity produced (i.e., the total amount of electricity produced, less the amount of electricity reintroduced by GE in producing electricity). This approach is similar to the Department's treatment of scrap inputs in cases involving steel (i.e., we do not value scrap reintroduced into production of steel and we assign all cost of production to good output).

Comment 8: Whether to Value Steam That is a By-Product of Self-Produced Electricity

GE argues that the Department should not value the steam that it used in production, as it is a by-product of self-generated electricity, the inputs of which were reported fully to the Department. Specifically, GE notes that while the Department used an Indian natural gas value and a natural gas-steam conversion ratio to value steam in the Preliminary Determination, it did not purchase steam or use natural gas to convert to steam. GE maintains that the Department verified the quantities of steam generated and consumed and there was no evidence that the steam it used was supplied from a source other than the electricity production. Further, GE cites CIT and Departmental precedents in which the Department did not value recycled materials or allow a credit for by-products to the extent that the respondent could demonstrate the amount of by-product actually sold or reused.[51] Accordingly, GE argues that in order to avoid double-counting

[51] See Notice of Final Determination of Sales at Less Than Fair Value: Mittal Steel, Steel Concrete Reinforcing Bars from the People's Republic of China, 66 FR 33522 (June 22, 2001) and accompanying Issues and Decision Memorandum, at Comment 5; Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Silicon Metal from the Russian Federation, 67 FR 59253, 59263 (September 20, 2002); Notice of Final Determination of Sales at Less Than Fair Value: Chlorinated Isocyanurates from the People's Republic of China, 70 FR 24502 (May 10, 2005) and accompanying Issues and Decision Memorandum at Comment 6; Preserved Mushrooms from the People's Republic of China: Preliminary Results and Partial Rescission of Fifth Antidumping Duty Administrative Review, 70 FR 10965, 10976 (March 7, 2005); and Final Determination of Sales at Less Than Fair Value: Certain Hot-Rolled Carbon Steel Products from the People's Republic of China, 66 FR 49632 (September 28, 2001).

the cost of self-generated electricity, the Department should not assign a surrogate value to the amount of the steam it used in production.

Petitioner maintains that there is no evidence that the cost of generating steam that is used in papermaking has already been fully captured in the factor usage rates reported for generating energy. Accordingly, petitioner requests that the Department continue to assign a surrogate value to steam as it did in the Preliminary Determination.

Department's position:

We agree with GE. The Department verified that all of the steam used by GE in papermaking was generated by GE while producing electricity. See GE's Verification Exhibit 15. Thus, contrary to petitioner's assertion, the cost of the steam used will be fully captured by valuing the factors of production used in generating electricity. Moreover, we note that the Department's practice is not to value by-products reused in production. Therefore, based on verification findings and consistent with the Department's practice, we did not value the steam by-products used to produce subject merchandise.

Comment 9: Whether to Value Certain Inputs used in Treating Water

Petitioner urges the Department to increase the surrogate value of water to account for the unreported inputs used to treat water that were discovered at verification. Specifically, petitioner requests that the Department use the usage rates for these inputs obtained at verification and surrogate value information on the record to value the inputs that were used in pre- and post-production processes to treat water.

However, GE contends that, consistent with Department practice, water treatment chemicals should not be valued as factors of production because they are more accurately described as overhead items. GE notes that in the most recent case in which the classification of water treatment inputs was at issue, the Department determined not to value water treatment chemicals and instead classified these items as overhead expenses to avoid the possibility of double counting the value of these chemicals (citing Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Polyvinyl Alcohol From the People's Republic of China, 68 FR 13674 (March 20, 2003) (Polyvinyl Alcohol). GE further contends that the Department will only value water treatment chemicals where these chemicals are "not used infrequently or in trace amounts" (citing Potassium Permanganate From the People's Republic of China: Notice of Final Results of Antidumping Duty Administrative Review, 66 FR 46775 (September 7, 2001) (Potassium Permanganate) and accompanying Issues and Decision Memorandum at Comment 22). GE further states that the even when the Department has decided to value water treatment chemicals, it will not assign surrogate values to certain chemicals when it cannot find surrogate values for these chemicals and when these chemicals constitute an insignificant portion of the total cost of production (citing Notice of Final Determination of Sales at Less Than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products

From Kazakhstan, 66 FR 50397 (October 3, 2001) (HRS from Kazakhstan) and accompanying Issues and Decision Memorandum at Comment 13)).

Additionally, GE argues that the surrogate value for water used by the Department, which is derived from the Maharastra Industrial Development Corporation (MIDC) data, already reflects the value of water treatment. In support of its argument, GE notes that the MIDC website states that it "supplies treated potable water to all industrial units."

Lastly, GE contends that the Department should not value inputs used to treat post-production wastewater. GE contends that, similar to the inputs used to treat post-production industrial wastes like slag, the inputs used to treat wastewater should not be assigned a value.

Department's position:

We agree with petitioner, in part. The record indicates that chemically treated water is used for more than incidental purposes, is required for production, and is a significant input in the production process (i.e., it is used in significant quantities).[52] Faced with similar facts in other cases, the Department valued water as a separate factor of production.[53] Here, the water to be valued is water that has been treated for use in producing paper. Therefore, the Department finds that the appropriate surrogate value for the treated water is one that captures not only the water value but the factors of production used by GE in treating water. We do not agree with GE's argument that the Indian surrogate value for water used by the Department already captures the cost of treatment simply because the surrogate value source indicates that it "supplies treated potable water to all industrial units." The American Heritage Dictionary defines "potable" as "fit to drink" (Houghton Mifflin Company, 1983). GE has not demonstrated that its chemical water treatment process produces water that is comparable to the chemically treated potable drinking supplied by the MIDC. Therefore, the Department is not persuaded by GE's argument that the value of GE's water treatment is reflected in the surrogate value for water.

Additionally, the cases cited by GE to support its assertion that the chemicals used to treat water should be not valued because they are included in overhead, are factually dissimilar to the instant investigation. After noting in HRS from Kazakhstan, that "chemicals used to treat the water for use in the blast furnace . . . were still inputs that should have been reported," the Department

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[52] See, e.g., GE's June 13, 2007 section D supplemental questionnaire response at Exhibit 7, which contains the per-unit consumption of water.

[53] See Freshwater Crawfish Tail Meat from the People's Republic of China; Notice of Final Results of Antidumping Duty Administrative Review and New Shipper Reviews, and Final Partial Rescission of Antidumping Duty Administrative Review, 66 FR 20634 (April 24, 2001) and accompanying Issues and Decision Memorandum at Comment 7 (Department valued water, noting that the process of producing "subject merchandise requires large quantities of water, and this is clearly different from water used by a company for incidental purposes").

separately valued those chemicals, with the exception of chemicals for which it could not find an appropriate surrogate value (noting that such chemicals appear to constitute an insignificant portion of the total cost of production). Similarly, in Potassium Permanganate, after finding that "water is a critical input in the production of potassium permanganate" and that "untreated river water cannot be used in the production process" the Department valued water treatment chemicals where surrogate value information was available. Thus, while it is true that in HRS from Kazakhstan and Potassium Permanganate from the PRC the Department did not value certain water treatment chemicals where no surrogate value information was available, it is clear that the Department valued water treatment chemicals where possible. GE's reliance on Polyvinyl Alcohol is also misplaced, because in that case the Department had a concern that water treatment chemicals may have been captured in the surrogate financial ratios. In the instant investigation, however, the expenses classified as factory overhead in the surrogate financial statements are limited to personnel, repairs, and maintenance expenses. Therefore, the value of water treatment chemicals is not included in the surrogate financial ratios, and the concern that the value of these chemicals may be double counted does not arise. Accordingly, the Department is not persuaded by GE's claim that Department precedent precludes valuing the inputs used by GE to treat water used in production.

However, we agree with GE's assertion that it is not appropriate to value the post-production inputs used to treat water prior to discharge. As GE correctly asserts, the treatment of wastewater occurs after production and, accordingly, the inputs used to treat discharged water should not be treated as factors of production because they are not used in production but used for purposes incidental to the production process.[54]

In light of the foregoing considerations, for the final determination, we have valued the inputs used to treat water used by GE to produce CFS, but will not value inputs used to treat wastewater.

Comment 10 Whether GE Incorrectly Reported the Unit Price of Certain Purchases

GE requests that the Department correct the market-economy unit prices of two chemicals that were incorrectly reported in RMB rather than U.S. dollars (the currency in which the purchases were made). In support of its request, GE claims that since the Department was able to verify prices for pulp in the market economy purchases worksheet, a worksheet that contains the prices for the two chemicals in question, it should accept the correction to the price reported for these two chemicals.

[54] See, e.g., Pacific Giant, Inc v. United States, 223 F. Supp. 2d 1336, 1346 (CIT 2002), where the court examined whether an input was used for more than incidental purposes in deciding whether to treat the input as a factor of production.

Petitioner argues that there is no indication that the Department verified such revisions; nor has GE presented any documentation on the record to substantiate its proposed revisions. Accordingly, petitioner requests that GE's argument be rejected.

Department's position:

We have decided to correct the prices in question for the final determination. Prior to verification, GE identified the currency error in the market-economy prices that it is asking the Department to correct.[55] While the Department did not examine the corrections at verification, this is not a basis for rejecting the corrections. A comprehensive examination of every piece of information at verification is neither practical nor realistic.[56] Thus, we do not agree with petitioner's position that because there is no indication that the Department examined the corrections, they should be rejected. Moreover, the Department did verify a number of the market-economy purchase prices reported by GE and found no pattern of misreported prices. Accordingly, the Department will use GE's corrected prices for the two chemical inputs in the final determination.

Comment 11: Whether the Department Erred in Calculating the Value of a Self-Produced Input

Petitioner argues that, in its preliminary calculation of GE's normal value, the Department excluded the value of water in its valuation of a certain self-produced input. Petitioner urges the Department to include the value of water that was consumed in the production of this self-produced input in its normal value calculation for this final determination.

GE agrees with petitioner that the Department's margin program did not include the value of water used to produce the input in question and should be corrected for the final determination.

Department's position:

We agree with both parties and revised the final calculations to capture in normal value the value of water consumed in the production of the self-produced input in question.

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[55] See GE's June 13, 2007, submission, at 11 and Exhibit 9.

[56] See Polyethylene Retail Carrier Bags from Thailand: Final Results of Antidumping Duty Administrative Review, 72 FR 1982 (January 17, 2007) and accompanying Issues and Decision Memorandum, at Comment 2 (noting that "{v}erification is not intended to be a test of every line of information and data submitted because an examination would be unrealistic").

Comment 12: Whether Certain Pulp Purchases Should be Treated as Market-Economy Purchases

GE claims that, in preparation for verification, it discovered that certain purchases of LBKP and NBKP, that had been previously reported as purchases from NME suppliers were actually purchases from market economy suppliers, in market economy countries, and paid for in a market economy currency.[57] Accordingly, GE requests that the Department consider the purchases of the pulp as market economy purchases (MEP), and use the actual price paid for NBKP and LBKP, instead of the surrogate value. GE notes that the inclusion of the additional purchases of NBKP and LBKP, to what GE had already reported as MEPs for these two inputs, would result in more than 33% of GE's total NBKP and LBKP purchases from market economy sources. In support of its request, GE maintains that these additional quantities of LBKP and NBKP were purchased based on arrangements with market-economy suppliers. According to GE, the information collected at verification documents the link between such arrangements with the market economy pulp suppliers and the individual purchase transaction documents issued by GE through local PRC trading companies to the pulp suppliers. In support of its claim, GE refers to Verification Exhibit 11, which, GE asserts, includes documents linking such arrangements to certain purchase records. For details, see the memorandum "Comments and Department of Commerce's Positions Containing Proprietary Information" (Proprietary Memorandum) dated concurrently with this memorandum. In addition, GE indicates that its role in the pulp purchases involving the market economy suppliers and the PRC trading company supports its claim that these are market economy purchases. For further details, see the Proprietary Memorandum.

In the verification report covering GE, the Department stated that it found no reference to the cited arrangements in any of the purchase documents between CU and the PRC trading companies.[58] GE argues that the Department's above-referenced statement may reflect a misunderstanding of how the purchase transactions for GE's LBKP and NBKP occur. GE claims that the Department appears to have incorrectly assumed that only a specific reference to the arrangements can be used to link the arrangements negotiated with the market economy suppliers, and the individual purchase transactions. According to GE, the arrangements at issue provide only general terms regarding the purchase of pulp. GE argues that such arrangements do not have specific identifiers that need to be referenced in subsequent purchase transactions to link the arrangements to the transactions. GE further argues that it would be unreasonable for the Department to expect that every subsequent pulp purchase refer to a specific item that identifies the arrangements in order to substantiate the existence of such arrangements. In support of its argument, GE maintains that the Department has recognized that framework contracts that lack definition of material terms of sale (such as price) are not binding contracts for purposes of definition of a "sale." Corus Staal BV v. United States, Slip Op. 06-112 (Ct. Int'l Trade July 25,

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[57] See GE's June 13, 2007 submission, at 5-6, Exhibit 17.

[58] See GE's June 13, 2007 submission and Verification Exhibit 11 of the August 24, 2007 Verification Report covering GE.

2006) at 7-14. Accordingly, GE argues that it would be unreasonable to require companies to refer to non-binding agreements when subsequently drafting the binding purchase contracts that do contain all material terms of sale. However, GE contends that the subsequent pulp purchases made by GE through China Union and the PRC trading companies are contingent upon the cited arrangements with the suppliers. This, according to GE, is demonstrated by certain aspects of the pulp purchases. See the Proprietary Memorandum for details.

Additionally, GE argues that the Court of International Trade has recognized that it is impermissible to reject potential market economy import prices merely because the purchase transaction involved a PRC trading company.[59] Accordingly, GE maintains that a purchase through PRC trading companies is not automatically ineligible for treatment as a market economy purchase just because the trading company is located within China. GE also cites Timken Co. v. United States, in which the CIT found that "Commerce's decision to use the PRC trading company's import steel price as a surrogate data for {certain PRC producers} is reasonable, is in accordance with law and is in accord with the statutory provisions to determine antidumping margins as accurately as possible."[60] In support of its argument, GE notes that 19 C.F.R. § 351.408 (c)(1) provides that where an input is "purchased from a market economy supplier and paid for in a market economy currency, the Secretary normally will use the price paid to the market economy supplier." GE further argues that the CIT has noted that the term "supplier" is open to interpretation because it arguably could either mean 'vendor' or 'producer."[61] GE argues that there is no dispute that its purchases of NBKP and LBKP originated from market economy countries, and that, in light of the Department's emphasis on the country of origin, the Department should find that GE's NBKP and LBKP purchases were market economy purchases.

Petitioner argues that GE has failed to provide sufficient evidence to support its requested revision, stating that the Department noted in its verification report that it ". . . found no contract reference number on any of the purchase documents that linked the {cited arrangements} to the

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[59] See Luoyang Bearing Factory v. United States, 26 CIT 1156, 1171, 240 F. Supp. 2d 1268, 1248 (2002) ("The Court finds that Commerce's refusal to review PRC trading company import prices and to determine whether that data constituted the best available information for purposes of the FOP analysis was unreasonable").

[60] Timken Co. v. United States, 26 CIT 434, 201 F. Supp.2d 1316, 1335 (2002).

[61] See Polyethylene Retail Carrier Bag Committee v. United States, Slip Op. 05-157 (Ct. Int'l Trade December 13, 2005) at 47. See also Polyethylene Retail Carrier Bags from the People's Republic of China, 69 FR 34125 (June 18, 2004) (Comment 4) (citing Antidumping Duties; Countervailing Duties; Final Rule, 62 FR 27296, 27366 (May 19, 1997), in which the Department cited the preamble to 19 C.F.R. § 351.408 (c)(1) for interpreting this regulations as applying to "those inputs that were produced in a market economy country."

purchases by CU that involved PRC trading companies." For details, see the Proprietary Memorandum.

Department's position:

We disagree with GE. The record shows that GE purchased the pulp at issue from trading companies located within the PRC; and not directly from the market economy supplier. GE's claim that its purchases of pulp were pursuant to arrangements with market economy suppliers, and that the trading companies were merely used as a financier for the purchases is not supported by record evidence. Contrary to GE's claim, we do not find that record evidence links the arrangements in question and the respondent's purchase of the pulp at issue from the PRC trading companies. Record evidence indicates that the PRC trading companies are the parties dealing with the market economy suppliers in the transactions at issue; not GE or its affiliates (due to the proprietary nature of this evidence, see the Proprietary Memorandum for details). Further, there is no evidence that the respondent placed its order with the market-economy suppliers, as evidence indicates the respondent contracts with the PRC trading companies, is invoiced by the trading companies, and pays the PRC trading companies, not the market-economy suppliers. In addition, we do not find that the record supports certain links, noted by GE, between the cited arrangements and the purchases at issue (see the Proprietary Memorandum). For the above-referenced reasons, we find that the record does not support GE's claim that the purchase of the pulp at issue was made pursuant to arrangements with market-economy suppliers. Accordingly, we have not considered the pulp purchases at issue to be purchases from market-economy suppliers but purchases from PRC trading companies. Because the Department's practice is not to use actual input prices based on purchase transactions between entities within the PRC, we did not grant GE's request to treat the pulp purchases as market-economy purchases. Thus, the Department has continued to value the pulp purchases at issue using Indian Import statistics.

Furthermore, we disagree with GE that Luoyang Bearing and Timken Co. v. United States apply to the fact pattern in this investigation. The issue in the instant case relates to whether the purchase of an input from a PRC entity constitutes a market-economy purchase, whereas, the issue in Luoyang Bearing and Timken Co. v. United States relates to the appropriate surrogate value for an input.

Comment 13: Whether it is Appropriate to Value Labor Using the Expected Wage Rate Calculated by the Department

GE argues that the regression-based calculation used by the Department to determine the PRC wage rate for the Preliminary Determination is flawed because it relies upon wage data from countries that are not economically comparable to the PRC. GE points out that the Department's surrogate value methodology is intended to value factors of production as if the NME producer were located in a country that is economically comparable to the PRC. Yet, GE notes that there is a disparity between the calculated PRC wage rate and the wage rates of countries that are

economically comparable to the PRC.[62] Moreover, GE claims that the Department's regression methodology is flawed and does not accurately estimate wage rates for any of the countries that are economically comparable to the PRC because it consistently overstates wage rates for lower income countries. GE notes that the Department's wage rate calculation methodology is currently subject to litigation in multiple cases before the U.S. Court of International Trade (CIT).[63] Accordingly, GE requests that, in the final determination, the Department recalculate a surrogate labor rate that accurately reflects the wages of countries that are economically comparable to the PRC.

Petitioner argues that the Department has consistently rejected such arguments because the statute does not require limiting the regression analysis solely to economically comparable countries.[64] Moreover, petitioner argues that such a limitation would lead to distorted results.[65] According to petitioner, GE has not presented any new arguments that would cause the Department to reverse its position on this issue.

Department's position:

We disagree with GE. The Department's regression formula, when applied to the non-market country's per-capita gross national income (GNI), enables the Department to determine the labor wage rate of a market economy country at a level of development comparable to that of the NME country. Thus, economic comparability is established in the regression calculation through the use of the GNI of the NME country in question. Therefore, the regression analysis ensures that the resulting wage rate represents a wage rate for a country that is economically comparable to the NME country. The CIT recognized this fact in Dorbest Ltd., et al. v. United States, 462 F. Supp. 2d 1262 (October 31, 2006), noting that "Commerce's calculation, at least in theory, produces a hypothetical wage rate for the PRC, which is therefore by definition a wage rate for a producer country at a comparable level of development, as required by {section 773(c)(4) of the Act}."[66]

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[62] E.g., India, Sri Lanka, Egypt, Indonesia, and the Philippines.

[63] See Wuhan Bee Healthy Co., Ltd. v. United States, Slip Op. 07-113 (Ct. Int'l Trade July 20, 2007); Taian Ziyang Food Co., et. al. v. United States, Slip Op. 06-160 (Ct. Int'l Trade October 31, 2006); Taian Ziyang Food Co., et. al. v. United States, Consol. Ct. No. 05-0399 (DOC filed redetermination on December 5, 2005, after requesting voluntary remand to reconsider surrogate labor wage rate).

[64] See Issues and Decision Memorandum, Amended Final Results of Antidumping Duty Administrative Review and New Shipper Review: Wooden Bedroom Furniture from China, 72 FR 46957 (August 22, 2007), at Comment 2.

[65] Id.

[66] See Dorbest, 462 F. Supp. 2d at 1293.

Moreover, the Department previously noted that restricting the basket of countries used in the regression analysis to only those countries that are economically comparable to the NME country would undermine the consistency and predictability of the Department's regression analysis.[67] A basket of "economically comparable" countries could be extremely small. Many NME countries have GNIs under or around US $1,000. The PRC has a GNI of US $1,500. Among the countries whose data were used to calculate the revised 2004 expected NME wage rate, there are only three countries with GNI less than US $1,000, five countries with GNI between US $1,000 and US $2,010, and eight countries with GNI less than US $2,010. The countries listed above would result an extremely small basket of countries for use in determining expected NME wage rates. The smaller the number of countries included in the basket, the more likely that data from any one country could have a distortive effect on the results of the regression analysis. As the Department previously noted, "more data is better data," and a regression based on an extremely small basket of countries would be highly dependent on each and every data point, which would defeat the reason the Department uses International Labor Organization (ILO) data to determine wage rates. See Antidumping Methodology Notice.

It is also worth noting that relative basket size would not be such a critical factor if there were a perfect correlation between GNI and wage rates. If this were the case, data from only two countries would be sufficient to calculate a precise regression line. However, while there is a strong worldwide relationship between wage rates and GNI, there is nevertheless variability in the data.[68] This inevitable variability in the underlying ILO data is especially true in the case of countries with a low GNI, where wage rates can be so low that even a difference of a few cents can appear to be enormous if represented in percentage terms.

Furthermore, we disagree with GE's claim that the Department's regression analysis consistently overstates wage rates for lower income countries. The Department addressed the same claim in a recent proceeding involving pencils from the PRC and stated the following:

> It is important to note that the Department's regression-based methodology is used to estimate wage rates based on a country's GNI and no estimation methodology can ever produce perfect wage rates. As with any estimate based on a pool of data, some data points will fall above the estimate, and some data points will fall below the estimate.

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[67] See Antidumping Methodologies: Market Economy Inputs, Expected Non-Market Wages, Duty Drawback; and Request for Comments, 71 FR 61716, 61720 (October 19, 2006) (Antidumping Methodology Notice).

[68] For example, in the data relied upon in the Department's revised 2004 expected NME wage rate calculation, observed wage rates did not increase in lockstep with increases in GNI in the three countries with GNI less than US$1,000. For example: Nicaragua, with a GNI of US$830, had reported a wage rate of US$0.85 per hour, Mongolia, with a GNI of US$600, had reported a wage rate of US$0.41 per hour, and India, with a GNI of $630, had a wage rate of US$0.13 per hour. " See http://ia.ita.doc.gov/wages/04wages/04wages-010907.html.

> Examining the results of the Department's regression-based methodology using 2004 data shows the following: (1) the wages predicted for 23 of the 58 countries included in the model lie *above* the regression line, i.e., the regression line "underestimates" these wage rates; (2) even confining the analysis to those economies classified by the World Bank in 2004 to be low-income economies (USD 825 or less) and lower-middle income economies (between USD 825 and USD 3,255), i.e., the two classifications that encompass all of the economies identified by the Department as non-market economies, seven out of 16 wage rates fall above the regression line (are "underestimated"). This indicates that the Department's regression-based methodology does not distort or systematically overestimate general wage rates or the wage rates of lower income countries. Rather, the regression line serves to smooth out the differences in the reported wage rates.[69]

Therefore, we have continued to value labor using the same regression-based analysis employed in the preliminary determination.

Comment 14: The Appropriate Surrogate Value For A Ground Calcium Carbonate Input

According to GE, the Department inappropriately valued the input that it ground to produce ground calcium carbonate, using the value of processed calcium carbonate even though GE reported that it ground unprocessed limestone/calcium carbonate fragments in rock form into a granular form. Thus, GE maintains the Department should value the calcium carbonate/limestone fragments used to produce ground calcium carbonate (GCC) using Indian import statistics for "limestone flux; limestone & other calcareous stone used for manufacture of lime/cement."

Petitioner argues that GE's records and the information collected during verification[70] prove that GE used marble, rather than limestone, to produce GCC and that it deliberately misled the Department regarding the nature of this input by not properly identifying the input[71] (see the Proprietary Memorandum for details). Thus, petitioner argues that GE's action is not merely a case of negligence, where the respondent simply failed to cooperate by not acting to the best of its ability with a request for information, but is a deliberate attempt to deceive the Department. Therefore, petitioner urges the Department to employ an adverse inference in selecting a surrogate value for this input. Specifically, petitioner requests that the Department value the input using the highest per-unit value for any individual eight-digit Indian Harmonized Tariff

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[69] See Certain Cased Pencils from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 72 FR 27074 (May 14, 2007) and accompanying Issues and Decision Memorandum at Comment 6.

[70] See Verification Exhibit 17 of GE's Verification Report.

[71] Id. at 5.

Schedule (HTS) number within headings 2509 (chalk), 2515 (marble), 2521 (limestone), and 2836 (carbonates), as partial adverse facts available. Alternatively, if the Department does not base the value of the input on adverse facts available, petitioner maintains the Department should value the input using Indian import statistics for rough marble. Petitioner notes that the information discovered at verification regarding the use of marble is consistent with other record information (see the Proprietary Memorandum).[72]

GE dismisses petitioner's request for the use of adverse facts available. According to GE, it referred to the GCC input as calcium carbonate fragments in most of its submissions; rather than "marble" or "limestone" because it considered the input as the "calcium carbonate source." While GE notes that it later attempted to clarify the nature of the input by describing it as "calcium carbonate fragments/limestone," it never attempted to change the reported factor from "calcium carbonate fragments" to "limestone." Moreover, GE claims its use of the Chinese word for marble in its records is simply a reference to a material that is chemically equivalent to limestone and thus could appropriately be translated as limestone, which has an industrial connotation, rather than marble, which could be confused with a broader range of materials not comparable to the input that it used. Further, notwithstanding its use of the Chinese word for "marble" in its records, GE believes its calcium carbonate fragments are more like limestone. Thus, GE contends that petitioner overreacted with its claim that GE ". . . actively and deliberately attempted to deceive the Department," and requests that the Department dismiss petitioner's request for the use of partial adverse facts available.

In addition, GE rejects petitioner's suggested import category because it does not use marble for construction applications, yet petitioner's import category covers "marble, travertine and other calcareous *monumental or building stone* ... whether or not roughly trimmed or merely cut, by sawing or otherwise, into blocks or slabs of a rectangular (including square) shape."[73] Further, GE states that a report issued by the U.S. Department of the Interior, U.S. Geological Survey (USGS) indicates that petitioner's import category is for "dimensional stone" that is used for building and construction applications.[74] GE notes that the USGS report explains that ". . . most dimension stone has been used in construction applications ... ."

Furthermore, GE claims that limestone/marble that is used for construction or monumental applications will have a higher value than limestone/marble that is processed to produce lime, cement, paper filler, or other industrial applications. GE contends that this is the case because cracks or other physical flaws that adversely impact the physical integrity of the limestone/marble will reduce the value of that limestone/marble for building purposes. In contrast, GE adds, limestone/marble that is merely being ground or processed to produce ground calcium carbonate,

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[72] See Exhibit 5 of petitioner's August 2, 2007, rebuttal surrogate value submission.

[73] See GE's August 10, 2007 submission at 6-9.

[74] See Exhibit 2 of GE's August 10, 2007, submission.

lime, cement or other industrial chemical does not need to maintain a physical shape because it is valued according to its purity level. Thus, GE argues that petitioner's proposed Indian import category should not be used to value the calcium carbonate fragments that it grinds to produce GCC.

Moreover, GE cautions against focusing on the labels "marble" and "limestone" in selecting the appropriate import category with which to value the calcium carbonate fragments that it used. GE contends that the terms for "limestone" and "marble," both in English and Chinese, have overlapping scientific and commercial descriptions. Specifically, GE states that both limestone and marble are calcareous stones that contain calcium carbonate that is desired for paper filler. Additionally, GE notes that Webster's New World Dictionary, Third College Edition, describes marble as "a hard crystalline or granular, metamorphic limestone ...". GE maintains that the fact that "marble" is defined by reference to "limestone" illustrates the confusion that can result by trying to distinguish a product as being "marble" or "limestone." GE contends that the important consideration in producing GCC is that the input, whether marble or limestone, be a calcium carbonate material containing a calcite crystal structure with purity levels satisfactory to process into GCC. In this case, GE argues that even if it did use the calcareous stone marble to produce GCC, this input should be valued based on Indian imports of "limestone flux; limestone and *other calcareous stone*, of a kind used for the manufacture of lime stone or cement," because the paper making process is more like the process of making lime than it is to monumental or building applications.

Petitioner argues that, contrary to GE's attempt to conflate the meaning of the words "limestone" and "marble," the fact is that "limestone" and "marble" are not the same. Petitioner points to record evidence indicating that limestone goes through a metamorphosis, with high pressure, heat and time creating marble."[75] Petitioner maintains that this process results in limestone and marble having different characteristics that can be important in the manufacture of GCC. For additional information, see the Proprietary Memorandum.

Moreover, petitioner disputes several of GE's assertions. First, petitioner states that GE cites no record evidence in support of its assertion that marble for construction has a higher quality and value than marble used to make GCC. Petitioner contends that record information shows there may be additional color and brightness considerations that would require that marble used in papermaking have an even higher quality than that used for certain building applications. Second, petitioner finds no basis for GE's claim that the marble used to make GCC should be valued using the import category for "limestone and other calcareous stones, of a kind used for the manufacture of lime or cement" simply because marble is a "calcareous stone." Petitioner contends that the marble GE used to make GCC does not fall within this import category because it is not used for the manufacture of lime or cement; nor does GE suggest that it converts marble into lime or cement before using it to make GCC. Therefore, petitioner argues that if the

[75] See Exhibit 2 of GE's August 13, 2007 surrogate value reply letter.

Department does not employ an adverse inference, it should, at minium, value this input under the HTS subheading for rough marble (i.e., 2515.11.00).

Department's position:

For the following reasons, we valued the input in question using the HTS subheading for marble that was suggested by petitioner. First, GE's records, including the documents that the Department collected at verification, identify the input used to produce GCC as marble. Second, although the HTS category proposed by petitioner covers rough marble for construction or monumental applications, there is no record evidence indicating, as suggested by GE, that marble for construction applications is higher in value than the GCC input used. In fact, record evidence regarding certain characteristics of the marble purchased by GE is at odds with GE's argument (see the Proprietary Memorandum for details). See GE's March 26, 2007, submission, at Exhibit 4. Further, certain record information provided by petitioner calls into question GE's contention that marble for construction applications is higher in value than the GCC input it used (see the Proprietary Memorandum for details).[76] Third, the HTS category proposed by GE does not appear to be specific to the input used, as it covers limestone flux and limestone & other calcareous stone *that are used for manufacture of lime/cement*. Therefore, for purposes of the final determination, we valued the input that GE ground to make GCC using the Indian HTS category for crude or roughly trimmed marble because we have determined that this is the best information available on the record for valuing the input.

We have not used adverse facts available to value the input that is ground to make GCC because we do not believe there is a basis for doing so. The Department uses facts available, where necessary information is not on the record or when an interested party withheld requested information, failed to provide timely information in the form or manner requested, significantly impeded a proceeding, or provided information that cannot be verified. Here, the necessary information is on the record, and GE did not withhold requested information, fail to provide timely information in the manner requested, or provide information that cannot be verified. Moreover, during the course of this investigation, GE provided the Department with purchase records for the GCC input at issue which identify the input (in Chinese) as marble.[77] While at times GE translated the name of the input on these documents as "calcium carbonate"[78] or indicated that the input is limestone, GE provided the requested purchase records identifying the input as marble. Thus, we find that GE cooperated with the Department's requests for information and did not significantly impede the proceeding. Additionally, in the same verification exhibit in which petitioner alleges GE attempted to deliberately mislead the Department by not properly identifying the input, GE provided the Department with translations

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[76] See Exhibit 5 of petitioner's August 2, 2007 rebuttal surrogate value submission.

[77] See, e.g., GE's March 26, 2007 submission at Exhibit 4, page 1.

[78] See Id.

of company records in which it identified the input in question as marble.[79] Therefore, we have not based the value of the marble used by GE on adverse facts available.

Comment 15: The Appropriate Surrogate Value for a Proprietary Material

According to petitioner, there are several different Indian HTS subheadings that could cover a certain material used by GE; however, it is not clear which HTS subheading applies because GE failed to sufficiently describe the material. Nonetheless, petitioner notes that a certain reference in Exhibit 19 of the verification report covering GE alludes to a characteristic of the material which indicates that the material should be valued using the HTS number it has proposed. See the Proprietary Memorandum for details.

GE argues that petitioner's claim is based on a misreading of the record. Specifically, GE asserts that it demonstrated at verification that it used a specific form of the material in its production of an intermediate input. GE further maintains that it reported to the Department the form of this material and how this material is used to produce the intermediate input. Accordingly, GE argues that from its description of how the material is used in production, it is clear that it did not use the form of the material alleged by petitioner. Therefore, GE requests that the Department continue to value this input using the Indian HTS number used by the Department in the Preliminary Determination. For details, see the Proprietary Memorandum.

Department's position:

We agree with GE. GE submitted information demonstrating how the material was used to produce an intermediate input. See Exhibit 5 of GE's April 11, 2007 submission. Based on this information, we find that the material does not appear to be in the form alleged by petitioner. Furthermore, the references in the verification exhibit cited by petitioner are listed under a "Work in Process" heading. Hence, these references could refer to the material after processing. Accordingly, since record evidence does not warrant changing the surrogate used to value this material, we have continued to value the material using the Indian HTS category that was used in the Preliminary Determination. For additional information, see the Proprietary Memorandum.

Comment 16: The Appropriate Surrogate Value for a Proprietary Material

Petitioner and GE disagree as to the appropriate Indian HTS category to use to value a certain material. The arguments center around the composition of the material at issue. Because the name and composition of the material in dispute are proprietary, we have summarized the arguments in the Proprietary Memorandum.

Department's position:

[79] See Verification Exhibit 17 of GE's Verification Report.

We agree with petitioner. Due to the proprietary nature of this issue, our position is outlined in the Proprietary Memorandum.

Comment 17: The Appropriate Surrogate Value for Hydrochloric Acid

GE argues that the Department should value hydrochloric acid using Indian Chemical Weekly prices, rather than Indian import prices, because Indian import data for hydrochloric acid are aberrational in comparison with U.S. import data for this acid. GE claims that, in other cases, the Department valued hydrochloric acid using Indian Chemical Weekly prices, recognizing that Indian import statistics do not provide a legitimate value for hydrochloric acid.[80] Moreover, GE notes that the Chemical Weekly value for hydrochloric acid during the POI, 5.55 Rs./kg., is consistent with the Chemical Weekly values derived for hydrochloric acid in other cases (4.01 Rs./kg in Hand Trucks, 3.48Rs./kg in Helical Spring Lock Washers, and 3.71 Rs./kg in Carbazole Violet Pigment). GE notes that in the Preliminary Determination, the Department valued hydrochloric acid at 124.83 Rs./kg using Indian import data.

Petitioner asserts that the Department should reject GE's argument because GE failed to perform the necessary benchmark comparisons to demonstrate that Indian import data for hydrochloric acid are aberrational compared to import data from other countries.

Department's position:

We agree with GE that Indian Chemical Weekly is the appropriate source to use to value hydrochloric acid in this case. When selecting surrogate values, it is the Department's practice to use data that represent a market price that does not appear to be distorted.[81] We note that the Department has expressed its preference for using data reflecting imports by potential surrogate

[80] See Hand Trucks and Certain Parts Thereof From the People's Republic of China: Final Results of Administrative Review and Final Results of New Shipper Review,, 72 FR 27287 (May 15, 2007) (Hand Trucks) and accompanying Issues and Decision Memorandum at Comment 8 (citing Certain Helical Spring Lock Washers from the People's Republic of China; Preliminary Results of Antidumping Duty Administrative Review, 69 FR 64903, 64905 (November 9, 2004) (Helical Spring Lock Washers)) and Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Carbazole Violet Pigment 23 From the People's Republic of China, 69 FR 35287, 35292 (June 24, 2004) (Carbazole Violet Pigment).

[81] See Saccharin from the People's Republic of China: Final Results of the 2005-2006 Antidumping Duty Administrative Review, 72 FR 51800 (September 11, 2007) (Saccharin from the PRC) and accompanying Issues and Decision Memorandum at Comment 2.

countries, rather than U.S. import statistics, to benchmark surrogate values.[82] However, such import data are not on the record. Nonetheless, the Department's recent experience in Hand Trucks, in which the Department found Chemical Weekly to be the appropriate source to value hydrochloric acid, supports using Chemical Weekly to value hydrochloric acid in the instant investigation. In the instant case, the Chemical Weekly value for hydrochloric is 5.55 Rs./kg while the average Indian import value is 124.83 Rs./kg. In Hand Trucks, the Chemical Weekly value for hydrochloric was 4.0091 Rs./kg while the average Indian import value was 124.49 Rs./kg. Thus, faced with similar values for hydrochloric acid in Hand Trucks, the Department determined that Chemical Weekly was the appropriate surrogate source. Accordingly, we have used Chemical Weekly data to value hydrochloric acid in this final determination.

Comment 18: The Appropriate Surrogate Values For Other Paper Chemicals

GE contends that to the extent the Department does not treat certain other paper chemicals as part of overhead, it should value the chemicals using the Indian HTS category for "agents of a kind used in the paper industry" rather than the purportedly more specific HTS categories used in the Preliminary Determination (see the Proprietary Memorandum for a list of the other paper chemicals in dispute). According to GE, CBP ruling letters on the record support its position. Specifically, GE notes that CBP ruling letter HQ 965797 explains that the HTS heading it proposes using is a *principal use* provision, which according to the explanatory notes referenced in the ruling,[83] covers products and preparations used in processing and finishing yarn, fabric, *paper*, paperboard, leather, or similar materials, not specified or included elsewhere (EN 38.09).[84] Given that the principal use of the chemicals in question is paper making, GE contends

[82] See Saccharin from the PRC and accompanying Issues and Decision Memorandum at Comment 2 ("While in the past the Department has used U.S. prices to benchmark surrogate values, as suggested by Shanghai Fortune, the Department's current practice has been to benchmark surrogate values against imports from the list of potential surrogate countries for a given case, if available").

[83] Explanatory Notes (EN) of the Harmonized Commodity Description and Coding System.

[84] GE maintains that EN 38.09 identifies the following types of paper industry products covered by the "agents of a kind" HTS category: (1) binders used to bind pigment particles in the coating mixture; (2) sizing agents or additives used in paper processing to improve printability, smoothness and loss, and to impart writing properties; and (3) wet-strengthening agents used to increase tensile, tearing, and bursting strength, and to increase resistance to abrasion.

that the chemicals should be valued using the "agents of a kind" HTS category.[85] Moreover, GE indicates that CBP ruling letter HQ 95081calls into question the HTS category used to value two of its inputs (see the Proprietary Memorandum) because the ruling explains that "Advantage 52B Defoamer," a nonionic surfactant, should be classified under the "agents of a kind" HTS category and not HTS 3402.13.

Petitioner asks the Department to reject GE's argument. Petitioner argues that there is no reason to use a basket-category to value these chemicals because the Indian HTS subheadings used by the Department to value these chemicals in the Preliminary Determination were specific to the chemicals.

Department's position:

We agree with petitioner. We found no basis to value the chemicals at issue using the "agents of a kind" HTS category proposed by GE. GE cites EN 38.09 which indicates that the "agents of a kind" HTS category covers a wide range of products used during processing paper that are "not specified or included elsewhere in the Nomenclature."[86] Yet, GE failed to provide specific reasons why each of the chemicals in question could not be included elsewhere under other HTS categories. Aside from two of the chemicals at issue, GE never attempted to explain how the CBP rulings, which were based on lab tests, and the chemical compositions and descriptions of *specific products*, demonstrated that the chemicals in question should not be valued using the HTS categories used in the Preliminary Determination. With respect to two of the chemicals, GE notes that CBP ruled that "Advantage 52B Defoamer," a nonionic surfactant, should be classified under the 'agents of a kind" subheading rather than an HTS heading used in the Preliminary Determination (see the Proprietary Memorandum). However, this CBP ruling is for a specific brand of defoamer with a specific chemical composition (i.e., 5 percent silica, 2.5 percent of ethyl-bis-stearamide, and 92.5 percent of paraffin oil), that was found to meet the requirements for classification under the "agents of a kind" HTS category. Based on GE's description of these two inputs,[87] it appears that the HTS headings used by the Department in the Preliminary Determination would cover these two inputs (see the Proprietary Memorandum). With respect to the other chemicals at issue, as noted above, GE never explained how the CBP rulings called into question the specific HTS categories used to value the chemicals in the Preliminary Determination. Therefore, we have continued to value the chemicals using the HTS

[85] GE points out that the General Rules of Interpretation (GRI) 1, which govern the classification of merchandise, require classification be determined first by the terms of the headings and any relative section or chapter notes.

[86] See GE's brief at 35.

[87] See Exhibit 2-a of GE's June 13, 2007 submission.

categories that correspond to GE's descriptions of these inputs, and that are supported by GE's own records.

Comment 19: The Appropriate Surrogate Value For Steam Coal

Given record evidence that Indian paper producers use significant amounts of domestic coal, GE claims the Department should value coal using domestic coal prices from Coal India Ltd. (CIL) rather than Indian import statistics.[88] Although petitioner argued against using CIL prices because they reflect government regulation and do not represent the entire Indian coal sector, GE notes that the CIT has rejected similar arguments in Wuhan Bee Healthy Co., Ltd. v. United States, Slip Op. 05-142 (CIT 2005) (Wuhan Bee) (noting that Teri data (derived from CIL prices) appear to cover many regions in India and the Department did not demonstrate that Teri data are unrepresentative of competitive market prices throughout India). In response to the CIT's ruling in Wuhan Bee, GE notes that on remand, the Department determined that it was appropriate to use Teri data that are obtained from CIL (which produces 80 percent of India's coal), explaining that the Teri data are representative of prices throughout India, published, and publicly-available.[89] Moreover, GE adds that in numerous NME cases, the Department has accepted domestic Indian prices for coal and natural gas, despite claims that the prices were government regulated or not representative of country-wide prices.[90] Also, GE notes that in the instant Preliminary Determination, the Department valued natural gas using GAIL data which reflect a floor/ceiling price system similar to that used by CIL. Therefore, GE urges the Department to value its coal using prices from the CIL website for coal similar to the coal GE uses, basic run of mine non-long-flame non-coking coal, grades B through F.

Petitioner argues that the Department should continue using import data to value coal because record evidence indicates that CIL's prices are not competitive market prices, and that Indian paper producers do use imported coal. Specifically, unlike the CIT case cited by GE where the Department failed to demonstrate that Teri data are unrepresentative, petitioner points to record evidence that CIL and its subsidiaries are wholly-owned by the central government, and that CIL

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[88] See JK Paper Ltd.'s 2005-2006 financial statement, at 19.

[89] See Final Results of Redetermination Pursuant to Remand for Hebei Metals & Minerals Import & Export Corp. v. United States, dated July 20, 2005, at 8-9.

[90] See Polyvinyl Alcohol from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 71 FR 27991 (May 15, 2006) (where the Department used Teri data to value coal and GAIL data to value natural gas even though GAIL caps its prices) and Saccharin from the People's Republic of China: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 71 FR 7515 (February 13, 2006)(where the Department used Teri data to value coal).

coal prices,[91] which have not changed since June 2004, fail to reflect market forces (e.g., shortages).[92] In addition, asserts petitioner, India's Ministry of Coal acknowledges being involved in coal pricing for the power sector and in suggesting coal pricing for other sectors.[93] Moreover, claims petitioner, half of the coal consumed by J. K. Paper is imported coal. Thus, petitioner contends that import prices do represent the prices paid by Indian paper producers for coal.

Nevertheless, should the Department decide to use CIL prices, petitioner contends that there is no basis for using a simple average price for grades B through F. Petitioner argues that, in this case, GE failed to provide the heat value of the coal it uses as proof of the grade of coal used and, as in previous cases, when respondent failed to identify the grade it uses, the Department should value coal using the highest CIL price, Rs. 2,130/MT (Rs. 1,870/MT as a base price plus Rs. 260/MT for other charges).

Department's position:

We agree with GE, in part. Section 773(c)(1) of the Act states that "the valuation of the factors of production shall be based on the best available information regarding the values of such factors. . .". In choosing the most appropriate surrogate value from publicly available information, the Department's practice is to consider several factors, including the quality, specificity, and contemporaneity of the data.[94] The CIL data provided by GE include prices for various grades of coal. Given that there is information on record to determine the grade of coal used by GE (contrary to petitioner's claim),[95] the CIL data are a better surrogate source, in terms of specificity, than Indian import statistics. In terms of quality, we note that the CIL data, for the types of coal at issue, are identical to Teri data, which have been used by the Department to value

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[91] Additionally, petitioner notes that, in fact, GE did not place Teri data on the record but submitted the CIL web page price list, a source previously rejected by the Department.

[92] See Petitioner's August 2, 2007, submission at Exhibit 3.

[93] See id. at Exhibit 4.

[94] See Notice of Final Determination of Sales at Less Than Fair Value, and Affirmative Critical Circumstances, In Part: Certain Lined Paper Products From the People's Republic of China, 71 FR 53079 (September 8, 2006) and accompanying Issues and Decision Memorandum at Comment 1; see also Brake Rotors From the People's Republic of China: Final Results of the Twelfth New Shipper Review, 71 FR 4112 (January 25, 2006) and accompanying Issues and Decision Memorandum at Comment 2.

[95] See GE's March 26, 2007, submission at Exhibit 6 and June 13, 2007, submission at Exhibit 2.a.

coal in a number of proceedings.[96] Regarding petitioner's claim that CIL's prices are not competitive market prices, although the Department has expressed concerns regarding the monopolistic structure of the coal industry in India, in recent cases it has determined that Teri steam coal prices are appropriate because they are "representative of the coal industry throughout India." While the CIL prices are not contemporaneous with the POI, we are able to adjust the prices to POI prices using Indian whole sale price indices (WPI) published in selected issues of the International Financial Statistics by the International Monetary Fund.

Lastly, we have not valued coal using prices for the grades suggested by GE or the highest CIL price suggested by petitioner, as the relevant issue here involves the kind of coal GE uses, not what is used in the paper industry. GE's own description of the coal and its purchasing records indicate the specific grades of coal that it used, and thus we valued coal using prices for these grades.[97]

Comment 20: The Appropriate Surrogate Value for Certain PET Packing Materials

Petitioner requests that the Department value two of GE's polyethylene terephthalate (PET)-based packing materials using Indian import data for flexible PET material, rather than rigid PET material because, although GE never stated whether these packing materials are flexible or rigid, they must be flexible to serve their packing function (e.g., shrink wrapping subject merchandise).

GE asserts that petitioner is incorrect. Specifically, GE contends that the record contains pictures showing that the packing material in question is not shrink wrap but the plastic banding strip used to bind together paper on a pallet. GE claims the plastic banding strip should be characterized as rigid because it must be strong enough to hold together an entire pallet of material and presumably has a modulus of elasticity greater than 100,000 psi. Therefore, GE argues, the Department should continue to value PET sheet using the Indian HTS subheading for

[96] See Saccharin from the People's Republic of China: Final Results of the 2005-2006 Antidumping Duty Administrative Review, 72 FR 51800 (September 11, 2007) and accompanying Issues and Decision Memorandum at Comment 3; see also Notice of Amended Final Determination of Sales at Less than Fair Value and Antidumping Duty Order Pursuant to Court Decision: Lawn and Garden Steel Fence Posts from the People's Republic of China, 72 FR 32835 (June 14, 2007) (the CIT sustained the Department's final results of redetermination in which the Department determined that Teri Data were the best source of a surrogate value for coal because the data were complete, comprehensive (in that it cover all sales of all types of coal made by Coal India Limited and its subsidiaries), and exclusive of duties and taxes).

[97] See GE's March 26, 2007, submission at Exhibit 6 and June 13, 2007, submission at Exhibit 2.a.

PET sheet, rigid. As an alternative, GE proposes using Indian HTS subheading 3923.90.90, which was used to value plastic banding in polyethylene retail carrier bags from the PRC.[98]

Department's position:

Information that would permit the Department to determine whether the PET packing materials in question are rigid or flexible is not on the record. In section D of the antidumping questionnaire, the Department requested that GE "describe each type and grade of material, as appropriate, used in the packing process."[99] In subsequent supplemental questionnaires, the Department twice requested that GE describe, in detail, its packing materials.[100] In response to the Department's requests, GE identified the packing materials at issue as materials used to "bind the paper" and identified one of the materials as the bands used to secure CFS on pallets. GE also suggested valuing the bands using Indian import data for rigid PET material. However, GE never provided the Department with any information that would allow it to identify the PET packing materials at issue as flexible or rigid.

In addition, we note that the descriptions for the Indian HTS categories proposed by petitioner and GE do not identify the criteria used (e.g., quantitative measurements of tensile strength, or product deformation) to classify PET materials as either flexible or rigid. Thus, neither petitioner's argument that the PET material is flexible because it wraps around the product, nor GE's assertion that the PET material is rigid because it must secure the CFS, is persuasive because there is no evidence that such considerations are entertained in classifying PET materials as flexible or rigid in Indian HTS statistics. Also, GE has not supported its claim that its plastic bands "presumably have a modulus of elasticity greater than 100,000 psi," or demonstrated that modulus of elasticity is considered in classifying PET materials as flexible or rigid.

Therefore, due to GE's reporting failure, the information needed to determine whether the materials at issue are flexible or rigid is not on the record. Additionally, GE's failure to report the requested information, despite the fact that it possessed records regarding the PET packing materials, indicates a lack of cooperation on its part. Therefore, pursuant to sections 776 (a)(1) and (b) of the Act (use of facts available when necessary information is not on the record and use of adverse inferences due to failure to cooperate to the best of its ability), we find it appropriate

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[98] See Polyethylene Retail Carrier Bags from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 72 FR 12762 (March 19, 2007).

[99] See page D-10 of section D of the Department's antidumping duty questionnaire.

[100] See the Department's March 26, 2007 supplemental questionnaire at question 1 (requesting GE to provide a "description {for each factor of production} that allows classification under the Harmonized Tariff Schedule;" and see the Department's April 24, 2007 supplemental questionnaire at question 11 (requesting GE to provide a "clear description of each of the packing factors").

to value the PET packing materials using the higher of the import value for flexible or rigid PET material.

Comment 21: The Appropriate Surrogate Value for a Proprietary Material

GE argues that the Department used the wrong surrogate to value a certain packing material for which GE has claimed proprietary treatment. According to GE, the packing material should be valued using Indian import data for a certain type of material rather than Indian import data for folding cartons, boxes, and cases of non-corrugated paper and paperboard. See the Proprietary Memorandum for details.

Petitioner argues that the Department should reject GE's argument because GE failed to cite any record evidence to support its assertion. See the Proprietary Memorandum for details.

Department position:

We agree with petitioner. Despite multiple requests from the Department that it describe, in detail, its packing materials,[101] GE, for the first time in this investigation, now claims in its brief that the packing material in question is unlike the material reflected by Indian import data for folding cartons, boxes, and cases of non-corrugated paper and paperboard . GE has cited no record evidence to support its assertion. Moreover, prior to the Preliminary Determination, GE suggested that the Department value its this packing material using an Indian HTS category for boxes of corrugated paper or paperboard, an HTS category very similar to the one used by the Department in the Preliminary Determination (a category that GE now maintains is incorrect). We do not find it appropriate to revise the surrogate value based on GE's unsupported assertion. Accordingly, the Department will continue to value the packing material in question using the Indian HTS category used in the Preliminary Determination. See the Proprietary Memorandum for details.

Comment 22: How to Account for Certain Unreported Expenses

Petitioner asserts that the unreported expenses discovered at verification in a number of accounts of GE's U.S. affiliate, GPS, should be allocated to all of GPS' reported sales and deducted as additional movement expenses. Petitioner notes that such expenses were composed almost entirely of the types of expenses that should have been reported to the Department. See the Proprietary Memorandum, dated concurrently with this memorandum, for a discussion of these expenses. Petitioner points out that the Department confirmed that these expenses relate to sales of GE's merchandise and, thus, GE should not be permitted to argue that some portion of these expenses relate to non-subject merchandise. Further, petitioner contends that GE failed to act to

[101] See section D of the Department's antidumping duty questionnaire at page D-10; the Department's March 26, 2007, supplemental questionnaire at question one; the Department's April 24, 2007, supplemental questionnaire at question 11.

the best of its ability to report these expenses; hence, the Department should employ an adverse inference, to the extent any such inference is required, by concluding that these expenses relate solely to GE's reported sales.

While GE acknowledges that its U.S. affiliate, GPS, incurred certain unreported expenses related to sales of subject merchandise, it argues that the Department incorrectly identified certain expenses as unreported expenses and/or incorrectly identified the actual amount of the expenses that GPS incurred. First, GE argues that the expenses in account 5530-01 were already reported as "warranty expenses" in the U.S. sales database. As proof of its claim, GE points out that a line item in account 5530-01, which lists a specific invoice number, corresponds to a reported expense listed in Exhibit 15 of its June 13, 2007 submission. Moreover, GE maintains that it already reported transaction-specific warranty expenses. Since the Department verified that GE reported transaction-specific warranty expenses, GE argues that it would be inappropriate to add to those reported expenses the period-specific expenses in account 5530-01 because this would double-count warranty expenses.

Second, GE claims that the commission expense in account 5540-01, should not be treated as an unreported expense because this expense does not relate to a U.S. sale of its merchandise. GE contends that Exhibit 10 of the Department's GPS verification report includes documentation that shows that GPS incurred the commission expense for a sale to a company located outside the United States.

Third, GE claims that the Department should not have added the negative amounts listed in account 1120 to the account's balance to determine the total amount of unreported expenses in the account. Specifically, GE contends that most of the negative figures in the account that the Department incorrectly assumed, based on the account name, to be payments of U.S. charges were actually amounts for inter-company reimbursements, which were properly excluded from GE's reported expenses. According to GE, this explanation is consistent with the way expenses were recorded in other GPS accounts that were fully and accurately reported in the U.S. sales database.

Because the Department's practice is to ignore inter-company transfers,[102] GE argues that such inter-company reimbursement transactions should not be treated as selling expenses related to U.S. sales of subject merchandise. Further, GE holds that adding these reimbursements to the account balances would double-count the expenses actually incurred by GPS.

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[102] See Notice of Final Determination of Sales at Less Than Fair Value and Final Determination of Critical Circumstances: Diamond Sawblades and Parts Thereof from the Republic of Korea, 71 FR 29310 (May 22, 2006) (noting that "we disagree with the petitioners that these inter-company expenses should be included in the calculation of U.S. indirect selling expenses because selling expenses are incurred when selling to external customers, not transfers between affiliates").

Lastly, GE claims that sub-account 1140-01 includes amounts for rebates and another proprietary expense (see the Proprietary Memorandum) that should not be subtracted from U.S. sales prices. In particular, GE notes that the rebate amounts have already been fully reported in the U.S. sales database and reviewed at verification. See Exhibit 10 of GPS' Verification Report. Moreover, GE claims the proprietary expense at issue appears to be unrelated to movement of subject merchandise. GE notes that Exhibit 1 of its rebuttal brief identifies the expenses that should be deducted from U.S. sales prices and contains a ratio it suggests multiplying by sales prices to derive the amount to deduct.

Department's position:

We agree, in part, with both parties. With the exception of rebates, the record does not support GE's claims that certain of the expenses listed in the accounts at issue were already reported in the U.S. sales database. There is no basis for concluding that the rebates in the accounts at issue were unreported because the Department verified that GE reported rebates equal to the per-unit rebates specified in rebate agreements, and found, on a selective basis, that GPS' rebate payments reflect the rebates in those agreements.[103] However, contrary to GE's claim, the record does not demonstrate that the line item in account 5530-01 cited by GE is fully accounted for in the "corresponding" line item in its warranty expense chart. The amounts of these two line items differ and thus the specific line-item in the account could be an additional expense not reported by GE. Moreover, there is no evidence that the other expenses in account 5530-01 were not necessarily additional expenses that were not reported to the Department. Further, although documents indicate the commission expense in account 5540-0 was incurred on a sale to a particular customer (see the Proprietary Memorandum), there is no information regarding the countries in which this customer has facilities or where this sale of GE's merchandise took place. Thus, the record does not demonstrate that the expense in question is unrelated to subject merchandise sales in the U.S. market. Lastly, with respect to the contested non-rebate expenses in account 1120 (see the Proprietary Memorandum) mentioned by GE, we find that the record does not clearly indicate the nature of these expenses. Therefore, we have not treated these expenses any differently from the other unreported expenses in the accounts under consideration.

Therefore, we treated the non-rebate expenses in the accounts at issue as unreported expenses relating to GE's subject merchandise sales in the U.S. market during the POI, and deducted these expenses from the reported gross unit prices of the CEP sales.[104] We did not treat the negative amounts referenced by GE as unreported expenses because these are not charges to the accounts (i.e., expenses), but reimbursements of expenses listed in the accounts.

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[103] See the Department's verification report covering GE at 12 and 13.

[104] Specifically, we divided the total unreported expenses by the total CEP sales quantity, in metric tons, to arrive at an average per-unit expense, which we deducted from the price of each reported CEP sale.

Comment 23: Whether the Department Should Base the Dumping Margin for One Unreported Sale on Total Adverse Facts Available

Petitioner requests that the Department assign a dumping margin based on adverse facts available (AFA) to one sale of subject merchandise that was discovered at the verification of GE's U.S. affiliate, GPS. Petitioner notes that the Department has stated that "the failure to report sales data is one of the most serious errors a respondent can commit."[105] Thus, petitioner urges the Department to follow its normal practice and assign, as partial AFA, the highest overall transaction-specific dumping margin to the unreported sales quantity, which it should then include in the weighted-average dumping margin calculation.

GE argues that there is no reason to apply AFA to the unreported sale – a resale of merchandise previously rejected by a customer – because the sale should not be treated as a U.S. sale since it was not made in the ordinary course of trade. GE states that the Department excused the respondent from reporting similar U.S. transactions in the concurrent Indonesian CFS investigation, acknowledging that the sales were not representative of ordinary export sales and the sale volumes were small. While GE acknowledges that the sale in question was a sale of subject merchandise, it claims the sale differs from the normal reported U.S. sales and is insignificant compared to the total volume of its normal U.S. sales. Accordingly, GE argues that the Department should not treat this sale as a U.S. sale or assign the sale a dumping margin based on AFA.

Department's position:

We agree with petitioner. The Department's questionnaire requests that the respondent report each constructed export price sale made after importation that has a date of sale within the POI. The questionnaire notes that "{i}f you believe there is a reason to report your U.S. sales on a different basis, please contact the official in charge before doing so."[106] Unlike the scenario in the concurrent Indonesian CFS case cited by GE, here GE made no request to the Department to be excused from reporting the sale in question. Moreover, the antidumping laws do not contain specific provisions that allow the Department to disregard U.S. sales as "outside the ordinary course of trade." While the Department has the discretion, in exceptional circumstances, to exclude unrepresentative and extremely distortive U.S. sales from its margin calculation, GE never established that this sale is unrepresentative and extremely distortive.[107] Due to GE's

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[105] See Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip in Coils From Italy, 64 FR 30750 (June 8, 1999).

[106] See section C of the Department's antidumping duty questionnaire at page C-1.

[107] See FAG U.K. Ltd. v. United States, 945 F. Supp. 260, 265 (CIT 1996) (FAG U.K.) citing Chang Tieh Industries Co. v. United States, 840 F. Supp. 141, 145-46 (CIT 1993) (exclusion of sales may be necessary to prevent a fraud on the Department's proceedings). See

reporting failure, the information needed to calculate a dumping margin for this sale is not on the record. Additionally, GE's failure to report the U.S. sale at issue, despite the fact that it possessed the necessary records regarding the sale, indicates a lack of cooperation on its part. Therefore, pursuant to sections 776 (a)(1) and (b) of the Act (use of facts available when necessary information is not on the record and use of adverse inferences due to failure to cooperate to the best of its ability), we find it appropriate to base the dumping margin for the unreported sale on the highest transaction-specific dumping margin calculated for the respondent.

Comment 24: Whether to Reclassify One Sale as a CEP Sale

Petitioner states that at verification, the Department found that GE had erroneously classified a CEP sale as an EP sale, and thus this sale should be treated as a CEP sale and assigned indirect selling and credit expenses.

GE agrees that the sale in question should be reclassified as a CEP sale. GE states that it disclosed the error in question in a May 2, 2007, submission to the Department, but that it inadvertently omitted the reclassified CEP sale from its sales database.

Department's position:

We agree with both parties that the sale at issue should be classified as a CEP sale. Therefore, for purposes of the final determination, we reclassified the sale as a CEP sale, and assigned to the sale indirect selling expenses and an average of the direct selling expenses reported for each CEP transaction (as facts available).

Comment 25: Whether to Adjust the Market-Economy Purchase Price of NBKP

Petitioner argues that the Department should make an upward adjustment to the reported per-unit market-economy purchase price of NBKP to account for a year-end adjustment in respondent's records involving NBKP purchases. However, GE argues that petitioner's proposed upward adjustment to the NBKP per-unit purchase price is unwarranted. A detailed summary of the parties' comments, which include proprietary information, can be found in the Proprietary Memorandum.

Department's position:

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also FAG U.K., citing Ipsco v. United States, 714 F. Supp. 1211, 1217 (CIT 1989), wherein the CIT stated that U.S. sales "should be excluded only in those limited situations in which ITA finds that inclusion of certain sales which are clearly atypical would undermine the fairness of the comparison of foreign and U.S. sales . . . ". FAG U.K., 945 F. Supp. at 265.

We agree with petitioner, in part. Based on record evidence, we calculated the percentage increase to the reported average per-unit price of NBKP by multiplying the reported average per-unit price by a percentage that we derived by dividing the amount of the year-end adjustment discovered at verification by the total value of NBKP purchases during fiscal year 2006. For additional information regarding the Department's position on this issue, see the Proprietary Memorandum.

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 firms in the Federal Register.

Agree ___ Disagree ____

_____
David M. Spooner
Assistant Secretary
for Import Administration

_____
(Date)