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

FROM: Susan H. Kuhbach
Acting Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the 2009-2010 Administrative Review of Stainless Steel Bar from India

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SUMMARY

We have analyzed the case and rebuttal briefs of interested parties in the administrative review of the antidumping duty order on stainless steel bar from India. As a result of our analysis, we have made certain changes in the margin calculations. We recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum. Below is a complete list of the issues for which we received comments and rebuttal comments by parties:

Comment 1: Whether to Revoke the Order as it Applies to Venus
Comment 2: Whether to Compare U.S. Sales to Home Market Sales of Similar Merchandise
Comment 3: Whether to Accept Venus' Minor Corrections
Comment 4: Whether Venus' Air Freighted Sales are Outside the Ordinary Course of Trade
Comment 5: Whether to Grant a Level of Trade ("LOT") Adjustment to Facor
Comment 6: Whether Application of Total Adverse Facts Available ("AFA") is Warranted
Comment 7: Whether the AFA Rate is Corroborated
Comment 8: Whether to Use Zeroing Methodology in this Administrative Review

BACKGROUND

On March 4, 2011, the Department of Commerce ("the Department") published the preliminary results of the administrative review of the antidumping duty order ("the Order") on stainless steel bar from India.[1] The period of review ("POR") is February 1, 2009, through January 31, 2010.

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[1] See Stainless Steel Bar From India: Preliminary Results of, and Partial Rescission of, the Antidumping Duty Administrative Review, and Intent Not To Revoke the Order, in Part, 76 FR 12044 (March 4, 2011) ("Preliminary Results").

This review covers imports of stainless steel bar from three producers/exporters: Facor Steels Ltd./Ferro Alloys Corporation, Ltd. ("Facor"); Mukand, Ltd. ("Mukand"); and Venus Wire Industries Pvt. Ltd. ("Venus Wire") and its affiliates Hindustan Inox Ltd. ("Hindustan"), Precision Metals, and Sieves Manufactures (India) Private Limited ("Sieves") (collectively "Venus").

DISCUSSION OF THE ISSUES

CHANGES SINCE THE PRELIMINARY RESULTS

Based on our analysis of the comments received, we made the following changes in calculating dumping margin for Venus: (1) we reversed our determination regarding Venus' eligibility for revocation from the Order; (2) we corrected a clerical error identified by Sieves regarding an incorrect grade reported in its home market for two control numbers ("CONNUMs"); (3) we corrected a clerical error identified by Venus regarding an incorrect size reported for two U.S. market CONNUMs; (4) we corrected a clerical error identified by Venus regarding an incorrect credit expense that resulted from a misreported date of sale for one home market sale; (5) we made an adjustment to one of Venus' U.S. sales to reflect a reimbursement it received for international freight expenses; (6) we recalculated Venus' and Sieves' annealing related charges based on the quantity processed, by grade series, regardless of size; (7) we revised Venus' reported conversion costs to correct minor errors found in the calculation of the direct labor, selected variable overhead items, and depreciation amounts; (8) we revised Sieves' reported conversion costs to allocate direct labor and selected variable overhead items only to stainless steel bright bar and to correct the processing related charges; (9) we increased Sieves' reported direct material costs to account for inputs obtained from affiliates at less than market prices; (10) we revised Sieves' general and administrative expense rate to exclude from the numerator the portion of the director remuneration expense reported as a selling expense; (11) we increased Hindustan's reported cost of manufacture ("COM") to include the unreconciled difference between the COM from its normal books and records and the reported COM; and (12) we changed the AFA rate applied to Mukand to the 21.02 percent rate calculated in the petition. See Comments 1, 3, and 7, below. For further details on how the changes relating to Venus were applied in the calculation, see Memorandum from Austin Redington to the File, "Final Results Calculation Memorandum for Venus Wire Industries Pvt. Ltd.," dated August 31, 2011 ("Venus Final Sales Calc Memo"); see also Memorandum from Angie Sepulveda and Heidi K. Schriefer to Neal M. Halper, "Cost of Production and Constructed Value Calculation Adjustments for the Final Results – Venus Wire Industries Pvt. Ltd.," dated August 31, 2011.

Comment 1: Whether to Revoke the Order as it Applies to Venus

Petitioners' Affirmative Comments

Petitioners[2] assert that the Department properly denied Venus' request for revocation in the Preliminary Results, due to Venus' above de minimis margin. Petitioners contend that, in the event that Venus' margin is below de minimis for the final results, the Department should continue to deny revocation because Venus has not met all the requirements set forth in 19 CFR

[2]Carpenter Technology Corporation, Valbruna Slater Stainless, Inc., Electralloy Corporation, a Division of G.O. Carlson, Inc., Universal Stainless ("Petitioners")

351.222(b)(2)(i). Specifically, Petitioners argue that: 1) Venus has not exported in commercial quantities for the three review periods that are the basis of Venus' request, and 2) the recent imposition of countervailing duties on stainless steel bar in the European Union will likely lead to increased dumping by Venus to the United States in the future.

Petitioners note that the determination of "commercial quantity" is made on a case-by-case basis because the Department's regulations do not define this term.[3] However, Petitioners contend that the Department generally compares a respondent's total sales quantity from the period of investigation ("POI") in the less than fair value ("LTFV") investigation to sales quantities made during the three review periods that underlie the revocation request. Petitioners note that total sales quantity from the period of the investigation can serve as a benchmark because it demonstrates a company's behavior prior to the imposition of dumping remedies.[4] Petitioners argue that, in the instant review, because Venus claims it is unable to report U.S. shipment data for the period prior to the imposition of the Order the Department should find that Venus has not met all of the requirements for revocation. Petitioners argue that, although Venus attempted to provide an estimate for its pre-Order shipment volumes based on its production of both stainless steel bar and stainless steel wire during the 1992-1993 period, the Department should not rely on this data because it is not verifiable.[5] Petitioners assert that where data for the original investigation period are unavailable, the Department has previously compared a respondent's shipments to its own shipment history, as well as to the average commercial shipments of other subject producers during the original investigation as an indication of the commercial practice of the industry prior to the order.[6] Therefore, Petitioners argue that it would be appropriate to use Venus' U.S. sales in the 2005/2006 POR as the benchmark for determining commercial quantities.

Moreover, Petitioners claim that Venus' sales quantities from the three years that are the basis of its request show declining sales volumes from an earlier review period.[7] Petitioners dismiss as

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[3] See Section 751 of the Tariff Act of 1930, as amended ("the Act"); see also Notice of Final Results of Antidumping Duty Administrative Review and Determination Not To Revoke the Antidumping Duty Order: Brass Sheet and Strip From the Netherlands, 65 FR 742 (January 6, 2000) ("Brass Sheet and Strip From the Netherlands"). See, e.g., Honey from Argentina: Final Results of Duty Administrative Review and Determination Not to Revoke In Part, 72 FR 25245 (May 4, 2007) ("Honey from Argentina"), and accompanying Issues and Decision Memorandum ("IDM") at Comment 2 ("Honey from Argentina IDM"), aff'd, Seylinco, S.A. v. United States, Slip Op. 2009-66 at 5-6 (CIT 2009).

[4] See Honey from Argentina IDM at Comment 2; see also Pure Magnesium From Canada; Final Results of Antidumping Duty Administrative Review and Determination Not To Revoke Order in Part, 64 FR 12977, 12979 (March 16, 1999) ("Pure Magnesium from Canada"); and Shandong Huarong Mach. Co. v. United States, Slip Op. 07-169 (CIT 2007).

[5] See Response of Venus Wire to the Supplemental Questionnaire in the 2009-2010 Antidumping Administrative Review of Stainless Steel Bar From India (February 16, 2011) at 3; see also 19 CFR 351.222(f); see also Certain Forged Stainless Steel Flanges From India: Preliminary Results of Antidumping Duty Administrative Review, Partial Rescission and Intent To Rescind, 72 FR 10142 (March 7, 2007); unchanged in final results.

[6] See Honey from Argentina IDM at Comment 2.

[7] See Response of Venus Wire to the Supplemental Questionnaire ("SQR") in the 2009-2010 Antidumping Administrative Review of Stainless Steel Bar From India (October 20, 2010) at Annexure SQR-7; and Petitioners' February 8, 2011 Letter at Attachment 1.

irrelevant Venus' explanations that the U.S. economic recession and Venus' lack of required certifications to fulfill U.S. military orders caused these declining sales volumes.[8]

Petitioners further argue that Venus and its affiliates currently are subject to countervailing duties in the European Union ("EU").[9] Petitioners allege that this demonstrates that Venus has engaged in unfair trade practices in markets where the discipline of an order was not in place. Moreover, Petitioners argue that the EU countervailing duties provide a strong incentive for Venus to divert its shipments to the U.S. market if it is granted revocation, and it will likely do so at dumped prices if the Order is revoked.

Venus' Rebuttal Comments:
Venus disagrees with Petitioners' claims that it did not sell to the United States in commercial quantities. Venus states that the United States was its second largest market in all three of the review periods at issue. Further, Venus states that over the three-year period, the aggregate quantity of its sales to the United States was five times higher than the amount it sold in its home market.[10]

Venus acknowledges that, despite its efforts, it was unable to obtain exact data relating to its first sale to the United States, prior to the Order.[11] However, Venus argues that Petitioners' request to deny Venus' revocation simply based on its inability to report actual data from the investigation period is unwarranted. Venus contends that in absence of Venus' shipping quantities in the United States during the investigation period, the Department could rely on the quantity sold by other respondents to establish the benchmark for commercial quantities, as it did in a previous new shipper review under this Order.[12] Venus urges the Department to use Venus' home market sales as the benchmark for determining commercial quantities because this data is not skewed by any possible influence from antidumping duties. Comparing Venus' U.S. sales quantities to its home market sales quantities, Venus argues that it sold in commercial quantities to the United States. Venus notes that the cases cited by Petitioners in which the Department denied revocation requests, i.e., Pure Magnesium from Canada, Honey from Argentina, and Brass Sheet and Strip From the Netherlands, involved abnormally small U.S. sales quantities.[13]

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[8] See 19 CFR 351.222(d)(1) and 351.222(e)(1)(ii).
[9] Council Implementing Regulation (EU) No 405/2011 of 19 April 2011 imposing a definitive countervailing duty and collecting definitively the provisional duty imposed on imports of certain stainless steel bars and rods originating in India, O.J. L 108/3 (April 28, 2011).
[10] See Venus' June 16, 2011 case brief ("Venus' Case Brief") at 7.
[11] The Department requested Venus' pre-order shipment data for its revocation analysis in a supplemental questionnaire, dated January 26, 2011. Venus responded in an e-mail placed on the official record stating that Venus does not keep records beyond 12 years and, therefore, it could not obtain the requested data. See Memorandum to the File (with attachment), dated January 28, 2011.
[12] See Stainless Steel Bar From India: Final Results of Antidumping Duty Administrative Review, 62 FR 37030 (July 10, 1997).
[13] In Honey from Argentina, there was only one sale of 20 tons which the Department determined not to be considered as a commercial quantity. In Pure Magnesium from Canada, the total number of sales was limited to three in two years. In Brass Sheet and Strip from the Netherlands, the Department found the quantity sold by the respondent during the period where it received a dumping margin was considerably higher than the period where it received a zero margin and respondents could not justify the reasons for the low sales in the U.S.

With regard to its declining sales in the United States, Venus contends that its explanation is reasonable and provides logical justification for the apparent decreasing U.S. sales trend. Venus notes that its sales reflect the basic principles of supply and demand, and to disregard the impact of the recent economic recession would be illogical. Venus explains that, as a result of the recent recession, U.S. customers became wary of import sources due to longer lead times and higher minimum order quantities, and were particularly concerned about unpredictable market conditions. With regard to its declining sales in the United States, Venus previously submitted information to further support its claim that the U.S. recession impacted Venus' apparent decreasing U.S. sales trend. This, in effect, resulted in a sharp reduction in Venus' export sales to the United States.[14] Further, Venus notes that its sales to Germany, another large export market for Venus, in this POR also have declined sharply since the 2007-2008 review period. Venus asserts that by Petitioners' logic, if a company wants to ensure that it maintains "commercial quantity" for revocation purposes, it would have to continue shipping material to the United States, regardless of whether or not there was sufficient demand for the product. Therefore, Venus argues that the Department should consider the impact of recent economic events in order to understand the reduction in Venus' sales to the United States.

Furthermore, Venus argues that, although its sales volumes declined from earlier review periods, the Department in its revocation analysis is merely examining whether the shipments executed during a certain period represent the prevailing market conditions and whether the sales terms are consistent with the respondent's activities in a market where a dumping order did not exist. Thus, the fact that Venus' sales were declining does not provide sufficient reason to deny revocation. Venus argues that Petitioners' current arguments and past behavior are quite contradictory. Petitioners have repeatedly requested administrative reviews of Venus, which, according to Venus, confirms that it has shipped in commercial quantities for the three most recent previous review periods.

Venus further disagrees with Petitioners' claim that the EU's recent imposition of countervailing duties against stainless steel bar from India would encourage Venus to resume dumping in the United States. Venus notes that Petitioners' argument that the EU's countervailing duty order would lead to Venus diverting more material to the United States is not supported by any evidence or examples of such occurrences in any international market. Venus also argues that the Department's regulations regarding revocation do not require that it investigate other antidumping or countervailing duty cases in which a respondent may be involved. Therefore, the discussion of the EU's countervailing duty order is irrelevant. However, despite the questionable relevance of the EU's recent imposition of countervailing duties, Venus clarifies that the EU's countervailing duty is not specific to Venus, or any specific exporter, but is a broad order related to the duty drawback offered to Indian exporters by the Government of India. Furthermore, the countervailing duty amount is very low (below five percent) for all Indian producers, which Venus asserts would not justify abandoning European markets in preference of the United States market, as Petitioners allege. Therefore, Venus claims that it is unreasonable to assume that the relatively small countervailing duty in the European market would prompt Venus to divert sales from Europe to the United States.

[14] See Venus' February 18, 2011 submission at Annexure 1.

Finally, Venus points out that it has never been found to be dumping in the United States and, therefore, the claim that it would likely resume dumping is without merit and goes against the Department's past findings in the previous seven reviews conducted of it. Further, Venus states that even if it receives a de minimis rate for the final results and is revoked from the Order, per the Department's regulations, the Department has the authority to reinstate the dumping order if the company were to be found dumping at any point subsequent to the revocation. See 19 CFR 351.222(b)(2)(i)(B). Venus notes that as part of its revocation request, it has agreed in writing to this possible reinstatement of the dumping order.[15] Therefore, there would be no incentive for Venus to begin dumping in the United States.

Department's Position

In the Preliminary Results, the Department calculated an above de minimis margin for Venus. Accordingly, the Department made a preliminary determination not to revoke the Order with respect to Venus as the calculated margin disqualified Venus from revocation from the Order, pursuant to 19 CFR 351.222(b)(1)(i)(A). However, for these final results, the Department has calculated a de minimis margin for Venus. Consequently, the Department has reexamined Venus' eligibility for revocation from the Order.

The Department's regulations specify three requirements for requesting revocation in an antidumping proceeding. See 19 CFR 351.222(e). As part of its revocation request, Venus submitted a written certification that for a consecutive three-year period, including this review period, the company: 1) sold the subject merchandise at not less than normal value ("NV") and that the company will not sell subject merchandise at less than NV during the future; 2) sold the subject merchandise in commercial quantities; and 3) agreed to reinstatement of the Order if the Department concludes that Venus, subsequent to revocation, sold subject merchandise at less than NV, pursuant to 19 CFR 351.222(e)(1)(i)-(iii). The Department is satisfied that Venus has met the requirements to request revocation of the Order.[16]

At issue here is Venus' certification that it sold subject merchandise to the United States in commercial quantities during each of the three most recent periods. As part of the revocation process, the Department analyzes this certification filed pursuant to 19 CFR 351.222(e)(1)(ii). Although neither the statute nor the Department's regulations define what constitutes a commercial quantity, the Department has explained that its normal practice when conducting this analysis in relation to revocation is to examine each request on a case-by-case basis, considering the unique facts of each case, the nature of the industry, and the company's normal behavior in order to guarantee that the revocation decision is based on a sufficiently broad base of information. See Ball Bearings and Parts Thereof From France, et al.; Final Results of Antidumping Duty Administrative Reviews, Rescission of Administrative Review in Part, and Determination Not To Revoke Order in Part, 68 FR 35623 (June 16, 2003) and accompanying IDM at Comment 27; Tapered Roller Bearings and Parts Thereof, Finished and Unfinished,

[15] See Venus' February 24, 2010 letter ("revocation request"), which is on file in the Central Records Unit in room 7046 in the main Department building.

[16] Venus' revocation request, including a commercial quantities analysis that cites business proprietary information, is further discussed in "Determination to Revoke the Antidumping Duty Order on Stainless Steel Bar from India for Venus Wire Industries Pvt., Ltd.; Precision Metals, Sieves Manufacturers (India) Pvt., Ltd., and Hindustan Inox, Ltd.," ("Revocation Memorandum") dated August 31, 2011.

From the People's Republic of China; Final Results of 1998-1999 Administrative Review, Partial Rescission of Review, and Determination Not To Revoke Order in Part, 66 FR 1953 (January 10, 2001) ("TRBs") and accompanying IDM at Comment 21; Polyvinyl Alcohol From Taiwan: Final Results of Third Antidumping Duty Administrative Review and Determination Not To Revoke Order in Part, 65 FR 60615 (October 12, 2000), and accompanying IDM at Comment 1c; and Pure Magnesium From Canada; Final Results of Antidumping Duty Administrative Review and Determination Not To Revoke the Antidumping Duty Order in Part, 65 FR 55502 (September 14, 2000). The purpose of the commercial-quantities analysis is to determine whether the producer/exporter has been participating in the U.S. market in a meaningful way. The analysis allows the Department to be satisfied that the respondent could sell in the U.S. market at non-dumped prices without the discipline of the order in place.

Where possible, the Department typically uses shipments during the original POI as the benchmark for a company's normal commercial behavior. The POI generally provides a valid benchmark for assessing whether sales have been made in commercial quantities because it demonstrates a company's behavior absent the existence of an antidumping duty order. However, because Venus was not selected as a respondent in the investigation, and as mentioned above no longer has sales records dating to the POI, we cannot rely upon this benchmark to assess commercial quantities.

We disagree with Petitioners that Venus' inability to provide POI data is a valid basis by itself for rejecting Venus' revocation request. The POI in this proceeding was 16 years ago,[17] and Venus has indicated that it does not retain records going back that far, which the Department finds is reasonable.

We further disagree with Petitioners that it would be appropriate to use Venus' U.S. sales in the 2005/2006 POR as the benchmark for determining commercial quantities. Petitioners did not provide any reasonable justification for why the 2005/2006 review period is a more suitable benchmark than any of the other seven post-order review periods in which Venus participated. In fact, because Venus' U.S. sales during the 2005/2006 period alone would have been influenced by the existence of the Order does not provide an impartial basis to assess and compare Venus' sales activity to the subsequent years.

As stated in TRBs and accompanying IDM at Comment 21, citing Professional Electric Cutting Tools From Japan: Final Results of the Fifth Antidumping Duty Administrative Review and Revocation of Antidumping Duty Order, in Part, 64 FR 71411 (December 21, 1999), the Department may examine the aggregate volume of total sales in the United States "in absolute terms or in comparison with the period of investigation or another appropriate benchmark period" to determine whether sales were made in commercial quantities. In other words, we may examine the sales volumes over the three most recent periods relative to an appropriate benchmark if one is available, or in absolute terms, based on the facts of the case.

The Department recently analyzed shipments on an absolute rather than a comparative basis in Ball Bearings and Parts Thereof From France, et al.: Final Results of Antidumping Duty

[17] See Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Bar from India, 59 FR 66915 (December 28, 1994)("SS Bar Final Determination").

Administrative Reviews, Final Results of Changed-Circumstances Review, and Revocation of an Order in Part, 75 FR 53661 (September 1, 2010) ("AFBs"). The AFBs' respondent, like Venus, did not participate in the original investigation and was unable to report pre-order exports to the United States. Also, like Venus, the respondent's shipments in AFBs had declined. Instead of comparing the AFBs' respondent's shipments to a benchmark, the Department considered the respondent's size in the subject merchandise export market, its overall sales-volume trends within the context of U.S. economic activity, and the respondent's number of unique customers to make a determination of commercial quantities in absolute terms.

For the instant review, the Department finds that Venus' sales activity in the United States over the three most recent periods constitutes "commercial quantities" in absolute terms. Venus is consistently the largest exporter of stainless steel bar from India among the companies that are individually reviewed, including the three review periods subject to our revocation analysis. Venus has explained that the decline in its shipments over the past three years is the result of decreased U.S. demand. Petitioners have provided no evidence that calls into question Venus' assertion. In fact, despite the decline in sales, Venus' sales consist of a multitude of transactions to several distinct customers in the U.S.[18] The Department therefore finds that the overall decline in volume during this period is not a basis for finding Venus' sales to the United States not to be of commercial quantities.

In comparison to the three cases cited by Petitioners to support their claim not to revoke, the number of transactions and quantities shipped by Venus are significantly large. As mentioned above, in Honey from Argentina, because there was only one sale of 20 tons, the Department determined the respondent's sales not to be of commercial quantity.[19] In Pure Magnesium from Canada, the total number of sales was limited to three in two years, which we found not to be indicative of commercial reality.[20] In Brass Sheet and Strip from the Netherlands, the Department found the quantity sold by the respondent during the period where it received a dumping margin was considerably higher than the period where it received a zero margin and the respondent could not justify the reasons for the low sales in the United States.[21] Additionally, Venus highlighted the general trend of its U.S. sales relative to its home market sales during the period to assert that, because its U.S. sales quantities were higher, they are of significant amounts. However, we did not rely on this as we found sufficient evidence in the aggregate U.S. sales to determine that they were of significant amounts to be considered commercial quantities

Accordingly, the Department finds that Venus's absolute sales trends over the three review periods support its claim that it has participated in the U.S. market in a genuine and meaningful manner. Although its sales volumes declined, the Department finds that the amounts shipped still represent commercial quantities in the U.S. market. Considering the entirety of this information, we determine that Venus sold stainless steel bar in commercial quantities to the United States in the three-year period forming the basis for Venus' revocation request.

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[18] For discussion of business proprietary information regarding number of unique transactions and customers, as well as total sales volume, see Revocation Memorandum.
[19] See Honey from Argentina IDM at Comment 2.
[20] See Pure Magnesium from Canada, 64 FR at 12980.
[21] See Brass Sheet and Strip from the Netherlands, 65 FR at 752.

Beyond a determination that Venus has shipped in commercial quantities, 19 CFR 351.222(b)(2)(i)(C) requires the Department to consider whether continued application of the antidumping duty order is necessary to offset dumping. Petitioners have argued that the EU's recently instituted countervailing duty order on stainless steel bar from India could cause Venus to divert shipments to the United States at dumped prices. We acknowledge the possibility that Venus' exports could shift from the European market to other export markets, including the United States, but we have no basis beyond Petitioners' speculation to conclude that those sales would be dumped. Venus has been subject to eight administrative reviews and has never been found to have dumped in the United States. Moreover, while its export volumes to the United States have declined over the three most recent review periods, the company's experience covering the five prior review periods demonstrates that it has sold increased volumes without dumping. Therefore, we do not agree with Petitioners that the Order needs to remain in place to offset dumping.

Comment 2: Whether to Compare U.S. Sales to Home Market Sales of Similar Merchandise

Venus' Affirmative Comments:
Citing section 771(16) the Act, Venus argues that products compared in a dumping margin calculation must be: 1) identical in physical properties, 2) like that merchandise in component materials and in the purposes for which it used, and 3) approximately equal in commercial value to that merchandise. Accordingly, Venus argues that in the absence of comparable home market sales, pursuant to sections 773(a)(4) and 772(b) of the Act, the Department should use constructed value ("CV") in its product comparisons, rather than matching to similar merchandise and making a difference in merchandise ("DIFMER") adjustment.

Venus asserts that because specific types of stainless steel vary by grade, physical characteristics, elemental composition, and intended application, matching non-identical products results in distortions even with a DIFMER adjustment. Thus, although many stainless steel products may be within the 20 percent benchmark set forth in Import Administration's Policy Bulletin 92.2 (July 29, 1992) ("Policy Bulletin"), Venus asserts that these products have completely different physical characteristics, applications, and commercial values. As such, Venus argues that the Department should use CV in its calculation of NV for the final results wherever identical home market sales cannot be found, pursuant to sections 773(a)(4) and 773(e) of the Act.

Petitioners' Rebuttal:
Petitioners argue that the Department should continue to apply the DIFMER adjustment in the final results. Petitioners state that the Department has already rejected similar arguments by Venus in the 2007-2008 administrative review of this Order. See Stainless Steel Bar From India: Final Results of Antidumping Duty Administrative Review, 74 FR 47198 (September 15, 2009), and accompanying IDM at Comment 6. Petitioners assert that Venus' interpretation of section 771(16) of the Act and its subsequent assertion that DIFMER is being improperly applied are inaccurate. Petitioners note that section 771(16)(C)(i) of the Act defines the foreign like product as merchandise that is produced in the same country by the same person and of the same general class or kind of the merchandise, which is subject to the investigation. Petitioners argue that

Venus failed to provide any instances in which the Department found stainless steel products within the same class or kind of merchandise to be non-comparable. Furthermore, Petitioners state that pursuant to section 771(16)(C)(ii) of the Act, the Department is permitted to make a reasonable adjustment for similar merchandise sold in the foreign market. Therefore, the Department should continue to apply the DIFMER adjustment in its calculations.

Department's Position:
We agree with Petitioners that Venus incorrectly interprets section 771(16) of the Act. Section 771(16) directs the Department to select for comparison purposes, in descending order of preference, merchandise that is: identical in physical characteristics with the subject merchandise, similar in physical characteristics and commercial value, or of the same general class or kind that can reasonably be compared. Furthermore, section 773(a)(6)(C)(ii) of the Act directs the Department to make a reasonable allowance for DIFMER, if the Department compares the U.S. merchandise to similar merchandise sold in the foreign market. Accordingly, these legal provisions demonstrate that Venus is incorrect to argue the Department resort to using CV prior to its comparison of similar merchandise.

We also find misguided Venus' request that the Department use CV pursuant to sections 772(b) and 773(a)(4) of the Act. Section 772(b) of the Act defines constructed export price ("CEP"), which is irrelevant to the discussion of whether to use the DIFMER adjustment for NV. Further, while section 773(a)(4) of the Act describes the circumstances under which the Department may determine it appropriate to use CV, it is the Department's normal practice to use CV where the DIFMER adjustment exceeds 20 percent.[22] Accordingly, in its calculations for the both the preliminary and final results, the Department relied on CV only in situations where the DIFMER adjustment was greater than 20 percent. It is the Department's practice to compare physically similar products as long as the difference in the variable costs between the two similar products does not exceed 20 percent and we have continued to do so for these final results.[23]

As Petitioners note in their case brief, the Department has already rejected a similar argument by Venus in the 2007-2008 administrative review of this case. As was the case in that administrative review, all stainless steel bar manufactured by Venus in the instant review, regardless of grade, comprises the foreign like product as that term is defined in section 771(16)(C) of the Act. The merchandise was produced by the same person (Venus) in the same country (India) and is within the same, single class or kind of merchandise covered by the Order. With the exception of prime and non-prime stainless steel products, we are not aware of, and Venus has not pointed to, any instances in which the Department has found stainless products within the same class or kind of merchandise to be non-comparable. Although Venus argues that the DIFMER adjustment leads to a comparison of products that it asserts are dissimilar in several respects, we find that when comparing similar merchandise, these products can be reasonably compared using the DIFMER adjustment to account for manufacturing cost differences.

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[22] See Policy Bulletin.
[23] See Policy Bulletin; see also Electrolytic Manganese Dioxide From Greece: Preliminary Results of Antidumping Duty Administrative Review, 65 FR 26567, 26568 (May 8, 2000).

Comment 3: Whether to Accept Venus' Minor Corrections

Venus' Affirmative Comments:
Venus requests that the Department accept four minor corrections to Venus Wire's and Sieves' databases that Venus discovered subsequent to the Preliminary Results. Specifically, Venus requests that the Department correct: 1) an erroneously reported sale date (and subsequent credit expense adjustment for one sale); 2) an erroneously miscoded size CONNUM for two of Venus Wire's U.S. sales; 3) an erroneous grade coding related to two of Sieves' home market sales; and 4) an adjustment to international freight expenses for which Venus Wire was reimbursed. Venus asserts that these errors are minor and would not require substantial revisions to the companies' responses. Further, Venus contends that the information submitted with regard to these minor corrections does not hinder either Petitioners' or the Department's ability to properly investigate the alleged reporting errors, as all supporting documentation was provided prior to the final results.

Venus points to the Court of Appeals for the Federal Circuit's ("CAFC") decision in Timken U.S. Corporation and Timken Nadellager, GMBH, v. United States, 434 F.3d 1345 (Fed. Cir. 2006) ("Timken"), arguing that the Department is able to accept these kinds of minor corrections. Venus argues that both the nature and timeliness of the requested corrections meet the criteria established by Timken, as Venus presented the errors and supporting documentation to the Department in its April 12, 2011 submission and also in its case brief. Venus notes that both of these submissions were timely filed prior to the final results. Further, Venus points out that three of the minor corrections presented in Venus' Case Brief are related to issues identified at the sales and cost verifications.[24]

Venus also points to Certain Fresh Cut Flowers From Colombia; Final Results of Antidumping Duty Administrative Reviews, 61 FR 42833, 42834 (August 19, 1996) ("Fresh Cut Flowers") in which the Department outlined six criteria it often considers when determining whether to correct clerical errors. Venus asserts that the errors it identified and the related minor corrections, meet each of the guidelines outlined in Fresh Cut Flowers. Therefore, Venus requests that the Department accept Venus' minor corrections and make the appropriate adjustments in the calculations for the final results.

Petitioners' Rebuttal:
Petitioners argue that the Department should reject Venus' corrections to its sales database. Regarding the erroneously reported date of sale, Petitioners assert that this adjustment is untimely because Venus failed to present this issue to Department officials at its sales

[24] See Memorandum from Austin Redington and Scott Holland to the File "Verification of the Sales Response of Venus Wire Industries Pvt. Ltd. and Precision Metals in the Antidumping Duty Administrative Review of Stainless Steel Bar from India," dated January 20, 2011 ("Venus' Sales Verification Report"). See also Memorandum from Angie Sepulveda and Heidi K. Schriefer to Neal M. Halper, "Verification of the Cost Response of Venus Wire Industries Pvt. Ltd. in the Antidumping Review of Stainless Steel Bar from India," dated April 29, 2011; Memorandum from Angie Sepulveda and Heidi K. Schriefer to Neal M. Halper, "Verification of the Cost Response of Sieves Manufacturers (India) Private Limited in the Antidumping Review of Stainless Steel Bar from India," dated April 29, 2011(collectively, "Venus' Cost Verification Reports").

verification. Further, Petitioners contend that the payment documentation Venus provided in its April 12, 2011 letter does not tie the invoice sales number to the bank payment.

Petitioners assert the Department should not make any adjustments to Venus' reported international freight expenses. Petitioners say that the source documentation shows that Venus' customer did not accept the debit note for one of the related invoices. Further, Petitioners argue that e-mails between Venus and its customer show that Venus did not meet the criteria, which were established by the customer, for air freight reimbursement. Petitioners note that Venus itself recognizes that for a specific invoice, no adjustment can be made because Venus has not yet received any reimbursement for the invoice.

Department's Position:
We disagree with Petitioners' claim that Venus' request for correction to the erroneously reported sale date was untimely. As stated by the CAFC in Timken, "Commerce is free to correct any type of importer error--clerical, methodology, substantive, or one in judgment--in the context of making an antidumping duty determination, provided that the importer seeks correction before Commerce issues its final results."[25] Venus first proposed this correction in its April 12, 2011 letter, 70 days prior to the case brief deadline and 141 days prior to the final results. Therefore, we find that Venus' request to correct this clerical error meets the criteria discussed in Timken and was timely filed with the Department.

Moreover, we find that: 1) the errors were clerical, not methodological, but just minor edits to change a date, as well as revise the CONNUM and grade coding for two out of numerous sales; 2) because the corrections to the misreported size and grade CONNUMs relate to errors verified by the Department during its cost verification[26] and because the documentation Venus provided in relation to the misreported sale date clearly identifies the specific invoice number, correct date of sale, and payment date, the Department is satisfied that the corrective documentation provided in support of the clerical error allegation is reliable; 3) as Venus notified the Department of these errors by letter on April 12, 2011 letter, a significant number of days prior to the final results, we find that Venus availed itself of the earliest reasonable opportunity to correct the error; 4) as noted above, Venus' clerical error allegation and corrective documentation were submitted to the Department a significant number of days prior to the due date for Venus' administrative case brief; 5) because making the corrections to these errors only requires the Department make minor adjustments to the respondent's data, we find that the clerical errors do not entail a substantial revision of the response; and 6) Venus' corrective documentation does not contradict information previously determined to be accurate at verification. For these reasons, we determine that it is appropriate to accept Venus' minor corrections. Accordingly, the Department has made the related corrections in its calculations for the final results. See Venus Final Sales Calc Memo.

With respect to Venus' request regarding the reimbursement of international freight expenses from its customer, we find that Venus has only partially substantiated its argument. During the sales verification, Venus notified Department officials that it expected to receive reimbursement

[25] See Timken, 434 F.3d at 1351.
[26] See Venus' Cost Verification Reports.

for certain sales that were shipped to the United States by air freight.[27] Subsequently, Venus submitted documentation related to the correction of its air freighted sales.[28] However, we find that Venus provided sufficient documentation to support adjusting the international freight expense for only one of the three sales for which it requested adjustment. Specifically, for this sale Venus provided a copy of the original invoice, the airway bill tied to the invoice, a debit note from Venus to the forwarding agent from which it expected reimbursement, tying it to the airway bill Venus provided, as well as the subsequent credit note issued by the forwarding agent, which also tied to the airway bill Venus provided. This confirmed Venus' claim for adjustment for only that one sale. As the Department has discretion to correct errors prior to the final results,[29] and because Venus' request was timely filed and included sufficient documentation to support making an adjustment for this sale, we have made the appropriate adjustment to the international freight expense field for this one sale.[30]

However, for the other two air freighted sales for which Venus requested an international freight expense adjustment, we find that, although the bank documentation Venus provided in its April 12, 2011 submission indicates Venus received a repayment from its customer relating to certain airfreight expenses, there is no evidence linking this repayment to any of the specific invoices Venus claims adjustment for, nor is there any evidence tying the repayment to the subject merchandise. Therefore, for the two sales where Venus did not provide sufficient documentation supporting an adjustment, no adjustment was made.

Comment 4: Whether Venus' Air Freighted Sales are Outside the Ordinary Course of Trade

Venus' Affirmative Comments:

Venus requests that the Department treat three sales it shipped to the United States by air freight as being outside the ordinary course of trade. Venus states that although it originally agreed to ship the materials by ocean freight, due to certain circumstances, the customer later requested that Venus send the materials by air freight. Venus agreed to the customer's request with the understanding that Venus would be reimbursed for the air freight expenses.[31] Venus argues that because of the relative small quantity and the relative infrequency of air freighted shipments to the United States, these three air freighted shipments should be considered outside the ordinary course of trade.

Petitioners' Rebuttal:

Petitioners argue that the Department should reject Venus' request to treat its air freight sales as outside the ordinary course of trade because Venus did not provide any support for its claim.

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[27] See Venus' Sales Verification Report at 3. The specific invoices related to these possible reimbursements were not mentioned, nor documented at verification.
[28] See Venus' April 12, 2011 submission at Annexure 1.
[29] See Timken, 434 F.3d at 1351.
[30] See Venus Final Sales Calc Memo.
[31] See Venus' April 12, 2011 submission at Annexure 1 in which Venus provided documents related to Venus' negotiations with the customer regarding air freighted shipments.

Department's Position:
Because the statutory provision allowing the Department to disregard sales made outside of the ordinary course of trade only applies to calculations of NV, Venus' reference to this provision is misplaced.[32]

The Court of International Trade ("CIT") has determined that the Department has discretion to exclude U.S. sales from its margin calculation irrespective of the fact that the statute does not contain a specific provision for treating U.S. sales as outside the ordinary course of trade. However, these exclusions typically occur under "exceptional circumstances" when sales are "unrepresentative and extremely distortive."[33] For example, in FAG U.K. Ltd. v. United States, 945 F. Supp. 260, 265 (CIT 1996), 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...".

In the instant case, Venus did not provide meaningful evidence that would support such a conclusion. Rather, information on the record indicates that these sales of stainless steel bar were subject merchandise and, contrary to Venus' claim, were significant in volume, representing quantities similar to several of Venus' other "ordinary" U.S. sales.[34] The only differentiating factor between these and other "ordinary" sales made by Venus is the chosen method of shipment, which was negotiated and agreed upon by Venus and its customer. Venus has not shown how the inclusion of these sales undermines the fairness of the comparison of foreign and U.S. sales. Moreover, while the circumstances of these sales may be unusual for Venus, there is no basis for claiming that air-freighted sales will not occur in the future. Therefore, the Department finds no evidence on the record to support excluding Venus' air freighted sales from the calculations for the final results.

Comment 5: Whether to Grant a Level of Trade ("LOT") Adjustment to Facor

Facor's Affirmative Comments:
Facor asserts that the Department erred in the Preliminary Results in finding a single LOT for Facor's home market sales. Facor notes that it sells to both end-users and retailers in its home market, and argues that the selling functions differ between these two customer categories. Facor argues that these differences are sufficiently significant to support a finding that it has two home market LOTs, and only one of these is comparable to its U.S. sales process.

In making these assertions, Facor cites to its May 24, 2010 section A questionnaire response ("May 24 AQR"), its August 9, 2010 sections B and C supplemental questionnaire response ("August 9 BCSQR"), and its February 4, 2011 section A supplemental questionnaire response

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[32] See Notice of Final Results of Antidumping Duty Administrative Review: Granular Polytetrafluoroethylene Resin from Italy, 68 FR 2007 (January 15, 2003) ("Granular Polytetrafluoroethylene Resin from Italy"), and accompanying IDM at Comment 4; see also Notice of Final Determination of Sales at Less Than Fair Value; Certain Hot-Rolled Carbon Steel Flat Products From the Netherlands, 66 FR 50408 (October 3, 2001)("Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands"), and accompanying IDM at Comment 3 .
[33] See Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands and accompanying IDM at Comment 3.
[34] See Venus' April 12, 2011 submission at Annexure 1. Sales quantities are identified on invoice documentation provided. See also Venus' U.S. sales database submitted October 25, 2010.

("February 4 ASQR"). Facor claims it reported in these responses that end-user terms of purchase are extremely stringent with regard to plant approval by government agencies, terms of sale, chemical and mechanical guarantees, delivery guarantees, and material requirements. See May 24 AQR, at 24; February 4 ASQR, at 1-5. Facor argues that these sales conditions are specific to end-users and result in higher sales prices to end-users.

Facor further asserts that the Preliminary Results incorrectly stated that Facor waives quality guarantees to long-standing end-use customers, and notes that it is the associated testing, not the guarantee, that is waived. Facor complains that the Department's Preliminary Results did not articulate why days in inventory are not a significant measure of inventory activity. Facor emphasizes that it sells through warehouse for its end-users and not for retailers, which it claims results in longer delivery times to end-use customers. Facor claims it incurs additional set up costs for warehouse maintenance, additional freight cost for transport to warehouse, and additional handling costs for end-user sales. Facor dismisses the Department's preliminary finding that advertising differences do not exist between its customer categories, and argues that advertising is irrelevant to its sales process. Facor objects to the Department's preliminary finding that the company failed to report staffing differences between its end-use and retail sales, and asserts that the Department never requested this information. Facor argues that it was not issued as many supplemental questionnaires as respondent Mukand, and that this discrepancy in respondent treatment is unlawful.

Petitioners' Affirmative Comments:
Petitioners agree with the Department's preliminary finding that one LOT exists for Facor's home market, and that this level is comparable to the U.S. sales process. To the extent that differences exist between Facor's end-user and retail sales, Petitioners claim that Facor did not prove that these differences are substantial. Further, Petitioners contend, the Department's regulations explain that, "differences in selling functions, even substantial ones, are not alone sufficient to establish a difference in the LOT." See Petitioners' Rebuttal Brief, dated June 29, 2011, at 2. See 19 CFR 351.412. Petitioners further contend that Facor's reference to pricing differences is misplaced because this consideration occurs only after the Department determines that different LOTs exist.

With regard to Facor's alleged differences in selling functions to home market end-users and retailers, Petitioners note that Facor failed to demonstrate the significance of any differences. Petitioners dismiss the relevance of Facor's product guarantees to the LOT analysis because Facor did not demonstrate that these guarantees vary significantly by customer type. Moreover, Petitioners cite to Facor's May 24 AQR to demonstrate that no differences exist between the guarantees issued to Facor's home market end-users and Facor's U.S. retailers. Petitioners further note that Facor's delivery guarantees to home market end-users are identical to those issued to its U.S. retailers.

Petitioners rebut Facor's assertion that the preliminary finding did not address inventory activity differences between end-use and retail sales, noting that, aside from a longer inventory period, Facor did not describe any differences. Petitioners note that the Department specifically requested Facor to explain any differences relating to inventory maintenance or control for its home market sales. Petitioners argue that the burden was clearly on Facor to demonstrate any differences regarding inventory selling activities to support its LOT claim, but it failed to do so.[35]

Regarding warehousing activities, Petitioners note that Facor's end-user sales are shipped both directly from its factory and through warehouse, and any additional warehousing activities performed by Facor do not amount to a significant difference in the intensity of this function. Petitioners contend that Facor did not submit information regarding staff/marketing resources that may affect sales negotiations with end-users. Petitioners cite to Facor's February 4 ASQR at 3, noting that Facor itself reported that any sales negotiation differences are incurred on only *some* of its end-user sales. Further, Petitioners note that the Statement of Administrative Action ("SAA") states that expenses that are deducted from NV, such as credit expenses, will not be deducted a second time through an LOT adjustment.[36] Thus, Petitioners contend that longer credit periods are not relevant to the LOT analysis.

Petitioners dismiss both Facor's claim that advertising is irrelevant to the LOT analysis and Facor's assertion that it does not advertise its products is contradicted by record evidence. Referencing Facor's August 9 BCSQR, Petitioners note that Facor reported that it generally advertises through its product brochures or displays for both its end-user and retail sales.

Finally, Petitioners rebut Facor's claim that it incurs additional freight cost to transport materials from factory to warehouse, as well as additional material handling for warehouse sales. Petitioners reiterate that only some Facor's end-user sales are through warehouse. Moreover, Facor contracts with third-party freight providers for delivery to both its retail and end-user customers, thus, no significant freight differences exist between customer categories.

Department's Position:
We continue to find that the information submitted by Facor regarding its selling activities in its home market indicates a single LOT there. In Facor's February 4 ASQR, the information suggests that differences may exist between end-user and retailer sales with respect to product testing, warehousing services, and sales negotiation process. However, as explained below, these differences are not significant or are diminished because the record also shows that these differences are not consistently experienced by Facor's end-user sales.

For example, for each guarantee described by Facor (e.g., chemical, mechanical, performance, delivery, and technical performance and critical application), we instructed Facor to describe the process that the company undertakes in granting the guarantee. See Department's January 26, 2011 supplemental questionnaire to Facor ("January SQR") at 1-2. Facor responded that, "samples are sent to independent agency in some grades for analysis on random basis. End users over a period of time based on the comfort level waive this independent analysis requirement." See February 4 ASQR at 4. While Facor's case brief correctly notes that the guarantee itself is not waived, its response indicates that the activity associated with the granting of that guarantee,

[35] See Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany: Final Results of Antidumping Duty Administrative Review, 56 FR 31692, 31710 (July 11, 1991).
[36] See Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103-316(I) at 830 (1994)("URAA").

i.e., testing, is waived. The existence of a guarantee without associated activities is not conclusive evidence of a different sales process intensity or a different level of trade.

Facor was also asked to explain whether sales negotiations for the terms of sale differ between end-users and retailers and, if differences exist, to provide details and address the significance of these differences. See January SQR at 1. Facor's response indicated that only some of its end-user sales are at a different negotiation level. See February 4 ASQR at 3. Thus, the significance of this selling function difference is diminished by its restriction to only a portion of Facor's end-user sales. Facor also stated that sales negotiations differ because, "approval of the plant manufacturing facility by certain authorities is essential before we participate in the sale negotiation." Id. This statement does not provide evidence of a significant difference between end-user and retail sales negotiations. Facor also states that its retail sales are not intended for specific applications, as opposed to end-user sales and that because its end-user sales are bought for specific applications, they have specific material requirements. As a consequence, Facor provides a guarantee in the form of product return. Id. Facor did not, however, provide evidence that this difference impacted its end-user sales negotiations. Thus, the relevance of this difference to our LOT analysis is limited by absence of information regarding its intensity or significance.

With regard to warehousing, again, only some of Facor's end-user sales are through its warehouse, diluting the significance of this activity. For this activity, we were able to review Facor's sales and, as noted by Petitioners, determined that Facor's sales to end-users are shipped both directly from its factory and through warehousing. See Facor's home market sales data, dated January 20, 2011. By reviewing Facor's reported sales expense fields, we found that end-user sales are not shipped through warehouse with a regularity that can be reasonably assumed to make this a significant distinguishing factor between end-user and retail sales in the home market. Id. Facor stated that it incurs loading/unloading expenses for sales through warehouse. Id. However, the significance of this selling function difference is diminished by its restriction to only a portion of Facor's end-user sales. Further, Facor arranges for third-party freight either to the warehouse or directly to the customer for all of its sales; thus, no differences exist with regard to freight activity for end-user and retail sales. See Facor's June 14, 2010 supplemental questionnaire response at 20.

Although Facor asserts that inventory time is one of the Department's criteria for an LOT adjustment, Facor does not cite to any precedent in previous administrative reviews that "days in inventory" is "a key condition of sale considered in dumping calculation margins." See Facor's June 22, 2011 case brief at 2-3. There is no basis to conclude that length of time in inventory increases the level of services being provided, thus, inventory carrying time is generally not a meaningful measure of sales process intensity.

In analyzing LOT for purposes of section 773(a)(7)(A) of the Act, the Department evaluates the seller's entire marketing process. This includes analyzing whether the extent to which the producer provides sales and marketing support, services associated with freight and delivery, support in the form of quality assurance and warranties, and activities relating to warehousing. Facor has reported no differences with regard to advertising/marketing. With regard to the remaining selling functions reported by Facor, the Department does not find for the reasons discussed above that the differences in the activities performed for end-users and retailers are significant. These differences are experienced only for a portion of Facor's end-user sales. Accordingly, we continue to find that only one LOT exists for Facor's home market sales.

Facor claims that the Department never requested information about the staffing differences between Facor's end-user and retail sales in the home market. We disagree. The questionnaire stated that the Department requires detailed information about Facor's channels of distribution, customer categories, selling activities or services associated with each channel of distribution and category of customer, and the level of selling expenses for each channel and category of customer. See Department's Section A Questionnaire at A-7 through A-9, A-17. The Department's questionnaire further informed Facor that it should provide a complete list of all the selling activities performed and services offered in the U.S. and foreign markets, including inventory maintenance, technical advice, warranty services, freight and delivery arrangements, advertising and any other sales support activities, and to describe each activity or service in detail. Id. Thus, Facor was made well aware of the information needed for determining LOTs.

Facor further complains that it was not issued as many supplemental questionnaires as respondent Mukand. Facor's reference to treatment of Mukand is misplaced, however, as Mukand was issued multiple questionnaires due to its failure to provide specific information about size-based costs. In contrast, the information that Facor submitted to the Department about the company's home market retail and end-user sales indicated that the differences between these sales were not sufficiently significant to justify a finding of multiple home market LOTs.

Consistent with our findings in the Preliminary Results, we continue to find that Facor's single home market LOT is comparable to Facor's U.S. LOT. See Preliminary Results, 76 FR at 12051. Facor reported export price ("EP") sales to unaffiliated customers in the United States. See Facor's June 3, 2010 section C questionnaire response. Facor reported a single channel of distribution and customer type to the U.S. market, direct sales to retailers. See May 24 AQR at 18. The Department compared the selling functions Facor performed in the single, home market LOT with the selling functions performed for its U.S. sales. The Department found that Facor advertised its products similarly in both markets. Moreover, the Department found that, for both markets, Facor contracted with third-party freight providers to handle all freight arrangements. With regard to product guarantees, U.S. sample sales document provided by Facor in its May 24 AQR shows that Facor provides the same or very similar guarantees issued to its home market end-users to its U.S. retail customers. See May 24 AQR at Exhibit A-2. Because the Department did not find any significant differences in the selling functions between Facor's home and U.S. market sales, we continue to find that Facor's sales in the home market and the United States were made at the same LOT. Thus, for these final results, we continued to match Facor's EP sales to sales at the same, single LOT in the home market.

Comment 6: Whether Application of Total Adverse Facts Available ("AFA") is Warranted

Mukand's Affirmative Comments:
Mukand argues that it fully answered all of the Department's questions and requests for cost information for the different sizes of bar it produces by stating that: 1) it produces a very wide range of sizes; 2) in a particular production run, the same size bar can be, and is, produced on different machines, with different machines requiring different processing times; and 3) Mukand does not know which machines produce particular sizes of subject merchandise during the POR. Therefore, Mukand claims that it cannot reasonably track, estimate, or know any relative difference in production cost by size.

Mukand also argues that the Department's finding in the Preliminary Results, that Mukand's claim that it does not keep track of its production costs, alone, is an insufficient basis to not report the size-specific cost difference, does not address why Mukand cannot report these size-specific costs.

Mukand alleges that the Department's multiple supplemental questionnaires and its findings in the Preliminary Results stating that: 1) it is standard procedure to request product-specific cost data, which it has received from the other respondents in the instant review; 2) in order to produce bars of difference sizes, Mukand personnel would need to set the machine parameter to produce the specific size desired; 3) it is reasonable to expect that Mukand has manufacturing plans or engineering standards associated with the production of specific sizes of bar that could have been used to reasonably allocate costs; 4) Mukand personnel could have timed current production runs to provide rolling times for specific sizes; 5) considering the engineering knowledge the company possesses to manufacture stainless steel bar it is reasonable to expect that Mukand does know the grade-specific, length-to-weight conversion factors for different sizes of bar; 6) Mukand could have developed a reasonable methodology to allocate costs using the company's normal cost-accounting records as a starting point; 7) Mukand is a large sophisticated company that has the resources to gather the information requested; and 8) because Mukand has participated in previous segments of this Order it has experience in responding to the Department's request for information and the type of information the Department requires, do not address the fact that Mukand could not report production costs on a size-specific basis.

Mukand further claims that because in the Preliminary Results the Department stated that "if Mukand cannot reasonably report size-wise production costs, then so state, explain, and not report," this indicates that the Department is not requesting that Mukand should report this information, irrespective of whether it is believed that it can be reasonably done. For this reason, Mukand claims that the Department never instructed Mukand to report size-specific costs, and had it done so, Mukand would have reported size-wise production costs with the best possible figures. Mukand argues that the Department did not request this information, because the Department did not say that Mukand should report size-wise production costs, "irrespective of whether you believe it is reasonably cannot be done in a verifiable way." Instead, because the Department's supplemental questionnaires also stated that, if Mukand could not reasonably report size-wise production costs, then it should explain why it could not, Mukand claims it was not directed to report size specific costs and therefore it has fully answered all questions.

With regard to the Department's decision in the Preliminary Results that "Mukand's repeated failure throughout the review to provide size-specific cost data or to provide any meaningful explanation of why such data could not be provided, demonstrates that Mukand did not cooperate to the best of its ability," the Department did not find fault in the Mukand's stated reasons for not reporting this information.

Mukand argues that the Preliminary Results are wrong in stating that the Department requested that Mukand report product cost by size, because the supplemental questionnaires state that if Mukand cannot reasonably report size-wise production costs, then it should so state and explain, instead of directing Mukand to report size-specific costs irrespective of whether they can be reported.

Mukand also argues that while other respondents have reported production costs by size, there is no evidence of any significant differences in production cost by size, which is the least significant factor in the product matching methodology. Mukand also states that it is unaware of any case where the Department applied total AFA when it did not get product costs for the least significant product matching characteristic. Mukand states, that while the Preliminary Results stated that the Department "routinely" requests *product-specific cost data*, in this case, the Department requested *size-based* production costs from Mukand.

Mukand asserts that the Department's assumption of size-specific cost differences is unsupported by record evidence and is, thus, contrary to law.[37] However, assuming *arguendo*, that size-specific cost differences exist, Mukand asserts that these differences are minimal and the Department's application of total AFA is impermissibly excessive. Mukand argues that its own submitted information demonstrates that the main cost components are costs other than variable and fixed overhead costs, and these other costs do not vary by size. Further, Mukand contends the insignificance of size differences to production costs is evidenced by the fact that size is the last factor in the Department's own product matching methodology.

Further, Mukand claims there is no evidence that the other respondents to this review shared and overcame Mukand's stated obstacles to reporting size-based costs. Additionally, Mukand claims that the Department's statement that it "routinely" requests product-specific costs indicates that the Department does not 'always' make this request. Thus, the Department's application of AFA is not supported by precedent and is unlawful. Mukand suggests that the Department use other respondents' information to serve as a basis to adjust Mukand's data as to any differences in costs of production ("COP") or to apply the average dumping margin of the mandatory respondents. According to Mukand the AFA rate is not corroborated because it is another respondent's AFA rate, and AFA cannot corroborate AFA.

[37] See United States Steel Corp. and Nucor Corp. v. United States, Slip Op. 11-66, June 14, 2011 ("U.S. Steel") at 10-11; Jinan Yipin Corp., Ltd. v. United States, 31 CIT 1901, 1933, 526 F. Supp. 2d 1347, 1375 (2007)("Jinan Yipin"); and, as incorrectly cited by Mukand, Pohang Iron and Steel Co. v. United States, 23 CIT 778, 790-91 (1999), but correctly cited as - 1999 WL 970743, 21 ITRD 1999 (Ct. Int'l Trade Oct. 20, 1999) ("Pohang Iron").

Lastly, Mukand urges the Department to permit the company to now report its production costs by size. Mukand claims that it can do so immediately upon request. Mukand states that it does not believe that production costs by size can reasonably be reported but is willing to submit immediately the best it believes it can do in this regard. Mukand states that English is not its first language, and that Mukand, after months of struggle, has come up with size-specific production costs and can submit this information immediately, upon request by the Department. Mukand emphasizes that it does not believe that size-specific production costs can be reasonably reported given its particular production circumstances, and that had the Department instructed Mukand to report size-based costs irrespective of whether it could reasonably do so, Mukand would have complied. For this reason, Mukand believes it should be allowed to submit subsequent cost differences.

Petitioners' Rebuttal:
Petitioners claim that Mukand materially and repeatedly failed to comply with the Department's requests for information concerning size-specific costs throughout this proceeding. See Mukand's supplemental questionnaire responses dated June 11, 2010 (stamped date) ("June 11 DSQR"); August 31, 2010; October 25, 2010; December 15, 2010; and February 10, 2011. Petitioners state that the Department instructed Mukand to use information reasonably available to the company to account for size-specific costs, and to quantify and explain its reasons for not reporting a cost difference if it believed that size did not contribute to costs. Petitioners point out that Mukand's explanation for not reporting cost differences by size was rejected by the Department, and the Department subsequently issued another supplemental questionnaire that unambiguously instructed Mukand to report size-specific costs. Petitioners maintain that the Department never stated or implied that Mukand could avoid submitting the requested data if it explained why it could not do so.

Petitioners note that size is an important CONNUM characteristic that has been used by the Department in all stainless steel bar cases because of its significant impact on pricing and production costs.[38] Petitioners state that the Department explained in Mukand's supplemental questionnaire that size-specific costs are required for the sales-below-costs test, CV calculations, and accurate price-to-price comparisons of similar merchandise. Petitioners claim that ample precedent exists for applying AFA to respondents that do not report correct size-based costs.[39]

Petitioners assert that Mukand's reasons for not providing the requested information are irrelevant to the Department's decision to apply AFA. Citing Nippon Steel Corp. v. United States, 337 F.3d 1373, 1381 (Fed. Cir. 2003)("Nippon Steel"), Petitioners note that the courts have determined that the focus is on the *failure* to provide information, and "the reason for the failure is of no moment." See also Steel Pipe From Mexico, and accompanying IDM at Comment 4. Petitioners note that Mukand repeatedly failed to provide cost differences for size

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[38] See Stainless Steel Bar from India: Final Results of Antidumping Duty New Shipper Review, 72 FR 72671 (December 21, 2007), and accompanying IDM at Comment 2.
[39] See, e.g., Stainless Steel Bar From India; Final Results, Rescission of Antidumping Duty Administrative Review in Part, and Determination To Revoke in Part, 69 FR 55409 (September 14, 2004)("2002-2003 SS Bar from India"), and accompanying IDM at Comment 1; Certain Circular Welded Non-Alloy Steel Pipe From Mexico: Final Results of Antidumping Duty Administrative Review, 76 FR 36086 (June 21, 2011) ("Steel Pipe From Mexico") and accompanying IDM at Comment 4.

even after the Department instructed the company to do so. Petitioners additionally point out that the Department instructed Mukand to provide factual information to demonstrate the significance or insignificance of cost differences associated with different sizes of bar produced, but Mukand failed to provide any such factual information. Petitioners note that the Department instructed Mukand to contact Department officials if it could not provide the requested information, however, Mukand failed to do so, claiming English was not the native language of company officials.

Petitioners continue that, under section 782(c) of the Act, a respondent has a responsibility not only to notify the Department if it is unable to provide requested information, but also to provide a "full explanation and suggested alternative forms."[40] Petitioners argue that Mukand failed to provide the Department with any data to support its claim that size-specific costs are insignificant. Further, say Petitioners, Mukand failed to explain what steps it took to comply with the request for information, nor did it propose an alternative methodology for compiling the necessary information.[41]

As for the AFA rate, Petitioners argue that the total AFA rate of 22.63 percent assigned to Mukand is not punitive, unlawful, or impermissibly excessive. Petitioners cite section 776(b) of the Act, which provides that the Department may use an adverse inference in applying facts otherwise available when the party has failed to cooperate by not acting to the best of its ability to comply with the Department's request. Petitioners state that in applying AFA, the Department selects facts that are sufficiently adverse "as to effectuate the purpose of the facts available rule to induce respondents to provide the Department with complete and accurate information in a timely manner."[42] Petitioners continue that the Department's practice is to also select facts with an adverse inference to ensure "that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully."[43] Therefore, Petitioners also reject Mukand's argument that neutral facts available should be applied in this case. Petitioners claim that the resulting dumping margin would not reflect accurately Mukand's real dumping rate, and it would improperly benefit Mukand for its failure to cooperate in this review.

Petitioners argue that Mukand's claim of the English language barrier is no excuse because Mukand's counsel did not contact the Department on Mukand's behalf. Further, Petitioners state that the Department does not consider the submission of incomplete or inaccurate data cooperation, and Mukand's recent contention that it can now provide size-specific costs shows that Mukand had the ability to comply with the Department's request, but chose not to comply. Petitioners assert that given the late state of this proceeding and the ample opportunity that Mukand was previously given to submit size-based costs, the Department should not allow Mukand to submit any new information at this late juncture.

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[40] See 19 U.S.C. § 1677m(c)(1).
[41] See Allied-Signal Aerospace Co. v. United States, 996 F.2d 1185, 1192 (Fed. Cir. 1993)("Allied-Signal"); and Preliminary Results.
[42] See Notice of Final Determination of Sales at Less than Fair Value: Static Random Access Memory Semiconductors From Taiwan, 63 FR 8909 (February 23, 1998)("Semiconductors From Taiwan").
[43] See Brake Rotors From the People's Republic of China: Final Results of the Twelfth New Shipper Review, 71 FR 4112 (January 25, 2006)("Brake Rotors"); SAA.

Petitioners add that Mukand failed to properly serve Petitioners in this review, citing multiple examples.[44] Therefore, Petitioners assert, Mukand did not cooperate to the best of its ability in this review.

Department's Position:

We have determined that the use of facts otherwise available with an adverse inference is appropriate for the final results with respect to Mukand because of Mukand's repeated failure to provide requested information that is necessary to this investigation. For a detailed proprietary evaluation of Mukand's submissions and the Department's findings, see Memorandum from Gary Urso to Neal Halper "Use of Adverse Facts Available for the Final Results – Mukand Ltd., Including Analysis of Reported Costs Differences for Size by Facor Steels, Ltd.," dated August 31, 2011 ("Cost Differences AFA Memo").

Section 776(a)(2) of the Act provides that:

> "if an interested party or any other person (A) withholds information that has been requested by the administering authority; (B) fails to provide such information by the deadlines for the submission of the information or in the form and manner requested, subject to subsections (c)(1) and (e) of section 782; (C) significantly impedes a proceeding under this title; or (D) provides such information but the information cannot be verified as provided in section 782(i), the administering authority and the Commission shall, subject to section 782(d), use the facts otherwise available in reaching the applicable determination under this title."

Section 776(b) of the Act provides that, if the Department finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information, the Department may use an inference adverse to the interests of that party in selecting the facts otherwise available. See Notice of Final Results of Antidumping Duty Administrative Review: Stainless Steel Bar from India, 70 FR 54023, 54025-26 (September 13, 2005), and Notice of Final Determination of Sales at Less Than Fair Value and Final Negative Critical Circumstances: Carbon and Certain Alloy Steel Wire Rod from Brazil, 67 FR 55792, 55794-96 (August 30, 2002). In addition, the SAA explains that the Department may employ an adverse inference "to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully." See SAA at 870; see also, e.g., Certain Polyester Staple Fiber from Korea: Final Results of the 2005-2006 Antidumping Duty Administrative Review, 72 FR 69663 (December 10, 2007). Furthermore, affirmative evidence of bad faith on the part of a respondent is not required before the Department may make an adverse inference. See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Circular Seamless Stainless Steel Hollow Products From Japan, 65 FR 42985 (July 12, 2000), Antidumping Duties, Countervailing Duties, Final Rule, 62 FR 27296, 27340 (May19, 1997), and Nippon Steel, 337 F.3d at 1382-83. It is the Department's practice to consider, in employing adverse inferences, the extent to which a party

[44] Petitioners provide as examples Mukand's June 14, 2011 extension request (never received by Petitioners), Mukand's June 16, 2011 extension request (received by Petitioners June 18), and Mukand's June 20, 2011 extension request (received by Petitioners June 24).

may benefit from its own lack of cooperation. Id.

The CAFC has stated that, "while the standard does not require perfection and recognizes that mistakes sometimes occur, it does not condone inattentiveness, carelessness, or inadequate record keeping." See Nippon Steel, 337 F.3d at 1382. The AFA standard, moreover, assumes that because respondents are in control of their own information, they are required to take reasonable steps to present information that reflects their experience for reporting purposes before the Department.

We have determined that the use of adverse facts otherwise available is appropriate for the final results with respect to Mukand because of Mukand's: 1) repeated failure throughout this review to provide product-specific cost data by size; 2) failure to provide an acceptable explanation of why such data could not be provided; and 3) failure to provide requested factual information to support its claim that such cost differences due to size are insignificant.

A. Whether Size Specific Costs Information Is Necessary for Margin Calculations

In the Preliminary Results, we explained that the product costs a respondent normally reports should reflect cost differences attributable to the different physical characteristics as defined by the Department to ensure that the product-specific costs we use for the sales-below-cost test and CV accurately reflect the corresponding product's physical characteristics. See sections 773(b)(1) and 773(e) of the Act. Similarly, the product-specific costs should incorporate differences in variable costs associated with the physical differences in the merchandise in accordance with 19 CFR 351.411(b) to be used in the calculation of the DIFMER adjustment.

For this administrative review, as the record reflects, product size must be accounted for in the COP and the CV because sales prices are compared to production costs on a size-specific basis. These comparisons cannot accurately be made without size-specific COP's. In addition, section 773(a)(6)(C)(iii) of the Act requires that we account for all differences in variable costs of manufacturing attributable to physical differences between the subject merchandise and the foreign like product if similar products are compared. Such comparison criteria are appropriate because physical characteristics provide the Department with a dependable, measurable means of comparing two different products sold in two different markets.

CONNUMs for stainless steel bar products, under the Indian Order and other orders, are comprised of six product characteristics (i.e., general type of finish, grade, re-melting, type of final finish, shape, and size). Mukand has failed to provide COP differences for the physical characteristic of size.

Specifically, Mukand failed, in its original and four supplemental responses,[45] to provide unique product costs which account for the differences in the physical characteristic size, as defined by the Department. Mukand assigned the same amount of conversion costs per kilogram of bar

[45]Mukand submitted initial and supplemental Section D responses on June 11, 2010; August 31, 2010; October 26, 2010; December 15, 2010 ("December 15 DSQR"); and February 10, 2011.

produced, irrespective of the final size of the product produced. See cost database from Mukand's June 11 DSQR.

In the supplemental questionnaires and in the Preliminary Results, the Department explained that Mukand's cost reporting methodology fails to provide the Department with product-specific COP and CV information.[46] In addition, it fails to provide the Department with information necessary to calculate a DIFMER adjustment to account for cost differences associated with differences in physical characteristics when comparing sales of similar merchandise. The Department highlighted for Mukand that the requirement of product-specific sales and cost information is one of the most basic and significant requirements in performing the dumping analysis and margin calculation.[47]

The specific physical characteristics identified at the beginning of each case, which make up the CONNUM, are those physical characteristics determined to be the most significant in differentiating between products. These are the physical characteristics that define unique products for sales comparison purposes. The level of detail within each physical characteristic (e.g., the multiple different sizes (i.e., dimensions) of a product) reflects the importance the Department places on comparing the most similar products in a price-to-price comparison. As explained to Mukand in the first section D supplemental questionnaire:

> Because of the significant variations in the physical characteristics and processing costs, the Department does not consider one broad based average cost to be reasonable for purposes of calculating the difference in merchandise adjustment, cost of production and constructed value… Therefore, it is imperative that you submit a new Section D database that includes a unique cost for each CONNUM as defined by the physical characteristics listed by the Department model match criteria at Appendix V of the antidumping duty questionnaire including any modifications made by the Department during this period of review. See supplemental questionnaire dated August 9, 2010.

We disagree with Mukand that the Department has made a unique request in this case for size-specific costs. This was not a unique request to Mukand because size is one of the Department's defined physical characteristics in this Order. See the antidumping duty questionnaire issued April 13, 2010 in this review and the Mukand antidumping duty questionnaire issued May 22, 2001. See Stainless Steel Bar From India: Final Results of Antidumping Duty Administrative Review, 68 FR 47543 (August 11, 2003), and accompanying IDM at Comment 1.

The requirement to report product-specific sales and cost data is one of the most basic and significant requirements in performing the dumping analysis and margin calculation. The specific physical characteristics (e.g., size) identified at the beginning of each case, which make up the CONNUM, are those physical characteristics determined to be the most significant in differentiating between products. These are the physical characteristics that define unique

[46] See id. See also Preliminary Results, 76 FR at 12047.
[47] See id.

products for sales comparison purposes. The level of detail within each physical characteristic (e.g., dimension) of a product reflects the importance the Department places on comparing the most similar products in a price-to-price comparison. Sales prices are compared to product costs on a size specific basis. These comparisons cannot be made without knowing how COP varies with size. Nor can we make accurate price-to-price comparisons of similar merchandise because we do not have accurate data to make a DIFMER adjustment.

Therefore, it is standard procedure for the Department to request product-specific cost data and we routinely receive such information from respondents, as we did from the other respondents, Facor and Venus, in this case. See, e.g., the Department's standard Section D Questionnaire at step III.A.3., and the Section D questionnaire responses dated June 4, 2010 for Facor, and dated June 14, 2010, for Venus.

We disagree with Mukand that size is not an important physical characteristic because it is the last physical characteristic in the Department's product matching methodology. As discussed infra, the Department has determined that size significantly impacts cost.

B. Whether Size has a Significant Impact on Product Costs

We disagree with Mukand's conclusion that cost differences between sizes are insignificant because total overhead costs are small relative to the total cost of manufacturing as such an analysis does not address the specific overhead cost differences between different sizes of stainless steel bar. It should be noted that Facor, another integrated steel producing respondent in this same proceeding, accounted for size-specific cost differences. Using Facor's cost database, we isolated CONNUMs with identical physical characteristics except for size in groups and calculated the percent difference between the highest CONNUM-specific conversion cost and average conversion cost for each group of identical products except for size, as a percentage of the average conversion cost for the group. The results of this analysis show that there can be significant cost differences between sizes. See Cost Differences AFA Memo at Attachment 1.

We issued Mukand four supplemental questionnaires requesting that it report its costs by size, as well as provided ample examples and suggestions, as discussed below, of how it could capture and report this information, but Mukand failed to do so. See supplemental questionnaires issued August 9, 2010 ("August 9 D supplemental"); October 4, 2010 ("October 4 D supplemental"); November 22, 2010; and January 21, 2011 ("January 21 D supplemental") (collectively, "Section D supplementals"). We further instructed Mukand that if it believed that size did not contribute to cost differences between products, it should quantify and explain its reasons for not reporting a cost difference. See August 9 D supplemental and October 4 D supplemental. In response, Mukand failed to provide cost differences for size, but did provide some explanation as to why it considered the cost differences insignificant, stating:

> Theoretically based on size wise productivity, there can be a difference in production process. But it becomes insignificant as smaller sizes can be processed at higher speed than to larger size. Cross-section area of larger size is higher than smaller sizes, therefore, difference in overall

> productivity of higher and lower sizes is not significant. Therefore advantage of larger size requires less processing time per kg is not there. See December 15 DSQR at 2.

While Mukand's explanation provided some insight into the size-specific cost issue, it still did not support the position that cost differences for different sizes are insignificant. Besides these general statements, Mukand did not provide any evidence to support its claim that there are no significant cost differences related to size for its production

The Department reiterated for Mukand, in the January 21 D supplemental, that it would appear that bar produced to smaller sizes would require more processing and larger sizes would incur less processing cost per metric ton produced and gave Mukand the opportunity to provide factual information to show the significance or insignificance of cost differences associated with the different sizes of stainless steel bar it produced. The Department explained to Mukand the problem with reporting costs for different sizes of bar using a weight-based method (i.e., the same cost for every size). We stated "Under your weight based method, for example, if the total POR cost of rolling were 2000 rupees then 2000 rupees would be divided by the total weight of POR production of bar of 110 metric tons to derive a cost of rolling per metric ton of approximately 18 rupees per metric ton reported for each bar product in the cost database."

The Department explained that Mukand's weight-based method did not account for the rolling time differences between sizes because larger sizes receive the same cost (i.e., 18 rupees) as smaller products which have gone through more rolling to be reduced to a smaller size. We specifically highlighted that if it takes 10 seconds to reduce a bloom or billet to a larger size in the rolling stand whereas it takes 200 seconds to reduce a bloom or billet to a smaller size in the rolling stand then the rolling cost assigned should reflect the relative time needed to produce each different size product. Although Mukand claimed that the "difference in productivity of higher and lower sizes is not significant," this contradicted the fact considering the large differences in sizes produced.

We also explained that a one meter length of a smaller size bar weighs significantly less than a one meter length of a larger size bar. If, for example, a one meter length of a smaller size bar weighs 10 kilograms and the average cost per meter of rolling is 1000 rupees, then the cost of rolling assigned to this product would be 100 rupees per kilogram (i.e., 1000 rupees divided by 10). If a one meter length of a larger size bar weighs 100 kilograms and the average cost per meter of rolling is 1000 rupees, then the cost of rolling assigned to this product would be 10 rupees per kilogram (i.e., 1000 rupees divided by 100). See id. at 1-2.

As such, the Department clearly informed Mukand that it had not provided an adequate explanation of why processing costs do not differ between sizes of bar. Specifically, in the January 21 D supplemental, we instructed Mukand to complete a table listing: 1) the different sizes of bar produced for a selected grade of the product; 2) the weight in kilograms per meter of bar for each different size of product; 3) rolling time in seconds per meter for each different size of product; and 4) rolling time per kilogram of bar for each different size of product. In addition, we requested that Mukand separately report conversion costs for the rolling and final finishing stages of production.

For its own stainless steel bar production, Mukand possesses the information necessary to establish whether the cost differences by size are significant or not. In addition to providing Mukand multiple opportunities to submit this information, the Department specifically gave suggestions on how Mukand could show the relative significance or insignificance of cost differences due to different sizes of bar produced. By deciding on its own what information it would and would not provide, Mukand impeded this review and failed to act to the best of its ability.

If Mukand had provided weight to length conversion factors the Department would have been able to evaluate the significance of the differences in length per unit weight for the various sizes of bar produced by Mukand.[48] Without this information, the Department could not reasonably verify Mukand's claim of whether it takes any more or less time to produce thinner versus thicker dimensions of stainless steel bar per unit weight of production. Nor could the Department evaluate the significance of the rolling costs or final finishing without a separate cost field in the database. This is precisely why we requested that Mukand provide a separate field in the cost database for rolling and final finishing costs. However, rather than providing the data as requested by the Department, Mukand chose instead to simply state that it could not report size-specific costs within its normal accounting system. See February 4 DSQR.

C. Whether Mukand's Failure to Provide the Requested Information Was Reasonable

With regard to Mukand's claim that it does not allocate different costs to specific sizes in its normal books and records, we informed Mukand that it should use information reasonably available to the company to account for size-specific cost differences. See Section D supplementals. As we explained in our supplemental questionnaires, Mukand personnel could have timed current production runs to provide estimated rolling times for the specific requested sizes which would have enabled the Department to analyze the significance of production time differences due to size.

Additionally, in the January 21 D supplemental the Department informed Mukand that in the event Mukand was unable to approximate the weight in kilograms per meter or could not approximate the rolling time in seconds per meter of bar produced for each requested size, to contact Department officials immediately. However, not only did Mukand not complete the table provided in the January 21 D supplemental, neither Mukand nor its counsel ever made contact with Department officials asking for assistance or clarification. Thus, Mukand never addressed the Department's concern that allocating the same cost for all sizes regardless of the obvious and undeniable differences in weight, is not a reasonable allocation method.

Even if a company does not calculate product-specific costs to the level of detail required by the Department in its normal financial and cost accounting records, as is the case here, we require

[48] We note that Mukand's reported COP and CV data is on a per unit weight basis.

that it account for such cost differences using information reasonably available to the company. See Section D Questionnaire dated June 11 DSQR at D-25 and Section D supplementals. For example, in our supplemental questionnaires we repeatedly instructed Mukand to rely not only on its existing financial and cost accounting records, but on other information which would allow it to reasonably allocate its costs to the many different sizes of stainless steel bar products produced.

Under section 782(c) of the Act, a respondent has a responsibility not only to notify the Department if it is unable to provide requested information, but also to provide a "full explanation and suggested alternative forms." In response to our numerous requests for product-specific cost data, Mukand maintained its position that it would not provide the requested data because cost differences related to size are insignificant and its accounting system does not track them. The Department repeatedly asked Mukand to support its claim that size-specific cost differences for bar products are insignificant. See Mukand's October 25, 2010 DSQR ("October 25 DSQR"), December 15 DSQR, and February 4 DSQR. However, Mukand has failed to provide the Department with any actual data to support its claims that size-specific cost differences are insignificant. As such, this case can be distinguished from Polyethylene Terephthalate Film, Sheet and Strip From Taiwan: Final Results of Antidumping Duty Administrative Review, 76 FR 9745 (February 22, 2011) and accompanying IDM at Comment 1, where the respondent provided an adequate explanation of why the cost differences for surface treatment were insignificant and provided actual data to support its claim. Cooperation in an antidumping investigation requires more than a simple statement that a respondent cannot provide certain information from its previously prepared accounting records; the burden to establish that it has acted to the best of its ability rests upon the respondent. If a party cannot provide certain information from its accounting records, then it may notify the Department that it is unable to submit this information in the form and manner requested but it must also provide explanation and suggest alternative forms in which it is able to submit the information. See Section 782 (c) of the Act. See also Notice of Final Determinations of Sales at Less Than Fair Value: Certain Cold-Rolled Flat-Rolled Carbon-Quality Steel Products from Turkey, 65 FR 15123 (March 21, 2000) ("Cold-Rolled from Turkey"). As noted above, to meet that burden a respondent must explain what steps it has taken to comply with the information request, and propose alternative methodologies for providing the necessary information. See also Allied-Signal, 996 F.2d at 1192. Mukand has failed to do either.

It is reasonable to expect that Mukand has manufacturing plans or engineering standards associated with the production of specific sizes of bar that could have been used to reasonably allocate costs to specific sizes because Mukand produced, and continues to produce, stainless steel bars to the exacting engineering standards advertised in its product brochure.[49] As Mukand continues to produce stainless steel bar, Mukand personnel could also have timed current production runs to provide estimated rolling times for specific sizes which could have been used as a reasonable basis for allocating costs to specific sizes. It is also reasonable to expect that Mukand knows the grade specific length to weight conversion factors for different sizes of bar with the engineering knowledge the company possesses to manufacture stainless steel bar.

[49] See Mukand's May 12, 2010 Section A response at Annexure O (product brochure).

While Mukand's financial and cost accounting records may not allocate unique costs to the different sizes of bar produced, the company could have developed a reasonable methodology to allocate costs to different sized products on a CONNUM-specific per-unit weight basis, using the company's normal cost accounting records as a starting point to calculate CONNUM-specific costs. The Department repeatedly requested that Mukand look beyond its financial and cost accounting records and select from a variety of data using, for example, engineering studies, rolling mill processing times, production experience, relative length to weight conversion factors, or other production records for allocating costs to products on a CONNUM-specific per-unit weight basis.

Although we provided Mukand with notice informing it of the consequences of its failure to respond fully to our antidumping questionnaire, Mukand's repeated failure throughout the review to provide the information requested demonstrates that it did not cooperate to the best of its ability. Moreover, Mukand has participated in previous segments of this order and, thus, has experience in responding to the Department's requests for information and is well aware of the types of information the Department requires. See, e.g., Stainless Steel Bar From India: Final Results of Antidumping Duty Administrative Review, 63 FR 13622 (March 20, 1998). See also, e.g., Nippon Steel, 337 F.3d at 1832, where the CAFC reiterated that to conclude that a party has not cooperated to the best of its ability, the Department need only show that a "reasonable and responsible importer would have known that the requested information was required to be kept and maintained under the applicable statutes, rules and regulations."

Mukand's failure to provide the requested data renders its response unusable for these final results under section 782(e) of the Act. The information Mukand did provide was so incomplete that it could not serve as a reliable basis for reaching a final determination because without the cost information based on size, the Department cannot conduct an adequate sales-below-cost test or calculate an accurate DIFMER adjustment for size. For example, size specific sales prices are compared to size specific costs in the sales below cost test, so without size specific costs, an accurate sales-below-cost test cannot be performed. Furthermore, because the information was so incomplete, we find it cannot be used without undue difficulty. Therefore, in light of Mukand's continued failure to provide requested information necessary to calculate an accurate dumping margin in this case, or even factual data indicating that cost differences due to size are insignificant, in accordance with section 776(a) of the Act, Mukand has failed to report information requested by the Department and significantly impeded this proceeding. Accordingly, we determine that the use of facts otherwise available with an adverse inference is appropriate to determine Mukand's margin.

As explained above, the Department has determined size to be an important physical characteristic. In other cases, we have applied AFA for similar failures to provide product specific costs, including size. See Cold-Rolled from Turkey, and accompanying IDM at Comment 1 (where the Department determined total AFA was warranted because Erdemir failed in its original and supplemental responses to provide product-specific costs based on physical characteristics); 2002-2003 SS Bar from India and accompanying IDM at Comment 1 (where the Department assigned a margin based on total AFA because the Department found Chandan's responses to the Department's original and supplemental questionnaires were so deficient that they were unusable. Similar to this case, Chandan did not allocate rolling mill costs (i.e., differentiate costs between products based on dimension) after the Department's repeated and specific requests); and Steel Pipe from Mexico, and accompanying IDM at Comment 4 (where the Department applied AFA to Ternium's cost information because of Ternium's refusal to provide product-specific costs based on product dimension after the Department's repeated and specific requests. The Department also noted in this case that few companies kept their own records in the exact manner requested by the Department and directed all the respondents to use a reasonable method based on available company records to calculate appropriate cost differences for all of the Department's physical characteristics. Similarly to this case, Ternium refused to provide detailed product-specific cost calculations that allocated costs based on product dimensions).

Mukand failed to adequately answer the Department's questions regarding size specific costs because the company refused to look beyond its normal accounting records, and use any reasonable method based on company records (e.g., engineering studies, production reports, etc.), to allocate costs to different dimensions of products. Through numerous suggestions on how Mukand could have calculated cost differences for sizes of stainless steel bar, the Department did address Mukand's stated reasons why it could not report size costs differences.

We disagree with Mukand's assertion that the Department unlawfully applied AFA in the instant review based on unsubstantiated assumptions. Although Mukand cites to Jinan Yipin, Pohang Iron and U.S. Steel, three cases in which the CIT stated the Department applied AFA based on assumptions that were not substantiated, the inappropriate assumptions in those cases are quite different from the facts the Department used in applying AFA in the instant review. For example in Jinan Yipin, the Department applied AFA to a respondent's customer because the respondent failed to identify the customer as an affiliated party in its questionnaire responses. The court found that this application of AFA could not be sustained because it presumed that the respondent and customer were affiliated parties without any evidence to this effect, the lack of which being the initial reason the Department sought to apply AFA to the respondent. In Pohang Iron, the Court was also reviewing the Department's affiliation determination based on limited information. The court found that, despite the two parties' inability to provide tangible evidence of price rejection through (1) handwritten entries in cost spreadsheets or (2) the substantial selling, general, and administrative expenses incurred by the U.S. affiliates in their U.S. sales, there was not a sufficient basis for finding affiliation between the companies. Finally, in U.S. Steel, the Court decided that without supporting evidence, the Department made a duty drawback adjustment simply based on the fact that respondent complied with the exporting country's licensing requirements. However, in the instant review, the Department's AFA determination is not based on unsubstantiated facts, but instead is based on conclusions clearly supported by record evidence, as further discussed below.

In its case brief, several months following the Preliminary Results, for the first time Mukand stated that it has now prepared these cost differences for sizes and requested that the Department allow Mukand to submit the data for consideration in the final results of this review. The fact that Mukand chose not to report these costs because it felt that the resulting calculations could not be "reasonable" contradicts that evidence it has offered to provide as well as Facor's evidence on the record. At a minimum, Mukand, if acting to the best of its ability, would have reported the requested product costs by size and allowed the Department and interested parties to analyze and assess the reasonableness of its methodology.

We were very clear in our supplemental questions that Mukand must either provide size specific costs or factual information showing that the cost differences due to size are insignificant. It provided neither. The level of complexity of operations indicated by Mukand as a reason for not providing the requested data does not excuse Mukand from devising some reasonable method to report size-specific product costs. Mukand's comments that using information outside the accounting system while possible would be unwieldy and imprecise are unpersuasive. As discussed above, the Department requires respondents to report product-specific costs to perform an accurate dumping analysis. We provided Mukand with several opportunities to submit factual information to support its claim that cost differences between sizes were insignificant. We requested the weight to length conversion factors, rolling times, and separate conversion cost fields for the rolling and other finishing stages of production in an attempt to analyze the potential significance or insignificance of cost differences due to size. Mukand provided none of the requested data. Without size specific product costs or rolling times, the Department has no data with which to evaluate Mukand's insignificance claim. In the end, Mukand, on its own, decided what it would and would not provide to the Department.

For the reasons discussed above, we find that Mukand did not answer all of the Department's questions to the best of its ability and significantly impeded the Department's ability to properly conduct this investigation. Specifically, Mukand failed to provide: 1) size-specific cost differences; 2) factual data to support its claim that cost differences due to size are insignificant; 3) weight to length conversion factors for selected sizes of product; 4) approximate relative rolling times for selected sizes of product; and 5) separate conversion cost fields for the rolling and final finishing stages of production.

We also disagree with Mukand that an appropriate remedy would be to use the costs differences reported for different sizes by the other respondents or the average dumping margin calculated for the other respondents in this review. We agree with Petitioners that in applying AFA, the Department selects facts that are sufficiently adverse "as to effectuate the purpose of the facts available rule to induce respondents to provide the Department with complete and accurate information in a timely manner."[50] The Department's practice is to select facts with an adverse inference to ensure "that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully."[51] Using cost information from other respondents or the average dumping margin for other respondents would improperly benefit Mukand for its failure to cooperate in this review because there is nothing necessarily adverse about either of these options. It would be beneficial to Mukand if we used Venus' de minimis margin in calculating a margin for Mukand and it would also be unfair to allow Mukand to benefit from Facor's cooperative participation.

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[50] See Semiconductors From Taiwan.

[51] See Brake Rotors; SAA.

We agree with Petitioners that Mukand's claim that the Department stated in its supplemental questionnaires that if Mukand could not reasonably report size-wise production cost, then Mukand should just explain why it could not, is incongruous. The Department never stated or implied that Mukand could avoid submitting the requested cost data if it explained why it could not do so. The Department repeatedly directed Mukand to supply product specific costs. See Section D supplementals. We disagree with Mukand's assertion that, because English was not its native language, it should be given additional consideration in answering its questionnaires because Mukand was represented by English speaking counsel during this review. Furthermore, given the late stage of this proceeding, to allow Mukand now to submit cost differences for sizes of stainless steel bar, would not be proper in that it would not allow sufficient time for the Departmental or interested party analysis and comment on this data. Mukand has been given numerous opportunities to report cost differences for sizes of stainless steel bar produced. See Section D supplementals. Combined with the fact that the Department clearly articulated to Mukand the importance and potential adverse risks of non compliance, we do not believe it practical to allow Mukand to submit new data at this late stage in this review. In this regard, the deadline has passed for the submission of new factual information. See 19 CFR 351.301(b). Because the Department faces strict statutory deadlines when conducting administrative reviews of antidumping duty orders, it is important that certain types of information from an interested party (e.g., Quantity and Value, COP, and CV information) are provided early in an administrative review and in a timely manner so that we can analyze such information effectively and meet our statutory obligations under U.S. law. It is too late in this proceeding for the Department to accept and analyze a new Section D questionnaire response, provide interested parties time to comment, address the interested party comments and calculate an antidumping duty margin within the statutory deadlines. Accordingly, the Department cannot accept Mukand's untimely request to submit cost data in its case brief.

Comment 7: Whether the AFA Rate is Corroborated

Mukand's Affirmative Comments:
Mukand asserts that the AFA rate that it received is another respondent's rate that is also based on AFA. Mukand argues that AFA cannot corroborate AFA. Further, Mukand argues that the rates for other respondents are erroneously calculated because the Department impermissibly zeroed in the dumping margin. Mukand asserts that the Department should calculate Mukand's actual dumping margin using Mukand's own data and without zeroing.

Petitioners' Rebuttal:
Petitioners assert that the AFA rate assigned to Mukand is the margin calculated for Ambica Steels Limited ("Ambica") in the 2006 new shipper review, and it is the highest calculated weighted-average margin determined for any respondent in any segment of this proceeding. Petitioners note that the Department stated that this AFA rate is reliable because it was calculated as the AFA rate for Ambica based upon its own submitted information and there is no information that calls into question the reliability of the information. Moreover, Petitioners state that the Department has corroborated the AFA rate with the transaction-specific margins calculated for the other respondents in this review. Finally, according to Petitioners, the AFA rate is further corroborated because the other respondents made significant numbers of sales in

commercial quantities, made in the ordinary course of trade, with margins near or exceeding the AFA rate.

Department Position:
Upon review of the issues raised by the parties, we find it inappropriate to assign Ambica's margin, which was calculated in the 2006 new shipper review, to Mukand as AFA. We have instead assigned the petition rate of 21.02 percent to Mukand as AFA.

Where the Department applies an AFA rate because a respondent failed to cooperate by not acting to the best of its ability to comply with a request for information, section 776(b) of the Act authorizes the Department to rely on information derived from the petition, a final determination, a previous administrative review, or other information placed on the record. See also 19 CFR 351.308(c) and the SAA at 870. Section 776(c) of the Act provides that, when the Department relies on secondary information as facts available, it must, to the extent practicable, corroborate that information from independent sources that are reasonably at its disposal. The SAA clarifies that "corroborate" means that the Department will satisfy itself that the secondary information to be used has probative value. See SAA at 870; see also 19 CFR 351.308(d). The SAA also states that independent sources used to corroborate may include, for example, published price lists, official import statistics, and customs data as well as information obtained from interested parties during the particular proceeding. Id. Information from a prior segment of the proceeding constitutes secondary information. Id.

The Department's practice, when selecting an AFA rate from among the possible sources of information, has been to ensure that the margin is sufficiently adverse "as to effectuate the statutory purposes of the adverse facts available rule to induce respondents to provide the Department with complete and accurate information in a timely manner." See, e.g., Semiconductors From Taiwan, 63 FR at 8932. Additionally, the Department's practice has been to assign the highest margin determined for any party in the LTFV investigation or in any administrative review of a specific order to respondents who have failed to cooperate with the Department. See, e.g., Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, From the People's Republic of China: Final Results of Antidumping Duty Administrative Reviews and Final Rescission and Partial Rescission of Antidumping Duty Administrative Reviews, 70 FR 54897, 54898 (September 19, 2005).

In the Preliminary Results, we applied to Mukand as AFA Ambica's margin calculated in its 2006 new shipper review. Upon further review of the issues raised by the parties, the Department now determines that this rate is not reliable. In Stainless Steel Bar from India: Final Results of Antidumping Duty New Shipper Review, 72 FR 72671 (December 21, 2007), even though the rate calculated at the preliminary results was based on Ambica's own submitted data, in the final results of the new shipper review, the Department stated that it was resorting to AFA because it was unable to depend on the accuracy and reliability of the information in Ambica's datasets. Id. Specifically, at verification, the Department discovered that Ambica incorrectly reported weighted-average gross unit home market sales prices by grade, regardless of the CONNUMs captured by that grade, and instead of the actual gross unit prices listed on Ambica's invoices. In addition, Ambica erroneously combined the quantities for two distinct sales of the same CONNUM on the same invoice. This resulted in a discrepancy in the number of sales reported in Ambica's home market sales database. These problems cast doubt on the reliability of Ambica's gross unit prices and the accuracy of its reported sales transactions. We find that the margin calculated using Ambica's flawed data is not sufficiently reliable to be applied as AFA to another respondent.

In order to ensure that the margin is sufficiently adverse so as to induce Mukand's cooperation, we have assigned the petition rate of 21.02 percent, which was also assigned to Mukand as AFA in the original investigation and most recently to the respondent in the 2004-2005 administrative review. See SS Bar Final Determination; Notice of Final Results and Final Partial Rescission of Antidumping Duty Administrative Review: Stainless Steel Bar from India, 71 FR 37905 (July 3, 2006)("2004-2005 SS Bar from India"). The Department finds that this rate is sufficiently high as to effectuate the purpose of the facts available rule (i.e., we find that this rate is high enough to encourage participation in future segments of this proceeding in accordance with section 776(b) of the Act).

Information from prior segments of the proceeding constitutes secondary information and section 776(c) of the Act provides that the Department shall, to the extent practicable, corroborate that secondary information from independent sources reasonably at its disposal. The Department's regulations provide that "corroborate" means that the Department will satisfy itself that the secondary information to be used has probative value. See 19 CFR 351.308(d) and SAA at 870. To the extent practicable, the Department will examine the reliability and relevance of the information to be used. Unlike other types of information, such as input costs or selling expenses, there are no independent sources from which the Department can derive dumping margins. The only source for dumping margins is administrative determinations.

The Department finds that the selected rate is reliable, because as discussed above, it was assigned to Mukand as AFA in the original investigation and in the seventh administrative review.[52] This rate has also been applied as AFA to other respondents to this proceeding.[53] We find no evidence offered on the record of this review that questions the reliability of this rate. Therefore, the Department finds to the extent practicable that this rate is reliable to be used in the current administrative review.

With respect to relevance aspect of corroboration of the AFA rate, we have used the transaction-specific margins we calculated for Facor in this review to determine whether the rate of 21.02 percent could bear a rational relationship to the commercial practices for sales of subject merchandise. Specifically, we analyzed transaction-specific margins of Facor to determine whether it made U.S. sales at prices that would result in transactional margins at or above 21.02 percent during the POR. We found that the 21.02 percent margin falls within the range of individual transaction margins and that there were many sales in commercial quantities, made in

[52] See SS Bar Final Determination; Stainless Steel Bar From India; Final Results of Antidumping Duty Administrative Review, 68 FR 47543 (August 11, 2003).

[53] See, e.g., Stainless Steel Bar From India; Final Results of Antidumping Duty Administrative Review and New Shipper Review and Partial Rescission of Administrative Review, 65 FR 48965 (August 10, 2000)("1998-1999 SS Bar from India"); 2002-2003 SS Bar From India; 2004-2005 SS Bar from India.

the ordinary course of trade, with margins near or exceeding 21.02 percent. Moreover, Facor's production structure is comparable to Mukand, i.e., it is an integrated producer that produces its own raw material inputs for producing the merchandise under review. See Memorandum from Mahnaz Khan to File regarding Preliminary Results Calculation Memorandum for Facor Steels, Ltd., at Attachment 2 (February 28, 2011) and Memorandum from Scott Holland to File, "Corroboration of the Total Adverse Facts-Available Rate for Mukand Ltd.," at Attachment 2 (August 31, 2011)("Corroboration of AFA Memo").

The transactions by Facor receiving a margin of 21.02 percent or greater are also representative of Facor's normal business practices. The Department found that these transactions are not aberrational or anomalies, but are reasonably similar to the quantity and value of all the other transactions. Facor had a reasonable percentage of transaction-specific margins that were higher or very close to the AFA rate, and those transactions were made in quantities that fell within the range of sales quantities experienced by Mukand. For a comparison of Facor and Mukand's total sales quantities during the POR, see Corroboration of AFA Memo.

Because we find that another Indian respondent in this administrative review made numerous sales of subject merchandise to the United States during the POR at prices that resulted in transaction-specific margins at or above 21.02 percent, we find that the rate of 21.02 percent bears a rational relationship to the commercial practices of sales of subject merchandise during the POR. Selecting a rate representing a substantial percentage of total U.S. sales transactions by Facor is in line with PAM, S.p.A. v. United States, 582 F.3d 1336, 1340 (Fed. Cir. 2009)(where the court upheld an AFA rate even though only 0.5 percent of the respondent's total sales were above the selected rate). Moreover, there is no information on the record of this review that demonstrates that the rate selected is not an appropriate AFA rate for Mukand.

In addition to the transaction specific margins corroborating this dumping margin, a review of all previous proceedings under this order indicates that similarly high dumping margins have previously been calculated. For example, in the 2001 new shipper review of Uday Engineering Works, the Department calculated a dumping margin of 19.8 percent for Uday. See Stainless Steel Bar from India: Final Results of New Shipper Antidumping Duty Administrative Review, 67 FR 69721, 69722 (November 19, 2002). Additionally, the cooperating respondent, Facor, received a rate of 19.54 in the fourth administrative review of this case. See 1998-1999 SS Bar From India.

The Department's recently calculated margins near the selected rate, and the substantial transaction specific margins at or above 21.02 percent for a cooperating respondent in this review, strongly indicate that this rate of 21.02 percent is representative of Mukand's commercial reality. Accordingly, we find that the AFA rate is corroborated to the extent practicable for Mukand.

Comment 8: Whether to Use Zeroing Methodology in this Administrative Review

Facor's and Mukand's Affirmative Comments:
Mukand and Facor argue that, in this review, the Department did not permit sales with negative dumping margins to offset the amount of dumping found for other sales. Citing Dongbu,[54] Mukand and Facor state that the CAFC has now found that the Department's use of such "zeroing" in administrative reviews is contrary to law.

Petitioners' Affirmative Comments:
Petitioners argue that, since the Department has applied total AFA to Mukand, the zeroing issue is irrelevant with regard to that respondent. Moreover, Petitioners assert that Dongbu did not find the Department's zeroing methodology to be contrary to law. Rather, state Petitioners, Dongbu remanded the issue of zeroing in administrative reviews to the Department "for further proceedings to give Commerce the opportunity to explain its reasoning." Id. Petitioners claim that the Department recently provided such explanation in Fresh Garlic From the People's Republic of China: Final Results and Final Rescission, in Part, of the 2008-2009 Antidumping Duty Administrative Review, 76 FR 37321 (June 27, 2011), and accompanying IDM at Comment 10. Therefore, Petitioners argue, consistent with its determinations in recent reviews, the Department should continue to employ its zeroing methodology in this administrative review.

Department's Position:
Section 771(35)(A) of the Act defines "dumping margin" as the "amount by which the normal value exceeds the export price or constructed export price of the subject merchandise" (emphasis added). Outside the context of antidumping investigations involving average-to average comparisons, the Department interprets this statutory definition to mean that a dumping margin exists only when NV is greater than EP or CEP. We disagree with the respondents that the Department's "zeroing" practice is an inappropriate interpretation of the Act. Because no dumping margins exist with respect to sales where NV is equal to or less than EP or CEP, the Department will not permit these non-dumped sales to offset the amount of dumping found with respect to other sales. The CAFC has held that this is a reasonable interpretation of section 771(35) of the Act. See, e.g., Timken Co. v. United States, 354 F.3d 1334, 1342 (CAFC 2004) ("CAFC Timken"); and Corus Staal BV v. Department of Commerce, 395 F.3d 1343, 1347-49 (CAFC 2005)("Corus I").

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

[54] See Dongbu Steel Co., Ltd. v. United States, Fed. Cir. Case No. 2010-1271 (March 31, 2011), Fed. Cir. Case No. 07-CV0125 (March 31, 2011) at 4 and 19 (Appeal from the United States Court of International Trade) ("Dongbu").

and not on an aggregate basis. At no stage of the process is the amount by which EP or CEP exceeds the NV permitted to offset or cancel the dumping margins found on other sales.

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

The CAFC explained in CAFC Timken that denial of offsets is a "reasonable statutory interpretation given that it legitimately combats the problem of masked dumping, wherein certain profitable sales serve to mask sales at less than fair value." See CAFC Timken, 354 F.3d at 1343. As reflected in that opinion, the issue of so-called masked dumping was part of the policy reason for interpreting the statute in the manner interpreted by the Department. No U.S. court has required the Department to demonstrate "masked dumping" before it is entitled to invoke this interpretation of the statute and deny offsets to dumped sales. See, e.g., CAFC Timken, 354 F.3d at 1343; Corus I, 395 F.3d at 1343; Corus Staal BV v. United States, 502 F.3d 1370, 1375 (CAFC 2007) ("Corus II"); and NSK Ltd. v United States, 510 F.3d 1375 (CAFC 2007) ("NSK").

In 2007, the Department implemented a modification of its calculation of weighted-average dumping margins when using average-to-average comparisons in antidumping investigations. See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification, 71 FR 77722 (December 27, 2006) ("Zeroing Notice") and Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margins During an Antidumping Investigations; Change in Effective Date of Final Modification, 72 FR 3783 (January 26, 2007)(collectively, "Final Modification for Antidumping Investigations"). With this modification, the Department's interpretation of the statute with respect to non-dumped comparisons was changed within the limited context of investigations using average-to-average comparisons. Adoption of the modification pursuant to the procedure set forth in section 123(g) of the URAA was specifically limited to address adverse World Trade Organization ("WTO") findings made in the context of antidumping investigations using average-to-average comparisons. The Department's interpretation of the statute was unchanged in other contexts.

It is reasonable for the Department to interpret the same ambiguous language differently when using different comparison methodologies in different contexts. In particular, the use of the word "exceeds" in section 771(35)(A) of the Act can reasonably be interpreted in the context of an antidumping investigation to permit negative average-to-average comparison results to offset or reduce the amount of the aggregate dumping margins used in the numerator of the weighted-average dumping margin as defined in section 771(35)(B) of the Act. The average-to-average comparison methodology typically applied in antidumping duty investigations averages together high and low prices for directly comparable merchandise prior to making the comparison. This means that the determination of dumping necessarily is not made for individual sales, but rather at an “on average” level for the comparison. For this reason, the offsetting methodology adopted in the limited context of investigations using average-to-average comparisons is a reasonable manner of aggregating the comparison results produced by this comparison method. Thus, with respect to how negative comparison results are to be regarded under section 771(35)(A) of the Act, and treated in the calculation of the weighted average dumping margin under section 771(35)(B) of the Act, it is reasonable for the Department to consider whether the comparison result in question is the product of an average-to-average comparison or an average-to-transaction comparison.

In U.S. Steel Corp., the CAFC considered the reasonableness of the Department’s interpretation not to apply zeroing in the context of investigations using average-to-average comparisons, while continuing to apply zeroing in the context of investigations using average-to-transaction comparisons pursuant to the provision at section 777A(d)(1)(B) of the Act.[55] Specifically, in U.S. Steel Corp., the CAFC was faced with the argument that, if zeroing was never applied in investigations, then the average-to-transaction comparison methodology would be redundant because it would yield the same result as the average-to-average comparison methodology. The Court acknowledged that the Department intended to continue to use zeroing in connection with the average-to-transaction comparison method in the context of those investigations where the facts suggest that masked dumping may be occurring. See U.S. Steel Corp., 621 F.3d at 1363. The Court then affirmed as reasonable the Department’s application of its modified average-to-average comparison methodology in investigations in light of the Department’s stated intent to continue zeroing in other contexts. Id.

In addition, the CAFC recently upheld, as a reasonable interpretation of ambiguous statutory language, the Department’s continued application of “zeroing” in the context of an administrative review completed after the implementation of the Zeroing Notice. See SKF USA Inc. v. United States, 630 F.3d 1365 (CAFC 2011) (“SKF”). In that case, the Department had explained that the changed interpretation of the ambiguous statutory language was limited to the context of investigations using average-to-average comparisons and was made pursuant to statutory authority for implementing an adverse WTO report. We find that our determination in this administrative review is consistent with the CAFC’s recent decision in SKF.

Furthermore, in Corus I, the CAFC acknowledged the difference between antidumping duty investigations and administrative reviews, and held that section 771(35) of the Act was just as ambiguous with respect to both proceedings, such that the Department was permitted, but not required, to use zeroing in antidumping duty investigations. See Corus I, 395 F.3d at 1347. That is, the Court explained that the holding in CAFC Timken – that zeroing is neither required nor precluded in administrative reviews – applies to antidumping duty investigations as well. Thus, Corus I does not preclude the use of zeroing in one context and not the other.

Moreover, we disagree with the respondents that the CAFC’s recent decision in Dongbu requires the Department to change its methodology in this administrative review. The holding of Dongbu, and the recent decision in JTEKT Corporation v. US, 2010-1516, -1518 (CAFC June 29, 2011) (“JTEKT”), was limited to finding that the Department had not adequately explained

[55] See U.S. Steel Corp., v. United States, 621 F. 3d 1351 (CAFC 2010) (U.S. Steel Corp.).

the different interpretations of section 771(35) of the Act in the context of investigations versus administrative reviews, but the CAFC did not hold that these differing interpretations were contrary to law. Importantly, the panels in neither Dongbu nor JTEKT overturned prior CAFC decisions affirming zeroing in administrative reviews, including SKF, which we discuss above, in which the Court affirmed zeroing in administrative reviews notwithstanding the Department's determination to no longer use zeroing in certain investigations. Unlike the determinations examined in Dongbu and JTEKT, the Department here is providing additional explanation for its changed interpretation of the statute subsequent to the Final Modification for Antidumping Investigations – whereby we interpret section 771(35) of the Act differently for certain investigations (when using average-to-average comparisons) and administrative reviews. For all these reasons, we find that our determination is consistent with the holdings in Dongbu, JTEKT, U.S. Steel Corp., and SKF.

Additionally, we note that the CAFC has held that WTO reports are without effect under U.S. law, "unless and until such a {report} has been adopted pursuant to the specified statutory scheme" established in the URAA. See Corus I, 395 F.3d at 1347-49; accord Corus II, 502 F.3d at 1375; and NSK, 510 F.3d 1375. As is clear from the discretionary nature of this scheme, Congress did not intend for WTO reports to automatically trump the exercise of the Department's discretion in applying the statute. See 19 USC 3538(b)(4) (implementation of WTO reports is discretionary). Moreover, as part of the URAA process, Congress has provided a procedure through which the Department may change a regulation or practice in response to WTO reports. See 19 U.S.C. 3533(g); and Zeroing Notice, 71 FR at 77722. Specifically, with respect to the United States – Antidumping Administrative Reviews and Other Measures Related to Imports of Certain Orange Juice from Brazil, WT/DS 382/R (Mar. 25, 2011), the United States has not yet employed the statutory procedure set forth at 19 U.S.C. 3533(g) to implement the panel's finding. With respect toUnited States – Measures Relating to Zeroing and Sunset Reviews, Recourse to Article 21.5 of the DSU by Japan, WT/DS322/RW (Apr. 24, 2009) , and United States – Final Anti-Dumping Measures on Stainless Steel From Mexico, WT/DS344/AB/R (Apr. 30, 2008), the steps taken in response to these reports do not require a change to the Department's approach of calculating weighted-average dumping margins in the instant administrative review.

Finally, the Department notes that it has published a proposed revised calculation methodology to eliminate "zeroing" in administrative reviews when it published a revised calculation methodology. See Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings, 75 FR 81533 (December 28, 2010) ("Proposed Calculation Methodology")(proposed regulations by their very nature are not binding to an agency). See Viraj Forgings Ltd. v. United States, 206 F. Supp. 2d 1288, 1293 (CIT 2002) (rejecting the plaintiff's reliance on a proposed rule as basis for receiving a zero margin). The Proposed Calculation Methodology is only a proposal that remains subject to review of comments from the public and statutory consultation requirements involving Congressional committees, among others. See section 123(g)(1) of the URAA. It does not provide legal rights or expectations for parties in this administrative review. The Proposed Calculation Methodology further makes clear that, in terms of timing, any changes in methodology will be prospective only, and "will be applicable in . . . all {administrative} reviews pending before the Department for which a preliminary result is issued more than 60 business days after the date of publication of the Department's Final Rule and Final Modification." See Proposed Calculation Methodology, 75 FR at 82535. Additionally, the Proposed Calculation Methodology would not apply to the present administrative review because normally, "{a} final rule or other modification . . . may not go into effect before the end of the 60-day period beginning on the date which consultations {between the Trade Representative heads of the relevant departments or agencies, and appropriate Congressional committees}. . . begin." See section 123(g)(2) of the URAA. Because the final results in this administrative review will be completed prior to the effective date of the final rule, any change in the treatment of non-dumped sales, pursuant to the Proposed Calculation Methodology (if implemented) would not apply to this administrative review.

Accordingly, and consistent with the Department's interpretation of the Act described above, in the event that any of the U.S. sales transactions examined in this review are found to exceed NV, the amount by which the price exceeds NV will not offset the dumping found in respect of other transactions.

RECOMMENDATION:

Based on our analysis of the comments received, we recommend adopting all of the above positions. If accepted, we will publish the final results of review and the final dumping margins in the Federal Register.

AGREE___________ DISAGREE___________

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Ronald K. Lorentzen
Deputy Assistant Secretary
for Import Administration

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Date