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

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

SUBJECT: First Administrative Review of Sodium Hexametaphosphate from the People's Republic of China: Issues and Decision Memorandum for the Final Results

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SUMMARY

We have analyzed the case and rebuttal briefs submitted by the Petitioners[1] and Hubei Xingfa Chemical Group Co., Ltd. ("Xingfa") in the first administrative review of sodium hexametaphosphate ("sodium hex") from the People's Republic of China ("PRC"). The Department of Commerce ("Department") published the *Preliminary Results* on March 12, 2010.[2] The period of review ("POR") is September 14, 2007 – February 28, 2009.

On November 19-23, 2009 the Department conducted verification of Hubei Xingfa's questionnaire responses.[3] Following the *Preliminary Results* and analysis of the comments received, we made changes to Xingfa's margin calculation.[4] We recommend that you approve

[1] The Petitioners are ICL Performance Products and Innophos, Inc. (hereinafter referred to as the "Petitioners").
[2] *See First Administrative Review of Sodium Hexametaphosphate from the People's Republic of China: Notice of Preliminary Results of the Antidumping Duty Administrative Review*, 75 FR 19613 (April 15, 2010) ("*Preliminary Results*").
[3] *See* Memorandum to the File through Scot T. Fullerton, Program Manager, Office 9, from Paul Walker, Senior Case Analyst, "First Administrative Review of Sodium Hexametaphosphate from the People's Republic of China: Verification of Hubei Xingfa Chemical Group Co., Ltd.," dated April 5, 2010 ("Verification Report").
[4] *See* Memorandum to the File, through Scot T. Fullerton, Program Manager, Office 9, from Paul Walker, Case Analyst, "First Administrative Review of Sodium Hexametaphosphate from the People's Republic of China: Final Analysis Memo for Hubei Xingfa Chemical Group Co., Ltd.," dated concurrently with this notice; *see also* Memorandum to the File through Scot Fullerton, Program Manager, Office 9, from Paul Walker, Case Analyst,

the positions described in the "Discussion of the Issues" section of this memorandum. Below is a complete list of issues for which we received comments and rebuttal comments by parties:

Comment 1: Intermediate Inputs – Electricity
Comment 2: Date of Sale
Comment 3: Surrogate Values
- **A. Sodium Pyrophosphate**
- **B. Coal**
- **C. Coke**
- **D. Phosphate Slag**
- **E. Labor**

Comment 4: Surrogate Financial Ratios
Comment 5: Placement of By-products in the Normal Value Calculation

DISCUSSION OF THE ISSUES

Comment 1: Intermediate Inputs – Electricity

Xingfa's Arguments

- Xingfa argues that its hydroelectric power stations, despite the existence of individual business licenses for each of the stations, are not separate legal entities from Xingfa.
- Xingfa contends that the hydroelectric power stations constitute a department within Xingfa, and are not separate, affiliated companies because Xingfa (a) pays the stations' employees salaries, (b) maintains the plants, and (c) records electricity production costs in its financial statement.[5]
- Xingfa asserts that there are distinctions between the business licenses of affiliated companies and the business licenses of the hydroelectric power stations; distinctions which indicate that the stations are not separate legal entities. According to Xingfa, because the business licenses of affiliated companies list the invested capital and the type of company (*e.g.*, limited liability, *etc*.), affiliated companies are required to have their own legal representation and issue financial statements.
- In contrast, Xingfa claims that the business licenses of the hydroelectric power stations only list the name of the facility, location, person in charge and the facility's function.
- Citing the *Fish Fillets Investigation*[6] and *Sinopec*[7] litigation, Xingfa notes that in past cases the Department has denied respondents' claims to valuing self-produced inputs when the respondent is not fully integrated, or if the input is purchased. Unlike *Fish Fillets Investigation* and *Sinopec*, Xingfa notes it wholly owns the power plants, and argues that it did not purchase the self-produced electricity.

"First Administrative Review of Sodium Hexametaphosphate from the People's Republic of China: Surrogate Factor Valuations for the Final Results," dated concurrently with this notice.

[5] Xingfa notes that the plants do not issue their own financial statements, nor are they listed under controlled subsidiaries in Xingfa's financial statements.

[6] *See Notice of Final Antidumping Duty Determination of Sales at Less Than Fair Value and Affirmative Critical Circumstances: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam*, 68 FR 37116 (June 23, 2003) ("*Fish Fillets Investigation*") and accompanying Issues and Decision Memorandum at Comment 3.

[7] *See* Petitioners' Rebuttal Brief, at fn 73, *citing Department's decision on Remand,* in *Sinopec Sichuan Vinylon Works v. United States*, Court Number 03-00791, *Slip Op. 06-78* (May 25, 2006) ("*Sinopec*").

Petitioners' Argument

- In their rebuttal brief, the Petitioners argue that the organizational chart prepared by Xingfa for this administrative review is the only record evidence which supports Xingfa's claim that the hydro electric power stations constitute a department within Xingfa.
- According to the Petitioners, for a non-market economy ("NME") respondent, having a business license is a fundamental test used by the Department to determine whether the company is independent for the purposes of receiving its own antidumping rate.
- The Petitioners assert that the Department's treatment of Xingfa's self-produced electricity in the *Preliminary Results* is consistent with the *Fish Fillets Investigation* and *Sinopec*. According to the Petitioners, in the *Fish Fillets Investigation* the respondent purchased whole fish from an affiliated producer, while in *Sinopec* the respondent purchased acetic acid from a joint venture.
- The Petitioners state that in this case, Xingfa's affiliated power stations produced power which was sold to the state-owned utility ("SOU"), and in a separate transaction, Xingfa purchased electricity from the SOU.

Department's Position:

We disagree with Xingfa that it is appropriate to treat electricity as a self-produced input for these final results. Where inputs are produced by an affiliated company, the Department will typically treat inputs as being self-produced by the respondent where it determines the two entities should be collapsed and treated as a single entity pursuant to section 351.401(f) of the Department's regulations.[8] Section 351.401(f)(1) of the Department's regulations provides that two affiliated companies may be treated as a single entity if the following two criteria are met: (1) the affiliated producers "have production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities"; *and* (2) "there is a significant potential for manipulation of price or production."[9] However, before deciding whether to treat multiple entities as a single entity, the Department must first reach a finding of affiliation. The Department determines affiliation under section 771(33) of the Tariff Act of 1930, as amended (the "Act").[10] The statute further provides that "a

[8] *See, e.g., Certain Cut-to-Length Carbon Steel Plate from the People's Republic of China: Final Results of the 2007-2008 Administrative Review of the Antidumping Duty Order*, 75 FR 8301 (February 24, 2010) ("*CTL Plate*") and accompanying Issues and Decision Memorandum at Comment 3 (where the Department declined to collapse two affiliated because one did not produce similar or identical merchandise); *see also Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results of the Antidumping Duty Administrative Review and New Shipper Reviews*, 75 FR 12726 (March 17, 2010) ("*5th Fish Fillets*") and accompanying Issues and Decision Memorandum at Comment 4a (where the Department declined to collapse two affiliates because substantial retooling would be required to produce similar or identical products).

[9] *See* section 351.401(f)(1) of the Department's regulations.

[10] Section 771(33) of the Act, provides that the following persons shall be considered to be "affiliated" or "affiliated persons":
(A) Members of a family, including brothers and sisters (whether by the whole or half blood), spouse, ancestors, and lineal descendants.
(B) Any officer or director of an organization and such organization.
(C) Partners.
(D) Employer and employee.
(E) Any person directly or indirectly owning, controlling, or holding with power to vote, five percent or more of the outstanding voting stock or shares of any organization and such organization.

person shall be considered to control another person if the person is legally or operationally in a position to exercise restraint or direction over the other person."[11]

Xingfa has argued that it should be collapsed with its hydroelectric power stations because these stations supply Xingfa with a portion of its electricity. However, at verification we found that none of the electricity consumed by Xingfa was purchased directly from its hydroelectric power stations. Rather, the electricity generated from the power stations is sold to a SOU, and Xingfa purchases its electricity directly from the SOU. Thus, although Xingfa's hydroelectric power stations generated the electricity, the SOU is the sole supplier of Xingfa's electricity FOP.[12] Accordingly, the correct analysis in determining whether the electricity should be treated as a self-produced input is whether Xingfa and the SOU should be treated as a single entity. We find no basis in the record upon which the Department could conclude that Xingfa is affiliated with the SOU within the meaning of section 771(33) of the Act. Specifically, there is no basis upon which to find that Xingfa is connected to or in a position to control the SOU, or vice versa. Moreover, Xingfa has not argued that it is affiliated with the SOU. As the first collapsing requirement of affiliation is not satisfied, there is no need to address whether the two companies should be collapsed, and treated as a single entity pursuant to section 351.401(f) of the Department's regulations. Therefore, for the final results, the Department has not collapsed Xingfa with the SOU.

Furthermore, because Xingfa purchases its electricity from an unaffiliated entity, we do not agree that the facts here are distinguishable from either those in either *Fish Fillets Investigation*, where the Department did not treat an input as self-produced because the respondent was not fully integrated with its supplier[13], or *Sinopec*, where the Department denied such treatment because the input was purchased. [14]

Moreover, even if we were to base our analysis on the relationship between Xingfa and the hydroelectric power stations, there would be no basis to treat them as a single entity.[15] We find Xingfa and the hydroelectric power stations to be affiliated pursuant to section 771(33)(E), because Xingfa wholly owns the hydroelectric power stations.[16] However Xingfa's hydroelectric power stations do not produce, and are not equipped to produce, similar or identical merchandise. Record evidence clearly indicates that Xingfa produces a variety of chemicals, including sodium hex and the hydroelectric power stations only produce electricity.[17] Moreover, even if Xingfa did consume electricity directly received from the power stations, because

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(F) Two or more persons directly or indirectly controlling, controlled by, or under common control with, any person.
(G) Any person who controls any other person and such other person.

[11] *See* 771(33) of the Act.

[12] *See* Verification Report at 16.

[13] *See Fish Fillets Investigation* at Comment 3.

[14] *See* the Petitioners' Rebuttal Brief at fn 73, *citing Sinopec*.

[15] *See, e.g., CTL Plate* at Comment 3 (where, as noted above, the Department declined to collapse two affiliated because one did not produce similar or identical merchandise); *see also 5th Fish Fillets* at Comment 4a (where the Department declined to collapse two affiliates because substantial retooling would be required to produce similar or identical products).

[16] *See, e.g.*, Verification Exhibit 25.

[17] *See* Verification Report at 1 and Verification Exhibit 20 (The Department verified that the hydroelectric power stations are a part of Xingfa's Electricity Production Workshop and each of their business licenses describe the legal scope of their business as electricity production).

Xingfa's power stations do not produce, or export, similar/identical products to sodium hex, we cannot collapse these entities with Xingfa, pursuant to section 351.401(f) of the Department's regulations.

Comment 2: Date of Sale

Xingfa's Arguments

- Xingfa argues that the Department should revise the date of sale for one of its sales because it was made pursuant to a long-term contract, dated July 2007, and hence, is outside the POR.
- Xingfa states that it made two types of sales during the POR, single-order spot sales and sales made pursuant to long-term contracts.
- Xingfa contends that while this sale may have been invoiced (October 2007) and entered (November 2007) during the POR, the material terms of the sale were set before the POR. Citing *Nucor*[18], Xingfa asserts that Xingfa and the customer had established the material terms of sale before the POR.

Petitioners' Argument

- In their rebuttal brief, the Petitioners argue that the date of sale should remain the invoice date because Xingfa has not provided sufficient evidence that the material terms of sale were established on a different date.
- The Petitioners assert that Xingfa has provided a chain of e-mails which purport to show that it had a long-term contract with its customer. The Petitioners maintain that this e-mail chain (a) contains no signed contract, (b) contains a meet or release clause, allowing the customer to break the contract if a lower price can be found, and (c) states that the buyer will commit to the purchase (by submitting a purchase order and shipping instructions) when Xingfa confirms the availability of the desired quantity. The Petitioners note that the signed purchase order is dated October 7, 2007, which is within the POR.
- Citing *Nucor*, the Petitioners argue that that factual basis supporting the Court's decision in that case is not present here. According to the Petitioner, the respondent in that case presented multiple written contracts to establish the date of sale, whereas in this case Xingfa has provided an e-mail chain which required further action from the purchaser before Xingfa was required to ship.
- The Petitioners contend that in *Nucor* the Court described the negotiation and execution process as having formal written contracts in which the price, shipment date and other material terms were established, all of which is absent in the e-mail chain Xingfa argues establishes the date of sale.[19]

Department's Position:

We agree with the Petitioner. Section 351.401(i) of the Department's regulations provides that "the Secretary may use a date other than the date of invoice if the Secretary is satisfied that a different date better reflects the date on which the exporter or producer establishes the material terms of sale." In practice, the Department will rely on a date other than invoice date for the date of sale only in cases where it can be demonstrated that the material terms (*i.e.*, price and

[18] *See Nucor Corporation v. United States*, 612 F. Supp. 2d 1264, 1299-1323 (CIT 2009) ("*Nucor*").
[19] *Id.*

quantity) are not subject to change between the proposed date and the invoice date, or where the record otherwise supports that a different date better reflects the date on which the material terms were firmly established.[20] The Department considers a sale as made when the material terms of sale (*i.e.*, price and quantity) are firmly established.[21]

We disagree with Xingfa that the record supports its assertion that material terms of sale were firmly set prior to the invoice date. Verification Exhibit 42 contains two documents presented by Xingfa as evidence of price negotiations for the sale in question, a "price offer" contained in a single e-mail, dated July 28, 2007, and a "purchase contract," dated October 7, 2007. Xingfa cites Verification Exhibit 42 as evidence that there were no changes in the material terms of sale between the contract and invoice. At the outset we note that the "contract," to which Xingfa refers, is the e-mail which contains an offer for sale, as opposed to the signed purchase contract. We note that the price offer contains a meet or release clause, allowing the customer to purchase sodium hex from another supplier if a lower price can be found, and an option to renegotiate prices depending on the outcome of the antidumping duty investigation. Moreover, while this e-mail contains the per-unit price for which the sodium hex was eventually sold, as reflected on the invoice, it does not contain the quantity. The quantity listed in the e-mail states that the volume is estimated to be a certain tonnage per year, a volume which was not met by this single sale.[22] In addition, there are two subsequent e-mails concerning the sale in question which are not included in Verification Exhibit 42, but are contained in Xingfa's questionnaire responses. Specifically, these e-mails state that the buyer will commit to the purchase (by submitting a purchase order and shipping instructions) when Xingfa confirms the availability of the desired quantity.[23] We do not find that the price offer contained in Verification Exhibit 42, or the subsequent e-mails, show that Xingfa and the purchaser established the material terms of sale because there was no obligation to purchase the sodium hex at the price contained therein, nor were the shipping terms set, until certain conditions had been met.

Finally, when questioned at verification about their sales, company officials confirmed that the "the final terms of sale are set when the invoice is created, because after that point the quantity and value do not change."[24] In doing so, no distinction was made between sales made pursuant to long- or short-term contracts, as Xingfa attempts to argue.[25] Based on these statements, we find that the invoice date is the correct date of sale, and that because the sale was invoiced on October 18, 2007, the sale is within the POR.

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[20] *See Seah Steel Corp. v. United States*, 25 CIT 133, 135 (2001).

[21] *See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Bottle-Grade Polyethylene Terephthalate (PET) Resin From Indonesia*, 70 FR 13456 (March 21, 2005) and accompanying Issues and Decision Memorandum at Comment 1.

[22] Because the exact quantities are proprietary, *see* Verification Exhibit 42.

[23] *See* Xingfa's August 29, 2009 submission at Exhibit 2.

[24] *See* Verification Report at 6. *See Nucor*, 612 F. Supp. 2d at 1309 (The court found that the correct date of sale is the date on which parties reached a "true meeting of the minds on the material terms of sale.").

[25] *See* Xingfa's Case Brief at 6.

Comment 3: Surrogate Values

A. *Sodium Pyrophosphate*

Petitioners' Argument

- The Petitioners note that in the *Preliminary Results* the Department valued sodium pyrophosphate[26] ("TSPP") using harmonized tariff schedule code ("HTS") 2835.22, described as "Mono, Disodium Phosphate."
- The Petitioners argue that the Department should value TSPP using HTS 2835.39.00, described as "Other Polyphosphates," because it is more specific to the input in question.[27]
- The Petitioners claim that TSPP is a polyphosphate which contains two phosphate molecules and that the products found in HTS 2835.22 contain one phosphate molecule.

Xingfa's Argument

- In its rebuttal brief, Xingfa contends that products found under HTS 2835.22 contain two sodium molecules just as TSPP contains two sodium molecules.
- According to Xingfa, the Petitioner has not provided record evidence that the term "phosphate," used in the description for HTS 2835.22, does not necessarily mean only one phosphate molecule is present.

Department's Position:

The Department's practice when selecting the "best available information" for valuing factors of production ("FOPs"), in accordance with section 773(c)(1) of the Act, is to select, to the extent practicable, surrogate values which are representative of a broad market average, publicly available, contemporaneous, product specific and tax-exclusive.[28] The Department undertakes its analysis of valuing the FOPs on a case by case basis, carefully considering the available evidence in light of the particular facts of each industry.[29] There is no hierarchy for applying the above stated principles. Thus, the Department must weigh available information with respect to each input value and make a case-specific decision as to what the "best" surrogate value is for each input.[30] In applying the Department's surrogate value selection criteria, as mentioned above, the Department has found that Indian import statistics represent the best available information for valuation purposes because they represent an average of multiple price points within a specific

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[26] The chemical formula for TSPP is $Na_2P_2O_7.10H_20$, which we note contains two phosphate molecules and two sodium molecules.

[27] The Petitioners note that the International Trade Commission has ruled that sodium pyrophosphates should be classified under HTS 2835.39.5000. *See Customs and Border Control Priv. Ltr. Rul. N021583* (April 16, 2008) ("*TSPP Customs Ruling*") which is found in the Petitioners' July 2, 2010 submission at Exhibit 3.

[28] *See Policy Bulletin 04.1: Non-Market Economy Surrogate Country Selection Process*, March 1, 2004 ("*Policy Bulletin*") at 4, found at http://ia.ita.doc.gov/policy/bull04-1.html; *see also Diamond Sawblades and Parts Thereof from the People's Republic of China, Final Determination in the Antidumping Duty Investigation*, 71 FR 29303 (May 22, 2006) ("*Sawblades*") and accompanying Issues and Decision Memorandum at Comment 11a.

[29] *See Glycine from the People's Republic of China: Notice of Final Results of Antidumping Duty Administrative Review*, 70 FR 47176 (August 12, 2005) and accompanying Issues and Decision Memorandum at Comment 1.

[30] *See Administrative Review of Certain Frozen Warmwater Shrimp From the People's Republic of China: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 75 FR 49460 (August 13, 2010) and accompanying Issues and Decision Memorandum at Comment 3.

period and are tax-exclusive.[31]

For TSPP the Department has weighed the record evidence and finds that it is best classified used HTS 2835.39.00, because it is more specific to the input in question. Specifically, we note that the *TSPP Customs Ruling* states that TSPP, at the six digit HTS level, should be classified under 2835.39. In the *TSPP Customs Ruling* the International Trade Commission states that it analyzed trisodium polyphosphate in its lab and concluded that it is a should be classified under HTS 2835.39 because this HTS covers phosphates. While we recognize that this is a U.S. Customs ruling and not an Indian Customs ruling, we note that U.S. and Indian tariff codes are harmonized at the six digit level.[32] As a consequence, we find it reasonable to assume that TSPP would enter India and the United States under the same six digit HTS code. Thus, for the final results, we have valued TSPP using HTS 2835.39.00.

B. *Coal*

Petitioners' Argument

- The Petitioners note that in the *Preliminary Results* we valued coal using HTS 2701.19.20, described as "Steam Coal."
- The Petitioners maintain that coal should be valued using HTS 2701.12.00, described as "Bituminous Coal."
- The Petitioners assert that bituminous coal has volatile matter limit of at least 14% and a calorific value of at least 5,833. The Petitioners argue that Xingfa's coal is similar to bituminous coal because Xingfa reported a volatile matter limit of at least 18% and a calorific value of at least 4,000.[33]
- The Petitioners contend that while the calorific content of Xingfa's coal is lower than that of bituminous coal, Xingfa did not state that this calorific value was a maximum value, thus the value could be as high as 5,833. The Petitioners also contend that because Xingfa bears the burden of providing the Department with accurate information to value its FOPs, and did not do so in this case, the Department should apply adverse facts available ("AFA") to Xingfa and value coal using HTS 2701.12.00.

Xingfa's Argument

- In its rebuttal brief, Xingfa states that it agrees with the Petitioners that in order for coal to be classified as bituminous, it must have volatile matter limit of at least 14% and a calorific value of at least 5,833.
- According to Xingfa, its coal only meets one of these criteria, and thus, is not bituminous coal.

[31] *See, e.g., Sawblades* at Comment 11a.

[32] The International Convention on the Harmonized Commodity and Coding System applies the same HTS six-digit prefix to products subject to international trade. *See, e.g., Proposed Modifications to the Harmonized Tariff Schedule of the United States, International Trade Commission*, Investigation 1205-6 (April 2006) at 4, which may be found at http://www.usitc.gov/tariff_affairs/hts_documents/Pub3851.pdf.

[33] *See* Xingfa's October 28, 2009 submission at Exhibit SS-6.

- Regarding the Petitioners' argument that the Department apply AFA to Xingfa's coal surrogate value, Xingfa asserts that it provided the Department with the grade of coal consumed, according to industry standards.[34]
- Xingfa notes that it also stated that the coal it consumes is used to make steam which it consumes as energy.[35]

Department's Position:
We agree with Xingfa, and for the final results valued coal using HTS 2701.19.20. We note that Chapter 27, subheading note 2, of the Indian Tariff Schedule classifies bituminous coal as "coal having a volatile matter limit (on a dry, mineral-matter-free basis) exceeding 14% and a calorific value limit (on a moist, mineral-matter-free basis) equal to or greater than 5833 kcal/kg."[36] We also note that Xingfa reported that its coal has a volatile matter limit of at least 18% and a calorific value of at least 4,000.[37] We therefore we find, Xingfa's reported calorific content does not meet the threshold to be considered bituminous coal.

While we note no interested party has placed information on the record concerning the volatile matter limit and calorific value of steam coal, there are no other surrogate values on the record for coal, discounting bituminous coal, with the exception of HTS 2701.19.20. In addition, Xingfa reported that its coal was consumed in the operation of its steam energy system, making the HTS description, "steam coal," more appropriate to the use of Xingfa's coal FOP.

Furthermore, we find the Petitioner's argument, that the Department should apply AFA to Xingfa because it did provide proper coal specifications, unpersuasive. Sections 776(a)(1) and 776(a)(2) of the Act, provide that the Department shall use, subject to subsection 782(d) of the Act, facts otherwise available in reaching the applicable determination, if necessary information is not available or on the record, or if an interested party: (A) withholds information that has been requested by the Department; (B) fails to provide such information in a timely manner or in the form or manner requested subject to sections 782(c)(1) and (e) of the Act; (C) significantly impedes a proceeding under the antidumping statute; or (D) provides such information but the information cannot be verified. In this case the Department twice requested information from Xingfa regarding its coal specifications, and twice Xingfa provided the Department with the requested information in a timely manner.[38] Moreover, at verification, when examining Xingfa's coal consumption, the Department noted no discrepancies.[39] Because Xingfa complied with the Department's requests for information in a timely manner, and did not impede the verification of this information, we find that we have no basis to apply AFA to Xingfa's coal FOP in accordance with sections 776(a) of the Act.

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[34] *Id.*
[35] *Id*.
[36] *See* the Petitioners' case brief at 8-9.
[37] *See* Xingfa's October 28, 2009 submission at Exhibit SS-6.
[38] *See* Xingfa's September 18, 2009 submission at Exhibit SD-13; *see also* Xingfa's October 28, 2009 submission at Exhibit SS-6.
[39] *See* Verification Report at 11.

C. *Coke*

Petitioners' Argument

- The Petitioners note that in the *Preliminary Results* we valued coke using HTS 2704.00.30, described as "Hard Coke of Coal."
- According to the Petitioners, coke should be valued using HTS 2704.00.90, described as "Coke and Semi-coke of Coal, of Lignite or of Peat, Whether or not Agglomerated; Retort Carbon, Other."
- The Petitioners assert that hard coke has a carbon content of at least 96% and a particle size of 100mm – 400mm.
- The Petitioners maintain that coke used in the production of elemental phosphorous has a carbon content of approximately 86% and a particle size of approximately 30mm. The Petitioners argue that the coke reported by Xingfa more closes matches this description than that of hard coke.
- According to the Petitioners, because coke used in the production of elemental phosphorous is different than that of hard coke, the Department should value Xingfa's coke using HTS 2704.00.90.

Xingfa's Argument

- In its rebuttal brief, Xingfa maintains that there is no record evidence concerning the specifications of hard coke or what type of coke is used in the production of elemental phosphorous.
- According to Xingfa, absent any record information concerning hard coke specifications, the Department should continue to value its coke using HTS 2704.00.30.

Department's Position:

We agree with Xingfa. We note that Xingfa reported that the coke it consumed has a carbon content of greater than 75% and a particle size of 5-25 mm.[40] The Petitioners argue that, based on carbon content and size, Xingfa's coke FOP should not be valued using an HTS for hard coke, because hard coke has a carbon content of at least 96% and a particle size of 100mm – 400mm. At the outset we note that there is no record evidence concerning the carbon content or particle size of hard coke. As a consequence, we are unable to evaluate the Petitioners' assertions with respect to the specifications of hard coke.

While the Petitioners are correct that record evidence indicates that coke with a carbon content of 86% and a particle size of 30mm may be used in the production of phosphorous, record evidence also indicates that "the distinguishing property" of coke used in the production of phosphorous is graphitization (*e.g.*, conductivity), not carbon content or particle size.[41] Thus, a range of cokes, or even coal (*e.g.*, anthracite coal), may be used in the production of phosphorous.[42] Moreover, as noted above, Xingfa reported that it consumed "coke" while the description of HTS 2704.00.90, "Coke and Semi-coke of Coal, of Lignite or of Peat, Whether or not Agglomerated; Retort Carbon, Other" contains several additional items. Specifically, "Semi-coke," "retort

[40] *See* Xingfa's October 28, 2009 submission at Exhibit SS-6.
[41] *See* Hurst at 1170. Phosphorous is made in furnaces and the purpose of adding coke or coal to the production of phosphorous is to add carbon to the reactive process.
[42] *Id*.

Carbon" and "other," as named in the HTS heading, are clearly not "coke," which is the factor of production in question. After weighing the available information on the record, we find that HTS 2704.00.90 is an overly broad, basket HTS category for Xingfa's coke input, and would be inappropriate because a more product-specific HTS value, HTS 2704.00.30, described as "Hard Coke of Coal," is available. As a consequence, for the final results, we have valued coke using HTS 2704.00.30.

D. *Phosphate Slag*

Petitioners' Argument

- The Petitioners note that in the *Preliminary Results* the Department valued phosphate slag using HTS 2523.90, described as "Portland, Aluminous, Slag, Other 2523."
- The Petitioners argue that slag must be further processed before it can be used in the production of cement.[43]
- The Petitioners contend that Xingfa does not process the slag it sells. Accordingly, the Petitioners assert that slag should be valued using the financial statement of ACC, Ltd. ("ACC"), an Indian company which purchases unrefined slag to make value added products such as cement.
- The Petitioners maintain that it is the Department's practice to not value inputs using Indian HTS basket categories when a more specific value is on the record.[44]

Xingfa's Argument

- In its rebuttal brief, Xingfa argues that record evidence indicates that slag need not be further processed before being used in cement production, that it can be used as aggregate.[45]
- According to Xingfa, there is no record evidence that ACC purchases phosphate slag as its financial statement only indicates that it purchased "slag."
- Xingfa contends that Chapter 25 of the HTS code covers phosphates, and thus, HTS 2523.90 is the proper HTS classification for its slag by-product.

Department's Position:

The Department agrees with Xingfa and determines that HTS 2523.90 is the best value for slag. To the extent practicable, the Department selects surrogate values which are representative of a broad market average, publicly available, contemporaneous, product specific and tax-exclusive.[46] In this administrative review, the record contains two surrogate values for phosphate slag, HTS 2523.90 and the ACC financial statement. Both values are publicly available, contemporaneous and tax-exclusive. We find that HTS 2523.90 provides more specificity that the ACC financial statement because HTS 2523.90 covers phosphates, providing some specificity to the input in question (as Xingfa's slag is produced from phosphate production). Conversely, the ACC financial statement is silent with respect to the type of slag purchased by ACC. Thus, we find that neither surrogate value is more specific than the other to the input in question. However, as noted above, the Department has found in numerous cases that Indian import statistics represent

[43] *See* the Petitioners' case brief at 2.
[44] *See, e.g., Certain Preserved Mushrooms from the People's Republic of China: Preliminary Results of the Antidumping Duty New Shipper Review*, 72 FR 45734 (August 15, 2007).
[45] *See* Xingfa's rebuttal brief at 7.
[46] *See Policy Bulletin* at 4; *see also Sawblades* at Comment 11.

the best information for the valuation of FOPs because the data represent a broad market average.[47] Conversely, the Department has found in numerous cases that financial statements represent the experience of just one company, and thus, do not represent the best information for the valuation of FOPs because the data is not representative a broad market average.[48] Therefore, because Indian import statistics represent a broad market average, and the ACC financial statement does not, for the final results we have valued phosphate slag using HTS 2523.90.

E. *Labor*

Petitioners' Argument

- The Petitioners argue that the Department should average the wage rates of all comparable surrogate countries for which there were exports of similar merchandise, with the exceptions of India and Honduras.
- The Petitioners contend that Honduran wage rates[49] are anomalous in that the reported rates are below the Honduran minimum wage, and the Honduran wage rate data should not be included in the labor wage rate calculation, as it has in other cases.[50]
- In addition, the Petitioners assert that Indian wage rates[51] are based on workers earning less than 6,500 Indian rupees per month.[52] Thus, the Petitioner argues that the Indian wage rate data should not be included in the labor wage rate calculation.
- In their rebuttal brief, the Petitioner reiterates their argument that the Department should exclude Indian wage rate data from the labor wage rate calculation, and that the Department should use an average of the wage rates of comparable surrogate countries for which there were exports of similar merchandise as it has in past cases.[53]

Xingfa's Argument

- Xingfa maintains that the Department did not indicate the methodology it plans to use in calculating the surrogate value for labor and the Department's failure to give notice of its intended methodology improperly denies Xingfa of the opportunity to comment on that methodology.
- Xingfa states that labor should be valued using the Indian wage rate. Xingfa notes that India is the surrogate country and is a producer of sodium hex.

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[47] *See, e.g., Third Administrative Review of Frozen Warmwater Shrimp From the People's Republic of China: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 74 FR 46565 (September 10, 2009) ("*PRC Shrimp*") and accompanying Issues and Decision Memorandum at Comment 3c.

[48] *See, e.g., First Administrative Review of Certain Activated Carbon from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 74 FR 57995 (November 10, 2009) and accompanying Issues and Decision Memorandum at Comment 3F.

[49] *See* Memo to the File, from Paul Walker, Case Analyst, Office 9, "First Administrative Review of Sodium Hexametaphosphate from the People's Republic of China: Data on Labor Wage," dated July 26, 2010 ("Wage Rate Memo") at Attachment 1.

[50] *See, e.g., See Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 75 FR 47771 (August 9, 2010) ("*Vietnamese Shrimp*") and accompanying Issues and Decision Memorandum at Comment 10.

[51] *See* Wage Rate Memo at Attachment 1.

[52] *See* the Petitioners' August 6, 2010 submission at 6 and Exhibit 1.

[53] *See, e.g., Vietnamese Shrimp* at Comment 10.

- According to Xingfa, it is the Department's preference to use a single surrogate country to value FOPs.[54] Xingfa argues that if the Department were to go outside the primary surrogate country, it would create inconsistencies between the valuation of labor and other FOPs, including surrogate financial ratios.
- Xingfa contends that most countries on the Department's list of producers are not significant producers of sodium hex, but producers of small amounts of products covered by the basket categories for which the Department has released export statistics.

Department's Position:
As a consequence of the United States Court of Appeals for the Federal Circuit's *(*"CAFC") ruling in *Dorbest II*, the Department is no longer relying on the regression-based wage rate described in section 351.408(c)(3) of the Department's regulations.[55] The Department is continuing to evaluate options for determining labor values in light of the recent CAFC decision. For the final results, we have calculated an hourly wage rate to use in valuing Xingfa's reported labor FOP by averaging earnings and/or wages in countries that are economically comparable to the PRC and that are significant producers of comparable merchandise.

Xingfa argues that the Department should use the hourly wage rate for India from the International Labor Organization ("ILO") as an alternative to our previous regression-based wage rate. The Department disagrees. While information from a single surrogate country can reliably be used to value other FOPs, wage data from a single surrogate country does not constitute the best available information for purposes of valuing the labor input due to the variability that exists between wages and gross national income ("GNI"). While there is a strong worldwide relationship between wage rates and GNI, too much variation exists among the wage rates of comparable market economies ("ME"). As a result, we find reliance on wage data from a single country to be unreliable and arbitrary. For example, when examining the most recent wage data, even for countries that are relatively comparable in terms of GNI for purposes of factor valuation (*e.g.*, countries with GNIs between U.S. Dollars ("USD") 950 and USD 4,100), the wage rate spans from USD 0.41 to USD 2.08.[56] Additionally, although both India and Guatemala have GNIs below USD 2,500, and both could be considered economically comparable to the PRC, India's observed wage rate is USD 0.47, as compared to Guatemala's observed wage rate of USD 1.14 – over double that of India.[57] There are many socio-economic, political and institutional factors, such as labor laws and policies unrelated to the size or strength of an economy, that cause significant variances in wage levels between countries. For this reason, and because labor is not traded internationally, the cross-country variability in labor rates, as a general rule, does not characterize other production inputs or impact other factor prices. Accordingly, the large variance in these wage rates illustrates the arbitrariness of relying on a wage rate from a single country. For these reasons, the Department maintains its longstanding position that, even when not employing a regression methodology, more data are still better than less data for purposes of valuing labor. Accordingly, the Department's has

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[54] *See, e.g., Certain Cut-to-Length Carbon Steel Plate from Romania: Notice of Final Results and Final Partial Rescission of Antidumping Duty Administrative Review*, 70 FR 12651 (March 15, 2005) and accompanying Issues and Decision Memorandum at Comment 3.
[55] *See Dorbest Limited et. al. v. United States*, 604 F.3d 1363, Fed. Cir. (2010) ("*Dorbest II*").
[56] *See* "Expected Wages of Selected NME Countries," revised in December 2009, available at http://ia.ita.doc.gov/wages/index.html.
[57] *Id*.

employed a methodology that relies on a larger number of countries in order to minimize the effects of the variability that exists between wage data of comparable countries.

To achieve a labor value that is based on the best available information for the final determination, we have relied on labor data from several countries determined to be both economically comparable to the PRC, and significant producers of comparable merchandise.

First, in order to determine the economically comparable surrogate countries from which to calculate a surrogate wage rate, the Department looked to the Surrogate Country Memo.[58] Early in this review, the Department selected six countries for consideration as the surrogate country for this review. To determine which countries were at comparable levels of economic development to the PRC, the Department placed primary emphasis on GNI.[59] The Department relies on GNI to generate its initial list of countries considered to be economically comparable to the PRC. In this investigation, the list of potential surrogate countries found to be economically comparable to the PRC included India, the Philippines, Indonesia, Colombia, Thailand, and Peru. The Department used the high- and low-income countries identified in the Surrogate Country Memo list as "bookends" and then identified all countries in the World Bank's *World Development Report* for 2007 with per capita incomes (using the 2007 GNIs from the 2009 Expected Wages of Selected NME Countries) that placed them between these "bookends". This resulted in 51 countries, ranging from India with USD 950 GNI to Colombia with USD 4,100.[60]

Regarding the second criterion of "significant producer," the Department identified all countries which have exports of comparable merchandise (defined as HTS 2835.39 and 3824.90), which are identified in the scope of this order) between 2007 and 2009.[61] After screening for countries that had exports of comparable merchandise, we found that 31 of the 51 countries designated as economically comparable to the PRC are also significant producers. In this case, we have defined a "significant producer" as a country that has exported comparable merchandise from 2007 through 2009. We disagree with Xingfa that *only* significant producers of exports to the United States should be considered. The antidumping statute and regulations are silent in defining a "significant producer," and the antidumping statute grants the Department discretion to look at various data sources for determining the best available information.[62] Moreover, while the legislative history provides that the "term 'significant producer' *includes* any country that is a significant net exporter,"[63] it does not preclude reliance on additional or alternative metrics. In practice, the Department has relied on other indices for determining whether a country is a significant producer. For example, in *PRC Furniture*[64] the Department relied on production data

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[58] *See* Memorandum to Scot T. Fullerton, Program Manager, Office 9, AD/CVD Operations, from Kelly Parkhill, Acting Director, Office for Policy, regarding "Request for List of Surrogate Countries for an Administrative Review of Sodium Hexametaphosphate from the People's Republic of China" ("Surrogate Country Memo"), dated July 2, 2009.

[59] *See* section 351.408(b) of the Department's regulations.

[60] *See* Wage Rate Memo.

[61] The export data is obtained from the Global Trade Atlas. *Id*.

[62] *See* section 733(c) of the Act.

[63] *See Conference Report to the 1988 Omnibus Trade & Competitiveness Act*, H.R. Conf. Rep. No. 576, 590, 100th Cong. 2nd Sess. (1988), reprinted in 134 Cong. Rec. H2031 (daily ed. April 20, 1988).

[64] *See Wooden Bedroom Furniture from the People's Republic of China: Preliminary Results of Antidumping Duty New Shipper Review*, 75 FR 9581, 9584 (March 3, 2010) ("*PRC Furniture*").

for selecting the primary surrogate country. In this case, we have relied on countries with exports of comparable merchandise as significant producers.

For purposes of valuing wages in this investigation, the Department determines the following 31 countries to be both economically comparable to the PRC, and significant producers of comparable merchandise: Albania, Algeria, Bolivia, Bosnia & Herzegovina, Cape Verde, Colombia, Dominican Republic, Ecuador, Egypt, El Salvador, Fiji, Guatemala, Guyana, Honduras, India, Indonesia, Jordan, Macedonia, Morocco, Namibia, Nicaragua, Paraguay, Peru, the Philippines, Sri Lanka, Swaziland, Syria, Thailand, Tunisia, Ukraine and Yemen.

Third, from the 31 countries that the Department determined were both economically comparable to the PRC and significant producers of comparable merchandise, the Department identified those with the necessary wage data. In doing so, the Department has continued to rely upon ILO Chapter 5B data "earnings", if available and "wages" if not.[65] We used the most recent data within five years of the base year (2007) and adjusted to the base year using the relevant Consumer Price Index.[66] Of the 31 countries that the Department has determined are both economically comparable and significant producers of comparable merchandise, 9 countries, *i.e.*, Algeria, Bolivia, Cape Verde, Morocco, Namibia, Swaziland, Syria, Tunisia and Yemen, were not used in the wage rate valuation because there were no earnings or wage data available. The remaining countries reported either earnings or wage rate data to the ILO within the last five years.[67]

The Department relied on data from the following countries to arrive at its wage rate in the final results: Albania, Bosnia & Herzegovina, Colombia, Dominican Republic, Ecuador, Egypt, El

[65] The Department maintains its current preference for "earnings" over "wages" data under Chapter 5B. However, under the previous practice, the Department was typically able to obtain data from somewhere between 50-60+ countries. Given that the current basket now includes 16 countries, the Department found that our long-standing preference for a robust basket outweighs our exclusive preference for "earnings" data. We note that several countries that met the statutory criteria for economic comparability and significant production, such as Indonesia and Thailand, reported only a "wage" rate. Thus, if earnings data is unavailable from the base year (2007) of the previous five years (2002-2006) for certain countries that are economically comparable and significant producers of comparable merchandise, the Department will use "wage" data, if available, from the base year or previous five years. The hierarchy for data suitability described in the 2006 *Antidumping Methodologies: Market Economy Inputs, Expected Non-Market Economy Wages, Duty Drawback; and Request for Comments*, 71 FR 61716, (October 19, 2006) ("*Antidumping Methodologies*") still applies for selecting among multiple data points within the "earnings" or "wage" data. This allows the Department to maintain consistency as much as possible across the basket.

[66] Under the Department's regression analysis, the Department limited the years of data it would analyze to a two-year period. *See Antidumping Methodologies*, 71 FR at 61720. However, because the overall number of countries being considered in the regression methodology was much larger than the list of countries now being considered in the Department's calculations, the pool of wage rates from which we could draw from two years-worth of data was still significantly larger than the pool from which we may now draw using five years worth of data (in addition to the base year). The Department believes it is acceptable to review ILO data up to five years prior to the base year as necessary (as we have previously), albeit adjusted using the Consumer Price Index. *See Expected Non-Market Economy Wages: Request for Comment on Calculation Methodology*, 70 FR 37761, 37762 (June 30, 2005). In this manner, the Department will be able to capture the maximum amount of countries that are significant producers of comparable merchandise, including those countries that choose not to report their data on an annual basis. *See also* the CPI data placed on record, obtained from the International Monetary Fund's *International Financial Statistics*, found in Labor Wage Rate Data.

[67] *See* International Labour Organization's *Yearbook of Labour Statistics*.

Salvador, Fiji, Guatemala, Guyana, India, Indonesia, Jordan, Macedonia, Nicaragua, Paraguay, Peru, the Philippines, Sri Lanka, Thailand and Ukraine. The Department calculated a simple average of the wage rates from these 21 countries. This resulted in a wage rate derived from comparable economies that are also significant producers of the comparable merchandise, consistent with the CAFC's ruling in *Dorbest II* and the statutory requirements of section 773(c) of the Act.

In response to the Petitioners' argument concerning Honduras, we agree. As we found in *Vietnamese Shrimp*, this wage rate is inaccurate, possibly due to an ILO reporting error.[68] The effective Honduran minimum wage during the same year as the underlying ILO data (2006) is USD 91.99 per month. With the assumption that the current reported ILO wage rate is USD 0.17, a worker would earn an average monthly wage of USD 32.64, a third of the minimum wage rate. Therefore, consistent with the Department's determination in *Vietnamese Shrimp*, the Department finds that the reported wage rate for Honduras is unreliable and is rejecting the Honduran wage rate for the purposes of averaging surrogate wage rates in this administrative review.

In response to the Petitioners' argument concerning India, we disagree. As we found in *PRC Furniture*, we do not believe that there is sufficient evidence on the record to undermine the validity of the Indian wage rate.[69] According to the notes to the ILO survey methodology, the ILO survey is conducted pursuant to the Factories Act of 1948. However, those notes also refer to the Payment of Wages Act of 1936, as amended in 1982, which covered employees making 1,600 rupees ("Rs") per month or less. Those notes have not been updated since 1995, which leads us to believe that, until recently, the survey was intended to cover those making 1,600 Rs per month or less. In 2005, the Payment of Wages Act of 1936 was amended, raising the application to those making 6,500 Rs per month or less (about USD 162), thereby covering more workers in India. The Petitioners argue that this amount acts as a hard cap on those surveyed, and therefore covers only the "lowest paid" of Indian workers. We disagree with this assessment of the record.

Although it is also our understanding that the Payment of Wages Act of 1936 is limited to employees earning 6,500 Rs or less, neither the survey, nor the Factories Act of 1948, appear to be so limited by Indian law. The record shows that for at least four different years, India reported a national average wage rate or industry-specific wage rate to the ILO that surpassed this alleged "cap." For example, in 2004, India reported a national wage of 1,732 Rs per month when the "cap" was 1,600, and in 2006 India reported an industry specific wage of 6,678 Rs per month at the time the "cap" was 6,500 Rs per month. This would mean that for those years, either for the country as a whole, or for specific industries, there were employees collecting wages over that amount and that the "cap" was simply not considered binding for the survey coverage. Furthermore, there are additional examples during that period in which the overall average or the industry-specific average met, or came near to, the alleged "cap" amount. Unless almost all workers surveyed were being paid nearly the same wage (which seems unlikely), it is reasonable to presume that there were workers surveyed that earned more than the alleged "cap."

[68] *See Vietnamese Shrimp* at Comment 10.

[69] *See Wooden Bedroom Furniture From the People's Republic of China: Final Results and Final Rescission in Part*, 75 FR 50992 (August 18, 2010) and accompanying Issues and Decision Memorandum at Comment 34.

The record evidence indicates therefore that India does not treat the 6,500 Rs amount for the 2006 wage rate as a hard cap, but rather possibly as a guideline.

In light of this fact, we also question the Petitioners' claim that only the "lowest paid" of Indian worker wages are covered by this amount. Assuming the guideline is generally considered in conducting the survey, only those workers earning over the 6,500 Rs per month or more might be excluded. There is no evidence on the record to suggest that this guideline would exclude a significant portion of workers in India's manufacturing sector. The Petitioners have provided no information on the record for which the Department can compare this amount to average wages throughout India. For example, the record contains no information with respect to the 2006 minimum wages in India, or any other industry specific minimum wage amounts. Thus, the Department has no means on this record of knowing whether or not 6,500 Rs per month applies only to the "lowest paid" employees, as argued by the Petitioners, or in fact to the vast amount of manufacturing wages in India. Accordingly, we have concluded based upon the record evidence the ILO wage data point for India is not distorted and we will continue to use it in our calculations for this review.

The Department further finds that calculating the cost of labor that is contemporaneous with the POI constitutes the best available information. Previously, the Department performed a regression on GNI per capita and wage data using the same time period. Under the new interim methodology, this mathematical relationship no longer exists since the Department is now taking the simple average of wages. The wage data is adjusted forward to the POI of the case using the actual consumer price index ("CPI"). The Department recognizes that a list of countries based on a 2009 GNI per capita may differ, in part, from the list that was derived using the Surrogate Country Memorandum, but many of the countries found economically comparable based on 2005 GNI per capita are the same countries as those found economically comparable based on 2007 GNI per capita, *e.g.* India, the Philippines and Indonesia.

With respect to the World Bank source of data from which the Department determines economic comparability, there is a two year lag between the time a country reports its GNI and when that GNI is published in the data source.[70] The Department relied on the most recent GNI per capita data available for this proceeding at the time that economic comparability was determined for this case. Accordingly, the Department believes that its use of the most contemporaneous labor rates on the administrative record is consistent with the Department's practice in selecting factor information for other surrogate values, and therefore is the best available information on the record.

Comment 4: Surrogate Financial Ratios

Xingfa's Argument

- Xingfa notes that at the *Preliminary Results* the Department calculated financial ratios using Tata Chemical ("Tata").

[70] *See* World Bank's *World Development Report* for 2007. We note that subsequently the World Bank has updated reported GNIs. *See also* the 2009 Expected NME Wage rates that were used to update the 2007 GNIs, found at http://ia.ita.doc.gov/wages/07wages/final/final-2009-2007-wages.html.

- Xingfa argues that the Department should average the Tata financial ratios with those of several other Indian chemical companies- Punjab Chemicals and Crop Protection Limited ("Punjab"), Zuari Industries Limited ("Zuari") and Kothari Industrial Corporation limited ("Kothari").
- Xingfa states that the financial statements of Punjab, Zuari and Kothari represent contemporaneous, public data from companies which produce similar merchandise.
- In addition, Xingfa contends that the Department should make several adjustments to the Tata financial ratios. Specifically, according to Xingfa packing costs, freight and forwarding costs, and discounts and commissions should be excluded from the calculation of surrogate financial ratios because these items are accounted for elsewhere in the Department's margin calculation.
- In addition, Xingfa asserts that the Department should offset selling, general and administrative ("SG&A") expenses with other interest income, because it is short-term income.
- Moreover, Xingfa claims that purchased goods should be included in the denominator for SG&A and profit.

Petitioners' Argument

- In their rebuttal brief, the Petitioners argue that it is the Department's practice to select, when available, companies which produce identical or comparable merchandise when calculating surrogate financial ratios. In this case, the Petitioners contend that none of the additional companies proposed by Xingfa produces sodium phosphates, which is comparable merchandise.[71]
- According to the Petitioners, it is the Department' practice to treat all selling expenses, including discounts and commissions, as SG&A in the ratio calculations.[72]
- The Petitioners assert that freight and forwarding costs are internal costs and should be included in the ratio calculations.
- The Petitioners claim that the Tata financial statement does not indicate whether the income is from short- or long-term interest, and it is the Department's practice not to make this offset if it is unclear as to whether the income is short- or long-term.[73]

Department's Position:

We agree with the Petitioners. As noted above, in selecting surrogate values for FOPs, section 773(c)(1) of the Act instructs the Department to use "the best available information" from the appropriate market-economy country. The Department's criteria for choosing surrogate companies are the availability of contemporaneous financial statements, comparability to the

[71] The Petitioners note that while Punjab produces phosphoric acid, an input into sodium hex, it does not produce sodium phosphates. The Petitioner argues that Kothari appears to have shuttered its manufacturing plant for part of this fiscal year and its main business activities are fertilizer mixing, trading in pesticides and leases. The Petitioner also argues that Punjab, Zuari and Kothari are not as vertically integrated as Xingfa, and thus, their production experiences are reflective of Xingfa's.

[72] *See Frontseating Service Valves From the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Final Negative Determination of Critical Circumstances*, 74 FR 10886 (March 13, 2009) and accompanying Issues and Decision Memorandum at Comment 1b.

[73] *See PRC Shrimp* at Comment 4a.

respondent's experience, and publicly available information.[74] Moreover, for valuing factory overhead, selling, general & administrative expenses, and profit, the Secretary normally will use non-proprietary information gathered from producers of identical or comparable merchandise in the surrogate country.[75] In addition, the CIT has held that in the selection of surrogate producers, the Department may consider how closely the surrogate producers approximate the non-market producer's experience.[76]

We note that both Tata and Xingfa are large, publicly-traded conglomerates which produce a multitude of chemical products, and thus, share a similar production experience.[77] Moreover, as we note below, Tata and Xingfa produce comparable products, *i.e.*, sodium phosphates. By contrast, after examining the financial statements of Punjab, Zuari and Kothari, we find that the production experiences of these companies are dissimilar to Xingfa's. The Punjab financial statement states that Punjab is engaged in the business of agro chemicals, mainly pesticides, herbicides, fungicides and biocides.[78] Moreover, unlike Xingfa which is vertically integrated and produces phosphoric acid, Punjab purchases phosphoric acid.[79] The Zuari financial statement maintains that it is a manufacturer and trader of chemical fertilizers and pesticides, as well as a trader of seeds.[80] Similar to Punjab, it appears Zuari purchases phosphoric acid, and does not produce it.[81] The Kothari financial statement describes its business as "limited to fertilizer mixing and trading in pesticides, besides receiving rental income. Moreover, although the company is in the process of restarting its super phosphate factory and is planning for commencing commercial production" by the end of the 2009 calendar year, it appears to not have produced any phosphates during the time of the relevant financial statement.[82] We note that while Kothari lists phosphate rock, one of the inputs into phosphoric acid, as a raw material consumed, it appears that most of the phosphate rock was traded rather than used to produce fertilizers.[83] Thus, a careful review of the Punjab, Zuari and Kothari financial statement shows that these companies do not have the level of integration of Xingfa, as they do not even produce the precursor to sodium hex, phosphoric acid.

In addition, the Department has reviewed the financial statements of all companies under consideration and has determined that while none of the companies produce merchandise that is identical to the subject merchandise; Tata produces merchandise that is sufficiently comparable to sodium hex, *i.e.*, sodium phosphates (*i.e.*, chemicals containing sodium and phosphate which

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[74] *See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Chlorinated Isocyanurates from the People's Republic of China*, 70 FR 24502 (May 10, 2005) ("*Isos*") and accompanying Issues and Decision Memorandum at Comment 3.

[75] *See, e.g., Sawblades* at Comment 2; *see also* section 351.408(c)(4) of the Department's regulations and section 773(c)(4) of the Act.

[76] *See Rhodia, Inc. v. United States*, 240 F. Supp. 2d 1247, 1253-1254 (CIT 2002); *see also Persulfates from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 70 FR 6836 (February 9, 2005) and accompanying Issues and Decision Memorandum at Comment 1.

[77] *See* Exhibit 11 of Xingfa's May 5, 2010 submission which provides a summarization of the products produced by Tata and its level of integration, specifically with regard to sodium phosphates.

[78] *See* page 47 of the Punjab financial statement, found in Exhibit 5 of Xingfa's May 5, 2010 submission.

[79] *Id*. at 55.

[80] *See* Zuari's financial statement at 36, found in Exhibit 7 of Xingfa's May 5, 2010 submission.

[81] *Id*. at 45, where Zuari notes that 94% of its raw materials are imported.

[82] *See* page 24 of the Kothari financial statement, found in Exhibit 9 of Xingfa's May 5, 2010 submission.

[83] *Id*. at 28-29.

can be used as a preservative, such as phosphate salts or sodium tripolyphosphate). Specifically, the Department finds that sodium phosphates share similar physical characteristics and end uses as sodium hex. Sodium hex is a phosphate salt, as is monosodium phosphate, disodium phosphate, TSPP and sodium tripolyphosphate.[84] As explained in *Phosphorous and Its Compounds*, all of these sodium phosphates, as well as sodium hex, are produced from phosphoric acid and soda ash (or caustic soda), with the addition of energy.[85] Also, the complexity and duration of the processes and the types of equipment used in the production of sodium phosphates are also similar to that of the subject merchandise.[86] Additionally, there is no record evidence which indicates that the goods produced by Punjab, Zuari and Kothari use a production process that is as complex as that of sodium hex, which involves the production of multiple intermediate products such as yellow phosphorous, phosphoric acid and phosphorous pentasulfide. Moreover, we note that none of these companies are listed as producers of sodium phosphates.[87] For these reasons, we find that Tata represents the only producer of sufficiently comparable merchandise on the record of this review.

Regarding purchased goods, it is the Department's practice to apply the surrogate manufacturing overhead ratios to the build-up of the respondent's cost of manufacture ("COM").[88] The denominator of these ratios must include, to the extent possible, only the manufacturing costs incurred by the selected Indian surrogate producers of comparable merchandise.[89] Because purchased goods do not reflect the surrogate Indian producers' manufacturing costs, in calculating the surrogate manufacturing overhead ratio we have excluded these purchased goods from Tata's COM, *i.e.*, the denominator of the overhead ratio calculation. The Department will normally include the purchase of traded goods in the denominator to calculate the SG&A and profit ratios because a company does incur SG&A expenses and realizes a profit on traded goods.[90] Therefore, for the final results, we have included purchased goods in the denominator of the SG&A and profit ratio calculations.

Regarding freight and forwarding expenses, we find that, based on the limited description in Tata's financial statement, freight and forwarding expenses are best considered as movement expenses, and thus, should be excluded from the surrogate financial ratio calculations.[91] In deriving appropriate surrogate values ("SVs") for overhead, SG&A, and profit, the Department typically examines the financial statements on the record of the proceeding and categorizes expenses as they relate to materials, labor & energy, factory overhead, SG&A and profit, and excludes certain expenses (*e.g.*, movement expenses) consistent with the Department's practice

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[84] *See* the Petitioners' October 23, 2009 submission at 3-4 and Exhibit 1. All phosphate salts start with a mixture of phosphoric acid and soda ash or caustic soda. *Id*., citing *Phosphorous and Its Compounds*, by J.R. Van Wazer.
[85] *Id*.
[86] *Id*.
[87] *See* the Petitioners' October 23, 2009 submission at Exhibit 3, *CEH Marketing Research Report, Industrial Phosphates*, which lists sodium phosphate producers in India.
[88] *See Isos* at Comment 7.
[89] *Id*.
[90] *See Amended Final Results of the First Antidumping Duty Administrative Review: Folding Metal Tables and Chairs From the People's Republic of China*, 70 FR 3187 (January 21, 2005).
[91] *See, e.g., Certain Woven Electric Blankets From the People's Republic of China: Final Determination of Sales at Less Than Fair Value***,** 75 FR 38459 (July 2, 2010) and accompanying Issues and Decision Memorandum at Comment 4.

of accounting for these expenses elsewhere.[92] In so doing, it is the Department's longstanding practice to avoid double-counting costs where the requisite data are available to do so.[93] We include freight expenses in our dumping calculations; therefore, to also include them in our calculation of the surrogate SG&A financial ratio that is then applied to the margin calculations would result in double-counting. Accordingly, for the final results, we have excluded freight and forwarding expenses from the surrogate ratio calculation because, based on the limited description in Tata's financial statement, freight and forwarding expenses are best considered as movement expenses which have been accounted for in the Department's margin calculation.

Similar to freight and forwarding expenses, we have excluded packing costs from the calculation of surrogate financial ratios. As noted above, when deriving surrogate financial ratios the Department excludes certain expenses and accounts for these expenses elsewhere[94] in order to avoid double-counting costs where the requisite data are available to do so.[95] Because we include packing costs in our dumping calculations, to include them in our calculation of the surrogate SG&A financial ratio would result in double-counting.[96] Accordingly, for the final results, we have excluded packing costs from the surrogate ratio calculation because, based on the limited description in Tata's financial statement, packing costs are best considered as packing which has been accounted for in the Department's margin calculation.

Regarding discounts and commissions, we disagree with Xingfa's argument that the Department should exclude sales commissions from the calculation of the surrogate financial ratios in order to avoid double-counting. Consistent with the Department's practice, because sales commissions represent standard selling expenses, these commissions should be included in the surrogate SG&A calculation.[97] Furthermore, whether a Chinese producer incurred sales commissions is irrelevant to the Department's surrogate SG&A calculation, as the Department does not modify surrogate financial ratios to match the particular circumstances of the NME country.[98] In this case, there is no evidence that discounts and commissions are valued in the margin calculations, thus, classifying discounts and commissions as SG&A will not double count any of Xingfa's reported FOPs. As a consequence, for the final results, we have included discounts and commissions in the surrogate ratio calculation.

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[92] *See, e.g., Freshwater Crawfish Tail Meat from the People's Republic of China: Notice of Final Results And Rescission, In Part, of 2004/2005 Antidumping Duty Administrative and New Shipper Reviews*, 72 FR 19174 (April 17, 2007) ("*Crawfish*") and accompanying Issues and Decision Memorandum at Comment 1. Moreover, the Department has specifically made deductions for loading and unloading expenses from the starting price in other cases. *See, e.g., Certain Frozen Warmwater Shrimp from India: Preliminary Results and Preliminary Partial Rescission of Antidumping Duty Administrative Review*, 74 FR 9991 (March 9, 2009), unchanged in final.

[93] *See, e.g., Helical Spring Lock Washers from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 73 FR 4175 (January 24, 2008) ("*Helical Lock Washers*"), at Comment 6.A. (where the Department clearly articulated its practice to avoid double-counting costs in calculating dumping margins).

[94] *See, e.g., Crawfish* at Comment 1.

[95] *See, e.g., Helical Lock Washers* at Comment 6.A.

[96] *See Wooden Bedroom Furniture from the People's Republic of China: Final Results of the 2004-2005 Semi-Annual New Shipper Reviews*, 71 FR 70739 (December 6, 2006) and accompanying Issues and Decision Memorandum at Comment 13.

[97] *See, e.g., Vietnamese Shrimp* at Comment 3.

[98] *Id.*

Regarding the offset of SG&A with interest income, we disagree with Xingfa that Tata's interest income is short-term in nature and should offset interest expense in the surrogate ration calculations. The Department's longstanding practice is to: (a) include all interest expense from the financial statements in the financial ratio calculations; (b) disaggregate interest income between short-term and long-term income; and, (c) offset interest expense with only the short-term interest revenue earned on working capital.[99] Additionally, it is the Department's practice to exclude income earned from long-term assets/investments because such income is not associated with the general operations of the company.[100] Further, the Department does not go behind the financial statement of the surrogate company to determine the appropriateness of including these items in the financial ratio calculations.[101] Because we cannot go behind financial statements, the Department will reduce interest and financial expenses by amounts for interest income only to the extent it can determine from those statements that the interest income was short-term in nature.[102]

In this case, there is no evidence in Tata's financial statements to indicate whether the interest earned is long-term or short-term in nature. Xingfa has noted that Tata received interest on income for intercompany loans and bank deposits, loans to subsidiaries and other advances.[103] As evidence that these items are short-term in nature, Xingfa has assumed that these items relate to "loans and advances" and "cash and bank balances" under current assets.[104] However, according to the Tata financial statement, the items listed under current assets reference a different schedule than that of other income.[105] Thus, as there appears to be no specific linkage between the two schedules, the Department is unable to determine whether the interest earned by Tata is of a short- or long-term nature. Accordingly, for the final results we have made no interest income offset to SG&A.

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[99] *See, e.g., Polyethylene Retail Carrier Bags from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Partial Rescission of Review*, 73 FR 14216 (March 17, 2008) and accompanying Issues and Decision Memorandum at Comment 1.

[100] *See Notice of Final Results of Antidumping Duty Administrative Review: Silicon Metal from Brazil*, 71 FR 7517 (February 13, 2006) and accompanying Issues and Decision Memorandum at Comment 4.

[101] *See Certain New Pneumatic Off-The-Road Tires from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances*, 73 FR 40485 (July 15, 2008) and accompanying Issues and Decision Memorandum at 18B.

[102] *See also Bulk Aspirin from the People's Republic of China; Final Results of Antidumping Duty Review*, 68 FR 6710 (February 10, 2003) and accompanying Issues and Decision Memorandum at Comment 5 (stating that we offset interest expense with short-term interest revenue where we could discern the short-term nature of the interest revenue from the financial statements); *Notice of Final Determination of Sales at Less Than Fair Value; Honey from the People's Republic of China*, 66 FR 50608 (October 4, 2001) and accompanying Issues and Decision Memorandum at Comment 3 (stating that we did not offset interest expense because the financial statements did not provide sufficient data for us to identify short-term interest revenue).

[103] *See* Tata's financial statement at 64, found in the Petitioners' November 6, 2009 submission (hereinafter referred to as "Tata's financial statement").

[104] *See* Tata's financial statement at 60.

[105] Current assets references schedules I and J, while other income references schedule 2. *See* the Tata financial statement at 60 and 61.

Comment 5: Placement of By-products in the Normal Value Calculation

Xingfa's Argument

- Xingfa argues that the Department should deduct by-products from COM, not normal value ("NV").
- Xingfa asserts that it it's the Department's practice to deduct by-products from COM when the surrogate company accounts for by-products as an adjustment to the cost of manufacture.
- According to Xingfa, because Tata did not credit by-product revenues to sales, by-products must have been reintroduced into production or used to offset its COM.

Petitioners' Argument

- The Petitioners contend that while Tata's financial statement does not specifically deal with by-product revenue, the by-product of the manufacture of soda ash is an input into Tata's cement production, and note that Tata records revenues from cement in its financial statement.
- Thus, the Petitioners argue that Tata records by-products as sales and the Department should deduct by-products from NV.

Department's Position:

While both parties have speculated as to how Tata might treat potential by-products it produces, we note that the Tata financial statement is silent with respect to by-products. The Department's practice in NME cases, when determining whether to apply the by-product offset to NV or COM, is to first look to the surrogate financial statements and treat the by-product offset in a manner consistent with those statements when a by-product offset is evidenced in those statements.[106] Where the surrogate financial statement does not indicate how the surrogate producer treated by-products in its financial statements, it is appropriate to consider other information on the record, such as whether the by-product was re-introduced into the production process or sold for revenue purposes.[107] Where the by-product is sold, we deduct the by-product from NV. This is consistent with accounting principles based on a reasonable assumption that if a company sells a by-product, the by-product necessarily incurs expenses for overhead, SG&A, and profit.[108] Conversely, where the by-product is reused, we deduct the by-product from COM because by reintroducing the by-product into production, the material costs of the subject merchandise are directly reduced.[109]

In this review, the Tata financial statement makes no mention of by-products, and thus, by-products have not been included in the calculation of surrogate financial ratios. Moreover, as Xingfa produced and sold its by-products (*i.e.*, ferrophosphorous and phosphate slag), for the final results, the Department has applied the by-product offset to NV.

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[106] *See Sawblades* at Comment 9, citing *Final Determination Pursuant to Court Remand Guangdong Chemicals Import & Export Corporation v. United States*, Court No. 05-00023 (May 3, 2006) at 8; *see also Folding Metal Tables and Chairs from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 71 FR 71509 (December 11, 2006) and accompanying Issues and Decision Memorandum at Comment 8.

[107] *Id.*

[108] *Id.*

[109] *Id.*

RECOMMENDATION

Based on our analysis of the comments received, we recommend adopting all of the above changes and positions, and adjusting the margin calculation program accordingly. If accepted, we will publish the final results of review and the final dumping margin in the *Federal Register*.

AGREE_____ DISAGREE_____

_____
Ronald K. Lorentzen
Deputy Assistant Secretary
for Import Administration

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Date