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January 5, 2010

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

FROM: John M. Andersen
Acting Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Silicon Metal from the People's Republic of China: Issues and Decision Memorandum for the Final Results of 2007/2008 Administrative Review

SUMMARY:

We have analyzed the comments submitted in the administrative review of silicon metal from the People's Republic of China ("PRC"). As a result of our analysis, we have made changes from the *Preliminary Results*.[1] We recommend that you approve the positions described in the "Discussion of the Issues" section of this Issues and Decision Memorandum. Below is the complete list of the issues in this review for which we received comments on the *Preliminary Results*:

Parts

I. General Issues:

Comment 1: Treatment of VAT and Export Taxes
Comment 2: Selection of Appropriate Surrogate Value for Silica Fume
Comment 3: Selection of Appropriate Surrogate Value for Electricity
Comment 4: Selection of Appropriate Surrogate Value Financial Statements
Comment 5: Treatment of the Silica Fume By-Product Offset
Comment 6: Selection of Appropriate Surrogate Value for Coal
Comment 7: Selection of Appropriate Surrogate Value for Truck Freight
Comment 8: Selection of Appropriate Surrogate Value for Oxygen
Comment 9: Selection of Appropriate Surrogate Value for Polypropylene Bags

[1] *See Silicon Metal from the People's Republic of China: Preliminary Results and Preliminary Rescission, in Part, of Antidumping Duty Administrative Review*, 74 FR 32885 (July 9, 2009) *("Preliminary Results").*

Comment 10: Inclusion of Certain U.S. Sales in Shanghai Jinneng's Antidumping Margin Calculation
Comment 11: Freight Distances Reported by the Respondents

II. Shanghai Jinneng Issues
Comment 12: Treatment and Valuation of Graphite Powder
Comment 13: Datong Jinneng's Reported Electricity Usage

III. Jiangxi Gangyuan Issues
Comment 14: Jiangxi Ganyuan's Production Quantity
Comment 15: Jiangxi Gangyuan's By-Product Offset

BACKGROUND:

The period of review ("POR") is June 1, 2007, through May 31, 2008. The Department of Commerce ("Department") verified information submitted by: 1) Shanghai Jinneng International Trade Co., Ltd.[2] ("Shanghai Jinneng") from May 7–8, 2009, its affiliated producer, Datong Jinneng Industrial Silicon Co., Ltd.[3] ("Datong Jinneng") from May 3–4, 2009; and 2) Jiangxi Gangyuan Silicon Industry Co., Ltd.[4] ("Jiangxi Gangyuan") from May 11–14, 2009. On June 29, 2009, the Department provided an opportunity for all interested parties to place new factual information on the record regarding Value Added Taxes ("VAT") in the PRC, and an opportunity to comment on this information. On July 20, 2009, the Department requested Shanghai Jinneng/Datong Jinneng and Jiangxi Gangyuan (collectively, "Respondents") to provide additional information regarding certain materials related to silicon metal production, and Respondents submitted the requested information.

In accordance with 19 CFR 351.309, we invited parties to comment on our *Preliminary Results*. On July 29, 2009, the Department received publically available information to value factors of production ("FOP") for the final results from Respondents and Globe Metallurgical, Inc.

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[2] *See* Memorandum to the File through Scot T. Fullerton, Program Manager, from Jerry Huang, International Trade Compliance Analyst, Paul Walker, Senior International Trade Compliance Analyst, regarding: "Verification of the Sales of Shanghai Jinneng International Trade Co., Ltd. in the 2007-2008 Antidumping Duty Administrative Review of Silicon Metal from the People's Republic of China," dated June 29, 2009 ("Shanghai Jinneng Verification Report").

[3] *See* Memorandum to the File through Scot T. Fullerton, Program Manager, from Jerry Huang, Case Analyst, Paul Walker, Senior Case Analyst, regarding: "Administrative Review of Silicon Metal from the People's Republic of China: Verification of Datong Jinneng Industrial Silicon Co., Ltd.," dated June 29, 2009 ("Datong Jinneng Verification Report").

[4] *See* Memorandum to the File through Scot T. Fullerton, Program Manager, from Susan Pulongbarit, International Trade Compliance Analyst, regarding: "Verification of the Sales and Factors of Production Response of Jiangxi Gangyuan Silicon Industry Co., Ltd. in the 2007-2008 Antidumping Duty Administrative Review of Silicon Metal from the People's Republic of China," dated June 29, 2009 ("Jiangxi Gangyuan Verification Report").

("Petitioner"), and on August 10, 2009, rebuttal comments on this information from Respondents and Petitioner. On August 21, 2009, the Department received case briefs from Respondents and Petitioner, and on September 9, 2009, rebuttal briefs from Respondents and Petitioner. No other party submitted case or rebuttal briefs. On August 10, 2009, Petitioner requested a hearing, including a portion to be closed to the public to discuss certain issues involving business proprietary information. On September 17, 2009, the Department conducted a hearing for the final results of this review in the Commerce Main Building.

On November 10, 2009, the Department received letters from Zhou Wenzhong, Ambassador Extraordinary and Plenipotentiary, of the Embassy of the People's Republic of China, and Zhou Xiaoyan, Director General of the Bureau of Fair Trade for Imports & Exports, of the Ministry of Commerce, for the People's Republic of China ("PRC letters"). On November 18, 2009, the Department placed the PRC letters, as well as the remand determination for *Pure Magnesium and Alloy Magnesium from the Russian Federation*, 60 FR 16440 (March 30, 1995) ("*Pure Magnesium*"), *Magnesium Corp. of America, et. al. v. United States*, 20 CIT 1092 (1996), on the record and requested comments from interested parties.

On December 2, 2009, the Department received comments on the PRC letters certified by Wang Xin, Division Director of the Bureau of Fair Trade for Import and Export, Ministry of Commerce, for the People's Republic of China.[5] On December 3, 2009, the Department received comments from Petitioner and Respondents regarding the PRC letters.

On December 5, 2009, the Department received a letter from Chinese Minister of Commerce Chen Deming. On December 11, 2009, the Department placed the letter on the record and invited comments on the letter from interested parties. On December 16, 2009, the Department received comments from Petitioner.

On December 22, 2009, the Department invited comments regarding the surrogate value for bags. The Department received no comments from parties.

DISCUSSION OF THE ISSUES:

General Issues

Comment 1: Treatment of VAT and Export Tax

[5] *See* December 2, 2009, submission from Winston & Strawn LLP, on behalf of the Bureau of Fair Trade of the Ministry of Commerce of the People's Republic of China: Comments on Deduction of Export Tax and VAT from Export Price, Silicon Metal from People's Republic of China.

In its August 21, 2009, case brief ("Respondents' Case Brief"), Respondents claim that the Chinese government imposed a 10 percent export tax on the FOB value of silicon metal exports, and Respondents listed this liability in their Section C sales listings. Respondents further claim that they increased the U.S. price to cover this expense, and the U.S. customer was aware of this expense because it was part of the negotiated price. Respondents claim that the export tax was "included in such price" as described by the statute and should be deducted from U.S. sales price pursuant to 19 U.S.C. 1677a(c)(2)(B). *See* Respondents' Case Brief at 6-7. Respondents claim that the Department erred in the *Preliminary Results* by applying this deduction to Jiangxi Gangyaun's sales in 2007, and should have only applied the deduction after January 1, 2008, pursuant to the Department's verification finding that Jiangxi Gangyuan did not pay the export tax prior to that date. *See* Respondents' Case Brief at 35.

Respondents argue that it did not include a value added tax imposed on silicon metal sales ("VAT") in the final sales price to U.S. customers, as evidenced by the lack of documentation of VAT on any of its sales invoices. Respondents further argue that there is no record evidence to demonstrate that VAT was embedded in the price to the U.S. customer, and conversely shows evidence that the U.S. prices do not include VAT, and were negotiated based on world market prices.[6] Respondents argue that Shanghai Jinneng was not even aware of its VAT liability until after the company negotiated the final U.S. sales price.[7] *See* Respondents' Case Brief at 4–6.

Respondents argue that, unlike the export tax, the VAT is not paid on a transaction specific basis, but rather, is paid on a periodic basis.[8] Regardless of any VAT liability, respondents argue that it is not the Department's practice to deduct every known tax generated by the sale of subject merchandise. Respondents argue that, in instances involving unrefunded VAT, the Department has previously refused to make adjustments to either normal value or U.S. price, finding that by ignoring VAT, the Department achieves tax neutrality.[9] Respondents argue that, consistent with the Department's findings in *OTR Tires from China*, it is irrelevant to non-market economy ("NME") countries whether or not producers paid VAT. *See* Respondents' Case Brief at 6–10.

Respondents argue that, should the Department consider any adjustment to U.S. price for the VAT, the adjustment should be limited to Respondents' actual net VAT expense. Respondents claim that the Department should follow its treatment of input VAT in the court-ordered remand

[6] *Citing* February 4, 2009, Jiangxi Gangyuan Supp. Section A QR at A-6 and Exhibit SA-5.
[7] *Citing* January 23, 2009, Shanghai Jinneng Supp. Section A QR, at Exhibit 1.
[8] *Citing* Verification Exhibit at 36.
[9] *Citing 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) *("OTR Tires from China"),* and accompanying Issues and Decision Memorandum at Comment 6.

of the 1999-2000 administrative review of silicon metal from Brazil.[10] According to Respondents, the Department must limit the VAT adjustment to the actual amount of VAT paid by Respondents. Respondents claim that this figure is available from its VAT summary worksheets. *See* Respondents' Case Brief at 10-11.

In its September 9, 2009, rebuttal brief ("Petitioner's Rebuttal Brief"), petitioner rebuts respondents' assertion that VAT was not included in the export sales price paid by respondents' U.S. customers, and argues that the VAT was imposed on a transaction-specific basis. Petitioner asserts that respondents have admitted that VAT was charged on export sales of subject merchandise. Specifically, petitioner asserts that respondents' documentation confirms that VAT was included on a transaction-specific basis[11] and cites Chinese VAT regulations suggesting that the PRC government intended that VAT be "collected" from customers.[12] Furthermore, petitioner argues that the Department has previously recognized VAT as a consumption tax,[13] and therefore, whether or not the VAT was individually identified on sales invoices, regardless of whether the purchasers knew of the VAT, and irrespective of how the price was determined, the statue[14] instructs the Department to deduct the full amount without exception.

Additionally, petitioner rebuts respondents' claim that VAT was remitted to the Chinese government on the aggregate rather than on a transaction-specific basis. Petitioner argues that the Chinese VAT regulations identify the transaction-specific formula to calculate the VAT liability,[15] and cite respondents' accounting records to demonstrate that VAT was included in the sales price. *See* Petitioner's Rebuttal Brief at 4–7.

Petitioner rebuts respondents' claim that *OTR Tires from China* is applicable to the instant administrative review. According to Petitioner, *OTR Tires from China* involved adjustments to normal value, and not U.S. price. Here, Petitioner argues that an adjustment to U.S. price to account for the VAT is necessary to achieve the Department's longstanding goal of tax neutrality, *i.e.*, the Department must compare a tax-exclusive normal value to a tax-exclusive U.S. price. *See* Petitioner Rebuttal Brief at 8–9.

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[10] *Citing Final Results of Redetermination Pursuant to Court Remand, Elkem Metals Co. and Globe Metallurgical v. United States*, Court No. 02-00232, Slip Op. 06-189 (Ct. Int'l Trade 2006).
[11] *Citing* Jiangxi Gangyuan Supplemental Section C Response at Exhibit SC-5.
[12] *Citing* June 29, 2009, Letter from Scot T. Fullerton, to All Interested Parties, regarding 2007/2008 Administrative Review of Silicon Metal from the People's Republic of China: Request for Comments Regarding Treatment of Chinese Value Added Taxes on Export Sales ("Value Added Tax Letter"), at Attachment II and Attachment III.
[13] *Citing Notice of Final Results of Antidumping Duty Administrative Review: Carbon and Certain Alloy Steel Wire Rod from Brazil*, 70 FR 28271 (May 17, 2005) ("*Brazil Alloy Steel*"), and accompanying Issues and Decision Memorandum at Comment 1.
[14] Section 772(c)(2)(B) of the Tariff Act of 1930, as amended (the "Act"), and 19 USC 1677a(c)(2)(B).
[15] *Citing* Value Added Tax Letter at article 5, Attachment II and Attachment III.

Petitioner also rebuts respondents' assertion that, should the Department deduct VAT, it should deduct the net amount of VAT that the producers actually paid on the export sale. Petitioner argues that respondents' proposed methodology is improper because the net amount involves a calculation based on VAT paid on inputs, which is irrelevant to U.S. prices and not considered when determining the normal value based upon surrogate values. Additionally, petitioner argues that the full VAT is collected from customers irrespective of the amount remitted to the government. Petitioner argues that the Department has previously declined to apply respondents' proposed methodology in market economy contexts.[16] Petitioner also rebuts respondents' claim that *Brazil Alloy Steel* supports respondents' proposed methodology. Petitioner asserts that *Brazil Alloy Steel* also concerns adjustments to normal value, and not U.S. price. *See* Petitioner's Rebuttal Brief at 9–11.

In its August 21, 2009, case brief ("Petitioner Case Brief"), petitioner asserts that respondents' U.S. sales price included VAT and export tax, as demonstrated by tax documents published by the PRC government and respondents' accounting records. [17] Petitioner claims that neither the VAT nor the export tax was ultimately refunded by the PRC government,[18] and thus argues that, in order to adequately compare the U.S. sales price to the tax neutral normal value ("NV"), the Department should deduct the full amount of the taxes from the Department's U.S. price.

Petitioner claims that Respondents' questionnaire responses demonstrate that their U.S. prices include the VAT. Specifically, Petitioner states that Jiangxi Gangyuan's Export Sales Detail Worksheet shows that their U.S. prices include VAT, and that Shanghai Jinneng's VAT Detailed Record demonstrates that their U.S. prices include VAT.

Petitioner disagrees with respondents' argument that the Department should deduct only a portion of the VAT included in the U.S. sales price, on the grounds that no portion of the VAT included in the U.S. sale price was refunded by the PRC government and the VAT system allows producers to recover the full VAT amounts paid on any intermediary materials inputs. Furthermore, petitioner asserts that the portion of VAT actually remitted to the PRC government by respondents is irrelevant in determining the total amount of VAT paid by the U.S. customers.

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[16] *Citing Notice of final Determination of Sales at Less Than Fair Value: Manganese Metal From the People's Republic of China*, 60 FR 56045–56052 (November 6, 1995), and accompanying Issues and Decision Memorandum at Comment 15; and *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 2.

[17] *Citing* Jiangxi Gangyuan April 21, 2009, Second Supplemental Section C and D Questionnaire Response. ("Second JG Supp C and D") at Exhibit SC-5; and Shanghai Jinneng April 20, 2009, Second Supplemental Sections C and D Questionnaire Response ("Second SJ Supp C and D"), at Exhibit SC-2.

[18] *Citing* Second JG Supp C and D, at 4; and Second SJ Supp C and D, at 1.

Petitioner argues that the antidumping statute requires that the full VAT amount be deducted from the Department's calculation of U.S. price.[19]

Pursuant to *OTR Tires from China*, among other authorities, Petitioner asserts that the Department's longstanding practice is to exclude all taxes from the antidumping margin calculation. Petitioner asserts that deducting the full VAT amount achieves tax neutrality in the margin calculation, and provides for a fair comparison between export price and normal value.[20] Petitioner claims that the Department previously rejected claims similar to those raised by Respondents in *Carbon and Certain Alloy Steel Wire Rod from Brazil*,[21] and deducted the full VAT amount from the home market price rather than the net VAT amount. *See* Petitioner's Case Brief at 4–13.

In its September 9, 2009, rebuttal brief ("Respondents' Rebuttal Brief"), respondents rebut petitioner's claim that the Department should deduct VAT from respondents' U.S. sales price. Respondents assert that VAT was not separately itemized on export invoices, and there is no record evidence that the final sale price to U.S. customers is inclusive of VAT. Respondents claim that they did not pass on the VAT liability to its U.S. customers. Respondents argue that there is a distinction between VAT imposed on domestic sales and VAT imposed on export sales under PRC law.[22] According to Respondents, the PRC tax system requires that producers, not customers, are responsible for VAT liabilities, and does not require producers to charge any amount of VAT to its export customers. Respondents claim that the accounting documents identified by petitioner to demonstrate that VAT is included in U.S. prices are internal company worksheets used to reconcile the companies' VAT liabilities, and the documents do not demonstrate that VAT was paid a transaction specific basis. As such, respondents claim that neither company passed any VAT to its U.S. customers.

Respondents rebut petitioner's claim that the statute requires that the Department deduct the full VAT amount from the U.S. sales price. Respondents argue that there is no record evidence to demonstrate that the VAT was included in the final U.S. sales price; therefore, the Department should not make any adjustments for VAT in the margin calculation. Respondent acknowledges that the export tax on silicon metal should properly be deducted.

[19] *Citing* Section 772(c)(2)(B) Act, and 19 USC 1677a(c)(2)(B).
[20] *Citing* Section 773(a) of the Act, and 19 USC 1677b(a).
[21] *Citing Brazil Alloy Steel*, 70 FR 28271 (May 17, 2005), and accompanying Issues and Decision Memorandum at Comment 1.
[22] *Citing* Chinese government circular, Cai Shui No. 52 (2004), and Letter from Globe Metallurgical Inc. to Department of Commerce (July 16, 2009).

Respondents claim that the antidumping margin calculated in the *Preliminary Results* was tax neutral, and argue that, consistent with *OTR Tires from China*, VAT liabilities are irrelevant when the Department applies the surrogate value methodology. *See* Respondents Rebuttal Brief at 3–9.

Respondents rebut petitioner's assertion that the Department had previously rejected similar claims, pointing to differences between the instant case and *Brazil Alloy Steel*. Respondents argue that, unlike *Brazil Alloy Steel*, where respondents included VAT in its home market price , respondents in the instant review did not include VAT in the price of its transaction specific U.S. sales. Citing 19 USC 1677a(c)(2) and *Elkem Metals Co. and Globe Metallurgical, Inc. v. United States*,[23] respondents further argue that, should the Department make an adjustment to U.S. price for VAT, the Department must limit the adjustment to the actual amount of VAT paid. *See* Respondents' Rebuttal Brief at 10–11.

***Letters from the PRC government*:**

On November 9, 2009, the Department received a letter from Mr. Zhou Wenzhong, Ambassador Extraordinary and Plenipotentiary of the People's Republic of China to the United States. In his letter, Ambassador Wenzhong stated that the deduction of VAT and export taxes from U.S. price would be inconsistent with the Department's normal practice. The Ambassador asserts that the tax deductions from U.S. price will further artificially increase dumping margins and have a serious effect on Chinese producers.

Ambassador Wenzhong's letter was accompanied by a letter from Madame Zhou Xiaoyan, Director General of the Bureau of Fair Trade for Imports and Exports, Ministry of Commerce of the People's Republic of China. Madame Zhou asserts that the Department previously found that, pursuant to section 772(c)(2)(B) of the Act, the Department declined to deduct export taxes, citing *Titanium Sponge from the Russian Federation*. Madame Zhou claims that the Department previously found that it was unable to deduct export tax from U.S. prices as the Department could not isolate the tax from the web of transactions between the government and producer, citing *Pure and Alloy Magnesium from Russia ("Magnesium from Russia").*

Madame Zhou argues that, contrary to the aforementioned precedents, the Department appears ready to deduct export taxes despite finding taxes to be an intra-NME expense. Madame Zhou asserts that, similar to its inability to account for export taxes, the Department is unable to deduct VAT from U.S. price as well. Madame Zhou contends that the Department found that it does not consider taxes in the NME context, citing *Certain Cut-to-Length Carbon Steel Plate From*

[23] *Citing Elkem Metals Co. and Globe Metallurgical, Inc. v. United States*, 2007 Ct. Intl. Trade Lexis 78, No. 02-00232, slip op. 07-09 (Ct. Intl Trade May 18, 2007).

Romania: Final Results of Antidumping Duty Administrative Review, 65 FR 1847 (January 12, 2000). Madame Zhou states the PRC government's objection to China's designation as a NME, but argues that under the Department's NME methodology, the Department cannot deduct VAT and other export taxes denominated in renminbi (RMB) from U.S. price.

On December 2, 2009, the Department received comments from the PRC Bureau of Fair Trade, Ministry of Finance, in which the PRC government reiterates that the Department's practice in NME cases is to not deduct export taxes from the export price or constructed export price. The PRC government argues that the Department did not provide due process prior to applying the deduction for export taxes from the constructed export price in the preliminary results of the instant review, as the Department failed to provide sufficient explanation for, or time to provide comment on, its change in practice. The PRC government further claims that the Department's failure to explain its departure from past practice impedes respondents' ability to fully participate in reviews as required by U.S. obligations to the World Trade Organization.

The PRC government asserts that judicial precedent and the Department's administrative practice dictate that the Department cannot presume that any taxes imposed on PRC exports are included in the U.S. price pursuant to section 772(c)(2)(B) of the Act. The PRC government argues that, if the Department is able to identify the export taxes and VAT taxes as parts of the U.S. sales price in the application of antidumping ("AD") margin calculation in non-market economy contexts, the Department should also be able to identify other cost elements which are presumed to be reflected in market economy prices. The PRC government further argues that the Department must recognize the market economy status of PRC entities if the Department intends to deduct export taxes and value added taxes from the U.S. price.

The PRC government argues that the Department is increasing protection to U.S. industry without regard to its established practices, court decisions, or WTO obligations, and has unlawfully applied inconsistent methodologies with respect to NMEs in the Department's countervailing and antidumping practices.

On December 9, 2009, the Department received a letter from Mr. Chen Deming, Minister of Commerce of the People's Republic of China. In addition to reiterating other claims by the PRC government, Minister Deming asserts that, in order to deduct VAT and export taxes, the Department must first recognize the PRC's market economy status and recognize PRC domestic prices and costs.

Comments on Letters from the PRC government:

Respondents' Comments:

On December 3, 2009, the Department received comments from Respondents on the PRC government letters. Respondents assert that the Department's established practice is that it cannot identify whether NME taxes are included in U.S. price pursuant to section 772(c)(2)(B), and that this practice has been upheld by the CIT and the CAFC. Based upon the *Magnesium from Russia* cases, including the final results of the antidumping investigation, voluntary remand, and CIT and CAFC decisions, Respondents argue that the courts have recognized that NME prices do not reflect fair value; there is no reliable way to identify the inclusion of export taxes in U.S. prices; the nature of NMEs does not permit the Department to identify taxes in U.S. prices; and the Department properly considers export taxes as intra-NME expenses.

Respondents further argue that, pursuant to the *Magnesium from Russia* cases, the Department has consistently declined to adjust U.S. prices based upon export taxes. Respondents claim that in *Titanium Sponges from the Russian Federation*, 61 FR 58525 (November 15, 1996) ("*Titanium Sponges*"), the Department declined to deduct export taxes from U.S. prices because Department could not determine that the taxes were included in the U.S. price. Respondents also claim that in the final results of the administrative review of *Certain Cut-to-Length Carbon Steel Plate from Romania*, 65 FR 1847 (January 12, 2000), the Department declined to deduct inland freight taxes from the U.S. price because the Department determined the taxes to be an intra-NME expense. Respondent argues that the Department declined to deduct the tax despite granting Romania market economy status several years later.

Respondent argues that, pursuant to *Coated Free Sheet Paper from China*, 72 FR 60632 (October 25, 2007), the Department maintains a "bright line" between its application of the countervailing duty laws and antidumping laws to China. Respondents argue that, according to the Department's statements in *Coated Free Sheet Paper*, the Department's determination to apply the countervailing duty laws to China does not warrant market economy status in antidumping proceedings. Respondents further claim that, according to *Coated Free Sheet Paper*, prices distorted by government interference cannot form the basis of normal value in an antidumping proceeding. Based upon the instant record, Respondents claim that their operations are impacted by government involvement.

Petitioner's Comments:

On December 3, 2009, the Department received comments from Petitioner on the PRC government letters. Petitioner argues that the letters were untimely filed and that the Department should reject the submissions. Petitioner argues that the Department's reliance upon 19 CFR 351.104(a) as the basis to include the PRC government's letters on the record is misplaced, as this provision merely describes the type of documents to be included in the administrative record and does not discuss relevant time limits. Petitioner states that accepting such late submissions is

in direct contravention of the Department's regulations. Petitioner claims that, pursuant to 19 CFR 351.302(d)(1), the Department's practice is to reject untimely submissions. Petitioner argues that their interests have been prejudiced because the PRC government did not properly serve its letters on Petitioner, and because the Department requested comments on the letters on an accelerated basis. Petitioner asserts that allowing the submissions on the record sets bad precedent and contravenes the Department regulations, and disrupts the administrative process.

Petitioner further argues that, should the Department consider the letters, the Department should find that the legal arguments raised in the letters are not applicable to the instant review. Petitioner argues that the statute requires that the Department deduct both the export tax and VAT from U.S. price. Furthermore, Petitioner asserts that it is the Department's long-standing practice to calculate dumping margins on the principle of tax-neutrality.

Petitioner argues that unlike the circumstances of the instant review, the Department's decisions in *Magnesium from Russia* and *Titanium Sponge* did not pertain to VAT, but rather involved export taxes which were assessed based on a rate applied to the quantity of merchandise sold, and not the selling price of export transactions as it is in the instant review. Petitioner argues that unlike *Magnesium from Russia* and *Titanium Sponge*, where the Department was unable to determine whether the tax was included in the U.S. price, in the instant review respondents have conceded that the export tax was included in the U.S. price and agreed that it should properly be deducted. Petitioner also asserts that there is record evidence to demonstrate that the Department verified the amount of the export tax included in respondents' U.S. sales price.

Petitioner rebuts the argument that the deduction of VAT would be contrary to the Department's practice, as the cases cited in the PRC government's letters concern export taxes, not VAT. Petitioner asserts that in the instant review, the VAT is a consumption tax borne by the purchaser of the final product, as required by the PRC tax regulations on record. Furthermore, petitioner asserts that it is irrelevant whether, for example, Respondents inform their U.S. customers of the VAT liability or whether VAT was separately itemized on the invoice because PRC law dictates that the VAT is incurred and collected based upon on Respondents' sales. Petitioner argues that, based upon PRC tax regulations on the record, purchasers may request a special VAT invoice separately to reflect the VAT amount included in the sales price.

Petitioner argues that, unlike *Magnesium from Russia*, the PRC export tax and VAT are not intra-NME transactions because they are based upon Respondents' export prices, which are market-based prices. Petitioner argues that Respondents have demonstrated an independence from the government in their respective price negotiations, and asserts that the percentage applied to the negotiated price to the market economy customer to determine export tax and VAT liability is not an internal NME transaction. Petitioner argues that the instant case is unlike

the circumstances in *Certain New Pneumatic Off-The-Road Tires from the PRC*, 73 FR 9278 (February 20, 2008) (preliminary results), where the indirect selling expenses were incurred in the PRC for sales to the United States. Petitioner argues that Respondents' sales prices are similar to the market economy input prices sometimes relied upon by the Department in determining NME normal value. Petitioner asserts that, *in Lasko Metal Products, Inc. v. United States*, 43 F.3d 1442 (Fed. Cir. 1994), the CAFC upheld the Department's practice of using market economy purchase costs by NME producers in the normal value calculation because the costs were based on international market prices. Petitioner argues that this decision is relevant to the instant case, as both the export tax and VAT were assessed on Respondent's market-oriented price negotiated with market economy customers.

Petitioner argues that the Department's recent determination that the PRC economy has undergone substantial reforms such that the Department can apply the countervailing duty law to imports from the PRC provides that the Department can determine that the export tax and VAT are included in Respondents' U.S. price. Petitioner states that, in the *Magnesium from Russia* remand determination, the Department noted its "uniform approach to intra-NME transfers" to explain its determination not to deduct the export tax from U.S. prices. Petitioner asserts that, pursuant to the Department's policy determination in *Coated Free Sheet Paper*, the Department's previous policy is no longer in place. Petitioner reiterates that Respondents' prices are market-based, and even if that were not the case, the Department's determination to apply the countervailing duty law to imports from the PRC allows the Department to determine that the export tax and VAT were included in Respondents' U.S. sales prices.

On December 16, 2009, the Department received additional comments from Petitioner regarding the December 9, 2009, letter from the PRC government. Petitioner rebuts the PRC government's claim that deducting VAT and export tax from U.S. price will under value export price, and reiterates its argument that failure to deduct the taxes will overstate export price and distort the margin calculation. Petitioner rebuts the PRC government's assertion that the deduction of taxes departs from the Department's policy and practice, and argues that the Department has a long-standing practice of calculating tax neutral margins, citing *Polyethylene Retail Carrier Bags from the PRC: 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 2, where the Department declined to adjust normal value and U.S. price in order to achieve a tax exclusive margin calculation. Petitioner argues the PRC VAT system is different from other countries, in that it imposes a VAT on export sales, and thus the Department has not previously had occasion to adjust U.S. price to achieve tax neutrality, and therefore has no established practice for the treatment of VAT in U.S. sales prices.

Petitioner rebuts the PRC government's assertion that the deduction of the taxes will evoke a strong reaction among Chinese industries, pointing out that the PRC government imposes VAT on a limited number of products. Additionally, with respect to the export tax, Petitioner argues that the specific question in this review is whether the export tax must be deducted from U.S. price based upon the circumstances and record evidence presented in the instant case.

Petitioner also disagrees with the PRC government's assertion that the Department must recognize the PRC's market economy status in order to consider PRC cost data of respondents in the Department's margin calculation. Petitioner asserts that the Department does not need to recognize the market economy status because the Department applies the NME methodology to determine normal value, not U.S. price. Petitioner contends that the tax deductions are based on percentages applied to a market-determined U.S. price, while continuing to value normal value using surrogate values, thus remaining consistent with the Department's NME practice.

Additional Comments

On January 4, 2010, Leo Gerard, International President of United Steelworkers ("USW"), submitted a letter to the Department commenting on the Department's potential adjustment to U.S. price for export taxes and VAT. *See* Memo to the File, Letter from United Steelworkers, dated January 5, 2010. In its letter, USW states that the PRC imposes both an export tax and VAT on certain products, and in untimely letters to the Department, the PRC government has asked that the Department not remove these taxes from U.S. price. USW argues that failure to adjust U.S. prices for these taxes would be contrary to U.S. antidumping law, overstate the price of the dumped product, and understate the dumping margins, and would be further inconsistent with the Department's practice of calculating tax-neutral dumping margins. With respect to whether the taxes are "intra-NME transfers," USW argues that export prices (and tax amounts based on those prices) are a function of market prices outside of China, not transfers within China. USW further suggests that if the Department finds that it cannot adjust U.S. price for export taxes and VAT, this finding would undermine the Department's application of the CVD law to China. Finally, USW argues that the Department should reject the untimely arguments raised by the PRC government, and deduct the taxes pursuant to the antidumping law.

Department's Position:

Pursuant to the CAFC's decision in *Magnesium Corp.* and the Department's NME practice, the Department reverses its preliminary determination to reduce Respondents' U.S. sales prices based upon an export tax imposed by the PRC government.[24] The Department further

[24] *See Magnesium Corp. of America, et. al. v. United States, et. al.*,166 F.3d 1364 (Fed. Cir.1999) ("Magnesium Corp.").

determines not to reduce Respondents' U.S. sales prices based upon a VAT on silicon metal sales imposed by the PRC government. For the reasons discussed below, the Department concurs with arguments that *Magnesium Corp.* and the Department's practice instruct that no reduction should be made to U.S. price based upon tax payments by NME respondents to NME governments.

The facts of *Magnesium Corp.* are substantively similar to the instant case. In the antidumping investigation that gave rise to *Magnesium Corp*., the Russian government imposed an export tax upon sales of subject merchandise. The *Magnesium Corp*. respondents reported that they paid the tax, and the *Magnesium Corp.* petitioners argued that section 772(c)(2)(B) required the Department to reduce U.S. price based upon the export tax. In the Department's final determination, the Department did not reduce U.S. price based upon the export tax.[25] The *Magnesium Corp.* petitioners challenged the Department's determination before the CIT, and the Department subsequently requested a remand from the CIT to further explain this determination. Pursuant to the Court's order granting the Department's request, the Department issued its remand determination.[26]

In the *Remand Determination*, the Department reiterated that it could not, in the NME context, apply the statutory instruction set forth in section 772(c)(2)(B) to reduce U.S. price by the amount of any export tax, duty, or other charge imposed by the export country on exports of subject merchandise. The Department explained that, based upon the statutory presumption that prices and costs within a NME are unreliable measures of value, the Department does not rely upon internal NME prices and costs. The Department reasoned that the Russian export tax was such an internal NME transfer. The Department further explained that government intervention and influence over enterprise activity in NMEs precluded the Department from determining whether, and to what extent, a tax might be reflected in a NME export price.[27]

The Department's reasoning was upheld by the CIT.[28] The CIT found that section 772(c)(2)(B) "does not specify how Commerce is to determine whether an export tax is included in United States price for goods produced in a {NME}. The treatment of market and non-market economies differs significantly under the statute." The trial court further found that, based upon

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[25] *See Notice of Final Determination of Sales at Less Than Fair Value: Pure Magnesium and Alloy Magnesium From the Russian Federation*, 60 FR 16440 (Mar. 30, 1995); *Notice of Amended Final Determination of Sales at Less Than Fair Value: Antidumping Duty Investigation of Pure Magnesium from the Russian Federation*, 60 FR 65635 (Dec. 30, 1995).

[26] *See Magnesium Corp. of America, et. al. v. United States, et. al.*, 20 CIT 1092 (Aug. 27, 1996) (granting request for remand); *Remand Determination: Magnesium Corp. of America, et. al. v. United States*, 94-06-00789 (Oct. 28, 1996) ("*Remand Determination*").

[27] *See Remand Redetermination* at 4-6.

[28] *See Magnesium Corp. of America, et. al. v. United States, et. al.*, 20 CIT 1464 (Dec. 23, 1996).

the possibility of government intervention in NMEs and because there is no market to determine price in a NME, the Department's interpretation of section 772(c)(2)(B) was reasonable.[29]

The appellate court upheld the CIT's findings. As explained by the CAFC, "{b}ecause the plain language of the statute does not require all export taxes to be deducted from the {U.S. price}, but requires deduction of only those that are included in the price of the merchandise, the statute clearly contemplates a situation where the export tax is *not included* in the price of the merchandise." In reaching this decision, the CAFC expressly rejected the argument that any export tax imposed must be deducted from the U.S. price, and found that the Department had discretion to determine whether an export tax was included in the U.S. sales price within the meaning of section 772(c)(2)(B) of the Act.[30]

The CAFC further found that there is no reliable way to determine whether an export tax had been included in the price of merchandise from a NME because the price of merchandise in a NME does not reflect its fair value. In support of this finding, the appellate court recognized that NMEs do not operate in accordance with market principles.[31] Moreover, the CAFC found that the Department's determination not to adjust U.S. price based upon a NME export tax harmonized the statutory definition of NMEs and the statutory instruction to reduce U.S. price based upon export taxes, particularly the requirement that export taxes must be "included in such price."[32] The Department has relied upon similar reasoning in other administrative determinations.[33]

With respect to the export tax, the salient issue in the instant case is the same issue that was before the CAFC in *Magnesium Corp.*: whether respondents' U.S. sales prices reflect a NME export tax such that the export tax is "included in such price" within the meaning of section 772(c)(2)(B) of the Act. As explained below, the Department disagrees with Petitioner's claims that the instant case is distinguishable from *Magnesium Corp.* Indeed, there are no meaningful distinctions between the instant case and *Magnesium Corp.* Because the Department continues to treat the PRC as a NME, and because the Department continues to reject reliance upon internal NME prices and costs as reliable measures of value, the CAFC's decision in *Magnesium Corp*. provides controlling precedent and must be followed here.

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[29] *Id.* at 1466.
[30] *See Magnesium Corp.*, 166 F.3d at 1370.
[31] *Id.*, 166 F.3d at 1370-71.
[32] *Id.* at 1371.
[33] *See, e.g., Titanium Sponge from the Russian Federation; Notice of Final Results of Antidumping Duty Administrative Review*, 61 FR 58525 (Nov. 15, 1998), and accompanying Issues and Decision Memorandum at Comment 8.

Petitioner asserts that the Department must reduce U.S. price for the PRC export tax because Respondents expressly acknowledged that their U.S. prices included the export tax and the instant record supports this assertion.[34] However, neither of these factors distinguishes the instant case from *Magnesium Corp*. As the Department explained in its *Remand Determination*, both *Magnesium Corp*. respondents reported that they paid export taxes. Specifically, "AVISMA reported that it paid export taxes . . . . SMW, the other Russian producer, also reported that it paid the export tax on its sales for export."[35] Thus, Respondents' acknowledgement that their U.S. prices included the PRC export tax and their submissions supporting this assertion do not distinguish the instant review because the *Magnesium Corp*. respondents also demonstrated that they paid a NME export tax. The controlling fact in both cases is that internal NME prices and costs are not reliable measures of value and, therefore, there is no reliable way to determine that such taxes are included in the U.S. price.

Additionally, Petitioner states that the instant case is distinguishable because Respondents did not rely upon intermediaries in their U.S. sales and the *Magnesium Corp*. respondents relied upon intermediaries.[36] However, Petitioner does not explain the relevance of this distinction and, moreover, there is no indication in the appellate court's decision that the *Magnesium Corp.* respondents' reliance upon intermediaries was relevant to its holding. This distinction is, therefore, not instructive.

The Department also disagrees with Petitioner's assertion that the PRC export tax does not constitute an intra-NME transfer because the PRC export tax is based on Respondents' export sales prices negotiated between Respondents and U.S. customers.[37] Petitioner suggests that that the Respondents' export prices are analogous to the market economy input prices relied upon by the Department to determine normal value in *Lasko*, where the appellate court found that the Department properly relied upon prices paid by NME respondents to value inputs purchased from market economy countries.[38] The Department rejects this analogy. First, the *Lasko* court was concerned with the Department's determination of normal value, not U.S. price. The *Lasko* court stated; "{t}he issue presented by this case is whether or not the Act permits the {Department} to determine the factors of production using both surrogate country values and actual cost values."[39] The *Lasko* court did not address adjustments to U.S. price, nor reductions to U.S. price based upon NME export taxes. Thus, the relevant precedent is *Magnesium Corp*., not *Lasko*.

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[34] *See* Petitioner's Dec. 3 Comments at 5-6.
[35] *See* Remand Determination at 2.
[36] *See* Petitioner's Dec. 16 Comments at 4.
[37] *See* Petitioner's Dec. 3 Comments at 13-15.
[38] *See Lasko Metal Products, Inc. v. United States*, 43 F.3d 1442, 1445-46 (Fed. Cir. 1994) ("*Lasko*").
[39] *Id.*, 443 F.3d at 1445.

Moreover, Petitioner's analogy ignores that the Department relies upon market economy input prices in its NME normal value determinations because the source country of the input price is a market economy country. For example, as stated in the determination that gave rise to the *Lasko* litigation, *Fans from China*; "{t}he simplest example of a value based on market principles in a proceeding involving an NME is a price paid in convertible or market economy currency for an input *sourced from a market economy country*."[40] (emphasis added). Indeed, *Lasko* stands for the proposition that when a NME respondent purchases inputs from a market economy supplier, the Department may rely upon the price paid to the market economy supplier in its normal value determination because the market economy supplier's prices are determined by market conditions.[41] Endorsement of Petitioner's analogy would suggest that NME export prices are determined by market conditions. The Department declines to adopt this fundamental change to its NME methodology.

The Department further disagrees with Petitioner's assertion that the instant case is distinguishable from *Magnesium Corp.* on the basis that, in the instant case, Respondents' export prices were not subject to government interference. In fact, in both *Magnesium Corp*. and the instant case, respondents demonstrated their eligibility for separate rates. Specifically, in the instant review, Shanghai Jinneng and Jiangxi Gangyuan have been treated as separate rate respondents. In *Magnesium Corp*., respondent SMW demonstrated its eligibility for a separate rate. [42] Thus, in both reviews, respondents demonstrated their export activities were generally free from government interference.

With respect to the VAT, the Department determines that there is no basis to reduce U.S. price based upon the VAT. The Department has not previously had occasion to consider whether to reduce U.S. prices based upon a VAT on all sales, including export sales, of a particular product. However, the Department disagrees with Petitioner's argument that cases where the Department declined to reduce U.S. prices based upon NME export taxes are inapposite with respect to the Department's consideration of the PRC VAT. The Department's view is that *Magnesium Corp.* sets forth the principle that tax payments by NME respondents to NME governments are intra-NME transfers that do not provide a basis for the Department to adjust U.S. price. The Department has previously applied this principle with equal force to taxes that are not classified as export taxes. For example, in *Plate from Romania*, the Department declined to reduce U.S. price based upon a tax imposed by a NME government on foreign inland freight because the tax

[40] *See Final Determination of Sales at Less Than Fair Value: Oscillating Fans and Ceiling Fans From the People's Republic of China*, 56 FR 55271 (Oct. 25, 1991) *("Fans from China")*, and accompanying Issues and Decision Memorandum at Comment 1.
[41] *See Lasko*, 443 F.3d at 1445.
[42] *See Notice of Final Determination of Sales at Less Than Fair Value: Pure Magnesium and Alloy Magnesium From the Russian Federation*, 60 FR at 16443-44.

was an intra-NME transfer that the Department could not consider under its NME methodology.[43] The same principle applies here because the PRC VAT is an internal NME transaction that does not provide a basis to reduce U.S. price pursuant to section 772(c)(2)(B).

With respect to arguments that the Department normally excludes VAT from its antidumping margin calculation, these claims are based upon market economy cases where the Department made adjustments to home market economy prices. However, in NME cases, the Department has declined to adjust either normal value or U.S. price based upon a PRC VAT paid by producers of subject merchandise and refunded upon exportation.[44] The Department explained that; "the Department's factors of production calculation uses Indian surrogate values which are exclusive of Indian taxes. Because the {FMV or fair market value, the predecessor to normal value} is net of taxes, neither a downward adjustment to FMV nor the alternative upward adjustment to {U.S. prices} . . . is necessary."[45] Moreover, to the extent that *Manganese Metal* is relevant to the instant case, it predates the CAFC's decision in *Magnesium Corp.*, which provides more recent and controlling precedent. In *Bags from China*, the Department considered whether to make an adjustment in the SG&A calculation, which is part of the normal value determination, based upon the method of recording taxes (including a VAT) in the surrogate financial statements.[46] In short, *Bags from China* was solely focused on the relevance of VAT to the normal value determination, not U.S. price.

The Department also disagrees with Petitioner's assertion that the Department's determination to apply countervailing duty law ("CVD law") to China provides that the Department can determine whether the export tax and VAT are included in Respondents' U.S. price.[47] The Department's determination to apply CVD law to NMEs does not warrant a change to the Department's application of section 772(c)(2)(B) because the Department still considers NME costs and prices unreliable to determine normal value. As explained in *Coated Free Sheet Paper*; "while the presence of limited market forces supports the application of the CVD law, this does not necessarily warrant market economy status in {antidumping} proceedings if these

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[43] *See Certain Cut-to-Length Carbon Steel Plate from Romania*, 65 FR 1847 (Jan. 12, 2000) *("Plate from Romania")*, and accompanying Issues and Decision Memorandum at Comment 2.
[44] *See Notice of Final Determination of Sales at Less Than Fair Value: Manganese Metal from the People's Republic of China*, 60 FR 56045, 56052 (Nov. 16, 1995).
[45] *Id.*
[46] *See Polyethylene Retail Carrier Bags from the People's Republic of China: Final Results of Antidumping Administrative Review and Partial Rescission of Review*, 73 FR 14216 (Mar. 17, 2008), and accompanying Issues and Decision Memorandum at Comment 2.
[47] *See* Petitioner's Dec. 3 Comments at 15-16; *Coated Free Sheet Paper from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 72 FR 60645 (October 25, 2007) *("Coated Free Sheet Paper")*, and accompanying Issues and Decision Memorandum at Comment 1.

forces are significantly distorted by government intervention, as they are in China."[48] Moreover, the Department stated; "{i}f the price is set in an environment distorted by significant government interference, however, this price cannot form the basis of normal value in an AD proceeding."[49]

The Department disagrees with Petitioner's assertion that, in placing the PRC government's letters on the record, the Department violated its regulations and prejudiced Petitioner's interests. There is no dispute that the PRC, as the exporting country, is an interested party within the meaning of the statute. The Department's determination to place the letters on the record was consistent with its regulations, which instruct that the Department "will include in the official record all factual information, written argument, or other material developed by, presented to, or obtained by the Secretary during the course of a proceeding that pertains to the proceeding."[50] Moreover, with respect to the Department's determination to place the letters on the record after the deadline for the submission of case briefs, the Department's regulations provide that; "{u}nless expressly precluded by statute, the Secretary may, for good cause, extend any time limit established by this part."[51]

The Department had good cause here to consider arguments outside of the normal regulatory deadlines. The Department received letters addressed to Department officials from the Chinese Ambassador to the United States, the Chinese Minister of Commerce, and the Chinese Director General of the Bureau of Fair Trade concerning, among other matters of economic policy, the instant case. The Department does not dispute that it normally rejects arguments submitted outside of its regulatory deadlines, however, such interest by the exporting country is unusual in an antidumping duty administrative review. This interest provides sufficient cause to warrant consideration of the exporting country's concerns, and parties' responses to those concerns, outside of the normal administrative deadlines.

Petitioner was not disadvantaged by the PRC government's letters. Petitioner was provided the same amount of time to respond to the letters as Respondents. Moreover, the Department's request for comments on the letters was consistent with its regulations, which provides that, notwithstanding regulatory deadlines for administrative case briefs, the Department "may request written argument on any issue from any person or U.S. Government agency at any time during a

[48] *See* Coated Free Sheet Paper at Comment 1.
[49] *Id.*
[50] *See* 19 CFR 351.104(a).
[51] *See* 19 CFR 351.302(b).

proceeding."[52] Thus, the Department's request for comments on the letters was consistent with its regulations.

Comment 2: Selection of Appropriate Surrogate Value for Silica Fume

Respondents claim that the Department's *Preliminary Results* methodology to value silica fume should not be used because it was previously rejected by the CIT and the Department in the new shipper reviews.[53] Respondents assert that the Department uses Infodrive data to examine the accuracy and reliability of World Trade Atlas ("WTA") data only if the following three conditions are met: 1) direct and complete evidence from Infodrive showing that imports from a particular country do not contain the product in question; 2) a significant portion of the overall imports under the relevant HTS category is represented by the Infodrive data; and 3) distortions of the average unit value ("AUV") in question can be demonstrated by Infodrive data.[54] Respondents continue that these criteria are not met here and, as a result, the Department should not rely on Infodrive for valuing silica fume as it did in the *Preliminary Results*. *See* Respondents' Case Brief at 23-24.

Respondents contend that the Department cannot properly analyze whether Infodrive data represents a significant portion of overall imports of silicon dioxide in WTA data because Infodrive reports quantities in various units of measure, which prevents an accurate comparison to WTA import data.[55] Respondents argue that comparing the quantity difference in import quantities between Infodrive and WTA may result in a greater disparity when comparing inconsistent units of measurement. Additionally, Respondents argue that the Department has previously cited Infodrive's non-uniform data as a reason for its unreliability.[56] *See* Respondents' Case Brief at 24 – 26.

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[52] *See* 19 CFR 351.309(b)(2).

[53] *Citing Final Results of Redetermination Pursuant to Court Remand* ("*Remand Redetermination*"), *Globe Metallurgical Inc. v. United States*, Court No. 07-00386, Slip. Op. 09-37 (Ct. Int'l Trade May 5, 2009).

[54] *Citing Wooden Bedroom Furniture from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and New Shipper Review*, 73 FR 49162 (August 20, 2008) ("*WBF from China*"), and accompanying Issues and Decision Memorandum at Comment 1; *Lightweight Thermal Paper From the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 73 FR 57329 (October 2, 2008) ("*Thermal Paper from China*"), and accompanying Issues and Decision Memorandum at Comment 9.

[55] *See* Letter from Respondents to Department of Commerce (April 13, 2009), Regarding Silicon Metal from the People's Republic of China, at Exhibit 15; Letter from Respondents to Department of Commerce (July 29, 2009), Regarding Silicon Metal from the People's Republic of China, at Exhibit 4.

[56] *Citing Final Results of Redetermination Pursuant to Court Remand ("Dorbest Remand"), Dorbest v. United States*, Court. No. 05-00003, Slip. Op. 06-160 at 48 (May 25, 2007) (aff'd by *Dorbest v. United States*, 547 F. Supp. 2d 1321 (Ct. Int'l Trade 2008); *Polyethylene Terephthalate Film, Sheet, and Strip from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 73 FR 55039 (September 24, 2008) ("*PET Film from China*"), and accompanying Issues and Decision Memorandum at Comment 2; *Final Determination of Sales at Less*

Respondents also contend that the universe of exporting countries reported in Infodrive is dissimilar to those reported by WTA, and precludes an accurate comparison between the two data sets. Respondents state that WTA reports imports from Australia, Finland, Russia, and Switzerland, but Infodrive does not. Conversely, according to Respondents, Infodrive reports imports from Denmark and India, but WTA does not. Respondents assert that, in *Diamond Sawblades from China*, the Department determined not to rely upon Infodrive data because it did not report imports from five countries included in the WTA data. *See* Respondents Case Brief at 26.

Respondents continue that this case parallels the 2005-06 new shipper reviews under the antidumping duty order in which the Department found Infodrive to be unreliable.[57] Respondents contend that due to the Department's inability to determine what percentage of WTA data is captured by Infodrive, the Department determined that Infodrive data was unreliable as a corroborative tool.[58] Moreover, they state that the CIT concurred and, accordingly, did not require the Department to use Infodrive data to value silica fume during the new shipper reviews. Respondents argue that the Department should continue to find Infodrive data unreliable as a corroborative tool because this problem still exists in the instant review. *See* Respondents Case Brief at 26.

Respondents argue that the Department misapplied its own methodology when the Department determined that the Infodrive data was reliable because Infodrive data from five countries aligned with WTA import data from the same five countries. Respondents claim that the Department's practice requires that a significant portion of overall import quantities from the relevant Harmonized Tariff Schedule ("HTS") category be represented by Infodrive in order for the Department to consider Infodrive to be a reliable source.[59] *See* Respondents' Case Brief at 27.

Respondents further assert that the Department should not have relied on Infodrive data to parse out WTA data when the overall reliability of Infodrive is in doubt. Respondents claim that the

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Than Fair Value and Final Partial Affirmative Determination of Critical Circumstances: Diamond Sawblades and Parts Thereof from the People's Republic of China, 71 FR 29303 (May 22, 2006) ("*Diamond Sawblades from China*"), and accompanying Issues and Decision Memorandum at Comment 11D.

[57] *Citing Silicon Metal from the People's Republic of China: Notice of Final Results of 2005/2006 New Shipper Reviews*, 72 FR 58641 (October 16, 2007) ("*New Shipper Reviews*"), and accompanying Issues and Decision Memorandum at Comment 5.

[58] *Id.*

[59] *Citing* Memorandum to the File from Jerry Huang, International Trade Compliance Analyst, and Bobby Wong, Senior International Trade Compliance Analyst, Regarding Preliminary Results of 2007 – 2008 Antidumping Duty Administrative Review of Silicon Metal from the People's Republic of China: Selection of Factor Values ("Surrogate Value Memo") (June 29, 2009) at 5 – 6.

Department has failed to satisfy 19 U.S.C. 1977e(c), which requires the Department to corroborate secondary data submitted by a party before using it.[60] Additionally, Respondents state that the Department has previously questioned the reliability of Infodrive data in other proceedings, which is evidence that the Department should not use Infodrive data in this administrative review.[61] Respondents expand that there is no evidence on the record that corroborates the reliability of Infodrive data in the instant review. *See* Respondents' Case Brief at 27 – 28.

Moreover, Respondents contend that there is no record evidence to suggest that the WTA data are distorted. Respondents assert that the average unit value ("AUV") from Infodrive ranges from $222/MT to $1302/MT[62] whereas the WTA data provides an AUV of $1,585/MT.[63] Additionally, they argue that the difference between the WTA AUV and Respondents' proposed AUV ($1,585/MT and $1,388/MT) is not substantial.[64] Respondents assert that the Department has previously disagreed with excluding entries from countries based on the value.[65] Respondents argue that the AUV of WTA data is a not substantial reason for the Department to determine whether their proposed AUVs are distorted.[66] *See* Respondents' Case Brief at 28-29.

Respondents argue that the Department has used Infodrive data as a benchmark to evaluate WTA data in only four decisions, and that the instant case is distinguishable from these cases.[67] Respondents contend that in *Thermal Paper from China*, the Department used Infodrive data to

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[60] *Citing Yantai Oriental Juice Co. v. United States*, 26 CIT 605, No. 00-0309, Slip. Op. 02-56 at 11 – 12 (2002).
[61] *Citing PET Film* at Comment 10; *OTR Tires from China* at Comment 10; *Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances: Certain Polyester Staple Fiber from the People's Republic of China*, 72 FR 19690 (April 17, 2007), and accompanying Issues and Decision Memorandum at Comment 7; *Diamond Sawblades from China* at Comment 11.D.
[62] *Citing* Respondents Case Brief at Exhibit 1.
[63] *Citing* Letter from Respondents To Secretary of Commerce Regarding Silicon Metal from the People's Republic of China ("Respondents' April 3 Surrogate Value Submission") dated April 3, 2009, at Exhibit 15 and Letter from Respondents to Secretary of Commerce Regarding Silicon Metal from the People's Republic of China ("Respondents' July 29 Surrogate Value Submission") dated July 29, 2009 at Exhibit 4.
[64] *Id.*
[65] *Citing* Remand Redetermination at 9.
[66] *Citing Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 74 FR 3987 (January 22, 2009) ("*Roller Bearings from China*"), and accompanying Issues and Decision Memorandum at Comment 6,; *Steel Wire Garment Hangers from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 73 FR 47587, and accompanying Issues and Decision Memorandum at Comment 4.
[67] *Citing Thermal Paper from China*, 73 FR 57329 (Oct. 2, 2008), and accompanying Issues and Decision Memorandum at Comment 9; *Frozen Fish Fillets from Vietnam*, 72 FR 13242 (Mar. 21. 2007), and accompanying Issues and Decision Memorandum at Comment 8D; *Final Results of Redetermination Pursuant to Court Remand, Dorbest v. United States*, Court No. 05-0000, Slip Op. 06-160 at 48 (May 25, 2007) ("*Dorbest Remand*") (aff'd by *Dorbest v. United States*, 547 F. Supp. 2d. 1321 (Ct. Int'l Trade 2008); *Chlorinated Isos*, 70 FR 24502 (May 10, 2005), and accompanying Issues and Decision Memorandum at Comment 1.

research petitioner's allegation that WTA data consisted primarily of misclassified products.[68] In the *Dorbest Remand*, Respondents argue that Infodrive was used to research whether WTA data contained misclassified products as alleged by respondents.[69] In *Frozen Fish Fillets from Vietnam*, Respondents assert that the Department did not employ the aforementioned three required criterion.[70] However, Infodrive data allowed the Department to determine that the HTS category did not contain any imports of the input in question.[71] Lastly, in *Chlorinated Isos* Respondents contend that the Department was able to use Infodrive data, in part, because the percentage of WTA data captured by Infodrive data could be determined.[72] Respondents argue that because the facts of the above cases do not match those of the instant case the Department should not use Infodrive to filter WTA data. *See* Respondents Case Brief at 27 – 32.

Respondents argue that instead of the Department's *Preliminary Results* methodology, it should use either the AUV of the WTA data[73] or the methodology employed by the Department on remand for the 2005-2006 new shipper reviews.[74] If the Department chooses to use the new shipper review methodology, Respondents propose that the valuation should be based on imports from countries that the U.S. Geological Survey's (USGS) 2006 Minerals Yearbook identifies as producing silicon metal and ferrosilicon. *See* Respondents Case Brief at 32.

Petitioner rebuts Respondents' assertion that the Department's reliance on Infodrive is contrary to Department policy. Petitioner states that the Department properly determined the surrogate value for silica fume based upon data from countries whose (1) WTA silicon dioxide import volumes during the POR closely correspond to silicon dioxide import volumes reported by Infodrive and (2) silicon dioxide imports during the POR consisted entirely of silica fume. Petitioner notes that the five countries' total volumes of silicon dioxide imports reported by WTA and Infodrive data almost identically matched, both on an aggregate basis and by country. With respect to France, although the aggregate volume reported by Infodrive exceeds the volume reported by WTA by 21 percent, Petitioner claims that there is no basis to conclude that imports from France included any significant volume of products other than silica fume. Petitioner also argues that the values produced by the Department's *Preliminary Results* methodology were

[68] *Citing Thermal Paper from China* at Comment 9.
[69] *Citing Dorbest Remand* at 49.
[70] *Citing Frozen Fish Fillets from Vietnam* at Comment 8.D.
[71] *Id.*
[72] *Citing Chlorinated Isos* at Comment 1.
[73] *Citing* Respondents' July 29 Surrogate Value Submission at Exhibit 4.
[74] *Citing* Remand Redetermination at 3 and *Globe Metallurgical Inc. vs. United States*, Court No. 07-00386, slip. op. 09-37 (Ct. Int'l Trade May 5, 2009).

consistent with silica fume values on the record and reflects a significant number of transactions.[75] *See* Petitioner's Rebuttal Brief at 12 – 14.

Petitioner rebuts Respondents' assertion that the Department did not follow its normal practice regarding the use of Infodrive. Petitioner claims that Respondents' comparison of WTA and Infodrive data is unreliable because it includes imports from China, Indonesia, South Korea, Thailand, and unspecified countries. Petitioner argues that it is the Department's practice to exclude imports from these countries in its analysis. Petitioner argues that after such exclusions are made, the import quantities are almost identical. Regarding Respondents' claim that Infodrive data reports quantities in various units of measure, Petitioner claims that the majority of these imports are silica gel desiccant packs. According to Petitioner, there is no basis to conclude that adding the weight of these packs would significantly or substantially increase the total volume of imports reported by Infodrive.[76] *See* Petitioner's Rebuttal Brief at 16 – 17.

With respect to Respondents' argument that the universe of exporting countries reported in Infodrive is dissimilar to those reported by WTA, Petitioner disagrees and claims that the comparability of Infodrive data and WTA data is not affected by these discrepancies. Instead, Petitioner argues that Infodrive India imports corroborate with WTA data for Australia, Finland, and Switzerland.[77] Regarding Russia, Petitioner states that Infodrive data does not report imports from Russia whereas WTA reports 18 MT of silicon dioxide imports, which Petitioner argues is a *de minimis* percentage of overall WTA import volume.[78] In response to Denmark and India, Petitioner contends that the imports which are not included in WTA are inconsequential as they have a combined quantity of six MT.[79] Petitioner asserts that Respondents' claims about these countries do not constitute significant discrepancies between WTA and Infodrive data which should discredit the *Preliminary Results* methodology in valuing silica fume. *See* Petitioner Case Brief at 17-18.

Petitioner rebuts Respondents' assertion that the Department should value silica fumes using the WTA data for silicon dioxide (HTS 2811.22.00) and states that the Department should not adopt this methodology because this data set is a basket HTS category for silicon dioxide which is not

[75] *Citing* Letter from Petitioner to the Secretary of Commerce, Regarding Submission of Surrogate Value Data dated April 3, 2009 ("Petitioner Preliminary Surrogate Value Submission"), at Exhibit 12..
[76] *Citing* Petitioner's Preliminary Surrogate Value Submission at Exhibit 12,; Respondents' Preliminary Surrogate Value Submission at Exhibit 2.
[77] *Citing* Petitioner's Preliminary Surrogate Value Submission at Exhibit 12 and Letter from Respondents to Secretary of Commerce Regarding Silicon Metal from the People's Republic of China dated April 13, 2009 ("Respondents Preliminary Surrogate Value Rebuttal") at Exhibit 2..
[78] *Citing* Surrogate Value Memo at Exhibit 6.
[79] *Citing* Petitioner Preliminary Surrogate Value Submission at Exhibit 12 and Respondents Preliminary Surrogate Value Rebuttal at Exhibit 2.

specific to silica fume. Accordingly, Petitioner contends that valuing silica fume using this method is contrary to the statute, case law, and Department's practice since it would capture more products than silica fume. Moreover, it would include countries that do not produce silicon metal or ferrosilicon. *See* Petitioner's Rebuttal Brief at 21.

Petitioner rebuts Respondents' assertion that the Department should use the AUV of imports into India during the POR from all countries that produced silicon metal or ferrosilicon during the POR based upon USGS 2006 Minerals Yearbook. Petitioner claims that this methodology produces a value several times higher than the record prices of Indian silica fume during the POR. Petitioner points out that the CIT's previously affirmed value was based on whether the surrogate value was within the range of silica fume prices in India on the record. *See* Petitioner's Rebuttal Brief at 22.

Department's Position:

The Department determines that the methodology applied in the *Preliminary Results* to derive surrogate value for silica fume satisfies the Department's obligation, pursuant to 773(c)(1) of the Act, to rely upon the best available information on the record to value factors of production. The Department normally determines surrogate values based upon publicly available information, and the Department considers the quality, specificity, and contemporaneity of the data.[80] The Department carefully considers the available evidence with respect to the particular facts of each case and evaluates the suitability of each surrogate value source on a case-by-case basis.[81] As there is no hierarchy for applying the above-mentioned principles (*e.g.*, quality, specificity, and contemporaneity), the Department must weigh available information with respect to each input and make a product and case-specific decision as to what constitutes the "best" available surrogate value for each input.[82]

In applying the Department's surrogate value selection criteria, the Department has found in numerous NME cases that WTA import data are reliable information for valuation purposes

[80] *See, e.g., Notice of Final Determination of Sales at Less Than Fair Value, and Affirmative Critical Circumstances, In Part: Certain Lined Paper Products From the People's Republic of China*, 71 FR 53079 (September 8, 2006) ("*CLPP*"), and accompanying Issues and Decision Memorandum at Comment 3.
[81] *See Certain Preserved Mushrooms from the People's Republic of China: Final Results and Final Partial Rescission of the Sixth Administrative Review*, 71 FR 40477 (July 17, 2006) ("*Mushrooms*"), and accompanying Issues and Decision Memorandum at Comment 1; *see also Freshwater Crawfish Tail Meat from the People's Republic of China; Notice of Final Results of Antidumping Duty Administrative Review, and Final Partial Rescission of Antidumping Duty Administrative Review*, 67 FR 19546 (April 22, 2002) and accompanying Issues and Decision Memorandum at Comment 2.
[82] *See Mushrooms.*

because they consist of average import prices, are representative of prices within the POR, and are both product-specific and tax-exclusive.[83]

However, consistent with the CIT's finding in its review of the 2005-06 new shipper reviews under the antidumping order on silicon metal from China ("05-06 NSRs"), the Department determines that the WTA HTS category for silicon dioxide, by itself, does not provide sufficiently specific data to value silica fume in the instant review.[84] Silica fume is a type of silicon dioxide, and as the CIT explained in its decision to remand the Department's reliance upon WTA import data for HTS 2811.22.00: Silicon Dioxide, "the record does not support Commerce's use of the WTA data for all silicon dioxide imports under the basket tariff subheading to determine the AUV for silica fume. Valuing silica fume based on data for the broader category of silicon dioxide captures too many products that are not the by-product silica fume."[85] Here, the Department is faced with the same WTA HTS category (HTS 2811.22.00: Silicon Dioxide), and this HTS category remains a basket tariff category that includes various types and grades of silicon dioxide that are not silica fume.

Thus, consistent with the CIT's finding concerning this HTS category, the WTA data is too broad to use, by itself, to value silica fume. The inclusion of other types and grades of silicon dioxide, in addition to silica fume, renders the category, by itself, too broad and unrepresentative of silica fume prices in India.

Because the WTA import data are not sufficiently specific, the Department has determined to filter the WTA data in a manner similar to the methodology upheld by the CIT in the 05-06 NSR.[86] However, rather than rely upon the USGS Minerals Yearbook as the filter, as the Department did in the 05-06 NSRs remand, the Department has relied upon Infodrive data. The Department has determined to rely upon Infodrive data because, based upon the instant record, the Infodrive data meets the criteria set forth in the Department's practice for reliance upon Infodrive as a corroborative tool to evaluate import data.

Pursuant to the Department's practice, the Department relies upon Infodrive data when further evaluating import data provided that three conditions are satisfied. As explained in *Thermal Paper from China*; first, there is direct and substantial evidence from Infodrive reflecting the

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[83] *See, e.g., Honey from the People's Republic of China: Rescission and Final Results of Antidumping Duty New Shipper Review*, 71 FR 58579 (October 4, 2006), and accompanying Issues and Decision Memorandum at Comment 2. *See also Final Determination of Sales at Less Than Fair Value and Final Partial Affirmative Determination of Critical Circumstances: Diamond Sawblades and Parts Thereof from the People's Republic of China*, 71 FR 29303 (May 22, 2006), and accompanying Issues and Decision Memorandum at Comment 11A.
[84] *See Globe Metallurgical Inc.*, Consol. Court No. 07-00386, Slip Op. 08-105 at 14.
[85] *Id.*
[86] *See Globe Metallurgical Inc.*, Consol. Court No. 07-00386. Slip. Op. 09-37 at 8.

imports from a particular country; second, a significant portion of overall imports under the relevant HTS category is represented by the Infordrive data; and third, distortions in the AUV in question can be demonstrated by the Infodrive data.[87] The Department has applied these criteria here and determined that, for the instant review, the Infodrive data satisfy each condition.

First, based upon the instant record, there is direct and substantial evidence from Infodrive reflecting the imports from a particular country. The Infodrive data for entries under HTS 2811.22.00 generally provide information indicating that they were, in fact, entries into India that were subject to customs duties, rather than merely merchandise transshipped through India to another destination. The Infodrive data generally provide the value of the merchandise for duty assessment purposes, the home port and country of the merchandise, and other data relevant to customs processing. There are no significant gaps in the reported data such that the Infodrive data are unreliable or unusable. Therefore, the Department finds that all of the data provided by Infodrive adequately represents import prices of silicon dioxide to India. See April 13, 2009, Respondents' surrogate value rebuttal comments at exhibit 2.

Second, based upon the instant record, a significant portion of overall imports under the relevant HTS category is represented by the Infodrive data. Specifically, based upon the instant record, the Infodrive data accounted for 116% of the total import quantity of silicon metal reported by WTA.[88] In other words, there is only a 16% discrepancy between the Infodrive and WTA data sets. The Department's analysis is based upon a comparison of the aggregate quantity of all imports reported from all countries by both data sets.

This analysis is consistent with the Department's analytical process in the 05-06 NSRs. In that review, the Department found that the Infodrive reported less than half of the quantity reported by WTA. Based upon this discrepancy, the Department found that Infodrive was not a reliable source for that review. Because the Department could not rely upon Infodrive, the Department turned to the USGS Mineral Yearbook, which identified countries that are producers of ferrosilicon and silicon metal. Here, because reliance upon Infodrive is consistent with the Department's practice, there is no reason to rely upon the USGS data.

Third, based upon the instant record, distortions in the AUV can be demonstrated by the Infodrive data. The WTA import data for the silicon metal HTS basket category reports an AUV of $1,585 per MT, which is outside of the range of silica fume imports to India ($222 - $1,302 per metric ton) reported by Infodrive. In other words, the WTA AUV exceeds the highest value in the range of silica fume prices available from Infodrive by over $280 per MT, or more than

[87] *See Thermal Paper from China* at Comment 9.
[88] *See* Respondents' April 13, 2009, Surrogate Value Rebuttal Brief at 6 (Infodrive India reports 1,390 MT of imports while WTA reports 1,198 MT of imports).

twenty percent. Moreover, with respect to countries whose exports to India during the POR were primarily silica fume, as reported by Infodrive, the range of values are significantly lower than the AUV derived from WTA data. As explained by Respondents, Infodrive reported that the prices of imports of silica fume from Egypt ranged from $296.20 to $357.48 per MT; the import price of silica fume from Iran ranged from $313.10 to $353.50 per MT; and the import price of silica fume from France ranges from $414.25 to $458.02 per MT. See August 21, 2009, Respondents' Case Briefs at exhibit 1.

Having met the conditions above, and faced with great difficulty in locating an otherwise appropriate surrogate value for silica fume, the Department examined whether the Infodrive data, some of which contains greater specificity as to product description (*i.e.*, specifically identifying silica fume), could refine the overbroad WTA data such that it reflected only importations of silica fume. Based upon the Infodrive import data, the Department eliminated approximately two dozen countries from the WTA import data because the import quantities for those countries reported by Infodrive differed significantly from the WTA data, or because imports from those countries were not primarily silica fume. The Department then calculated the surrogate value for silica fume based upon the WTA data for the remaining countries, all of which, according to Infodrive, exported primarily silica fume to India. In short, the Department used Infodrive in a manner similar to how the Department used the USGS data in the preceding NSRs: to filter countries out of the WTA data so that the resulting WTA data contained only countries that exported primarily silica fume to India during the POR.

Specifically, consistent with our determination in the *Preliminary Results*, we determine that it is appropriate to disregard the data from twelve countries in calculating the value for silica fume. The twelve countries are Australia, Brazil, Denmark, Finland, Netherlands, Russia, South Africa, Sweden, Switzerland, Taiwan, and the United States. For these countries, the quantity reported by Infodrive and WTA differed significantly, *e.g.* Infodrive reported 210% of the import quantities of silicon dioxide from Taiwan reported by WTA. For more details of the calculation, *see* Factors of Production Memorandum accompanying these final results.

Next, the Department has compared the imports of silicon dioxide reported by Infodrive to the remaining countries in the WTA data to determine which countries' data are primarily silica fume. As a result of this analysis, the Department disregarded the data of ten additional countries that were not primarily exporters of silica fume. The ten additional countries are Belgium, Germany, Hong Kong, Italy, Japan, Malaysia, Philippines, Singapore, Spain, and the United Kingdom. *See* Factors of Production Memorandum accompanying these Final Results.

The Department finds that the WTA import quantities for the five remaining countries, Egypt, France, Iceland, Iran, and Norway are similar to the values reported by Infodrive, and that

Infodrive demonstrates that imports from these countries were primarily silica fume. For example, as explained by Respondents, 100% of Iceland's imports of silicon dioxide (1,478.4 MT) were comprised of silica fume; 95.6% of France's imports of silicon dioxide (797.95 MT of France's total 833.47 MT) of silicon dioxide were comprised of silica fume; and 100% of Egypt's imports of silicon dioxide (428.26 MT) were comprised of silica fume. *See* April 13, 2009, Respondents' surrogate value submission at exhibit 2. For example, the WTA based AUV for silicon dioxide from Egypt of $352.72 per metric ton falls within the range of Egyptian prices provided by Infodrive of $296.20 – $354.78 per MT; and WTA based AUV for silicon dioxide from Iran of $336.48 per metric ton falls within the range of Iranian prices provided by Infodrive of $313.10 – $353.50 per MT. Therefore, the Department finds that the above methodology constitutes the best available information on the record, as it is based on reliable, contemporaneous data that is specific to silica fume. The Department further notes that this methodology produces a value of $560 per metric ton for silica fume, which falls within the range of values on the record of the instant review (from $222 to approximately $1,600 per metric ton).

With respect to Respondents' proffered alternative methodology, *i.e.*, applying the USGS Mineral Yearbook to filter the WTA data to exclude countries that are producers of ferrosilicon and silicon metal, the Department finds that Infodrive provides more specific data and, therefore, a more accurate surrogate value. The USGS data only allows the Department to identify those countries that are producers of silicon metal or ferrosilicon; it does not allow the Department to determine whether those countries' entries were, in fact, primarily silica fume. As demonstrated above, Infodrive provides for greater precision in filtering the WTA data than the USGS data.

With respect to Respondents' claim that Infodrive is unreliable because WTA and Infodrive contain data from different countries, the Department acknowledges that the two data sets do not report entries from all of the same countries. The Department further acknowledges that, in *Diamond Sawblades*, the Department declined to rely upon Infodrive because, in part, Infodrive excluded data from countries reported by WTA. However, this was only one component of the Department's analysis. In *Diamond Sawblades*, the Department's first concern was that the aggregate quantity of imports reported by Infodrive accounted for only about 30 percent of the total quantity of imports reported by WTA. *See Diamond Sawblades*, 71 FR 29303 and accompanying Issues and Decision Memorandum at Comment 11.D. Here, no such concern exists and, for the additional reasons cited here, Infodrive meets the test established in *Thermal Paper from China*. Thus, the Department disagrees with Respondents' assertion that Infodrive and WTA must align exactly with respect to the source countries of the reported imports for Commerce to rely upon Infodrive.

In addition, the Department disagrees with Respondents' claim that the instant case presents any meaningful distinction from prior instances where the Department has relied upon Infodrive to filter WTA data. In *Thermal Paper from China*, the Department relied upon Infodrive data to filter WTA data to determine the appropriate surrogate value for base paper. In *Thermal Paper from China*, the Department's reliance upon Infodrive was based upon its application of the same three-part test described above. In *Thermal Paper from China*, the Department found that the Infodrive data represented 88% of the imports quantity reported by WTA, i.e., the Department identified a discrepancy of only 12% between the WTA and Infodrive data. Here, there is only a 16% difference.

Respondents claim that *Thermal Paper from China* sets forth additional conditions that must be satisfied in order for the Department to rely upon Infodrive data: (1) there must be allegations that the WTA import data contains misclassified products; (2) the AUV for the HTS category must show a drop from the previous year; and (3) the HTS category must not be a basket category.[89] These are not necessary conditions for the Department to rely upon Infodrive data.

First, the Department has abandoned reliance upon the unadjusted WTA import data in the instant review because, in the CIT's review of the Department's reliance upon this data in the 05-06 NSRs, the CIT found that the HTS category was overly broad and not specific to silica fume such that it distorted the Department's surrogate value for silica fume. This decision remains relevant to the Department's analysis. As demonstrated above, the WTA continues to include imports that distort the AUV derived from the WTA data.

Second, the Department's concern for the drop in AUV from the previous year in *Lightweight Thermal Paper* is not a "condition" that must be satisfied for the Department to rely upon Infodrive. Rather, it was one basis that the Department cited in *Lightweight Thermal Paper* to explain why it would not rely upon the unadjusted WTA category. The fact that the AUV has not changed significantly from the AUV during the 05-06 NSRs only demonstrates that the WTA import data continues to suffer the same deficiency identified by the trial court, not that the Department should rely upon the WTA data.

Third, Respondents' claim that the Department should not look to Infodrive data because "the HTS category for silicon dioxide is a basket category and naturally contains different types of silicon dioxide" wholly ignores the CIT's finding that the basket category at issue does not provide data representative of silica fume prices. Although the Department may sometimes rely upon basket tariff categories to determine surrogate values, based upon the analysis provided

[89] *See* Respondents' Case Brief at 29-30.

above, the Department continues to consider CIT's finding that the WTA basket category for silicon dioxide does not provide specific data as relevant to the circumstances of this case.

With respect to the *Dorbest Remand*, the Department's reliance upon Infodrive here is consistent with the *Dorbest Remand.* In the *Dorbest Remand*, the Department declined to rely upon Infodrive to evaluate the WTA import data for resin because the Infodrive data excluded data from several countries which represented 54% percent of total imports, by quantity (excluding imports from the PRC, Thailand, and South Korea).[90] Moreover, in the *Dorbest Remand*, Infodrive provided incomplete data for all but two countries.[91] Thus, in *Dorbest Remand*, there were significant discrepancies between the Infodrive and WTA data sets and the Infodrive data was incomplete for nearly every country. No such problems exist in the instant case.

Respondents argue that, in the *Dorbest Remand*, an additional reason why the Department rejected reliance upon Infodrive to evaluate the WTA data for resin is because Infodrive classified imports under multiple units of measure.[92] To the extent that the Infodrive data on the instant record reports entries in unquantifiable units, these entries represented relatively small units, such as grams (*e.g.*, 23,910 one gram canisters of silica, which approximately equates to 24 kilograms),[93] in contrast to kilograms, pounds, and metric tons which comprise nearly 80% of entries in the Infodrive data.

In the *Dorbest Remand*, the Department relied upon Infodrive data to evaluate the WTA import data for mirrors.[94] The Department found it necessary to rely upon the Infodrive data based upon allegations that certain merchandise from Taiwan had compromised the reliability of the WTA data. In its analysis of the data sets, the Department explained that the Infodrive data comprised 100% of the relevant HTS category, as reported by WTA.[95] Thus, as in the instant case, the correspondence between the two data sets was close.

Respondents claim that the instant case is distinguishable from the Department's reliance upon Infodrive to evaluate the WTA data for mirrors in the *Dorbest Remand* because, in the instant case, there is no claim that one country's merchandise has compromised the WTA data. The Department disagrees that this distinction is relevant. Here, as explained above, the Department's determination to look behind the WTA data is based upon the CIT's finding that

[90] *See Dorbest Remand* at 47; *Dorbest v. United States*, 547 F. Supp. 2d 1321, 1333 (Ct. Int'l Trade 2008).
[91] *Id.*
[92] *See* Respondents' Case Brief at 25-30.
[93] *See* April 13, 2009, Respondents Surrogate value submission, exhibit 2, silicon dioxide entry on November 15, 2007.
[94] *See Dorbest Remand* at 51.
[95] *Id.*

the basket category for silicon dioxide is overly broad. The common denominator in both cases is that the Department had a reasonable basis to question the WTA data.

Respondents claim that the instant review is different from *Frozen Fish Fillets from Vietnam,* where the Department rejected reliance upon WTA import data based upon Infodrive data.[96] In *Frozen Fish Fillets from Vietnam,* the Department found that because the Infodrive data contradicted WTA data and the record demonstrated that the WTA data contained merchandise other than the input at issue. Respondents claim that the instant review differs from this situation because "{t}here is no evidence in this review that the HTS category for silicon dioxide does not contain silica fume exports."[97] This argument misses the point. The relevant question is what else is contained in the HTS category for silicon dioxide other than silica fume and, as in *Frozen Fish Fillets from Vietnam,* there is record evidence that the WTA data is not sufficiently specific.

Finally, Respondents claim that, unlike in *Chlornated Isos,* it is impossible to determine here what percentage of WTA data were represented by the Infodrive data.[98] The Department disagrees with this assertion. As demonstrated above, there is a 16% discrepancy between the Infodrive and WTA data sets. Moreover, the instant case is similar to *Chlorinated Isos* because, as in *Chlorinated Isos,* the Infodrive data demonstrates that the WTA data contains entries that are not specific to silica fume.

Comment 3: Selection of Appropriate Surrogate Value for Electricity

Petitioner asserts that the Department should calculate the surrogate value for electricity based upon Indian electricity tariffs for small, medium, and industrial users provided in the March 2008 edition of "Electricity Tariff & Duty and Average Rates of Electricity Supply in India" ("Electricity Tariff & Duty"), published by the Central Electricity Authority ("CEA") of the Government of India. Petitioner claims that the March 2008 edition is superior to the July 2006 edition of Electricity Tariff & Duty, which the Department relied upon in the *Preliminary Results*, because the March 2008 edition provides data that is more contemporaneous with the POR. Specifically, Petitioner claims that the March 2008 edition provides data through July 2007. Additionally, according to Petitioner, the March 2008 edition reflects the revision of 28 of 42 tariffs from the July 2006 edition, of which 15 went into effect in the months preceding to the POR. *See* Petitioner's Case Brief at 25-26.

Respondents argue that the Department should use the consumption rate for large industrial users from the July 2006 edition of Electricity Tariff & Duty instead of the broad market average

[96] *See* Respondents' Case Brief at 31; *Frozen Fish Fillets from Vietnam*, 72 FR 13242 at Comment 8D.
[97] *See* Respondents' Case Brief at 31.
[98] *See* Respondents' Case Brief at 31-32; *Chlorinated Isos*, 70 FR 24502 at Comment 2.

electricity rate across all industries used in the *Preliminary Results*. Respondents contend that the consumption rates for large industrial users are more specific and reflective of the Respondents' production experience. Moreover, Respondents state that the large industry category contains rates from India's 28 states and seven union territories,[99] which satisfies the Department's prior determination that prices from seven Indian states represent a broad market average.[100] *See* Respondents' Case Brief at 12.

In rebuttal, Petitioner states that the Department should maintain its practice of using the average of the rates for small, medium and large industrial users. Petitioner contends that the Respondents based their proposed electricity surrogate value on the monthly consumption of electricity but did not take into account other factors, including peak demand and load factor, that determine whether an electricity user is assigned an industrial electricity tariff. Moreover, based upon proprietary data, Petitioner argues that Respondents' proffered surrogate value does not reflect their total monthly electricity consumption. According to Petitioner, based upon Respondents' monthly electricity consumption, the electricity tariffs from Table 7(g) of the March 2008 Electricity Tariff and Duty (Large Industries 50000 KW 40% LF) is more specific and reflective of the Respondents' production experience. *See* Petitioner's Rebuttal Brief at 25 – 26.

Department's Position:

We agree with Petitioner that the March 2008 edition of Electricity Tariff & Duty provides the best available information on the record from which to determine the surrogate electricity value. The data is specific to electricity, published in a publicly available source, and contemporaneous to the POR. The Department also agrees with Petitioner that the Department should continue to use the average of the rates for small, medium, and large industrial users to determine the surrogate value for electricity as there is no record evidence to demonstrate that Respondents are more properly classified as large industrial users of electricity.[101]

The record does not demonstrate that Respondents meet all criteria required to be considered a "Large Industrial User," as defined in the Electricity Tariff & Duty report. Specifically,

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[99] *Citing* Letter from Respondents to the Department of Commerce at Exhibit 3 (April 13, 2009).
[100] Citing *Fresh Garlic from the People's Republic of China*, 74 FR 29174 (June 8, 2009) *("Garlic from China")*, and accompanying Issues and Decision Memorandum at Comment 2.
[101] *See Chlorinated Isocyanurates from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 73 FR 52645 (September 10, 2008), and accompanying Issues and Decision Memo at Comment 3; *see also Certain Steel Threaded Rod from the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value*, 73 FR 58931, 58939 (October 8, 2008), unchanged in final determination, *see Certain Steel Threaded Rod from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 74 FR 8907 (February 27, 2009).

Respondents did not report information relevant to all factors that would determine whether they should be considered a large industrial user, *i.e.*, delivery voltage, peak demand, and load factor.[102] Because there is no information on the record concerning these characteristics, the Department is unable to match Respondents' electricity consumption experience with the category for "Large Industrial Users" identified in the March 2008 Electricity Tariff & Duty data.[103] With respect to Respondents' contention that their alternative comports with the Department's practice, Respondents have not demonstrated that they meet all characteristics of Large Industrial Users as described in the March 2008 Electricity Tariff & Duty report, thus their proposed surrogate value is not supported by substantial evidence. Therefore, as in the *Preliminary Results*, we have continued to apply the average rate for small, medium, and large industrial users, but we have used the more contemporaneous data from the March 2008 CEA publication.

Comment 4: Selection of Appropriate Surrogate Financial Statements

Petitioner argues that the Department should rely upon the financial statements of Sharp Ferro Alloys Limited ("Sharp"), Sova Ispat Alloys (Mega Projects) Limited ("Sova Ispat"), VBC Ferro Alloys Limited ("VBC"), and FACOR Alloys Limited ("FACOR") in its calculating the factory overhead; selling, general and administrative expense; and profit ratios for the final dumping margins. Petitioner states that, in the *Preliminary Results*, the Department stated that it would rely upon the financial statements of Sharp and Sova Ispat, but, according to Petitioner, the Department only relied upon Sharp's statements in its preliminary calculations.[104] Additionally, Petitioner states that VBC and FACOR are producers of merchandise comparable to silicon metal[105], have operations which match the production experience of the respondents[106], have financial statements that are publicly available and contemporaneous with the POR, and contain no evidence of countervailable subsidies as those are not used by the Department[107]. Petitioner argues that reliance upon the financial statements of VBC and FACOR would be consistent with the Department's preference to use financial statements of multiple surrogate producers.[108] *See* Petitioner's Case Brief at 39 – 40.

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[102] *See* Letter from Petitioner to Secretary of Commerce Regarding Silicon Metal From the People's Republic of China; 2007-08 Administrative Review; Submission of Surrogate Value Information dated July 29, 2009 ("Petitioner Final Surrogate Value Submission") at Exhibit 1.
[103] *Id.*
[104] *Citing Preliminary Results.*
[105] *Citing New Shipper Reviews* at Comment 3.
[106] *Id.* at Comment 1.
[107] *Citing e.g., Thermal Paper from China* at Comment 1.
[108] *Citing Circular Welded Austenitic Stainless Pressure Pipe from the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determinatio*n, 74 FR 51788, 51790

In rebuttal, Respondents state that the Department should continue to rely on the financial statements from only Sharp Ferro Alloys Limited and Sova Ispat. Respondents contend that the financial statements from VBC and FACOR contain evidence of subsidies and should be rejected because the Department finds financial statements of companies who have received subsidies "less representative of the financial experience of that company or the relevant industry than {those} derived from financial statement that do not contain subsidization."[109] *See* Respondents Rebuttal Brief at 25. Specifically, Respondents contend that VBC receives a "State Govt. Subsidy" as identified in the "Capital Reserve" account.[110] Respondents also point out that the FACOR financial statements also reflect subsidies in the form of "Exports Incentives."[111] Additionally, Respondent argues that, as a producer of ferrochrome, FACOR is eligible for the Duty Entitlement Passbook Scheme export incentive,[112] which the Department previously deemed countervailable. *See* Respondents' Rebuttal Brief at 27.

Respondents argue that FACOR is a "sick" company under Indian law.[113] According to Respondents, FACOR's financial statements demonstrate that, during the POR, FACOR was implementing a rehabilitation scheme administered by the Indian Government Board for Industrial and Financial Reconstruction ("BIFR"). [114] Although the BIFR scheme was not fully implemented,[115] Respondents argue that FACOR's financial statement cannot be used since it is the Department's practice to not use the financial statements of a "sick" company. *See* Respondents' Rebuttal Brief at 28 – 29.

Respondents further argue that FACOR's financial statement should be rejected by the Department since its production experience is dissimilar to Respondents' production experience.[116] Respondents assert that FACOR purchases raw materials from an affiliated party[117] and is vertically integrated, owning its mines and quarries.[118] Respondents continue that,

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(September 2008)*; Brake Rotors From the People's Republic of China: Preliminary Results of Third New Shipper Review and Preliminary Results and Partial Rescission of Second Antidumping Duty Administrative Review*, 64 FR 73007, 73011 (December 29, 1999).

[109] *Citing Certain Steel Threaded Rod from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 74 FR 8907 (February 27, 2009), and accompanying Issues and Decision Memorandum at Comment 1.

[110] *See* Letter from Petitioner To Secretary of Commerce Regarding Silicon Metal from the People's Republic of China dated July 29, 2009) (" Petitioner Surrogate Value Submission") at Exhibit 4 at 34 (VBC Financial Statement).

[111] *Id.* at Exhibit 4 at 34 (FACOR Financial Statement).

[112] *See* Letter from Respondents To Secretary of Commerce Regarding Silicon Metal from the People's Republic of China (Surrogate Value Submission) at Exhibit 1.

[113] *See* Respondents' August 10, 2009, Surrogate Value Submission at Exhibit 1, "Sick Industrial Companies Act"

[114] *See* Petitioner Surrogate Value Submission at Exhibit 4 at 11 (FACOR Financial Statement).

[115] *See id.* at Exhibit 4 at 25 (FACOR Financial Statement).

[116] *Citing Chlorinated Isos* at Comment 3.

[117] *See id.* at Exhibit 4 at 39 (FACOR Financial Statement).

as previously determined by the Department, it would be inappropriate to rely on a financial statement on a company whose levels of integration do not match those of Respondents.[119] Respondents assert that in the 2005 – 2006 new shipper reviews, the Department previously decided not to use the financial shipments of a vertically integrated producer because the respondents did not have similar levels of integration.[120] *See* Respondents Rebuttal Brief at 29 – 31.

Department's Position:

In addition to 07/08 Sharp Ferro Alloys Limited ("Sharp Alloys") and 07/08 Sova Ispat Alloys (Megal Projects) Limited ("Sova Ispat") used in the preliminary results, the Department finds that the 07/08 FACOR and 07/08 VBC financial statements are appropriate sources for the purposes of calculating the surrogate financial ratios. The Department agrees with Petitioner's statement that the Department failed to include the Sova Ispat financial statements in its preliminary margin calculation, and the Department has corrected this inadvertent error for the final results.

In selecting surrogate values for factors of production, section 773(c)(1) of the Act instructs the Department to use "the best available information" from the appropriate market-economy country. In choosing surrogate financial ratios, it is the Department's policy to use data from market-economy surrogate companies based on the "specificity, contemporaneity, and quality of the data."[121] Moreover, for valuing factory overhead, SG&A, and profit, the Secretary normally will use non-proprietary information gathered from producers of identical or comparable merchandise in the surrogate country. *See* 19 CFR 351.408(c)(4) and section 773(c)(4) of the Act.

The Department's criteria for choosing surrogate companies are the availability of contemporaneous financial statements, comparability to the respondent's production experience, and publicly available information. *See, e.g.*, *Chlorinated Isos*, 70 FR 24502 (May 10, 2005) and accompanying Issues and Decision Memorandum at Comment 3; *PRC Shrimp*, 69 FR 70997 (December 8, 2004) and accompanying Issues and Decision Memorandum at Comment 9F.

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[118] *See id.* at Exhibit 4 FACOR Financial statement at 31.
[119] *Citing Certain Ball Bearing and Parts Thereof from the People's Republic of China*, 68 FR 10685 (March 6, 2003), and accompanying Issues and Decision Memorandum at Comment 4.
[120] *Citing New Shipper Reviews* at Comment 3.
[121] *See Notice of Final Determination of Sales at Less Than Fair Value and Affirmative Critical Circumstances, In Part: Certain Lined Paper Products From the People's Republic of China*, 71 FR 53079 (September 8, 2006) ,and accompanying Issues and Decision Memorandum at Comment 1.

In the instant review, the Department determines that the Sharp Alloys, Sova Ispat, FACOR, and VBC financial statements are all contemporaneous with the POR, publicly available, and specific to ferro-alloy producers in India.

The Department disagrees with Respondents' assertion that the FACOR financial statement is not representative of respondent's overhead and SG&A production experience as a vertically integrated company. To the extent that FACOR is vertically integrated, FACOR's holdings of quarries and mines account for less than 0.011 percent of fixed assets (1.14 Rupees in lacs), comparatively comprising a mere fraction of the company's holdings in office equipment, furniture, or vehicles. *See* FACOR financial statements at page 31, schedule E: Fixed Assets. Therefore, the Department finds that there is no evidence to suggest that degree of integration renders the financial statements unrepresentative and unusable as surrogate financial statements.

Furthermore, the Department disagrees with Respondents' inference that FACOR's purchases of "goods" from "enterprises where significant influence exists" (Rs. 2,878.91 lacs) and consumption of chrome ore (Rs. 2,493.80 lacs) implies that the company purchased chrome from its "vertically integrated affiliate." The Department disagrees with Respondents' supposition that because the two values are similar they must be related and indicative of purchases from an affiliated party. The Department finds that it is unclear from the FACOR financial statements whether the two values are related, and further notes that in 2006-2007, FACOR purchased Rs. 1,033.35 lacs of "goods" from "enterprises where significant influence exists," but consumed Rs. 3,267.63 lacs of chrome.[122] Therefore, the Department finds that there is no substantial record evidence to demonstrate that FACOR's purchase of goods from an "enterprise where significant influence exists" were, in fact, purchases of chrome ore. The Department notes that FACOR does not identify the specific nature of the "goods" purchased, or whether they are indeed raw materials; however, the Department notes that FACOR also purchased other goods, such as coke and coal, carbon paste, quartz, and other miscellaneous raw materials. Therefore, the Department finds that, based on the FACOR financial statements, it is unclear what "goods" FACOR purchased from "Enterprises where Significant Influence exists." *See* FACOR financial statements at 40, schedule K: Contingent Liabilities and Notes.

Furthermore, the Department disagrees with Respondents' allegation that VBC and FACOR are unusable because the companies received subsidies. The Department stated in *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) ("*Tires*") at Comment 17.A, that it is the

[122] The 2006-2007 data are included in the 2007-2008 FACOR financial statements, as the financial statements report data for two years.

Department's practice to disregard financial statements where we have reason to suspect that the company has received actionable subsidies, and where there is other usable data on the record. While the Department notes that both the VBC and FACOR financial statements received subsidies and export incentives, there is no record evidence to demonstrate that the specific subsidies received by the companies were actionable under the Department's CVD practice.

With respect to Respondents' assertion that the Department previously found export incentives to be countervailable subsidies in evaluating the Balasore Alloys Ltd. financial statements ("Balasore Alloys")[123], the Department notes that the Balasore Alloys financial statements specifically demonstrated the company received subsidies under the EPGC scheme. However, in the instant review, the Department finds that neither financial statement specifically identifies the types of subsidies received, and therefore is unable to determine whether the subsidies are actionable under the Department's CVD practice.

Additionally, the Department disagrees with Respondents' assertion that because Indian producers of Ferrochrome may be eligible for the DEPB countervailable subsidy, the Department should reject the FACOR financial statements. The Department finds that there is no record evidence to substantiate the claim that ferrochrome producers are entitled to the DEPB subsidy, nor any record evidence to suggest that FACOR received it. Therefore, as there is no direct evidence to suggest that either VBC or FACOR received actionable subsidies, the Department finds that both financial statements are appropriate to include in the calculation of the surrogate financial ratios for the final results.

The Department also disagrees with Respondents' assertion that FACOR was a "sick" company during the POR. It is the Department's practice not to use, in the calculation of the surrogate financial ratios, the financial statements of companies officially designated as "sick" by the Indian government when there are other usable financial statements available. *See, e.g.*, *Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Color Television Receivers From the People's Republic of China*, 69 FR 20594 (April 16, 2004) ("*Color TVs*"), and accompanying Issues and Decision Memorandum at Comment 14, and *Certain Steel Threaded Rod from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 74 FR 8907 (February 27, 2009) ("*STR*"), and accompanying Issues and Decision Memorandum at Comment 1. The Department has previously disregarded the financial statements of companies that were officially designated as "sick" under Indian law, however, the Department finds that there is no record evidence to demonstrate that FACOR had this designation during the POR. The Department notes that in *Color TVs* and *STR*, the Department found that the financial statements of the "sick" companies

[123] *See* April 13, 2009, Respondents surrogate value submission at exhibit 1.

specifically identified in the auditor's notes were classified as "sick" under Indian law. In the instant review, in examining the FACOR financial statements, the Department notes that it does not identify the company as sick.

Furthermore, the Department disagrees with Respondents' inference that, because the 07/08 FACOR financial statements identified the company's participation in the "Rehabilitation Scheme," the company was "sick" during the POR. While the Indian Sick Industrial Companies Act of 1985 notes that "sick" companies may be ordered to "prepare… a scheme" for financial reconstruction, there is no record evidence to demonstrate that the Rehabilitation Scheme referenced by FACOR was, in fact, instituted based on the company's designation as a sick company under Indian law.[124] Additionally, the Department also notes that, even if FACOR were previously designated a sick company, section 17 of the Indian Sick Industrial Companies Act provides "sick" companies "time… as it may deem fit to make {the company's} networth exceed the accumulated losses."[125] The Department notes that FACOR recorded positive profits for both yearend 2007 and 2008,[126] and therefore finds that the timeframe provided by Sick Industrial Companies Act does not consist of substantial record evidence to suggest that FACOR's participation in the Rehabilitation Scheme implies that it was a sick company during the POR. The Department finds no record evidence demonstrating that FACOR was designated a sick company under Indian law during the POR, and thus finds FACOR to be appropriate to include in the calculation of the surrogate financial ratios for the final results.

Additionally, the Department agrees in part with Respondents' assertions with respect to the financial ratio allocation of "trading goods" in the Sharp Alloys financial statements. Consistent with *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the PRC*, 71 FR 75936 (December 9, 2006) ("*TRB*"), and accompanying Issues and Decision Memorandum at comment 2, it is the Department's practice to allocate "traded goods" to the denominator in the calculation of SG&A and profit financial ratios. As articulated in *TRB*, when deriving the factory overhead surrogate financial ratio, it is the Department's practice to include in the denominator only those costs associated with materials, labor, and energy. Therefore, consistent with the Department's practice in *TRB*, the Department has not allocated the cost for "trading goods" to the denominator in the calculation of the manufacturing overhead financial ratio. For detailed information regarding the calculation, *see* Final Factors of Production Memorandum accompanying these final results.

[124] *See* August 10, 2009, Respondent's surrogate value submission at exhibit 1: Sick Industrial Companies Act, at section 18.
[125] *Id.* at section 17.
[126] *See* FACOR Financial Statement at 27: Profit and Loss Account for the Year Ended 31st March, 2008.

Therefore, in addition to the Sharp Alloys and Sova Ispat financial statements, the Department has applied the VBC and FACOR financial statements to the calculation of the surrogate financial ratios for the final results.

Comment 5: Treatment of the Silica Fume By-Product Offset

Petitioner contends that there is no evidence on the record supporting the Department's claim that Jiangxi Gangyuan sold as much silica fume as it produced. Therefore, the Department should limit the by-product offset granted to Jiangxi Gangyuan to the lesser of the company's production or sales during the POR. *See* Petitioner's Case Brief at 43-44.

In rebuttal, Respondents state that the Department was correct in changing its practice to granting a by-product offset based on production quantity instead of limiting the offset to the lesser of the volume of by-product sold or produced during the POR. Additionally, Respondents contend that the Department's change in practice is based on the fact that there is no evidence on the record that silica fume will not ultimately be sold. *See* Respondents' Rebuttal Brief at 34 – 35.

Department's Position:

In the *Preliminary Results*, the Department announced that it was modifying its practice with respect to its determination of by-product offsets in NME cases. In the *Preliminary Results,* we stated that, under our new methodology, we would determine the by-product offset based upon the quantity of by-product produced by respondents during the POR. The Department continues to find that its new methodology provides a more reasonable approach than its existing practice and, therefore, adopts its new methodology for the final results.

The Department's new methodology is more reasonable than its existing NME practice for several reasons. First, under its previous practice, the Department determined the by-product offset based on the lesser of production or sales during the POR. Thus, in some reviews, the Department relied upon sales data and, in others, the Department relied upon production data. Under the new methodology, the Department will always rely upon production data, which provides a more predictable administrative process.

Moreover, the new methodology will allow the Department to achieve consistency in by-product valuation across multiple segments. The previous practice of switching between sales and production data to determine the by-product offset would understate by-product production over multiple PORs. For example, if a respondent produced ten kilograms of a by-product and sold five kilograms of the by-product during POR1, and subsequently produced five kilograms of the by-product and sold ten kilograms of the by-product during POR2, selecting the lesser of the two

quantities in each review (*i.e.*, five kilograms sold in POR1 and five kilograms produced in POR2) would only account for ten kilograms although the respondent produced 15 kilograms over the two review periods. Therefore, in order to fairly and accurately represent the quantity of by-product offset, the Department will determine the by-product offset based upon the quantity respondents produced during a POR.

The Department further notes that change in practice brings the Department's valuation of by-products in NME cases in line with its practice in market economy cases.[127] There is no basis in the Department's broader NME practice to determine by-product offsets in NMEs differently from by-product offsets in market economies.

Because the Department has determined to base Respondents' by-product offset on the quantity of by-product produced, Petitioner's claim that Jiangxi Gangyuan did not sell all of their by-product is immaterial to the Department's determination. However, as a factual matter, the Department disagrees with Petitioner's assertion and finds that there is sufficient evidence in Respondents' submissions, as verified by the Department, that Jiangxi Gangyuan sells all of the silica fume that they produce.[128]

Comment 6: Surrogate Value for Coal

Petitioner disagrees with the Department's preliminary determination to rely upon the domestic Indian price for grade A non-coking coal provided by the *2007 Indian Minerals Yearbook* published by the Indian Bureau of Mines ("IBM Yearbook") as the surrogate value for coal. Petitioner disputes Respondents' statement that, because Respondents do not produce coke, they do not use coking coal. Petitioner asserts that the end use of the coal does not determine the type of coal consumed. Petitioner further disputes Respondents' statement that the ash content and moisture content of the coal used in their production process provide that the surrogate coal value should be based upon non-coking coal. Petitioner claims that neither ash content, nor moisture content, nor end use, are relevant to coal classification under the Indian and British coal classification system. Petitioner further claims that, under the Chinese system for coal classification, the coal utilized by Respondents falls within the classification of "1/3 coking coal" based upon its volatile matter content and caking index. *See* Petitioner Case Brief at 30 – 34.

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[127] *See, e.g., Certain Hot-Rolled Carbon Steel Flat Products From Thailand: Preliminary Results of Antidumping Duty Administrative Review and Partial Rescission*, 72 FR 69187 (December 7, 2007), unchanged in final results, *see Certain Hot-Rolled Carbon Steel Flat Products From Thailand: Final Results of Antidumping Duty Administrative Review and Partial Rescission of Antidumping Duty Administrative Review*, 73 FR 33396 (June 12, 2008).

[128] *See* Letter from Respondents to Secretary of Commerce Regarding Silicon Metal from the People's Republic of China, dated June 11, 2009 at 13 and Exhibit 3, Second SJ Supp C and D at Exhibit SD2-10, Second JG Supp C and D at SD2-12, and Jiangxi Gangyuan Verification Report at 2 and Exhibit 29.

Petitioner further disputes Respondents' claim that they do not use coking coal. Petitioner claims that only coking coal can withstand metallurgical applications due to its physical properties, and that non-coking coal is too fragile for metallurgical uses. Petitioner further argues that Jiangxi Gangyuan's narrative description for the use of coal in its production process confirms that coking coal must be used. *See* Petitioner Case Brief at 34 – 35.

Petitioner contends that the CIT has clarified that the proper selection of a coal surrogate value starts with establishing the type of coal used in the respondent's production process. *See Hebei Metal & Minerals Imp. & Exp. Corp. v. United States*, 366 F. Supp. 2d 1264, 1270-1273 (Ct. Int'l Trade 2005). Accordingly, Petitioner argues that the Department must select a surrogate value specific to the coal Respondents consumed. Petitioner asserts that the coking coal produced in India is of poor quality, with high ash content that does not meet the requirements indicated by Respondents. Given the poor quality of Indian coking coal, Petitioner states that Indian steel producers use imported coking coal to blend with domestic coal, or rely primarily on imported coking coal. Petitioner argues that the Department should use the Indian import data as reported by WTA for coking coal to value coal. *See* Petitioner Case Brief at 35 – 38.

In their rebuttal brief, Respondents argue that the Department should not depart from its preliminary determination. Respondents claim that they consume non-coking coal in their production process. Respondents assert that both coking and non-coking coal are bituminous coal with similar physical properties, but have different end uses and thus are distinguished by end use. Respondents state that coking coal is used to produce coke for the manufacture of iron and steel, where as non-coking coal has broader, diverse uses. *See* Respondents Rebuttal Brief at 21 – 22.

Respondents further argue that Petitioner failed to establish that Respondents use coking coal even under Chinese coal classification system, and Petitioner's reference to British and Chinese coal classification systems is altogether irrelevant, as the Department applies Indian surrogate values. With respect to Petitioner's assertion regarding Indian coal classification, Respondents argue that record evidence demonstrates that the Indian classification system does consider end use, ash and moisture content in grading of coal. Respondents disagree with Petitioner's claim that non-coking coal is not suitable for use in silicon metal production and argue non-coking coal with lower ash content and higher fixed carbon can be used in metallurgical applications. *See* Respondents Rebuttal Brief at 22 – 25.

Department's Position:

Consistent with the Department's *Preliminary Results* and the 2005-06 NSRs, for these final results, the Department continues to find that the *IBM Yearbook* data provides the best available

information to value the coal consumed by Respondents. *See Silicon Metal from the People's Republic of China: Notice of Final Results of 2005/2006 New Shipper Reviews*, 72 FR 58641 (October 16, 2007) and accompanying Issues and Decision Memorandum at Comment 6. Based upon the instant record, the Department finds that Grade A non-coking coal most closely corresponds with the coal consumed by Respondents.

For the *Preliminary Results*, the Department based the surrogate coal value upon *IBM Yearbook* data for Grade A non-coking coal because the ash and moisture content and useful heat value ("UHV") correspond most closely to that of the coal used by Respondents. *See Preliminary Results*, 74 FR at 32889. The Department has continued to rely upon this value for the following reasons. We find that the *IBM Yearbook* provides the most detailed information to value specific grades of coal based on UHV which is derived from an empirical formula of ash and moisture content of coal. *See* Respondents' April 13, 2009 surrogate value submission at Exhibit 17. Respondents provided the maximum ash and moisture content requirements for the coal used in their respective silicon metal production. *See* Shanghai Jinneng's March 11, 2009 supplemental Section D response at Exhibit SD-7 and Jiangxi Gangyuan's February 23, 2009 supplemental Section D response at Exhibit SD-11. Based on the coal definition provided by IBM Yearbook, both types of coal consumed by Respondents most closely correspond to Grade A non-coking coal. *See* Respondent's April 13, 2009 surrogate value submission at Exhibit 17 (IBM Yearbook at Table 29).

Petitioner's arguments against the Department's reliance upon the *IBM Yearbook* data for Grade A non-coking coal are not persuasive. The Department notes that Petitioner did not challenge the accuracy of the *IBM Yearbook* itself. Instead, Petitioner provides several assertions about properties of the coal consumed by Respondents. First, Petitioner's assertion that only coking coal can withstand metallurgical applications due to its physical properties is contradicted by a publication by Indian Ministry of Steel. This publication provides that non-coking coal with lower ash content and higher fixed carbon than coking coal can be used in metallurgical applications. *See* Petitioner's April 13, 2009 surrogate value submission at Exhibit 2 (Indian Ministry of Steel's Glossary of Terms/Definitions Commonly Used in Iron & Steel Industry). Second, with regard to Petitioner's argument that the Chinese coal classification system would classify the coal consumed by Respondents as coking coal, this claim is immaterial to the Department's determination. Section 773(c)(4) of the Act instructs the Department to value factors in the calculation of normal value in NME proceedings from surrogate country. Because the Department has determined that India is the appropriate surrogate country in preliminary results of the instant review and this determination remains unchanged for the final results, we find that the reference to Chinese or British classification system to be irrelevant. *See Preliminary Results*, 74 FR 32887-88. Finally, while Petitioner argues that additional factors

beyond ash and moisture content are used to classify coal in India, Petitioner has not demonstrated how the consideration of any additional factor would classify coal consumed by Respondent as coking coal in India.

Finally, because the Department has determined that there is no record evidence demonstrating that the coal consumed by Respondents should be classified as coking coal, the Department finds Petitioner's arguments regarding the poor quality of coking coal in India and the WTA data concerning coking coal imports to be moot. Consistent with the Court's guidance in *Hebei Metals* that the Department must properly establish the type of coal consumed by respondents, and for the reasons discussed above, the Department has properly classified the coal consumed by Respondents.

Comment 7: Surrogate Value for Truck Freight

Petitioner states that, in the *Preliminary Results*, the Department valued truck freight using data from www.infobanc.com/logistics/logtruck.htm ("Infobanc data") from November 2008, which is outside the POR. Petitioner argues that the Department should use more contemporaneous data from www.supplychainmanagement.in ("Supply Chain Management data") for the final results. *See* Petitioner's Case Brief at 41.

In rebuttal, Respondents argue that the Department has relied upon Infobanc data in numerous other proceedings. Further, Respondents claim that the Supply Chain Management data overlaps with only four months of the POR, while the Infobanc data used is only six months after the POR. Citing *Hebei Metals v. United States*, Respondents argue that this difference is not, by itself, a reason to rely upon the Infobanc data.[129] Furthermore, Respondents argue that there is no evidence that Supply Chain Management data provides figures that tax-exclusive, and that the Supply Chain Management data is less representative than Infobanc data because Supply Chain Management only provides truck freight rates to one city. *See* Respondents' Rebuttal Brief at 31 – 32.

Department's Position:

Pursuant to section 773(c)(1) of the Act, it is the Department's practice to use the best available information to derive surrogate values. In considering what constitutes the best available information, the Department considers several factors, including the quality, specificity and contemporaneity of the source information. *See, e.g., Fresh Garlic from the People's Republic of China: Final Results of Antidumping Duty New Shipper Review*, 67 FR 72139 (December 4, 2002), and accompanying Issues and Decision Memorandum at Comment 6.

[129] *See Hebei Metals v. United States*, 366 F. Supp. 2d 1264, 1275 (Ct. Int'l Trade 2005) ("*Hebei Metals*").

Petitioner's preferred data source overlaps with only a few months of the POR, and Respondents' preferred data sources falls only six months outside the POR. We agree with Respondents that, as in *Hebei Metals*, this small difference in contemporaneity is not a sufficient reason for the Department to select Petitioner's proposed value. Because neither data source is entirely contemporaneous with the POR, the Department has considered which data source provides a more comprehensive view of truck freight costs. We find that the Infobanc data represent a broader market average as it is based on rates from four major Indian cities (Delhi, Mumbai, Kolkata, and Chennai) to more states and union territories. *See* Respondents' April 3, 2009, Surrogate Value Submission at Exhibit 29. In contrast, the Supply Chain Management data that is based on rates from only one major city (Delhi) to fewer destinations. *See* Petitioner's April 3, 2009, Surrogate Value Submission at Exhibit 13. Consistent with the *Preliminary Results* and past practice, the Department has continued to value truck freight using Infobanc data for the final results. *See Certain Cased Pencils from the People's Republic of China: Preliminary Results and Partial Rescission of Antidumping Administrative Review*, 74 FR 673, 680 (January 7, 2009), unchanged in final results, 74 FR 33406 (July 13, 2009)

Comment 8: Surrogate Value for Oxygen

Respondents argue that the Department should not have valued oxygen using WTA import data in the preliminary results, as the Department has previously found that WTA import data is not specific enough to value commercial oxygen.[130] Specifically, Respondents argue that the Department found the HTS category 2804.40.90 is a basket category, and is too broad to use in valuing the oxygen used by Respondents. Respondents claim that the Department has previously compared import values to other countries in order to evaluate the reliability of prices, and such comparisons in this case demonstrate that the Indian WTA data for oxygen is distorted. *See* Respondents' Case Brief at 13 – 14.

Respondents argue that the Department should use weighted-average value of oxygen reported in the financial statements of seven Indian oxygen producers. Respondents assert that the value is specific, contemporaneous, a broad market average, tax exclusive, and is consistent with the Department's past practice.[131] *See* Respondents' Case Brief at 14 – 16.

[130] *See Diamond Sawblades and Parts Thereof from the People's Republic of China*, 71 FR 29303 (May 22, 2006), ("*Diamond Sawblades*"), and accompanying Issues and Decision Memorandum at Comment 11.B.
[131] *See Certain Preserved Mushrooms from the People's Republic of China*, 72 FR 44827 (August 9, 2007) ("*Mushroom*") , and accompanying Issues and Decision Memorandum at Comment 1; *Glycine from the People's Republic of China*, 72 FR 58809 (October 17, 2007) ("*Glycine*"), and accompanying Issues and Decision Memorandum at Comment 3; and *Saccharin from the People's Republic of China*, 71 FR 7515 (February 13, 2006) ("*Saccharin*"), and accompanying Issues and Decision Memorandum at Comment 6.

Alternatively, Respondents argue that the Department should use the price list from Bhoruka Gases, an Indian producer of industrial gases.[132] Respondents claim that while the Bhoruka price list is less contemporaneous, it is more specific to the oxygen consumed by Respondents. *See* Respondents' Case Brief at 16.

Respondents also note that Shanghai Jinneng's reported oxygen consumption, which was originally reported in metric tons, contained a conversion error. Respondents state that the Department should use the consumption figure originally reported in cubic meters. *See* Respondents' Case Brief at 16 – 17.

In its rebuttal brief, Petitioner states that the Department's practice in selecting surrogate values is to use values that are specific to the inputs consumed. Petitioner claims that the Bhoruka price list contains specific data for both liquid oxygen and oxygen gas, and is more specific than the sales data from the financial statements of the Indian producers. Petitioner argues that the Department should use the oxygen value contained in the Bhoruka price list if the Department does not rely on the WTA data. *See* Petitioner's Rebuttal Brief at 26 – 28.

Department's Position:

Consistent with *Diamond Sawblades*, the Department determines that the Bhoruka price list provides the most appropriate surrogate value for oxygen. While the Bhourka price list is not contemporaneous with the POR, it is the only surrogate value source that provides data specific to both the liquid oxygen and oxygen gas consumed by Respondents. *See* Respondents' July 29, 2009, Surrogate Value Submission at Exhibit 2. For the final results, we have inflated this value to be contemporaneous with the POR. *See* Final Factor Memo at 2.

With regard to the WTA data, the average unit price of Indian imports under the HTS category 2804.40.90,"other oxygen," provides a surrogate value ($21.84 per kilogram) that is substantially higher in comparison to import statistics for oxygen from other countries on the list of potential surrogate countries, specifically for Thailand ($1.23 per kilogram), the Philippines ($7.99 per kilogram), Indonesia ($0.17 per kilogram) and Colombia ($0.23 per kilogram.) Indeed, the Indian value is nearly three times the highest AUV provided by any other potential surrogate country. Although the Department relied upon the Indian WTA data in the *Preliminary Results*, we find that the Indian WTA data for oxygen in this review is likely to be overly broad and inclusive of much higher valued oxygen such that the Department cannot rely upon it to determine the value of oxygen consumed by Respondents.

[132] *See Diamond Sawblades* at Comment 11.B.

With regard to the financial statements of Indian industrial gas producers submitted by Respondents, we find them to be less specific, with respect to liquid oxygen, than the Bhoruka price list. We note that three of the financial statements, for Earnest Gases Pvt. Ltd., Pankaj Oxygen Ltd., and Northeast Gases Private Limited, contain sales data only for oxygen gas. Three others, for National Oxygen Limited, Bhagawati Gases Limited and Nove Industrial Gases PVT, contain sales data for "oxygen" with no further description. The one remaining for Rukmani Metals & Gaseous Ltd. contains sales data for "oxygen/nitrogen gas." Moreover, the sales data for National Oxygen Limited include "self consumption," that may indicate that this sales data does not represent market prices. *See* Respondents' July 29, 2009, submission at Exhibit 2.

Comment 9: Surrogate Value for Polypropylene Bags

Respondents claim that the WTA import data that the Department used to value packaging bags in the preliminary results is aberrational. Respondents assert that the quantity of eligible imports reported by WTA data is an insignificant quantity, and that the value is substantially higher when compared to the other surrogate value data for bags on the record. Respondents argue that the Department has rejected WTA data with small quantities in various cases previously.[133] Instead, Respondents recommend that the Department value packaging bags using information contained in the financial statements of three Indian producers of polypropylene bags. Respondents argue that the Department should rely on the value from the financial statements as these Indian companies produce a significantly larger quantity of bags,[134] and that it is more specific.[135] *See* Respondents' Case Brief at 17 – 19.

In rebuttal, Petitioner argues that Respondents have not demonstrated that the WTA import value is aberrational or the financial statements are more representative of the market price in India. Petitioner further argues that the instant case is distinguishable from the cases cited by Respondents, that the Department either had more reliable alternatives, or aberrational value or insignificant quantity are demonstrated. *See* Petitioner's Rebuttal Brief at 29 – 32.

Department's Position:

[133] *See Glycine from the People's Republic of China*, 72 FR 58809 (Oct. 17, 2007), and accompanying Issues and Decision Memorandum at Comment 3; *Pure Magnesium from the People's Republic of China*, 73 FR 76336 (December 16, 2008), and accompanying Issues and Decision Memorandum at Comment 2;*Pure Magnesium from the People's Republic of China*, 71 FR 61019 (October 17, 2006), and accompanying Issues and Decision Memorandum at Comment 1.
[134] *See Glycine* at Comment 3;*Saccharin* at Comment 6.
[135] *See Mushroom* at Comment 1.

As stated throughout this memorandum, when selecting possible surrogate values for use in an NME proceeding, the Department's preference is to use surrogate values that are publicly available, broad market averages, contemporaneous with the POR, specific to the input in question, and exclusive of taxes on export. *See Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results of the Second Administrative Review*, 72 FR 13242 (March 21, 2007) and accompanying Issues and Decision Memorandum at Comment 8B. Pursuant to section 773(c)(1) of the Act, it is also the Department's practice to use the best available information to derive surrogate values. The Department considers several factors, including quality, specificity and contemporaneity, to determine the best available information in accordance with the Act.

We find that the prices from the financial statements of Indian bag producers to be less reliable than the other values on the record, as the financial statements identify the sales of Karur Packkagings {sic} and Jumbo Bag as including significant export sales of bags, and thus may not represent the market prices in India. We also note that the sales of Pankaj Polymers and Jumbo Bag appear to include aggregated revenue along with other merchandise and tolling services. *See* Respondents' April 3, 2009, Surrogate Value Submission at Exhibit 22.

We note that the WTA import data for bags for the POR period of June 1, 2007, to May 31, 2008, is based on only 5 MT of imports. *See* Prelim Factor Memo at Exhibit 3. We also note that this value appears to be unusually high, as it roughly quadrupled to 402.605 rupees per kilogram from the value of 105.4268 rupees per kilogram from the same HTS category that the Department relied upon during the 2005-06 NSRs. *See* Prelim Factor Memo at 6; *see also* Respondents' April 3, 2009 Surrogate Value Submission at 13. Because the total import quantity reported in the 2007-08 WTA data is so low, and because the corresponding value is unusually high, we find that the 07-08 WTA data for bags is unrepresentative of the overall price for bags in India. *See* Respondents' April 3, 2009, Surrogate Value Submission at Exhibit 22; *see also* Respondents' July 29, 2009, Surrogate Value Submission at Exhibit 3.

Therefore, we find that the WTA value used in the final results of the 2005-06 NSRs is the best available information on the record. The Department placed the 2005-06 WTA data on the record on December 22, 2009, and afforded parties an opportunity to comment. *See* Letter from the Department to All Interested Parties, regarding "2007/2008 Administrative Review of Silicon Metal from the People's Republic of China", dated December 22, 2009. No party submitted any comments on the WTA data for bags from the 2005-06 NSRs. As the Department previously found the 2005-06 WTA data reliable and it is based on a larger quantity of 123 MT of imports, we find that this value represents a broader market price in India and does not contain the substantive deficiencies apparent in the other two alternatives on the record. *See id*. For the

final results, we have inflated this value to be contemporaneous with the POR. *See* Final Factor Memo at 2.

Comment 10: Inclusion of Certain U.S. Sales in Shanghai Jinneng's Antidumping Margin Calculation

Petitioner states in its case brief that the Department erroneously included in Shanghai Jinneng's dumping margin calculation certain individual U.S. sales with dates of entry after the POR. Petitioner argues that this does not conform to the statute[136] or the Department's established practice. Petitioner cites to the Department's practice of excluding export price ("EP") sales with dates of entry outside the POR.[137] Petitioner further points out that the Department's questionnaire instructions request that respondents report EP sales that entered for consumption. *See* Petitioner Case Brief at 13 – 15.

Petitioner contends that both Respondents made only EP sales and they know the entry dates for each U.S. sale. Petitioner rebuts the Respondents' prior comments for the preliminary results that the Department's questionnaire required the reporting of sales within the POR. Petitioner asserts that Respondents misconstrued the Department's instruction regarding how to report the quantity of sales in the U.S. sales listing.[138] Therefore, Petitioner argues that the Department should calculate the Respondents' dumping margins using only U.S. sales that were both sold and entered during the POR. *See* Petitioner Case Brief at 15 – 16.

In its rebuttal brief, Respondents argue that while the statute states that the Department is to assess antidumping duties on entries during the POR, the Department has the discretion to calculate margins based on entries, exports, or sales of subject merchandise.[139] Respondents further argue that the Department's questionnaire instructions require the reporting of all sales during the POR, regardless of when they enter the United States. *See* Respondents Rebuttal Brief at 11 – 12.

Department's Position:

[136] *See* Section 751(a)(2)(A) of the Act.
[137] *See Certain Corrosion-Resistant Carbon Steel Flat Products from France: Notice of Rescission of Antidumping Duty Administrative Review*, 71 FR 16553, 16555 (April 3, 2006) ("*Flat Products from France*"); *Certain Frozen Warmwater Shrimp from Thailand*, 73 FR 50933 (August 9, 2004) ("*Shrimp from Thailand*") ,and accompanying Issues and Decision Memorandum at Comment 4; and *Certain Frozen Warmwater Shrimp from Ecuador: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 73 FR 39945 (July 11, 2008) *("Shrimp from Ecuador")*, and accompanying Issues and Decision Memorandum at Comment 4.
[138] *See* the Department's Original Questionnaire at C-12.
[139] *See* 19 C.F.R. 351.213(e)(1)(ii); *Silicon Metal from Brazil*, 61 FR 46763, 46765 (September 6, 1996).

We disagree with Petitioner that the statute requires the Department to review sales solely based on entry. Although section 751(a)(2)(A) of the Act states that the Department is to calculate margins based on entries of subject merchandise, as explained in the *Advance Notice of Proposed Rulemaking*, the Department stated that, "by referring to 'entry,' the drafters of section 751 in the 1979 Act likely intended that in a review, unlike an investigation, the Department would examine every transaction; they did not mean necessarily that the Department would have to tie 'entries' to 'sales' in ordering assessment." *See* 56 FR 63696 (December 5, 1991). The Department's regulations reflect this approach and, in relevant part, instruct that an administrative review "will cover, as appropriate, entries, exports, or sales." *See* 19 CFR 351.213(e)(1)(ii).

We agree with Petitioner that it is the Department's practice to consider entries of subject merchandise in U.S. export price ("EP") sales. However, the Department must deviate from its normal practice here for two reasons. The first reason is methodological and the second reason is evidentiary. From a methodological standpoint, because the Department relied on sales date in the 2005-06 new shipper reviews, the Department will continue to include all transactions with sales dates during the POR. To do otherwise would establish an inconsistency between review periods and may lead to missing transactions from review-to-review. In order to comprehensively examine the universe of any respondent's transactions, the Department must apply a consistent methodology across segments in order to avoid potentially overlooking transactions.

From an evidentiary standpoint, Respondents did not provide the information necessary to tie U.S. sales to their entry dates, thus, the Department is unable to filter the U.S. sales data such that sales that entered after the POR can be excluded. The instant record does not provide the specific entry dates of Respondents' transactions. Respondents reported that their respective transactions were sold on an EP basis[140] and thus appropriately reported the shipment dates, but not the entry dates. [141] Without the specific entry date for each reported sale during the POR, the Department is unable to verify and conclusively determine which transactions should be properly excluded from the Department's calculations under the Department's normal practice.

With respect to Petitioner's reliance upon *Flat Products from France*, *Shrimp from Thailand*, and *Shrimp from Ecuador* in support of their claim that it is the Department's normal practice to

[140] *See* June 29, 2009, verification report for Shanghai Jinneng's at 15-16, and at exhibit 6-10; and June 29, 2009, verification report for Jiangxi Gangyuan at 15 – 16, and at exhibits 10-16; February 5, 2009, Jiangxi Gangyuan Supplemental Questionnaire Response at Exhibit 11; and March 11, 2009, Shanghai Jinneng Supplemental Questionnaire Response at Exhibits SC-3 and SC-5.

[141] *See* November 17, 2008, Jiangxi Gangyuan Section C Response at C-22; November 18, 2008, Shanghai Jinneng Section C response at C-24

include only EP sales in the calculation where the Department is able to determine that the transaction entered during the POR, the Department finds that the instant case is distinguishable. In those cases, the respondents had reported the entry dates of their transactions and appropriately excluded EP sales which entered after the POR. Specifically, in *Flat Products from France*, the Department stated that its determination to limit its review to entries, rather than sales, was based upon the available record evidence.[142] In *Shrimp from Thailand*, the record contained the entry dates.[143] In *Shrimp from Ecuador*, the Department specifically noted that the respondent had provided the entry dates.[144] As explained above, the record lacks the entry dates of Respondents' U.S. sales.

Therefore, consistent with its practice in the prior segment, and in the absence of reported entry dates for the POR transactions, the Department will continue to rely on sales date to determine which transactions to include in the Department's antidumping margin calculation.

Comment 11: Freight Distances Reported by the Respondents

Petitioner argues that, in the *Preliminary Results*, the Department inadvertently capped the freight distances for all inputs at the shorter of the actual distance from the supplier to the factory or the distance to the nearest seaport. Petitioner argues that, consistent with the 2005-06 NSRs of the instant antidumping duty order, the Department should calculate freight costs using actual reported distances for quartz and all other inputs whose surrogate values are based on domestic Indian sources.[145] *See* Petitioner's Case Brief at 42 – 43.

In rebuttal, Respondents do not dispute Petitioner's argument with respect to the Department's normal practice, but note that the only inputs that this change would affect are quartz and coal, and argue that for these inputs, the Department should apply the verified freight distances. *See* Respondents Rebuttal Brief at 32 – 33.

Department's Position

[142] *See Flat Products from France*, 71 FR at 16555 ("the record in this proceeding does not support a conclusion that the Department should deviate from our normal practice of conducting administrative reviews of entries rather than sales").
[143] *See Shrimp from Thailand* at Comment 4 ("{W}e inadvertently included EP transactions with dates of entry outside the POR in our margin calculations for the preliminary results. Consequently, we have amended our calculations for the final results to use only those transactions with dates of entry during the POR.").
[144] *See Shrimp from Ecuador* at Comment 4 ("In this review, Promarisco has reported the entry dates for all of its U.S. sales. Therefore, for the final results, the Department has revised its analysis of Promarisco's U.S. sales to include only those sales with entry dates within the POR, consistent with its normal practice in cases where entry dates for EP sales are known (internal citations omitted).").
[145] *See New Shipper Reviews Final Results*, 72 FR 58641, (October 16, 2007), and accompanying Issues and Decision Memorandum at Comment 9.

We agree with Petitioner that it is the Department's practice to only apply the shorter of the actual distance from the supplier to the factory or the distance to the nearest seaport for inputs valued by import statistics. *See Honey from the People's Republic of China: Preliminary Results of First Antidumping Duty Administrative Review*, 68 FR 69988, 69993 (December 16, 2003), unchanged in final results, *Honey from the People's Republic of China: Final Results of First Antidumping Duty Administrative Review*, 69 FR 25060 (May 5, 2004). Therefore, the Department has revised its margin calculation for the final results, and applied the actual, verified freight distances for quartz and coal where the Department relied upon domestic Indian prices as surrogate values. *See* SJ Analysis Memo at 2-3 and JG Analysis Memo at 3-4.

Shanghai Jinneng Issues

Comment 12: Treatment and Valuation of Graphite Powder

Respondents argue that the Department erred in its preliminary determination to treat both types of graphite powder used by Datong Jinneng as a direct material input. Respondents claim that Datong Jinneng consumed two types of graphite powder, one type for plugging furnaces and a different type to apply to its molds. Respondents argue that both types of graphite powder are auxiliary items that the Department should capture through the surrogate overhead ratios in the final results.

Respondents state that the Department considers several criteria in determining whether any material should be treated as a direct material input, including 1) whether the material is physically incorporated into the final product; 2) the material's contribution to the production process and finished products; 3) the relative cost of the input and the frequency of its use; and 4) the way the cost of the material is typically treated in the industry.[146] Respondents assert that, for both types of graphite consumed by Datong Jinneng, 1) neither are physically incorporated into silicon metal; 2) neither are essential for the production of silicon metal; 3) they are both of very low value in Respondents' cost of manufacturing and less frequently used than other inputs; 4) neither are treated by the ferroalloy industry as a direct input. Moreover, Respondents argue that Datong Jinneng recorded graphite as an auxiliary material in its books and records, and therefore the Department should treat graphite as factory overhead and not a direct material input. *See* Respondents' Case Brief at 19 – 22.

Alternatively, if the Department concludes that graphite powder is a direct material input, Respondents argue that the Department should rely upon the value for "Above 93% F.C." and "60-65 C (200 mesh)" graphite fines contained in the *2007 IBM Yearbook* to value the graphite

[146] See *OTR Tires* at Comment 27; *Urea Ammonium Nitrate Solutions from the Russian Federation*, 68 FR 9977 (March 3, 2003), and accompanying Issues and Decision Memorandum at Comment 5.

powders. Respondents state that the IBM Yearbook contains prices more specific to the graphite powder used by Datong Jinneng. *See* Respondents' Case Brief at 22 – 23.

Shanghai Jinneng further asserts that the Department inadvertently transposed the quantities of the graphite powder consumption in the preliminary results, and requests that the Department correct this clerical error for the final results. *See* Respondents Case Brief at 38 – 39.

Petitioner provided no comments on this issue.

Department's Position:

Consistent with the criteria the Department outlined in *OTR Tires*, we find that graphite powder is more appropriately classified as an auxiliary material, and not as a direct material input. We agree with Respondents that, for both types of graphite powder consumed by Datong Jinneng, 1) neither are physically incorporated into silicon metal; 2) neither are essential as evidenced by the fact that the other company in the instant review does not used graphite powder for the production of silicon metal; 3) they are both of very low value in Datong Jinneng's cost of manufacturing and less frequently used than other inputs; 4) neither are treated by the ferroalloy industry as a direct input. Additionally, the Department acknowledges that it inadvertently transposed the quantities of the two kinds of graphite powder used by Datong Jinneng, however, no correction is necessary here because the Department is not relying upon a surrogate value for Datong Jinneng's graphite powder.

Comment 13: Datong Jinneng Reported Electricity Usage

Petitioner argues that Datong Jinneng's reported electricity consumption does not reflect all of the electricity consumed to produce silicon metal. Petitioner states that in addition to the electricity consumed in powering the furnaces, silicon metal producers also consume electricity to light the plant and operate other machinery and equipment. Petitioner disputes Respondents' prior argument that other electricity recorded as overhead or SG&A has been captured in the surrogate financial ratios. Petitioner notes that neither the financial statements used in the margin calculation for the preliminary results nor the two financial statements under consideration for these final results contain separate line items for other electricity consumption. Petitioner claims that because the surrogate financial ratios normally do not capture other electricity, the Department's practice in NME cases is to include such electricity in the electricity usage rate. Accordingly, Petitioner argues that the Department should revise Shanghai Jinneng's electricity consumption for the final results by including the other electricity consumption categorized by Datong Jinneng as overhead or SG&A. *See* Petitioner's Case Brief at 26 – 30.

In rebuttal, Respondents claim that Datong Jinneng's reported electricity consumption figure includes all direct production electricity plus furnace maintenance for silicon metal production. Respondents assert that all other electricity consumed by the plant is properly recorded by the company as overhead or SG&A, and the majority of that is the furnace maintenance consumption that is already reported in Datong Jinneng's electricity FOP.

Respondents state that the statute directs the Department to rely on the books and records of the exporter or producer.[147] Furthermore, Respondents assert that the Department's practice is to accept reporting methodologies that are reasonable and are based on the records maintained by a respondent in the ordinary course of business.[148] Therefore, Respondents argue that the Department should rely on Datong Jinneng's normal books and records as they reasonably reported direct electricity consumption for silicon metal. Respondents claim that the electricity consumed by Datong Jinneng recorded as overhead and SG&A is either used by overhead facilities such as the raw material workshop that services products other than silicon metal, or administrative facilities such as the office building. Given that the Department accounts for overhead and SG&A expenses in the financial ratios, Respondents argue that the Department should not include overhead and SG&A expenses in Datong Jinneng's energy consumption. Respondents argue that the Petitioner's proposal to include overhead electricity would partially double count the electricity already reported and overstates the electricity consumed for silicon metal production by Datong Jinneng. *See* Respondents Rebuttal Brief at 18 – 21.

Department's Position:

Pursuant to section 773(c)(3)(C) of the Act, the Department includes the amount of electricity and other utilities consumed by respondents in the calculation of normal value. Consistent with the Department's decision in *Silicomanganese from the PRC*, 65 FR 31514 (May 18, 2000), Issues and Decision Memorandum at Part IV.4, and after review of the financial ratios for the instant case along with Datong Jinneng's electricity meter readings and its electricity diagram, we agree with Petitioner, in part, and find no record evidence that the surrogate value for factory overhead includes any direct production energy costs. While Respondents argue that the Department should rely upon Datong Jinneng's books and records, we determine that Datong Jinneng's classification for certain electricity consumption as overhead is improper and Shanghai Jinneng has not fully reported its electricity consumption because its reported quantity does not capture all direct manufacturing electricity.

[147] *See* Section 773(f)(1)(A) of the Act.
[148] *See Frontseating Service Valves From the People's Republic of China*, 74 FR 10886 (March 13, 2009), and accompanying Issues and Decision Memorandum at Comment 12g.

Specifically, we find that a portion of the electricity consumed by the raw material workshop and finished product workshop should be included in Datong Jinneng's total electricity consumption figure for silicon metal production. Shanghai Jinneng describes Datong Jinneng's silicon metal production process as involving workers grinding quartz by hand or with electric grinders, and crushing silicon metal by machine after smelting. *See* Shanghai Jinneng's November 17, 2008, submission at D-4. Given that the crushing of production inputs and finished products are a regular part of the direct production process for silicon metal, we find them appropriate to be included in Shanghai Jinneng's electricity FOP.

However, we disagree with Petitioner that the electricity consumed for warehouse and gatekeeper, or water pump station, should be considered as direct manufacturing expenses for silicon metal. There is no record evidence to tie the electricity consumed by the warehouse and gatekeeper, or water pump station, to silicon metal production. Because the workshop electricity is not captured through the use of financial ratios, the inclusion of that portion of electricity consumed by the raw material warehouse and finished product warehouse does not overstate or double count Datong Jinneng's electricity consumed for the production of silicon metal.

Shanghai Jinneng reported Datong Jinneng's plant-wide electricity meter readings, including the readings for the raw material workshop and finished product workshop. *See* Shanghai Jinneng's April 20, 2009, Second C&D Supplemental Response at Exhibit SD2-5. However, Datong Jinneng only began to record the electricity consumption for the raw material and finish product workshops in January 2008. Because the Department lacks specific data for electricity consumption in these workshops prior to January 2008, we have determined that the use of neutral facts available is appropriate to account for Datong Jinneng's total consumption of electricity for silicon metal production. Section 776(a)(1) and (2) of the Act provides that the Department shall apply "facts otherwise available" if, necessary information is not on the record or an interested party or any other person: (A) withholds information that has been requested, (B) fails to provide information within the deadlines established, or in the form and manner requested by the Department, subject to subsections (c)(1) and (e) of section 782 of the Act, (C) significantly impedes a proceeding, or (D) provides information that cannot be verified as provided by section 782(i) of the Act. Here, the Department must rely upon facts available because Datong Jinneng failed to report electricity consumption for the raw material and finished products workshops throughout the entire POR.

For the final results, the Department has relied on the actual meter readings for the raw material workshop and finished product workshop recorded by Datong Jinneng during January – May 2008. *See* Shanghai Jinneng's April 20, 2009, Supplemental Response at Exhibit SD2-5. For a detailed discussion of the calculation, *see* SJ Analysis Memo at 4-5.

Jiangxi Gangyuan Issues

Comment 14: Jiangxi Gangyuan's Production Quantity

Petitioner disagrees with the Department's preliminary determination to include off-specification silicon metal, which Jiangxi Gangyuan describes as Chinese grades Si-1 through Si-6, in Jiangxi Gangyuan's reported production quantity. Petitioner asserts that the Department should exclude the off-specification silicon metal from Jiangxi Gangyuan's production quantity and recalculate the FOP consumption rates for the final results. *See* Petitioner's Case Brief at 17.

Petitioner argues that the off-specification silicon metal is not a commercial grade of silicon metal, but a by-product produced unintentionally during the production process for silicon metal. With regard to the treatment of by-products, Petitioner claims that the Department's practice allows for the allocation of production costs to co-products, not by-products.[149] Additionally, Petitioner argues that such off-specification silicon metal is more properly treated as by-products of silicon metal based on the Department's practice. Petitioner states that the Department's analysis of whether a type of merchandise is a co-product or a by-product considers 1) whether the product is an unavoidable consequence of producing another product, 2) whether management intentionally controls production of the product, 3) the significance of each product relative to other products, 4) whether the product requires significant further processing after the split-off point, and 5) how the company records and allocates costs in the ordinary course of business.[150] *See* Petitioner's Case Brief at 18-19.

Petitioner argues that according to the Department's analysis that determines whether a product is a co-product or by-product, Jiangxi Gangyuan's off- specification silicon metal is a by-product. Petitioner further states that Jiangxi Gangyuan mixes some of the off-specification silicon metal with higher grade silicon metal[151] while other off-specification silicon metal is sold separately and at a discount.[152] Petitioner argues that Jiangxi Gangyuan should not receive a by-product offsets for these sales of off-specification silicon metal because did not provide records of sales for off-specification silicon metal[153] and that this treatment would be consistent with the Department's denial of a by-product offset for slag in the *Preliminary Results*. *See* Petitioner Case Brief at 21 – 25.

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[149] *Citing Fresh Garlic from the People's Republic of China; Final Results of Antidumping Duty Administrative Review and Rescission of Administrative Review in Part*, 68 FR 4758 (January 30, 2003) ("*Garlic from China*"), and accompanying Issues and Decision Memorandum at Comment 6.
[150] *Citing Notice of Final Determination of Sales at Less Than Fair Value: Pure Magnesium from Israel*, 66 FR 49349 (September 27, 2001), and accompanying Issues and Decision Memorandum at Comment 3.
[151] *Citing* Second JG Supp. C and D at 6.
[152] *Id.* at 7.
[153] *Citing* Jiangxi Gangyuan Verification Report at 26.

In rebuttal, Respondents state that off-specification silicon metal is not a by-product but that it is indeed silicon metal which fits within the scope of the order. Respondents note that all grades of silicon metal produced by Jiangxi Gangyuan meet the minimum silicon content stated in the scope. Respondents further state that the Department has found that the scope does not differentiate size or form of silicon metal and that non-prime merchandise is not explicitly excluded from the scope of the investigation.[154] Moreover, Respondents assert that the off-specification silicon metal is sold commercially in the local market. *See* Respondents Rebuttal Brief at 13 – 16.

Respondents argue that the Department and judicial precedent supports the inclusion of Jiangxi Gangyuan's non-prime production in total production quantity. Specifically, they cite *Certain Activated Carbon* arguing that the Department a by-product was within the scope of the investigation because there was scope language that contained size of form restrictions.[155] Respondents also contend that Court decisions have consistently upheld the Department's treatment of non-prime material as subject merchandise, and not a by-product, because the merchandise fell within the scope of the investigation.[156] *See* Respondents Rebuttal Brief at 16 – 17.

Department's Position:

With respect to Petitioner's claim that off-specification silicon metal is a by-product, we disagree. As evidenced in the verification report, the Department verified that the chemical properties for the silicon metal at issue fell within the scope.[157] We also agree with Respondents' assertion that it is the Department's practice to include silicon metal within the scope of the order regardless of size. In the previous new shipper reviews, the petitioner argued that the Department should exclude silicon metal fines that shared the same chemical properties as commercial-grade silicon metal from the respondent's production quantity. The Department determined that "the scope of the investigation does not differentiate between size or form of silicon metal" and included the fines in the production quantity.[158] Therefore, we will continue to include off-specification silicon metal in Jiangxi Gangyuan's production quantity.

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[154] *Citing Final Results of 2005-05 New Shipper Reviews*, 72 FR 58641 (October 16, 2007), and accompanying Issues and Decision Memorandum at Comment 13.
[155] *Citing Final Determination of Sales at Less Than Fair Value: Certain Activated Carbon from the People's Republic of China*, 72 FR 9508 (March 2, 2007) ("*Certain Activated Carbon*").
[156] *Citing Anshan Iron & Steel Co., Ltd. v. U.S.*, 358 F.Supp. 2d 1236 (Ct. Int'l Trade 2004) ("*Anshan Iron & Steel v. U.S.*") and *Ipsco, Inc. v. United States*, 714 F.Supp. 1211, 1216 (Ct. Int'l Trade 2004).
[157] *See* Jiangxi Gangyuan Verification Report at Exhibit 31.
[158] *See New Shipper Reviews* at Comment 13.

The Department notes that while *Magnesium from Israel* provides criteria to determine whether a product is a co-product or by-product, this distinction is irrelevant to the instant review. In the instant review, the Department verified that the off-specification silicon metal's properties properly categorized it as within the scope of the order.[159] Consistent with *Certain Activated Carbon* in which the Department did not grant a by-product offset because the merchandise in consideration fell within the scope of the investigation[160] and *Anshan Iron & Steel Co., Ltd. v. U.S.*, where non-prime merchandise was treated as subject merchandise because it was still considered merchandise subject to the order[161], we find that off-specification silicon metal is not eligible for a by-product offset, and thus *Magnesium from Israel* and *Garlic from China* do not apply. Therefore, we find it unnecessary to perform an analysis as to whether the off-specification silicon metal is a co-product or by-product because all silicon metal sold by Jiangxi Gangyuan falls within the description of the scope.[162]

Petitioner is correct that the Department's practice is to only allocate production costs to co-products and not by-products. However, we note that we need not address how Jiangxi Gangyuan allocates production costs in terms of off-specification silicon metal since it is neither a co-product nor a by-product. Unlike *Magnesium from Israel* and *Garlic from China*, the Department finds that the off-specification silicon metal is within the scope of the order.

Comment 15: Jiangxi Gangyuan's By-Product Offset

Respondents disagree with the Department's decision to decline a by-product offset for slag generated by Jiangxi Gangyuan. Respondents argue the Department confirmed that Jiangxi Gangyuan produced and sold slag at verification.[163] Additionally, Respondents claim that the Department's practice allows for an offset to be granted for by-products that are generated and collected from the production of subject merchandise and re-entered into the production process or sold.[164] *See* Respondents' Case Brief at 32 – 33.

Respondents state that the Department observed the process by which slag was removed from the ladle and stored on the factory floor during verification.[165] Furthermore, Respondents state that Jiangxi Gangyuan maintains records of its sales of slag, but does not track production and claim that this method of accounting is consistent with the treatment of by-product produced during the

[159] *See* Jiangxi Gangyuan Verification Report at Exhibit 31.
[160] *See Certain Activated Carbon*, and accompanying Issues and Decision Memorandum at Comment 5.
[161] *See Anshan Iron & Steel v. U.S.*, 358 F. Supp. 2d at 1244.
[162] *Id*.
[163] *Citing* Jiangxi Gangyuan Verification Report at 11, 26, and Exhibit 30.
[164] *Citing e.g. Frontseating Valves from China* at Comment 10g.
[165] *Citing* Jiangxi Gangyuan Verification Report at 11.

production process.[166] They contend that the Department has previously found that a respondent's failure to track the inventory of a by-product in its accounting records does not preclude it from granting an offset if the Department is able to verify that the by-product was generated during the production process.[167] They also assert that the Department verified that slag was sold during the POR.[168] Moreover, they contend that Jiangxi Gangyuan submitted evidence of payments received for slag sales made after the POR.[169] *See* Respondents' Case Brief at 33 – 34.

Respondents contend that if the Department grants a by-product offset for slag, it should value slag using WTA data for the HTS 2619.00, "Slag, Dross, (Exc Granulated Slag) Scales and Other Waste Etc." for the year ending May 31, 2007 and inflated for the POR[170] or HTS 2621.90, "Slag And Ash Nes, Including Seaweed Ash (Kelp)."[171] *See* Respondents' Case Brief at 34 – 35.

Petitioner rebuts that it is the Departments practice to grant by-products offsets if a respondent demonstrates that (1) the by-product was generated from the subject merchandise and (2) that it realized income from the sale of the by-product.[172] Petitioner further argues that it is the respondent's burden to demonstrate that they are entitled to a by-product offset by providing documentation showing that the two above mentioned criteria have been fulfilled.[173] Petitioner cites the *Preliminary Results* in which the Department stated that "Jiangxi Gangyuan was unable to provide source documentation for payment of slag sales during verification."[174] *See* Petitioner's Rebuttal Brief at 32 - 33.

Petitioner disagrees with Respondents' argument that the Department previously granted a by-product offset to a respondent that did not track the inventory of its by-product in its accounting system. In that instance, Petitioner argues that the Department was able to review the accounting system that tracked the sales of the by-product.[175] Petitioner contends that Jiangxi Gangyuan does not have a corresponding system to verify the sale of slag. Moreover, Petitioner notes that

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[166] *Citing* Letter from Respondents to the Department of Commerce Regarding Silicon Metal from the People's Republic of China at 12 -1 3, dated June 11, 2009.
[167] *Citing Citric Acid and Certain Citrate Salts From the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value*, 74 FR 16838 (April 13, 2009) ("*Citric Acid from the PRC*"), and accompanying Issues and Decision Memorandum at Comment 17.
[168] *Citing* Jiangxi Gangyuan Verification Report at 26 and Exhibit 30.
[169] *Id*.
[170] *Citing* Respondents' April 3 Surrogate Value Submission at Exhibit 24.
[171] *Citing* Respondents' July 29 Surrogate Value Submission at Exhibit 5.
[172] *Citing Chlorinated Isos* at Comment 6.
[173] *Citing Frontseating Valves from China* at Comment 10g.
[174] *Citing Preliminary Results*.
[175] *Citing Citric Acid from the PRC* at Comment 17.

Jiangxi Gangyuan acknowledges that it did not record an inventory of slag[176] and that accounting records are not generated during the sale of slag.[177] Additionally, Petitioner contends that the verification report for Jiangxi Gangyuan is silent with respect of payments of slag sales made after the POR.[178] *See* Petitioner Rebuttal Brief at 34 - 35.

Department's Position:

As stated in *Citric Acid from the PRC*, the Act allows the Department to grant an offset to costs of production for a by-product generated in the manufacturing process that is either sold for revenue or has commercial value and is reintroduced into production.[179] The Department agrees with Petitioner that the Department requires documentation on the production and sales to receive a by-product offset.[180] Since Jiangxi Gangyuan has not provided any source documentation qualifying whether payments were received for the sales of slag, the Department will continue to deny granting a by-product offset for slag for the Final Determination.

With respect to Jiangxi Gangyuan's argument that the Department confirmed Jiangxi Gangyuan produced and sold slag at verification, we disagree. As stated in the verification report, "{the Department} requested to see sales payment documents related to … slag; however company officials could not provide any."[181] Moreover, although Jiangxi Gangyuan contends that Jiangxi Gangyuan maintains records of sales but not production of slag, we note that that they did not provide sales documentation of slag as requested by the Department.[182] This distinguishes the instant case from *Citric Acid from the PRC*, in which the Department was able to verify sales documentation and the accounting system that tracked the sales of the by-product. [183] Moreover, Jiangxi Gangyuan did not have a corresponding accounting system to track the sales of slag, as evidenced by Jiangxi Gangyuan's statement that "when Jiangxi Gangyuan sells slag, it generates the weight ticket, however, no invoice or other financial accounting record is generated by the sale."[184]

[176] *Citing* Respondents Case Brief at 33.
[177] *Citing* Second JG Supp C and D at 5.
[178] *Citing* Jiangxi Gangyuan Verification Report.
[179] *See Citric Acid from the PRC* at Comment 17.
[180] *Id.*
[181] *See* Jiangxi Gangyuan Verification Report at 26.
[182] *See* Jiangxi Gangyuan Verification Report at 26 and Exhibit 31.
[183] *See Citric Acid from the PRC* at Comment 17.
[184] *See* Second JG Supp C and D at 5.

The Department notes that Jiangxi Gangyuan did present accounting records of post-POR slag sales during the verification.[185] However, since the Department is not granting a by-product offset for slag, these records are not relevant to our calculations.

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 determination of this investigation and the final weighted-average dumping margins in the *Federal Register*.

AGREE_____ DISAGREE_____

_____
Ronald K. Lorentzen
Deputy Assistant Secretary
for Import Administration

_____
Date

[185] *See* Jiangxi Gangyuan Verification Report at Exhibit 30.