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International Trade Administration
Washington, D.C. 20230

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2nd Administrative Review
POR 3/1/10 – 2/28/11
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September 19, 2012

**MEMORANDUM TO:** Paul Piquado
Assistant Secretary
for Import Administration

**FROM:** Christian Marsh
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

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

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## SUMMARY

The period of review ("POR") is March 1, 2010, through February 28, 2011. In accordance with 19 CFR 351.309, we invited parties to comment on our *Preliminary Results*.[1] Between June 4, 2012, and June 11, 2012, we received briefs and rebuttal briefs from ICL Performance Products and Innophos, Inc. ("Petitioners") and Hubei Xingfa Chemical Group Co., Ltd. ("Xingfa").

We have analyzed the comments submitted in the second administrative review of sodium hexametaphosphate ("sodium hex") from the People's Republic of China ("PRC"). As a result of our analysis, we have made changes from the *Preliminary Results*. 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*:

Comment I. Surrogate Financial Ratios
Comment II. Surrogate Value for Electricity
Comment III. Surrogate Value for Yellow Phosphorous
Comment IV. Freight

[1] *See Sodium Hexametaphosphate from the People's Republic of China: Preliminary Results of Second Antidumping Duty Administrative Review*, 77 FR 17013 (March 23, 2012) ("*Preliminary Results*").

## DISCUSSION OF THE ISSUES

### Comment I. Surrogate Financial Ratios

*Xingfa*:

- Aditya Birla Chemicals (Thailand) Ltd. ("Aditya") and Aditya Birla Grasim ("Grasim") are affiliated companies which are both a part of the Aditya Birla Group, located in India. However, Aditya's unconsolidated financial statement is not consolidated in Grasim's financial statement. Thus, the Grasim financial statements used by the Department to calculate the overhead ratio did not include Aditya's results.[3]
- The Department should not use Aditya's consolidated financial statements to calculate SG&A and profit, because the consolidated financial statement includes the results of two subsidiaries, Aditya Birla Grasoon Chemicals (Fangsengkang) Ltd. ("Aditya Grasoon") and Aditya Birla Chemicals (Europe) Ltd. ("Aditya Europe"). These two companies are located outside of Thailand, and therefore, are not representative of a Thai company.[4]
- Although overhead is not specifically listed in the Aditya unconsolidated financial statement, it can be calculated by subtracting the difference between the sum of the expenses identified in Note 16 and the cost of goods sold. The list of expenses in Note 16 does not equal the cost of goods sold, consequently, the difference is Aditya's overhead. This methodology will allow the Department to use the Aditya unconsolidated statement to calculate all ratios.
- If the Department determines that Aditya's unconsolidated financial statements do not permit it to accurately calculate overhead, two Thai chemical companies, Thai Central Chemical Public Company Limited ("Thai Central") and PTT Chemical Public Company Limited ("PTT Chemical"), could be used to calculate financial ratios.[5] If the Department uses PTT

[2] *See Sigma Corp. v. United States*, 117 F. 3d 1401 (Fed. Cir. 1997) ("*Sigma*").
[3] According to Xingfa, Note I, Schedule 23(B) of the Grasim financial statement, where Grasim lists the consolidated affiliates, Aditya is not listed. *See* Petitioners' November 18, 2011, submission at Exhibit 16.
[4] *See* Petitioners' November 18, 2011, submission at Exhibit 15, Aditya financial statement, "Statement of Profit and Loss" and in Note 16, "Financial Statement for Specific Business."
[5] Xingfa notes that in *Optical Brighteners* the Department analyzed several financial statements of Thai companies and found that Thai Central was among the companies that did not contain the details required to calculate surrogate overhead and/or SG&A ratios, and thus, could not be used. However, the Department did use PTT Chemical as it was the only financial statement on the record of that investigation found to be sufficiently detailed to calculate ratios. *See Certain Stilbenic Optical Brightening Agents from the People's Republic of China*, 77 FR 17436 (March 26, 2012) ("*Optical Brighteners*") and accompanying issues and Decision Memorandum at Comment 2.

Chemical's financial statements, it should not separately value electricity as energy costs are included in the overhead ratio.

- If the Department determines that none of the Thai financial statements are appropriate, the financial statements of two companies from the Philippines, another country on the list of possible surrogate countries, are on the record, Atlas Fertilizer Corporation ("Atlas") and Philippine Phosphate Fertilizer Company ("PhilPhos").[6]
- Tata Chemicals, although it is a producer of sodium hex, should not be used to calculate ratios as it is an Indian company, and has received countervailable subsidies.[7]
- The Department should not make adjustments to the ratios to account for electricity.

*Petitioners*:

- The Department should use the consolidated Aditya statement to calculate SG&A and profit.[8] The Department should not use Aditya to calculate overhead because Aditya does not produce yellow phosphorous[9], and thus, does not consume the amounts of electricity that Xingfa does.
- Using Xingfa's overhead calculation methodology, which is Aditya's depreciation rate and other unidentified costs, yields an overhead rate of only 4.6 percent. Tata Chemicals Ltd., which has been used in all prior past segments of this case to calculate ratios, has an overhead rate of 41.9 percent – nearly ten times the overhead rate of Aditya and five times the overhead rate of Grasim.[10] So, comparing Aditya's financial statement to other large, integrated chemical producers indicates that the overhead rate of Aditya is not representative of a company similar to Xingfa.
- The Department should use Grasim to calculate overhead. Although Grasim is located in India, the unusual circumstances of this case, *i.e.*, that energy costs are not listed in the Aditya statement, permit the Department to leave the surrogate country. In *Clearon*, the Department must consider the "relative merits" of data from different sources, none of which are the preferred source of surrogate value data.[11]
- Although Grasim's results do not consolidate Aditya, the consolidated Aditya statement does consolidate Aditya Grasoon in the PRC, which is a producer of phosphoric acid supplied to Aditya.[12] As a result, within the consolidated Aditya statement, there is significant production of phosphoric acid, which is comparable to Xingfa's own production in the PRC.
- Grasim's annual report does not indicate that any government grants or other subsidies were received during the POR. The report merely indicates that if any grants were received, they would be recognized.[13]

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[6] In the case of PhilPhos, its production of phosphate fertilizer is comparable to Xingfa's production process for sodium hex although Xingfa (thermal) and PhilPhos (wet) use different processes.

[7] *See* Petitioners' May 4, 2012, submission, at Exhibit 10, Tata financial statement at 16 and 100.

[8] *See* Memorandum to the File, from Scot T. Fullerton, Program Manager, from Paul Walker, Case Analyst, "Second Administrative Review of Sodium Hexametaphosphate from the People's Republic of China: Surrogate Values for the Preliminary Results," dated March 13, 2012 ("*Prelim SV Memo*").

[9] Yellow phosphorus is a key input to the subject merchandise.

[10] Tata produces phosphate salts, such as sodium tripolyphosphate, using various intermediate chemicals that it produces in its own plants, as well as self-generated electricity.

[11] *See Clearon Corp. v. United States*, Slip Op. 11-142 at 13 (Nov. 18, 2011) ("*Clearon*").

[12] *See* Petitioners' November 18, 2011, submission at Exhibit 15.

[13] *Id*. at Exhibit 16, at 107 and 109.

- The Thai and Philippine fertilizer companies proposed by Xingfa are not reasonable sources of surrogate ratios as they have different production processes resulting in single digit overhead ratios.[14]
- Given that the financial statement of Aditya does not separately identify electricity or energy costs, and given the need to include these costs in the normal value, the Department should calculate overhead as a ratio of overhead to materials and labor, but separately add electricity using data from Grasim as a percentage of materials and labor.

**Department's Position:** In these final results, we have calculated all financial ratios using Aditya's unconsolidated financial statement. Aditya is a producer of sodium hex, and as explained below, we find that Aditya's unconsolidated financial statement represents the "best available" information within the meaning of the statute.

In selecting surrogate values for factors of production ("FOPs"), section 773(c)(1) of the Tariff Act of 1930, as amended, (the "Act") instructs the Department to use "the best available information" from the appropriate market economy country. It is the Department's well established practice to rely upon the primary surrogate country for all surrogate values, whenever possible, and to only resort to a secondary surrogate country if data from the primary surrogate country are unavailable or unreliable.[15] Furthermore, the Department's criteria for choosing surrogate companies are the availability of contemporaneous financial statements, comparability to the respondent's experience, and publicly available information.[16] Moreover, for valuing overhead, SG&A and profit, the Department uses non-proprietary information gathered from producers of identical or comparable merchandise in the surrogate country.[17] Further, courts have recognized the Department's discretion when choosing appropriate companies' financial statements to calculate surrogate financial ratios.[18]

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[14] Although fertilizer producers utilize phosphate rock as a raw material, the process used to make "wet" phosphoric acid for fertilizers is not comparable to the production of yellow phosphorus, the precursor material to sodium hex. Fertilizer producers react phosphate rock and sulfuric acid to produce wet phosphoric acid, they do not use enormous amounts of electricity as Xingfa does. *See generally* Petitioners' May 25, 2012, submission at Exhibits 10, 11 & 12; Xingfa's May 4, 2012, submission at Exhibit 4 (articles concerning phosphorus production and usage); Petitioners' November 18, 2011, submission at Exhibit 10 (Van Wazer describes the production of thermal phosphoric acid and the use of furnaces). Moreover, industry publications such as SRI, do not include fertilizer and phosphate salts in the same report or identify the producers as a single industry. *See* Petitioners' May 25, 2012, submission at Exhibit 12, at 7.

[15] *See, e.g., Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results and Partial Rescission of the Seventh Antidumping Duty Administrative Review,* 77 FR 15039 (March 14, 2012) ("*Fish Fillets*") and accompanying Issues and Decision Memorandum at Comment 2A; *see also Steel Wire Garment Hangers from the People's Republic of China: Preliminary Results and Preliminary Rescission, in Part, of the Second Antidumping Duty Administrative Review*, 76 FR 66903, 66905 (October 28, 2011), unchanged in final *Steel Wire Garment Hangers from the People's Republic of China: Final Results and Final Partial Rescission of Second Antidumping Duty Administrative Review*, 77 FR 12553 (March 1, 2012) ("*Hangers*").

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

[17] *See* 19 CFR 351.408(c)(4); *see also* section 773(c)(4) of the Act.

[18] *See, e.g., FMC Corp. v. United States,* 27 CIT 240, 251 (CIT 2003); affirmed *FMC Corp. v. United States*, 87 Fed. Appx. 753 (Fed. Cir. 2004) (where the Court of International Trade ("CIT") held that the Department can exercise discretion in choosing between reasonable alternatives); *see also Crawfish Processors Alliance v. United*

Record evidence indicates that Aditya produces sodium hex, which we consider to be identical merchandise. As a result, we find that Aditya's production experience is representative of Xingfa's production experience, and thus, represents the best information available for the purposes of calculating surrogate financial ratios. We disagree that the Thai Central and PTT Chemical statements are appropriate for these final results because Thai Central is primarily a producer of fertilizer and PTT Chemical is primarily a producer of petrochemicals, *i.e.*, these companies do not produce comparable merchandise. Fertilizer producers do not produce comparable merchandise due to the differences in production techniques.[19] As noted above, fertilizer producers use a wet process to leach phosphorous from phosphate rock, *i.e.*, a chemical reaction separates the phosphorous from the rock when it is mixed with acid.[20] Sodium hex producers use a thermal process to leach phosphorous from phosphate rock, *i.e.*, phosphate rock and other materials are heated in a furnace in order to separate phosphorous from the rock. We also note that the *Chemical Economic Handbook Marketing Research Report: Industrial Phosphates*, does not include products such as sodium hex, a phosphate salt, in the same industry as fertilizers.[21] Consequently, we have not considered the statements of fertilizer companies as appropriate for use in the final results.

We do not agree with the Petitioners that Aditya's financial statement is unsuitable for calculating overhead because Aditya is not as fully integrated as Xingfa, *i.e.*, it does not produce yellow phosphorous, which results in a lower overhead ratio than would be expected of an integrated producer. It is not necessary for the Department to duplicate the exact production experience of the respondent.[22] Additionally, both the Federal Circuit and CIT have upheld the Department's use of smaller companies to calculate surrogate financial ratios because "excluding smaller companies based on distortions in economies of scale would also necessitate excluding the larger companies based on economies of scale, thereby impermissibly excluding all data from all surrogate companies."[23] There is no financial statement for a large, fully integrated producer of sodium hex that is similar to Xingfa from the surrogate country, Thailand, on the record of these final results. Therefore, we find the unconsolidated Aditya financial statement represents the best available information to calculate surrogate ratios for the final results.[24]

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*States*, 343 F. Supp.2d 1242, 1251 (CIT 2004) ("If Commerce's determination of what constitutes the best available information is reasonable, then the Court must defer to Commerce.").

[19] *See First Administrative Review of Sodium Hexametaphosphate from the People's Republic of China: Final Results of the Antidumping Duty Administrative Review*, 75 FR 64695 (October 20, 2010) and accompanying Issues and Decision Memorandum at Comment 4.

[20] *See generally* Petitioners' May 25, 2012, submission at Exhibits 10, 11 & 12; Xingfa's May 4, 2012, submission at Exhibit 4; Petitioners' November 18, 2011, submission at Exhibit 10.

[21] *See* Petitioners' May 25, 2012, submission at Exhibit 12, at 8.

[22] *See Nation Ford Chem. Co.* v. *United States*, 166 F.3d 1373, 1377 (Fed. Cir. 1999) *citing NFC I*, 985 F. Supp. 133, 137 (CIT 1997) (while a surrogate value must be as representative of the situation in the NME country as is feasible, the Department need not duplicate the exact production experience of the respondent at the expense of choosing a surrogate value that most accurately represents the fair market value of an input).

[23] *See Lifestyle Enter. v. United States*, 768 F. Supp. 2d 1286, 1306 (CIT 2011) *citing Dorbest Ltd. v. United States*, 604 F.3d 1363, 1374 (Fed. Cir. 2010).

[24] We note that Aditya's consolidated financial statement contains the results of two non-Thai companies, Aditya Grasoon and Aditya Europe. As a result, we have relied upon Aditya's unconsolidated financial statement to calculate surrogate financial ratios.

Regarding the Petitioners' argument that overhead should be valued using Grasim, while SG&A and profit be calculated using Aditya, we disagree. The Department prefers not to mix and match financial ratios from different companies.[25] A company's financial ratios are a function of its total expenses, and therefore, its ratios are tied to one another. The use of Grasim's overhead ratio, while using Aditya to calculate SG&A and profit, would result in our applying an overhead ratio in the margin calculation that would bear no relationship to the SG&A and profit ratios.[26] As noted above, we find that this approach would increase the potential for double-counting or under-counting of expenses because different companies may classify expenses differently. For these same reasons, it is inappropriate to use data from Grasim to modify Aditya's financial statement, as Xingfa suggests.

In the *Preliminary Results*, we stated that, because we were unable to segregate energy costs in the calculation of the surrogate financial ratios, the Department would disregard energy inputs, *i.e.*, electricity, in the calculation of normal value in order to avoid double-counting energy costs that may have been captured in the surrogate financial ratios.[27] While we agree with Petitioners that Aditya's financial statement does not contain the full level of detail that the Department ideally prefers, it does provide sufficient detail for the Department to calculate the overhead ratio. Moreover, by including only depreciation in Aditya's calculation of overhead, we have explicitly excluded energy costs from the surrogate financial ratios. In this way, energy costs may be included in normal value in accordance with section 773(c)(3) of the Act, which states that normal value for non-market economies shall be determined on the basis of the FOPs utilized in producing the merchandise, including amounts of energy and other utilities consumed. Consequently, consistent with *Citric Acid*, electricity may be included as an FOP in normal value as there is no double-counting of energy costs.[28]

Regarding the Philippine financial statements, the Indian financial statement and the use of the consolidated Aditya statement, which includes the results of companies outside of Thailand, consistent with *Fish Fillets* and *Hangers*, because we have useable financial statements from a producer of identical merchandise in the surrogate country, there is no need to rely on financial

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[25] *See Glycine from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 74 FR 41121 (August 14, 2009) and accompanying Issues and Decision Memorandum at Comment 1 (rejecting financial statements that did not contain a suitable profit figure).

[26] *See Persulfates from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 68 FR 6712 (February 10, 2003) ("*Persulfates*") and accompanying Issues and Decision Memorandum at Comment 9 (where the Department did not mix and match financial ratios from different companies); *see also Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Final Results of the Antidumping Duty Administrative Review and New Shipper Reviews*, 74 FR 11349 (March 17, 2009) and accompanying Issues and Decision Memorandum at Comment 1.A (where the Department rejected the argument that portions of a surrogate company's ratios should be used due to the interconnectedness of overhead, SG&A and profit).

[27] *See, e.g., 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) and accompanying Issues and Decision Memorandum at Comment 2.

[28] *See Citric Acid and Certain Citrate Salts from the People's Republic of China: Final Results of the First Administrative Review of the Antidumping Duty Order*, 76 FR 77772 (December 14, 2011) ("*Citric Acid*") and accompanying Issues and Decision Memorandum at Comment 1 (where the Department found that including water as a factor of production did not double-count water costs because there was no evidence that water was captured in overhead) .

statements from outside the primary surrogate country. As a result, we have not considered the financial statements of Atlas, PhilPhos and Tata for the final results.

**Comment II. Surrogate Value for Electricity**

*Xingfa*:

- If the Department uses surrogate financial statements which separate energy costs, and allow for energy costs to be valued as factors of production, the Department should use data from the Electricity Generating Authority of Thailand, *Annual Report 2010: Key Statistical Data* ("*EGAT Report*").[29]
- A simple average should not be calculated using the *EGAT Report* as the Department did in the *Activated Carbon SV Memo*.[30] Nor should the Department use the company-specific methodology as it did in the *Silicon Metal SV Memo* [31] because it does not represent a country-wide or publicly available rate.
- Disagrees with the Petitioners' contention that the electricity surrogate value calculated in *Galvanized Wire*, using the *EGAT Report*, is not a national average.[32]
- The issue in *Citric Acid* was the proper classification of water that was used both as an energy input and a direct material input in the production process. However, one of the respondents had refused to break out the water used in production and the water used for energy. So, as facts available the Department treated total water consumption as a direct material input and none as energy.[33] The Department's normal practice is to treat electricity as an energy cost, separate from direct material inputs.[34]

*Petitioners*:

- Provided calculations which indicate that electricity is the single most important input in the production of sodium hex.[35]

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[29] *See* Xingfa's May 4, 2012, submission at Exhibit 17, *citing* Memorandum to the File, from Katie Marksberry, International Trade Analyst, through Catherine Bertrand, Program Manager, "Investigation of Galvanized Steel Wire from the People's Republic of China: Surrogate Values for the Preliminary Determination," dated October 27, 2011, at 10, and Attachment 8 ("*Galvanized Wire SV Memo*") (where the Department used the Overall Average Sales Price as calculated and provided in the *EGAT Report*).

[30] *See* Xingfa's May 4, 2012, submission at Exhibit 23, *citing* Memorandum to the File, from Catherine Bertrand, Program Manager, from Katie Marksberry, International Trade Specialist "Fourth Administrative Review of Certain Activated Carbon from the People's Republic of China: Surrogate Values for the Preliminary Results," dated April 4, 2012 ("*Activated Carbon SV Memo*").

[31] *See* Xingfa's May 4, 2012, submission at Exhibit 4, *citing* Memorandum to the File, from Rebecca Pandolph, International Trade Complaint Analyst, through Howard Smith, Program Manager, "Antidumping Duty Administrative Review of Silicon Metal from the People's Republic of China: Factor Valuation Memorandum," dated March 1, 2012, at 5, and Attachment 6 ("*Silicon Metal SV Memo*").

[32] *See* Petitioners' November 18, 2011, submission at 14, note 36.

[33] *See Citric Acid* at Comment 1.

[34] *See, e.g.*, *Silicon Metal SV Memo*.

[35] Because these calculations are proprietary, *see* Petitioners' June 4, 2012, submission at 4-5. According to the *China Chemical Reporter*, yellow phosphorus, the precursor material to sodium hex, is a product with high energy consumption, requiring 13,500-15,000 kWh of electricity to produce one ton of yellow phosphorous. *See* Petitioners' February 9, 2012, submission at Exhibit 1, "Initial achievements in readjustment to yellow phosphorus industrial policy," *China Chemical Reporter*, October 6, 2008.

- Energy costs must be valued as an FOP and cannot be subsumed in overhead in accordance with section 773(c)(3) of the Act.[36]
- In *Bicycles*, the Department found that an input should be separately valued, rather than subsumed in overhead, if it was "essential for producing the finished product."[37]
- In *Citric Acid*, the Department found that water was a necessary direct input. Although water was not reflected in the surrogate company financial statement, the Department included water in the normal value calculation and applied the overhead rate to materials, labor and energy costs calculated from factor values so as to not double-count the water costs.[38]
- It is not reasonable to conclude that Aditya would classify direct electricity costs incurred in the production of phosphorus as depreciation or the residual between cost of goods sold and other costs as Xingfa would suggest.
- The *EGAT Report* is an inappropriate source to value electricity because it does not include electricity rates charged to end users, nor is there any evidence that EGAT sells to end users. The *EGAT Report* clearly shows that its function is to sell electricity to regional electric utilities such as the Metropolitan Electricity Authority ("MEA") and the Provincial Electric Authority ("PEA"). According to the *EGAT Report*, sales to regional electric utilities accounted for 98.02% of its sales in 2010.[39] Xingfa is an end user of electricity, not a municipal or regional utility, and Xingfa has asserted that it qualifies for a separate rate in this proceeding. Accordingly, it cannot avail itself of electricity rates reserved to public utilities, rates which are not relevant to this proceeding.
- The PEA rate in the *Silicon Metal SV Memo* used to calculate a base rate was taken from the publication, *Thailand Energy Regulatory Developments 2009*, with an effective date of October 2000.[40] The MEA data give an effective date of July 2011. Consequently, the MEA data are more contemporaneous than the PEA data and should be used in the final results.
- Electricity rates in Thailand involve a base charge plus various other charges, all of which should be included in any electricity surrogate value.[41] Using the MEA data to value electricity would accomplish this.

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[36] *See* Xingfa's May 4, 2012, submission at Exhibit 12, *citing* Memorandum to the File, from Shawn Higgins, International Trade Complaint Analyst, through Robert Bolling, Program Manager, "Antidumping Duty Investigation of Certain Stilbenic Optical Brightening Agents from the People's Republic of China: Surrogate Value Memorandum," dated October 27, 2011, at 4 and Attachment 6 ("*Optical Brighteners SV Memo*"); *Galvanized Wire SV Memo* at 15-16.

[37] *See Notice of Final Determination of Sales at Less Than Fair Value: Bicycles from the People's Republic of China*, 61 FR 19026, 19040 (April 30, 1996) ("*Bicycles*").

[38] *See Citric Acid* at Comment 1; *see also Malleable Iron Pipe Fittings From the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 71 FR 37051 (June 29, 2006) and accompanying Issues and Decision Memorandum at Comment 18 (where the Department stated that cooling and cleaning of fittings is essential to the production process, and significant amounts of water are used in the production of subject merchandise, *i.e.*, "water is not incidentally or occasionally consumed in production of the subject merchandise but is a significant material input").

[39] *See* Petitioners' November 18, 2011, submission at Exhibit 13, *EGAT Report* at 102.

[40] *Id*., letter on behalf of Globe Metallurgical at 13.

[41] The Thailand Board of Investment data submitted by Xingfa show that Thai electricity rates include a "Demand Charge" (per kW or per kWh), plus an "Energy Charge" or "Service Charge." Moreover, the data from the *Silicon Metal SV Memo* confirm that multiple charges must be taken into account.

- It is misleading for Xingfa to claim that the MEA rates are company specific, as the rates are established according to a published formula. A formula has the advantage that it can be applied to Xingfa's electricity inputs to yield a more accurate surrogate value.
- The MEA electricity rates are widely available in Thailand. Indeed, the publication *Thailand Energy Regulatory Developments 2009*, which was used in the *Silicon Metal SV Memo* and is advocated by Xingfa, reports the "Electricity Tariffs" for each rate category with the subtitle "Municipal Electricity Authority," *i.e.*, MEA.[42]
- Xingfa did not provide the proper supporting documentation for its electricity usage rate. As a result, the Department should apply adverse facts available ("AFA") to Xingfa because it did not provide adequate supporting documentation for its electricity usage.

**Department's Position:** In these final results, we have valued electricity using MEA data and the calculation methodology used in the *Silicon Metal SV Memo*. As explained below, we find the MEA data represents the "best available" information within the meaning of the statute.

The record contains three potential sources to value Xingfa's electricity: the *EGAT Report*, PEA and MEA. We find that all three sources are from an approved surrogate country, publicly available and specific to the input. Record evidence indicates that the *EGAT Report* and MEA are contemporaneous[43] to the POR. The PEA data used in the *Silicon Metal SV Memo* methodology are 5 years[44] outside the POR. Because this data is not contemporaneous to the POR, and because no party has argued that electricity should be valued using PEA data, we have not used PEA for the final results.

According to the *EGAT Report*, EGAT is a producer and transmitter of electricity to utilities such as MEA, which in turn sell to end users.[45] Thus, EGAT sells electricity at a wholesale price to MEA, and MEA then sells electricity at a retail price to end users.[46] The Thai Energy Regulatory Commission ("ERC") approves tariffs and issues licenses in order to regulate Thailand's energy sector in order to make it more rules-based and transparent.[47] We note that the ERC has issued licenses to EGAT for the generation and transmission of electricity, but has not issued any licenses for the distribution of electricity.[48] The ERC has issued licenses to MEA for the distribution of electricity.[49] Thus, the record indicates that the *EGAT Report* provides wholesale prices to utilities, rather than a broad market average to end users such as Xingfa.

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[42] *See* Xingfa's May 4, 2012, submission, at Exhibit 16, *Thailand Energy Regulatory Developments 2009* at 5.
[43] *See* Petitioners' November 18, 2011, submission, at Exhibit 12. While the 2009 MEA data fall three months outside the POR, we note that the CIT has found data six months outside the POR to still be considered contemporaneous. *See Hebei Metals & Minerals Import & Export Corp. and Hebei Wuxin Metals & Minerals Trading Co., Ltd. v. United States*, 366 F. Supp. 2d 1264, 1275 (CIT 2005).
[44] *See* Xingfa's May 4, 2012, submission at Exhibit 12, *Costs of Doing Business in Thailand* at 6.
[45] *See* Xingfa's November 18, 2011, submission at Exhibit 13.
[46] *Id*.
[47] *See* Xingfa's May 4, 2012, submission at Exhibit 16, *Thailand Energy Regulatory Developments 2009*, at 1.
[48] *Id*. at 4.
[49] *Id*.

We further note that according to the ERC, electricity prices in Thailand are comprised of three parts, a base tariff, the fuel adjustment mechanism and a value added tax ("VAT").[50] While the *EGAT Report* does identify a price to direct customers, it does not identify which of the above-named portions of the electricity tariff are included, and importantly, does not indicate whether the *EGAT Report*'s direct customer price is exclusive of the VAT. As noted above, the Department prefers surrogate values to be tax and duty exclusive. Because EGAT's electricity prices do not represent broad market averages to end users, and because it has not been demonstrated that these prices are tax and duty exclusive, we have not valued Xingfa's electricity using the *EGAT Report* for the final results.

For these final results, we have used the MEA to calculate the electricity surrogate value. In order to ensure that the surrogate value includes all applicable portions of the electricity tariff in Thailand, and in order to ensure that the surrogate value is tax and duty exclusive, we have calculated electricity using the methodology used in the *Silicon Metal SV Memo*.[51]

As we noted in the *Preliminary Results*, when the Department is unable to segregate, and therefore, exclude energy costs from the calculation of the surrogate financial ratios, it is the Department's practice to disregard the respondent's energy inputs in the calculation of normal value in order to avoid double-counting energy costs which have necessarily been captured in the surrogate financial ratios.[52] As noted above in Comment I, we ensured there are no energy expenses in Aditya's overhead ratio, so that electricity and other energy factors may be included in the normal value calculation without risk of double-counting.

We find Petitioners' argument to apply AFA to Xingfa to be unpersuasive. Section 776(a) of the Act provides that the Department shall use facts otherwise available in reaching the applicable determination, if necessary information is not available or on the record, or if an interested party: (A) withholds information that has been requested by the Department; (B) fails to provide such information in a timely manner or in the form or manner requested; (C) significantly impedes a proceeding under the antidumping statute; or (D) provides such information but the information cannot be verified. Because the Department did not request additional information from Xingfa, which the Petitioners identify as being missing from the record, Xingfa did not fail to provide requested information or otherwise impede the Department's proceeding. Accordingly, we have no basis to apply facts available to Xingfa.

**Comment III. Surrogate Value for Yellow Phosphorous**

*Xingfa*:

- The Department should value the yellow phosphorous consumed by Xingfa using Indian Harmonized Tariff Schedule ("HTS") 2704.70.30, "Yellow Phosphorous," because none of the countries on the surrogate country list have imports specific to yellow phosphorous.

[50] *Id.*
[51] *See Silicon Metal SV Memo*.
[52] *See 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, 16839 (April 13, 2009) and accompanying Issues and Decision Memorandum at Comment 2.

- There are many different types of phosphorus, but the three major categories are yellow phosphorus, red phosphorus and black phosphorus.[53] These categories have very different production requirements, and thus, have very different values.[54]
- None of the countries on the Department's list of surrogate countries have a breakout for yellow phosphorus. India, on the other hand, has HTS breakouts for black, red and yellow phosphorous which are significantly different products, and is therefore, a more specific source to value this factor of production.[55]

*Petitioners*:
- For the *Preliminary Results*, the Department relied upon Thai HTS 2804.70.00000 "Phosphorus," which was originally proposed by Xingfa.
- Disagrees with Xingfa's speculation that because Thai import statistics do not separately break out yellow or red phosphorus, the unit values are not reliable. Record evidence does not indicate that red phosphorus prices are higher than yellow phosphorus prices. For example, Indian import statistics show that, on average, imports of red phosphorus into India were made at 111.33 Rs/kg, but imports of yellow phosphorus had an average unit value of 169.63 Rs/kg.[56]
- Variation of prices by country of import does not indicate that the product is not yellow phosphorus, as the vast majority of world production of phosphorus is yellow phosphorus due to the much higher demand for yellow phosphorous over red.[57]
- The Department should not value yellow phosphorous using Indian import statistics because India is not economically comparable to the PRC.
- If the Department does not value yellow phosphorous using Thai import statistics for the final results, Indonesian import statistics would be the best alternative source for this surrogate value.

**Department's Position:** As noted above, in choosing the best available information to value FOPs, it is the Department's well established practice to rely upon the primary surrogate country for all surrogate values, whenever possible, and to only resort to a secondary surrogate country if data from the primary surrogate country are unavailable or unreliable.[58] Xingfa reported that it consumes yellow phosphorous in the production of subject merchandise.[59] Here, we find that the description of Thai HTS 2804.70.00000 "Phosphorus," is sufficiently close to the FOP and serves as a reliable factor value. Xingfa has not shown that the value provided in Thai HTS 2804.70.00000 is aberrational, or that it is inclusive of other types of phosphorous. Moreover,

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[53] White phosphorus almost always contains some red phosphorus and therefore appears yellow - for this reason it is called yellow phosphorus. Red phosphorus is produced by heating white phosphorus to 2500 C, while violet phosphorus is produced by annealing red phosphorus above 5500 C. Black phosphorus is produced under high pressures. For a discussion regarding the details of the production process for each form of phosphorus, *see* Xingfa's May 4, 2012, submission at Exhibit 8.

[54] For example, black phosphorus production process typically requires high pressurization, and therefore, its costs and value are much higher than other types of phosphorus. *Id*.

[55] *See* Xingfa's May 4, 2012, submission, at Exhibit 5.

[56] *See* Xingfa's May 4, 2012, submission, at Exhibit 7.

[57] *Id*.; *see also* Xingfa's May 4, 2012, submission, at Exhibit 8, *Wikipedia*, "Production," at 6.

[58] *See* 19 CFR 351.408(c)(2); *Fish Fillets* at Comment 2A; *Steel Cylinders* Comment II.A.

[59] *See, e.g.*, Xingfa's July 1, 2011, submission at Exhibit 4.

the record does not support Xingfa's argument that the Thai HTS value should be rejected because it might include more expensive red phosphorous. On the contrary, the record evidence indicates that red phosphorous, although it is further processed yellow phosphorous, is less valuable that yellow phosphorus. This differs from our decision to use Indian data for ferro-phosphorous because, as we noted in the *Preliminary Results*, none of the economically comparable countries had a HTS specific enough to ferro-phosphorous.[60] For these reasons, we have continued to value yellow phosphorous using Thai HTS 2804.70.00000.

**Comment IV. Freight**

A. *Capping the Sigma Distance*

*Xingfa*:

- In the *Preliminary Results,* the Department stated that it used 150 kilometers as the capped *Sigma* freight distance for calculating inland freight expenses. The Department should have based *Sigma* freight distances on the data in Xingfa's Section D questionnaire response.[61]
- If the Department bases this capped freight on its Section D questionnaire response, then no barge freight will be incurred by Xingfa for its inputs, as no distance is greater than 150 km.

*Petitioners*:

- Xingfa did not provide evidence that the Department erred in applying the *Sigma* distance. The only evidence supplied by Xingfa was a spreadsheet indicating its suppliers' distances, but not invoices for freight costs or shipping bills.
- Xingfa concedes that some of the raw materials travelled by truck and barge. Hence, it is unclear how the Department erred by including truck and barge freight costs.
- Consistent with *Stainless Steel Bar*, it is too late for Xingfa to claim a clerical error, unless it also provides supporting evidence that is reliable and consistent with evidence already found in the record.[62]

**Department's Position:** We agree with Xingfa that it is the Department's practice, pursuant to *Sigma*[63], to calculate a surrogate freight cost using the shorter of the reported distance from the input supplier to the factory or the distance from the closest PRC port to the factory.[64] We note

[60] The Department valued ferro-phosphorus using an Indian HTS because there were no HTS categories specific to ferro-phosphorous. *See Preliminary Results*, *see also* Prelim SV Memo at 6-7.

[61] *See* Xingfa's July 1, 2011, submission at Exhibit 5.

[62] *See Stainless Steel Bar from India: Final Results of Antidumping Duty Administrative Review*, 75 FR 54090 (September 3, 2010) ("*Stainless Steel Bar* ") and accompany Issues and Decision Memorandum at Comment 2 (where the Department permitted a respondent to correct an alleged clerical error first identified in its case brief only because the respondent submitted copies of invoices related to the clerical error along with copies of the corresponding shipping documentation, bills of lading, customs documentation, and brokerage and handling documentation).

[63] *See Sigma*, 117 F.3d at 1408.

[64] *See Final Determination of Sales at Less Than Fair Value: Certain Cut to Length Carbon Steel Plate from the People's Republic of China*, 62 FR 61964, 61977 (November 20, 1997); *see also Folding Metal Tables and Chairs from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and New Shipper Review, and Revocation of the Order in Part*, 76 FR 66036 (October 25, 2011) and accompanying Issues and Decision Memorandum at Comment 3.

that although Xingfa provided this information to the Department, it did not properly calculate the capped *Sigma* distances in its Section D response. After the *Preliminary Results*, Xingfa provided the correct calculation for the capped *Sigma* distances. Therefore, for the final determination, for Xingfa, we have applied the corrected distances from the supplier to Xingfa's facilities, capped at the distance to the closest port, as reported by Xingfa in its section D response.

B. *Surrogate Value for Truck Freight*

*Xingfa*:

- In the *Preliminary Results*, the Department calculated all inland truck freight using the World Bank's *Doing Business 2012: Thailand*. However, the freight costs reported in *Doing Business* are for shipping 20-foot standard containers. Xingfa's export shipments are not containerized until they reach the port for export at Shanghai.
- The costs of containerization at the port of export are included in the brokerage fees paid to Xingfa's broker.[65] Thus, there is no basis to use a cost for containerized domestic truck transport as the surrogate.
- Inputs purchased by Xingfa were transported to its facilities by truck and barge, and are not containerized because neither barges nor Xingfa's trucks are suited to container transport.[66]
- Hence, for the final results, the Department should value truck freight using a value which does not include containerization, Express Transportation Organization of Thailand ("ETO"). Xingfa notes that this source has been used in several other cases.[67]

*Petitioners*:

- The Department's policy is to select, when possible, surrogate values that are product-specific, representative of a broad market average, publicly available, contemporaneous with the period of review, and exclusive of tax and duties. Where there are reliable, publicly available data that are contemporaneous, such as *Doing Business*, the Department has rejected the non-contemporaneous data, such as ETO.[68]
- An APEC report explains that ETO, a Thai government enterprise, was closed down in 2005 due to its inefficient operation and the financial burden it created.[69] Thus, it cannot be assumed that ETO was charging market rates, and is therefore, unreliable as a source for a surrogate value for truck freight..
- The distinction claimed by Xingfa – that there is a difference between containerized and non-containerized truck freight rates – is not supported by the ETO data. Specifically, the ETO data refer to "road transportation" and "Rate of Charter in ETO Truck Load (Charter

[65] *See* Xingfa's October 24, 2011, submission at 3.
[66] *See* Xingfa's May 4, 2012, submission at Exhibit 14, "Barge" at 2, noting that barges are used for low-value bulk items, such as the coal, sulfur and sodium carbonate shipped by barge to Xingfa's facilities.
[67] *See Activated Carbon SV Memo*
[68] *See, e.g., Certain Kitchen Appliance Shelving and Racks from the People's Republic of China: Final Results of the First Antidumping Duty Administrative Review*, 77 FR 21734, (April 4, 2012) and accompanying Issues and Decision Memorandum at 13.
[69] *See* the Petitioners' May 25, 2012, submission at Exhibit 4, *The Impacts and Benefits of Structural Reforms in Transport, Energy and Telecommunications Sectors*, Chapter 12, "Road Transport in Thailand," as published by APEC.

Service)" and the source of ETO rates also indicate that the rates are "maximum cargo load 13 tons per truck." [70]

- From this description, it is not clear whether the truck rates apply to enclosed trailers, flatbed trailers, container/trailer combinations, or all of the foregoing. Stated differently, if the ETO data provided separate rates for containerized and non-containerized truck freight, there might be a factual basis on which to argue that the distinction causes a difference in rates. But, without such information, the source documents do not support the argument Xingfa urges.
- Citing a *Wikipedia* entry, Xingfa argues for the first time in its case brief that its FOPs are not containerized because neither barges, nor Xingfa's trucks, are suited to container transport.[71] A *Wikipedia* entry can hardly substitute for facts known to Xingfa that could have been submitted in response to the Department's questionnaire or supplemental questionnaire.
- Accordingly, there is no record evidence to support Xingfa's allegations that inbound raw materials were not shipped in containers.
- For the above stated reasons, the Department should value truck freight using *Doing Business: Thailand 2011*.

**Department's Position:** We agree with the Petitioners that the best available information with which to value truck freight is *Doing Business: Thailand 2011*. The value for truck freight in *Doing Business: Thailand 2011* is publicly available and contemporaneous with the POR. In contrast, the values from ETO are not contemporaneous with the POR as they predate the POR by five years. Xingfa did not indicate in its questionnaire responses whether their inputs were containerized or not. Nor is there record evidence as to whether ETO's values are for containerized or non-containerized products. Given the contemporaneous nature of the values from *Doing Business: Thailand 2011*, and given that neither value is more specific than the other with respect to the truck freight expenses incurred by Xingfa, we find that *Doing Business: Thailand 2011* represents the best information with which to value truck freight for these final results. In addition, although no party has argued we do so, because now we have a contemporaneous *Doing Business: Thailand 2011*, we have updated the brokerage and handling surrogate value. [72]

C. *Surrogate Value for Barge Freight*

*Xingfa*:

- In the *Preliminary Results*, the Department valued inland freight charges by boat using Indonesian freight rates for the month of September 2011, with weight calculated on a containerized basis. This is not an accurate basis for the calculation of a surrogate value for barge freight because the inputs shipped to Xingfa by barge were not containerized.

[70] *See* Xingfa's May 4, 2012, submission at Exhibit 12, *Optical Brighteners SV Memo*, Attachment 8, "Fuel Costs, Air, Sea, Rail and Road Freight Rates and Air Fares," *Costs of Doing Business in Thailand* at 5.
[71] *See* Xingfa's June 4, 2012, submission at 13.
[72] At the *Preliminary Results*, the Department valued brokerage and handling using *Doing Business: Thailand 2012*, and deflated this value to be contemporaneous to the POR. As noted above, the record now contains a contemporaneous *Doing Business: Thailand 2011*, which need not be deflated.

- As noted above, if the Department properly uses the *Sigma* freight distances provided by Xingfa, there will be no need to use barge rates to calculate inland freight transport costs.
- The Department's standard practice for valuing barge freight rates has been to use the price data reported by the Ministry of Shipping, Road Transport & Highways (India) for the 2007-2008 period, whether or not the primary surrogate country was India, because alternative rates have not been found in the public domain. [73]

*Petitioners*:

- The Department does not have a "standard practice" to prefer factor values from a country that is not economically comparable. In prior cases, Indian barge rates were used solely because an alternative from an economically comparable country was not publicly available.
- There is no logical reason that a container could not be placed on a barge, or that containerized barge rates would be different than bulk rates.
- The source document used by the Department does not mention or distinguish containerized versus other rates.[74]

**Department's Position:** We continue to find that Indonesian freight rates represent the best available information for valuing barge freight in these final results. As noted above, in choosing the best available information to value FOPs, it is the Department's well-established practice to rely upon the primary surrogate country for all surrogate values, whenever possible, and to only resort to a secondary surrogate country if data from the primary surrogate country are unavailable or unreliable.[75] Because there is no barge freight surrogate value on the record of this review for Thailand, the Department, in accordance with section 773(c)(4) of the Act,[76] looked to the list of countries on the surrogate country list that were found to be economically comparable to the PRC.[77] As data were available for a country on the surrogate country list, Indonesia, the Department need not look to India for a barge freight surrogate value. Although Xingfa has argued that the Indonesian data are inappropriate because they represent a containerized rate, the record evidence does not indicate whether the Indonesian value represents containerized or non-containerized products. As a result, we continue to value barge freight using Indonesian freight rates.

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[73] *See Citric Acid and Certain Citrate Salts From the People's Republic of China: Preliminary Results of the First Administrative Review of the Antidumping Duty Order; and Partial Rescission of Administrative Review,* 76 FR 34048 (June 10, 2011) ("*Citric Acid*"), unchanged in final results (Indonesia was the primary surrogate country and Indian barge rates were used).

[74] *See Prelim SV Memo* at Exhibit 6, "Prices for Indonesian Freight Forwarded PT. Mantap Abiah Abadi," September 29, 2011.

[75] *See* 19 CFR 351.408(c)(2); *Fish Fillets* at Comment 2A; *Steel Cylinders.*

[76] *See* section 773(c)(4) of the Act (the Department "in valuing factors of production . . .shall utilized, to the extent possible, the prices or costs of factors of production in one or more market economy countries that are – (A) at a level of economic development comparable to the nonmarket economy country.").

[77] *See Preliminary Results*, 77 FR at 17014.

**Comment V. Coal**

A. *Surrogate Value for White Coal*

*Xingfa*:

- The white coal Xingfa purchased fits the parameters of coking coal, although the Department misclassified it under an inappropriate sub-category of bituminous coal.
- White coal is used in the production of yellow phosphorus as a carbon source, not as an energy source. In the last review, Xingfa used coke for the same purpose.[78] Either coke or coking coal can serve as the carbonaceous material used in the production process of making yellow phosphorus in an electric arc furnace.[79]
- White coal clearly fits the classification for coking coal both in terms of general industry standards as well as under the Thai Tariff Schedule where, under Subheading Note 2 of Chapter 27, bituminous coal is defined as having a calorific value limit equal to or greater than 5,833 kcal/kg.[80] Under the Thai HTS, bituminous coal is broken out into two sub-categories: 2701.12.10 - coking coal, and 2701.12.90 - other.[81]
- Thai HTS 2701.12.90 is the sub-category for steam or thermal coal used as an energy source. Thus, Xingfa's white coal, which is not used as an energy source, should be classified under Thai HTS 2701.12.10, coking coal.
- In a recent review, the Department confronted a similar issue regarding the proper HTS classifications for bituminous coal, coking coal and steam coal.[82] Recognizing that the coking coal used by respondents in that review met the kcal threshold for bituminous coal, the Department used Thai HTS 2701.12 as the basis for its surrogate value for coking coal. Accordingly, the Department should select either Thai HTS 2701.12, the generic classification of bituminous coal, as was done for bituminous coking coal in the *Activated Carbon SV Memo*, or the more specific classification for bituminous coking coal, Thai HTS 2701.12.10.

*Petitioners*:

- Xingfa failed to supply any support for its claim that it uses white coal *in lieu* of coke, as it did in the prior review and investigation. When asked by the Department to support this response, Xingfa submitted a purchase order alleged to describe the minimum specifications of the white coal.[83]
- The purchase order is not evidence of the actual grade of the coal used by Xingfa. When the Department requested a chemical analysis or other evidence to support the caloric value of the white coal, Xingfa stated that it does not have nor requires a certificate of assay for coal, but instead verifies the characteristics of the coal and decides whether to accept it, without

[78] *See* Xingfa's December 22, 2011, submission at 5.
[79] *See* Xingfa's May 4, 2012, submission at Exhibit 3, which describes the use of "carbonaceous material (coal, coke, *etc*.)" in the production of elemental (*i.e.,* white or yellow) phosphorus.
[80] *See* Xingfa's September 15, 2011, submission at Exhibit 2.
[81] *Id*.
[82] *See Activated Carbon SV Memo*, found in Xingfa's May 4, 2012 submission.
[83] *See* Xingfa's December 22, 2011, submission at 11.

submitting any laboratory report or analysis to support the alleged carbon content and calorific values.[84]

- Xingfa should not be permitted to obtain a lower surrogate value by withholding evidence that it alone possesses, particularly where the record indicates that the coal used by Xingfa had a high calorific value and high carbon content.[85]
- The purchase order submitted by Xingfa does not reference bituminous coal.[86] Given independent evidence that white coal refers to calcined or "up-graded" and further-processed coal, the record supports the conclusion that the surrogate value should be based on imports of anthracite, not bituminous coal.[87]

**Department's Position**: While there is some conflicting evidence on the record, the kcal value of Xingfa's white coal matches four different types of coal. According to the International Energy Agency ("IEA"), bituminous coal, hard coal, anthracite and coking coal all have kcal values which fall within the range of Xingfa's white coal.[88] While Xingfa has argued that its white coal should be valued using coking coal, because coking coal was used in past segments by Xingfa, we note that each segment of a proceeding has its own unique facts and underlying information.[89] When the Department requested the specification of the type of coal consumed by Xingfa,[90] Xingfa provided a purchase order.[91] The purchase order provided by Xingfa specifies that the type of coal consumed by Xingfa is anthracite and not coking coal. Based on this evidence, we determine that for the final results, Thai HTS 2701.11.00000, "Anthracite" represents the best available information to value Xingfa's white coal.

B. *Surrogate Value for Crude Coal*

*Xingfa*:

- The crude coal Xingfa consumed in this review is the same crude coal consumed in the first review.
- The Department recently made a similar finding where coal with a calorific value below 5,833 kcal/kg was valued using Thai HTS number 2701.19, which is "Coal, other than anthracite or bituminous, whether or not pulverized, but not agglomerated."[92]

*Petitioners*:

- The Department correctly valued crude coal in the *Preliminary Results*.

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[84] Much of the content of this purchase order is proprietary, including the specifications. As a result, *see* Xingfa's December 22, 2011, submission at 11, and Exhibit 34 for more detail..

[85] *See, e.g., QVD Food Co. v. United States*, 658 F.3d 1318, 1324 (Fed. Cir. 2011) (the burden of creating an adequate record lies with interested parties and not with Commerce).

[86] *Id*.

[87] *See* Xingfa's December 22, 2011, submission at Exhibit 32.

[88] *See* Xingfa's May 4, 2012, submission at Exhibit 3, *Coal Information (2009)*, as published by the IEA, at 7.

[89] *See 1-Hydroxyethylidene-1, 1-Diphosphonic Acid from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final Rescission in Part*, 76 FR 48142 (August 8, 2011) and accompanying Issues and Decision Memorandum at Comment 2, *citing Peer Bearing Co. v. U nited States*, 587 F.Supp. 2d 1319, 1325 (CIT 2008).

[90] *See* the Department's letter dated November 23, 2011, at 8-9.

[91] *See* Xingfa's December 22, 2011, submission at Exhibit 32.

[92] *See Activated Carbon SV Memo*.

- Crude coal should be valued solely by reference to the calorific value of the coal, which in this case should be lignite because lignite has a lower calorific value than bituminous coal.[93]

**Department's Position:** For these final results, the Department has continued to value crude coal using a value for lignite coal (*i.e.*, Thai HTS 2621.90.00090). As noted by the Petitioners, Xingfa's crude coal has a calorific value of less than 4,165 kcal/kg. Based on information placed on the record of this review, lignite coal has a calorific value between 3,055 kcal/kg and 4,611 kcal/kg, while sub-bituminous coal has a calorific value equal to or greater than 4,165 kcal/kg. As Xingfa's crude coal clearly falls into the range of calorific values for lignite coal, the best available information on this record to value crude coal is Thai HTS 2621.90.00090.

**Comment VI. Surrogate Value for Phosphate Rock**

*Xingfa*:

- The Department should value phosphate rock using Thai HTS 2510.10.90, described as "Natural Calcium Phosphates ... Other."[94]
- The only source of the Thai HTS 2510.10.90 imports is Nauru.[95] The phosphate rock from Nauru is guano, which is formed from the accumulation of phosphorus rich droppings of sea birds.[96]
- Petitioners have submitted an article showing that one of the major fertilizer companies in Thailand has entered into a long-term arrangement to rebuild a mine and purchase guano-based phosphate rock from Nauru.[97] Therefore, imports coming into Thailand in this HTS category are of a comparable product to the phosphate rock consumed by Xingfa.
- Moreover, the courts have held that the Department need not exactly recreate the production process of the Chinese producer in selecting surrogate values.[98] Therefore, the fact that Xingfa uses phosphate rock that contains other forms of phosphate rather than phosphate rock formed from guano is irrelevant.
- Contrary to Petitioners' suggestion that the Department value this factor using an HTS that contains apatite, Xingfa notes it uses phosphate rock and not apatite to produce sodium hex.[99] In contrast, apatite has a definite chemical composition and is a separate major division of

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[93] *See* Xingfa's May 4, 2012, submission at Exhibit 3, *Coal Information* at 7.

[94] Xingfa notes that in the *Preliminary Results*, the Department did not use Thai import statistics to value phosphate rock because neither Thai HTS 2510.10.10 ("Natural Calcium Phosphates ... Apatite") nor Thai HTS 2510.10.90 ("Natural Calcium Phosphates ... Other") were specific to phosphate rock, and instead used Indonesian HTS 2510.10.9000 ("Natural Calcium Phosphates ... Unground") as the basis for the surrogate value for phosphate rock. Xingfa further notes that the Department stated that Thai HTS 2510.10.90 appears to be a mixture of guano and limestone, whereas Thai HTS 2510.10.10 may be a mineral of gemstone quality.

[95] *See* Xingfa's May 4, 2012, submission at Exhibit 1, "World Phosphate Deposits" at Table 1 and Figure 2.

[96] The other main source of phosphate rock is composed of high concentrations of phosphate bearing minerals. *See* Xingfa's May 4, 2012, submission at Exhibit 1, "Phosphorite," paragraph 1 under the "Production and Use" section.

[97] *See* Petitioners' May 25, 2012, submission at Exhibit 3.

[98] *See Nation Ford Chem. Co.* v. *United States*, 166 F.3d 1373, 1377 (Fed. Cir. 1999) *citing NFC I*, 985 F. Supp. 133, 137 (CIT 1997) (while a surrogate value must be as representative of the situation in the NME country as is feasible, the Department need not duplicate the exact production experience of the respondent at the expense of choosing a surrogate value that most accurately represents the fair market value of an input).

[99] *See* Xingfa's December 22, 2011, submission at 6.

natural calcium phosphates. Apatite, in its pure state and when its crystals are clean and clear, is sometimes used as a gemstone, but it is always characterized by its purity.[100]

- Xingfa disagrees with the Petitioners that the phosphate rock should be based on, or include, any HTS for "Apatite" because the Thai and Indonesian import data are for very small quantities at very high prices[101], which are likely to include gem quality apatite.

*Petitioners*:

- The only country that exported phosphate rock, which in actuality is guano, to Thailand under HTS 2510.10.90000 was Nauru. The average unit value of Nauru imports is so low relative to other benchmarks available in the record because it is tainted by government subsidies; the prices do not reflect arm's-length transactions and the prices may have been affected corruption.
- Xingfa's phosphate rock input differs from guano, which is formed from bird droppings. Petitioners contend that the price of phosphate rock is related to the phosphorus content. Because apatite is the highest value phosphate rock in the import statistics, it has high phosphorous content, and is most specific to the phosphate rock input consumed by Xingfa.
- According to the U.S. State Department, the government of Nauru owns the phosphate rock producer, the Republic of Nauru Phosphate Company ("RONPhos").[102] RONPhos, is extremely important to Nauru as its phosphate rock exports, which amounted to $100.2 million in 2009, was much larger than its GDP that year, $54.2 million.[103] A Thai company, Montree Group, provided funding to Nauru to restart guano production starting in 2006, the largest deal ever between the government of Nauru and a foreign private firm.[104]
- Certain important details of the agreement call into question the reliability of the value of imports of HTS 2510.10.90000 into Thailand.[105]
- As a result of this contract, Nauru's phosphate rock business was restarted and exports resumed and continued through 2010.[106] Consequently, it follows that the 2010-2011 imports from Nauru into Thailand were pursuant to the same contracts with the Montree Group. Therefore, the Department cannot rely upon the Thai import statistics to provide the market value of the imports from Nauru.
- Aside from the other issues raised by the use of the Nauru guano imports, it was reported by several sources that the president of Nauru was forced to resign because he received kickbacks on the transaction with Thailand.[107] The president resigned November 11, 2011.[108]
- In the event the Department does not value phosphate rock using a Thai HTS, Indonesian import statistics could be used to value this input.

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[100] *Id*.
[101] *See* Xingfa's June 4, 2012, submission at 3-4 for an AUV comparison of Apatite versus unground phosphate rock.
[102] *See* Petitioners' November 18, 2012, submission at Exhibit 7, at 4.
[103] It was reported that the government devoted 50 percent of its total budget to phosphate rock production in 2006. *See* Petitioners' May 25, 2012, submission at Exhibit 3.
[104] *Id*.
[105] *Id*.
[106] *See* Petitioners' November 18, 2012, submission at Exhibit 7.
[107] *Id*. at Exhibit 9; *see also* Petitioners' May 25, 2012, submission at Exhibit 3.
[108] *See* Petitioners' May 25, 2012, submission at Exhibit 3.

**Department's Position:** For the final results, we have continued to value phosphate rock using Indonesian HTS 2510.10.9000. Parties have argued that phosphate rock should be valued using either a Thai or Indonesian HTS for Apatite or a Thai HTS for Natural Calcium Phosphates, Other. However, as explained below, we continue to find that neither of these HTS categories represents the best available information.

Apatite is a natural calcium phosphate which occurs naturally in phosphate rock, and can be used in the production of yellow phosphorus, an input into sodium hex.[109] According to Global Trade Atlas ("GTA"), Thai HTS 2510.10.10 consists of very low quantities of apatite relative to the amounts consumed in this industry. In past cases the Department has rejected surrogate values of such small quantities.[110]

Both parties agree that Thai HTS 2510.10.90 is comprised of guano from Nauru. Although Xingfa states that guano from Naurau is comparable to the phosphate rock it consumed, we disagree. Record evidence indicates that guano is a different a different type of rock than is consumed by Xingfa, *i.e.*, guano is used in the production of fertilizers, not in the production of sodium hex.[111] Furthermore, guano uses a wet process to extract phosphorous.[112] Xingfa consumes a different kind of phosphate rock which requires large amounts of electricity to extract the phosphorous.[113] As such, we find that the rock consumed by Xingfa is different than the rock consumed by fertilizer producers.

As noted in the *Prelim SV Memo*, the Department conducted its own research into the historical average unit values of the two Thai HTS numbers and found that, for the past six years, imports were sporadic and the average unit values varied greatly.[114] We also noted that the Indonesian data was more specific to the input in question.[115] We note that no party has contested these points or the Indonesian data. Because we find that there is no viable Thai HTS number to value phosphate rock, we have continued to value phosphate rock using Indonesian HTS 2510.10.9000.

**Comment VII. Surrogate Value for Phosphate Slag**

*Xingfa*:

- In the *Preliminary Results*, the Department valued Xingfa's phosphate slag using imports under Thai HTS 2621.90.00090, "Slag and Ash, Other."

[109] *See* Petitioners' November 18, 2011, submission at Exhibit 4, *Hawley's Condensed Chemical Dictionary* at 87.
[110] *See, e.g.*, *Pure Magnesium from the People's Republic of China: Final Results of 2004-2005 Antidumping Duty Administrative Review*, 71 FR 61019, (October 17, 2006) and accompanying Issues and Decision Memorandum at Comment 1.
[111] *See* Petitioners' May 25, 2012, submission at Exhibit 3.
[112] *See* Petitioners' May 25, 2012, submission at Exhibit 12, *Industrial Phosphates* at 10
[113] Petitioners' May 25, 2012, submission at Exhibit 10, information from the U.S. Environmental Protection Agency which explains the fundamental differences in quality and production process between phosphoric acid used in fertilizer and phosphoric acid used to produce sodium hex.
[114] *See Prelim SV Memo* at 3.
[115] *Id*.

- The Thai HTS heading 2523 describes the products covered under this heading as "Portland cement, aluminous cements, slag cement, supersulphate cement and similar hydraulic cements, whether or not coloured or in the form of clinkers"[116]. Given the breakout of the various six-digit subheading under 2523, slag cement would be covered under Thai HTS 2523.90 "Other hydraulic cement."
- In its Section D response, Xingfa provided sample invoices of its sales of phosphate slag to cement companies.[117]
- Disagrees with Petitioners' assertions that Xingfa slag is the type of slag which must be further processed.

*Petitioners*:

- The "Explanatory Notes" to the Thai HTS indicate that subheading 2523 applies to cement, but it does not cover slag.[118]
- News articles on the record indicate that Xingfa and an affiliated company did not live up to its contract to supply phosphate slag to a PRC cement producer.[119] Xingfa's phosphate slag is a raw material used to manufacture cement; it is not cement.
- Xingfa has stated that is does not further process its phosphate slag, although slag must be further processed to be used in cement.
- Xingfa did not dispute the customs rulings which distinguishes "slag" from cement.[120]
- Slag is primarily silica and carbon, with a small amount of phosphorus, which is the result of producing pure phosphorus and is, in fact, less valuable as a by-product than ferro-phosphorus. However, the value proposed by Xingfa for phosphate slag exceeds the surrogate values for phosphate rock, silica sand or coal. In the *Steel Nails Investigation*, the Department rejected a scrap value that resulted in steel wire rod scrap being assigned a higher value than steel wire rod.[121]

**Department's Position:** The Department agrees with Petitioners that Thai HTS number 2621.90.00090, "Slag and Ash, NESOI," is the best available information with which to value phosphate slag. As noted by Petitioners, Thai HTS subheading 2523 covers cement, not slag, which is a component of the cement apparently falling under Thai HTS subheading 2523. Thai HTS 2621.90.00090 specifically covers slag, and therefore represents more specific information

[116] *See* Xingfa's September 15, 2011, submission at Exhibit 2.
[117] *See* Xingfa's July 1, 2011, submission at Exhibit D-Il
[118] Petitioners argue that the heading excludes finely ground blast furnace slag which requires the addition of a small quantity of accelerator at the time of making up. However, ground slag mixed with an accelerator, ready for use, does fall in this heading.
[119] *See* Petitioners' May 25, 2012, submission at Exhibit 8. The articles include: "Hubei Xingfa Chemicals Group Co. Ltd Announces Involvement in Lawsuit," www.reutersreprints.com, October 28, 2010; and "Huaxin Cement Co., Ltd., Announcement on Litigation." November 4, 2010.
[120] In their November 18, 2011, submission at Exhibit 11, the Petitioners placed several CBP rulings on the record which indicate that HTS Chapter 2621 covers ash and other residues derived from the working of ores or metallurgical processes.
[121] *See Certain Steel Nails from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances*, 73 FR 33977("*Steel Nails Investigation*") (June 16, 2008) and accompanying Issues and Decision Memorandum at Comment 12, *citing* Final Determination Pursuant To The Remand Order From The U.S. Court Of International Trade in, *Paslode Division of Illinois Tool Works, Inc. v. United States*, Ct. No. 97 12-02161 (January 15, 1999).

with which to value phosphate slag on the record of this review. Consequently, we have continued to apply this HTS as the surrogate value for phosphate slag for these final results.

**Comment VIII. Surrogate Value for Super Sacks**

*Xingfa*:

- The type of bag used as packing material is one super sack consisting of both a polypropylene ("PP") outer bag and a polyethylene ("PE") inner bag for packing one metric ton of sodium hex.[122]
- In recent determinations, the Department has used a more appropriate HTS classification for plastic bags of the type used by Xingfa: HTS 6305.33, "Sacks and Bags of a Kind Used for the Packing of Goods: Other, of polyethylene and polypropylene or the like,"[123] as the HTS description consists of two types of plastic used by Xingfa.

*Petitioners*:

- In this administrative review, Xingfa provided surrogate values for HTS 3923.21 and 3923.29, which the Department has previously relied upon.[124] Accordingly, the values of imports under these headings continue to be the best available information to value Xingfa's packing materials.
- It is clear that Xingfa uses PP and PE bags to transport packed subject merchandise. Xingfa's argument boils down to a contention that some of the subheadings specifically broken out under headings 3923 include "aseptic" sacks and bags, "sterile" sacks and bags and bags "coated with aluminum." Nevertheless, in each case there is an "other" subheading that encompasses sacks and bags without these characteristics. It follows that sacks and bags classified under headings 3923.21 and 3923.29, by type of plastic, could include "bulk carriers for industrial chemicals." And, indeed, Xingfa provides no contrary customs rulings or other authority, such as the Thai HTS explanatory notes.[125]
- Xingfa's super sacks are better described as "flexible intermediate bulk containers" and should be valued under heading 6305.32, since Xingfa describes the packing as a "jumbo bag."[126]
- Although not legally binding, the explanatory notes "are generally indicative of the proper interpretation of a tariff provision."[127] The courts have held that it must credit the unambiguous text of relevant explanatory notes absent persuasive reasons to disregard it.

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[122] *See* Xingfa's July 1, 2011, submission at 16.

[123] *See, e.g., Silicon Metal SV Memo* at 4 and Attachment I; *Activated Carbon SV Memo* at 4 and Attachment I, both found in Xingfa's May 4, 2012, submission.

[124] *See Sodium Hex 1st AR*.

[125] The Explanatory Note to heading 6305.32 of the Harmonized Tariff Schedule of the United States ("HTSUS") states as follows: Flexible intermediate bulk containers are usually made of polypropylene or polyethylene woven fabrics and generally have a capacity ranging from 250 kg to 3,000 kg. They may have lifting straps at the four top corners and may be fitted with openings at the top and bottom to facilitate loading and unloading. They are generally used for packing, storage, transport and handling of dry, flow able materials.

[126] *See* Xingfa's June 4, 2012, submission at 20.

[127] *See Drygel, Inc. v. United States*, 541 F. 3d 1129, 1134 (Fed. Cir. 2008).

Several U.S. Customs rulings classifying similar large-volume bags under subheading HTSUS 6305.32.0010.[128]

**Department's Position:** Consistent with the Department's recent practice, we are valuing Xingfa's PP and PE super sacks using Thai HTS 6305.33.[129] As noted by Xingfa, this HTS category specifically covers PP and PE bags, and has been used in recent proceedings to value similar inputs. With respect to Petitioners' comment that HTS 6305.32 is a more appropriate heading with which to value PP and PE super sacks inputs, we note that there is no evidence on the record that Xingfa's PP and PE super sacks are woven, which is a clear requirement of HTSUS 6305.32, consistent with the Explanatory Notes cited. While it is possible that Thai HTS headings 3923.21 and 3923.29 may include bulk carriers for industrial chemicals, it is clear that Thai HTS 6305.33 is specific to the PP and PE super sacks that Xingfa has reported consuming. Therefore, Thai HTS 6305.33 is the best available information with which to value PP and PE super sacks for these final results.

We do not find Petitioners' cites to customs rulings to be persuasive. We note that the harmonized tariff code only extends to three digits and each country may interpret the harmonize code in different ways. As such, a ruling form CBP has no bearing on how imports into Thailand may be classified.

## RECOMMENDATION

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

AGREE_____ DISAGREE_____

_____
Paul Piquado
Assistant Secretary
for Import Administration

_____
Date

[128] In Port Ruling Letter (PD) B82698, dated March 24, 1997, Customs classified polypropylene flexible bulk containers under subheading 6305.32.0010. The bags were made of polypropylene strip, made in various sizes and designed with capacities from 500 to 8,000 pounds. *See* Petitioners' May 25, 2012, submission at Exhibit 6. In Headquarters Ruling Letter (HQ) 961938, dated June 11, 1999, Customs classified a woven polypropylene bag measuring 4 feet high by 4 feet wide by 4 feet deep as a flexible intermediate bulk container. *Id*.

[129] *See, e.g., Silicon Metal SV Memo* at 4 and Attachment I, found in Xingfa's May 4, 2012 submission.