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MEMORANDUM TO: Paul Piquado
Assistant Secretary
for Import Administration

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

SUBJECT: Issues and Decision Memorandum for the Final Results in the Administrative Review of Floor-Standing, Metal-Top Ironing Tables and Certain Parts Thereof from the People's Republic of China

SUMMARY:

We have analyzed the comments and rebuttal comments of interested parties in the final results of the 2009 - 2010 administrative review of the antidumping duty order covering floor-standing, metal-top ironing tables and certain parts thereof from the People's Republic of China (PRC). As a result of our analysis, we have made certain 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 administrative review for which we received comments by parties:

Comment 1: Selection of Indonesia rather than India as Primary Surrogate Country
Comment 2: Financial Ratios
Comment 3: Errors in Calculation of Indonesian Surrogate Values
Comment 4: Proper Valuation of Steel Wire
Comment 5: Brokerage and Handling

Comment 6: Zeroing
Comment 7: Department Regulation Regarding Submission of Surrogate Value Information

BACKGROUND:

On September 7, 2011, the Department published the preliminary results of this administrative review. *See Floor-Standing, Metal-Top Ironing Tables and Certain Parts Thereof From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review, 76* FR 55357 (September 7, 2011) *(Preliminary Results).* The merchandise covered by the order is floor-standing, metal-top ironing tables and certain parts thereof from the PRC, as described in the "Scope of the Order" section of the *Federal Register* notice. The period of review (POR) is August 1, 2009, through July 31, 2010. This administrative review covers Foshan Shunde Yongjian Housewares & Hardwares Co., Ltd. (Foshan Shunde).

In the *Preliminary Results,* we invited parties to comment. On October 7, 2011, the Department received a timely case brief from Foshan Shunde. On October 12, 2011, Home Products International (the Petitioner in this case) submitted a rebuttal brief. On January 10, 2012, we extended the final results of this administrative review by 60 days. *See Floor-Standing, Metal-Top Ironing Tables and Certain Parts Thereof From the People's Republic of China: Extension of Time Limit for Final Results of Administrative Review,* 77 FR 1455 (January 10, 2012).

DISCUSSION OF THE ISSUES

Comment 1: Selection of Indonesia rather than India as Primary Surrogate Country

Foshan Shunde argues that the Department should have included India on the June 8, 2011 list of comparable countries for calculating surrogate values. Foshan Shunde notes that the Department listed India as a comparable country for calculating surrogate values in four administrative reviews of Chinese cases in which the review period is contemporaneous with the instant review. Foshan Shunde, citing surrogate country memos in several other reviews, observes that the surrogate country list included India for several other reviews that covered the period June 1, 2009 through May 31, 2010. *See* Foshan Shunde Case Brief at 4. Moreover, Foshan Shunde notes that in *Steel Nails* the Department did indeed select India as the source of surrogate country information. *See Certain Steel Nails from the People's Republic of China: Preliminary Rescission in Part of Antidumping Duty Administrative Review and Preliminary Intent to Rescind New Shipper Review* 76 FR 56147, 56149-50 *("Steel Nails").* Foshan Shunde notes that the period of review in *Steel Nails* is August 1, 2009 through July 31, 2010, as is the instant review.

Foshan Shunde notes the Department initiated this review on September 29, 2010. Foshan Shunde argues that the Department's issuance of its Surrogate Country Memorandum on June 8, 2011, (which is 252 days after initiation of this review) runs contrary to Policy Bulletin No., 04.1 which stipulates that "early in a proceeding the operations team sends the Office of

Policy a written request for a list of potential surrogates." *See* Foshan Shunde Case Brief at 5 (Foshan Shunde's emphasis). Foshan Shunde contends that had the Department operations team requested surrogate value information earlier in the proceeding, India would have been on the list of surrogate countries. Foshan Shunde further asserts that the Department's 'tardy" release of surrogate value information has "prejudiced" Foshan Shunde in this review. *Id.*

Foshan Shunde notes that in all past reviews of this case the Department used India as the source country for its surrogate values. Foshan Shunde asserts that it has come to rely upon India as the source country for surrogate values and asserts that "principles of fairness" preclude the Department from changing the surrogate country "at such a late stage" of the proceeding. *Id.* Foshan Shunde cites to *Shikoku Chemicals Corp.* v. *United States,* 795 F. Supp. 417, 421 (CIT *1992) (Shikoku)* as precedent that the Department may not change its calculation methodology too late in a proceeding. *Id.* Foshan Shunde asserts that analogous to *Shikoku,* the Department's use of India as the source of surrogate value information has become the "law of these proceedings." *Id.* at 6.

Foshan Shunde further notes that in *Steel Nails* the Department determined that India is at a comparable level of economic development to China. *Id.* at 8. Foshan Shunde asserts that having determined India to be at a comparable level of economic development to the PRC in *Steel Nails,* the Department cannot reasonably determine that India is not at a comparable level of economic development in the instant review. *Id.* Moreover, Foshan Shunde asserts that the Department cannot treat respondents in Ironing Tables and *Steel Nails* differently. Foshan Shunde cites to *Consolidated Bearings Co.* v. *United States* 348 F.3d 997, 1007 (Fed. Cir. 2003) as precedent.

Foshan Shunde asserts that Gross National Income (GNI), by itself, is not an appropriate benchmark of economic comparability in the ironing table industry. Foshan Shunde claims that in the steel industry India is more economically developed than is Indonesia. Foshan Shunde asserts that India's greater level of economic development in its steel industry is evidenced by India's wage rate in the ironing table industry. Foshan Shunde notes the Indian wage rate is more than double that of Indonesia. *Id.* at 10. Foshan Shunde further notes the import values for Indonesian and Indian steel are virtually identical. *Id.* Foshan Shunde asserts that unlike Indonesia, India is a world class steel producer. *Id.* at 10-11. Foshan Shunde further asserts that unlike Indonesia, India is home to a number of producers of ironing tables. *Id.* at 11-14.

Foshan Shunde maintains that ironing tables are "unique dedicated products." *See* Foshan Shunde Case Brief at 17. Thus, Foshan Shunde asserts, Policy Bulletin 04.1 requires the Department to favor the country which is a "significant producer" over countries which may be more "economically comparable." Foshan Shunde insists ironing tables are only produced in a "known discrete list of countries." *Id.* at 17. Foshan Shunde asserts that as in *Freshwater Crawfish Tails Meat from the People's Republic of China: Notice of Preliminary Results of Antidumping Duty Administrative Review* 67 FR 63877 (October 16,2002), the Department is required to first determine whether the country is a known producer of ironing tables. Moreover, Foshan Shunde argues that the Department is required to consider the quality and availability of

data from surrogate countries. Foshan Shunde notes that in *Folding Metal Tables and Chairs: Preliminary Results of Antidumping Duty Administrative Review and New Shipper Review and Intent to Revoke in Part,* 76 FR 35825 (June 20, 2011) (unchanged in final results, 76 FR 66026, October 25,2011) the Department held that the fmancial statements of PT Lion did not provide the Department with sufficient detail to discern the amount of comparable merchandise. Foshan Shunde claims the same factual situation exists in the instant case. Foshan Shunde contends that this same defect permeates the financial statement of PT Lion in this review, and that India offers higher quality data than does Indonesia for purposes of calculating antidumping margins. *Id.* at 17.

Foshan Shunde asserts that the Department has failed to provide substantive reasons which establish that Indonesia is a "significant producer" of comparable merchandise. According to Foshan Shunde, the Department failed to consult with in-house experts, other government agencies, or other interested parties in this case. Foshan Shunde further avers that the export categories set forth in Petitioner's July 8, 2011, submission are much broader than the actual scope of the antidumping order. *Id.* at 19.

Foshan Shunde argues that the Department's selection of Indonesia rather than India has undermined the remedial purpose of the antidumping law. Foshan Shunde notes that the Petition in this case as well as all administrative reviews previous to the instant review used surrogate values derived from India. Foshan Shunde asserts the "Department's practice of considering India economically comparable to China is so pervasive and long-established that it amounts to an established agency rule or practice." *Id.* at 21. As such, Foshan Shunde insists, the Department was obligated under the Administrative Procedures Act to "put any change in this practice out for public notice and comment before changing this practice." *See* 5 U.S.C. Section 553.

Petitioner supports the Department's selection of Indonesia as a surrogate country. Petitioner argues that in this review the Department has adhered to its normal country selection policy and procedure for choosing a surrogate country. Because India is no longer comparable in economic development to China, Petitioner argues, Department policy necessitated rejeCtion of India as a surrogate country. *See* Petitioner's Rebuttal Brief at 5.

Petitioner notes that according to the World Bank's *World Development Report 2011,* China's 2009 Gross National Income is more than triple that of India ($3,590 for China, $1,180 for India). *See* Petitioner Rebuttal Brief at 5-6. Additionally, Petitioner notes that in the 2008-2009 annual review the Department cautioned parties that India could be removed from the list of eligible surrogate countries owing to the growing gap between the GNI of India and China. *Id.* at 3.

Petitioner notes that in the instant review the Department identified six countries that were found to be at a comparable level of economic development to China. These counties included Philippines (GNI $1,790), Indonesia (GNI $2,230), Ukraine, (GNI $2,800), Thailand (GNI $3,760), Columbia (GNI $4, 930), and South Africa (GNI $5,770). *See* Petitioner Case

Brief at 6. Petitioner argues that use of India as a surrogate country would constitute use of 2008 rather than 2009 data and "would directly contravene established policy and practices and make a mockery of the general statutory directive to ascertain the best information available." *Id.*

Petitioner also disputes Foshan Shunde's assertion that the company "relied" upon the Department selecting Indonesia as a surrogate country and that the selection of Indonesia "denied" Foshan Shunde any chance to adjust its prices during the paR. Petitioner notes that during the paR, Foshan Shunde did not know and had no way of determining what the factors of production would be for its surrogate values. Moreover, Petitioner argues, no party can know the identity of the surrogate country at the time that the company made its U.S. sales. "The notion of detrimental reliance," Petitioner concludes, "is chimerical." Petitioner's Rebuttal Brief at 7.

Finally, Petitioner disputes Foshan Shunde's assertion that Ironing Tables are unique dedicated products. Petitioner argues "not a single material input to any ironing table or product comparable thereto is relatively scarce or little traded." *Id.* at 8. Petitioner also disputes Foshan Shunde's proffered Indian producers, OMax Autos, Ltd. (Omax) and Uttam Galva Steel Co., Ltd. (Uttam Galva) as producers of comparable merchandise. Foshan Shunde, petitioner insists, has not demonstrated that either Omax or Uttam Galva produced ironing tables during the paR. Petitioner argues that Omax is primarily an automobile parts manufacturer while Uttam Galva is a basic steel producer. *Id.* at 9-11.

Department's Position:

We have continued to rely on Indonesia for the primary surrogate in this review. In selecting Indonesia, we have adhered to our established practice which is to base the chosen surrogate country on (1) GNI, relative to that of the PRC; (2) whether that country is a significant producer of comparable merchandise, and (3) the availability of surrogate values within the selected country. This approach is consistent with the Department's regulations (19 C.F.R. 351.408(b)), with Policy Bulletin No., 04.1, and with the approach employed by the Department in all proceedings that involve NMEs,[1] including past reviews of this case.

The Department determines economic comparability on the basis of per capita gross national income (GNI). *See* 19 CFR 351.408(b), and Policy Bulletin No., 04.1. Based on the most current data available from the World Bank *(World Development Report 2011),* the Department, determines that Indonesia, with a GNI of 2,230 USD has a GNI that is proximate to that of the PRe, which has a GNI of 3,590 USD. Moreover, we continue to find that Indonesia is a significant producer of comparable merchandise. Ironing tables are currently classifiable under U.S. Harmonized Tariff Schedule item 9403.20.0011 which is classified as a specific type of "household metal furniture" and falls within the international subheading 9403.20 ("Other metal furniture"). During the paR Indonesia exported merchandise within the category 9403.20 which we view as a "comparable product" within the meaning of Policy Bulletin No., 04.1. *See*

1 *See, e.g., Amended Final Results of Antidumping Duty Administrative Review and New Shipper Reviews: Wooden Bedroom Furniture From the People's Republic of China,* 72 FR 46957 (August 22,2007), and accompanying Issues and Decision Memorandum, at Cmt. 1,

Petitioner July 8, 2011 submission at Exhibit 1. Finally, we found Indonesia had sufficient available data from which to value the factors of production for these final results, as the Department was able to obtain surrogate values for all the factors of production from Indonesia.

We disagree with Foshan Sunde that India should have been selected as the primary surrogate. At the outset of each administrative proceeding, Import Administration's Office of Policy creates a list of possible surrogate counties. The list is comprised of countries that are proximate to the PRC in terms of GNI, and the Department considers all countries on the list to be equal in terms of economic comparability for purposes of evaluating their suitability for use as a surrogate country. India was not included in the surrogate country list prepared at the onset of this proceeding. *See* June 8, 2011 Surrogate Country Memorandum. The Department finds that the selection of the range of economically comparable countries based on GNI, included in the Surrogate Country Memo, is reasonable and consistent with the Act. It is further consistent with the Department's long-standing and predictable practice of selecting economic comparable countries on the basis of absolute GNI. Furthermore, when selecting a primary surrogate country, the Department will normally look first to the list of countries included in the surrogate country memo, as these countries have been determined to be equally comparable to the PRC. The Department may find it is appropriate to rely on data from other countries, if it is determined that either none of these countries are viable options because they are not significant producers of comparable merchandise, do not provide sufficient reliable sources of publicly available surrogate value data or are otherwise unsuitable. However, those facts are not present in these final results: Indonesia has been determined to be economically comparable to the PRC, it is a producer of comparable merchandise to ironing tables, and data from Indonesia are available to value all of the surrogate values in this proceeding. Accordingly, we have continued to rely on surrogate values from Indonesia in these fmal results.

Additionally, we find unpersuasive Foshan Shunde's assertion that the Department should rely on the older data set forth in the *World Development Report 2010* rather than the more contemporaneous data outlined in the *World Bank Development Report 2011.* The Department has an established practice to use the most current annual issue of the *World Trade Development Report* that is available at the stage in the proceeding in which the Office of Policy issues its memo of potential surrogate countries. Furthermore, because there is a two-year lag in data reported by *World Trade Development Report,* data reported in 2011 is representative of 2009. Accordingly, we find that the data set forth in the *World Bank Development Report 2011* represents the best available information available to the Department pursuant to section 773(c)(I) of the statute because it is both the most current data available, and more contemporaneous with the POR than the 2010 report.

The Department disagrees with Foshan Shunde's argument that it should rely on data from the 2010 Report, given the availability of 2011 data in this proceeding? The Department

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2 *See Amended Final Results of Antidumping Duty Administrative Review and New Shipper Reviews: Wooden Bedroom Furniture fram the People's Republic af China,* 72 FR 46957 (August 22, 2007), and accompanying Issues and Decision Memorandum, at Cmt. I.A. ("The Department has an established practice to use the most current annual issue of the World Development Report that is available at the stage of the proceeding in which the Office of

begins relying on more recent data when they become available. While, in other cases, the more recent 2011 report may not have been available at the time the surrogate country decision was made, such information was available in these final results. It is therefore appropriate to base our decision on the most current information.

We disagree with Foshan Shunde's contention that it was deprived of an adequate opportunity to comment on the surrogate country selection methodology employed in this review. In these final results, the Department issued the Surrogate Country Memorandum to Foshan Shunde on June 10,2011. Case briefs were due and submitted on October 7, 2011, and the deadline for FOP data was September 27,2011. Foshan Shunde was thus afforded several months to comment on the methodology used by the Department to identify the primary surrogate country, and to submit surrogate value information. We therefore find that Foshan Shunde was afforded a sufficient period of time to comment on our surrogate country selection.

The Department further disagrees that it was required to provide notice of its decision to exclude India from the list of potential primary surrogate countries through formal notice-and-rulemaking procedures, pursuant to the Administrative Procedures Act (APA). Formal rulemaking procedures under the APA do not apply to "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. § 553(b)(3)(A). It is well established that the APA does not apply to antidumping proceedings because they are largely investigative, and not adjudicatory.3 Indeed, the CIT has long recognized the Department's discretion to modify its practice and has upheld decisions by the Department to change its policies on a case-by-case basis rather than by rulemaking when it has provided a reasonable explanation for any change in policy.4 Moreover, while the Department must explain changes in or departures from longstanding practice and methodologies,S the Department's decision not to include India on the list of potential surrogate countries in these fmal results does not represent a change in methodology, but rather a change in result based on the record evidence present in this administrative review. In this review, Commerce followed its longstanding practice of basing its surrogate country selection primarily on ONI, and India's exclusion from the list is based on the ONI figures currently available.

As to Foshan Shunde's claim of detrimental reliance and denial of due process, we cannot agree with this argument. Each antidumping duty administrative review proceeds *de novo,* and determinations in that review are based upon the record as developed during the course of the proceeding. In each NME review, the Department solicits anew a list of potential surrogate countries, based upon economic comparability. Neither petitioner nor Foshan Shunde

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Policy issues its memo or potential surrogate countries.").

3 See GSA, S.R.L. v. United States, 77 F.Supp. 2d 1349, 1359 (CIT 1999), citing Statement of Administrative Action at 892 ("Antidumping and countervailing duty proceedings ... are investigatory in nature.").

4 See *Budd Co. Wheel* v. *United States,* 746 F. Supp. 1093, 1100 (CIT 1990) (finding that the Department didnot deprive plaintiff of procedural fairness under the APA when it fully explained its decision on the record.); *Sonco Steel Tube Div* v. *United States,* 694 F.Supp. 959, 966-67 (CIT 1988). (formal rulemaking procedures were not required in determining whether it was appropriate to deduct further manufacturing profit from the exporter's sales price).

5 See Seah Steel Corp. v. *United States,* 704 F. Supp. 1353, 1361-1362 (CIT 2010).

could know at the outset of a review which country would be selected as the primary source for surrogate value data. Foshan Shunde's reliance upon the use of a specific company's financial statements for surrogate financial ratios is, likewise, misplaced. Even within a given country, the selection of the best surrogate financial statements to use is subject to change as the record develops. Thus, we find Foshan Shunde's argument on this point unconvincing.

As for the use of the more up-to-date *World Development Report 2011,* that document was issued well in advance of our surrogate country memorandum, thus putting Foshan Shunde on notice that India had receded still farther from China as measured by GNI. Our surrogate country memorandum for this review, which omitted India, appeared some two months later, in early June, or more than two and one-half months before our *Preliminary Results.* Clearly, at that point at the latest Foshan Shunde was put directly on notice that India would not be considered as a surrogate country. Further, Foshan Shunde cites to *Steel Nails* in its case brief; in that very proceeding, the Department noted "the disparity in per capita GNI between India and China has consistently grown in recent years, and should this trend continue, the Department may determine in the future that the two countries are no longer 'at a comparable level of economic development' ..." *See* Petitioner's Rebuttal Brief at 3 and n. 2, quoting Memorandum from C. Showers to R. Weible, "List of Surrogate Countries for new shipper review of Certain Steel Nails from China. We find Foshan Shunde has not been put at any disadvantage by our use of our normal surrogate country selection in this review. As petitioner notes, "there was no change in rule; no change in policy; not even a change in methodology." Petitioner's Case Brief at 6. That the results changed as a result of shifts in the relative GNI of potential surrogate countries does not in any way impeach the methodology

Based upon the foregoing, we have continued to use Indonesia as the source of surrogate values in these *Final Results.*

Comment 2: Financial Ratios

Foshan Shunde objects to the Department's reliance on the financial statements of PT Lion Metal Works Tbk (PT Lion) to calculate factory overhead, SG&A expenses and profit in this review. Foshan Shunde contends that if the Department selects India as the primary surrogate country for the final results, it should select the 2009-2010 financial statements of either Omax or Uttam Galva. Foshan Shunde notes that it has placed both Omax's and Uttam's financial statements on the record of this proceeding. *See* Foshan Shunde's July 22,2011, submission at Attachments 5 (Uttam Galva) and 6 (Omax). Foshan Shunde asserts that both Uttam Galva and Omax are producers of comparable products and notes that either set of financial statements are contemporary to the POR. Moreover, Foshan Shunde asserts that both Omax's and Uttam Galva's financial statements constitute "the best available information" in this proceeding. Foshan Shunde cites the Department's preference in selecting financial statements based upon the "specificity, contemporaneity and quality of the data" they contain. *See* Foshan Shunde Case Brief at 23, quoting *Certain Oil Country Tubular Goods from the People's Republic of China* 75 FR 20335 (April 19, 2010) and accompanying Issues and Decision Memorandum at Comment 13 *(OCTG).* Foshan Shunde asserts the Department must

consider whether surrogates are "representative of the industry." ld.(quoting *Certain Activated Carbon from the People's Republic of China,* 74 FR 57995 (November 10, 2009) and accompanying Issues and Decision Memorandum at Comment 2b *(Activated Carbon)).* Moreover, Foshan Shunde asserts that the Department should not rely upon the financial PT Lion or the Indian firm, Infiniti Modules, Ltd.

As to Infiniti Modules, Foshan Shunde asserts the 2009-2010 financial statements of that company are not publicly available. *See* Foshan Shunde's Case Brief at 28. Moreover, Foshan Shunde avers, the merchandise produced by Infiniti Modules is less comparable to the subject merchandise than is the merchandise produced by either Uttam Galva or Omax.

Foshan Shunde further argues that PT Lion does not produce merchandise that is comparable to the subject merchandise. Foshan Shunde asserts the selection of the financial statements of PT Lion runs contrary to the precedent set forth in *Multilayered Wood Flooring From the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value,* 76 FR 30656 (May 26,2011) *(Wood Flooring Preliminary Determination).* Foshan Shunde notes that in the *Wood Flooring Preliminary Determination* the Department opted to use the Philippines as its surrogate country, and used the four financial statements of Philippine producers, rather than two financial statements of Indonesian producers. Foshan Shunde also notes that in the *Wood Flooring Preliminary Determination* the Department noted "translation issues" with the Indonesian financial statements in question. Foshan Shunde asserts the same translation issues exist in the instant review with Indonesian data. *See* Foshan Shunde's Case Brief at 32. Moreover, Foshan Shunde claims the financial statements of PT Lion fail to "clearly state exactly what it consumes or produces." *ld.* Foshan Shunde contends PT Lion is also involved in real estate and the production of custom beams. Foshan Shunde notes it is conceivable that the majority of PT Lion's business could come from "steel beams and construction." *ld.*

Foshan Shunde maintains that whereas Foshan Shunde, Omax and Uttam Galva produce "non-branded" products that will be sold by purchasers under their own respective brand names, PT Lion produces its own "Lion" brand products, marketed under its own name. Because PT Lion sells its own branded products, Foshan Shunde argues, PT Lion accumulates higher SG&A expenses than does Foshan Shunde, Omax or Uttam Galva. Foshan Shunde further asserts that PT Lion's "dominant market position" in Indonesia precludes use of PT Lion's financial statements to calculate financial ratios for producers of "non-branded" products, such as Foshan Shunde. Foshan Shunde's Case Brief at 32. Foshan Shunde points to U.S. Internal Revenue Service transfer-price guidelines that classify a product's brand name as an "embedded tangible." *ld.* Foshan Shunde asserts that just such an "embedded tangible" exists in the financial statements of PT Lion and argues that this 'embedded tangible results in PT Lion incurring higher selling expenses than does Foshan Shunde which produces non-branded merchandise. *ld.*

Foshan Shunde also claims the financial statements of both Omax and Uttam Galva are more contemporaneous to the POR than are the financial statements of PT Lion. Foshan Shunde asserts that in *Chlorinated lsocyanurates From the People's Republic of China: Final Results of*

June 2008 Through November 2008 Semi-Annual New Shipper Review 74 FR 68575 and Accompanying Issues and Decision Memorandum at Comment 1 *(Isocyanurates)* the Department held that it will exclude financial statements of companies whose statements are less contemporaneous when more suitable contemporaneous financial statements exist. Foshan Shunde concludes that *Isocyanurateses* establishes that "if there is any statement in Indonesia or India of any company that even makes a small percent of the comparable product, they must be favored over PT Lion for the purposes of this annual review under Departmental practice." *Id* at 34.

Foshan Shunde further contends that if the Department continues to exclude Indian financial statements in this review, the 2010 financial statements of Kedawung Setia Industrial Tbk (Kedewung) and Pelangi Indah Canindo TbK (Pelangi) are more suitable sources of surrogate value data than are the financial statements of PT Lion. Foshan Shunde asserts that both Kedewang's and Pelangi's financial statements are more contemporaneous to the POR. In addition, as producers of fabricated metal products, Foshan Shunde suggests, Kedewang and Pelangi produce merchandise that is more comparable to the subject merchandise than does PT Lion. *Id* at 36. Foshan Shunde claims both Kedewang and Pelangi produce housewares that are sold through the same channels as is the merchandise sold by Foshan Shunde; both companies, Foshan Shunde avers, produce merchandise that is less sophisticated and complex than the merchandise sold by PT Lion. *Id* at 36-38. Foshan Shunde argues that some of the products sold by PT Lion include "building materials" which cannot reasonably be compared to ironing tables. *Id.* at 37. Foshan Shunde further asserts that products such as steel doors and safes, or cold-formed steel products sold by PT Lion are also more complex than the merchandise sold by Foshan Shunde. Foshan Shunde concludes that PT Lion is a consolidated entity "with a range of far-flung companies whose activities are far removed from the production of metal housewares products." *Id* at 39.

Moreover, Foshan Shunde argues that PT Lion has purchased raw materials from related parties and is thus a far more integrated producer than is Foshan Shunde. *Id.* Foshan Shunde asserts that PT Lion's profit ratios are therefore suspect because a "very significant portion of {PT Lion's} sales were not made at arm's length." *Id* at 39-40.

Petitioner argues that the Department should continue to base its calculation of financial ratios upon the financial statements of PT Lion. Petitioner notes that PT Lion is a producer of "metal desks, filing cabinets, lockers, trolleys beds with tubular goods and shelving." *See* Petitioner's Rebuttal Brief at 14. Therefore, Petitioner concludes, PT Lion and Foshan Shunde are producers of "comparable products." Moreover, Petitioner notes that PT Lion's 2009 financial statements overlap the POR by 5 months, therefore rendering PT Lion's data contemporaneous with the POR. *Id.*

Petitioner asserts that neither Pelangi nor Kedewang produce comparable products. Petitoner asserts that Pelangi is a producer of steel drums, cans, and pressure tanks and that Kedewang is a producer of kitchen cookware. Petitioner's Case Brief at 15. Petitioner notes that ironing tables are classifiable under the HTS subheading 9403.20 while industrial containers are

classifiable under HTS subheadings 7309 and 7310, and cookware is classifiable under subheading 7323.99. *Id.* Also, Petitioner insists that both the financial statements of Pelangi and Kedewang are incomplete. Petitioner notes that notes 16-34 to Kedewang's financial statements are missing, while Pelangi's financial statement is unaccompanied by an English translation. *Id.* at 14-15.

Department's Position:

In these Final Results, we have continued to base our calculation of the overhead, SG&A and profit ratios on PT Lion's financial statements. As explained below, we have based our analysis on the merit of the financial statements on the record and our determination that the 2009-2010 financial statements of PT Lion constitute the "best available information" within the meaning of the statute.

In valuing 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. In choosing surrogate financial ratios, the Department's policy is to use data from the market-economy surrogate companies based on the "specificity, contemporaneity, and quality of the data." *See, e.g., Fresh Garlic from the People's Republic of China: Final Results of Antidumping Duty Administrative Review,* 70 FR 34082 (June 13, 2005) and accompanying Issues and Decision Memorandum at Comment 5. Moreover, in valuing factory overhead, SG&A, and profit, the Department uses 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. Moreover, we note courts have recognized the Department's discretion in selecting surrogate values. *See FMC Corporation* v. *United States,* 27 CIT 240,251 (2003) (citing *Technoimportexport, UCF America Inc.* v. *United States,* 783 F. Supp. 1401, 1406 (CIT 1992), *aj J'd 2004* U.S. App Lexis 3096 (Fed. Cir. 2004). Similarly, in *Crawfish Processors Alliance* v. *United States,* 343 F. Supp. 2d 1242, 1251 (CIT 2004) the court held "{i}f Commerce's determination of what constitutes the best available information is reasonable, then the Court must defer to Commerce."

As noted in our response to Comment 1, we have continued to rely upon Indonesia as the primary surrogate source country for surrogate values in this review. Thus pursuant to section 351.408(c)(2) of our regulations, we have first looked to Indonesian sources for financial statements rather than to Indian sources such as Omax or Uttam Galva.

We continue to find that the 2009-2010 financial statements of PT Lion represent the best available source of financial ratios in this review. PT Lion's statements are taken from a manufacturer of merchandise (metal desks, filing cabinets, and shelving) that is similar to the subject merchandise. Also, PT Lion's financial statements are contemporaneous because they overlap the POR by five months. Finally, the financial statements of PT Lion are complete and fully translated, and are thus useable for these final results.

We have further evaluated the financial statements of two other Indonesian companies,

Kadewang and Pelangi; however, neither of the financial statements from those companies are suitable for use in these final results. Kadewang's financial statements are incomplete, as they are missing several auditor's notes. Specifically, notes 16-34 of Kadewang's 2009-2010 financial statements are missing. *See* Exhibit 4b to Foshan Shunde's September 27, 2011 submission. Pelangi's financial statements lack complete English translations, as none of the auditor's notes are translated. *Id.* at Exhibit 5b. The absence of complete translations precludes the Department from fully evaluating the financial information set forth in Pelangi's financial statements. By contrast, PT Lion's financial statements are complete, and fully translated. Finally, because financial statements from the primary surrogate country are available, the Department has not evaluated the suitability of the Indian financial statements (Omax and Uttam Galva), but instead, has relied on PT Lion's financial statement from within the primary surrogate country. *See* 19 CFR 351.408(c)(2). ("The Secretary will normally value all factors in a single surrogate country").

Comment 3: Errors in Calculation of Indonesian Surrogate Values

Foshan Shunde asserts that in the Preliminary Results the Department rounded all Global Trade Atlas (GTA) imports to the nearest million. Foshan Shunde asserts that this error inflated the surrogate values and precluded Foshan Shunde from evaluating the Department's calculations. According to Foshan Shunde, "the record ... does not contain any useable input data with the exception of a single value submitted by Foshan Shunde for low-carbon steel wire." Foshan Shunde Case Brief at 50-51.

Petitioner notes that the Department identified the source of all of its surrogate value calculations. Petitioner argues that the Department calculated surrogate values by considering import values in millions of Indonesian rupiahs and imports in millions of units *(e.g.,* kilograms). Petitioner argues that such an approach yields "a mathematically valid average." *See* Petitioner's Rebuttal Brief at 21. Petitioner argues, however, that the Department could obtain additional "precision" in its calculations by using GTA data in its "full precision format" which expresses "all significant digits in the value and quantity of imports."

Department's Position:

We agree with both Foshan Shunde and the Petitioner that setting the GTA software to "full precision units" reflects a more precise calculation than does rounding Indonesian factors to the nearest million rupiah. Use of "full precision units" lessens the effects of rounding errors, therby resulting in a more accurate calculation of surrogate values. Accordingly, in these final results, we have revised our calculation of Indonesian factors of production to reflect values based upon individual units of measurement rather than units rounded to the nearest million rupiah.

Comment 4: Proper Valuation of Steel Wire

Foshan Shunde asserts that in valuing steel wire, the Department inappropriately used a Harmonized Tariff System (HTS) classification for high-carbon steel wire submitted by petitioner (HTS classification 7217.10.3900) rather than the Indian surrogate value (HTS classification 7217.10.1000) that Foshan Shunde placed on the record in its July 22, 2011submission. Foshan Shunde argues that the Indonesian HTS value is inappropriate because the Indonesian value represents high carbon steel, whereas the Indian HTS value used in previous reviews correspond to low carbon steel wire. *See* Foshan Shunde's Case Brief, at 51.

Petitioner asserts Indian and Indonesian HTS classifications correspond only at the six digit international level. Beyond the six digit classification level, petitioner asserts, each country "establishes its own procedures." *See* Petitioner's Rebuttal Brief at 22. Petitioner notes that Indonesian HTS 7217.10.3900 covers "steel wire not coated or plated, containing 0.6% or more carbon" whereas HTS 7217.10.1000 covers a carbon content of 0.25% or less. Petitioner notes that because the carbon content of the wire in question is unknown in this case, "it is certainly not unreasonable for the Department to assume a higher value provision so as to ensure that inputs are not undervalued." *Id*

Department's Position:

For the reasons noted in our response to Comment 1, in these final results we have continued to use Indonesia as the primary surrogate country. Accordingly, we have first examined whether Indonesian surrogate values are available. *See* 19 CFR 351.408(c)(2). ("The Secretary will normally value all factors in a single surrogate country"). We continue to find that HTS classification 7217.10.3900, which covers "steel wire not coated or plated, containing 0.6% or more carbon" constitutes the best available information for valuing steel wire in these Final Results. Foshan Shunde's production records do not distinguish the carbon content of its steel wire inputs or record the carbon content contained in its steel wire. Therefore, we disagree with Foshan Shunde that HTS classification 7217.10.3900 is an inappropriate value because it covers a higher carbon content than Foshan Shunde's proffered HTS value from India. Accordingly, in these final results, we have continued to use HTS classification 7217.10.3900 to value carbon steel wire.

Comment 5: Brokerage and Handling

Foshan Shunde asserts that the *Doing Business 2010: Indonesia* study relied upon by the Department to value brokerage and handling is flawed. Foshan Shunde argues that use of another company's actual brokerage and handling expenses represents a preferable way of calculating brokerage and handling expenses to a methodology based upon the World Bank's *Doing Business 2010: Indonesia* study. *See* Foshan Shunde's Case Brief at 50.

If, however, the Department continues to rely on *Doing Business 2010: Indonesia* to calculate brokerage and handling expenses, Foshan Shunde alternatively argues that the

Department must modify its calculation to represent the actual experience of Foshan Shunde. Foshan Shunde argues the Department erroneously calculated its brokerage and handling expenses by 1) basing the calculation on a 20 foot container size rather than a 40 foot container size, and 2) including charges such as letter of credit and document preparation fees in the calculation. Foshan Shunde contends that following the precedent established in *Certain Polyester Staple Fiber from the People's Republic of China,* 76 FR 2886 (January 18,2011) and accompanying Issues and Decision Memorandum at Comment 2 *(Polyester Staple Fiber); Magnesium Metal from China,* 75 FR 65450 (October 25,2010) and accompanying Issues and Decision Memorandum at Comment 8; and *Hand Trucks and Certain Parts Thereof from China,* 76 FR 36083 (June 21,2011) and accompanying Issues and Decision Memorandum at Comment 8, the Department should revise its brokerage and handling calculation to account for the actual expenses that the respondents incurred. Moreover, Foshan Shunde asserts that many elements of brokerage and handling are flat fees which do not vary by the weight or size of the container. Foshan Shunde argues that "Document Preparation" and "Customs Clearance" fees remain the same regardless of container size. Therefore, Foshan Shunde argues that these fees should not be increased when adjusting for container size. Foshan Shunde notes the documentation set forth in its June 23, 2011 supplemental response establish that all "fees are flat fees" which are unrelated to container size. *See* Foshan Shunde's Case Brief at 43. Additionally, Foshan Shunde claims the "Parts and Terminal Fees" listed in the *Doing Business 2010: Indonesia* study include labor and overhead expenses which are already included within its labor costs and financial ratios. *Id.*

Foshan Shunde further asserts that it does not use letters of credit and, thus, incurs no letter of credit fees. Foshan Shunde provided an e-mail from a staff member of the World Bank indicating that letter of credit fees are included within the *Doing Business 2010: Indonesia* study. Foshan Shunde asserts that the "vast majority" of the "document preparation fees" listed in the *Doing Business 2010: Indonesia* study pertain to securing letters of credit. As such, Foshan Shunde argues that the Department should remove "document preparation fees" from Foshan Shunde's brokerage and handling expenses because Foshan Shunde does not incur letter of credit expenses.

Petitioner defends the Department's calculation of brokerage and handling and insists Foshan Shunde has failed to demonstrate any error in that calculation. First, Petitioner contends that because the World Bank collected brokerage and handling expenses on the basis of a 20 foot container load, while Foshan Sliunde shipped ironing boards in 40 foot containers, it was reasonable for the Department to estimate the weight of Foshan Shunde ironing boards shipped in a 20 foot container and then to divide the brokerage handling amount by that estimated weight to arrive at a brokerage and handling cost per kilogram. *See* Petitioner's Rebuttal Brief at 17.

Petitioner further argues that the schedules put forth by Foshan Shunde to support its contention that "document preparation" and "customs clearance" are flat fees are an insufficient basis to conclude that Indonesian "document preparation" and "customs clearance" fees are flat and do not vary by container load. First, Petitioner argues that the fees set forth at Exhibit 8 of Foshan Shunde's July 22,2011 surrogate values submission relate solely to shipments from India. Petitioner asserts that Foshan Shunde has provided no evidence to suggest that Indonesian

"document preparation" or "customs clearance" fees would similarly be uniform over container size. Moreover, Petitioner asserts that with respect to "ports and terminal handling charges" the ratio of how such fees would vary from 20 foot to 40 foot containers range widely. Finally, Petitioner asserts that there is nothing on the record that allows the Department to determine what component of letter of credit cost is embedded within the document preparation fee set forth in the *Doing Business 2010: Indonesia* study. Petitioner argues that bank schedules can vary by transaction and that not all bank charges "might be incurred in a given transaction." *Id.* at 20. Moreover, Petitioner asserts that letters of credit are often negotiated "between banks and traders." *Id.* Finally, Petitioner argues that letter of credit costs (or a portion of those costs) are often assumed by the foreign purchaser. As such, Petitioner argues that there is no way for the Department to determine what component of the "document preparation fee" is attributable to letter of credit costs.

Department's Position:

We have continued to use *Doing Business 2010: Indonesia* to value Foshan Shunde's brokerage and handling expense.

In valuing FOPs, section 773(c)(l) of the Act instructs the Department to use the "best available information" from the appropriate market economy (ME) country. The Department's surrogate value (SV) information is normally based on publicly available information, and the Department considers several factors, including the quality, specificity, and contemporeneity when choosing the most appropriate data *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 (Sept. 8,2006), and accompanying Issues and Decision Memorandum at Comment 3. Further, the Department's practice is to consider FOPs on a case-by-case basis wherein the Department makes product and case-specific decisions as to what constitutes the "best" available surrogate value for each input. *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), and accompanying Issues and Decision Memorandum at Comment 1.

We continue to find that *Doing Business 2010: Indonesia* represents the best available source for valuing Foshan Shunde's brokerage and handling expense. The value is based upon publicly available information which is culled from the actual brokerage and handling experience of companies in Indonesia. The World Bank study is based upon shipments in a 20-foot container load while Foshan Shunde's shipments were made in 40-foot containers. We therefore, determine it reasonable to adjust the brokerage and handling expense to reflect the actual container sizes used by Foshan Shunde.

Additionally, we find that there is insufficient evidence to support Foshan Shunde's argument that the value from *Doing Business 2010: Indonesia* includes flat fees such as "document preparation" and "customs clearance" which apply to any container, regardless of size. Foshan Shunde relies, in part, on documentation from *Indian* freight forwarders *(see*

Foshan Shunde's Case Brief, at 43 *citing,* Exhibit 8), however, we find this evidence unpersuasive because it does not address the Indonesian data relied upon in these final results. Additionally, the *Doing Business 2010: Indonesia* study does not establish how much of "the document preparation fees" are related to securing letters of credit and how much of those expenses relate to other components of brokerage and handling expense. Unlike the record in *Polyester Staple Fiber* cited by respondent, as noted, the record in this review does not permit a segregation of letter of credit fees. For this reason, we disagree that there is sufficient support warranting an adjustment to the values reflected in the *Doing Business 2010: Indonesia* study.

We further fmd that the *Doing Business 2010: Indonesia* study does not provide a breakdown of which expenses included within that study are attributable to labor. We therefore disagree with Foshan Shunde that there is evidence to support its assertion that "Parts and Terminal Fees" include labor and overhead expenses already included in other parts of the dumping calculation.

Based upon the foregoing, in these final results, we have continued to use the brokerage and handling calculation set forth in the *Preliminary Results.*

Comment 6: Zeroing

Foshan Shunde contends that the Department should not apply its standard practice of zeroing in this review. Foshan Shunde asserts that the Department's zeroing practice is contrary to U.S. obligations under General Agreement on Trade and Tariffs (GATT) 1994 and the World Trade Organization (WTO) Antidumping Agreement. Foshan Shunde notes that on April 18, 2006, the WTO Appellate Body determined that the Department's standard margin calculation methodology violated U.S. trade obligations under the Anti-Dumping Agreement and GAIT 1994. Foshan Shunde further asserts that the WTO has determined in all subsequent determinations that the Department's practice of zeroing in administrative reviews is contrary to U.S. trade obligations. *See* Foshan Shunde's Case Brief at 52-53.

Foshan Shunde further argues that recent Federal Circuit decisions have called into question the Department's application of zeroing. Foshan Shunde asserts that *Dongbu Steel Co.,* v. *United States* 1363, 1372 (Fed. Cir. 2011) *(Dongbu)* establishes that the Department's determination to comply with WTO decisions only in regard to investigations "does not mean that it is lawful to give inconsistent constructions to the same statutory language." Foshan Shunde's Case Brief at 55. Rather, Foshan Shunde insists, the Department's interpretation of the statute must comply with domestic law including reasonably interpreting statutes. Moreover, Foshan Shunde asserts *that JTEKT Corp.* v. *United States,* 642 F.3d 1378, 1384 (Fed. Cir. 2011) *(JTEKT)* directed the Department to explain why it is permissible for the Department to use a different methodology with regard to zeroing in investigations than in annual reviews. As such, Foshan Shunde asserts that the Department's citations to WTO implementation procedures that were set forth in *Floor-Standing Metal-Top Ironing Tables and Certain Parts thereoffrom the People's Republic of China* March 22, 2011 (76 FR 15297) and accompanying Issues and Decision Memorandum at Comment 4 are of "no moment because the Courts have called into

question the Department's compliance with U.S. law and the basic tenets of statutory construction." Foshan Shunde Case Brief at pages 56-57.

Petitioner asserts that the Department's administrative practice is to set negative margins to zero in administrative reviews. Petitioner cites to *Certain Preserved Mushrooms from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Rescission in Part,* 76 FR 56732 (September 14, 2011) *(Mushrooms)* and accompanying Issues and Decision Memorandum at Comment 14 and *Small Diameter Graphite Electrodes from the People's Republic of China: Final Results of First Administrative Review of the Antidumping Order and Final Rescission of the Administrative Review in Part,* 76 FR 56397 (September 13, 2011) as two recent cases wherein the Department has adhered to the methodology of setting negative margins to zero.

Department Position:

We have not changed our calculation of the weighted-average dumping margin, as suggested by the respondents, in these fmal results.

Section 771(35)(A) of the Act defines "dumping margin" as the "amount by which the normal value exceeds the export price or constructed export price of the subject merchandise" (emphasis added). The definition of "dumping margin" calls for a comparison of normal value (NV) and export price (EP) or constructed export price (CEP). Before making the comparison called for, it is necessary to determine how to make the comparison.

Section 777A(d)(l) of the Act and 19 C.F.R. 351.414 of the Department's regulations provide the methods by which NV may be compared to EP (or CEP). Specifically, the statute and regulations provide for three comparison methods: average-to-average, transaction-to-transaction, and average-to-transaction. These comparison methods are distinct from each other, and each produces different results. When using transaction-to-transaction or average-to-transaction comparisons, a comparison is made for each export transaction to the United States. When using average-to-average comparisons, a comparison is made for each group of comparable export transactions for which the EPs (or CEPs) have been averaged together (averaging group).

Section 771(35)(B) of the Act defines weighted-average dumping margin as "the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer." The definition of "weighted average dumping margin" calls for two aggregations which are divided to obtain a percentage. The numerator aggregates the results of the comparisons. The denominator aggregates the value of all export transactions for which a comparison was made.

The issue of "zeroing" versus "offsetting" involves how certain results of comparisons are treated in the aggregation of the numerator for the "weighted average dumping margin" and

relates back to the ambiguity in the word "exceeds" as used in the definition of "dumping margin" in section 771(35)(A). Application of "zeroing" treats comparison results where NY is less than EP or CEP as indicating an absence of dumping, and no amount (zero) is included in the aggregation of the numerator for the "weighted average dumping margin". Application of "offsetting" treats such comparison results as an offset that may reduce the amount of dumping found in connection with other comparisons, where a negative amount may be included in the aggregation of the numerator of the "weighted average dumping margin" to the extent that other comparisons result in the inclusion of dumping margins as positive amounts.

In light of the comparison methods provided for under the statute and regulations, and for the reasons set forth in detail below, the Department finds that the offsetting method is appropriate when aggregating the results of average-to-average comparisons, and is not similarly appropriate when aggregating the results of average-to-transaction comparisons, such as were applied in this administrative review. The Department interprets the application of average-to-average comparisons to contemplate a dumping analysis that examines the pricing behavior on average of an exporter or producer with respect to the subject merchandise, whereas under the average-to-transaction comparison methodology the Department undertakes a dumping analysis that examines the pricing behavior of an exporter or producer with respect to individual export transactions. The offsetting approach described in the average-to-average comparison methodology allows for an overall examination of pricing behavior on average. The Department's interpretation of section 771(35) of the Act to permit zeroing in average-to-transaction comparisons, as in this administrative review, and to permit offsetting in average-to-average comparisons reasonably accounts for differences inherent in the distinct comparison methodologies.

Whether "zeroing" or "offsetting" is applied, it is important to note that the weighted-average dumping margin will reflect the value of all export transactions, dumped and non-dumped, examined during the POR; the value of such sales is included in the aggregation of the denominator of the weighted-average dumping margin. Thus, a greater amount of non-dumped transactions results in a lower weighted-average dumping margin under either methodology.

The difference between "zeroing" and "offsetting" reflects the ambiguity the Federal Circuit has found in the word "exceeds" as used in section 771(35)(A). *Timken Co.* v. *United States*, 354 F.3d 1334, 1341-45 (Fed. Cir. 2004) *(Timken).* The courts repeatedly have held that the statute does not speak directly to the issue of zeroing versus offsetting.[6] For decades the

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[6] *See PAM, S.p.A.* v. *United States*, 265 F. Supp. 2d 1362, 1371 (CIT 2003) *(PAM)* ("{The} gap or ambiguity in the statute requires the application of the *Chevron* step-two analysis and compels this court to inquire whether Commerce's methodology of zeroing in calculating dumping margins is a reasonable interpretation of the statute."); *Bowe Passat Reinigungs-Und Waschereitechnik GmbH v. United States*, 926 F. Supp. 1138, 1150 (CIT 1996) *(Bowe Passat)* ("The statute is silent on the question of zeroing negative margins."); *Serampore Indus. Pvt. Ltd* v. *U.S. Dep't of Commerce*, 675 F. Supp. 1354, 1360 (CIT 1987) *(Serampore)* ("A plain reading of the statute discloses no provision for Commerce to offset sales made at {less than fair value} with sales made at fair value.... Commerce may treat sales to the United States market made at or above prices charged in the exporter's home market as having a zero percent dumping margin.").

Department interpreted the statue to apply zeroing in the calculation of the weighted-average dumping margin, regardless of the comparison method used. In view of the statutory ambiguity, on multiple occasions, both the Federal Circuit and other courts squarely addressed the reasonableness of the Department's zeroing methodology and unequivocally held that the Department reasonably interpreted the relevant statutory provision as permitting zeroing.[7] In so doing, the courts relied upon the rationale offered by the Department for the continued use of zeroing, *i.e.*, to address the potential for foreign companies to undermine the antidumping laws by masking dumped sales with higher priced sales: "Commerce has interpreted the statute in such a way as to prevent a foreign producer from masking its dumping with more profitable sales. Commerce's interpretation is reasonable and is in accordance with law."g The Federal Circuit explained in *Timken* that denial of offsets is a "reasonable statutory interpretation given that it legitimately combats the problem of masked dumping, wherein certain profitable sales serve to mask sales at less than fair value." *See Timken,* 354 F.3d at 1343. As reflected in that opinion, the issue of so-called masked dumping was part of the policy reason for interpreting the statute in the manner applied by the Department. No U.S. court has required the Department to demonstrate "masked dumping" before it is entitled to invoke this interpretation of the statute and deny offsets to dumped sales. *See, e.g., Timken,* 354 F.3d at 1343; *Corus 1,395* F.3d at *1343; Corus 1/.502* F.3d at 1370, 1375; and *NSK,* 510 F.3d at 1375.

In 2005, a panel of the World Trade Organization (WTO) Dispute Settlement Body found that the United States did not act consistently with its obligations under Article 2.4.2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 when it employed the zeroing methodology in average-to-average comparisons in certain challenged antidumping duty investigations. *See* Panel Report, *United States - Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing),* WTIDS294/R (Oct. 31, 2005) *(EC-Zeroing Panel).* The initial WTO Dispute Settlement Body Panel Report was limited to the Department's use of zeroing in average-to-average comparisons in antidumping duty investigations. *See EC-Zeroing Panel,* WTIDS294/R. The Executive Branch determined to implement this report pursuant to the authority provided in Section 123 of the Uruguay Round Agreements Act (URAA) (19 U.S.c. § 3533(f), (g» (Section 123). *See Final Modification for Investigations,* 71 FR at 77722; and *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Change in Effective Date of Final Modification,* 72 FR 3783 (Jun. 26, 2007) (together, *Final Modification for Investigations).* Notably, with respect to the use of zeroing, the Panel found that the United States acted

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7 *See, e.g., Koyo Seiko Co.* v. *United States,* 551 F.3d 1286, 1290-91 (Fed. Cir. 2008) *(Koyo 2008); NSK Ltd.* v. *United States,* 510 F.3d 1375, 1379-80 (Fed. Cir. *2007)(NSK); Corus Staal BV v. United States,* 502 F.3d 1370, 1375 (Fed. Cir. 2007) *(Corus II); Corus Staal BV v. Department o/Commerce,* 395 F.3d 1343, 1347 (Fed. Cir. *2005) (Corus I); Timken,* 354 F.3d at 1341-45; *PAM,* 265 F. Supp. 2d at 1370 ("Commerce's zeroing methodology in its calculation of dumping margins is grounded in long-standing practice."); *Bowe Passat,* 926 F. Supp. at 1149-*50; Serampore,* 675 F. Supp. at 1360-61.

8 *Serampore,* 675 F. Supp. at 1361 (citing *Certain Welded Carbon Steel Standard Pipe and Tube From India; Final Determination o/Sales at Less Than Fair Value,* 51 FR 9089, 9092 (Mar. 17, 1986» ; *see also Timken,* 354 F.3d at *1343; PAM,* 265 F. Supp. 2d at 1371.

inconsistently with its WTO obligations only in the context of average-to-average comparisons in antidwnping duty investigations. The Panel did not fmd fault with the use of zeroing by the United States in any other context. In fact, the Panel rejected the European Communities' argwnents that the use of zeroing in administrative reviews did not comport with the WTO Agreements. *See, EC-Zeroing Panel* at 7.284, 7.291.

Without an affmnative inconsistency fmding by the Panel, the Department did not propose to alter its zeroing practice in other contexts, such as administrative reviews. As the Federal Circuit recently held, the Department reasonably may decline, when implementing an adverse WTO report, to take any action beyond that necessary for compliance. *See Thyssenkrupp Acciai Speciali Terni S.p.A.* v. *United States,* 603 F. 3d 928, 934 (Fed. Cir. 2010). Moreover, in *Corus I,* the Federal Circuit acknowledged the difference between antidwnping duty investigations and administrative reviews, and held that section 771(35) of the Act was just as ambiguous with respect to both proceedings, such that the Department was permitted, but not required, to use zeroing in antidwnping duty investigations. *See Corus 1,395* F. 3d at 1347. In light of the adverse WTO Dispute Settlement Body fmding and the ambiguity that the Federal Circuit found inherent in the statutory text, the Department abandoned its prior litigation position - that no difference between antidwnping duty investigations and administrative reviews exists for purposes of using zeroing in antidwnping proceedings - and departed from its longstanding and consistent practice by ceasing the use of zeroing. The Department began to apply offsetting in the limited context of average-to-average comparisons in antidwnping duty investigations. *See Final Modification for Investigations,* 71 FR at 77722. With this modification, the Department's interpretation of the statute with respect to non-dwnped comparisons was changed within the limited context of investigations using average-to-average comparisons. Adoption of the modification pursuant to the procedure set forth in section 123(g) of the URAA was specifically limited to address adverse WTO findings made in the context of antidwnping investigations using average-to-average comparisons. The Department did not, at that time, change its practice of zeroing in other types of comparisons, including average-to-transaction comparisons in administrative reviews. [9] *See id.,* 71 FR at 77724.

The Federal Circuit subsequently upheld the Department's decision to cease zeroing in average-to-average comparisons in antidwnping duty investigations while recognizing that the Department limited its change in practice to certain investigations and continued to use zeroing when making average-to-transaction comparisons in administrative reviews. *See US. Steel Corp.,* 621 F. 3d. at 1355 n.2, 1362-63. In upholding the Department's decision to cease zeroing in average-to-average comparisons in antidwnping duty investigations, the Federal Circuit accepted that the Department likely would have different zeroing practices between average-to-

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9 On February 14,2012, in response to several WTO dispute settlement reports, the Department adopted a revised methodology which allows for offsets when making average-to-average comparisons in reviews. *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification,* 77 FR 8101 (February 14,2012). *("Final Modification for Reviews").* The *Final Modification for Reviews* makes clear that the revised methodology will apply to antidumping duty administrative reviews where the preliminary results are issued after April 16, 2012. Because the preliminary results in this administrative review were completed prior to April 16,2012, any change in practice with respect to the treatment of non-dumped sales pursuant to the *Final Modification for Reviews* does not apply here.

average and other types of comparisons in antidumping duty investigations. *Id.,* at 1363 (stating that the Department indicated an intention to use zeroing in average-to-transaction comparisons in investigations to address concerns about masked dumping). The Federal Circuit's reasoning in upholding the Department's decision relied, in part, on differences between various types of comparisons in antidumping duty investigations and the Department's limited decision to cease zeroing only with respect to one comparison type. *Id.,* at 1361-63. The Federal Circuit acknowledged that section 777A(d) of the Act permits different types of comparisons in antidumping duty investigations, allowing the Department to make average-to-transaction comparisons where certain patterns of significant price differences exist. *See id.,* at 1362 (quoting sections 777A(d)(I)(A) and (B) of the Act, which enumerate various comparison methodologies that the Department may use in investigations); *see also* section 777A(d)(I)(B) of the Act. The Federal Circuit also expressly recognized that the Department intended to continue to address targeted or masked dumping through continuing its use of average-to-transaction comparisons and zeroing. *See U.S. Steel Corp.*, 621 F. 3d at 1363. In summing up its understanding of the relationship between zeroing and the various comparison methodologies that the Department may use in antidumping duty investigations, the Federal Circuit acceded to the possibility of disparate, yet equally reasonable interpretations of section 771(35) of the Act, stating that "{b}y enacting legislation that specifically addresses such situations, Congress may just as likely have been signaling to Commerce that it need not continue its zeroing methodology in situations where such significant price differences among the export prices do *not* exist." *Id.* (emphasis added).

We disagree with the respondent(s) that the Federal Circuit's decisions in *Dongbu Steel* v. *United States,* 635 F. 3d 1363 (Fed. Cir. 2011) *and JTEKT Corporation* v. *US,* 2010-1516, -1518 (CAFC June 29, 2011) *(JTEKT),* require the Department to change its methodology in this administrative review. These holdings were limited to finding that the Department had not adequately explained the different interpretations of section 771(35) of the Act in the context of investigations versus administrative reviews, but the Federal Circuit did not hold that these differing interpretations were contrary to law. Importantly, the panels in *Dongbu* and *JTEKT* did not overturn prior Federal Circuit decisions affirming zeroing in administrative reviews, including *SKF,* in which the Court affirmed zeroing in administrative reviews notwithstanding the Department's determination to no longer use zeroing in certain investigations. *See SKF v. United States,* 630 F.3d 1365 (Fed. Cir. 2011). Unlike the determinations examined in *Dongbu* and *JTEKT,* the Department, in these final results, provides additional explanation for its changed interpretation of the statute subsequent to the *Final Modification for Investigations* -- whereby we interpret section 771(35) of the Act differently for certain investigations (when using average-to-average comparisons) and administrative reviews. For all these reasons, we fmd that our determination is consistent with the holdings in *Dongbu, JTEKT, U.S. Steel,* and *SKF.*

The Department's interpretation of section 771(35) of the Act reasonably resolves the ambiguity inherent in the statutory text for multiple reasons. First, outside of the context of average-to-average comparisons,[10] the Department has maintained a long-standing, judicially-

[10] The *Final Modification for Reviews* adopts this comparison method with offsetting as the default method for

affmned interpretation of section 771(35) of the Act in which the Department does not consider a sale to the United States as dumped if nonnal value does not exceed export price. Pursuant to this interpretation, the Department treats such a sale as having a dumping margin of zero, which reflects that no dumping has occurred, when calculating the aggregate weighted-average dumping margin. Second, adoption of an offsetting methodology in connection with average-to-average comparisons was not an arbitrary departure from established practice because the Executive Branch adopted and implemented the approach in response to a specific international obligation pursuant to the procedures established by the Uruguay Round Agreements Act for such changes in practice with full notice, comment, consultations with the Legislative Branch, and explanation. Third, the Department's interpretation reasonably resolves the ambiguity in section 771(35) of the Act in a way that accounts for the inherent differences between the result of an average-to-average comparison and the result of an average-to-transaction comparison.

The Department's *Final Modificationfor Investigations* to implement the WTO Panel's limited finding does not disturb the reasoning offered by the Department and affinned by the Federal Circuit in several prior, precedential opinions upholding the use of zeroing in average-to-transaction comparisons in administrative reviews as a reasonable interpretation of section 771(35) of the Act. *See, e.g., SKF USA, Inc.* v. *United States,* 537 F. 3d 1373, 1382 (Fed. Cir. *2008); NSK,* 510 F. 3d at 1379-1380; *Corus* 11,502 F. 3d at 1372-1375; *Timken,* 354 F. 3d at 1343. In the *Final Modificationfor Investigations,* the Department adopted a possible construction of an ambiguous statutory provision, consistent with the *Charming Betsy* doctrine, to comply with certain adverse WTO dispute settlement findings.[11] Even where the Department maintains a separate interpretation of the statute to permit the use of zeroing in certain dumping margin calculations, the *Charming Betsy* doctrine bolsters the ability of the Department to apply an alternative interpretation of the statute in the context of average-to-average comparisons so that the Executive Branch may detennine whether and how to comply with international obligations of the United States. Neither section 123 nor the *Charming Betsy* doctrine require the Department to modify its interpretation of section 771(35) of the Act for all scenarios when a more limited modification will address the adverse WTO finding that the Executive Branch has detennined to implement. Furthennore, the wisdom of Commerce's legitimate policy choices in this case - *i.e.,* to abandon zeroing only with respect to average-to-average comparisons - is not subject to judicial review. *Suramerica de Aleaciones Laminadas, CA.* v. *United States,* 966 F. 2d 660, 665 (Fed. Cir. 1992). These reasons alone sufficiently justify and explain why the Department reasonably interprets section 771(35) of the Act differently in average-to-average comparisons relative to all other contexts.

Moreover, the Department's interpretation reasonably accounts for inherent differences

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administrative reviews, however, as explained in note 4 this modification is not applicable to these final results.

[11] According to *Murray* v. *Schooner Charming Betsy,* 6 U.S. 64, 118 (1804), "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country." The principle emanating from the quoted passage, known as the *Charming Betsy* doctrine, supports the reasonableness of the Department's interpretation of the statute in the limited context of average-to-average comparisons in antidumping duty investigations because the Department's interpretation of the domestic law accords with international obligations as understood in this country.

between the results of distinct comparison methodologies. The Department interprets section 771(35) of the Act depending upon the type of comparison methodology applied in the particular proceeding. This interpretation reasonably accounts for the inherent differences between the result of an average-to-average comparison and the result of an average-to-transaction comparison.

The Department may reasonably interpret section 771(35) of the Act differently in the context of the average-to-average comparisons to permit negative comparison results to offset or reduce positive comparison results when calculating "aggregate dumping margins" within the meaning of section 771(35)(B) of the Act. When using an average-to-average comparison methodology, *see, e.g.,* section 777A(d)(1)(A)(i) of the Act, the Department usually divides the export transactions into groups, by model and level of trade (averaging groups), and compares an average export price or constructed export price of transactions within one averaging group to an average normal value for the comparable merchandise of the foreign like product. In calculating the average export price or constructed export price, the Department averages all prices, both high and low, for each averaging group. The Department then compares the average EP or CEP for the averaging group with the average normal value for the comparable merchandise. This comparison yields an average result for the particular averaging group because the high and low prices within the group have been averaged prior to the comparison. Importantly, under this comparison methodology, the Department does not calculate the extent to which an exporter or producer dumped a particular sale into the United States because the Department does not examine dumping on the basis of individual U.S. prices, but rather performs its analysis "on average" for the averaging group within which higher prices and lower prices offset each other. The Department then aggregates the comparison results from each of the averaging groups to determine the aggregate weighted-average dumping margin for a specific producer or exporter. At this aggregation stage, negative, averaging-group comparison results offset positive, averaging-group comparison results. This approach maintains consistency with the Department's average-to-average comparison methodology, which permits EPs above normal value to offset EPs below normal value within each individual averaging group. Thus, by permitting offsets in the aggregation stage, the Department determines an "on average" aggregate amount of dumping for the numerator of the weighted-average dumping margin ratio consistent with the manner in which the Department determined the comparison results being aggregated.

In contrast, when applying an average-to-transaction comparison methodology, *see, e.g.,* section 777A(d)(2) of the Act, as the Department does in this administrative review, the Department determines dumping on the basis of individual U.S. sales prices. Under the average-to-transaction comparison methodology, the Department compares the EP or CEP for a particular U.S. transaction with the average normal value for the comparable merchandise of the foreign like product. This comparison methodology yields results specific to the selected individual export transactions. The result of such a comparison evinces the amount, if any, by which the exporter or producer sold the merchandise at an EP or CEP less than its normal value. The Department then aggregates the results of these comparisons - *i.e.,* the amount of dumping found for each individual sale - to calculate the weighted-average dumping margin for the period of

review. To the extent the average normal value does not exceed the individual EP or CEP of a particular U.S. sale, the Department does not calculate a dumping margin for that sale or include an amount of dumping for that sale in its aggregation of transaction-specific dumping margins.[12] Thus, when the Department focuses on transaction-specific comparisons, as it did in this administrative review, the Department reasonably interprets the word "exceeds" in section 771(35)(A) of the Act as including only those comparisons that yield positive comparison results. Consequently, in transaction-specific comparisons, the Department reasonably does not permit negative comparison results to offset or reduce other positive comparison results when determining the "aggregate dumping margin" within the meaning of section 771(35)(B) of the Act.

Put simply, the Department interprets the application of average-to-average comparisons to contemplate a dumping analysis that examines the pricing behavior, on average, of an exporter or producer with respect to the subject merchandise, whereas under the average-to-transaction comparison methodology the Department continues to undertake a dumping analysis that examines the pricing behavior of an exporter or producer with respect to individual export transactions. The offsetting approach described in the average-to-average comparison methodology allows for a reasonable examination of pricing behavior, on average. The average-to-average comparison method inherently permits non-dumped prices to offset dumped prices before the comparison is made. This offsetting can reasonably be extended to the next stage of the calculation where average-to-average comparison results are aggregated, such that offsets are (1) implicitly granted when calculating average export prices and (2) explicitly granted when aggregating averaging-group comparison results. This rationale for granting offsets when using average-to-average comparisons does not extend to situations where the Department is using average-to-transaction comparisons because no offsetting is inherent in the average-to-transaction comparison methodology.

In sum, on the issue of how to treat negative comparison results in the calculation of the weighted-average dumping margin pursuant to section 771(35)(B) of the Act, for the reasons explained, the Department reasonably may accord dissimilar treatment to negative comparison results depending on whether the result in question flows from an average-to-average comparison or an average-to-transaction comparison. We noted that neither the CIT nor the Federal Circuit has rejected the above reasons. In fact, the CIT recently sustained the Department's explanation for using zeroing in administrative reviews while not using zeroing in certain types of investigations. *See Union Steel* v. *United States,* Consol. Court No. 11-00083, slip op. 12-24 (CIT Feb. 27,2012). Accordingly, the Department's interpretations of section 771(35) of the Act to permit zeroing in average-to-transaction comparisons, as in the underlying administrative review, and to permit offsetting in average-to-average comparisons reasonably accounts for the differences inherent in distinct comparison methodologies.

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[12] As discussed previously, the Department does account, however, for the sale in its weighted-average dumping margin calculation. The value of any non-dumped sale is included in the denominator of the weighted-average dumping margin while no dumping amount for non-dumped transactions is included in the numerator. Therefore, any non-dumped transactions results in a lower weighted-average dumping margin.

Regarding other WTO reports cited by the respondent(s) finding the denial of offsets by the United States to be inconsistent with the Antidumping Agreement, the Federal Circuit has held that WTO reports are without effect under U.S. law, "unless and until such a {report} has been adopted pursuant to the specified statutory scheme" established in the URAA. *See Corus I,* 395 F.3d at 1347-49; accord *Corus II,* 502 F.3d at 1375; and *NSK,* 510 F.3d 1375. As is clear from the discretionary nature of this scheme, Congress did not intend for WTO reports to trump automatically the exercise of the Department's discretion in applying the statute. See 19 USC 3538(b)(4) (implementation of WTO reports is discretionary). Moreover, as part of the URAA process, Congress has provided a procedure through which the Department may change a regulation or practice in response to WTO reports. *See* 19 U.S.C. 3533(g).

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

Comment 7: Department Regulation Regarding Submission of Surrogate Value Inforination

Foshan Shunde asserts that the Department's Regulations regarding submission of case briefs "do not adequately account for the intricacies and complexities of NME antidumping duty proceedings and are thus unreasonable on their face". *See* Foshan Shunde's Case Brief at 57. Moreover, Foshan Shunde claims the Department "abused" its discretion by not acquiescing to Foshan Shunde's request for extending the deadline for filing case briefs in this review. *Id.*

Foshan Shunde notes that section 351.301(c)(3)(ii) (2010) establishes that rebuttals to surrogate value information are due 30 days after publication of the preliminary results. This is also the same date that case briefs are due. Foshan Shunde submitted rebuttal surrogate value information on this 30-day deadline. However, Foshan Shunde argues, it could not know for certain whether other interested parties would rebut its surrogate value information or what would form the final administrative record in this case until after the deadline for the case briefs had effectively passed. Foshan Shunde asserts that it has thus been deprived of a "reasonable opportunity to ascertain the exact scope of the administrative record." Foshan Shunde's Case Brief at 57. Foshan Shunde speculates that the Department's regulatory scheme could permit Petitioner to file a rebuttal brief without providing Foshan Shunde an opportunity to comment on the contents of Petitioner's submission. Foshan Shunde asserts that this possibility renders the Department's regulation unreasonable and a violation of the Administrative Procedures Act.

Foshan Shunde also argues that the Department abused its discretion by neglecting to account for the impact that the filing of Foshan Shunde's case brief had on the ability of its officials to celebrate Chinese National holidays (which ran from October 1, 2011 through October 7,2011). Foshan Shunde further asserts that the Department "routinely" grants some extension for filing surrogate value information. Foshan Shunde's Case Brief at 59. Foshan Shunde notes that in the previous review's final results, the Department's granted interested parties an extension to submit surrogate value information. Foshan Shunde concludes that the

Department is "obligated to provide the parties a reasonable time to evaluate the factual record, as finalized in the final round of surrogate value facts, before preparing case briefs." *Id* at 60. Foshan Shunde asserts that such a "reasonable" period of time can be no less than seven days. *Id.*

Department's Position:

Foshan Shunde's assertion that the Department deprived it of adequate opportunity to fully comment on the factors of production used in the *Preliminary Results* is without merit. The source of all of the factors of production utilized in the *Preliminary Results* is set forth in the August 31, 2011 Memorandum from Michael J. Heaney to Robert James: "Factors of Production for the Preliminary Results" (Preliminary FOP Memorandum). The Preliminary FOP Memorandum was disclosed to Foshan Shunde. Consistent with sections 351.301(c)(3)(ii) and 353.301(c)(1) of our regulations, we established a deadline of September 27,2011 (20 days after publication of the *Preliminary Results)* for submission of surrogate value information, and a deadline of October 7, 2011 (30 days after publication of the *Preliminary Results)* for submission of any rebuttals to surrogate value information. However, no new FOP data was submitted beyond August 31, 2011. Case briefs were due on October 7, 2012, consistent with 19 CFR 351.309(c)(ii).

In these final results, we have adhered to our normal procedures and find that parties were provided with adequate time to provide surrogate value information in this review. We note that Foshan Shunde was able to file a case brief to respond to the FOP data on the record as of August 31, 2011, and the Department has considered Foshan Shunde's comments in these *Final Results.* Moreover, as noted in our *Preliminary Results,* most of the Indonesian surrogate value information relied upon in these final results is based upon GTA information submitted by Petitioner on June 8, 2011. *See Preliminary Results* 76 FR at 55357. Based upon the foregoing, we disagree with Foshan Shunde's assertion that the regulatory scheme has somehow deprived Foshan Shunde of adequate time to submit either affirmative or rebuttal surrogate value information.

Finally, we disagree Foshan Shunde's contention that extensions are "routinely" granted for case briefs, or that observances of Chinese holidays necessitate the granting of such extensions. Although the Department makes every effort to accommodate extension requests, the Department also must remain mindful of the statutory deadlines in place for its proceedings, and the time and resources needed to adequately respond to the parties' arguments. For this reason, it is not always possible to grant extension requests in every instance. In this review, we find that Foshan Shund was afforded ample time, without an extension, for Foshan Shunde to comment on the record evidence and on the *Preliminary Results.* Furthermore, since there were no new FOP data submitted after August 31, 2011, Foshan Shunde was fully apprised of the complete record when it filed its case brief.

RECOMMENDATION

Based on our analysis of the comments received, we recommend adopting all of the positions set forth above and adjusting the related margin calculations accordingly. If these recommendations are accepted, we will publish the fmal results and the final weighted-average dumping margins for Foshan Shunde and Since Hardware in the *Federal Register*.

Agree ✓ Disagree _

Paul Piquado
Assistant Secretary
for Import Administration

5 MARCH 2012
Date