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Investigation
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March 21, 2018

MEMORANDUM TO: Gary Taverman
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations,
performing the non-exclusive functions and duties of the
Assistant Secretary for Enforcement and Compliance

FROM: James Maeder
Associate Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations
performing the duties of Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Final Affirmative Determination in the Less-Than-Fair-Value Investigation of Carton-Closing Staples from the People's Republic of China

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I. Summary

The Department of Commerce (Commerce) finds that carton-closing staples from the People's Republic of China (China) are being, or are likely to be, sold in the United States at less than fair value (LTFV), as provided in section 735 of the Tariff Act of 1930, as amended (the Act). The period of investigation (POI) is July 1, 2016, through December 31, 2016.

After analyzing the comments submitted by interested parties, we have made changes to the *Preliminary Determination*.[1] We recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum.

II. Background

On November 3, 2017, Commerce published in the *Federal Register* its preliminary affirmative determination in the LTFV investigation of carton-closing staples from China. Between December 4, 2017, and December 15, 2017, we conducted a verification of the questionnaire responses of the sole individually-examined respondent, Shanghai Yueda Nails Co., Ltd. (Yueda) and its affiliates, Qiushan Printing Machine Manufacture Co., Ltd (Qiushan), Fastnail

[1] *See Carton-Closing Staples from the People's Republic of China: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Postponement of Final Determination and Extension of Provisional Measures*, 82 FR 51213 (November 3, 2017) (*Preliminary Determination*) and accompanying Preliminary Decision Memorandum.

Company Limited (Fastnail), and Wuhan FOPO Trading Co., Ltd. (FOPO) (collectively, Yueda Group).[2] We invited parties to comment on the *Preliminary Determination*.

Commerce exercised its discretion to toll deadlines affected by the closure of the Federal Government from January 20 through 22, 2018. If the new deadline falls on a non-business day, in accordance with Commerce's practice, the deadline will become the next business day. The revised deadline for the final determination of this investigation is now March 21, 2018.[3]

On January 26, 2018, Yueda Group and the petitioner filed case briefs.[4] On January 31, 2018, the petitioner submitted its rebuttal brief,[5] and on February 1, 2018, the Yueda Group submitted its rebuttal brief.[6] Based on our review of the *Preliminary Determination*, the results of the verification of Yueda Group and our analysis of the comments received, we made certain changes from our *Preliminary Determination*.

III. Changes from the Preliminary Determination

1. Affiliation/Single Entity Determination

In the *Preliminary Determination*, Commerce found mandatory respondent Yueda affiliated with Qiushan, China Wind International Limited, High-Quality Fastener Ltd., FOPO, and Fastnail, pursuant to sections 771(33)(A) and (F) of the Act.[7] Further, based on the evidence presented in Yueda's questionnaire responses, we preliminarily found that Yueda, Qiushan, FOPO and Fastnail should be treated as a single entity (the Yueda Group) for the purposes of this investigation, pursuant to 19 CFR 351.401(f).[8] In the *Preliminary Determination*, we did not find China Dinghao Co., Limited (Dinghao) affiliated with Yueda because we found no evidence that the owner of Dinghao was in a position to exercise restraint or control over Yueda.[9]

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[2] In the *Preliminary Determination*, Commerce preliminarily determined that Yueda, Qiushan, Fastnail, and FOPO comprise a single entity. *See Preliminary Determination* and accompanying Preliminary Decision Memorandum at 13-14.
[3] *See* Memorandum for The Record from Christian Marsh, Deputy Assistant Secretary for Enforcement and Compliance, performing the non-exclusive functions and duties of the Assistant Secretary for Enforcement and Compliance, "Deadlines Affected by the Shutdown of the Federal Government" (Tolling Memorandum), dated January 23, 2018. All deadlines in this segment of the proceeding have been extended by 3 days.
[4] *See* Letter from Yueda Group re: "Submission of Administrative Case Brief," dated January 26, 2018 (Yueda's Case Brief), and Letter from North American Steel & Wire, Inc./ISM Enterprises (ISM) (the petitioner), re: "Case Brief," dated January 26, 2018 (Petitioner's Case Brief).
[5] *See* Letter from the petitioner, re: "Rebuttal Brief," dated January 31, 2018 (Petitioner's Rebuttal).
[6] *See* Letter from Yueda Group, re: "Rebuttal Brief," dated January 31, 2018 (Yueda's Rebuttal).
[7] *See Preliminary Determination* and accompanying Preliminary Decision Memorandum at 13; *see also* Memorandum, "Less-Than-Fair-Value Investigation of Carton Closing Staples from the People's Republic of China: Preliminary Affiliation and Single Entity Determination," dated October 27, 2017 (Affiliation and Single Entity Memo).
[8] *See* Affiliation and Single Entity Memo.
[9] *Id.*, at 6.

However, for the final determination, based on our verification findings, we determine that it is appropriate to find Dinghao affiliated with Yueda, pursuant to section 771(33)(G) of the Act. Furthermore, we find that Dinghao should be included in the Yueda Group single entity.[10]

Section 771(33) of the Act sets out several categories of persons who are considered to be "affiliated" or "affiliated persons" under the Act:

(A) Members of a family, including brothers and sisters (whether by whole or half blood), spouse, ancestors, and lineal descendants.
(B) Any officer or director of an organization and such organization.
(C) Partners.
(D) Employer and employee.
(E) Any person, directly or indirectly owning, controlling, or holding with power to vote, five percent or more of the outstanding voting stock or shares of any organization and such organization.
(F) Two or more persons directly or indirectly controlling, controlled by, or under common control, with any person.
(G) Any person who controls any other person and such person.[11]

The Act further states that "a person shall be considered to control another person if the person is legally or operationally in a position to exercise restraint or direction over the other person."[12]

Additionally, 19 CFR 351.401(f)outlines the criteria for treating affiliated producers as a single entity for purposes of antidumping proceedings –

(1) In general. In an antidumping proceeding under this part, the Secretary will treat two or more affiliated producers as a single entity where those producers have production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities and the Secretary concludes that there is a significant potential for the manipulation of price or production.

(2) Significant potential for manipulation. In identifying a significant potential for the manipulation of price or production, the factors the Secretary may consider include:

(i) The level of common ownership;
(ii) The extent to which managerial employees or board members of one firm sit on the board of directors of an affiliated firm; and
(iii) Whether operations are intertwined, such as through the sharing of sales information, involvement in production and pricing decisions, the sharing of facilities or employees, or significant transactions between the affiliated

[10] *See* Memorandum to the File, re: "Verification of the Questionnaire Responses of the Yueda Group and its Toller in the Antidumping Investigation of Carton-Closing Staples from the People's Republic of China (China)," dated January 12, 2018 (Verification Report).
[11] *See* section 771(33) of the Act.
[12] *Id*.

producers.

To the extent that section 771(33) of the Act does not conflict with Commerce's application of separate rates and enforcement of the NME provision or section 773(c) of the Act, Commerce will determine that exporters and/or producers are a single entity if the facts of the case support such a finding.[13]

At verification, company officials provided sufficient detail regarding the functions of Dinghao as an exclusive reseller of Yueda and/or Qiushan produced-merchandise. Commerce learned that Dinghao does not make any sales to the United States independent of direct orders from Yueda. Furthermore, as Commerce noted in the Verification Report:

> according to a Yueda/Qiushan employee {Sun Yan} who is also the registered owner/director of Dinghao (on paper), Zhang Po created this company for the purpose of exporting Qiushan-produced merchandise via a sales channel other than Yueda as exporter of record. Also, according to this individual, Dinghao does not retain any earnings; all Dinghao earnings from export sales of subject merchandise are transferred to Yueda/Qiushan.[14]

Commerce further noted that "Sun Yan stated that Dinghao was 'created' as a Hong Kong company at the request of Zhang Po, the majority owner of Yueda, for the sole purpose of selling Qiushan-produced carton-closing staples through a company other than Yueda as identified on the export documentation as the seller/exporter."[15] Finally, Sun Yan stated that "Dinghao receives no remuneration for its sales of Quishan-produced merchandise as Dinghao is essentially a paper company created by Zhang Po, using Sun Yan's name, for the sole purpose of exporting Qiushan-produced merchandise under another name."[16] Thus, the majority owner of Yueda founded Dinghao in Hong Kong for the sole purpose of creating a secondary sales channel other than Yueda's direct sales to the United States. Although we found Yueda and Dinghao not affiliated in the *Preliminary Determination*, we have reconsidered this preliminary finding in light of our verification findings and find that Yueda/Qiushan controls Dinghao and, thus, that the two companies are affiliated within the meaning of section 771(33)(G) of the Act. We find that control exists because Yueda is in a position to impact Dinghao's decisions concerning the pricing of subject merchandise sold to the United States as a result of a Yueda employee being the sole owner of Dinghao. The stated purpose of Dinghao's existence and the fact that all Dinghao earnings are transferred to Yueda are further evidence of the control exercised by Yueda.

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[13] *See Certain Preserved Mushrooms from the People's Republic of China: Preliminary Results of Sixth New Shipper Review and Preliminary Results and Partial Rescission of Fourth Antidumping Duty Administrative Review*, 69 FR 10410, 10413 (March 5, 2004) (*Mushrooms*), unchanged in *Final Results and Final Rescission, in Part, of Antidumping Duty Administrative Review: Certain Preserved Mushrooms from the People's Republic of China*, 70 FR 54361 (September 14, 2005).
[14] *See* Verification Report at 2.
[15] *Id.*, at 5.
[16] *Id.*

Further, pursuant to 19 CFR 351.401(f), Commerce also finds that Dinghao should be treated as part of the Yueda Group single entity. Because Dinghao is an exporter of the merchandise subject to this investigation (*i.e.*, merchandise produced by Yueda) we find that the first criterion in 19 CFR 351.401(f)(1) is met. Additionally, we find that the second criterion in 19 CFR 351.401(f)(1), a significant potential for manipulation of price or production, is also met. Specifically, the record evidence demonstrates that Yueda's and Dinghao's operations are intertwined[17] through the sharing of sales information and through the transfer of Dinghao's earnings to Yueda.[18]

2. *China-wide Entity*

In the *Preliminary Determination*, Commerce determined that mandatory respondent, Zhejiang Best Nail Industrial Co., Ltd. (Best Nail) and 20 other exporters and/or producers did not respond to our request for information and, further, did not demonstrate that they were eligible for a separate rate. Thus, Commerce considered them to be part of the China-wide entity.[19] Additionally, Commerce preliminarily found that the China-wide entity, which includes Best Nail and the other Chinese exporters and/or producers that did not respond to Commerce's requests for information, failed to provide necessary information, withheld information requested by Commerce, failed to provide information in a timely manner, and significantly impeded this proceeding by not submitting the requested information.[20] Accordingly, Commerce determined that the use of facts available was warranted in determining the rate of the China-wide entity, pursuant to sections 776(a)(1) and (a)(2)(A)-(C) of the Act.

Moreover, Commerce found that the China-wide entity's failure to provide the requested information constitutes circumstances under which it is reasonable to conclude that the China-wide entity did not cooperate to the best of its ability.[21] Thus, based on the facts of the record, we preliminarily found that an adverse inference based on adverse facts available (AFA) is warranted in selecting from the facts otherwise available with respect to the China-wide entity in accordance with section 776(b) of the Act and 19 CFR 351.308(a). In the *Preliminary Determination*, Commerce determined to base the AFA rate for the China-wide entity on Yueda's highest transaction-specific margin of 58.93 percent.[22] For the final determination, we continue to determine that AFA is warranted for the China-wide entity, including Best Nail. However, based on our final determination with regard to Yueda Group, as discussed below, Commerce is revising the AFA rate assigned to the China-wide entity for the final determination.

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[17] *See* 19 CFR 351.401(f)(2)(iii).
[18] *See* Verification Report at 2 and 5.
[19] *See Preliminary Determination*, 82 FR at 51214 and accompanying Preliminary Decision Memorandum at 14.
[20] *Id.*
[21] *Id.*, at 16.
[22] *Id.*, at 16-17.

IV. Discussion of Issues

GENERAL ISSUES

Comment 1: Whether to Assign Total Adverse Facts Available to Yueda Group

Petitioner Case Brief:

- Commerce should apply total adverse facts available (AFA) to Yueda, pursuant to section 776(a) and (b) of the the Act, because Yueda has failed to cooperate to the best of its ability. Yueda prevented Commerce from verifying the toller's purchase, production, inventory, sales, and accounting information that was incorporated in Yueda's responses.
- Yueda informed Commerce on December 3, 2017, the day prior to the beginning of verification, that the toller's production facility had been shut down by the Government of China on November 30, 2017, allegedly due to the toller's non-compliance with environmental standards. Commerce's subsequent independent contact with the toller by telephone resulted in an affirmative reply from a company official that the toller was operational. Thus, Commerce canceled its planned verification of the toller's shutdown as the phone call made it clear that the toller was "open for business, operational and available for prospective business opportunities."[23]
- Commerce was unable to verify the production processes undertaken by the toller, including the drawing of steel wire rod into steel wire and the process of coating the drawn steel wire in zinc or copper, required for subject staples.[24] Commerce was also unable to verify the quantities of the direct materials, labor and energy consumed by the toller to produce coated and galvanized steel wire, as well as Yueda's claim that no yield loss occurred when drawing wire rod into wire.[25]
- Commerce reports that it checked the amounts of raw material withdrawals from the toller, including coated and galvanized steel wire, against the raw material cost allocation for December 2016 and found no discrepancies.[26] However, because Commerce could not visit the toller or verify the toller's production process, Commerce has no basis for concluding that the quantity of steel wire rod that Yueda reported that it provided its toller represents the actual amount of steel wire rod used to produce the coated steel wire sent to Yueda by the toller. The toller could have purchased additional raw materials or used inputs from its inventories to produce the steel wire it sent to Yueda.
- According to Commerce's Dumping Manual, "Plant tours are essential to Non-Market Economy (NME) verifications. Because factors of production are the basis for calculating normal value in NME investigations and reviews, plant tours are necessary to physically verify the production process."[27]
- Commerce has stated that "it is fundamental to verification that a respondent be able to show, through a simple plant tour, that production occurred in the manner the respondent described

[23] *See* Petitioner Case Brief at 4, citing to Verification Report at 3.
[24] *Id*., at 4.
[25] *Id.*
[26] *Id*., at 4-5, citing to Verification Report at 16.
[27] *Id*., at 5, citing to Commerce Antidumping Manual, Chapter 15, at 30; available at: https://enforcement.trade.gov/admanual/index.html.

in its responses."[28] Commerce has also stated that AFA may be appropriate when a toller's data and production cannot be verified.[29] In past cases, Commerce has applied total AFA where a respondent's reported cost of production data is unverified[30] and where the absence of verified cost data renders a respondent's response unusable.[31]

- As this is an NME investigation, Commerce's inability to verify significant elements of the inputs that are used to produce subject merchandise prevents the calculation of normal values and so precludes the calculation of accurate dumping comparisons. Thus, Yueda's response cannot be used, and total AFA is warranted.
- If Commerce does not assign total AFA to Yueda, it should apply partial AFA to value the coated steel wire acquired by Yueda from the toller for its subject staple production. Commerce should select as facts available (FA) for Yueda's coated wire the SVs for coated wire that are on the record. Commerce should adopt an adverse inference in applying these values so as to preclude the respondent from benefitting from its refusal to allow its toller's information to be verified. Commerce should also include the cost of freight from the toller to Yueda's facilities in the cost of the coated wire.
- As in *Blankets from China*, Commerce's practice is to assign FA when information regarding factors of production (FOPs) cannot be verified.[32]

Yueda Group Rebuttal Brief:

- Commerce should not apply total AFA to Yueda in the final determination. There is no reasonable basis, much less substantial evidence in the record, supporting the application of total or even partial AFA in this investigation. For the final determination, Commerce should base its antidumping margin on the reported FOPs, including those reported by the toller.
- The truth of what actually occurred with regard to verification of the toller does not support the application of either total or even partial AFA. The petitioner has mischaracterized the truth, in order to sustain its argument.
- The petitioner provided unfounded assertions, such as "Yueda prevented the Department from visiting and verifying the toller's purchase'" or Commerce should "preclude the respondent from benefitting from its refusal to allow its toller's information to be verified.'"[33] The administrative record demonstrates that Yueda did not refuse to cooperate with Commerce and "practically begged the Department to verify the toller's information

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[28] *Id.*, citing to *Notice of Final Results of Administrative and New Shipper Reviews, and Rescission of New Shipper Review: Freshwater Crawfish Tail Meat from the People's Republic of China*, 65 FR 20948 (April 19, 2000) (*Crawfish 2000*) and accompanying Issues and Decision Memorandum at Comment 3.

[29] *Id.*, at 5-6, citing to *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 (June 16, 2008) (*Nails LTFV*) and accompanying Issues and Decision Memorandum at Comment 21D.

[30] *Id.*, at 6, citing to *Certain Oil Country Tubular Goods from the People's Republic of China: Final Determination of Sales at Less Than Fair Value, Affirmative Final Determination of Critical Circumstances and Final Determination of Targeted Dumping*, 75 FR 20335 (April 19, 2010) (*China OCTG LTFV*) and accompanying Issues and Decision Memorandum at Comment 30.

[31] *Id.*, citing to *Certain Cut-to-Length Carbon Steel Plate from Sweden: Final Results of Antidumping Duty Administrative Review*, 62 FR 18396 (April 15, 1997) (*Sweden CTL Plate*).

[32] *Id.*, citing to *Certain Woven Electric Blankets from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 75 FR 38459 (July 2, 2010) (*Blankets from China*) and accompanying Issues and Decision Memorandum at Comment 1.

[33] *See* Yueda's Rebuttal Brief at 1, citing to Petitioner's Case Brief at 1.

contained in Yueda's responses."[34] There is no AFA warranted for a cooperative respondent for events out of the respondent's control.

- The verification report accurately reflects that, from the first day of verification, Yueda indicated that the toller would cooperate fully with a verification of its FOPs. The toller was so willing to establish the accuracy of its FOPs that it gave Yueda its original books and records from the POI, which Yueda proffered to Commerce officials at verification. The shutdown of the toller's plant did not impact the ability of Commerce to verify the FOPs, because all of the toller's relevant books and records were on-hand at the Yueda verification.
- Yueda urged Commerce officials to visit the toller's premises to confirm that the toller was no longer operating facilities to galvanize steel wire, for which Yueda arranged transportation and was disappointed that Commerce chose to cancel the toller verification without explanation. As a result, Yueda filed a letter on the record requesting that Commerce re-consider its decision not to verify the toller, which urged Commerce to proceed with the verification as scheduled on December 12, 2017, and reiterated that the toller and its officials would be available to respond to questions.
- Yueda and its toller acted to the best of their abilities in every facet of this investigation, responding in full to all questionnaires, supplemental questionnaires, and requests for information. The Chinese government's decision to shut down the toller's facility is a matter of *force majeure* by the Chinese government, over which neither Yueda nor the toller had any control.
- Neither the statute nor case law provides any basis for applying either total or partial AFA where a respondent has cooperated. Commerce is authorized to invoke "facts otherwise available" when a party: (1) withholds requested information; (2) fails to provide information by established deadlines or in the form or manner requested; (3) significantly impedes the review; or (4) provides information that cannot be verified, none of which are applicable here. Yueda provided all information requested by Commerce, never withheld information, never impeded the investigation, and consistently requested that Commerce conduct verification of its toller, and cooperated in making such verification logistically available.
- The law is clear that Commerce is not permitted to resort to adverse inferences automatically.[35] Commerce must make the additional finding that a party failed to cooperate by not acting to the best of its ability to comply with a request for information before drawing adverse inferences. Even where Commerce properly finds the respondent failed to act to the best of its ability and that, therefore, an adverse inference can be drawn, Commerce has a continuing obligation to balance the statutory objective of finding an accurate dumping margin with the goal of inducing compliance.[36] Commerce's discretion is not unbounded and it must consider whether the assigned AFA rate creates an overly punitive result.[37]
- Commerce's application of partial or total AFA here would be unduly punitive and unwarranted, because both Yueda and the toller were cooperative. Commerce chose not to verify the toller and never revealed its reasons for doing so or gave Yueda an opportunity to

[34] *Id*.
[35] *Id.*, at 4, citing to *Borden, Inc. v. United States,* 4 F. Supp. 2d 1221, 1246 (CIT 1998), rev'd on other grounds, 2001 WL 312232 (Fed. Cir. 2001).
[36] *Id.*, citing to *See F. I 1 i De Cecco Di Filippo Fara S. Martino S.p.A. v. United States,* 216 F.3d 1027, 1032 (Fed. Cir. 2000); *Chia Far Indus. Factory Co., Ltd. v. United States,* 343 F. Supp. 2d 1344, 1366 (CIT 2004).
[37] *Id.*, citing to *Chia Far Indus. Factory Co.,* 343 F. Supp. 2d at 1366

explain the circumstances of Commerce's independent phone call with the toller, which resulted in the cancellation of the toller visit. Commerce's cancellation of the visit was hasty and based on a misunderstanding that could have been rectified if Commerce had shared the information obtained from the phone call with Yueda.

- There is no reasonable basis or substantial evidence in the record supporting the application of partial AFA in this investigation. For the final determination, Commerce is requested to base its antidumping margin on the reported FOPs, including those reported by the toller.[38]

Commerce's Position:

Commerce agrees with the petitioner regarding the application of AFA to Yueda in the final determination. In order to establish the basis for this determination, we must first provide a timeline of events, as they developed at verification, including information revealed for the first time to Commerce. As the timeline below demonstrates, Yueda and its toller provided discordant information to Commerce regarding the nature of the toller's shutdown and when that shutdown occurred. Because the nature of certain facts on the record is business proprietary information (BPI), Commerce has included these facts in the BPI Memo accompanying its determination.[39]

A. Chronology

- Early in 2017,[40] the provincial government issued its first letter to the toller indicating that a specific industry would be undergoing changes to rectify environmental issues surrounding the affected areas. This letter served as notification to all companies within this industry that changes to regulatory standards within this industry, and implementation thereof, were imminent with a firm deadline date established.

  The above information was not initially on the record of this investigation and Commerce was presented with this information only on the second day of verification (December 5, 2017).

- On July 3, 2017, Yueda first reported the existence of a tolling relationship, per Commerce's instructions.[41] The SAQR did not disclose that the toller would experience a shutdown on November 30, 2017.

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[38] Yueda's Rebuttal Brief arguments that total AFA and partial AFA are unwarranted are subsumed in Comment 1. Thus, Commerce has not repeated those arguments for Comment 2.

[39] *See* Memorandum to the File, re: "Carton-Closing Staples from the People's Republic of China: Business Proprietary Information Accompanying Comment 1 of the Issues and Decision Memorandum," dated concurrently with this memorandum (BPI Memo).

[40] *See* Verification Report at Verification Exhibit (VE) 29; *see also* BPI Memo at bullet 1.

[41] *See* Yueda's Section A Questionnaire Response (SAQR) dated July 3, 2017, at 25; *see also* BPI Memo at bullet 2.

- On July 31, 2017, Yueda submitted its SDQR, wherein Yueda did not provide a narrative explanation describing the role of the toller in the production process.[42] Rather, Yueda provided a production flow chart for the steel wire production stage with no indication of toller involvement and minimal information in narrative form.[43] The only reference to a toller in Yueda's SDQR was in the listing of the documents generated from the production of the subject merchandise, which includes a "monthly summary sheet for tolled materials."[44] In Exhibit R-2-1 of the SDQR, Yueda provided this summary sheet for tolled materials for both Yueda and affiliated producer Qiushan, for July 2016, but this sheet contained no information regarding the toller, aside from its name.[45] This same exhibit also contained an inventory balance sheet identifying tolled materials from April through December 2016.[46]

- On August 10, 2017, Yueda submitted a supplemental response, wherein it responded to Commerce's specific questions related to the toller, the toller's operations, and the relationship between Yueda/Qiushan and the toller.[47] Yueda reported information here that demonstrates the toller's significant involvement in the production process of subject merchandise.[48]

- On August 31, 2017, Yueda submitted a supplemental response, wherein it responded to Commerce's request to provide a detailed narrative of the production process, including the participation of the toller, as directed in the original NME questionnaire.[49] In Exhibit SD-3, Yueda provided two production flow charts: one for the tolled production and one for subject merchandise production. In reviewing this flow chart, it is apparent that the tolling process, which produces steel wire from steel wire rod, requires more substantial materials, labor, and energy,[50] as a whole, when compared with the production process Yueda performs for the subject merchandise, which is limited to wire flatting, wire banding, punching, and packing. These four stages require steel wire, glue, tape, packing materials, labor, and electricity, while the tolling stage requires substantially more materials to generate the intermediate input for subject merchandise (coated or galvanized steel wire). Yueda reported the following FOPs for the subject merchandise production stage: coated or galvanized steel wire, glue, tape, packing materials.

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[42] *See* Yueda's Section D Questionnaire Response (SDQR) dated July 31, 2017, where Yueda simply referred to Exhibit 2 (containing a "production flow chart and the technical description of each stage of the process."). Commerce subsequently issued supplemental questionnaires which included numerous questions about the toller, the toller's relationship with Yueda/Qiushan, and the production process for which the toller was responsible.
[43] *Id.*, at Exhibit D-2.
[44] *Id.*, at Exhibit D-3.
[45] *Id.*, at Exhibit R-2-1; *see also* BPI Memo at bullet 3.
[46] *Id.*, at .pdf page 97.
[47] *See* Yueda's Supplemental Section A Questionnaire Response (SSAQR) dated August 10, 2017, at 32; *see also* BPI Memo at bullets 4-5.
[48] *Id.*
[49] *See* Yueda's Supplemental Section D Questionnaire Response (SSDQR) dated August 31, 2017, at 3, where Yueda again referred Commerce to an exhibit, rather than providing a narrative response to describe the production process. The exhibit in question, SD-3, contains limited narrative.
[50] *See* BPI Memo at bullet 6.

Also on August 31, 2017, Yueda provided an example of a monthly tolling contract.[51] Yueda also provided an FOP response, which Commerce had requested the toller complete.[52] In this response, Yueda provided reconciliation worksheets for direct materials, labor, and energy[53] consumed by the toller in "providing tolling services on the steel wire rod provided by Yueda or Qiushan."[54] Yueda also provided a cost reconciliation worksheet for the toller's cost of tolling for Yueda/Qiushan for the six-month POI and the toller's December 2016 Income Statement.[55]

- On September 12, 2017, Commerce issued a supplemental questionnaire to Yueda, where Commerce cautioned Yueda that "the toller's information is subject to on-site verification. Upon such verification, should we find that this information differs from what was reported, or if the toller demonstrates the lack of completeness and reliability of its information on the record on this issue, the Department may resort to the application of facts available."[56]

  In the third quarter of 2017, the provincial government issued its second letter to the toller, indicating that the previously-specified rectifications, from the first letter, were to be tested by the previously specified deadline date.[57] (This information was not initially on the record of this investigation and Commerce was presented with this information only on the third day of verification (December 6, 2017)).

- On September 29, 2017, Yueda submitted a supplemental response, wherein it responded to additional questions regarding the toller and also provided the toller's company certification.[58] Yueda noted that the toller's company certification was included in the SSACDQR "to accompany this response and demonstrates the toller *has been involved in preparing responses* about the production process at the tolling stage."[59]

- Several weeks after the provincial government issued the second letter to the toller, it issued its third and final letter to the toller. This letter provided the toller with the results of the inspection and a final list of directives to be completed by the toller by November 30, 2017, or face consequences for failure to complete the directives by that date.[60]

- On October 27, 2017, Commerce issued its *Preliminary Determination*, which published on November 3, 2017.

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[51] *See* SSDQR, at Exhibit SD-6-2.
[52] *Id.*, at Exhibit SD-9.
[53] *Id.*, at Exhibit SD-9-2.
[54] *Id.*, at Exhibit SD-9, page D4.
[55] *Id.*, at Exhibit SD-9-3.
[56] *See* Commerce's Supplemental Sections A, C, D Questionnaire, dated September 12, 2017, at 3.
[57] *See* Verification Report at VE 29; *see also* BPI Memo at bullet 7.
[58] *See* Yueda's Supplemental Sections A, C, D Questionnaire Response (SSACDQR) dated September 29, 2017, at Exhibit S2-6.
[59] *Id.*, at page 12 (emphasis added).
[60] *See* Verification Report at VE 29; *see also* BPI Memo at bullet 8.

- On November 1, 2017, Commerce issued a letter to Yueda containing the verification schedule.[61] This letter contained a start date and end date for three phases of verification: December 4 through 11, 2017, for Yueda and Qiushan, December 12, 2017, for the toller, and December 14 through 15, 2017, for the two affiliated resellers within the single entity. Commerce notes that this schedule was agreed upon by both Commerce and Yueda's counsel after counsel consulted with Yueda's availability, which is the normal practice in scheduling verifications.

- On November 24, 2017, Commerce issued its verification agenda to Yueda regarding our verification of "Shanghai Yueda Nails Co., Ltd. (Yueda) and Qiushan Printing Machine Manufacture Co., Ltd (Qiushan), their toller, and Wuhan FOPO Trading Co., Ltd. (FOPO) and Fastnail Company Limited (Fastnail)."[62] Commerce reiterated its schedule for each company it intended to verify – there were no changes from the Verification Schedule Letter.

  Commerce split the Verification Outline into three distinct parts related to the three different on-site verifications identified in the Verification Schedule Letter and the Verification Outline itself. As such, Commerce prepared an agenda for the toller with the intention to verify the following: 1) corporate structure and organization; 2) accounting and data systems; 3) production process (with a plant tour "to show the raw materials inventory, wire drawing and coating/galvanizing process, packing, and shipment to Yueda/Qiushan");[63] 4) cost reconciliation; 5) tolled material inputs purchases and consumption, including those purchased and provided by the toller (*i.e.*, materials which Yueda/Qiushan did not purchase for the tolling process); 6) energy consumption for tolling; 7) labor consumption for tolling; 8) freight factors for tolling; 9) packing of tolled intermediate inputs (coated or galvanized steel wire); and 10) inspection of certifications (*i.e.*, the toller company certification provided in Exhibit S2-6 of Yueda's SSACDQR dated September 29, 2017).

- On November 30, 2017, counsel for Yueda tried to contact the lead Commerce official scheduled to conduct verification *via* telephone to discuss a verification issue, but the Commerce official had departed for the day in preparation for the departure on December 1, 2017, for China. As Commerce noted in the Verification Report, "while counsel for Yueda left a telephone message for Commerce lead analyst on November 30, 2017, to discuss a verification issue, the Commerce analyst had already left Commerce headquarters for the day, and had left an out-of-office message which provided any callers the contact information for other Commerce personnel for assistance. Counsel did not leave any messages for any other Commerce personnel on November 30, 2017, or December 1, 2017."[64]
  As Commerce relayed in the Verification Report, counsel for Yueda stated that the toller "was shut down, not producing, and unavailable for on-site verification at the location identified on the record in Changshu. Counsel noted that, while this shutdown would affect

[61] *See* Commerce's Letter to Yueda, re: "Verification Schedule," dated November 1, 2017 (Verification Schedule Letter). The schedule was uploaded to ACCESS on November 1, 2017, under barcode 3635561-01.
[62] *See* Commerce's Letter to Yueda, re: "Verification Outline," dated November 24, 2017 (Verification Outline). The agenda was uploaded to ACCESS on November 24, 2017, under barcode 3644502-01.
[63] *See* Verification Outline at 18.
[64] *See* Verification Report at 2, footnote 2.

the planned on-site verification, it would not affect Commerce's ability to verify the information from the toller which were filed on the record with Yueda's questionnaire responses."[65]

- On November 30, 2017, based on the document provided to Commerce verification officials on December 6, 2017, the toller was shut down by the provincial government.[66]

- On December 3, 2017, counsel to Yueda contacted Commerce officials in the evening to report that the toller was shut down. Commerce officials replied to counsel that this information would be discussed the following morning upon the beginning of the official verification.[67]

- On December 4, 2017, after the first full day of verification was complete, Commerce officials notified their headquarters of the toller shutdown issue and received instruction to verify that the toller was shut down, as Yueda reported.[68] On December 5, 2017, Commerce officials notified Yueda and its counsel that they would do so on the originally scheduled toller verification date of December 12, 2017.

- The following day, Yueda notified Commerce officials that "the toller and the landlord of the building where the toller's production took place were not 'getting along' because the toller broke its lease due to the shutdown, implying that the current state of this relationship may cause difficulty in accessing the building during the planned visit."[69] Commerce officials later changed that planned visit to December 8, 2017.

- On December 6, 2017, Yueda provided Commerce officials with the three letters issued by the provincial government as evidence of the toller's mandatory shutdown.[70]

- On December 7, 2017, Commerce officials, detailed to the U.S. Embassy in Beijing, contacted the toller to ascertain whether the company is a producer of metal wire products and to inquire about the purchase of such products. The responding individual stated that the company is "operational but busy with something unspecified."[71] As a result, Commerce canceled its planned December 8, 2017, visit to the toller.

- On December 8, 2017, Yueda filed a letter on the record requesting Commerce to verify the toller as planned in the Verification Outline.[72] Yueda continued that:

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[65] *Id.*, at 2.
[66] *Id.*, at 2-3; *see also* BPI Memo at bullet 8. *See also* Yueda's Letter re: "Comments on the Department's Cancellation of its Visit to the Toller's Premises," dated December 8, 2017 (December 8 Letter).
[67] *See* Verification Report at 2.
[68] *See*, *e.g.*, Yueda's Case Brief at 4.
[69] *See* Verification Report at 3.
[70] *Id.*, at VE 29.
[71] *Id.*, at 3 and Attachment 3, (Memorandum from Damian Felton, Office of Policy, to the File, re: "Verification of the Antidumping Duty Investigation of Carton Closing Staples from the People's Republic of China.").
[72] *See* December 8 Letter.

"notwithstanding the Department's cancellation of the scheduled visit to the toller's closed facility, we request that the Department verify the toller's information that was incorporated in Shanghai Yueda's responses on December 12, 2017, as scheduled. As the Department is aware, all books and records of the toller relating to the POI have been moved to Shanghai Yueda for purposes of the Department's scheduled verification. Moreover, the toller's owner and the toller's accountant will be available to review the toller's records with the Department and to respond to any questions from the Department beginning on December 12, 2017 (or earlier if so requested by the Department)."[73]

- On January 12, 2018, Commerce issued its Verification Report.
- On January 25, 2018, Yueda filed a declaration[74] from the toller regarding the circumstances of the telephone call Commerce officials made from the U.S. Embassy in Beijing to the toller. The declaration included the following statements, made by the individual that received the phone call memorialized in the memorandum from the Commerce officials at the U.S. Embassy in Beijing, and certified by Yueda:

    1. "On November 30, 2017, our company was forced to shut down its galvanizing and copper coating operations by an edict of the municipal government of Changshu City. The government shut down these operations as part of a country-wide effort in China to reduce pollution from manufacturing activities."
    2. "As our company still had considerable inventory of steel wire rod that it wished to sell. I told her that we were operational and asked her to call back in a week to speak with a sales person."

Additional details regarding the toller's activities after the November 30, 2017, shutdown are in the BPI Memo.

B. Verification and Timing

Commerce disagrees with Yueda's account of the events at verification as they transpired. At the outset, Yueda's arguments are not consistent with the information on the record and are not consistent with day-to-day events that developed at verification. On numerous occasions during verification, Yueda contradicted itself regarding information on the record and information provided at verification.

First, the inconsistent flow of information from Yueda, and ostensibly, the toller, pertaining to the shutdown and the toller's availability for verification, inhibited Commerce's ability to verify the toller's information as described in the Verification Outline. Indeed, while Yueda argues that it "practically begged" Commerce to verify the toller's information "contained in Yueda's

[73] *Id.*, at 2-3.
[74] *See* Yueda's Letter re: "Factual Information In Response to the Department's Verification Report," dated January 25, 2018 at Attachment 1 (Toller Declaration).

responses,"[75] counsel for Yueda explicitly stated to Commerce that the toller "was shut down, not producing, and unavailable for on-site verification at the location identified on the record in Changshu."[76] Furthermore, while counsel for Yueda noted that "this shutdown would affect the planned on-site verification, it would not affect Commerce's ability to verify the information from the toller which were filed on the record with Yueda's questionnaire responses,"[77] this statement, on its face, is contradictory and inaccurate. Commerce would not be able to verify the information regarding the toller's production process or its accounting and data systems at Yueda's facility, first and foremost, because the toller's production process and accounting and data systems are not located at Yueda. In past cases, we have stated that our preference is to verify at the company site, and acknowledged when that is not possible, we may verify at an alternate site.[78] However, here, Commerce was unable to verify the toller at the toller's location because Commerce was only informed of the shutdown on the day prior to verification. This was not a circumstance, such as in *Brake Rotors*, where Commerce determined to verify a company at an alternate site based on "security/logistics issues." Here, Commerce was not provided with an opportunity to make such an arrangement in order to verify the toller's production process, which accounts for a significant part of the production of subject merchandise, or the accounting records kept in the normal course of business. Rather, Yueda suggests that simply verifying the toller's consumption of materials, labor, and energy, without any reconciliation to the production process or the original cost accounting records and data systems, would be sufficient here. As the record demonstrates, because the toller conducts a significant portion of the production process, Commerce's inability to verify such impeaches the reliability of the toller's data, especially because the toller and Yueda were aware of the pending shutdown, per the timeline of events described above.

The conversation with Yueda's counsel on December 3, 2017, on the eve of verification, conflicts with Yueda's subsequent claims. First, Yueda claimed, *via* its counsel, that on-site verification would not be possible due to the shutdown; next, Yueda claimed that Commerce should verify that the toller was actually shut down by visiting the facility in Changshu; and then, on the very next day, Yueda claimed that a dispute between the toller and its landlord in Changshu may inhibit Commerce's ability to access the facility. In short, Yueda did not maintain a consistent narrative. Each day, Yueda provided a differing piece of information regarding the actual status of the toller, and these statements contradict Yueda's subsequent arguments that the toller was readily available for verification.

Yueda argues that it and its toller acted to the "best of their abilities in every facet" of this investigation, responded in full to all questionnaires, supplemental questionnaires, and requests for information and that the Chinese government's decision to shut down the toller's facility is a matter of *force majeure* by the Chinese government, over which neither Yueda nor the toller had any control.[79] Although it may be correct that neither Yueda nor the toller had any control over the provincial government's decision to enact new environmental laws which led to the eventual

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[75] *See* Yueda's Rebuttal Brief at 1.
[76] *See* Verification Report at 2.
[77] *Id.*
[78] *See*, *e.g.*, *Brake Rotors from the People's Republic of China: Rescission of Second New Shipper Review and Final Results and Partial Rescission of First Antidumping Duty Administrative Review*, 64 FR 61581, 61582 (November 12, 1999) (*Brake Rotors*).
[79] *See* Yueda Rebuttal Brief at 3.

shutdown of the toller, Yueda and the toller did have control over reporting the toller's shutdown to Commerce during the investigation and well ahead of verification. Yueda's and the toller's silence on the record regarding the known shutdown was not a result of *force majeure.* Additionally, not only did Yueda and the toller keep this information from Commerce during the course of the investigation, Yueda waited until the last possible moment to attempt to notify Commerce of the shutdown (*i.e.*, the day of the shutdown), when it was already too late for Commerce to make other arrangements to fully verify the toller, as it had intended.

While Yueda may argue that it was unaware of the impending shutdown, Commerce is unconvinced. The record demonstrates that Yueda was dependent upon its toller for drawing wire rod into wire and then galvanizing or coating it.[80] The record also provides evidentiary support of this dependence through the monthly tolling contracts between Yueda and its toller.[81] Given the monthly recurrence of these contracts and Yueda's dependence on the toller for its supply of coated/galvanized steel wire for the production of subject merchandise, it is reasonable to conclude, based on these facts, that a constant line of communication between Yueda and its toller was a necessary part of their business relationship. Thus, it is also reasonable to conclude that if the toller's ability to supply Yueda with the intermediate material necessary for producing subject merchandise was in jeopardy, the toller would have informed Yueda of that impending interruption in supply. Moreover, the fact that Yueda is the purchaser of the steel wire rod which is delivered to the toller for drawing into wire and coating/galvanizing, demonstrates that Yueda would likely have been aware of the impending shutdown.

The record demonstrates that the toller had been aware of the impending threat of a shutdown since early 2017.[82] The record also demonstrates that the toller was aware of its inspection failure and the decision of the provincial government to shut down the toller's operations, all of which occurred before Commerce released its Verification Schedule.[83] Thus, with Yueda's and the toller's knowledge of the Verification Schedule, as of November 1, 2017, and the knowledge of the impending November 30, 2017, shutdown, Yueda had an obligation to inform Commerce that it would not be possible to complete verification of the toller on the scheduled day (December 12, 2017). Yueda and the toller had information relevant to Commerce's ability to verify the information Yueda and the toller placed on the record regarding a significant portion of the total production process that they did not share with Commerce. Rather, counsel to Yueda: 1) did not contact Commerce until November 30, 2017; 2) did not contact any other Commerce officials despite being provided with contact information in the out-of-office message; and 3) waited until the eve of the start of verification to inform Commerce that it would be unable to verify the toller's information on site, as planned.

C. Reliance on Unverified Information

Yueda also argues that, because the toller's FOP data were readily available for verification at Yueda, Commerce should have verified those data rather than refusing to do so. As an initial

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[80] *See* BPI Memo at bullet 4.
[81] *See* Verification Report at VE 28.
[82] *See* BPI Memo at bullet 1.
[83] Commerce issued the Verification Schedule on November 1, 2017. *See* BPI Memo at bullet 8 for the date on which the toller became aware that the provincial government determined to shut down the toller's operations.

matter, Commerce's Verification Outline provided agenda items for the toller's portion of the verification that far exceeded simply verifying the FOPs consumed by the toller. As noted above, Commerce's intended verification of the toller included corporate structure, affiliation, accounting and data systems, cost reconciliation, the production process and plant tour, *etc.* Lacking verification of these agenda items, we find that we cannot rely on the toller's information to calculate an accurate margin,[84] particularly when the toller's information represents a significant portion of the normal value (NV). Simply put, in order for Commerce "to use information in an AD/CVD proceeding, it needs to be verifiable, and information that contains a material misrepresentation or omission would not be verifiable."[85] Accordingly, the record with respect to the toller's shutdown contains numerous instances of material misrepresentations (when Yueda and the toller knew of the shutdown) and information that cannot be verified (the production process at the toller's inaccessible facility).

While Yueda offered to invite the toller's owner and accountant to Yueda to respond to Commerce's questions, verifying the toller's FOPs without verifying the toller's accounting systems, financial records, production process, *etc.*, which is what on-site verification allows for, could not have resulted in a finding that the toller's FOPs had been properly reported.

Yueda has not cited to any Commerce practice or case law that suggests Commerce ought to rely unverified toller information in an investigation to calculate an accurate dumping margin.[86] Rather, Yueda argues that "the shutdown of the toller's plant would not have impacted the ability of the Department to verify the factors of production because all of the toller's relevant books and records were on-hand at the Yueda verification."[87] It should be clear that Commerce did not verify the toller's FOP records, that happened to be located at Yueda's facility, because all the remaining verification agenda items, which far exceeded a simple examination of the toller's material, labor, and energy consumption paperwork, would remain unverified, due to the shutdown.

Commerce normally relies on tollers' FOPs when it has successfully verified the information supplied by the tollers. For example, in *Nails 2008*, Commerce stated that:

> *…If we had been unable to conduct a verification of the toller's data, or if the verification had not been successfully completed, the application of AFA may have*

[84] *See Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results and Partial Rescission of Antidumping Duty Administrative Review; 2013-2014*, 81 FR 17435 (March 29, 2016) (*Fish Fillets 2016*) and accompanying Issues and Decision Memorandum at Comment 3 ("Because Toller A and Toller B's FOP information is unverified, we have not relied on it in the final results, and have removed the data from Tafishco's margin calculation.")
[85] *See Administrative Review of Certain Frozen Warmwater Shrimp from the People's Republic of China: Final Results, Partial Rescission of Sixth Antidumping Duty Administrative Review and Determination Not To Revoke in Part*, 77 FR 53856 (September 4, 2012) (*China Shrimp 2012*) and accompanying Issues and Decision Memorandum at Comment 1, citing to *Certification of Factual Information to Import Administration During Antidumping and Countervailing Duty Proceedings: Interim Final Rule*, 76 FR 7491, 7496 (February 10, 2011).
[86] *See*, *e.g.*, Yueda's Case Brief at 3-7.
[87] *Id.*, at 4.

> *been appropriate*. In the instant case, however, our verification of the wire drawing FOP data and the cost reconciliation of the toller's data were successful.[88]

In this case, Commerce could not verify the totality of information supplied by the toller, and included in the Verification Outline. Thus, unlike *Nails 2008*, where our determination to rely on the toller FOPs was based on our ability to verify a toller's data (and production process), here, we were unable to verify the toller's information as intended in our Verification Outline. Critically, the fact that we would be unable to do so was withheld until it was too late for Commerce to have made other arrangements to verify the toller comprehensively, as intended.

While Yueda argues what Commerce could have, and should have, done, it is not Yueda's or its counsel's place to direct Commerce's verification. Verification is not a forum for Commerce to resolve issues that have not been resolved in questionnaire responses, especially when the issues pertain to the integrity and accuracy of the totality of the data.[89] Because Yueda certified that the toller's data, including the production process, are accurate, which Commerce could not verify, we find that the toller and Yueda provided information on the record that could not be verified.

Yueda argues that Commerce's only course of action to mitigate the "damage that Yueda might suffer as a result of the failure to verify the toller"[90] is to rely on the FOPs as reported to calculate a final dumping margin. Commerce disagrees and remains unconvinced that "the failure to verify the toller" lies with any party other than the toller and Yueda. Further, that Commerce has not found the toller affiliated with Yueda does not preclude Commerce from reaching a determination about Yueda's degree of cooperation with Commerce on the basis, in part, of that toller's noncooperation.

While there have been proceedings where Commerce has not held a respondent accountable for its toller's failure to provide information or cooperate with requests for information, the particular circumstances of this investigation can be differentiated from these other proceedings involving toller company behavior. For example, as noted in *Solar Cells 2015*, Commerce may apply FA, as opposed to AFA, when a toller's information is missing in instances where the respondent has a number of tollers it identified in a timely manner, has documented its unsuccessful attempts to obtain FOPs from its tollers, the non-reporting tollers account for only a small portion of FOPs, and there is usable FOP information from other suppliers that could serve

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[88] *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 (June 16, 2008) (*Nails 2008*) and accompanying Issues and Decision Memorandum at Comment 21D (emphasis added).
[89] *See*, *e.g.*, *Certain Steel Nails from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2013-2014*, 81 FR 14092 (March 16, 2016) (*Nails 2016*) and accompanying Issues and Decision Memorandum at Comment 4.2
[90] *See* Yueda's Case Brief, at 7.

as a substitute for the missing FOPs.[91] Those circumstances are not present here. Moreover, in *Solar Cells 2017*, Commerce applied AFA for the failure of a toller to report FOPs when the percentage of the input provided by the toller is not small, insignificant, or reasonably characterized as being of limited quantity.[92]

Here, the toller's unverifiable information is not insignificant. Rather, our NV analysis demonstrates that the toller performs a significant part of the production of the main input used to produce subject merchandise (coated and galvanized steel wire), and, accordingly, consumes the majority of the materials, labor, and energy used to produce coated and galvanized steel wire.[93] In this case, the toller conducts a significant portion of the production process, that remains unverified as a result of Yueda's and the toller's failure to timely notify Commerce of the shutdown event that impeded our ability to verify the totality of the toller's information. Because the toller's information is unverified, due to the actions and behavior of Yueda and its toller, we have not relied on it in the final determination.

D. Commerce's Conduct Regarding the Toller[94]

Commerce disagrees with Yueda's claims that the agency "violated every principle of transparency by conducting this inquiry in secret and away from counsel."[95] We also disagree with Yueda's characterizations that Commerce conducted this investigation in an inappropriate and non-transparent manner.[96] To the contrary, under the rather unique circumstances as Yueda presented them, Commerce officials in real time did what they reasonably could to verify Yueda's representations to the extent possible. Neither the statute nor regulations define the parameters of verification, nor do they direct Commerce to confer with parties as to how it might determine the veracity of the parties' representations to the agency.

Furthermore, Commerce disagrees that it "violated APO when it provided the name and contact information for the toller to an unnamed employee from the U.S. Embassy in Beijing, who is not bound by the terms of the APO."[97] First, Commerce is not subject to the APO (which governs

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[91] *See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2012-2013*, 80 FR 40998 (July 14, 2015) (*Solar Cells 2015*) and accompanying Issues and Decision Memorandum at Comment 10. *See also Certain Steel Nails from the People's Republic of China: Final Results and Final Partial Rescission of the Second Antidumping Duty Administrative Review*, 77 FR 12556 (March 1, 2012) and accompanying Issues and Decision Memorandum at comment 5 ("The Department did not find it necessary to request the missing FOP information from Stanley's tollers because we were able to use accurate data from Stanley's own experience and from Stanley's other galvanizers for this stage of production, and the portion of FOPs Stanley was unable to obtain represented only a *small* quantity.")

[92] *See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2014-2015*, 82 FR 29033 (June 27, 2017) (*Solar Cells 2017*) and accompanying Issues and Decision Memorandum at Comment 1.

[93] *See* BPI Memo at Attachment I.

[94] Commerce's position here is in response to Yueda's affirmative Case Brief arguments at pages 3-7.

[95] *See* Yueda's Case Brief at 5.

[96] *Id.*

[97] *See* Yueda's Case Brief at 7.

the access of interested parties to information that has been designated business proprietary) but instead, is bound by the Trade Secrets Act.[98] Second, the author of the memorandum attached to the Verification Report, along with his staff, are Commerce employees detailed to the U.S. Embassy in Beijing. As Commerce employees, they are considered part of the administering authority, rather than interested parties to a proceeding and, thus, there has been no violation.[99]

E. Application of Facts Available and Adverse Facts Available

Section 776(a)(1) and (2) of the Act provides that, if necessary information is missing from the record, or if an interested party (A) withholds information that has been requested by Commerce, (B) fails to provide such information in a timely manner or in the form or manner requested, subject to subsections 782(c)(1) and (e) of the Act, (C) significantly impedes a proceeding under the antidumping statute, or (D) provides such information but the information cannot be verified, Commerce shall, subject to subsection 782(d) of the Act, use facts otherwise available in reaching the applicable determination.

Commerce determines that the toller and Yueda were in possession of the knowledge of the toller's shutdown well in advance of the verification, yet failed to disclose this information to Commerce until the eve of verification, when it was already too late for Commerce to make other arrangements to verify the toller's information as intended. Commerce agreed to the verification schedule Yueda suggested to its counsel, completely unaware of the fact the shutdown would occur just before the commencement of verification. In negotiating the time-table for verifying Yueda/Qiushan, the toller, and FOPO/Fastnail, Yueda and its counsel could have informed Commerce that the toller would or could be shutting down operations on November 30, 2017, thereby allowing Commerce to suggest alternatives.

Thus, pursuant to section 776(a)(2)(C) of the Act, we find that Yueda and its toller significantly impeded the investigation and Commerce's ability to verify a significant portion of the subject merchandise production process. Moreover, Commerce finds that, pursuant to section 776(a)(2)(D) of the Act, Yueda and the toller placed information on the record that they knew would be unverifiable, and were aware of this fact well in advance of the scheduled verification. In past cases, Commerce has applied a neutral FA determination in circumstances where a

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[98] *See* 18 U.S.C. 1905.

[99] The Trade Secrets Act, 18 U.S.C. § 1905, generally prevents a federal agency from disclosing business proprietary information unless specific exemption is provided by the statute. In case of antidumping and countervailing duty laws, section 777 of the Act provides such exemption from the Trade Secrets Act for Commerce and permits limited disclosure of BPI for purposes of proper administration of antidumping and countervailing duty laws. Indeed, section 777(b)(1)(A)(i) provides that information submitted to Commerce which is designated as business proprietary may be disclosed "to an officer or employee of {Commerce} who is directly concerned with carrying out the investigation in connection with which the information is submitted…."

mandatory respondent's unaffiliated toller did not provide FOP information.[100] However, these cases are not instructive here. For example, in *Solar Cells 2015,* Commerce listed several factors it considered relevant to using neutral FA for missing toller data, including: the respondent's identification of its tollers, the documentation of its unsuccessful attempts to obtain FOPs from its tollers, whether the non-reporting tollers account for only a small portion of FOPs, and whether there is usable FOP information from other supplies that could serve as a substitute for the missing FOPs.[101] Thus, unlike *Solar Cells 2015*, here, the sole toller represents a significant portion of the production process and FOPs, and accordingly, the cost of manufacturing and NV.[102] Yueda ignores that in *Solar Cells 2017,* Commerce applied AFA for the failure of a toller to report FOPs when the percentage of the input provided by the toller is not small, insignificant, or reasonably characterized as being of limited quantity.[103] Additionally, unlike the fact pattern in *Solar Cells 2015*, or in *Boltless*,[104] here, Yueda and its toller failed to disclose known information until the eve of verification, as noted above. Further, during the course of the investigation, the toller provided, and Yueda certified, information on the record that they knew would not be verifiable (*i.e.*, the toller's production process). Thus, we find that the application of facts available is appropriate here.

Section 776(b) of the Act provides that, if Commerce finds that an interested party failed to cooperate by not acting to the best of its ability to comply with a request for information, Commerce may use an inference adverse to the interests of that party in selecting the facts otherwise available.[105] In addition, the SAA explains that Commerce may employ an adverse inference "to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully."[106] Furthermore, affirmative evidence of bad faith on the part of a

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[100] *See*, *e.g.*, *Boltless Steel Shelving Units Prepackaged for Sale from the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value*, 80 FR 17409 (April 1, 2015) (*Boltless*) and accompanying Preliminary Decision Memorandum at 23-24 ("While Topsun obtained certain FOP information from the tollers…Topsun subsequently stated the tollers were 'unwilling and unable' to complete the Department's section D and reconciliation…Therefore, for this preliminary determination we have not used the FOPs provided by Topsun's tollers, and as facts available, have valued the wire decks using Bulgarian GTA import statistics."), unchanged in Boltless Steel Shelving Units Prepackaged for Sale from the People's Republic of China: Final Determination of Sales at Less Than Fair Value. 80 FR 51779 (August 26, 2015) (wherein there were no changes to our treatment of the respondent's toller).
[101] *See Solar Cells 2015* and accompanying Issues and Decision Memorandum at Comment 10.
[102] *See* BPI Memo at Attachment I.
[103] *See Solar Cells 2017*, and accompanying Issues and Decision Memorandum at Comment 1.
[104] In *Boltless*, Commerce applied partial FA with no adverse inference to the inputs consumed by the mandatory respondent's uncooperative toller and simply applied a surrogate value to the input supplied by the toller without extending an adverse inference to the mandatory respondent for non-cooperation.
[105] *See also* 19 CFR 351.308(a); *see also Notice of Final Results of Antidumping Duty Administrative Review: Stainless Steel Bar from India*, 70 FR 54023, 54025-26 (September 13, 2005); *see also Notice of Final Determination of Sales at Less Than Fair Value and Final Negative Critical Circumstances: Carbon and Certain Alloy Steel Wire Rod from Brazil*, 67 FR 55792, 55794-96 (August 30, 2002).
[106] *See Statement of Administrative Action accompanying the Uruguay Round Agreements Act*, H.R. Rep. 103-316, Vol. 1, 103d Cong. at 870 (1994), reprinted in 1994 U.S.C.C.A.N. (SAA); *see also Certain Polyester Staple Fiber from Korea: Final Results of the 2005-2006 Antidumping Duty Administrative Review*, 72 FR 69663, 69664 (December 10, 2007).

respondent is not required before Commerce may make an adverse inference.[107] It is Commerce's practice to consider, in employing adverse inferences, the extent to which a party may benefit from its own lack of cooperation.[108]

In *Nippon Steel*, the Court of Appeals for the Federal Circuit (CAFC) noted that while the statute does not provide an express definition of the "failure to act to the best of its ability" standard, the ordinary meaning of "best" is "ones maximum effort."[109] Thus, according to the CAFC, the statutory mandate that a respondent act to the "best of its ability" requires the respondent to do the maximum it is able to do. The CAFC indicated that inadequate responses to an agency's inquiries would suffice to find that a respondent did not act to the best of its ability. While the CAFC noted that the "best of its ability" standard does not require perfection, it does not condone inattentiveness, carelessness, or inadequate record keeping.[110] The "best of its ability" standard recognizes that mistakes sometimes occur; however, it requires a respondent to, among other things, "have familiarity with all of the records it maintains," and "conduct prompt, careful, and comprehensive investigations of all relevant records that refer or relate to the imports in question to the full extent of" its ability to do so.[111]

Here, Commerce finds, in accordance with section 776(b) of the Act, that Yueda failed to cooperate to the best of its ability in this investigation and, thus, that the application of AFA is appropriate. Yueda is ultimately responsible for having timely reported the toller's shutdown and compelled the toller to be available for Commerce to verify the toller's production process and other agenda items *before* the shutdown occurred. That the toller draws wire rod into wire, treats the wire, and coats or galvanizes the wire, which results in the single most significant input used to produce subject merchandise, fundamentally links Yueda and its toller with respect to the production of subject merchandise. Because Yueda's supply of coated and galvanized wire is intrinsically linked with the toller and the toller's ability to supply Yueda with this major input would be terminated by the shutdown, we find it reasonable to conclude that Yueda was aware of the impending shutdown. Yueda failed to report the impending shutdown to Commerce in any of its questionnaire responses or after having been provided with the Verification Schedule. Yueda also failed to inform Commerce within a reasonable amount of time prior to verification, such that we could have verified the toller well ahead of November 30, 2017. Further, having been unable to reach the lead verifying official, Yueda did not contact any other Commerce officials.

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[107] *See, e.g., Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382-83 (Fed. Cir. 2003) (*Nippon Steel*); *see also Notice of Final Determination of Sales at Less Than Fair Value: Circular Seamless Stainless Steel Hollow Products from Japan*, 65 FR 42985 (July 12, 2000); Antidumping Duties; Countervailing Duties, 62 FR 27296, 27340 (May 19, 1997) (*Preamble*).
[108] *See, e.g., Steel Threaded Rod from Thailand: Preliminary Determination of Sales at Less Than Fair Value and Affirmative Preliminary Determination of Critical Circumstances*, 78 FR 79670 (December 31, 2013), and accompanying Issues and Decision Memorandum at page 4, unchanged in *Steel Threaded Rod from Thailand: Final Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances*, 79 FR 14476 (March 14, 2014).
[109] *See Nippon Steel*, 337 F.3d at 1383.
[110] *Id.*, at 1382.
[111] *Id.*

Additionally, we find that it is appropriate to apply AFA in determining Yueda's margin in this investigation, because its toller failed to cooperate to the best of its ability in this investigation. Specifically, the toller withheld information that would impact Commerce's ability to verify the toller's significant production process by failing to alert Commerce to the potential shutdown of the company at any time during the investigation, including a reasonable period of time prior to verification. The Courts have upheld the use of AFA when a respondent refused to participate in verification.[112] Here, the circumstances are analogous. The toller was in possession of information that it knew would impede our verification of a significant portion of the production process (*i.e.*, the tolling process).

Although Yudea argues that the application of AFA to it is not appropriate here, we find the CAFC's guidance in *Mueller* to be instructive. In *Mexico Pipe*, Commerce applied AFA to a unaffiliated supplier (which was also a mandatory respondent) of the mandatory respondent Mueller for its refusal to provide necessary cost information.[113] In subsequent litigation, the Court sustained Commerce's application of AFA to that unaffiliated supplier.[114] Specifically, the CAFC held that Commerce may apply AFA for an unaffiliated party's failure to cooperate in determining the margin for a cooperating respondent, as long as the application of AFA is reasonable given the particular facts of the proceeding, the predominate interest in accuracy is properly taken into account,[115] and when the respondent could have induced the supplier's cooperation, by for example, refusing to do business with the supplier in the future.[116] Here, the record demonstrates that Yueda and the toller shared a close business relationship, based on the volume of galvanized or coated wire supplied to Yueda. Indeed, the information on the record indicates that Yueda would not have produced any of the subject merchandise during the POI without the toller.[117] Given this close relationship, we find that Yueda was in a position to induce the toller's cooperation with Commerce's request for an on-site verification[118] and, thus, we find that the application of AFA in determining Yueda's margin is appropriate.

For the reasons set forth in detail above, and pursuant to sections 776(a)(2)(C) and (D), and 776(b) of the Act, we recommend applying, as AFA, 263.40 percent, which is the highest petition rate on the record of this proceeding.[119]

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[112] *See*, *e.g.*, *Crawfish Processors Alliance v. United States*, 343 F. Supp. 2d 1242 (CIT 2004).
[113] *See Certain Circular Welded Non-Alloy Steel Pipe from Mexico: Final Results of Antidumping Duty Administrative Review*, 76 FR 36086 (June 21, 2011) (*Mexico Pipe)* and accompanying Issues and Decision Memorandum at Comment 4; *see also Fish Fillets 2016* and accompanying Issues and Decision Memorandum at Comment 3.
[114] *See Mueller Comercial De Mex. V. United States*, 887 F. Supp.2d 1360 (CIT 2012) (*Mueller CIT*); *Mueller Comercial De Mexico v. United States*, 753 F.3d 1227 (Fed. Cir. 2014) (*Mueller CAFC*), collectively *Mueller*.
[115] *See Mueller CAFC*, 753 F.3d at 1233.
[116] *Id.*, at 1235.
[117] *See* BPI Memo at bullet 4, which demonstrates Yueda's dependency on the toller for its coated and galvanized steel wire.
[118] As discussed above, the record indicates that the toller was "operational" at the time of verification. *See* Verification Report at 3 and Attachment 3.
[119] *See* Petition for the Imposition of Antidumping Duties on Imports of Carton-Closing Staples from the People's Republic of China, dated March 31, 2017 (Petition); *see also* Petitioner's Supplemental Questionnaire Response, dated April 6, 2017 (Petition Supplemental Response), at 19-20 and Exhibit II-SQ-9.

F. Selection and Corroboration of the AFA Rate

When using facts otherwise available, section 776(c) of the Act provides that, when Commerce relies on secondary information rather than on information obtained in the course of an investigation or review, it shall, to the extent practicable, corroborate that information from independent sources that are reasonably at its disposal.[120] Secondary information is defined as information derived from the petition that gave rise to the investigation or review, the final determination concerning the subject merchandise, or any previous review under section 751 of the Act concerning the subject merchandise.[121] Further, and under the Trade Preferences Extension Act of 2015 (TPEA), Commerce is not required to corroborate any dumping margin applied in a separate segment of the same proceeding.[122]

Finally, under the new section 776(d) of the Act, Commerce may use any dumping margin from any segment of a proceeding when applying an adverse inference, including the highest of such margins.[123] The TPEA also makes clear that when selecting an AFA margin, Commerce is not required to estimate what the dumping margin would have been if the interested party failing to cooperate had cooperated; neither is Commerce required to demonstrate that the dumping margin reflects an "alleged commercial reality" of the interested party.[124]

In selecting a rate for the China-wide entity and Yueda Group based on AFA, Commerce's practice is to select a rate that is sufficiently adverse to ensure that the uncooperative party does not obtain a more favorable result by failing to cooperate than if it had fully cooperated.[125] Specifically, it is Commerce's practice to select, as an AFA rate, the higher of: (a) the highest dumping margin alleged in the petition; or (b) the highest calculated dumping margin of any respondent in the investigation.[126] There are no calculated margins for any respondents in this investigation. Therefore, as AFA, Commerce has assigned to the China-wide entity and the Yueda Group the rate of 263.40 percent, which is the highest dumping margin alleged in the Petition. Because the AFA rate that Commerce used is from the Petition, it is secondary information subject to the corroboration requirement. The petitioner's methodology for calculating the export price and NV in the Petition is discussed in the *Initiation Notice* and the Initiation Checklist.[127] We determined that the highest petition margin of 263.40 percent is

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[120] *See also* 19 CFR 351.308(d).
[121] *See* SAA.
[122] *See* section 776(c)(2) of the Act; TPEA, section 502(2).
[123] *See* section 776(d)(1)-(2) of the Act; TPEA, section 502(3).
[124] *See* section 776(d)(3) of the Act; TPEA, section 502(3).
[125] *See*, *e.g.*, *Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Purified Carboxymethylcellulose from Finland*, 69 FR 77216 (December 27, 2004), unchanged in *Notice of Final Determination of Sales at Less Than Fair Value: Purified Carboxymethylcellulose from Finland*, 70 FR 28279 (May 17, 2005).
[126] *See*, *e.g.*, *Certain Stilbenic Optical Brightening Agents from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 77 FR 17436, 17438 (March 26, 2012); *Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Flat-Rolled Carbon Quality Steel Products from the People's Republic of China*, 65 FR 34660 (May 31, 2000), and accompanying Issues and Decision Memorandum.
[127] *See Initiation Notice*; *see also* AD Investigation Initiation Checklist: Carton-Closing Staples from the People's Republic of China (Initiation Checklist), dated April 20, 2017.

reliable where, to the extent appropriate information was available, we reviewed the adequacy and accuracy of the information in the Petition during our pre-initiation analysis.[128]

To corroborate the 263.40 percent petition rate for purposes of this final determination, Commerce first revisited its pre-initiation analysis of the reliability of the information in the Petition. During our pre-initiation analysis, we examined: (1) the information used as the basis for export price and NV in the Petition; (2) the calculations used to derive the alleged margin; and (3) information from various independent sources provided either in the petition or in supplements to the Petition.[129]

Based on our examination of the information, as discussed in detail in the Initiation Checklist, we consider the petitioner's export price and NV calculations to be reliable.[130] In addition, we obtained no other information that would make us question the validity of the sources of information or the validity of information supporting the U.S. price or NV calculations provided in the Petition. Because we confirmed the accuracy and validity of the information underlying the derivation of the margin in the Petition by examining source documents, as well as publicly available information, we preliminarily determine that this petition rate is reliable for the purposes of assigning an AFA rate as the China-wide rate and Yueda Group's rate in this investigation.

In making a determination as to the relevance aspect of corroboration, Commerce will consider information reasonably at its disposal as to whether there are circumstances that would render a margin not relevant. The petition rate is relevant because it is based on a price quote for the merchandise under consideration and surrogate values that are contemporaneous with the POI. In addition, no information has been placed on the record that discredits this information. As such, we find the highest petition rate of 263.40 percent relevant to the China-wide entity and Yueda Group. Furthermore, as there are cooperative non-individually examined respondents in this investigation to which we are assigning a separate dumping margin, we relied upon a simple-average of the range of rates found in the Petition, as the separate rate, which is the only information regarding the carton-closing staples industry reasonably at Commerce's disposal.[131]

Accordingly, the Department has corroborated the AFA rate of 263.40 percent, to the extent practicable, within the meaning of section 776(c) of the Act.

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[128] *Id.*, at 9; *see also* Petition Supplemental Response, at 19-20 and Exhibit II-SQ-9. While both the *Initiation Notice* and the Initiation Checklist identify the highest petition margin as 263.43 percent, the *Preliminary Determination* correctly identified the correct highest petition margin as 263.40 percent. *See Preliminary Determination* and accompanying Preliminary Decision Memorandum at 17. The correct highest petition margin is 263.40 percent, as identified in Petition Supplemental Response at 19-20 and Exhibit II-SQ-9. Thus, we are using the correct highest petition margin for the final determination.
[129] *See*, *e.g.*, *Initiation Notice*,Petition, and Petition Supplemental Response.
[130] *See* Petition, Petition Supplemental Response and Initiation Checklist.
[131] *See* Comment 3 below, for further discussion.

Comment 2: Reliance on Toller's Reported FOP Data

Yueda Group Case Brief:

- Yueda objects to Commerce's conduct during verification with respect to the toller shutdown. Yueda encouraged Commerce to verify the toller and was prepared for Commerce's verification of the toller's information. Commerce's refusal to verify this data as a result of Commerce's contacting of the toller, under false pretenses, without Yueda's knowledge during verification, should not impede reliance on the data which were ready and available for verification.
- Commerce jumped to an unwarranted conclusion that the toller had not shut down its operations, as reported at the beginning of verification. The information Commerce independently obtained from the toller at verification should not have caused Commerce to cancel its visit to the toller. Rather, Commerce reached a conclusion without any further investigation, all based on a false presumption.
- In reality, the person who answered the phone call from the U.S. Embassy in Beijing was an accountant and wife of the owner of the toller, who, after the verification, signed a declaration submitted to Commerce stating that she told the caller that the company was operational because it still had significant inventory of steel wire rod and was seeking customers to purchase the inventory. This explanation is completely reasonable, and had Commerce disclosed the conversation to Yueda, the toller and counsel, Commerce could have received answers to any of the questions it might have about the status of the toller.
- Commerce has an obligation to conduct its investigations in a fair and open manner. At verification, Commerce violated every principle of transparency by conducting this inquiry in secret and away from counsel. It is not permissible for Commerce to conduct such independent, secretive investigations, to represent falsely that it is a purchaser of metal wire products, to withhold information received from the respondent, and to subsequently rely on that information to make a decision that cannot later be corrected.
- Commerce violated the APO when it provided the name and contact information for the toller to an unnamed employee from the U.S. Embassy in Beijing, who is not bound by the terms of the APO. The U.S. Embassy employee had no reason or basis or right to be informed of the identity of the toller, a name that Yueda had consistently maintained as confidential during this investigation. Commerce must rectify its wrongful conduct by accepting and using the tollers FOPs for the final determination.
- Commerce verified that the toller does not record the weight of steel wire rod before the wire drawing process; thus, it does not maintain any records regarding yield loss or gain during the tolling of steel wire rod into steel wire.

Petitioner Rebuttal Brief:

- Commerce should not rely on the toller's unverified FOPs; rather, Commerce should apply total AFA to Yueda or, at least, partial AFA to value the coated and galvanized wire due to Yueda's obstruction of verification of the toller.
- Section 776(a)(2)(D) of the Act provides that if Commerce does not verify information, it is to rely on facts otherwise available for its determination.
- While Yueda argues that Commerce could have verified its information using data at the Yueda facility and that it cooperated to the best of its ability, Yueda's behavior preceding and

during the verification demonstrated a lack of cooperation. Yueda asserts that its toller's plant was shut down as of November 30, 2017. However, Yueda had a verification outline in advance of the verification and knew that the Commerce verifiers intended to visit the toller's facility; yet it waited until the day before verification was to commence to advise Commerce that the toller's plant was shut down and was not available for verification.

- The verification exhibits demonstrate that the toller knew about the November 30, 2017, shutdown date before the verification was scheduled. Thus, the failure to advise Commerce that a portion of its planned verification could not be accomplished impeded the verification.
- While Commerce was at Yueda's manufacturing facility, the production lines for subject merchandise were shut down.[132] Yueda asserts that production at the toller's plant was similarly shut down. Thus, it is not clear why Yueda allowed verification of its own non-operational plant but did not allow verification of the toller's non-operational plant. This evinces a lack of cooperation on Yueda's part.
- Yueda's most significant failure to cooperate is its representation that the toller's plant was shut down and could not be visited, which Commerce had planned to confirm by visiting the toller's facility. Commerce's subsequent cancellation of this visit after contacting the toller confirmed that Yueda's information about the closure was inaccurate.[133]
- Yueda's subsequent certification from the toller claiming that there was no contradiction to the initial shutdown statements does not provide a reasonable explanation for Yueda's misrepresentations and does not demonstrate the plant had been shut down.
- The Toller Declaration does not explain why the telephone responder said that the plant was "busy," a clear indication of operation.[134] The Toller Declaration notes that the caller asserted that it was looking to buy steel wire product.
- The Toller Declaration also certifies that the toller had "considerable inventory of steel wire rod" to sell, which, in itself, belies the representation that the plant was shut down, and is also inconsistent with the information/direction within the final notice from the provincial agency which instructed the toller to comply with the shutdown order by November 30, 2017.[135] Based on the terms of the provincial government's compliance instructions to be completed by November 30, 2017, there should have been no operations or opportunity for the toller to be "busy" as it would be non-compliant with the provincial government's orders.
- Commerce was right to independently confirm the alleged closure of the toller and to cancel verification of the toller when it learned that the toller was still operating, contrary to Yueda's assertions. Commerce is an investigative agency and confirming the alleged shutdown of the toller represented appropriate and necessary efforts to investigate fully the

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[132] *See* Petitioner's Rebuttal Brief at 5, citing to Verification Report at 9-10.
[133] *Id.*, at 5-6 citing to Verification Report at 2-3.
[134] *Id.*, at 6, citing to Verification Report at 3 and Toller Declaration at 2.
[135] *Id.*, at 7, citing to Verification Report and Verification Exhibit 29 at page 16 (which contains business proprietary information regarding the terms of the provincial government's shutdown instructions to the toller and what directives from the provincial government had to be completed prior to November 30, 2017: the shutdown date).

accuracy and reliability of the information submitted by Yueda, as Commerce is obligated under the Act to do.[136]

- Commerce should apply facts available to yield loss during the wire drawing stage because Yueda's statement that there was no yield loss or gain from the quantity of wire rod sent to the toller and drawn into steel wire does not comport with reality.[137] All normal manufacturing processes experience some yield loss.
- As Commerce was unable to verify Yueda's toller, it cannot verify whether there was yield loss or gain to the steel wire rod during the wire drawing stage. While Yueda claims that it and the toller only recorded the weight of post-coating/galvanizing steel wire,[138] Yueda has no factual basis for asserting that there was no yield loss, nor does Commerce have any verified information supporting Yueda's claim that there is no yield loss when the toller draws steel wire rod into steel wire.[139] Thus, Commerce should apply SVs for coated wire to the weights of the inputs reported by Yueda as facts available plus an additional amount based on an adverse inference to encourage respondent cooperation.

Commerce's Position:

Because Commerce is applying total AFA to Yueda for the final determination, the arguments with respect to reliance on Yueda's and the toller's reported FOP data and the issue of yield loss are moot. Commerce has addressed Yueda Group's arguments for this issue in Comment 1 above.

Comment 3: Adjustment of Separate Rate Assigned to Non-Individually Examined Respondents

Petitioner Case Brief:

- In the *Preliminary Determination*, Yueda was the only individually investigated company, and the separate rate recipients were assigned the same dumping margin as Yueda, pursuant to Commerce practice. Thus, for the final determination, Commerce should modify the rate it assigns to the separate rate companies to conform to its final determination for Yueda.
- If Commerce applies total AFA to the Yueda Group, then Commerce should determine a rate for the separate rate companies that reflects the fact that both of the mandatory respondents have been assigned AFA rates.[140]

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[136] *Id.*, at 7, citing to *Certain Steel Grating from China: Final Affirmative Countervailing Duty Determination*, 75 FR 32362 (June 8, 2010) and accompanying Issues and Decision Memorandum at Comment 4; *Torrington*, 68 F.3d 1347, 1351-52 ("agencies with statutory enforcement responsibilities enjoy broad discretion in allocating investigative and enforcement resources"); *Micron Tech., Inc. v. United States*, 68 F.3d 1347, 1351-52 (Fed. Cir. 1997).

[137] *See* Petitioner's Rebuttal Brief at 8.

[138] *Id.*, at 9, citing to Yueda's Case Brief at 8.

[139] *Id.*, at 9, citing to Verification Report at 16.

[140] *See* Petitioner's Case Brief at 16-17, citing to *Yantai Xinke Steel Structure Co., Ltd. v. United States*, Slip Op. 12-95, WL 2930182 at *5-6 (CIT 2012); *Certain Steel Grating from China: Final Determination of Sales at Less Than Fair Value*, 75 FR 32366 (June 8, 2010) (*Grating from China*) and accompanying Issues and Decision Memorandum at Comment 14; *Sodium Hexametaphosphate from China: Final Determination of Sales at Less Than Fair Value*, 73 FR 6479 (February 4, 2008) (*Sodium Hex from China*) and accompanying Issues and Decision Memorandum at Comment 2.

- If Commerce calculates a partial AFA for Yueda, it should assign that rate to the separate rate recipients.[141]

No other interested parties commented on this issue.

Commerce's Position:

Commerce disagrees with the petitioner, in part, with respect to the separate rate assigned to the cooperative separate rate recipients.

In proceedings involving NME countries, Commerce begins with a rebuttable presumption that all companies within the country are subject to government control and, thus, should be assigned a single antidumping duty deposit rate.[142] It is Commerce's policy to assign all exporters of merchandise subject to investigation in an NME country this single rate unless an exporter can demonstrate that it is sufficiently independent to be entitled to a separate rate.[143]

In the *Preliminary Determination*, we found that two companies were eligible for separate rate status because they demonstrated that they operated under an absence of *de jure* and *de facto* government control.[144] Based on the information on the record of this investigation, we continue to find that these companies, Hangzhou Huayu Machinery Co., Ltd. and The Stanley Works (Langfang) Fastening Systems Co., Ltd., are eligible for a separate rate.

Neither the statute nor Commerce's regulations address how we are to determine the dumping margin for separate rate companies not selected for individual examination where Commerce limits its examination in a LTFV investigation pursuant to section 777A(c)(2) of the Act. Our practice in this regard has been to look to section 735(c)(5) of the Act for guidance, which provides instructions for calculating the all-others rate in an investigation,[145] as a general rule, and assign this dumping margin to separate-rate companies that were not individually examined. Section 735(c)(5)(A) of the Act provides that Commerce shall calculate the all-others rate equal to the weighted-average of the margins calculated for the individually examined respondents, excluding margins that are zero, *de minimis*, or based entirely on facts available. Section 735(c)(5)(B) of the Act provides that if all dumping margins for the individually examined respondents are zero, *de minimis*, or based entirely on facts available, then the Department may use any reasonable method, including averaging the dumping margins for the individually examined respondents. The SAA also provides that the expected method to apply when using any reasonable method in situations where the dumping margins for all of the exporters and

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[141] *See* Petitioner's Case Brief at 17, citing to *Certain Lined Paper Products from China: Notice of Final Results of the Antidumping Duty Administrative Review*, 74 FR 17160 (April 14, 2009) (*Lined Paper from China*) and accompanying Issues and Decision Memorandum at Comment 8.
[142] *See Preliminary Determination*.
[143] *See Initiation Notice*.
[144] *See Preliminary Determination*, 82 FR at 51214.
[145] *See* Section 735(c)(5); *Antidumping Duty Investigation of Stainless Steel Sheet and Strip from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances*, 82 FR 9716 (February 8, 2017) (*China SSSS*) and accompanying Issues and Decision Memorandum at "Part VII: Separate Rates."

producers that are individually investigated are determined entirely on the basis of the facts available, or are zero or *de minimis*, is to "weight-average the zero and *de minimis* margins and margins determined pursuant to the facts available, provided the volume data is available." The SAA stipulates, however, that if the method is not feasible or if it "results in an average that would not be reasonably reflective of potential dumping margins for non-investigated exporters or producers," Commerce may use any other reasonable method.[146]

As noted above, for the final determination, Commerce is applying the AFA rate of 263.40 percent to the Yueda Group. Furthermore, Commerce continues to determine that the use of facts available is warranted in determining the rate of the China-wide entity,[147] pursuant to sections 776(a)(1) and (a)(2)(A)-(C) of the Act, as the facts regarding the China-wide entity have not changed since the *Preliminary Determination*. However, for the final determination, we are now applying the highest petition rate of 263.40 percent as the AFA rate to the China-wide entity, because we are no longer relying upon Yueda Group's data as the basis for the AFA rate, as we did in the *Preliminary Determination*.[148]

Because we are determining Yueda Group's rate and the China-wide rate based on AFA, we look to section 753(c)(5)(A)-(B) of the Act for guidance and "any reasonable method" to determine the rate for exporters that are not being individually examined and found to be entitled to a separate rate, as we did in the *Preliminary Determination*. As "any reasonable method," we find it appropriate to assign the simple average of the petition rates (*i.e.*, 115.65 percent) to the separate rate applicants not individually examined.[149]

While the petitioner urges Commerce to apply the AFA rate to the separate rate companies, we find the AFA rate of 263.40 percent is unwarranted for cooperative separate-rate companies. Thus, consistent with our normal practice,[150] we have assigned to the non-individually examined separate-rate the simple average of the petition rates, *i.e.*, 115.65 percent.[151]

[146] *See* SAA; *see also China SSSS* and accompanying Issues and Decision Memorandum at "Part VII: Separate Rates."
[147] In the *Preliminary Determination*, Commerce preliminarily relied upon facts otherwise available, with adverse inferences, for the China-wide entity, including Zhejiang Best Nail Industrial Co., Ltd. (Best Nail), pursuant to sections 776(a) and (b) of the Act. *See Preliminary Determination*, 82 FR at 51214 and accompanying Preliminary Decision Memorandum at 14-17.
[148] *Id.*, and accompanying Preliminary Decision Memorandum at section VII, parts F and G.
[149] *See* Petition Supplemental Response at Exhibit II-SQ-9. The petitioner calculated 36 individual petition margins ranging from lowest (13.80 percent) to highest (263.40 percent), the simple average of which is 115.65 percent.
[150] *See*, *e.g.*, *Galvanized Steel Wire from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 77 FR 17430, 17431-32 (March 26, 2012).
[151] *See* Petition Supplemental Response at Exhibit II-SQ-9.

Comment 4: Whether to Find Affirmative Critical Circumstances

Petitioner Case Brief:

- In addition to continuing to apply total AFA to Best Nail, the mandatory respondent that withdrew its participation from the investigation, Commerce should also find, as an adverse inference, that critical circumstances exist with respect to Best Nail.[152]
- If Commerce relies on total AFA to determine a margin for Yueda, it should similarly find that critical circumstances exist with respect to Yueda.
- As an adverse inference, Commerce should impute affirmative knowledge of dumping, as the AFA rate exceeds 25 percent.[153]
- As an adverse inference, Commerce should impute massive imports during a relatively short period of time, which is "generally…three months following the date of the filing of the petition."[154]
- When Commerce does not have verifiable data from uncooperative companies, Commerce must base its massive imports determination using an adverse inference without additional analysis.[155]

No other interested parties commented on this issue.

Commerce's Position:

Commerce disagrees with the petitioner regarding its argument that an affirmative finding of critical circumstances is appropriate for the final determination. The petitioner's argument in its case brief is misplaced. The purpose of case briefs is "namely to comment on what the Department did in its preliminary determination and to place before the Department any arguments that continue, in the submitter's view, to be relevant to the Secretary's final determination or results of review."[156]

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[152] *See* Petitioner's Case Brief at 19, citing to *Certain Cold-Drawn Mechanical Tubing of Carbon and Alloy Steel from the Republic of Korea: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Preliminary Affirmative Determination of Critical Circumstances, in Part, Postponement of Final Determination, and Extension of Provisional Measures*, 82 FR 55564 (November 22, 2017) and accompanying Preliminary Decision Memorandum at XII; *Emulsion Styrene-Butadiene Rubber from the Republic of Korea: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Affirmative Determination of Critical Circumstances, in Part, Postponement of Final Determination and Extension of Provisional Measures*, 82 FR 11536 (February 24, 2017) (*Korea Rubber*) and accompanying Preliminary Decision Memorandum at XI.
[153] *See* Petitioner's Case Brief at 17, citing to *Non-Oriented Electrical Steel from Germany, Japan, and Sweden: Preliminary Determinations of Sales at Less Than Fair Value, and Preliminary Affirmative Determinations of Critical Circumstances, in Part*, 79 FR 29423 (May 22, 2014) (*GOES*) and accompanying Issues and Decision Memoranda.
[154] *See* Petitioner's Case Brief at 18, citing to *Certain Small Diameter Carbon and Alloy Seamless Standard Line, Pressure Pipe from Japan and South Africa*, 65 FR 12509 (March 9, 2000).
[155] *See* Petitioner's Case Brief at 19, citing to *Notice of Final Determination of Sales at Less than Fair Value and Affirmative Final Determination of Critical Circumstances: Certain Orange Juice from Brazil*, 71 FR 2183, 2186-87 (January 13, 2006).
[156] *See Preamble*, 62 FR at 27335.

Section 733(e)(1) of the Act provides that, upon receipt of a timely allegation of critical circumstances, Commerce will determine whether there is a reasonable basis to believe or suspect that: (A)(i) there is a history of dumping and material injury by reason of dumped imports in the United States or elsewhere of the subject merchandise or (ii) the person by whom, or for whose account, the merchandise was imported knew or should have known that the exporter was selling the subject merchandise at less than its fair value and that there was likely to be material injury by reason of such sales; and (B) there have been massive imports of the subject merchandise over a relatively short period.[157]

The petitioner correctly noted in its argument that Commerce will determine whether there is a reasonable basis to believe or suspect that critical circumstances exist[158] and the petitioner has cited to numerous cases where Commerce has found affirmative critical circumstances as part of an AFA determination. However, in each of those cited cases, the records contain a separate written allegation, submitted in accordance with 19 CFR 351.206, that includes factual data.[159] For example, in *Korea Rubber*, the petitioners in that case included an analysis of massive imports within their written allegation.[160] which Commerce subsequently evaluated.[161] What the petitioner would have Commerce do here is something different. Section 351.206(b) of our regulations requires a petitioner to submit "a written allegation of critical circumstances, with reasonably available factual information supporting the allegation." The "reasonably available factual data" required to substantiate the written allegation does not include an AFA determination as a proxy for factual data, which is effectively an absence of factual data, even where Commerce made AFA determinations.[162]

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[157] *See* section 733(e)(1) of the Act; *see also Final Determination of Sales at Less Than Fair Value and Affirmative Determination of Critical Circumstances: Small Diameter Graphite Electrodes from the People's Republic of China*, 74 FR 2049 (January 14, 2009) (*Electrodes LTFV Final*) and accompanying Issues and Decision Memorandum at Comment 4.
[158] *See* Petitioner's Case Brief at 17-18.
[159] *See*, *e.g.*, *Korea Rubber* and accompanying Preliminary Decision Memorandum at 16 ("On January 25, 2017, Petitioners alleged that critical circumstances exist with respect to imports of the subject merchandise, pursuant to section 733(e)(1) of the Act and 19 CFR 351.206(c)(1)").
[160] *Id.*, at 17.
[161] *Id.*, citing to *Notice of Final Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances: Circular Welded Carbon Quality Steel Pipe from the People's Republic of China*, 73 FR 31970, 31972-73 (June 5, 2008) (*Carbon Steel Pipe Final Determination*); *see also Electrodes LTFV Final*, 74 FR 2049, 2052-53
[162] *See*, *e.g.*, *Countervailing Duty Investigation of Cold-Drawn Mechanical Tubing of Carbon and Alloy Steel from the People's Republic of China: Final Affirmative Determination, and Final Affirmative Determination of Critical Circumstances, in Part*, 82 FR 58175, 58176 (December 11, 2017) ("The petitioners provided U.S. Census Bureau data obtained from the ITC's DataWeb, which they contend shows an increase in imports of subject merchandise between the "base period" prior to the filing of the Petition, *i.e.*, December 2016 through April 2017, and the "comparison period" after the petition was filed, *i.e.*, May 2017 through September 2017…"); *Certain Hardwood Plywood Products from the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination, Preliminary Affirmative Critical Circumstances Determination, in Part, and Alignment of Final Determination with Final Antidumping Duty Determination*, 82 FR 19022 (April 25, 2017) and accompanying Preliminary Decision Memorandum at Section VIII ("On March 23, 2017, Petitioners alleged that critical circumstances exist with respect to imports of hardwood plywood from the PRC…Petitioners supplemented their critical circumstances allegation on March 30, 2017, and filed an additional month of newly available import data on April 6, 2017.").

In *Electrodes LTFV Final*, for example, Commerce applied an adverse inference in its final determination,[163] *after having already made an affirmative critical circumstances determination in its preliminary determination based on a written allegation* and the collection of relevant data pursuant to section 733(e)(1) of the Act.[164] However, even when Commerce has applied affirmative critical circumstances as part of an AFA determination, as in that case, Commerce still relied on a proper, written allegation, including factual information, to evaluate whether critical circumstances existed. Thus, we decline the petitioner's request to reach an affirmative finding of critical circumstances with respect to the China-wide entity (including Best Nail) and Yueda Group.

ADDITIONAL ARGUMENTS REGARDING CALCULATIONS

The petitioner and Yueda Group made additional arguments related to calculations in the *Preliminary Determination*. These arguments include:

1. Correction of Packing Material Surrogate Values[165]
2. Correction of Weights Used for Per-Kilogram U.S. Prices[166]
3. VAT Tax Calculation[167]
4. Surrogate Financial Ratios Calculation[168]
5. Steel Wire Rod Yield Loss[169]

Because Commerce is applying total AFA to Yueda Group for the final determination, the above-noted arguments with respect to the calculations are moot.

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[163] *See Electrodes LTFV Final* and accompanying Issues and Decision Memorandum at Comment 4.
[164] *See Small Diameter Graphite Electrodes from the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Affirmative Preliminary Determination of Critical Circumstances, in Part*, 73 FR 49408 (August 21, 2008) ("On July 23, 2008, the petitioners requested that the Department make a finding that critical circumstances exist with respect to imports of graphite electrodes from the PRC. The Department issued questionnaires regarding critical circumstances to Fushun Jinly and the Fangda Group on July 24, 2008. Fushun Jinly and the Fangda Group submitted their responses to those questionnaires on July 30, 2008.")
[165] *See* Petitioner's Case Brief at 10.
[166] *See* Petitioner's Case Brief at 11-16.
[167] *See* Yueda's Case Brief at 1-3; *see also* Petitioner's Rebuttal Brief at 1-3.
[168] *See* Yueda's Case Brief at 7-8; *see also* Petitioner's Rebuttal Brief at 8.
[169] *See* Yueda's Case Brief at 8; *see also* Petitioner's Rebuttal Brief at 8-9.

V. **Recommendation**

Based on our analysis of the comments received, we recommend adopting the above positions. If this recommendation is accepted, we will publish the final determination of the investigation and the final dumping margins in the *Federal Register*.

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Agree Disagree

3/21/2018

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Signed by: GARY TAVERMAN

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Gary Taverman
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations,
performing the non-exclusive functions and duties of the
Assistant Secretary for Enforcement and Compliance