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Investigation
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January 23, 2020

MEMORANDUM TO: Jeffrey I. Kessler
Assistant Secretary
for Enforcement and Compliance

FROM: James Maeder
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 Certain Fabricated Structural Steel from the People's Republic of China

I. SUMMARY

The Department of Commerce (Commerce) finds that certain fabricated structural steel (fabricated structural steel) from the People's Republic of China (China) is being, or is 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, 2018 through December 31, 2018.

We analyzed the comments submitted by interested parties and have made changes to the *Preliminary Determination*.[1] As a result of our analysis, and based on our findings at verification, we made changes to the margin calculations for Jinhuan Construction Group Co., Ltd. (JCG) and Wison (Nantong) Heavy Industry Co. Ltd. (Wison).[2] Further, with respect to Modern Heavy Industries (Taicang) Co., Ltd. (Modern Heavy), we have relied upon facts available with an adverse inference, based upon cascading failures within its factors of production (FOP) database. We recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum. Below is the complete list of the issues in this LTFV investigation for which we received comments from interested parties:

[1] *See Certain Fabricated Structural Steel from the People's Republic of China: Preliminary Determination of Sales at Less-Than-Fair-Value and Postponement of Final Determination*, 84 FR 47491 (September 10, 2019) (*Preliminary Determination*), and accompanying Preliminary Decision Memorandum (PDM).

[2] We have "collapsed" Wison (Nantong) Heavy Industry Co., Ltd. with its affiliate Wison Offshore & Marine (Hong Kong) Limited, and, as a result, we are treating them as a single-entity (collectively, Wison). No party commented on this finding from the *Preliminary Determination*; thus, we have not changed our preliminary finding with respect to the treatment of these two companies as the collective entity, Wison.

General Comments

Comment 1: Value Added Tax

Surrogate Values

Comment 2: Surrogate Country
Comment 3: Surrogate Value for Ocean Freight
Comment 4: Surrogate Value for Truck Freight
Comment 5: Surrogate Value for Timber
Comment 6: Surrogate Value for JCG's Market Economy Input
Comment 7: Surrogate Value for Angle and Channel Steel
Comment 8: Surrogate Value for Steel Grating, Steel Skirting Board
Comment 9: Surrogate Value for Wison's Packing Input
Comment 10: Selling and Distribution Expenses

Company-Specific Comments

Comment 11: JCG's U.S. Sale Classification
Comment 12: Modern Heavy's Verification Failures
Comment 13: Modern Heavy's Moot Arguments
Comment 14: Wison's Galvanizing Costs
Comment 15: Wison's Further Manufacturing Costs
Comment 16: Wison's Further Manufacturing General and Administrative Expenses
Comment 17: Wison's Steel Scrap Offset
Comment 18: United Steel Structures Ltd.'s Separate Rate

II. BACKGROUND

On September 10, 2019, Commerce published the *Preliminary Determination* of sales at LTFV of fabricated structural steel from China. Also in September, Commerce received supplemental questionnaire responses from JCG and Wison.[3] From September through October 2019, we conducted verification of the sales and FOP data reported by JCG, Modern Heavy and Wison, in accordance with section 782(i) of the Act.[4] In October 2019, we requested that Wison submit

[3] *See* JCG's September 24, 2019 Questionnaire Response and Wison's September 3, 2019 Second Supplemental Questionnaire Response (Wison September 3, 2019 SSQR).

[4] *See* Memorandum, "Verification of the Responses of Jinhuan Construction Group Co., Ltd. in the Less-Than-Fair-Value Investigation of Certain Fabricated Structural Steel from the People's Republic of China," dated September 30, 2019 (JCG's Verification Report); Memorandum, "Verification of the Responses of JH Steel International Inc. in the Less-Than-Fair-Value Investigation of Certain Fabricated Structural Steel from the People's Republic of China," dated October 28, 2019 (JH Steel Verification Report); Memorandum, "Verification of the Responses of [ ] and [ ] in the Less-Than-Fair Value Investigation of Certain Fabricated Structural Steel from the People's Republic of China," dated November 15, 2019 (JCG Affiliates Verification Report); Memorandum, "Verification of the Responses of Modern Heavy Industries (Taicang) Co., Ltd. in the Less-Than-Fair-Value Investigation of Certain Fabricated Structural Steel from the People's Republic of China," dated November 14, 2019 (Modern Heavy's Verification Report); Memorandum, "U.S. Verification of the Responses of Wison NA in the Less-Than-Fair-Value Investigation of Certain Fabricated Structural Steel from the People's Republic of China," dated October 7, 2019

revised FOP and U.S. sales databases. We received these revised databases during the same period.

We invited parties to comment on the *Preliminary Determination*. In November, we received case briefs from JCG, Modern Heavy, Wison, United Steel Structures Ltd. (United Steel), and the American Institute of Steel Construction Full Member Subgroup (the petitioner).[5] In December 2019, we received rebuttal briefs from JCG, Modern Heavy, Wison and the petitioner.[6] On December 20, 2019, we held a public hearing.[7]

Based on our analysis of the comments received, as well as our verification findings, we revised our calculations of the weighted-average dumping margins for JCG, Modern Heavy and Wison from our calculations in the *Preliminary Determination*.

III. SCOPE OF THE INVESTIGATION

The product covered by this investigation is fabricated structural steel from China. For a complete description of the scope of this investigation, *see* Appendix I of the accompanying *Federal Register* notice.

IV. SCOPE COMMENTS

During the course of this investigation, and the concurrent AD and CVD investigations of fabricated structural steel from Canada, China, and Mexico, Commerce received scope comments from interested parties. Commerce issued Preliminary Scope Decision Memoranda to address these comments and establish a period of time for parties to address scope issues in

(Wison CEP Verification Report); and Memorandum, "Verification of the Responses of Wison in the Less-Than-Fair-Value Investigation of Certain Fabricated Structural Steel from the People's Republic of China," dated October 9, 2019 (Wison FOP Verification Report).

[5] *See* Petitioner's Case Brief, "Certain Fabricated Structural Steel from China: Case Brief," dated November 22, 2019 (Petitioner's Case Brief); JCG's Case Brief, "Administrative Case Brief of JCG, Less-Than-Fair-Value Investigation of Certain Fabricated Structural Steel from the People's Republic of China," dated November 22, 2019 (JCG's Case Brief), Modern Heavy's Case Brief, "Modern Heavy Industries (Taicang) Co., Ltd. Case Brief in the Antidumping Duty Investigation of Fabricated Structural Steel from the People's Republic of China (A-570-102)," dated November 22, 2019 (Modern Heavy's Case Brief); United Steel's Case Brief, "Certain Fabricated Structural Steel from the People's Republic of China: United Steel Case Brief," dated November 22, 2019 (United Steel's Case Brief); and Wison's Case Brief, "Certain Fabricated Structural Steel from the People's Republic of China: Wison's Case Brief," dated November 22, 2019 (Wison's Case Brief).

[6] *See* Petitioner's Rebuttal Brief, "Certain Fabricated Structural Steel from China: Rebuttal Brief," dated December 3, 2019 (Petitioner's Rebuttal Brief); JCG's Rebuttal Brief, "Administrative Rebuttal Brief: Less-Than-Fair-Value Investigation of Certain Fabricated Structural Steel from the People's Republic of China," dated December 3, 2019 (JCG's Rebuttal Brief); Modern Heavy's Rebuttal Brief, "Modern Heavy Industries (Taicang) Co., Ltd. Rebuttal Case Brief in the Antidumping Duty Investigation of Fabricated Structural Steel from the People's Republic of China (A-570-102)," dated December 3, 2019 (Modern Heavy's Rebuttal Brief); and Wison's Rebuttal Brief, "Certain Fabricated Structural Steel from the People's Republic of China: Wison's Rebuttal Case Brief," dated December 3, 2019 (Wison's Rebuttal Brief).

[7] *See* Public Hearing Transcript, "Less-Than-Fair-Value Investigation of Certain Fabricated Structural Steel from the People's Republic of China," dated December 20, 2019.

scope case and rebuttal briefs.[8] We received comments from interested parties on the Preliminary Scope Decision Memoranda, which we addressed in the Final Scope Decision Memorandum.[9] As a result, for this final determination, we made certain changes to the scope of these investigations from that published in the *Preliminary Determination*.

V. USE OF ADVERSE FACTS AVAILABLE

Sections 776(a)(1) and 776(a)(2)(A)-(D) of the Act, provide that if necessary information is not available on 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 section 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 as provided for in section 782(i) of the Act, Commerce shall, subject to subsection 782(d) of the Act, use facts otherwise available in reaching the applicable determination.

Section 782(c)(1) of the Act provides that if an interested party "promptly after receiving a request from {Commerce} for information, notifies {Commerce} that such party is unable to submit the information requested in the requested form and manner," Commerce shall consider the ability of the interested party and may modify the requirements to avoid imposing an unreasonable burden on that party.

Section 782(d) of the Act provides that, if Commerce determines that a response to a request for information does not comply with the request, Commerce shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person an opportunity to remedy or explain the deficiency. If that person submits further information that continues to be unsatisfactory, or this information is not submitted within the applicable time limits, Commerce may, subject to section 782(e), disregard all or part of the original and subsequent responses, as appropriate.

Section 782(e) of the Act states that Commerce shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements established by the administering authority if: (1) the information is submitted by the established deadline; (2) the information can be verified; (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination; (4) the interested party has demonstrated that it acted to the best of its ability; and (5) the information can be used without undue difficulties.

Section 776(b) of the Act provides that Commerce may use an adverse inference in applying the facts otherwise available (AFA) when a party fails to cooperate by not acting to the best of its

[8] *See* Memorandum, "Fabricated Structural Steel from Canada, Mexico, and the People's Republic of China: Preliminary Scope Decision Memorandum," dated July 5, 2019; *see also* Memorandum, "Fabricated Structural Steel from Canada, Mexico, and the People's Republic of China: Second Preliminary Scope Memorandum," dated September 3, 2019 (collectively, Preliminary Scope Decision Memoranda).

[9] *See* Memorandum, "Fabricated Structural Steel from Canada, Mexico, and the People's Republic of China: Final Scope Decision Memorandum," dated concurrently with this memorandum (Final Scope Decision Memorandum).

ability to comply with a request for information.[10] In doing so, Commerce is not required to determine, or make any adjustments to, a weighted average dumping margin based on any assumptions about information an interested party would have provided if the interested party had complied with the request for information. Section 776(b)(2) provides that an adverse inference may include reliance on information derived from the petition, the final determination from the investigation, a previous administrative review, or other information placed on the record. In addition, the Statement of Administrative Action accompanying the Uruguay Round Agreements Act 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."[11]

In *Nippon Steel*, the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) held 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 "one's maximum effort."[12] Thus, according to the Federal Circuit, 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 Federal Circuit 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 Federal Circuit noted that the "best of its ability" standard does not require perfection, it does not condone inattentiveness, carelessness, or inadequate record keeping.[13] 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.[14] Moreover, further, affirmative evidence of bad faith on the part of a respondent is not required before Commerce may make an adverse inference.[15]

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, it shall, to the extent practicable, corroborate that information from independent sources that are reasonably at its disposal. 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.[16] Further, Commerce is not required to corroborate any dumping margin applied in a separate segment of the same proceeding.

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[10] *See* section 776(b)(1)(B) of the Act.
[11] *See* Statement of Administrative Action Accompanying the Uruguay Round Agreements Act, H.R. Doc. 103-316, vol. 1 (1994) (SAA) at 870.
[12] *See Nippon Steel Corp. v. United States*, 337 F. 3d 1373, 1382-83 (Fed. Cir. 2003) (*Nippon Steel*).
[13] *Id*. at 1382.
[14] *Id.*
[15] *See*, *e.g.*, *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) (*Seamless Stainless Steel Hollow Products from Japan*); *Antidumping Duties; Countervailing Duties: Final Rule*, 62 FR 27296, 27340 (May 19, 1997) (*Preamble*); and *Nippon Steel*, 337 F. 3d at 1382-83.
[16] *See* SAA at 870.

Finally, under section 776(d) of the Act, Commerce may use any dumping margin from any segment of a proceeding under an antidumping duty (AD) order when applying an adverse inference, including the highest of such margins. 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 or to demonstrate that the dumping margin reflects an "alleged commercial reality" of the interested party.

Selection and Corroboration of the AFA Rate

When using facts otherwise available, section 776(c) of the Act provides that, where Commerce relies on secondary information (such as the Petition)[17] rather than information obtained in the course of an investigation, it must corroborate, to the extent practicable, information from independent sources that are reasonably at its disposal. 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.[18] The SAA clarifies that "corroborate" means that Commerce will satisfy itself that the secondary information to be used has probative value,[19] although Commerce is not required to corroborate any dumping margin applied in a separate segment of the same proceeding.[20] To corroborate secondary information, Commerce will, to the extent practicable, examine the reliability and relevance of the information to be used, although Commerce is not required to estimate what the dumping margin would have been if the interested party failing to cooperate had cooperated or to demonstrate that the dumping margin reflects an "alleged commercial reality" of the interested party.[21]

In applying an adverse inference, Commerce may rely on information derived from the Petition, the final determination in the investigation, any previous review, or any other information placed on the record.[22] As stated above, in selecting an AFA rate, Commerce selects 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.[23] In an investigation, Commerce's practice with respect to the assignment of an AFA rate is to select the higher of: (1) the highest dumping margin alleged in the Petition; or (2) the highest calculated dumping margin of any respondent in the investigation.[24]

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[17] *See* Petitioner's Letter, "Petitions for the Imposition of Antidumping and Countervailing Duties on Certain Fabricated Structural Steel from Canada, Mexico, and the People's Republic of China," dated February 4, 2019 (the Petition), at Volumes I and IV.
[18] *See* SAA at 870.
[19] *Id.*; *see also* 19 CFR 351.308(d).
[20] *See* section 776(c)(2) of the Act.
[21] *See* section 776(d)(3) of the Act; *see, e.g.*, *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished from Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, from Japan; Preliminary Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews*, 61 FR 57391, 57392 (November 6, 1996), unchanged in *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from Japan; Final Results of Antidumping Duty Administrative Reviews and Termination in Part*, 62 FR 11825 (March 13, 1997).
[22] *See* SAA at 870.
[23] *Id.*
[24] *See, e.g.*, *Certain Uncoated Paper from Indonesia: Final Determination of Sales at Less Than Fair Value*, 81 FR 3101 (January 20, 2016).

Application of AFA for the China-wide Entity

As noted above, 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 AD 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. Section 776(b) of the Act provides that Commerce may use an adverse inference in applying the facts otherwise available when a party fails to cooperate by not acting to the best of its ability to comply with a request for information.

In the *Preliminary Determination*, we found that the China-wide entity 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. We further determined that because non-responsive China companies had not demonstrated their eligibility for separate rate status, Commerce considered them part of the China-wide entity. Finally, Commerce preliminarily assigned a China-wide rate based on the facts otherwise available, pursuant to sections 776(a)(1) and (a)(2)(A)-(C) of the Act, using an adverse inference, pursuant to 776(b) of the Act.[25]

In the *Preliminary Determination*, when selecting an appropriate rate to apply as AFA, we found that we were not able to corroborate the highest dumping margin found in the Petition. Specifically, based on the information placed on the record since we initiated this investigation, we were unable to corroborate the highest petition rate of 222.35 percent for this final determination.[26] In attempting to corroborate that rate, we compared the highest petition rate of 222.35 percent to the individually investigated respondents' highest transaction-specific dumping margins within the appropriate comparison method and found the petition rate to be significantly higher than any of the highest calculated transaction-specific dumping margins. Because we were unable to corroborate the highest petition margin of 222.35 percent with individual transaction-specific margins from the respondents, we next applied a component approach and compared the normal values (NVs) and net U.S. prices underlying the highest petition margin to the NVs and net U.S. prices calculated for the respondents. We found, however, that we were also unable to corroborate the highest petition margin of 222.35 with this component approach. Specifically, Commerce found – and continues to find – that the NVs and net U.S. prices calculated for the China-wide entity, are not within the range of the NVs and net U.S. prices underlying the highest margin alleged in the Petition.

Thus, in the *Preliminary Determination*, we assigned a dumping margin of 141.38 percent, the highest transaction-specific dumping margin for any of the mandatory respondents, for the

[25] *See Preliminary Determination* PDM at 22-23.
[26] *See* Antidumping Duty Investigation Initiation Checklist: Certain Fabricated Structural Steel from the People's Republic of China, dated February 25, 2019, at 11.

China-wide entity.[27] In addition, we determined that it was unnecessary to corroborate this rate because it was calculated using data obtained in the course of this investigation and, therefore, was not secondary information, pursuant to section 776(c) of the Act.[28] Consequently, we preliminarily determined to apply the highest calculated transaction-specific dumping margin, based on data in the current investigation, as an AFA rate for the China-wide entity for the *Preliminary Determination*. We had applied the China-wide rate to all entries of subject merchandise, except for entries from JCG, Modern Heavy, Wison, and the other producers/exporters receiving a separate rate.

For this final determination we continue to find that the China-wide entity failed to cooperate to the best of its ability in responding to Commerce's requests for information. However, we have revised our margin calculations for JCG and Wison[29] in this final determination and, as a result, the highest calculated transaction-specific dumping margin is now 154.14 percent. Consequently, we are now applying, as the AFA rate, the highest calculated transaction-specific dumping margin for JCG and Wison of 154.14 percent, which, under section 776(c) of the Act, we continue to determine does not require corroboration because it was calculated using information obtained in the course of this investigation. The China-wide rate applies to all entries of subject merchandise, except for entries from JCG, Modern Heavy, Wison, and the other producers/exporters receiving a separate rate.

Application of Total AFA to Modern Heavy

Additionally, regarding Modern Heavy, we determine that Modern Heavy's FOP data are so unreliable, based upon significant and pervasive discrepancies found at verification,[30] that we are unable to use Modern Heavy's reported FOPs to calculate an accurate margin for Modern Heavy.

As discussed further below in Comment 12, in this case, we find that the application of facts available is appropriate under sections 776(a)(2)(A) through (D) of the Act because Modern Heavy withheld information requested by Commerce, did not submit requested information by the established deadline in the form or manner requested, and provided information that was unable to be verified. Further, *in toto*, we find that these actions significantly impeded the proceeding. Additionally, we find that Modern Heavy did not cooperate to the best of its ability to comply with Commerce's requests for information, and thus, an adverse inference is warranted in selecting from the facts available, within the meaning of section 776(b) of the Act.

Regarding its underreporting of steel inputs, Modern Heavy withheld information requested by Commerce, failed to provide the requested information by the deadline, and failed to provide complete, accurate, and verifiable information. As evidenced by the verification report, it is clear that for Modern Heavy's steel FOPs Modern Heavy possessed the necessary records to provide a complete and accurate accounting of its steel FOPs including accurate consumption

[27] *Id.* at 24-25.
[28] *Id.* at 25.
[29] For the final determination, we have determined to apply total AFA to Modern Heavy. *See* Comment 13 for a full discussion of our decision to apply total AFA to Modern Heavy. Thus, because we did not calculate an individual dumping margin for Modern Heavy as a result of applying total AFA, we do not have transaction-specific margins for Modern Heavy from which select a potential AFA rate.
[30] *See* Modern Heavy Verification Report at 2, 17-19, 20-21, and 27-28.

data, but did not conduct a comprehensive investigation of all relevant records in a timely manner whether willfully or by carelessness. In addition, with respect to Modern Heavy's packing FOPs and use of difficulty variances, as evidenced by its inability at verification to provide substantiating documentation, it is clear Modern Heavy did not keep adequate records which were necessary to demonstrate the completeness and accuracy of its FOP reporting for these inputs. We therefore find that Modern Heavy, by failing to provide the requested information, and by failing to provide complete and accurate FOPs, and thereby inhibiting Commerce from accurately calculating a dumping margin, withheld information that Commerce had requested, failed to provide information by the deadlines for submission of the information in the form and manner requested, provided information that could not be verified, and significantly impeded this proceeding, in accordance with sections 776(a)(2)(A) through (D) of the Act. In addition, we find that Modern Heavy's failure to keep adequate records constitutes a failure to act to the best of its ability. Moreover, Modern Heavy's failures to report the requested information, accurately and in the manner requested, using the records over which it maintained control at all times further indicates that Modern Heavy did not act to the best of its ability to comply with our requests for information. Furthermore, in accordance with section 782(d) of the Act, as explained below in Comment 12, Commerce provided Modern Heavy with multiple opportunities to remedy or explain the deficiencies in its initial responses regarding the unverifiable FOPs. Additionally, Modern Heavy failed to do the maximum it is able to do to be prepared for Commerce's verification, which resulted in the discovery at verification of serious errors and misreporting of information requested by Commerce. Hence, we find that based on the combination of factors discussed in detail in Comment 12, the application of total AFA is appropriate under section 776(b) of the Act. Thus, for this final determination, we have applied total AFA to Modern Heavy by applying the highest non-aberrational transaction-specific margin calculated for mandatory respondent Wison to Modern Heavy's dumping margin. Therefore, we have determined, as AFA, that Modern Heavy's dumping margin is 154.14 percent for this final determination. *See* Comment 12, below.

VI. CHANGES SINCE THE PRELIMINARY DETERMINATION

We calculated constructed export price (CEP), export price (EP), and normal value (NV) for the respondents using the same methodology as stated in the *Preliminary Determination*,[31] except as follows:[32]

JCG:

- We revised our margin calculations for JCG to take into account corrections from verification.

[31] *See Preliminary Determination* PDM at 26-28; *see also* Memoranda, "Preliminary Analysis Memorandum for JCG," dated September 3, 2019 (JCG Preliminary Analysis Memo), "Preliminary Analysis Memorandum for Modern Heavy," dated September 3, 2019, and "Preliminary Analysis Memorandum for Wison," dated September 3, 2019.

[32] *See* Memoranda, "Final Analysis Memorandum for JCG," dated January 23, 2020 (JCG Final Calculation Memorandum), and "Final Analysis Memorandum for Wison," dated January 23, 2020 (Wison Final Calculation Memorandum).

- We revised our margin calculations for JCG's FOP for the packing material fumigation timber (*i.e.*, field "TIMBER") to average the HS categories proposed by JCG and the petitioner. *See* Comment 5.

- We revised our calculation of JCG's hot rolled large welded circular tube input (*i.e.*, in the field LARGEWELDCIRT) by using a surrogate value instead of the purchase price for this input. *See* Comment 6.

Modern Heavy:

- We based Modern Heavy's dumping margin on total adverse facts available because of the significant issues with Modern Heavy's FOP reporting discovered at verification. *See* Comment 12.

Wison

- We revised our margin calculations for Wison to take into account corrections from verification.[33] *See* Comment 9.

- We incorporated changes from Wison's September 3, 2019, supplemental questionnaire response to include certain additional FOPs.[34]

- We made an adjustment to include zinc, for previously unreported galvanizing discovered at verification, for one of Wison's projects. *See* Comment 14.

- We made adjustments for Wison's further manufacturing costs to exclude general and administrative expenses from Wison's further manufacturing, in order to avoid double-counting the same expense. *See* Comment 15.

- We made adjustments for Wison's further manufacturing to use the entire contract value with its subcontracted installer, including remaining amounts to be paid, to offset the complete selling price, inclusive of all change orders. *See* Comment 16.

VII. ADJUSTMENT UNDER SECTION 777A(f) OF THE ACT

As discussed in the *Preliminary Determination*,[35] in applying section 777A(f) of the Act, Commerce examines: (1) whether a countervailable subsidy (other than an export subsidy) has been provided with respect to a class or kind of merchandise; (2) whether such countervailable subsidy has been demonstrated to have reduced the average price of imports of the class or kind

[33] *See* Wison FOP Verification Report; Wison CEP Sales Verification Report; Wison's Letter, "Certain Fabricated Structural Steel from the People's Republic of China: Wison Revised Databases," dated October 18, 2019 (Wison October 18, 2019 Revised Databases Submission); and Memorandum, "Wison (Nantong) Heavy Industry Co., Ltd. Revised Databases in SAS Format," dated October 21, 2019"; *see also* Wison Final Calculation Memorandum.
[34] *See* Wison September 3, 2019 SSQR.
[35] *See Preliminary Determination* PDM at 35-38.

of merchandise during the relevant period; and (3) whether Commerce can reasonably estimate the extent to which that countervailable subsidy, in combination with the use of NV determined pursuant to section 773(c) of the Act, has increased the weighted-average dumping margin for the class or kind of merchandise.[36] For a subsidy meeting these criteria, the statute requires Commerce to reduce the dumping margin by the estimated amount of the increase in the weighted-average dumping margin due to a countervailable subsidy, subject to a specified cap.[37] In conducting this analysis, Commerce has not concluded that concurrent application of non-market economy (NME) dumping duties and countervailing duties necessarily and automatically results in overlapping remedies. Rather, a finding that there is an overlap in remedies, and any resulting adjustment, is based on a case-by-case analysis of the totality of facts on the administrative record for that segment of the proceeding as required by the statute.[38]

In our *Preliminary Determination*, upon consideration of the responses from all three mandatory respondents and the relevant statutory criteria, we concluded that an adjustment under section 777A(f) of the Act was not warranted in this investigation.[39] No party challenged Commerce's preliminary determination not to grant an offset to parties' cash deposit rates. Therefore, consistent with our *Preliminary Determination*, we have not made any adjustment under section 777A(f) of the Act to the rates assigned to any of the mandatory respondents, the separate rate respondents, or the China-wide entity in this final determination.

VIII. ADJUSTMENTS TO CASH DEPOSIT RATES FOR EXPORT SUBSIDIES

As we stated in the *Preliminary Determination*, in an LTFV investigation, where there is a concurrent countervailing duty (CVD) investigation, it is Commerce's normal practice to calculate the cash deposit rate for each respondent by adjusting the respondent's estimated weighted-average dumping margin to account for export subsidies found for each respective respondent in the concurrent CVD investigation.[40] Doing so is in accordance with section 772(c)(1)(C) of the Act, which states that U.S. price "shall be increased by the amount of any countervailing duty imposed on the subject merchandise … to offset an export subsidy."[41]

Commerce determined in the final determination of the companion CVD investigation that two of the mandatory respondents (*i.e.*, Modern Heavy and Shanghai Matsuo), the non-selected respondents (*i.e.*, the "All Others" companies), and the companies receiving subsidy rates based upon total AFA, each benefitted from the export buyers credit subsidy program, which is export contingent, and whose subsidy rate equals 10.54 percent.[42] Accordingly, in order to avoid a

[36] *See* sections 777A(f)(1)(A)-(C) of the Act.
[37] *See* sections 777A(f)(1)-(2) of the Act.
[38] *See*, *e.g.*, *Fine Denier Polyester Staple Fiber from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value*, 83 FR 24740 (May 30, 2018), and accompanying Issues and Decision Memorandum (IDM) at Comment 2.
[39] *See Preliminary Determination* PDM at 35-38.
[40] *Id*.
[41] *See Carbazole Violet Pigment 23 from India: Final Results of Antidumping Duty Administrative Review*, 75 FR 38076, 38077 (July 1, 2010), and accompanying IDM at Comment 1.
[42] *See* Unpublished *Federal Register* notice, "Certain Fabricated Structural Steel from the People's Republic of China: Final Affirmative Countervailing Duty Determination," dated concurrently with this determination and memorandum.

double remedy as a result of export subsidies which are collected as part of the companion CVD proceeding, and pursuant to section 772(c)(1)(C) of the Act, we must adjust the estimated weighted-average dumping margins by the amount of export subsidies that are countervailed as a result of the companion CVD proceeding. Therefore, we are adjusting each of the estimated weighted-average dumping margins for this final determination by 10.54 percent to determine the cash deposit rate for the mandatory respondents, the non-examined companies which are eligible for a separate rate, and the China-wide entity.

IX. DISCUSSION OF THE ISSUES

General Comments

Comment 1: Value Added Tax (VAT)

JCG's, Modern Heavy's, and Wison's Case Briefs

- Commerce should make no adjustment for irrecoverable VAT in the final determination results. Commerce has historically held that section 772(c)(2)(B) of the Act should not apply to NME proceedings because there is no reliable way to determine whether an export tax has been included in the price of a product.[43] This practice changed with the implementation of *Section 772(c)(2)(B) Methodological Change*.[44]

- Commerce's deduction of irrecoverable VAT from the reported U.S. price is not authorized by the plain language of the statute. Section 772(c)(2)(B) of the Act states that adjustments to export price are the amount of tax charged "on the exportation of subject merchandise to the United States." Therefore, Commerce should not offset the U.S. sale price by the amount of irrecoverable VAT because it is related to the cost of production and not the export sale price.[45]

- Further, JCG and MHI did not pay VAT on subject merchandise exported to the United States.[46] Similarly, Wison argues that China's VAT is not a tax on exports and is not linked to the exportation of subject merchandise.[47] The term "exportation" is defined as the point in the chain of commerce when a good is physically transported between two sovereign

[43] *See* JCG's Case Brief at 35; and MHI Case Brief at 25 (citing *Magnesium Corp. of Am. v. United States*, 166 F. 3d 1364, 1370-71 (Fed. Cir. 1999) (*Magnesium Corp.*)).
[44] *Id.* (citing *Methodological Change for Implementation of Section 772(c)(2)(B) of the Tariff Act of 1930, as Amended, in Certain Non-Market Economy Antidumping Proceedings*, 77 FR 36481, 36482 (June 19, 2012) (*Section 772(c)(2)(B) Methodological Change*)).
[45] *See* JCG's Case Brief at 36; and MHI Case Brief at 27.
[46] *See* JCG's Case Brief at 36; and MHI Case Brief at 26.
[47] *See* Wison's Case Brief at 7-8.

countries,[48] and the *2008 Chinese VAT Regulation* affirms that no VAT is imposed on the subject merchandise at the point of exportation.[49]

- The *2012 VAT Circular* enables Chinese exporters to add the equivalent amount of their irrecoverable VAT to the cost of production of exported goods, thus reducing exporters' income tax liabilities.[50] JCG, MHI, and Wison paid VAT on domestic purchases for inputs used in the production of subject merchandise. The VAT is an internal tax associated with the cost of acquiring inputs within China.[51] MHI reports irrecoverable VAT in cost of goods sold and sets export prices independent of the amount of irrecoverable VAT.[52]

- Commerce's methodology of applying a flat rate of three to seven percent to free on board (FOB) prices is contrary to section 772(c)(2)(B) of the Act and Commerce's interpretation of the antidumping law cannot be contrary to the plain language of the statute or conflict with plain Congressional intent.[53] Court precedent prohibits Commerce from deducting an amount of allegedly irrecoverable input VAT from the U.S. price.[54]

- Case precedent shows that an adjustment to U.S. price for VAT should be based upon the amount of VAT paid rather than the tax rate to prevent a "multiplier effect" if the VAT rate is applied to a different value.[55] In addition, in several court decisions, the Court of International Trade (CIT) found that China's *2012 VAT Circular* failed to provide evidentiary support for Commerce's irrecoverable VAT calculation. The CIT also found a disconnect between the *Section 772(c)(2)(B) Methodological Change* and Commerce's methodology

[48] *See* JCG's Case Brief at 38; and MHI Case Brief at 28 (citing *Swan & Finch Co. v. United States*, 190 U.S. 143, 145 (1903) (*Swan & Finch Co. v. United States*)).
[49] *See* JCG's Case Brief at 36; and MHI Case Brief at 26 (citing *Interim Regulations of the People's Republic of China on Value-Added Tax* (2008) (*2008 Chinese VAT Regulation*); *see also* JCG May 18, 2019 Section C and D Questionnaire Response (JCG May 28, 2019 CDQR) at Exhibit C-10.
[50] *See* JCG's Case Brief at 47; and MHI Case Brief at 37 (citing *Circular on Value-Added Tax and Consumption Tax Policies on Exported Goods and Services* (*2012 VAT Circular*); *see also* JCG May 28, 2019 CDQR at Exhibit C-12.
[51] *See* JCG's Case Brief at 38-39; and MHI Case Brief at 28-29 (citing *Globe Metallurgical Inc. v. United States*, 781 F. Supp. 2d 1340, 1346-1347 (CIT 2011) (*Globe Metallurgical*); and *Bridgestone Ams., Inc. v. United States*, 33 C.I.T. 1040, 1048-50 (2009) (*Bridgestone*)); *see also* Wison's Case Brief at 6-7 (citing *Guizhou Tyre Co. v. United States*, 389 F. Supp. 3d 1350 (CIT 2019) (*Guizhou Tyre*)).
[52] *See* MHI's Case Brief at 38.
[53] *See* JCG's Case Brief at 39; and MHI Case Brief at 29 (citing *Dorbest Ltd. v. United States*, 604 F. 3d 1363, 1371-72 (Fed. Cir. 2010) (*Dorbest 2010*) and *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984) (*Chevron*)).
[54] *See* JCG's Case Brief at 40-47; and MHI Case Brief at 30-36 (citing *Qingdao Qihang Tyre Co. Ltd. v. United States*, 308 F. Supp. 3d 1329 (CIT 2018) (*Qingdao Qihang Tyre*); *Guizhou Tyre*; and *China Mfrs. Alliance, LLC v. United States*, 205 F. Supp. 3d 1325, 1346-1351 (2017) (*China Mfrs Alliance*)); *see also* Wison's Case Brief at 6 (citing *Qingdao Qihang Tyre*).
[55] *See* JCG's Case Brief at 49-52; and MHI Case Brief at 38-41 (citing *Federal Mogul v. United States*, F. 3d 1572 (Fed. Cir. 1995) (*Federal Mogul*); *E. I. du Pont de Nemours & Co. v. United States*, 20 C.I.T. 373, 381 (1996) (*E. I. du Pont de Nemours*); and *Fine Furniture (Shanghai), Ltd. v. United States*, 2016 Ct. Intl. Trade LEXIS 85, 11-15 (Ct. Int'l Trade Sept. 9, 2016) (*Fine Furniture*)).

based on the *2012 VAT Circular* with respect to both the rationale behind irrecoverable VAT and the formula used to compute it.[56]

- JCG and MHI fully responded to Commerce's questions concerning VAT and Commerce did not request additional information to calculate the allegedly unrefunded VAT incurred on inputs. Commerce is obligated to promptly inform a party if it believes information is deficient and to provide the party with an opportunity for explanation.[57]

Petitioner's Rebuttal Brief

- Commerce followed its established practice and standard methodology when reducing the EP or CEP by the amount of irrecoverable VAT. In the final determination, Commerce should continue to deduct irrecoverable VAT from the Chinese respondent's U.S. prices.

- Since 2012, Commerce's established practice has been to deduct irrecoverable VAT from the U.S. price of goods exported from NMEs, like China.[58] The approach of deducting irrecoverable VAT from U.S. price is authorized under section 772(c)(2)(B) of the Act since Commerce's standard methodology is to treat irrecoverable VAT as a charge that should be deducted from U.S. price in order to reach a tax neutral dumping comparison.[59]

- While the Chinese respondents relied on several CIT opinions that have found Commerce's current irrecoverable VAT practice contrary to the law, there are numerous opinions that have found Commerce's practice consistent with the law.[60] In *TRBs from China*, Commerce stated that it does not consider *China Mfrs. Alliance* or *Qingdao Qihang Tyre Co.* to be binding precedent and Commerce disagreed with the CIT in issuing its remand determination in *Guizhou Tyre*.[61]

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[56] *See* JCG's Case Brief at 52-56; and MHI Case Brief at 41-44 (citing *Jacobi Carbons AB v. United States*, 313 F. Supp. 3d 1344, 1373 (CIT 2018) (*Jacobi Carbons 2018*); *Aristocraft of Am., LLC v. United States*, 331 F. Supp. 3d 1372, 1376 (CIT 2018) (*Aristocraft 2018*); and (*China Mfrs. Alliance*)).

[57] *See* JCG's Case Brief at 51; and MHI Case Brief at 39-40 (citing *Hebei Metals & Minerals Imp. & Exp. Corp. v. United States*, 28 C.I.T. 1185, 1193-95 (2004) (*Hebei Metals*)).

[58] *See* Petitioner's Rebuttal Brief at 31-32 (citing *Section 772(c)(2)(B) Methodological Change*; *Tapered Roller Bearing and Parts Thereof, Finished and Unfinished, from the People's Republic of China*, 84 FR 6132 (February 26, 2019) (*TRBs from China AD AR 16-17*), and accompanying IDM at Comment 3; *Multilayered Wood Flooring from the People's Republic of China*, 84 FR 38002 (August 5, 2019) (*MLWF from China AD AR 16-17*), and accompanying IDM at Comment 5; and *Diamond Sawblades and Parts Thereof from the People's Republic of China*, 82 FR 26912 (June 12, 2017) (*DSBs from China AD AR 14-15*), and accompanying IDM at Comment 11).

[59] *See* Petitioner's Rebuttal Brief at 32-33 (citing *Section 772(c)(2)(B) Methodological Change*).

[60] *See* Petitioner's Rebuttal Brief at 34 (citing *Aristocraft of A., LLC v. United States*, 269 F. Supp. 3d 1316, 1324-25 (CIT 2017) (*Aristocraft 2017*); *Jacobi Carbons AB v. United States*, 222 F. Supp. 3d 1159, 1186-88 (CIT 2017) (*Jacobi Carbons 2017)*; *Fushun Jinly Petrochemical Carbon Co. v. United States*, No. 14-00287, slip op. 16-25 at 25 (CIT March 23, 2016) (*Fushun Jinly*); and *Juancheng Kangtai Chem. Co. v. United States*, No. 14-00056, slip op. 17-3 at 32-33 (CIT January 19, 2017) (*Juancheng*).

[61] *See* Petitioner's Rebuttal Brief at 36-37 (citing *TRBs from China AD AR 16-17* IDM at Comment 3; *MLWF from China AD AR 16-17* IDM at Comment 5; and *Guizhou Tyre*, No. 17-00100, slip op. 19-64 (CIT May 24, 2019), *Final Results of Redetermination Pursuant to Court Remand* (September 23, 2019) at 4 (Public Version) (*Guizhou Tyre Remand*)).

- JCG and MHI argue that the VAT paid on domestic inputs used in the production of subject merchandise is an internal tax, and therefore cannot be deducted from the U.S. price.[62] In previous cases, however, Commerce has rejected similar arguments and dismissed the characterization of the irrecoverable VAT as an internal tax.[63] Irrecoverable VAT, in this context, is defined by Chinese law as a net VAT burden that arises from, and is specific to, exports.[64]

- Commerce should continue to follow its standard methodology when adjustment the EP or CEP for irrecoverable VAT. Commerce's approach has been endorsed by the CIT in previous cases.[65]

Commerce's Position:

For the reasons explained below, we continue to adjust respondents' U.S. price for irrecoverable VAT, using the same methodology relied upon in the *Preliminary Results*.

We disagree with the respondents' claim that irrecoverable VAT is not an expense covered by section 772(c)(2)(B) of the Act (*i.e.*, an export tax, duty, or other charge imposed upon exportation). Section 772(c)(2)(B) of the Act authorizes Commerce to deduct from EP or CEP the amount, if included in the price, of any "export tax, duty, or other charge imposed by the exporting country on the exportation" of the subject merchandise. Commerce's current methodology has been in place since 2012, when Commerce announced it would begin adjusting U.S. price for irrecoverable VAT in an NME proceeding in accordance with section 772(c)(2)(B) of the Act.[66] In this announcement, Commerce stated that the statute provides for when an NME government imposes an export tax, duty, or other charge on subject merchandise or on inputs used to produce it, from which the respondent was not exempted, Commerce will reduce the respondent's U.S. price by the amount of the tax, duty or charge paid, but not rebated.[67]

VAT is an indirect, *ad valorem*, consumption tax imposed on the purchase or sale of goods. It is levied on the purchase or sale price of the good, *i.e.*, it is paid by the buyer and collected by the seller for remittance to the government. For example, if the purchase price is $100 and the VAT rate is 15%, the buyer pays $115 to the seller, which consists of $100 paid for the goods and $15 paid in VAT. VAT is typically imposed at each step in the chain of commerce. Thus, a party (1) pays VAT on its purchases of inputs and raw materials (*i.e.*, input VAT) as well as (2) collects VAT on its sales of their output products (*i.e.*, output VAT). Thus, this indirect consumption tax is passed through each party in the chain of commerce and paid by the ultimate consumer of the goods. This ultimate consumer is the party which ends, or breaks, the repetitive chain of (1) pay

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[62] *See* Petitioner's Rebuttal Brief at 35 (citing JCG's Case Brief at 37-39; and MHI Case Brief at 28-29).
[63] *See* Petitioner's Rebuttal Brief at 35 (citing *TRBs from China AD AR 16-17* IDM at Comment 3).
[64] *See* Petitioner's Rebuttal Brief at 37-38 (citing *DSBs from China AD AR 14-15* IDM at Comment 11; *MLWF from China AD AR 16-17* IDM at Comment 5).
[65] *See* Petitioner's Rebuttal Brief at 39 (citing *Aristocraft*, 269 F. Supp. 3d at 1324; and *Jacobi Carbons*, 222 F. Supp. 3d at 1187-88).
[66] *See Section 772(c)(2)(B) Methodological Change*, 77 FR at 36482.
[67] *Id.*, 77 FR at 36483; *see also Chlorinated Isocyanurates from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2011-2012*, 79 FR 4875 (January 30, 2014) (*Chlorinated Isocyanurates China Final AR*), and accompanying IDM at Comment 5.

the (input) VAT, (2) pass through the VAT to the next party in the chain of commerce, and (3) collect the (output) VAT on behalf of the government. Further, in a typical VAT system, output VAT is fully refunded or not collected by reason of exportation of the merchandise.

A company calculates input VAT and output VAT for "net VAT liability" purposes, *i.e.*, to determine the total amount of money which the company must remit to the government. This calculation is done on a company-wide, not on a transaction-specific, basis, *i.e.*, in the case of input VAT, on the basis of all input purchases regardless of whether used in the production of all goods for export or domestic consumption, and in the case of output VAT, on the basis of all sales, of all products, in-scope and not, to all markets, foreign and domestic. For example, a company might pay the equivalent of $60 million in total input VAT across all input purchases and collect $100 million in total output VAT across all sales. In this example, the company will remit to the government $40 million of the $100 million in output VAT that it collected on behalf of the government because the company can claim the $60 million payment for input VAT as a credit against the collected output VAT. In other words, the company recovers the $60 million in input VAT that it paid to its suppliers through its collection of $100 million in output VAT, and the supplier is responsible for remitting the $60 million to the government. The $40 million remittance to the government (*i.e.*, net VAT liability) is the tax on the value added by the company and is the transfer to the government of this VAT paid by and collected from the company's customers. Thus, both the $60 million and $40 million are passed through by the company to the company's customers, and these costs burden the company's customers, not the company itself.

As noted by the respondents, the Chinese VAT system is governed by the *2008 Chinese VAT Regulation* and *2012 VAT Circular*. Wison provides the laws and regulations governing the VAT system in China in its July 1, 2019 CQR submission. A summary of the *2008 Chinese VAT Regulation* is as follows:

> Article 1 of the {*2008 Chinese VAT Regulation*} explains that "All units and individuals engaged in the sales of goods, the provision of processing, repairs and replacement services, and the importation of goods within the territory of the People's Republic of China are taxpayers for value-added tax and shall pay value added tax in accordance with these Regulations." Article 5 states that "For taxpayers that engage in the sales of goods or taxable services, the output tax shall be the value-added tax payable calculated on the basis of the sales amount involved and the tax rates prescribed in Article 2." Article 2.3 confirms that "For taxpayers that export goods, the tax rate shall be zero, unless otherwise provided by the State Council."[68]

This is consistent with the general description of the VAT tax system above – All units and individuals …. within the territory of the People's Republic of China …. shall pay value added tax …. on the basis of the sales amount {as} prescribed in Article 2. Article 5 further provides that the amount of the VAT shall be

[68] *See* Wison July 1, 2019 CQR at Exhibit C-12 Interim Regulations of the People's Republic of China on Value-Added Tax (Revised in 2008) (*2008 Chinese VAT Regulation).*

Output tax = Sales amount * Tax rate[69]

This formula is also consistent with the general description of a VAT tax system above. The term "output tax" in this formula refers to any transaction between a "taxpayer" (*i.e.*, a company) and its customer, and represents an amount of VAT collected by the taxpayer from the customer on behalf of the government. This "output tax" is identical with the "output VAT" included in the generic description of a VAT system above. The tax amount for the transaction between a supplier and a company (*i.e.*, input VAT) represents the amount of VAT paid by the company to its supplier, as also calculated by this formula (in other words, it is the "output tax" for the supplier). Input VAT is similar to the term "input tax" used in the Chinese regulations, where "input tax" includes all VAT-related amounts which a party must pay. This includes the input VAT that a company would pay a supplier (as part of the repetitive chain of paying, passing through and collecting VAT) as well as the amount of irrecoverable VAT which a company must bear as a cost as a result of the exportation of goods. As noted above, the input VAT is not born as a cost by the company because the company generally passes through the amount of the input VAT to the next party in the chain of commerce.[70] As discussed below, the amount of irrecoverable VAT must be borne by the company as a cost in its books and records.

These definitions are used in Article 4 of the *2008 Chinese VAT Regulation*:

> Except as provided in Article 13 of these Regulations, for taxpayers engaged in the sales of goods or the provision of taxable services (hereinafter referred to as "the sales of goods or taxable services"), the tax payable shall be the balance of output tax for the current period subtracted by the input tax for current the period. The formula for computing the tax payable is as follows:
>
> Tax payable=Output tax for the current period-Input tax for the current period[71]

Thus, for the current period, the "output tax" is the amount of VAT that a company collects for the benefit of the government; the "input tax" is the amount of VAT that a company must pay to the government (*e.g.*, the VAT tax included in the purchases of inputs); and the "tax payable" is the net VAT liability that a company must remit to the Chinese government.

As noted above in Article 5, Article 2 of the *2008 Chinese VAT Regulation* provides for the rates for calculating VAT. Article 2.1 provides that the normal VAT rate will be 17%, and Article 2.2 provides for an exceptional VAT rate for the prescribed products in Article 2.2 or as otherwise provided for by the State Council.[72] Article 2.3 provides that for "export goods, the tax rate shall

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[69] *See 2008 Chinese VAT Regulation* at Article 5.
[70] Input VAT is borne as a cost by the party that ultimately consumes the goods.
[71] *See 2008 Chinese VAT Regulation* at Article 4. Article 4 also provides that if the net VAT liability is negative, then the company may carry over that negative amount to the next tax period. Article 13 recognizes the requirements for a party's registration as a taxpayer.
[72] Numerous other provisions in the *2008 Chinese VAT Regulation* provide for exceptions to the general VAT rate provided for in Article 2.1, none of which are relevant in this proceeding.

be zero, unless otherwise provided by the State Council."[73] Further, Article 25 provides for the refund of VAT for exported goods.

> Taxpayers that export goods to which provisions relating to tax refund (exemption) are applicable shall, upon completion of export procedures with customs authorities, apply for tax refund (exemption) for such goods to the competent taxation authorities on a monthly basis on the strength of export declaration forms and other relevant evidence.[74]

Commerce reasonably concludes based on Articles 2.3 and 25, that a company within China which exports goods is liable for VAT as with domestic sales, and then that amount of VAT is refunded "upon completion of export procedures." The net result of this "tax refund" is that the VAT rate for exported goods is zero. However, as provided for in Article 2.3, this result may still be altered by the State Council.

On May 25, 2012, the Chinese government promulgated the *2012 VAT Circular*:

> For the purposes of making it easier for tax authorities and taxpayers to understand and implement the export taxation policies systemically and accurately, the Ministry of Finance and State Administration of Taxation has sorted out and classified the VAT policies and consumption tax policies on exported goods and foreign-oriented processing, repair and fitting services (hereafter referred to as the "exported goods and services," including the "goods deemed as exported goods") which were enacted successively In the recent years, and clarified the several problems reflected in the actual implementation.[75]

Article 1 defines the "export enterprises," "manufacturing enterprises" and "export goods" that "the policies concerning the exemption and refund of Value-added Tax (hereafter referred to as the 'VAT refund (exemption)') shall be applied."[76] Article 2 provides for the "exemption, offset and refund" of VAT and Article 3 defines the VAT refund rate for exported goods. Article 3.1, consistent with Article 2.3 of the *2008 Chinese VAT Regulation*, states,

> Except for the export VAT refund rate (hereafter referred to as the "tax refund rate") otherwise provided for by the Ministry of Finance and the State Administration of Taxation according to the decision of the State Council, the tax refund rate for exported goods shall be the applicable tax rate. The State Administration of Taxation shall promulgate the tax refund rate through the Tax Refund Rate Catalogue of Exported Goods and Services according to the aforesaid provisions for the implementation of the tax authorities and taxpayers.[77]

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[73] *See 2008 Chinese VAT Regulation* at Article 2.3.
[74] *Id.* at Article 25.
[75] *See* Wison July 1, 2019 CQR at Exhibit C-12 Circular on Value-Added Tax and Consumption Tax Policies on Exported Goods and Services (*2012 VAT Circular*).
[76] *See 2012 VAT Circular* at Article 1.
[77] *Id.* at Article 3.1.

Thus, unless otherwise defined, the VAT refund rate will be the applicable VAT rate for the exported goods, and, consequently, as stated in Article 2.3 of the *2008 Chinese VAT Regulation*, "the {net} tax rate shall be zero." Further, the Chinese tax authorities will publish the applicable VAT refund rates in the "Tax Refund Rate Catalogue of Exported Goods and Services."

Articles 4 provides for the calculation of the amount of the VAT refund because of exportation and the basis on which this amount is calculated. The basis for the VAT refund "shall be the actual FOB price, of exported goods and services"[78] or "shall be determined based on the FOB price of the exported goods after having deducted the amount of customs bonded imported materials and parts as included in the exported goods."[79] Consistent with Article 4, Article 5.1 then provides the following formula for the amount of the "Tax which may not be exempted or offset," *i.e.*, the irrecoverable VAT.[80]

$$\textbf{Irrecoverable VAT} = (P - c) \times (T_1 - T_2),$$

where,

P = "FOB Price {*i.e.*, value} of exported goods;"
c = "Price {*i.e.*, value} of tax-free purchased raw materials;"
T_1 = "Applicable tax rate of exported good;" and
T_2 = "Tax refund rate of exported goods."

This formula can be applied on a shipment-specific basis as well as to accumulated values over a defined period of time. This amount, the irrecoverable VAT, cannot be exempted or offset by reason of exportation of the goods, and thus must be passed on by the company exporting the goods to its customer. It represents the amount of input VAT paid by the exporter to its supplier and which must be borne by the exporter's customer, *i.e.*, implicitly embedded in the export price charged to the exporter's customer.

Lastly, Article 5.3 provides that "the tax refund rate is lower than the applicable tax rate, the corresponding differential sum calculated shall be included into the cost of the exported goods and services." The amount of irrecoverable VAT must be borne by the exporter just as the VAT must be borne by the ultimate consumer of the goods. In essence, the exporter is the ultimate consumer of the goods in the chain of pay, pass on, and collect the VAT. The exporter breaks that chain of commerce along which the indirect consumption tax is passed through to the ultimate consumer, but unlike an ultimate consumer inside the domestic market, the exporter has the benefit that some or all of the VAT is refunded or exempted by the Chinese government.

Continuing the example from above, when the accumulated export sales amount to P = $200 million, c = 0, T_1 = 17% and T_2 = 10%, the amount of irrecoverable VAT will be ($200 million - $0) x (17% - 10%) = $200 million x 7% = $14 million. This amount, $14 million, must also be remitted to the Chinese government, and be recorded as a cost of the export sales in the company's books and records. Thus, the exporter incurs a cost equal to $14 million, which is calculated on the basis of FOB export value at the *ad valorem* rate of $T_1 - T_2$. This cost would

[78] *Id.* at Article 4.1.
[79] *Id.* at Article 4.2.
[80] *Id.* at Article 5.1(1).

not be incurred but for the exportation of the goods, and, therefore, functions as an "export tax, duty, or other charge" and is covered by the price of the exported goods. It is for this "export tax, duty, or other charge" that Commerce makes a downward adjustment to U.S. price under section 772(c) of the Act, contrary to the respondents' arguments otherwise.[81]

It is important to note that Commerce, in its analysis, has viewed the amount of irrecoverable VAT as a reduction in the amount of creditable input VAT. This amount of creditable VAT is offset against the amount of output VAT collected by the company to reduce the net VAT liability which the company must remit to the Chinese government. Thus, reducing the offset for input VAT will increase the amount which the company must remit. Under Chinese law the reduction in creditable input VAT and determination of the net VAT liability is defined in terms of, and applies to, the company as a whole across all purchases and sales.[82] This company-wide accounting of VAT does not distinguish the VAT treatment of export sales from the VAT treatment of domestic sales from an input VAT recovery standpoint, not specific products, markets or sales.

We have reviewed our determination and the record evidence, and further explain our determination with respect to the amount of the deduction from U.S. price for irrecoverable VAT. Although the link between the amount of VAT remitted to the Chinese government (*i.e.*, net VAT liability) and our irrecoverable VAT adjustment is evident in the respondents' monthly VAT statements and relevant to the Chinese VAT scheme, it is not relevant to the calculation of the adjustment to U.S. price for irrecoverable VAT. The monthly VAT statements summarize the respondents' payments and collections of VAT for the companies as a whole to determine net VAT liability, *i.e.*, required remittance to the government. These statements include the amount for irrecoverable VAT, but do not relate to the recordation of the export-specific actual cost for irrecoverable VAT, which is one of many accounts summarized in the monthly VAT reports.[83] In other words, the sum total of the respondents' required VAT remittance does not impact the export-specific actual cost of irrecoverable VAT.

The respondents cite the CIT's decisions in *Qingdao Qihang Tyre* and *Guizhou Tyre* in support of their argument that Commerce's practice of deducting VAT from U.S. price is contrary to law. As an initial matter, in Commerce's remand response to *Qingdao Qihang Tyre*, Commerce explained that it made its redetermination under protest.[84] Likewise, Commerce also made its

[81] Because the $14 million is the amount of input VAT that is not refunded to the company and increases the company's net VAT liability, it is sometimes referred to as "irrecoverable input VAT." However, that phrase is perhaps misleading because the $14 million is not a fraction or percentage of the VAT that the company paid on purchases of inputs used in the production of exports. If that were the situation, the value of production inputs, not FOB export value, would appear somewhere in the formula in Article 5 of the *2012 VAT Circular* as the tax basis for the calculation. The value of production inputs does not appear in the formula. Instead, as explained above, the $14 million is simply a cost imposed on firms that is tied to export sales, as evidenced by the formula's reliance on the FOB export value as the basis for the calculation. Thus, "irrecoverable input VAT" is in fact, despite its name, an export tax within the meaning of section 772(c)(2)(B) of the Act.

[82] *See*, *e.g.*, *2012 VAT Circular* at Article 5(1).

[83] *See*, *e.g.*, Wison July 1, 2019 CQR at Exhibit C-13.

[84] *See Qingdao Qihang Tyre Co., Ltd. et al. v. United States*, Consol. Court No. 16-00075; Slip Op. 18-35 (CIT 2018); and Final Results of Redetermination Pursuant to Court Demand at 8 (July 24, 2018).

redetermination in *Guizhou Tyre* under protest.[85] Nonetheless, as Commerce explained in *Cast Iron Soil Pipe Fittings*, where we continued to adjust U.S. price by the reported amount of irrecoverable VAT, "the {CIT} has yet to speak in one voice on this issue."[86] For instance, the CIT explained in *Jacobi Carbons I* that *Qingdao Qihang Tyre*'s holding "was premised on its understanding that Commerce was applying the export tax, duty or other charge language to a domestic tax," but "in this case, Commerce is adjusting for an output VAT charged on the exportation of the merchandise."[87] The CIT recognized that the *2012 VAT Circular* mandates that a taxpayer recognize a cost for exported merchandise as a result of "irrecoverable VAT" and that this cost is imposed as a reduction in the credit which the taxpayer is due for paid VAT-in on a companywide basis.[88]

We continue to find that our long-standing practice of finding VAT to be an "export tax, duty, or other charge imposed by the exporting country on the exportation of the subject merchandise" to be a reasonable interpretation of the statute. As an initial matter, the Act does not define the term(s) "export tax, duty, or other charge imposed" on the exportation of subject merchandise. The Act considers whether U.S. price includes "any export tax, duty, or other charge imposed by the exporting country on the exportation of the subject merchandise to the United States."[89] Commerce's reading of section 772(c)(2)(B) of the Act is whether there exists "any export tax, duty, or other charge imposed by the exporting country" included in the U.S. price at the time of exportation; Commerce does not interpret the phrase "on the exportation of the subject merchandise to the United States" to be limited to "by reason of the exportation of the subject merchandise to the United States."[90] To "impose" means to "{t}o charge; impute;" "{t}o subject (one) to a charge, penalty or the like;" "{t}o lay as a charge, burden, tax, duty, obligation, command, penalty, etc."[91] The "imposition" in the case of China's irrecoverable VAT occurs as a result of exportation, which is a permissible interpretation of the statute.[92]

Therefore, we find it reasonable to interpret these terms as encompassing irrecoverable VAT because the irrecoverable VAT is a cost that arises as a result of export sales.[93] The CIT has upheld our interpretation as a permissible interpretation of the statute.[94] Additionally, the irrecoverable VAT is set forth in Chinese law, and, therefore, can be considered to be "imposed" by the exporting country upon exportation of subject merchandise. Further, an adjustment for irrecoverable VAT falls under section 772(c)(2)(B) of the Act, as it reduces the gross U.S. price charged to the customer to a tax neutral net U.S. price received by the seller. This deduction is

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[85] *See Guizhou Tyre Remand* at 4.
[86] *See Cast Iron Soil Pipe Fittings from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value and Final Determination of Critical Circumstances, in Part*, 83 FR 33205 (July 17, 2018) (*Cast Iron Soil Pipe Fittings*), and accompanying IDM at Comment 9.
[87] *See Jacobi Carbons AB v. United States*, 313 F. Supp. 3d 1308, 1340 n.49 (CIT 2018) (*Jacobi Carbons I*).
[88] *Id.*
[89] *See, e.g.*, *Diamond Sawblades Manufacturers' Coalition v. United States*, 301 F. Supp. 3d 1326, 1335 (CIT 2018) (*Diamond Sawblades Manufacturers' Coalition*).
[90] *Id.*
[91] *Id.* (citing Webster's New International Dictionary of the English Language Unabridged, at 1251 (2nd ed. 1956)).
[92] *Id.* ("The satisfaction of any such imposition is not necessarily concurrent with the act of imposition, which may occur at any time, and the vagueness of the statutory language neither precludes nor requires such interpretation.").
[93] *Id.*
[94] *See Aristocraft 2017*; *Jacobi Carbons 2017*; and *Fushun Jinly*.

consistent with our longstanding policy, which is in turn consistent with the intent of the statute, that dumping margin calculations be tax-neutral.

Furthermore, as discussed in detail above, the *2008 Chinese VAT Regulations* and *2012 VAT Circular* establish that the Chinese VAT system can impose a cost on export sales of subject merchandise which must be recovered by the exporter through the U.S. price. As such, the U.S. price incorporates an "export tax, duty, or other charge imposed by the exporting country on the exportation" of the subject merchandise which is not reflected in the comparable normal value.

Thus, section 772(c)(2)(B) of the Act is squarely applicable to the question at hand. Commerce finds that the comparison of U.S. price with normal value must be tax neutral,[95] in order to ensure a fair comparison.[96] Therefore, the amount of any such "charge" must be deducted from the reported U.S. price. In particular, as recently explained in *Jacobi Carbons II*, and as is the final determination here, "{t}o interpret section {772}(c)(2)(B) {of the Act} as unambiguously barring Commerce from adjusting EP/CEP for these taxes when comparing those prices to a tax-exclusive normal value would be to require that it understate the margin of dumping."[97] Furthermore, the *2008 Chinese VAT Regulation* and *2012 VAT Circular* clearly demonstrate that the cost associated with "irrecoverable VAT" is imposed on export sales, including export sales of subject merchandise.

Nowhere does the Chinese VAT system provide an exception for the respondents as taxpayers, and the respondents cite to no such exemption. The cost for "irrecoverable VAT" is imposed on the taxpayer as a reduction in the credit which the taxpayer may claim for VAT-in paid to its suppliers. Further, this offset to the taxpayer's VAT-in credit (and consequential increase in the taxpayer's net VAT liability) is on a company-wide basis. Theoretically, a taxpayer could pay no VAT-in for inputs to produce subject merchandise (*e.g.*, VAT-exempt inputs are imported from which subject merchandise is produced and exported) and yet the Chinese VAT system would still impose a cost on the taxpayer for export sales consistent with the *2008 Chinese VAT Regulations* and the *2012 VAT Circular*. This is demonstrated by the deduction of the amount of "Price of duty-free raw materials purchased" in the formula from the *2012 VAT Circular*, which defines the calculation of "irrecoverable VAT."

Commerce disagrees with JCG and MHI's assertion that no VAT is paid on subject merchandise because the VAT rate is zero.[98] The appropriate VAT rates were 17 percent prior to May 1, 2018, and 16 percent on and after May 1, 2018.[99] Further, respondents did not report that any inputs were imported under a bonded warehouse scheme.[100] Therefore, as provided for in Article 5.1 of the *2012 VAT Circular*, the companies were liable for irrecoverable VAT equal to the

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[95] *See Jacobi Carbons AB v. United States*, Slip Op. 19-27, at 30-32 (CIT 2019) (*Jacobi Carbons II*) ("{T}he principle that dumping margin calculations should be tax-neutral supports Commerce's adjustment").
[96] *See* section 773(a) of the Act.
[97] *See Jacobi Carbons II* at 33.
[98] *See* JCG's Case Brief at 36; and MHI Case Brief at 26.
[99] *See 2008 Chinese VAT Regulation* at Article 2.1; *see also* Wison July 1, 2019 CQR at Exhibit C-12 Circular of the Ministry of Finance and the State Administration of Taxation on Adjusting Value-Added Tax Rates (*2018 VAT Circular).*
[100] *See* JCG May 28, 2019 CDQR at 34; MHI May 15, 2019 CDQR at 28; and Wison July 1, 2019 CQR at 40.

difference between the input VAT rate paid and the refund rate at time of export, as a percent of the FOB value of the subject merchandise.

Commerce disagrees with the respondents' characterization that a VAT is an internal tax that is not imposed on exportation of the subject merchandise and that it is related to the cost of production within China.[101] As discussed above, VAT is an indirect consumption tax which is borne (*i.e.*, paid) by the ultimate consumer of the goods and consists of repeated steps of pay, pass through, and collect the VAT from a party's purchase of inputs through to the sale of goods. As such, each party completing these three steps incurs no VAT cost, including as a cost of production. However, the ultimate consumer ends or breaks this chain by not selling the goods to another party (*i.e.*, a taxpayer as defined in the *2008 Chinese VAT Regulations*) and thus that party must recognize the VAT as a cost which is not passed on. The exception is when a party exports goods, where the Chinese government provides for the refund of the VAT which would have been assessed on the exported goods. Pursuant to the *2008 Chinese VAT Regulations*:

> For taxpayers that export goods, the tax rate shall be zero, unless otherwise provided by the State Council.[102]

Thus, in general, no VAT is collected on exported goods because that VAT is refunded by the Chinese government. However, for fabricated structural steel, as respondents have reported, the refund rate is not the full VAT rate of 16 or 17 percent (depending on the export period), but rather a rate that varied between nine and 13 percent, resulting in irrecoverable VAT rates ranging from three to eight percent.[103] Thus, respondents must pay to the Chinese government three to eight percent of the FOB value of the subject merchandise because of the exportation of that merchandise, and the respondents must also recognize this as a cost of the export sales. Accordingly, this amount must be recovered within the price of the subject merchandise and constitutes "an export tax, duty or other charge" as discussed above.

Commerce also rejects the respondents' claim that the VAT adjustment is a deduction for VAT paid on the purchase of material inputs. The amount of irrecoverable VAT for which Commerce has adjusted JCG's and Wison's U.S. prices is not related to the VAT paid by the respondents for its purchases of material inputs. This amount is calculated based on (1) the FOB value of the subject merchandise and (2) the difference between the assessed VAT rate and the VAT refund rate stipulated by the Chinese government. The amount of irrecoverable VAT is only "related" to the amount of VAT paid for inputs (*i.e.*, input VAT) in that both amounts are used with other accounts to determine the net amount which the respondents must remit to the Chinese government. Nonetheless, the amount of irrecoverable VAT is neither impacted by the amount of input VAT nor does the amount of irrecoverable VAT impact the amount of input VAT.

This relationship can also be seen in respondents' monthly VAT statements. As explained above, the irrecoverable VAT expense is a liability calculated based on the VAT rate and the

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[101] *See* JCG's Case Brief at 38; MHI Case Brief at 28; and Wison's Case Brief 6-7.
[102] *See 2008 Chinese VAT Regulation* at Article 2.3.
[103] *See* Wison FOP Verification Report at 10; *see also* JCG May 28, 2019 CDQR at 34; and Wison July 1, 2019 CQR at 40.

refund rate specific to the exported good and the FOB value of the subject merchandise.[104] Respondents' monthly VAT statements provide step-by-step guidance on the calculations, described in the *2012 VAT Circular*, that exporters are to carry out in order to arrive at their net VAT liability.[105] For example, if a firm sells goods that are not subject to the irrecoverable VAT expense (*e.g.*, Company A), it is able to credit the total amount of input VAT paid as a deduction from the amount of output VAT collected from its downstream customers, the difference being its net VAT liability. If a firm sells some goods that are exported and thus subject to the irrecoverable VAT expense (*e.g.*, Company B), then it must deduct the irrecoverable VAT amount (*e.g.*, $1.2 million) from the amount of the creditable input VAT before it is permitted to deduct that amount from the amount of output VAT collected from downstream customers. In this example, Company A's output VAT is reduced (*i.e.*, offset) by the full amount of its input VAT paid (*e.g.*, $10 million), and Company B's output VAT is only partially reduced by its input VAT after deducting an amount corresponding to the value of its irrecoverable VAT (*i.e.*, $10 million - $1.2 million = $8.8 million). It is important to note that, but for the deduction of irrecoverable VAT from its input VAT credit, Company B would have been granted a credit equal to its total input VAT paid, effectively recovering 100 percent of its input VAT paid; instead that credit was reduced by $1.2 million to $8.8 million, rendering $1.2 million of its input VAT paid unrecovered and increasing Company B's net VAT liability to the government by $1.2 million. This example illustrates how a firm's irrecoverable VAT results in a payment to the government in the amount of the FOB value of the exported goods times the difference between the VAT rate and the refund rate specific to the exported good.[106] Chinese VAT law instructs firms to record this irrecoverable expense as a cost of goods sold so that the exporter may recover that portion of the input VAT that is forgone as a result of the exportation of the products and the generation of irrecoverable VAT that otherwise would have been fully credited against their output VAT if the product had not been exported.[107] The record demonstrates that the respondents booked the irrecoverable VAT on their exported fabricated structural steel, based upon FOB export value, to their accounting records and considered it as a cost of sales of fabricated structural steel.[108]

As described above, the impact of irrecoverable VAT is plainly evident in the amount of "total deductible tax" available to Company B in the single-month scenario presented. However, the respondents' VAT statements underscore how China's complex system of liabilities, deductions, offsets, and exemptions, with carryover amounts between periods and adjustments reflecting calculations from prior periods, can obscure the impact of irrecoverable VAT on the input VAT credit. Furthermore, it demonstrates that input VAT credits and reductions for irrecoverable VAT are not forgiven in any single month because input VAT credits are carried over from month to month. Notwithstanding these company-wide accounting procedures regarding the net VAT liability to the Government of China, the record demonstrates that the respondents' irrecoverable VAT results in an increased net VAT liability to the government based on a

[104] *See, e.g.*, Wison August 5, 2019 ACDSQR at Exhibit SC-17 and SC-18; and Wison FOP Verification Report at 10 and verification exhibit 13.
[105] *See, e.g.*, JCG May 28, 2019 CDQR at Exhibit C-16.
[106] *See 2012 VAT Circular* at Article 5.1(1).
[107] *Id.* at Article 5(3).
[108] *See, e.g.*, Wison August 5, 2019 ACDSQR at 14-15 and Exhibits SC-16-20 and revised Exhibit C-14.

percentage of the value of their FOB sales, and that the existence of this increased net VAT liability is due to the exportation of subject merchandise.[109]

Although, as stated above, input VAT is not a factor included in the calculation of the adjustment to U.S. price for irrecoverable VAT, we further explain the function of input VAT. The input VAT and irrecoverable VAT, along with output VAT, all relate to overall net VAT liability, but input VAT is not relevant to our calculation of a transaction-specific irrecoverable VAT expense, which is based on the calculation required of exporters by Chinese law and uses the variables with which exporters are required by Chinese law to calculate the amount of their irrecoverable VAT expense. Moreover, in this context, input VAT is not relevant to the calculation of export price because it is a credit to an exporter's output VAT, not a cost incurred but rather passed through to the next customer. The important point is that the amount of VAT that is irrecoverable, in essence, becomes an export-contingent tax and, therefore, is properly considered an "export tax, duty, or other charge" described in section 772(c)(2)(B) of the Act that must be deducted from export price.

As illustrated by the respondents' monthly VAT statements, if a firm's "total deductible tax" (which is equal to the amount of its input VAT paid plus an amount of its deductible VAT paid carried over from a prior month, minus the amount of its irrecoverable VAT) is greater than the amount of the output VAT collected from its customers, then the amount of its "actual tax deductible" becomes its output VAT and the difference between its output VAT and total deductible tax, *i.e.*, its "Tax retained end of this month," can be credited forward to the next month as its tax "Retained last month."[110] Thus, for an exporter such as the respondents, the difference between its "total deductible tax" and its "actual tax deductible" is transferred to the next month as its tax "retained last month," and the firm's deductible tax is serially transferred from one month to the next, and is continually reduced by the amount of irrecoverable VAT incurred in each period.[111] Thus, the effect of the irrecoverable VAT expense is not isolated to a single month but, rather, continues to affect the offsetting of the input VAT credit in subsequent months. This relationship underscores another reason why the input VAT that the respondents paid is not relevant to the irrecoverable VAT calculation during the POI; not only is irrecoverable VAT calculated on a different basis than input VAT, but the effect of the irrecoverable VAT expense is not tied to input VAT paid in any particular month. Thus, to the extent that Commerce may not be able to link the input VAT to the deduction for irrecoverable VAT on any given record, the input VAT paid is not relevant to the calculation of irrecoverable VAT, consistent with Chinese law. In addition, the amount of irrecoverable VAT is not dependent on either the amount of output VAT or the amount of net VAT liability, but net VAT liability is dependent on the amount of the irrecoverable VAT.

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[109] *Id.*; *see also* JCG May 28, 2019 CDQR at 33-35 and Exhibits C-14 and C-16; and MHI May 15, 2019 CDQR at 27-29 and Exhibit C-7.

[110] *See also 2012 VAT Circular* at Article 5.1(3).

[111] A firm's "deductible tax" is the sum of its creditable input VAT plus an amount retained and carried forward from the previous month, minus its irrecoverable VAT. *See, e.g.*, GGB October 16, 2017 CQR at Exhibit C13 at box 17 (although the formula in box 17 also includes adjustments for "Refundable tax for exemption, offset, refund of goods" and "Overdue tax payable," the record provides no detail indicating that these variables have an effect on the amount of irrecoverable VAT incurred).

It is important to note that while the interplay between irrecoverable VAT and input VAT has a direct effect on the overall net VAT liability of a firm, we must emphasize that it is not the overall net VAT liability of the respondents with which we are concerned, but the effect of the irrecoverable VAT expense on the exporter's ability to offset its tax liability by its input VAT credit, and the recording of the irrecoverable VAT expense as a cost of goods sold. Most importantly, the effect of the irrecoverable VAT expense on the exporter's ability to offset its net VAT liability by its input VAT credit is not a function of the VAT rate paid on inputs, the value of those inputs, or the aggregate amount of input VAT paid, but is a function of the FOB selling price of the exported goods and the difference in the VAT rate and the VAT refund rate for those exported goods.[112] The Act requires that Commerce reduce the export price or constructed export price used in the antidumping margin calculation by "the amount, if included in such price, of any export tax, duty, or other charge imposed by the exporting country on the exportation of the subject merchandise to the United States, other than an export tax, duty, or other charge described in section 771(6)(C) …." of the Act.[113] Commerce's irrecoverable VAT adjustment deducts the amount of irrecoverable VAT that was included in the selling price of FSS sold to the United States and is calculated on the same basis (*i.e.*, percentage of FOB price) that Chinese law requires.[114]

Section 772(c)(2)(B) of the Act authorizes Commerce to deduct from U.S. price the amount, if included in the price, of any "export tax, duty, or other charge imposed by the exporting country on the exportation" of the subject merchandise. Although the respondents argue that they pay no VAT upon export, they misstate the issue before Commerce. Despite acknowledging in their responses that they record irrecoverable VAT as a cost of goods sold,[115] the respondents refuse to acknowledge that the irrecoverable VAT is truly a cost. This demonstrates either intentional misleading on the respondents' part or a misunderstanding of their own costs under Chinese law. If, for example, the Chinese government were to determine that it wanted to either extract higher taxes from fabricated structural steel exporters or restrict the exports of fabricated structural steel, it could reduce the rebated VAT amount upon export; a reduction of the rebate from 15 percent to five percent would result in an increased cost of 10 percent of FOB value that would have to be booked as a cost and recover though its pricing of export sales. That would equate to a real cost increase of 10 percent of FOB value. Under Chinese law, the cost increase would only apply to exports, since only exports incur irrecoverable VAT. Irrecoverable VAT, as defined in Chinese law, which is supported by evidence on the record, is a net VAT burden that arises solely from, and is specific to, exports.[116] Irrecoverable VAT is, therefore, an "export tax, duty, or other charge imposed" on exportation of the subject merchandise to the United States.[117]

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[112] *See 2012 VAT Circular* at Article 5.1(1).
[113] *See* section 772(c)(2)(B) of the Act.
[114] *See* Wison August 5, 2019 ACDSQR at 14.
[115] *Id.*; *see also* Wison Verification Report at 10 and verification exhibits 8 and 13.
[116] *See, e.g.*, *Small Diameter Graphite Electrodes from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2012-2013*, 79 FR 57508 (September 25, 2014), and accompanying IDM at Comment 7.
[117] *See, e.g.*, *Frontseating Service Valves from the People's Republic of China; Final Results of Antidumping Duty Administrative Review; 2012-2013*, 79 FR 71385 (December 2, 2014), and accompanying IDM at Comment 5.

We disagree with the respondents' contention that irrecoverable VAT is linked to the cost of production of goods instead of their export sale prices consistent with Article 5.3 of the *2012 VAT Circular*.[118] Article 5.3 states that the irrecoverable VAT "shall be included into the cost of the exported goods and services." Article 5.3 does not specify production costs, and clearly such an expense is caused by the exportation of the subject merchandise and not its production, yet both are reasonably seen as costs of goods sold. The respondents' claim is inapposite.

We also reject JCG's and MHI's claim that the method to calculate the adjustment for irrecoverable VAT is unreasonable.[119] JCG and MHI assert that the 17 (or 16) percent VAT rate is only applicable to purchased inputs, and that the VAT adjustment calculated simply as three to seven percent of the FOB value of the subject merchandise is unreasonable. Article 5.1(1) of the *2012 VAT Circular* clearly provides for the formula for the amount of irrecoverable VAT as discussed above. This amount is based on the difference of the VAT rate and the VAT refund rate for the exported goods (*i.e.*, subject merchandise) and the FOB of the exported goods. Further, it is this amount that Article 5.3 stipulates must be recorded as a cost of the goods sold in the exporter's books and records. There is no factual evidence on the record to support JCG and MHI's claim that the amount of irrecoverable VAT is dependent on the purchase value of material inputs.

We also reject the respondents' concept that the VAT is not levied on exported subject merchandise and is only levied on domestically purchased inputs.[120] Article 1 of the *2008 Chinese VAT Regulations* states:

> All units and individuals engaged in the sales of goods, provision of processing, repairs and replacement services, and the importation of goods within the territory of the People's Republic of China are taxpayers of value-added tax and shall pay value-added tax in accordance with these Regulations.

Further, Article 2.1 of the *2008 Chinese VAT Regulations* states:

> "For taxpayers that sell or import goods, other than those specified in items (2) and (3) of this Article, the tax rate shall be 17%."

More recently, the *2018 VAT Circular* states:

> "Where a taxpayer engages in a taxable sales activity for the value-added tax (VAT) purpose or imports goods, the previous applicable 17-percent and 11-percent tax rates are adjusted to be 16 percent and 10 percent respectively."[121]

Thus, all parties that sell or import goods within China shall pay VAT in accordance with the regulations and that generally the VAT rate is 17 (or 16) percent. There are no provisions, either here or elsewhere in the *2008 Chinese VAT Regulation* or the *2012 VAT Circular* which exempt

[118] *See* JCG's Case Brief at 47-49; Modern Heavy's Case Brief at 36-38; and Wison's Case Brief at 6-8.
[119] *See* JCG's Case Brief at 49-58; and Modern Heavy's Case Brief at 38-46.
[120] *Id.*; and Wison's Case Brief at 6-8.
[121] *See* Wison July 1, 2019 CQR at Exhibit C-12 *2018 VAT Circular*.

sales by an individual within China from VAT simply because the goods are exported. Exported goods are subject to VAT just as goods sold to a customer with China. Nonetheless, the VAT paid on exported goods may be eligible for exemption or refund consistent with these regulations. The respondents have failed to demonstrate that sales of subject merchandise are not subject to this requirement to pay VAT on subject merchandise. Rather, respondents may claim a refund of VAT consistent with these regulations, as discussed herein.

We do not find *China Mfrs. Alliance* or *Qingdao Qihang Tyre Co.* to be applicable as binding precedent in this investigation. In both cases, Commerce issued remand redeterminations disagreeing with the Court's opinion.[122] Further, the CIT has recently addressed the issue of the irrecoverable VAT within the *Chevron*[123] framework in several cases.[124] Unlike *China Mfrs. Alliance* and *Qingdao Qihang Tyre Co.*, the *Chevron* analysis in *Fushun Jinly* and *Juancheng* does not interpret the statute to prevent Commerce from finding irrecoverable VAT in U.S. prices in the absence of a finding of an actual imposition of an irrecoverable VAT.[125] *Fushun Jinly* and *Juancheng* held that section 772(c)(2)(B) of the Act affords Commerce broad discretion to calculate deductions for an export tax, duty, or other charge and sustained Commerce's deductions of irrecoverable VAT.[126] Even after *China Mfrs. Alliance*, *Jacobi Carbons 2017* followed *Fushin Jinly* and held that Commerce reasonably interpreted section 772(c)(2)(B) of the Act to deduct irrecoverable VAT from respondents' CEP as a charge imposed by the exporting country on the exportation of subject merchandise.[127] *Diamond Sawblades Manufacturers' Coalition* also upheld our deduction of irrecoverable VAT, notwithstanding *China Mfrs. Alliance.*[128] Our interpretation of the Chinese law to the effect that (1) exportation itself "gives rise to the irrecoverable VAT 'imposed' by {China} on the process of manufacture and on the sale of subject merchandise" and (2) "the 'irrecoverable' amount of VAT is to be calculated by reference to the full FOB export value of subject merchandise" is reasonable and sustained in *Diamond Sawblades Manufacturers' Coalition*.[129]

As explained above, where the irrecoverable VAT is a fixed percentage of U.S. price, the final step in arriving at a tax-neutral dumping comparison is to reduce the U.S. price downward by this same percentage.[130] *Jacobi Carbons 2017* held that this methodology reasonably interpreted vague language in section 772(c)(2)(B) of the Act, including the requirement that such taxes or

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[122] *See* Commerce's Remand Redeterminations, *China Manufacturing Alliance, LLC, et al. v. United States*, Consol. Court No. 15-00124; Slip Op. 17-12 (CIT 2017), Final Results of Redetermination Pursuant to Court Remand, dated June 21, 2017; and *Qingdao Qihang Tyre Co., Ltd., et al. v. United States*, Consol. Court No. 16-00075; Slip Op. 18-35 (CIT 2018), Final Results of Redetermination Pursuant to Court Remand, dated July 24, 2018.
[123] *See Chevron* (holding that, in the context of agency rulemaking, and assuming the statute is silent or ambiguous, courts should defer to agency understanding of the statute pursuant to which the agency promulgates regulations).
[124] In the chronological order, those cases are *Fushun Jinly*, *Juancheng*, *China Mfrs. Alliance*, *Jacobi Carbons 2017*, *Aristocraft 2017*, and *Diamond Sawblades Manufacturers' Coalition.*
[125] *See Aristocraft 2017*, 269 F. Supp. 3d at 1323-24.
[126] *Id.* at 1324.
[127] *Id.*
[128] *See Diamond Sawblades Manufacturers' Coalition*, 301 F. Supp. 3d at 1335-39.
[129] *Id.* at 12.
[130] *Id*.

other charges be imposed by the exporting country.[131] *Aristocraft 2017* described the differences of the *Chevron* analyses between *Juancheng*, *China Mfrs. Alliance*, and *Jacobi Carbons 2017* and stated that "{t}his Court is persuaded by the *Chevron* analysis of *Jacobi Carbons 2017* and *Juancheng*."[132]

We also do not find that *Fine Furniture* is applicable to this investigation. The sole issue in *Fine Furniture* regarding irrecoverable VAT is the appropriate FOB export value to which to apply the irrecoverable VAT rate. In the underlying administrative review of *Fine Furniture*, Commerce did not consider the transfer price between the respondent and the respondent's affiliate headquartered in Singapore to be an appropriate basis for calculating the FOB export value because Commerce treated them as a single entity and their internal transactions as intra-company transactions, not export sales.[133] On remand, Commerce found it more appropriate to calculate the irrecoverable VAT using the transfer price between the respondent and the affiliate in Singapore as the FOB export value.[134] We do not have a similar situation in this investigation. For JCG's and Wison's U.S. sales, we used the irrecoverable VAT recorded directly on the export documentation, which were based upon the VAT rates in place at time of exportation and the FOB sales value, to determine of the irrecoverable VAT amounts—and no party has contested to which value the irrecoverable VAT should be applied.[135]

The respondents and the CIT (*e.g.*, in *Qingdao Qihang Tyre Co.*) both misread the Federal Circuit's decision in *Federal Mogul*.[136] As an initial matter, the law under review in *Federal Mogul* was a prior version of the antidumping statute, and so the nuances of the ruling are not transferrable to the current version of the statute. Additionally, the ruling in *Federal Mogul* addressed adjustments for price-to-price comparisons in a market economy context (*i.e.*, appropriate adjustments for home market prices), rather than adjustments that are appropriate in the NME context which is based upon FOPs. The CIT's decision in *Diamond Sawblades Manufacturers' Coalition* sustained our use of VAT rates to calculate the VAT amounts and distinguished *Federal Mogul* on the basis that *Federal Mogul* was in the context of a market economy's VAT, as explained in *Section 772(c)(2)(B) Methodological Change*.[137] Contrary to the respondents' argument, in *Federal Mogul*, the Federal Circuit's decision regarding how to treat certain taxes provided deference to Commerce's interpretation of the Act ("Commerce's understanding of its duty under the Act, as well as under our international agreements, and the expertise it brings to the administration of the Act, lends support to the position it has taken").[138]

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[131] *See Aristocraft 2017*, 269 F. Supp. 3d at 1324, and *Jacobi Carbons 2017*, 222 F. Supp. 3d at 1187-88 ("To understand the parameters of what it means for something to be 'imposed,' and, thus, to determine whether Commerce's statutory construction is permissible, the court considers the term's plain meaning. …. The ordinary meaning of the term 'imposed' demonstrates the reasonableness of Commerce's interpretation.").
[132] *See Aristocraft 2017*, 269 F. Supp. 3d at 1322.
[133] *See Fine Furniture*, 182 F. Supp. 3d at 1359; *see also* Final Results of Redetermination Pursuant to Court Order in *Fine Furniture* dated August 28, 2017, at 6 for the location of the affiliate's headquarters.
[134] *See* Final Results of Redetermination Pursuant to Court Order in *Fine Furniture* dated August 28, 2017, at 8-9.
[135] *See, e.g.*, Wison FOP Verification Report at 10 and Exhibit 13.
[136] This includes *E. I. DuPont De Nemours*.
[137] *See Diamond Sawblades Manufacturers' Coalition*, 301 F. Supp. 3d at 1336-39 (citing *Section 772(c)(2)(B) Methodological Change*, 77 FR at 36483).
[138] *See Federal Mogul* at 1582.

We also disagree with JCG and MHI that the Court's finding in *Dorbest 2010* is relevant here. The statute is ambiguous as to whether unrefunded VAT which would otherwise be refunded or repaid might be an export tax under section 772(c)(2)(B) of the Act. Thus, in the *Federal Register* notice *Section 772(c)(2)(B) Methodological Change*, Commerce provided public notification of a clear change in its methodology with regard to unrefunded VAT on export sales from certain NME countries, pursuant to its interpretation of section 772(c)(2)(B) of the Act, and Commerce has implemented the change consistently in all applicable cases initiated after the publication of the notice in the *Federal Register*.[139] Consequently, our application of the VAT rates is in accordance with the respondents' reporting, the applicable Chinese regulations, our methodology in *Section 772(c)(2)(B) Methodological Change*, and the judicial precedent.[140] Our finding of the irrecoverable VAT imposed on the exportation of the subject merchandise is based on the Chinese regulations on the record, not based on presumption.[141]

We disagree with JCG and MHI's notion that *Magnesium Corp.*, *Globe Metallurgical*, and *Bridgestone* have any precedent in this investigation in regard to our treatment of VAT in an NME; Commerce's methodology regarding irrecoverable VAT related to export sales, in the NME context, has changed and was publicly announced in the *Section 772(c)(2)(B) Methodological Change*. We also disagree that JCG and MHI's citation to *Hebei Metals* is relevant; in that case, the Court held that Commerce has, to the extent practicable, an obligation to provide parties with an opportunity to remedy or explain a deficiency.[142] In this investigation, we afforded the respondents the opportunity to provide information regarding the Chinese VAT system and the irrecoverable VAT incurred upon export in the initial and supplemental questionnaires.[143] Thus, consistent with the Court's finding in *Hebei Metals*, and to the extent practicable, we provided the respondents with multiple opportunities to explain the Chinese VAT system and the irrecoverable VAT it incurred upon export.

Thus, with the exception of (1) a correction for Wison's irrecoverable VAT from verification,[144] and (2) basing Modern Heavy's dumping margin on total AFA (*see* Comment 12), we are making no changes to the *Preliminary Determination* with respect to our calculation of the irrecoverable VAT deducted from respondents' export price.

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[139] *See Section 772(c)(2)(B) Methodological Change*, 77 FR at 36483.
[140] *Id.* at 15, citing *Section 772(c)(2)(B) Methodological Change*, 77 FR at 36483.
[141] *Id.* at 15-16.
[142] *See* JCG's Case Brief at 51; and MHI Case Brief at 40 (citing *Hebei Metals*).
[143] *See* JCG May 28, 2019 CDQR at Exhibits C-10-16; JCG August 12, 2019 Section ACD Supplemental Questionnaire Response (JCG August 12, 2019 ACDSQR) at Exhibits SC-C.10, SC-C.8, and SA-B-2-2; MHI May 15, 2019 Section C and D Questionnaire Response (Modern Heavy May 15, 2019 CDQR) at Exhibits C-7 and C-8; MHI June 28, 2019 Section A and C Supplemental Questionnaire Response (Modern Heavy June 28, 2019 ACSQR) at Exhibits SC-9-11; Wison July 1, 2019 Section C Questionnaire Response (Wison July 1, 2019 CQR) at Exhibits C-12-14; and Wison August 5, 2019 Section A, C, and D Supplemental Questionnaire Response (Wison August 5, 2019 ACDSQR) at Exhibits SC-16-20 and revised C-14.
[144] *See* Wison FOPs Verification Report at 10 and Exhibit 13; and Wison October 18, 2019 Revised Databases Submission.

Surrogate Values

Comment 2: Surrogate Country

Petitioner's Case Brief

- In the *Preliminary Determination*, Commerce selected the Russian Federation (Russia), rather than Brazil or Mexico, as the primary surrogate country, on the basis that it is a significant producer of identical or comparable merchandise, has reliable import data to value the respondents' FOPs and "complete {surrogate value (SV)} information is available from Russia and the financial statements from Russia are more reliable."[145] The conclusions by Commerce concerning surrogate country at the *Preliminary Determination* were incorrect and Commerce did not address substantial evidence on the record demonstrating that Russia is unfit to serve as the primary surrogate country.

- Commerce has correctly continued to recognize China as a non-market economy (NME) country in this proceeding, meaning that Commerce must select an appropriate surrogate country at the comparable level of economic development to China, and a producer of comparable merchandise, to value the respondents' FOPs. Once these requirements are met, Commerce treats all potential surrogate countries as equal and reliability of the data from the potential surrogate countries becomes the primary factor in Commerce's decision.[146] Of the six countries originally identified as potential surrogate countries, Commerce determined that three were economically comparable and were significant producers of subject merchandise: (1) Brazil; (2) Mexico; and (3) Russia.

- Commerce erred in selecting Russia as the primary surrogate country. Russia has only recently been added to Commerce's list of potential surrogate countries for China, and this is the first time Russia has been selected as the primary surrogate country in an NME antidumping proceeding. Further, Commerce only provided two reasons for selecting Russia over Brazil and Mexico beyond the threshold requirements (*i.e.*, economic comparability and significant producer of comparable merchandise): complete and specific Russian Global Trade Atlas (GTA) data for each input factor, and the Russian financial statements were more reliable than those on the record for Brazil and Mexico.

- Commerce's *Preliminary Determination* to select Russia as the primary surrogate country is rebutted by the fact that: (1) Russia is not at the same level of economic development as China; (2) even if it is at the same level of economic development, it cannot serve as a surrogate country in a Chinese NME proceeding because the publicly available price data are inaccurate and does not reflect market economy prices; and (3) the Russian financial statements are not more reliable than the Mexican or Brazilian ones.

[145] *See* Petitioner's Case Brief at 2-3 (citing *Certain Fabricated Structural Steel from the People's Republic of China*, 84 FR 47491 (September 3, 2019), and accompanying PDM at 11).
[146] *Id.* at 4 (citing section 773(c)(4) of the Act and Import Administration Policy Bulletin 04.1: Nonmarket Economy Surrogate Country Selection Process (March 1, 2004) (Policy Bulletin 04.1), available at https://enforcement.trade.gov/policy/bull04-1.html).

- Commerce relied on its practice of a comparison of nominal per capita gross national income (GNI) to determine economic comparability. However, Commerce noted that it is not the only indicator of a country's level of economic comparison. Other indicators, such as per capita gross domestic product (GNP) as measured by purchasing power parity (PPP) and the Big Mac Index show a wide gulf between Russia and China in terms of economic development. Data shows that the 2017 Chinese PPP-derived gross domestic product (GDP) is on 63 percent of the 2017 Russian PPP-derived GDP. This measurement is based on observed prices and demonstrates that unit of currency in Russia buys twice as much as a unit of currency in China.

- In the provided 2018 Big Max Index data, which measures PPP by comparing the average national price of a Big Mac™ in U.S. Dollars (USD), Russia ranked last of the 55 countries surveyed, further demonstrating Russia's status as an outlier in terms of economic comparability.

- Russia's observed prices are so low due to widespread corruption. Transparency International rates Russia 28 out of 100 on its Corruption Perceptions Index, rendering it one of the most corrupt countries in the world. Thus, observed, official, and published prices do not reflect the actual prices of goods and services because they do not take into account under-the-table payments and bribes. Corruption deflates observed prices, and thus, a corrupt country's prices are a subpar choice "for serving as a measure of prices in a normally functioning economy."[147]

- Russian prices sourced from official customs data are not reliable for a number of reasons. First, Russia has a history of underreported import values, as evidenced using mirror export statistics from the exporting counties. Systematic corruption also drives down reported import value. Finally, misclassification of imports, in order to pay lower import duties, is also rampant. These various grey schemes which serve to drive down import prices, leave Russia without accurate or reliable import data.

- Commerce graduated Russia to market economy (ME) status in 2002. However, while it may be acceptable to treat Russia as a ME country for antidumping proceedings involving Russia, it is not suitable to treat Russia as a ME for consideration as a surrogate country in an NME proceeding. When Commerce graduated Russia to ME status in 2002 it did so only on the basis of macro-economic factors, but Commerce failed to take into account: (1) freedom of capital movement; (2) ability to negotiate wage rates; (3) the representativeness of prices; or (4) the reliability of observed pricing data. All these factors are important to consider when assessing whether Russia is suitable to use as a surrogate country.

- Record evidence shows that Russia's legacy of a centrally planned economy still affects the pricing of goods. Thus, Russia still does not operate as a free market uninhibited by government distortions. Therefore, Russia's status as a recent NME country preclude it from consideration as a surrogate country.

[147] *Id.* at 10.

- Russia is particularly ill-suited to serve as the surrogate country in the instant proceeding, because of significant distortions in the two largest surrogate values (*i.e.*, steel mill products and labor). The steel industry was particularly affected by the Soviet centralized economy, and after privatization the steel mills were sold to new oligarchs. While steel mills within Russia are now nominally private, they do not operate under ME principles because they work "to build themselves into the state system, in order to gain access to state contracts and budget money."[148] The current steel industry is characterized by low capital and financing costs and substantial excess capacity, which have driven Russian prices down. Since imports have to compete with the domestic industry within Russia, import prices, as a result, have also lowered.

- The table provided containing the import values for the last six months of 2018 of the six potential surrogate countries for the major types of steel used in FSS production, shows that, in all but one instance, Russian prices were the lowest, consistently approximately 60 percent of the value of imports of other potential surrogate countries.[149]

- Steel prices within Russia are further distorted by government support. Specifically, natural gas, freight, and financing, three major inputs to steel production, are heavily subsidized by the Russian government. Commerce's practice is to reject countries for use as the primary surrogate country if the data on the primary inputs is distorted.[150]

- The Russian financial statements preclude the calculation of CONNUM-specific labor costs. The surrogate financial ratios, calculated from the surrogate financial statements are one of the largest inputs in an NME case, and the quality of the financial statements on the record is a critical factor of Commerce's determination of which surrogate country to use. In *Steel Threaded Rod Prelim*, Commerce selected Romania over Russia on the basis of the reliability of Romania's financial statements.[151] Commerce cited the reliability of the Russian financial statements in the *Preliminary Determination*. However, significant flaws in the Russian financial statements should preclude their use in this proceeding. One such flaw is, as Commerce noted, the Russian financial statements lack the detail to break out manufacturing labor costs, forcing Commerce to include labor as part of the overhead ratio. Thus, using the Russian financial statements for the *Preliminary Determination* resulted in a less accurate assignment of labor cost for individual projects. Commerce has previously rejected financial

[148] *Id.* at 15 (citing Petitioner's Letter, "Certain Fabricated Structural Steel from the People's Republic of China: Petitioner's Initial Rebuttal Surrogate Value Comments," dated July 22, 2019 (Petitioner July 22, 2019 Rebuttal SV Comments), at Exhibit 8).
[149] *Id.* at 16-17.
[150] *Id.* at 20 (citing *Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: Preliminary Results of Antidumping Duty New Shipper Review; 2011-2012*, 78 FR 14267 (March 5, 2013) (*Pneumatic Tires 11-12*), and accompanying PDM; and *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Preliminary Results of the Antidumping Duty Administrative Review and new Shipper Review; 2011-2012*,78 FR 55676 (September 11, 2013) (*Fish Fillets 11-12*), and accompanying PDM at 13-14).
[151] *Id.* at 20-21 (citing *Alloy and Certain Carbon Steel Threaded Rod 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*, 84 FR 50379 (September 25, 2019) (*Steel Threaded Rod Prelim*), and accompanying PDM).

statements that were not sufficiently detailed to break out manufacturing overhead.[152] Fabricated structural steel is highly labor intensive, and the consumption of labor highly vary from CONNUM-to-CONNUM depending on the intensity and complexity of the project. Thus, any financial statement that cannot break out manufacturing labor, allowing for the separate valuation of labor, should be considered unusable.

- All the Russian financial statements on the record are otherwise of poor quality for reasons including: (1) non-contemporaneity; (2) appearing to be pieced together from multiple sources; (3) missing pages and disclosures (*i.e.*, incomplete financial statements); and (4) the company does not make comparable merchandise. None of the Russian financial statements are contemporaneous with this proceeding, unlike the Mexican and Brazilian financial statements, and Commerce has often rejected a surrogate country for use where there were no contemporaneous financial statements on the record.[153] Commerce has also repeatedly refused to use incomplete financial statements.[154] Apparent manipulation and selective submissions further call into question the reliability of the Russian financial statements. Thus, Commerce's conclusion that the Russian financial statements are superior to those of Brazil and Mexico is without merit.

- Commerce also cited better harmonized schedule (HS) input data as a reason for choosing Russia over Brazil or Mexico. Specifically, the relevant factors Commerce referenced for this decision were completeness and specificity. However, the record shows that the HS data for Russia is neither more complete, nor more specific than that from Brazil or Mexico.

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[152] *Id.* at 21 (citing *Certain Steel Nails from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, and Final Determination of No Shipments; 2016-2017*, 84 FR 17134 (April 24, 2019) (*Steel Nails from China 16-17*), and accompanying IDM at Comment 2; *Steel Wire Garment Hangers from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 2014-2015*, 82 FR 18115 (April 17, 2017) (*Garment Hangers from China 14-15*), and accompanying IDM at Comment 2; *Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2013-2014*, 81 FR 23272 (April 20, 2016) (*Pneumatic Tires 13-14*), and accompanying IDM at Comment 8; and *Antidumping Duty Investigation of Certain Passenger Vehicle and Light Truck Tires from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances, in Part*, 80 FR 34893 (June 18, 2015) (*Passenger Vehicle Tires Investigation*), and accompanying IDM at Comment 9).

[153] *Id.* at 24 (citing *Certain Passenger Vehicle and Light Truck Tires from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review and Rescission, in Part; 2017-2018*, 84 FR 55909 (October 18, 2019) (*Passenger Vehicle Tires 17-18 Prelim*), and accompanying PDM; *Certain Hardwood Plywood Products from the People's Republic of China: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Preliminary Affirmative Determination of Critical Circumstances, in Part*, 82 FR 28629 (June 23, 2017) (*Hardwood Plywood Prelim*), and accompanying PDM; and *Multilayered Wood Flooring from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review; 2012-2013*, 80 FR 1388 (January 9, 2015) (*Multilayered Wood Flooring 12-13 Prelim*), and accompanying PDM at Section C).

[154] *Id.* at 25 (citing *Floor-Standing, Metal-Top Ironing Tables and Certain Parts Thereof from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 73 FR 14437, (March 18, 2008) (*Ironing Tables from China 05-06 Final Results*), and accompanying IDM at Comment 1; and *Notice of Final Determination of Sales at Less Than Fair Value: Steel Concrete Reinforcing Bars from Belarus*, 66 FR 33528 (June 22, 2001) (*Rebar from Belarus*), and accompanying IDM at Comment 2).

- The GTA data for Russia is no more complete than the GTA data placed on the record for Mexico or Brazil by the petitioner as, for all three countries, Commerce has an HS code and data for each reported material inputs by the respondent.

- The respondents placed SV data on the record other than from GTA. Commerce has previously rejected SV data from sources other than GTA.[155] Instead, Commerce independently placed GTA data for Russia on the record of the investigation, departing from its practice.

- All of the potential surrogate countries' HS codes are the same at the six-digit level, and, consequently, the Russian GTA data are no more specific than the Mexican or Brazilian GTA data at the six-digit level, which accounts for vast majority of the HS codes upon which Commerce valued the respondents' inputs.

- For those inputs Commerce valued at the 10-digit level, the Russian data shows no meaningful difference in the value of the inputs, whether valued on a six- or ten-digit level (*i.e.*, less or more specific level). This is because the six-digit HS code for these steel inputs are specific in terms of type (*e.g.*, plate or beam) and chemistry (*e.g.*, alloy or non-alloy) and the ten-digit HS code only further specifies dimensions (*i.e.*, thickness and width). Commerce has previously found that minor differences in width or thickness do not have a meaningful effect on price. Thus, the six-digit HS codes provide accurate and reliable measurements of commercial value.[156] This is demonstrable in comparing the surrogate values for certain steel inputs of the respondents. The difference in the prices between the six- and ten-digit levels are negligible and not indicative of a meaningful difference in price.[157] Additionally, the Brazil and Mexican HS categories under 7304.39 distinguish on the basis of diameter; thus, the ten-digit Russian HS categories are no more specific than the Mexican or Brazilian ones.[158]

- For the final determination, Commerce should find Brazil to be the most appropriate surrogate country.

- Though Commerce noted that each country on the surrogate country list is at the same level of economic development as China in terms of per capita GNI, Brazil's GNI ($8,580) is more comparable to China's ($8,690) than Russia's ($9,232). Additionally, unlike Russia, there is no record evidence that GNI dos not accurately represent economic comparability.[159] Record

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[155] *Id.* at FN 71 (citing *Chlorinated Isocyanurates from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review; 2017-2018*, 84 FR 42891 (August 19, 2019) (*Chlorinated Isocyanurates 17-18 Preliminary Results*), and accompanying PDM at 15).
[156] *Id.* at 27 (citing *Circular Welded Non-Alloy Steel Pipe from the Republic of Korea: Final Results of the Antidumping Duty Administrative Review; 2010-2011*, 78 FR 35248 (June 12, 2013) (*CWP from Korea 10-11 Final Results*), and accompanying IDM at Comment 6).
[157] *Id.* at 27-32
[158] *Id.* at 32 (citing Petitioner's Letter, "Certain Fabricated Structural Steel from the People's Republic of China: Petitioner's Final Surrogate Value Comments," dated August 5, 2019 (Petitioner Second SV Comments), at Exhibits 1 and 4).
[159] *Id.* at 34.

evidence also indicates that Brazil is a significant producer of subject merchandise.[160] Finally, the surrogate value information on the record is reliable. Contrary to Commerce's *Preliminary Determination*, the Brazilian data are not less reliable than the Russian surrogate value data. The totality of the Brazilian data are complete, publicly available, contemporaneous, and specific to the inputs of the respondents.[161]

- The petitioner has placed on the record the original, fully translated, publicly available 2018 financial statements of Empresa Construtora Brasil S.A (Empresa), which is a "producer of identical or comparable merchandise."[162] Unlike the Russian financial statements, the statements of Empresa are contemporaneous and sufficiently detailed to calculate the surrogate financial ratios.[163]

- If Commerce declines to select Brazil as the primary surrogate country for the final determination, it should select Mexico, as Mexico satisfies the statute's requirements for selection as a surrogate country. In addition, the petitioner has placed on the record the 2018 financial statements of Grupo Carso, a "Mexican producer of identical or comparable merchandise." These statements are superior to the Russian financial statements because they are contemporaneous, publicly available, highly detailed, and include the ability to break out manufacturing labor and overhead.[164]

- Should Commerce continue to use Russia as the primary surrogate country for the final determination, it should exclude Ukrainian exports of steel inputs into Russia for its calculation of the steel surrogate values. Ukrainian exports account for the vast majority of the steel being imported into Russia. However, the Russian occupation of Eastern Ukraine has had a dramatic effect on the Ukrainian steel industry, significantly distorting the Ukrainian export prices. Some of the largest Ukrainian steel producers are located in Russian occupied territories, and some were seized during the occupation. Russia has also occupied the Azov Sea, blocking Ukrainian vessels out of the Mariupol port, which provides some 25 percent of Ukrainian export revenue. The result of these current events is a clear distortion of the price of Ukrainian steel being imported into Russia.[165]

- Data on the record shows that Ukrainian steel prices into Russia are systematically lower than steel imports into Russia from other countries. The data table shows that for the primary steel types used in the production of fabricated structural steel, the Ukrainian steel prices are significantly lower than all other countries either on an average basis or on a country-by-country basis.[166]

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[160] *Id.* at 34-35.
[161] *Id.* at 35-36.
[162] *Id.* at 36.
[163] *Id.*
[164] *Id.* at 37-38.
[165] *Id.* at 38-39.
[166] *Id.* at 39-40.

- Thus, for the final determination, should Commerce persist in its use of Russia as the primary surrogate country, Commerce should exclude all imports from Ukraine as aberrational, pursuant to its decisions in past cases.[167]

JCG's and Modern Heavy's Rebuttal Briefs[168]

- The petitioner's argument that Commerce erred in selecting Russia as the surrogate country is not supported by record evidence and should be rejected. The petitioner's statement that Russia was only recently included in the surrogate country choices for China is not a reason to exclude Russia from the surrogate country choices. Commerce's August 2018 decision to include Russia among the surrogate country choices was issued six months before the initiation of this investigation and nine months before Commerce placed its memorandum on the record.[169] In general, the petitioner's argument that Commerce failed to examine the quality of Russian data is incorrect. Commerce selected Russia as the surrogate country after a comparative evaluation that found "Russian SV and financial statement data to be of superior quality and availability" than other sources on the record.[170]

- The petitioner's argument that Russia does not meet the first statutory criteria for a surrogate country because it is not economically comparable to China should be rejected. The petitioner failed to raise this issue at the beginning of the investigation by not providing comments on Commerce's list of six potential surrogate countries, and thus effectively acknowledged Russia's economic comparability to China.[171] Also, in the petitioner's surrogate country comments, it affirms that Russia and the five other surrogate country choices are economically comparable to China.[172]

- The petitioner's arguments in support of using per capita GDP adjusted by PPP (*i.e.* PPP GDP) and Big Mac Index data as alternatives to per capita gross national income data should be rejected. The petitioner compares Russia's and China's per capita GDP (*i.e.* nominal GDP) and PPP GDP and finds that although Russia's nominal GDP is only 23 percent higher than China's, its PPP GDP is higher by 63 percent due to the level of PPP in each country.[173] However, the petitioner fails to provide literature explaining the methodology for computing

[167] *Id.* at 40 (citing *Chrome-Plated Lug Nuts from the People's Republic of China; Final Results of Antidumping Duty Administrative Review*, 63 FR 53872 (October 7, 1998) at Comment 1).
[168] JCG incorporated Modern Heavy's rebuttal arguments concerning surrogate country and surrogate values by reference. *See* JCG's Rebuttal Brief at 5.
[169] *See* Modern Heavy's Rebuttal Brief at 1.
[170] *Id.* at 2 (citing Memorandum, "Less-Than-Fair-Value Investigation of Certain Fabricated Structural Steel from the People's Republic of China: Surrogate Value Memorandum for the Preliminary Determination," dated September 3, 2019 (Preliminary SV Memo), at 2).
[171] *Id.* at 2-3 (citing Commerce's Letter to Interested Parties, "Less-Than-Fair-Value Investigation of Certain Fabricated Structural Steel from the People's Republic of China: Request for Economic Development, Surrogate Country and Surrogate Value Comments and Information," dated May 21, 2019 (Surrogate Country Letter), which contains the Memorandum, "List of Surrogate Countries for Antidumping Investigations and Reviews from the People's Republic of China ('China')," dated August 2, 2018 (*i.e.*, the surrogate country list)).
[172] *Id.* at 3 (citing Petitioner's Letter, "Certain Fabricated Structural Steel from the People's Republic of China: Comments on Surrogate Country Selection," dated June 14, 2019 (Petitioner Surrogate Country Comments), at 2).
[173] *Id.* at 3 (citing Petitioner's Case Brief at 8).

PPP GDP, to explain the superiority of using PPP GDP as a metric for economic comparability as opposed to other metrics, to identify the observed prices on which PPP GDP is calculated, and to provide similar data for Brazil and Mexico. Commerce has rejected similar arguments to use PPP GDP data in *Frozen Fish Fillets Vietnam Preliminary AR*, *Chlorinated Isocyanurates China Final AR*, and *Manganese Metal China Final* and should do so in this case.[174] With respect to the Big Mac Index, the petitioner failed to provide additional information regarding its underlying formula and, moreover, according to the Big Mac Index, Brazil's prices are more disparate than Russia's prices.

- Commerce should reject the petitioner's argument that Russian prices are unreliable, that there are systemic issues with Russian customs data, and that Russian imports are underreported and undervalued. There is both judicial and agency precedent in rejecting similar arguments.[175] The petitioner's general claims that the Russian steel market does not operate under free market principles should also be rejected due to an absence of evidence.

- The petitioner argues that the three largest inputs into steel production, including natural gas, freight, and financing, are subsidized by the Russian government, which distorts costs and pricing in the Russian steel market. This argument should be rejected because it lacks specific evidentiary support. An investigation of an allegation of upstream subsidies is conducted in the context of CVD investigations pursuant to 19 CFR 351.523.[176] Further, Commerce has previously held in *OTR Tires from China CVD Final Determination* that the recipients of subsidies do not automatically lower their prices when allocating their benefits.[177] There are currently no U.S. CVD orders on any product from Russia. Meanwhile, there are currently four U.S. CVD orders on Brazilian steel products, which further undermines the petitioner's subsidy-related arguments and makes a stronger case against using Brazil as a surrogate country.[178]

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[174] *Id.* 4-5 (citing *Fish Fillets 11-12* PDM at 14; *Chlorinated Isocyanurates China Final AR* IDM at Comment 1; and *Notice of Final Determination of Sales at Less Than Fair Value: Manganese Metal from the People's Republic of China*, 60 FR 56045 (November 6, 1995) (*Manganese Metal China Final*), and accompanying IDM at Comment 1).
[175] *Id.* at 6-7 (citing *Yingqing v. United* States, 195 F. Supp. 3d 1299, 1306-07 (CIT 2016) (*Yingqing*); Certain *Steel Nails from the People's Republic of China; Final Results of Third Antidumping Duty Administrative Review; 2010-2011*, 78 FR 16651 (March 18, 2013) (*Steel Nails China Final AR3*), and accompanying IDM at Comment 1C; and *Certain Steel Nails from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2012-2013*; 80 FR 18816 (April 8, 2015) (*Steel Nails from China 2012-2013 Final*), and accompanying IDM at Comment 1).
[176] *See* Modern Heavy's Rebuttal Brief at 9-10 (citing 19 CFR 351.523).
[177] *Id.* at 10 (citing *Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Negative Determination of Critical Circumstances*, 73 FR 40480 (July 15, 2008) (*OTR Tires from China CVD Final Determination*), and accompanying IDM at Comment 2).
[178] *Id.* at 10-11 (citing *Countervailing Duty Order; Certain Heavy Iron Construction Castings from Brazil*, 51 FR 17786 (May 15, 1986); *Iron Construction Castings from Brazil, Canada, and the People's Republic of China: Continuation of Antidumping Duty Orders and Countervailing Duty Order*, 82 FR 1699 (January 6, 2017); *Notice of Countervailing Duty Orders: Carbon and Certain Alloy Steel Wire Rod from Brazil and Canada*, 67 FR 64871 (October 22, 2002); *Carbon and Certain Alloy Steel Wire Rod from Brazil, Indonesia, Mexico, Moldova, and Trinidad and Tobago: Continuation of Antidumping and Countervailing Duty Orders*, 79 FR 38008 (July 3, 2014); *Certain Cold-Rolled Steel Flat Products from Brazil, India, and the Republic of Korea: Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order (the Republic of Korea) and Countervailing Duty Orders (Brazil and India)*, 81 FR 64436 (September 20, 2016) (*Cold-Rolled Steel Flat Products Brazil Final*

- Commerce should reject the petitioner's argument that Russia's recent NME status should make it unusable as a surrogate country. The petitioner argues that Commerce did not focus on freedom of capital movement or the ability to negotiate wages in its evaluation of Russia. However, clauses (i), (iii), (iv), and (v) of section 771(18)(B) of the Act address the freedom of movement of capital and clause (ii) addresses the ability to negotiate wage rates.[179] In *Steel Nails China Final AR3*, Commerce rejected a similar argument with respect to its selection of Ukraine as a surrogate country.[180]

- The petitioner argues that Russian steel prices should be rejected because they are generally lower when compared to prices in four potential surrogate countries (*i.e.* Brazil, Malaysia, Mexico, and Romania).[181] Commerce should reject this argument for several reasons. First, the petitioner omits import data from Kazakhstan, suggesting that Kazakhstan's import prices may be similar to Russia's import prices. Second, an identical analysis reveals that Brazilian prices are generally higher than the weighted-average prices from the four other surrogate countries.[182] The analysis demonstrated that the average deviation of Russian prices is 34 percent and the average deviation of Brazilian prices is 76 percent.[183] In addition, in *Steel Threaded Rod Prelim*, the U.S. domestic industry has proposed using Russia as the surrogate country.[184] For these reasons, the petitioner's argument should be rejected.

- The petitioner argues that the Russian financial statements are of poor quality because they do not adequately break out manufacturing labor costs. However, the record evidence demonstrates that the four financial statements analyzed in the *Preliminary Determination* (*i.e.*, ZOK JSC, ChZMK JSC, Kashira Steel, and ESK OJSC) contain two line items (*i.e.* "labor payment expense" and "contribution to social funds") that capture production labor costs.[185] Non-production labor cost is presumed to be included in "selling and distribution expenses" or "administrative expenses."[186] Commerce has relied on financial statements that contain only one line item for direct labor costs, indirect labor costs, or both and treated such costs as part of production labor cost.[187] Therefore, Commerce should reject the petitioner's argument that Russian financial statements are unusable because of how labor is reported.

- The petitioner argues that the Russian financial statements are also unusable because they are not contemporaneous. Commerce should reject this argument because court precedent

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CVD and CVD Order); and *Certain Hot-Rolled Steel Flat Products from Brazil and the Republic of Korea: Amended Final Affirmative Countervailing Duty Determinations and Countervailing Duty Orders*, 81 FR 67960 (October 3, 2016)).

[179] *Id.* at 12 (citing section 771(18)(B) of the Act).

[180] *Id.* (citing *Steel Nails China Final AR3* IDM at Comment 1).

[181] *Id.* at 13 (citing Petitioner's Case Brief at 17).

[182] *Id.* 13-15.

[183] *Id.* at 15.

[184] *Id.* at 15-16 (citing *Steel Threaded Rod Prelim* PDM at 7).

[185] *Id.* at 16 (citing Preliminary SV Memo at 10 and Exhibit 10).

[186] *Id.*

[187] *Id.* at 16-17 (citing *Certain Steel Nails from the People's Republic of China: Final Results of the Fourth Antidumping Duty Administrative Review*, 79 FR 19316 (April 8, 2014) (*Steel Nails China Final AR4*), and accompanying IDM at Comment 2).

indicates that "Commerce may invoke contemporaneity as a tie-breaking factor when choosing between equally reliable datasets" but cannot use it as the sole reason to dismiss a surrogate country.[188] In this case, the Brazilian and Mexican financial statements are not equally reliable and therefore, this argument should be rejected.

- Commerce should also reject the petitioner's argument that certain Russian financial statements are incomplete. The petitioner asserts that the financial statements from ChZMK JSC, Belebeevsky, and MMK-METIZ OJSC have information that appears to come from separate sources and page numbering anomalies. An examination of the financial statements reveals that they are complete, and the page numbering anomalies are trivial and do not impact the calculation of financial ratios. It is Commerce's practice to find financial statements complete and reliable when they contain trivial errors.[189] The petitioner asserts that Kashira Steel's financial statements are missing changes in equity and cash flow statements, but these do not impact the calculation of financial ratios. Lastly, the petitioner asserts that ESK OJSC lacks the production of comparable merchandise, but both the financial statements and Commerce affirm that it does produce comparable merchandise.[190] Neither Brazil nor Mexico provide adequate financial statements. In the case of Brazil, the company Empresa conducts many unrelated activities and also likely received subsidies from the government of Brazil.[191]

- The petitioner argues that the Russian Global Trade Atlas (GTA) data are no more specific than the Mexican and Brazilian GTA data because the HS descriptions at the six-digit level are the same for all three countries and the inputs categorized under the six-digit headings represent the majority of total material, by value. This argument should be rejected because, in fact, the materials under the 10-digit HTS categories represent, by value, an overwhelming majority of the total cost of material inputs for JCG and Modern Heavy. Therefore, it is important to use surrogate values resulting from 10-digit HTS subheadings in calculating normal value.

- Commerce should also reject the petitioner's arguments that steel products at the six-digit level are "relatively specific in terms of type and chemistry," that the difference at the 10-digit level relates to dimension only, and that there is no meaningful difference in the value of inputs when calculated at the six- and 10-digit level.[192] In the *Preliminary Determination*, the 10-digit subheadings Commerce applied to JCG and Modern Heavy's steel plates

[188] *Id.* at 18 (citing *Blue Field (Sichuan) Food Indus. Co. v. United States*, 949 F. Supp. 2d 1311, 1330 (CIT 2013) (*Blue Field*)).
[189] *Id.* at 18-19 (citing *Multilayered Wood Flooring from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2011-2012*, 79 FR 26712 (May 9, 2014) (*MLWF China Final 2011-2012 AR*), and accompanying IDM at Comment 2).
[190] *Id.* at 19 (JCG's and Modern Heavy's Letter, "JCG's and MHI's Second Surrogate Value Comments in the Antidumping Duty Investigation on Fabricated Structural Steel from the People's Republic of China," dated August 5, 2019 (JCG and Modern Heavy Second SV Comments), at Exhibit 5B).
[191] *Id.* at 20 (citing JCG's and Modern Heavy's Letter, "JCG's and MHI's Second Surrogate Value Rebuttal Comments in the Antidumping Duty Investigation on Fabricated Structural Steel from the People's Republic of China," dated August 15, 2019, at Exhibit 5 and Exhibit 5C).
[192] *Id.* at 21-22 (citing Petitioner's Case Brief at 27-30).

depended on chemistry, heat treatment, and dimensions.[193] JCG and Modern Heavy's steel plates are characterized by thickness and width. The cost of steel plates is a function of these two physical attributes and, therefore, it is important to use a tariff heading which covers a narrower range of thickness and width levels. The Russian tariff contains several HTS subheadings that more precisely fit the descriptions of JCG and Modern Heavy's steel plates and provide a better surrogate value to more accurately determine costs. Court precedent confirms the importance of Commerce's statutory objective of assigning the most accurate dumping margins.[194] The petitioner argues that it is unaware of when Commerce has found differences in dimensions to be a factor in determining commercial value, but there are, in fact, several cases where this occurred.[195]

- The petitioner argues that with respect to valuing H-sections, the Russian 10-digit HTS subheading is only more specific in terms of height. However, height is an important physical characteristic, and moreover, there is a significant variation in the average unit value of the two 10-digit subheadings compared to the six-digit heading. Therefore, using the Russian 10-digit subheading allows for a more accurate calculation.[196]

- The petitioner argues, with respect to angles and channels, that the Russian 10-digit HTS subheading 7216.50.9900 is a basket category that is not specific to inputs. However, the subheading is actually more product-specific because it excludes goods covered in HTS subheading 7216.50.1000 and 7216.50.9100 and, therefore, is more product-specific than 7216.50 and results in a more accurate surrogate value.[197]

- The petitioner argues, with respect to pipes, the 10-digit subheadings are no more accurate than Brazil's HS categories. However, the Russian tariff schedule breaks out the six-digit headings based on diameter ranges, while Brazil's method is unclear and references only one diameter parameter.[198]

- With respect to other inputs, the petitioner argues that those valued using the 10-digit Russian import statistics do not "confer a benefit in terms of specificity or accuracy to the margin calculation." Commerce should reject this argument because the Russian import statistics are more specific and yield more accurate surrogate values.[199]

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[193] *Id.* at 22-23 (citing Preliminary SV Memo at Exhibit 1; and JCG's and Modern Heavy's Letter, "JCG's and MHI's First Surrogate Value Comments in the Antidumping Duty Investigation on Fabricated Structural Steel from the People's Republic of China," dated July 15, 2019 (JCG and Modern Heavy First SV Comments), at Exhibit 11).
[194] *Id.* at 24 (citing *Shenzhen Xinboda Indus. Co. v. United States*, 279 F. Supp. 3d 1265, 1301 (CIT 2017) (*Shenzhen Xinboda*); and *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F. 3d 1370, 1379 (Fed. Cir. 2013)).
[195] *Id.* at 25 (citing *Utility Scale Wind Towers from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 77 FR 75992 (December 26, 2012) (*Wind Towers China Final*), and accompanying IDM at Comment 1).
[196] *Id.* (citing Petitioner's Case Brief at 30).
[197] *Id.* at 26 (citing Petitioner's Case Brief at 31).
[198] *Id.* at 26-27 (citing Petitioner's Case Brief at 32; JCG and Modern Heavy First SV Comments at Exhibit 11; and Petitioner Second SV Comments at Exhibit 1).
[199] *Id.* at 27 (citing Petitioner's Case Brief at 32).

- The petitioner's argument that Brazil is a more appropriate surrogate country than Russia is without merit.[200] The petitioner argues that Brazil's GNI is more comparable to China's GNI than Russia's GNI. However, as held in *Frozen Warmwater Shrimp Vietnam Final 2011-2012 AR*, there is no statutory requirement that Commerce select a surrogate country whose GNI is closest to the NME and that Commerce considers each of the surrogate countries on the list comparable in terms of economic development.[201] The petitioner argues that the record fails to support that Brazilian data are less reliable than Russian data. However, the evidence on the record and the fact that the petitioner's surrogate values are calculated using six-digit level HTS headings indicate that this argument is meritless.[202] Lastly, the petitioner's argument that Brazil's financial statements are contemporaneous and provide details to calculate financial ratios should be rejected because of the precedent set in *Blue Fields*, and the fact that the company conducts activities unrelated to the subject merchandise and is a likely recipient of subsidies.

- The petitioner argues that Mexico is also a more appropriate surrogate country than Russia. Commerce should reject this proposal for several reasons. First, similar to Brazil, the evidence on the record and the petitioner's calculated surrogate value based on six-digit level HTS headings indicate that the argument is meritless.[203] Second, the petitioner's calculated surrogate value based on the Mexican freight information on the record is only based on the cost and weight of a shipment and lacks information about the distance the subject merchandise travels to the U.S.-Mexico border.[204] Third, the sole financial statement from Grupo Carso does not provide a broad market average of financial ratios in comparison with the six Russian financial statements which are more reliable. Lastly, the ongoing U.S. AD investigation on subject merchandise from Mexico makes the country particularly unsuitable as a surrogate country in this investigation.[205]

Wison's Rebuttal Brief

- Commerce selects surrogate countries based on statutory criteria and on the availability and reliability of data.[206] Commerce should reject the petitioner's argument that Russia is unusable as a surrogate country because it is not economically comparable to China and its data are not reliable.[207]

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[200] *Id.* at 27-29 (citing Petitioner's Case Brief at 33-36).
[201] *Id.* at 28 (citing *Certain Frozen Warmwater Shrimp from the People's Republic of China: Final Results of Administrative Review; 2011-2012*, 78 FR 56209 (September 12, 2013) (*Frozen Warmwater Shrimp Vietnam Final 2011-2012 AR*), and accompanying IDM at Comment 1A).
[202] *Id.* (citing Petitioner's Case Brief at 35; and Petitioner's Letter, "Certain Fabricated Structural Steel from the People's Republic of China: Petitioner's Initial Surrogate Value Comments," dated July 15, 2019 (Petitioner First SV Comments), at Exhibit 1).
[203] *Id.* at 29 (citing Petitioner's Case Brief at 37-38; and Petitioner First SV Comments at Exhibit 1).
[204] *Id.* 29-30 (citing Petitioner's Case Brief at 38; and Petitioner Second SV Comments at Attachment 1).
[205] *Id.* at 30.
[206] *Id.* at 3 (citing section 773(c)(4) of the Act; and Import Administration Policy Bulletin 04.1: Non-Market Economy Surrogate Country Selection Process (March 1, 2004)).
[207] *See* Wison's Rebuttal Brief at 3-4.

- Commerce placed Russia on a list of possible surrogate countries, which, as precedent indicates, means that Russia is economically comparable to China.[208] In addition, in other proceedings, Commerce has determined that Russia is economically comparable to China.[209] The petitioner argues that Commerce should use other sources, such as the Big Mac Index to determine economic comparability.[210] However, Commerce has rejected using alternative methods in past cases and the Courts have upheld such an approach.[211] Therefore, Commerce should reject the petitioner's arguments and continue its long-standing practice of using GNI data to determine economic comparability.

- The petitioner argues that Russian data are not usable because of issues with its customs data and its recent status as an NME country. However, Commerce carefully considered possible surrogate countries for China, and included Russia on a list where countries were flagged as being likely to have good data availability and quality.[212] With respect to Russia's customs data, the Courts have found that possible manipulation does not equate to affected import values.[213] Thus, Commerce should reject the petitioner's argument that Russian customs data are unusable for use as surrogate values.

- The petitioner argues that Russia's recent status as an NME should disqualify it from being used as a surrogate country. Commerce previously rejected similar arguments made in *Steel Nails China Final AR3* with respect to using Ukraine as a surrogate country.[214] Commerce made the decision to change Russia's status to a market economy and there is no evidence that demonstrates that the surrogate values on the record are distorted.[215] Therefore, Commerce should reject the petitioner's argument.

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[208] *Id.* at 4 (citing Surrogate Country Letter; *Certain Kitchen Appliance Shelving and Racks from the People's Republic of China: Antidumping Duty Administrative Review, 2010-2011*; 77 FR 61385 (October 9, 2012) (*Kitchen Appliance China 2010-2011 AR*), and accompanying PDM at 6; and *Ceramic Tile from the People's Republic of China: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Preliminary Negative Critical Circumstances Determination, and Postponement of Final Determination*, 84 FR 61877 (November 14, 2019) (*Ceramic Tile China Preliminary*), and accompanying PDM at 14).

[209] *Id.* (citing *1-Hydroxyethylidene-1, 1-Diphosphonic Acid from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review; 2016-2018*; 84 FR 33238 (July 12, 2019), and accompanying PDM at 6; and *Passenger Vehicle Tires 17-18 Prelim* PDM at 16-17).

[210] *Id.* at 5 (citing Petitioner Case Brief at 8).

[211] *Id.* (citing *Diamond Sawblades and Parts Thereof from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review: 2010-2011*, 77 FR 73417 (December 10, 2012), and accompanying PDM at 11; *Certain Kitchen Appliance Shelving and Racks from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review; 2011-2012*, 78 FR 54450 (September 4, 2013) (*Kitchen Appliance from China*), and accompanying PDM at 7; and *Jiaxing Brother Fastener Co. v. United States*, 961 F. Supp. 2d 1323, 1329 (CIT 2014) (*Jiaxing Brother Fastener*)).

[212] *Id.* at 6 (citing surrogate country list).

[213] *Id.* (citing *Certain Activated Carbon from the People's Republic of China: 'Final Results of Antidumping Duty Administrative Review; 2014-2015*, 81 FR 62088 (September 8, 2016), and accompanying IDM at Comment 2; and *Elkay Manufacturing Company v. United States*, 180 F. Supp. 3d 1245, 1255 (CIT 2016) (*Elkay Manufacturing*)).

[214] *Id.* at 7 (citing *Steel Nails China Final AR3* IDM at Comment 1).

[215] *Id.* at 7 (citing Memorandum to Faryar Shirzad from Albert Hsu et al, "Inquiry into the Status of the Russian Federation as a Non-Market Economy Country under the U.S. Antidumping Law," dated June 6, 2002).

- The petitioner argued that Commerce should remove Ukrainian imports from the Russian data.[216] Commerce should reject this argument since its long-standing practice has been to use the full GTA dataset and has found numerous times that Ukrainian import data is usable.[217] Additionally, in *High Pressure Steel Cylinders China Final*, Commerce determined that one country's steel industry's involvement in another country's steel industry does not necessarily distort import data and found that comparing country's imports at the six-digit level was unrevealing.[218]

- The petitioner argues that the financial statements for Brazil and Mexico are more usable than the Russian financial statements because they are contemporaneous. The petitioner further argues that the Russian financial statements do not sufficiently break out labor costs and that certain Russian financial statements contain missing pages.[219] These arguments should be rejected because Commerce found that the Russian financials provided sufficient detail to calculate surrogate values.[220] In addition, the financial statements for Brazil and Mexico are not usable because the companies have significant involvement in activities unrelated to the subject merchandise. It is Commerce's practice to use financial statements from companies producing the subject merchandise and to reject financial statements from companies that do not focus on producing the subject merchandise, including diversified companies, even if its statements are more contemporaneous.[221] In this case, the financial statements for the Mexican company Grupo Carso S.A. (Grupo Carso) and the Brazilian company Empresa Construtora Brasil S.A. (Empresa) demonstrate that neither company focuses primarily on fabricated structural steel.[222] In addition, it is highly likely that Grupo Carso and Empresa both received subsidies from their respective governments. Commerce is currently investigating Mexican subsidies in the fabricated structural steel industry and preliminarily determined that Swecomex, a subsidiary of Grupo Carso, received subsidies on

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[216] *Id.* at 8 (citing Petitioner's Case Brief at 40).
[217] *Id.* (citing *Polyethylene Terephthalate Film, Sheet, and Strip from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2010-2011*, 78 FR 35245 (June 12, 2013) (*PET Film, Sheet, and Strip China 2010-2011 AR*), and accompanying IDM at Comment 2; and *Small Diameter Graphite Electrodes from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review and Partial Rescission; 2012-2013*, 79 FR 15944 (March 24, 2014) (*Small Diameter Graphite Electrodes China 2012-2013 AR*), and accompanying PDM at 15).
[218] *Id.* (citing *High Pressure Steel Cylinders from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 77 FR 26739 (May 7, 2012), and accompanying IDM at Comment 1).
[219] *Id.* at 8-9 (citing Petitioner's Case Brief at 23).
[220] *Id.* at 9 (citing *Citric Acid and Certain Citrate Salts from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value*, 74 FR 16838 (April 13, 2009), and accompanying IDM at Comment 1).
[221] *Id.* at 9 (citing *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; 2015-2016*, 83 FR 35616 (July 27, 2018) (*CSP Cells China 2015-2016 AR*), and accompanying IDM at Comment 10; *Certain Kitchen Appliance Shelving and Racks from the People's Republic of China; 2010-2011; Final Results of Antidumping Duty Administrative Review*, 78 FR 5414 (January 25, 2013) (*Kitchen Appliance Shelving and Racks China 2010-2011 Final AR*), and accompanying IDM at Comment 1; and *Certain Polyethylene Terephthalate Resin from the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 80 FR 62024 (October 15, 2015) (*PET Resin China Preliminary*), and accompanying PDM at 13).
[222] *Id.* at 10 (citing Petitioner Second SV Comments at Exhibit 1 at 6, Exhibit 3 at 292, and Exhibit 7 at 2).

fabricated structural steel.[223] Commerce also repeatedly found that the government of Brazil provides subsidies to the steel industry.[224] Commerce's practice is to not rely on financial statements where there is evidence that countervailable subsidies have been received because it is not the best information with which to calculate surrogate values.[225] Commerce should reject the petitioner's arguments because the Russian financials, and the Malaysian financials that Wison provided, are preferable surrogate companies to those from Brazil and Mexico.[226]

- When choosing surrogate values, Commerce examines how specific they are to the major inputs. The surrogate values that the petitioner argues should be used from Brazil and Mexico contain major flaws and should not be used. The petitioner's comparison of unit price differences between the eight-digit and 10-digit tariff levels is an illogical way to demonstrate the difference between the Brazilian, Mexican, and Russian HTS tariff lines. The petitioner fails to provide the 10-digit HTS codes in the Brazilian and Mexican schedules and, therefore, it remains unclear what the descriptions in the schedules mean and if they comprise relevant tariff lines.[227] The petitioner also argues that because Commerce uses a "lack of detail" in valuing Wison's other inputs, that using a specific 10-digit tariff line does not improve the accuracy of the margin calculation.[228] However, using the 10-digit tariff category for Wison's largest input is important to ensuring that the margin is accurate. The petitioner also ineffectively translated the HTS tariff classifications and, therefore, provided multiple tariff lines with inaccurate or vague descriptions or incorrect codes.[229] Lastly, there are multiple ratios which lack support, such as the conversion ratio for oxygen.[230]

- The Russian import data, which is reported on a CIF basis (*i.e.*, cost, insurance, and freight), is preferable to use over the Brazilian and Mexican import data, which is reported on an FOB basis. Commerce's practice is to adjust import data reported on an FOB basis to be on a CIF basis and has found this makes a country more preferable as a choice for being a surrogate.[231] There are issues with the way in which the petitioner calculates the per unit ocean freight and

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[223] *Id.* 10-11 (citing *Certain Fabricated Structural Steel from Mexico: Preliminary Affirmative Countervailing Duty Determination, and Alignment of Final Determination with Final Antidumping Duty Determination*, 84 FR 33227 (July 12, 2019) (*Fabricated Structural Steel Mexico Preliminary CVD*); *see also* Petitioner Second SV Comments at Exhibit 7 at 2).
[224] *Id.* at 11 (citing *Notice of Amended Final Affirmative Countervailing Duty Determination: Carbon and Certain Alloy Steel Wire Rod from Brazil*, 67 FR 61071 (September 27, 2002); *Cold-Rolled Steel Flat Products Brazil Final CVD and CVD Order*; *Countervailing Duty Investigation of Certain Hot-Rolled Steel Flat Products from Brazil: Final Affirmative Determination, and Final Determination of Critical Circumstances, in Part*, 81 FR 53416 (August 12, 2016); and Wison's Letter, "Certain Fabricated Structural Steel from the People's Republic of China: Rebuttal Surrogate Value Comments," dated August 16, 2019 (Wison Second SV Comments) at 9-10).
[225] *Id.* at 10 (citing *PET Resin China Preliminary*; *see also CSP Cells China 2015-2016 AR* IDM at Comment 10).
[226] *Id.* at 11 (citing Wison SV Comments at Exhibit SV-3).
[227] *Id.* at 12 (citing Petitioner Second SV Comments at Exhibit 1 at 6 and Exhibit 4 at 334).
[228] *Id.* at 13 (citing Petitioner Case Brief at 32).
[229] *Id.* (citing Wison Second SV Comments at 7-8; *see also* Petitioner Second SV Comments at Exhibit 1 at 8 and Exhibit 4 at 341).
[230] *Id.* at 14 (citing Commerce's Letter, "Less-Than-Fair-Value Investigation of Certain Fabricated Structural Steel from the People's Republic of China: Rejection of Submission," dated August 22, 2019).
[231] *Id.* (citing *Certain Steel Racks and Parts Thereof from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value*, 84 FR 35595 (July 24, 2019), and accompanying IDM at Comment 1).

insurance, which makes the data unusable.[232] Therefore, using the import data from Brazil or Mexico, which needs to be adjusted, will be less accurate than using the import data from Russia.

Commerce's Position:

In the *Preliminary Determination*, we selected Russia as the surrogate country. As detailed below, we continue to find that Russia is the appropriate surrogate country with which to value factors in this investigation.

As explained in the *Preliminary Determination*,[233] when Commerce is investigating imports from an NME country, section 773(c)(1) of the Act directs it to base NV, in most circumstances, on the NME producer's FOPs, valued in a surrogate market economy (ME) country or countries considered to be appropriate by Commerce. Specifically, in accordance with section 773(c)(4) of the Act, in valuing the FOPs, Commerce shall utilize, "to the extent possible, the prices or costs of FOPs in one or more {ME} countries that are: (A) at level of economic development comparable to that of the {NME} country; and (B) significant producers of comparable merchandise."[234] As a general rule, Commerce selects a surrogate country that is at the same level of economic development as the NME unless it is determined that none of the countries are viable options because: (a) they either are not significant producers of comparable merchandise; (b) do not provide sufficiently reliable sources of publicly available surrogate value data; or (c) are not suitable for use based on other reasons.[235] Surrogate countries that are not at the same level of economic development as the NME country, but still at a level of economic development comparable to the NME country, are selected only to the extent that data considerations outweigh the difference in levels of economic development. To determine which countries are at a similar level of economic development, Commerce generally relies solely on per capita GNI from the World Bank's *World Development Report*.[236] In addition, if more than one country satisfies the two criteria noted above, Commerce narrows the field of potential surrogate countries to a single country (pursuant to 19 CFR 351.408(c)(2), Commerce "normally will value all factors in a single surrogate country") based on data availability and quality.

Consistent with our practice, and section 773(c)(4)(A) of the Act, we determined that Romania, Malaysia, Russia, Mexico, Brazil, and Kazakhstan were countries at the same level of economic development as China, based on the most current annual issue of *World Development Report*.[237] No party asserts that we should use a country not on this list.

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[232] *Id.* at 14.
[233] *See Preliminary Determination* PDM at 8-9.
[234] *See* Policy Bulletin 04.1.
[235] *See, e.g.*, *Certain Quartz Surface Products from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value, and Final Affirmative Determination of Critical Circumstances*, 84 FR 23767 (May 23, 2019) (*Quartz Surface Products from China*), and accompanying IDM at Comment 8.
[236] *See* Policy Bulletin 04.1.
[237] *See Preliminary Determination* PDM at 9; *see also* Surrogate Country Letter, which contains the Memorandum, "List of Surrogate Countries for Antidumping Investigations and Reviews from the People's Republic of China ('China')," dated August 2, 2018 (*i.e.*, the surrogate country list).

Section 773(c)(4)(B) of the Act requires Commerce, to the extent possible, to value FOPs in a surrogate country that is a significant producer of comparable merchandise. Neither the statute nor Commerce's regulations provide further guidance on what may be considered comparable merchandise. Among the factors we consider in determining whether a country is a significant producer of comparable merchandise is whether the country is an exporter of comparable merchandise. In order to determine whether the above-referenced countries are significant producers of comparable merchandise, we examined which countries on the surrogate country list exported merchandise comparable to the subject merchandise.[238] Consistent with our *Preliminary Determination*, we continue to find that information on the record indicates that Brazil, Mexico, Russia, and Malaysia are significant exporters of merchandise covered by the Harmonized Tariff Schedule of the United States (HTSUS) categories identified in the scope of this investigation, and are thus significant exporters of comparable merchandise.[239] Accordingly, consistent with our *Preliminary Determination*, we find that Brazil, Mexico, Russia, and Malaysia meet the significant producer of comparable merchandise prong of the surrogate country selection criteria, as provided in section 773(c)(4)(B) of the Act.[240] Further, no party challenges Russia as a producer of comparable merchandise and, indeed, we have financial statements from four Russian producers of fabricated structural steel on the record, which we used to calculate financial ratios for the *Preliminary Determination*; thus, we continue to find that Russia is a significant producer of identical merchandise.

If more than one potential surrogate country satisfies the statutory requirements for selection as a surrogate country, Commerce selects the primary surrogate country based on data availability and reliability.[241] When evaluating SV data, Commerce considers several factors, including whether the SVs are publicly available, contemporaneous with the POI, representative of a broad market average, tax- and duty-exclusive, and specific to the inputs being valued.[242] There is no hierarchy among these criteria.[243] It is Commerce's practice to carefully consider the available evidence in light of the particular facts of each industry when undertaking its analysis.[244]

In the *Preliminary Determination*, we found that parties placed complete data for Mexico, Brazil, and Russia, and limited data for Malaysia, on the record;[245] and that no party provided complete

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[238] *See Preliminary Determination* PDM at 10.
[239] *Id.*; *see also* Petitioner Surrogate Country Comments at 2-3 and Exhibits 1 and 2; and JCG's and Modern Heavy's Letter, "JCG's and MHI's Surrogate Country Comments in the Antidumping Duty Investigation on Fabricated Structural Steel from the People's Republic of China," dated June 14, 2019, at Exhibit 1, showing that, of the six countries on the surrogate country list, only Kazakhstan did not export subject merchandise during the POI.
[240] *See Preliminary Determination* PDM at 10.
[241] *See* Policy Bulletin 04.1; *see also, e.g.*, *Citric Acid and Certain Citrate Salts from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2013-2014*, 80 FR 77323 (December 14, 2015) (*Citric Acid from China 13-14 Final Results*).
[242] *See* Policy Bulletin 04.1.
[243] *See, e.g.*, *Certain Preserved Mushrooms from the People's Republic of China: Final Results and Final Partial Rescission of the Sixth Administrative Review*, 71 FR 40477 (July 17, 2006), and accompanying IDM at Comment 1.
[244] *See* Policy Bulletin 04.1.
[245] *See Preliminary Determination* PDM at 11; *see also* JCG and Modern Heavy First SV Comments; Petitioner First SV Comments; JCG and Modern Heavy Second SV Comments; Petitioner Second SV Comments; and Wison's Letter, "Certain Fabricated Structural Steel from the People's Republic of China: Surrogate Values Information," dated August 5, 2019 (Wison SV Comments).

surrogate value information for the other countries on the list (*i.e.*, for Kazakhstan or Romania), or argued in favor of using surrogate value information for any of the other countries.

Specifically, in the *Preliminary Determination*, we found that the Russian data constitutes the best available data for valuing respondents' FOPs because: (1) we have complete, specific Russian GTA data for each input used by the respondents; and (2) the Russian surrogate financial statements on the record are more reliable and are for four companies that produce fabricated structural steel, which is merchandise identical to the merchandise under consideration in this investigation.[246] Therefore, because complete surrogate value information is available from Russia and the financial statements from Russia are more reliable, we determined that the Russian data is the best available surrogate value data.[247] The factual record in this case has not changed. Nor have parties pointed to record evidence which is contrary to our findings for the *Preliminary Determination*. Therefore, we continue to find that Russia meets the criteria in section 773(c)(4) of the Act as being: (1) at a similar level of economic development to China; (2) a significant producer of both comparable and identical merchandise, Furthermore, we find that Russia has the best data availability. Thus, we continue to find that Russia is the best choice for the surrogate country in this investigation.

We disagree with the petitioner that Russia is not economically comparable to China for the purposes of use as a surrogate country. In the Surrogate Country Letter, we listed six countries Commerce considers comparable for China (*i.e.*, Russia, Brazil, Mexico, Malaysia, Romania, and Kazakhstan), based on per capita GNI. The petitioner argues that Brazil is not only more comparable than Russia when compared to China by GNI, but that, according to other metrics of economic development, Russia should not be considered comparable.[248] As an threshold issue, Commerce's practice is not to compare the comparability of the countries included on the surrogate country list.[249] As explained in the *Preliminary Determination*, pursuant to section 773(c)(4)(A) of the Act, both Russia and Brazil are considered to be at the same level of economic development as China.[250] Thus, they are not ranked and are considered equal in terms of economic comparability. Consequently, contrary to the petitioner's claim, for the purposes of surrogate country selection, Brazil is not more comparable than Russia to China in terms of economic development merely because Brazil's per capita GNI is closer to China's than is Russia's.

We further disagree with the petitioner that GDP, as measured on a PPP basis, or the Big Mac Index[251] should prevent Commerce from selecting Russia as a surrogate country. First,

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[246] *See Preliminary Determination* PDM at 11.
[247] *Id.*
[248] *See* Petitioner's Case Brief at 7-10 and 34.
[249] *See, e.g.*, *Certain Tool Chests and Cabinets from the Socialist Republic of Vietnam: Final Affirmative Determination of Sales at Less Than Fair Value*, 83 FR 15361 (April 10, 2018), and accompanying IDM at 11 ("Commerce considers all countries on the surrogate country list to be at the same level of economic development as Vietnam and does not use {GNI} alone as the basis for selecting among these six countries.").
[250] *See Preliminary Determination* PDM at 10.
[251] The International Monetary Fund describes the Big Mac Index as: "The Big Mac Index is a way of measuring {PPP} between different countries. By diverting the average national Big Mac prices to U.S. dollars, the same goods can be informally compared. The Big Mac can also be a good indicator for the individual purchasing power

Commerce has a long-standing practice of selecting economically comparable countries on the basis of absolute GNI, and its reliance on GNI is reasonable and consistent with the Act.[252] In our surrogate country memorandum we stated that "GNI is the primary indicator of a country's level of economic development."[253] The Courts have similarly upheld this practice,[254] and affirmed that Commerce's sole reliance on GNI is reasonable and lawful.[255] Moreover the petitioner has provided no legal basis to deviate from this practice. Instead, the petitioner points to PPP GDP to show that China's PPP GDP is only 63 percent that of Russia's. However, the petitioner fails to demonstrate how this is significant – particularly because we look to import prices for surrogate values.[256] In addition, the petitioner did not explain why it believes PPP GDP is a superior metric to nominal GDP or nominal GNI, especially in light of the fact that the majority of our surrogate values use import values – and import values should reflect GNI purchasing power on a consistent basis with the rest of the world, and not PPP where the market for locally traded goods, services, and land/property may be not reflect global commodity prices for purely domestic reasons.[257]

The petitioner also tries to refute Commerce's preliminary findings on economic comparability by pointing to the Big Mac Index. The petitioner argues that the Big Mac Index confirms that Russia is not economically comparable to China, because, of the 55 countries compared, Russia ranked last with a price for a Big Mac at $1.65 (compared to China's $3.05).[258] However, we agree with the respondents that the Big Mac Index is not a good indicator of economic comparability with which to identify surrogate countries. For example, the difference between Brazil ($4.55 on the Big Mac Index) and China is $1.50 – even greater than the $1.40 difference between Russia and China.[259] Moreover, the most comparable countries to China on the Big Mac Index are Hungary and Peru, which are ranked 56 and 86 on Commerce's preferred GNI metric, as compared to the countries on the surrogate country list which rank between 64 and 74.[260] Thus, the petitioner's argument that Russia is not comparable when taking into account

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of an economy since he exists worldwide in standard size, composition and quality." *See* Petitioner's Case Brief at 9.

[252] *See, e.g.*, *Magnesium Metal from the People's Republic of China: Final Results of the 2008-2009 Antidumping Duty Administrative Review of the Antidumping Duty Order*, 75 FR 65450 (October 25, 2010), and accompanying IDM at Comment 4.

[253] *See* Surrogate Country Letter at Attachment.

[254] *See Jiaxing Brother Fastener*¸ 961 F. Supp. 2d at 1329 ("Commerce's utilization of that otherwise consistent, transparent, and objective metric to identify and compare a country's level of economic development is, in the {C}ourt's view, a reasonable interpretation of the statute").

[255] *See, e.g.*, *Clearon Corporation v. United States*, No. 13-00073, 2014 WL 3643332 (CIT 2014) at 9 ("Kangtai first challenges Commerce's sole reliance on *per capita* GNI to identify economically comparable countries to {China}, arguing Commerce's reliance on the measure is unreasonable and contrary to law…The {C}ourt finds Kangtai's arguments unpersuasive, and Commerce's reliance on *per capita* GNI reasonable and in accordance with law.").

[256] *See* Surrogate Country Letter at Attachment ("PPP is purchase power parity; an international dollar has the same purchasing power over GNI as a U.S. dollar has in the United States.").

[257] *See* Petitioner's July 22, 2019 Rebuttal SV Comments at Exhibit 2 ("A nation's GDP at purchasing power parity (PPP) exchange rates is the sum value of all goods and services produced in the country valued at prices prevailing in the United States in the year noted.").

[258] *See* Petitioner's Case Brief at 8-9.

[259] *See* Modern Heavy's Rebuttal Brief at 5-6 (citing Petitioner's Case Brief at 9).

[260] *See* Surrogate Country Letter at Attachment.

PPP is contradictory, as it would also rule out the petitioner's preferred surrogate country (*i.e.*, Brazil). Thus, we continue to find that Russia is economically comparable to China based on per capita GNI, in accordance with our long-standing practice,[261] because per capita GNI is reported across almost all countries by an authoritative source (*i.e.*, the World Bank), and because Commerce finds that the per capita GNI represents the single best measure of a country's level of total income, and, thus, level of economic development.[262] No party has argued that Russia is not a significant producer of comparable merchandise. Thus, we continue to find that Russia satisfies the statutory requirements for a surrogate country, pursuant to section 773(c)(4) of the Act.

No party argued that Russia, Brazil, or Mexico were not significant producers of comparable merchandise. Thus, if potential surrogate countries have not been disqualified at this point in Commerce's analysis (by either failing to demonstrate economic comparability or significant production of comparable merchandise), Commerce next looks to the reliability and availability of SV data on the record to determine the most appropriate surrogate country.[263] Russia afforded the best overall data availability and reliability and Commerce preliminarily determined that Russia affords better quality financial statements information for use in calculation of surrogate financial ratios of those available from Brazil and Mexico, and thus selected Russia as the appropriate surrogate country.[264]

The petitioner insists that Russia is unsuitable as a surrogate country in this proceeding – and in an NME proceeding in in general – for a multitude of reasons, including: (1) Russia has only recently been a market economy and when Commerce graduated Russia in 2002 it focused solely on macro-economic factors instead of pricing freedom in the country; (2) the Russian market does not sufficiently act as a free market; (3) Russia is one of the most corrupt countries in the world and official or published prices of goods and services (including import prices) do not reflect true prices; (4) Russian prices, as calculated from official customs data, are not reliable because Russia has a history of underreported import values; (5) market prices for steel in Russia are significantly distorted due to overcapacity issues and the history of steel privatization in Russia, and thus import data for steel, as a result of both corruption and the distorted steel market, is not reliable for use as surrogate values for the primary inputs of fabricated structural steel; (6) record information regarding Russian surrogate value information is not more complete, specific, or reliable than available information for Brazil or Mexico; and (7) the Russian financial statements on the record do not allow for the calculation of CONNUM-specific labor and electricity costs, are not contemporaneous with the POI, relate to dissimilar products, and are incomplete. We will address each of the petitioner's specific arguments, in turn, below.

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[261] *See, e.g.*, *Kitchen Appliance from China* PDM at "Economic Comparability," unchanged in *Certain Kitchen Appliance Shelving and Racks from the People's Republic of China: Final Results and Partial Rescission of Antidumping Duty Administrative Review; 2011-2012*, 79 FR 3176 (January 17, 2014).
[262] *See Jiaxing Brother Fastener*, 961 F. Supp. 2d at 1329.
[263] *See, e.g.*, *Citric Acid from China 13-14 Final Results*.
[264] *See Preliminary Determination* PDM at 11.

As an initial matter, no party has requested a review of Russia's ME status. Commerce graduated Russia to ME status, effective April 1, 2002.[265] While the petitioner acknowledges that Commerce considers Russia to be an ME country, it claims that it is not suited to act as an ME surrogate country because when Commerce graduated Russia to ME status it did so solely on the basis of macro-economic factors.[266] The petitioner claims that Russia's legacy of a centrally planned economy continues to prevent Russia from operating as a market economy, and, thus, is unsuitable to act as a surrogate country to China because the prices are not representative of free market prices.[267] However, the petitioner is essentially claiming that Russia still functions as an NME (*i.e.*, the Russian economy is too distorted by government interference – or the legacy of government interference – to serve as a surrogate country) almost 17 years after it graduated to ME status. Section 773(c)(4) of the Act only directs Commerce to value the FOPs in one or more market economy countries that are economically comparable to the NME country and a significant producer of comparable merchandise. As noted above, Russia is considered to be a market economy by Commerce.[268] In making the 2002 determination that Russia was a market economy Commerce considered many factors, including the extent of government control over production, the extent of government control over the allocation of resources and over the price and output decisions of enterprises, etc.[269] Thus, we have not disqualified Russia as a potential surrogate country in this investigation based on the petitioner's arguments. We have also rejected a similar argument in another case regarding our decision to use Ukraine as a surrogate country.[270]

The petitioner points to low observed prices in Russia as compared to the rest of the world to show why Russia is unsuitable to act as a surrogate country in this proceeding. These low observed prices, the petitioner argues, are due to widespread corruption.[271] Transparency International's Corruption Perceptions Index calls Russia one of the most corrupt countries in the world, the petitioner argues.[272] Further, the petitioner claims, "neither, observed, official, nor published Russian prices of goods and services reflect their true prices, as they do not include under-the-table payments (or bribes) to acquire goods and services."[273] The petitioner goes on to claim that this is evident in the fact that Russia has a history of under-reported import prices, rendering Russian import data unreliable.[274] Specifically, the petitioner claims that mirror

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[265] *See* Memorandum, "Inquiry into the Status of the Russian Federation as a Non-Market Economy Country Under the U.S. Antidumping Law," dated June 6, 2002 (Russia Market Economy Memo); *see also Countervailing Duty Investigation of Certain Cold-Rolled Steel Flat Products From the Russian Federation: Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination*, 81 FR 49935 (July 29, 2016), and accompanying IDM at 3 n.4 and 8 (identifying that Russia is a market economy).
[266] *See* Petitioner's Case Brief at 13.
[267] *Id.* at 13-14.
[268] *See* Russia Market Economy Memo.
[269] *Id.*
[270] *See Certain Steel Nails from the People's Republic of China; Final Results of Third Antidumping Duty Administrative Review; 2010-2011*, 78 FR 16651 (March 18, 2013), and accompanying IDM at Comment 1.C.
[271] *See* Petitioner's Case Brief at 10.
[272] *Id.*; *see also* Petitioner July 22, 2019 SV Comments where the petitioner placed corruption rankings on the record for Russia. We note that the record lacks comparable data regarding corruption for Brazil and Mexico, the petitioner's other two proffered surrogate countries.
[273] *See* Petitioner's Case Brief at 10.
[274] *Id.* at 11.

statistics from Russian trade partners showing export values demonstrate that Russian import values are systematically undervalued. In addition, the petitioner contends that the rampant corruption impacts import values, due to grey customs schemes, where customs officials are bribed to allow importers to undervalue their imports, or misclassify their imports as other merchandise that has a smaller import duty. Thus, the petitioner argues that there are systemic issues with Russian customs data, which causes Russian SV data to be unreliable and otherwise deficient.[275]

Additionally, the petitioner contends that there exist distortions in two of the largest surrogate values in this proceeding: steel inputs and fabrication (*i.e.*, labor and overhead).[276] The petitioner recounts how under the centralized Soviet economy, the steel industry in Russia was allocated abundant resources, resulting in significant steel capacity. Though the steel mills were privatized, the petitioner argues that does not mean they operate like in a free market.[277] In addition, "cheap physical assets, little to no financing costs, and substantial excess capacity" drive down Russian steel prices, which imports must compete with, driving down import prices as well, claims the petitioner.[278] The petitioner argues that this is clearly demonstrated in six-digit HS categories for the main types of steel used for production of fabricated structural steel, where the Russian import values are consistently approximately 60 percent of the other surrogate countries values.[279] Moreover, the petitioner claims that subsidies and government intervention in three of the major inputs for steel production (*i.e.*, natural gas, freight, and financing) further distort the Russian steel market.[280]

We agree with the respondents, and do not find that the record demonstrates that the Russian data are unreliable due to corruption, customs issues, and supposed distortions in the steel sector. In previous instances, Commerce has rejected arguments that a country's entire customs statistics are unusable and render that country unsuitable to act as the primary surrogate country. For example, in *Steel Nails from China 2012-2013 Final*, an interested party pointed to U.S. Trade Representative (USTR) reports stating that the Thai Customs authority manipulates customs data, as a reason for Commerce to reject Thailand as a surrogate country.[281] Specifically, we made the following statement:

> With regard to Xi'an Metals concerns over the reliability of the Thai import data as outlined in the USTR reports, we disagree. In two recent cases…{Commerce} determined that these USTR reports do not make Thai import data unreliable, and we declined to conclude that all Thai import data should be rejected due to the reports. With regard to the USTR reports, we explained that although "the United States has expressed concerns over the practices of Thailand's Customs Department officials, we cannot conclude from{the} report that the entirety of the Thai import should, therefore, be rejected as unreliable." The report does not

[275] *Id.* 11-12.
[276] *Id*. at 14.
[277] *Id*. at 15.
[278] *Id.* at 16.
[279] *Id.* at 17.
[280] *Id.* at 18-20.
[281] *See Steel Nails from China 2012-2013 Final* IDM at Comment 1.

> address any of the raw material inputs that are consumed by the respondents in this administrative review but instead presents concerns with respect to the practices of Thailand's Customs Department officials. As a result, {Commerce} cannot conclude from this report that the entirety of the Thai import data should be rejected.[282]

Likewise, in this case, the reports and data provided by the petitioner do not address specific raw material inputs. Rather, the petitioner placed multiple news articles and publications on the record discussing Russian corruption, government intervention, imports, and the steel industry.[283] However, these articles do not contain data linking corruption/government intervention and distorted import values for the specific inputs to produce fabricated structural steel. The only data-driven article cited by the petitioner as evidence with respect to potentially inaccurate or distorted Russian import values is from 2007, and uses data collected from 2000-2005 (*i.e.*, 13 plus years prior to the POI of the instant proceeding).[284] This study discusses various grey import schemes and the quantity of Russian imports affected by them. However, we find this study to be irrelevant for two reasons. First, the article does not address any of the inputs specific to the respondents, and, thus, we have no evidence that the Russian imports used to value the respondents' inputs are subject to the distortions caused by grey import schemes. Instead, the main items the study concludes are subject to grey import schemes appear to be consumer items. Second, given the age of the study and its underlying data, we cannot assume that the data are necessarily an accurate reflection of the investigation period.[285] As a result, and similar to our findings in *Steel Nails from China 12-13 Final Results*, we cannot conclude from this report that the entirety of the Russian import data should be rejected. Moreover, the CIT has upheld Commerce's findings that reports, such as the one proffered by the petitioner, is not enough to rule out the import data for a potential surrogate country.[286]

With respect to the petitioner's arguments that the Russian steel sector has significant excess capacity, does not operate under free market principles, and distorts steel prices within Russia, we disagree. The petitioner has failed to provide any evidence that over-capacity in the steel industry, or within Russia, has had a downward effect on the price of Russian steel imports to a greater extent than for other surrogate country candidates.

Instead, the petitioner benchmarks Russian prices for certain six-digit HS codes that represent some of the major inputs in fabricated structural steel to the prices in other potential surrogate countries.[287] This information merely demonstrates that the Russian import values are, in general, lower than the import values in the other potential surrogate countries. However, contrary to the petitioner's arguments, the mere fact that the average unit values (AUVs) of imports for these HS codes in Russia are lower than the AUVs of imports for these HS codes in

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[282] *Id.* (citations omitted).
[283] *See* Petitioner July 22, 2019 Rebuttal SV Comments.
[284] *Id.* at Exhibit 13.
[285] The period of investigation is July 1, 2018 through December 31, 2018.
[286] *See Elkay Manufacturing*, 180 F. Supp. 3d at 1255 ("{t}he record evidence of manipulation of customs values does not rise to such a level that Commerce was left with no choice but to foreclose any use of {the particular country's} import data to determine a surrogate value for a production input.").
[287] *See* Petitioner's Case Brief at 16-17.

other potential surrogate countries does not, in and of itself, demonstrate that the data themselves are somehow flawed or aberrational.

While the petitioner implies that "lower" is the same as "less accurate," there is no evidence on the record to support such a conclusion. The mere fact that a value is lower than others on the record does not demonstrate that the value in question is aberrational.[288] Indeed, when we examine the import data on the record for the six HS codes the petitioner supplies for Russia, we find that these imports were in commercially significant quantities, from multiple countries, and occurred in multiple months in the period.[289] Thus, we find nothing unusual about the import data which would call into question its reliability.[290] Accordingly, we find that the Russian AUVs are not aberrational merely by virtue of being lower than the other potential surrogate countries' AUVs. Courts have held that a party needs to provide "specific evidence" that a value is aberrational, and affirmed Commerce's practice not to find values aberrational merely by being higher (or in the instant case, lower) than other values.[291] Here, the petitioner avers that the Russian AUVs are approximately 60 percent of the other potential surrogate countries' AUVs. On its face, that cannot be considered to be distorted or aberrational without significant "specific evidence" demonstrating the aberrational nature of these values, which the petitioner has not provided with any sort of pertinent quantitative analysis.

Additionally, while Russia's average AUV for these six HS codes are on average 66 percent of the simple average of the other potential surrogate countries, Brazil's average AUV is on average 176 percent of the simple average of the other potential surrogate countries.[292] Accordingly, by the petitioner's own reasoning, Brazilian surrogate value data is even more distorted than the Russian data. As such, we find that the petitioner has failed to make a compelling argument that the Russian import data, in whole or in part, is aberrational, such that Commerce should instead select Brazil.

The petitioner also points to evidence of government subsidies within Russia for freight, natural gas, and financing to attempt to substantiate its claims that steel prices in Russia are distorted, and notes that Commerce has previously rejected surrogate countries for use "if their data on the primary inputs is distorted."[293] Here, the petitioner relies upon conclusory assertions, rather than any specific data, to support its allegations. The petitioner has not provided sufficient evidence to prove distortions to the cost of production of steel, much less fabricated structural steel (*i.e.*, a downstream product), in Russia. The petitioner has not placed any data on the record demonstrating the effect of these subsidies on the domestic price of steel production in Russia. In addition, the petitioner has not placed any evidence on the record to demonstrate that these subsidies have been passed on to the consumers of Russian steel through lowered prices, a

[288] *See, e.g.*, *Quartz Surface Products from China* IDM at Comment 10, stating "merely being a larger value than others on the record does not demonstrate that the value in question is aberrational."
[289] *See* Preliminary SV Memo at Exhibit 3.
[290] *Id.*
[291] *See Trust Chem Co. Ltd. v. United States*, 791 F. Supp. 2d 1257, 1263-64 (CIT 2011) (*Trust Chem*).
[292] *See* Modern Heavy's Rebuttal Brief at 13-15 (citing Petitioner's Case Brief at 17).
[293] *See* Petitioner's Case Brief at 18-20 (citing *Pneumatic Tires 11-12* PDM; and *Fish Fillets 11-12* PDM at 13-14).

distinction that is necessary to show distortion in the price of steel within Russia.[294] Further, in this case, we are using import data, not domestic purchase data, for steel. Accordingly, because the petitioner has not provided sufficient evidence, we find that the Russian import prices for steel are not distorted due to alleged subsidies for natural gas, financing, and freight.[295] Moreover, Commerce's practice is to exclude data from consideration only when the record evidence demonstrates that the alleged subsidy programs constituted countervailable subsidies.[296] In this case, there is also no record evidence that the subsidies alleged by the petitioner constitute countervailable subsidies.

The petitioner also argues that the Russian data are no more specific or reliable than the Brazilian or Mexican data. Specifically, the petitioner argues that at the six-digit level, the level at which the vast majority of the respondents' inputs were valued, the HS codes are standardized between countries, and, thus, the Russian data are no more specific than the Brazilian or Mexican data at this level.[297] For the remaining SVs valued on a ten-digit level, the petitioner contends that the differences at this level only relate to dimensions (*i.e.*, width, thickness, height, diameter, etc.) for the steel inputs, which do not translate to meaningful impacts on price, as previously determined by Commerce.[298] The petitioner compares the price differences between multiple ten-digit Russian HS codes (with the same first six digits) used to value the respondents' inputs, concluding that the negligible difference in certain HS codes demonstrates that the ten-digit HS codes are not more specific. Finally, the petitioner notes that for certain six-digit HS codes, the Mexican and Brazilian HS codes also distinguish on the basis of dimensions.[299]

We disagree with the petitioner that the added specifications of dimensions in the descriptions of the Russian HS codes do not provide more specificity to the Russian data. Not only does the petitioner select only certain HS codes which support its arguments,[300] but it is also unclear which numerical comparisons the petitioner is making. For example, the petitioner compares the price difference between certain ten-digit HS codes beginning with 7216.33 and 7216.50.[301] These HS codes were used in the *Preliminary Determination* to value Modern Heavy's and JCG's H-sections inputs, and Modern Heavy's angle steel and channel steel inputs.[302] However, comparing two ten-digit HS codes, where the beginning six digits are not the same, is fundamentally incorrect as the differing six digits indicate that these products are not necessarily

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[294] *See OTR Tires from China CVD Final Determination* IDM at Comment 2 ("{w}hile subsidies unquestionably benefit their recipients, it is by no means certain that those recipients automatically respond to subsidies by lowering their prices, *pro rata*, as opposed to investing in capital improvements, retiring debt, or any number of uses.").
[295] We also note that the source documents provided by the petitioner to substantiate its allegations with respect to subsidies were not authoritative sources and do not demonstrate clear benefits to steel producers, or consumers, in Russia. *See* Petitioner's First Rebuttal SV Comments at Exhibits 14-22; *see also* Modern Heavy's Rebuttal Brief at 8-10 (citing Petitioner's Case Brief at 18-20; and *OTR Tires from China CVD Final Determination* IDM at Comment 2).
[296] *See, e.g.*, *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results of the New Shipper Review*, 77 FR 27435 (May 10, 2012), and accompanying IDM at Comment I.
[297] *See* Petitioner's Case Brief at 26-27.
[298] *Id.* at 27 (citing *CWP from Korea 10-11 Final Results* IDM at Comment 6).
[299] *Id.* at 32.
[300] *Id.* at 28-33.
[301] *Id.* at 31.
[302] *See* Preliminary SV Memo at Exabit 1.

comparable. Each six-digit category is a distinct product that cannot be benchmarked against a different six-digit HS category. As such, we note that the Russian HS codes beginning with 7216.33 provide the following comparison:[303]

Russian HS Code	Description	Surrogate Value (USD/kg)
7216.33	H Sections Of Iron Or Non-Alloy Steel, Simply Hot-Rolled, Hot-Drawn Or Extruded, 80Mm Hi Or More	0.7719
7216.33.1000	H Sections Of Iron Or Non-Alloy Steel, Simply Hot-Rolled, Hot-Drawn Or Extruded, Of A Height >= 80 Mm But <= 180 Mm	0.8271
7216.33.9000	H Sections Of Iron Or Non-Alloy Steel, Simply Hot-Rolled, Hot-Drawn Or Extruded, Of A Height > 180 Mm	0.7664

The largest difference between the six-digit and ten-digit level is between 7216.33 and 7216.33.1000, with a difference of $0.0552 per kg, or 7.15 percent. At the ten-digit level, the difference between 7216.33.1000 and 7216.33.9000 is $0.0607 per kg, or 7.92 percent. When looking at it purely by dollar value, it is easy to assume that a five or six cent difference in price based on the difference in height of the H sections is not significant. However, as a percentage, a 7.15 percent difference between the six- and ten-digit levels, and a 7.92 percent difference at the ten-digit level, is clearly significant when it is applied to multiple metric tons of steel inputs. Another example is Russian HS codes beginning with 7304.39, which were used to value certain seamless tube and pipe inputs of the respondents:[304]

Russian HS Code	Description	Surrogate Value (USD/kg)
7304.39	Tubes, Pipes And Hollow Profiles, Seamless, Of Circular Cross-Section, Of Iron Or Non-Alloy Steel, Not Cold-Drawn Or Cold-Rolled (Cold-Reduced)	1.6373
7304.39.9209	Pipes with cut thread or on which there can be cut threaded (gas pipes), other, with an external diameter not over 168.3 mm	1.8589
7304.39.9300	Tubes, Pipes And Hollow Profiles, Seamless, Of Circular Cross-Section, Of Iron Or Non-Alloy Steel, Not Cold-Drawn Or Cold-Rolled (Cold-Reduced), Of An External Diameter Of > 168,3 Mm But <= 406,4 Mm	1.3613

Again, there are large differences between the six- and ten-digit levels, and within the ten-digit level itself. The added specificity provided by the ten-digit level translates into significant and meaningful price differences, contrary to the petitioner's claim. Thus, we do not believe that

[303] *Id.* at Exhibit 3.
[304] *Id.* at Exhibits 1 and 3.

CWP from Korea 10-11 Final Results is instructive on this matter. Moreover, in other instances Commerce has recognized the importance of steel dimensions and their effect on price.[305] Further, we note that the petitioner is not claiming the Russian data are not more specific; rather, the petitioner argues that it does not translate into meaningful differences in price.[306]. However, as explained above, when Commerce is considering SV data, it considers several factors including whether the SVs are specific to the inputs being valued.[307] Thus, it can be reasoned that a more specific SV (*i.e.*, an HS code at the ten-digit level) would be more specific to the input being valued, and therefore preferable to a less-specific six-digit HS code.[308]

In addition, we disagree with the petitioner that the Mexican or Brazilian HS codes are as specific at the six-digit level as the Russian ones are at the ten-digit level, because certain HS codes also factor in dimension at the six-digit level. By virtue of the HS code being the same across countries at the six-digit level, any HS code for which dimension is specified at the six-digit level for Brazil or Mexico will also be specified at the six-digit level for Russia. The Brazilian or Mexican data at the six-digit level and the Russian data at the six-digit level are equally specific, as previously acknowledged by the petitioner.[309] However, at the ten-digit level, the Russian data become more specific, as do the Mexican and Brazilian data.[310] Nonetheless, the petitioner has not demonstrated that the Mexican or Brazilian data at the six-digit HS level are equally, much less more, specific than the Russian data at the ten-digit HS level.

The petitioner notes that Commerce has previously rejected surrogate countries when parties have supplied SV data from sources other than the Global Trade Atlas (GTA), and here the respondents failed to place GTA data on the record.[311] The petitioner argues that for the *Preliminary Determination*, Commerce broke from its practice and placed the GTA data on the record itself. The petitioner is incorrect that the respondents failed to place GTA data on the record. We note that Wison placed GTA data on the record to value its inputs.[312] In addition, while we note that Modern Heavy and JCG did not place GTA data on the record for the *Preliminary Determination*, opting to place TDM data on record instead, the source of the TDM

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[305] *See, e.g.*, *Wind Towers China Final* IDM at Comment 1 ("{T}he Department has also found that Thai import data allows the Department to value each respondent's steel plate, which accounts for a significant portion of each company's normal value, more accurately than either the South African or Ukrainian data because the Thai data is most specific to the size and chemistry of the respondents' steel plate. Specifically, the Thai tariff schedule classifies imports into four carbon content ranges and three width ranges. In contrast, the South African and Ukrainian tariff schedules do not classify steel plate imports by levels of carbon content and the South African tariff schedule provides only a single tariff item for non-alloy steel plate in excess of 10 mm.").
[306] *See* Petitioner's Case Brief at 27.
[307] *See* Policy Bulletin 04.1.
[308] *See, e.g.*, *Shenzhen Xinboda* ("the overarching principle which *Longkou* repeats is that 'a surrogate value must be as representative of the production process in the {non-market economy} country as is practicable, if it is to achieve the statutory objective of assigning dumping margins as accurately as possible.'").
[309] *See* Petitioner's Case Brief at 26.
[310] We note that the Brazilian and Mexican tariff schedules go to the eight-digit level at their most specific. *See* Petitioner First SV Comments at Exhibits 1-2 and 11-12; *see also* Petitioner Second SV Comments at Exhibits 1-5.
[311] *See* Petitioner's Case Brief at FN 71 (citing *Chlorinated Isocyanurates 17-18 Preliminary Results* PDM at 15).
[312] *See* Wison's SV Comments at Exhibit SV-2.

data is the Federal Customs Service of Russia,[313] the same source used by GTA for its import data. We placed full and complete GTA data on the record for the *Preliminary Determination*, which was necessitated by the fact that we determined it was appropriate to value the SVs with data for the calendar year 2018, rather than merely the POI, and no party had placed SV data on the record for the whole of calendar year 2018.[314]

Thus, consistent with our *Preliminary Determination*,[315] we find that Russia provides the best available data for valuing the respondents' FOPs because we have complete, specific Russian GTA data for each input used by the respondents.

In selecting financial statements for the purposes of calculating financial ratios, Commerce's policy is to use data from ME surrogate companies based on the "specificity, contemporaneity, and quality of the data."[316] In accordance with 19 CFR 351.408(c)(4), Commerce normally will use non-proprietary information gathered from producers of identical or comparable merchandise in the primary surrogate country to value manufacturing overhead, general expenses, and profit.[317] Additionally, Commerce has a regulatory preference to value all FOPs from a single surrogate country.[318] As stated above, we have selected Russia as our primary surrogate country – in part, due to the availability of multiple financial statements from producers of identical merchandise and because we find that it best meets our selection criteria. For the purposes of selecting surrogate financial statements, Commerce examines how similar a proposed surrogate producer's production experience is to the NME producer's experience.[319] Commerce, however, is not required to "duplicate the exact production experience of" an NME producer, nor must it

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[313] *See* JCG and Modern Heavy First SV Comments at Exhibit 2.

[314] *See Preliminary Determination* PDM at FN 147 ("Commerce's normal practice is to use data that is contemporaneous with the POI to calculate SVs; however, because the respondents' sales are project-based and most of the production took place throughout 2018, we find it appropriate to capture data from the entire year of 2018 instead."); *see also* Preliminary SV Memo at 2.

[315] *See Preliminary Determination* PDM at 11.

[316] *See, e.g.*, *Pure Magnesium from the People's Republic of China: Final Results of the 2008-2009 Antidumping Duty Administrative Review of the Antidumping Duty Order*, 75 FR 80791 (December 23, 2010), and accompanying IDM at Comment 2; and *Notice of Final Determination of Sales at Less Than Fair Value, and Affirmative Critical Circumstances, in Part: Certain Lined Paper Products from the People's Republic of China*, 71 FR 53079 (September 8, 2006), and accompanying IDM at Comment 1.

[317] *See Certain frozen Warmwater Shrimp from the People's Republic of China: Notice of Final Results and Rescission, in Part, of 2004/2006 Antidumping Duty Administrative and New Shipper Reviews*, 72 FR 52049 (September 12, 2007), and accompanying IDM at Comment 2.

[318] *See* 19 CFR 351.408(c)(2); *Clearon Corporation v. United States*, No. 08-00364, 2013 WL 646390 (CIT 2013) at 6 ("{T}he court must treat seriously {Commerce's} preference for the use of a single surrogate country."); *see also Fine Furniture (Shanghai) Ltd. v. United States*, Slip Op. 18-163 at 42 (CIT 2018); and *Jiaxing Brother Fastener Co. v. United States*, 822 F. 3d 1289, 1302 (Fed. Cir. 2016) where the court affirmed Commerce's preference to source SVs from a single surrogate country.

[319] *See, e.g.*, *Frontseating Service Valves from the People's Republic of China: Final Results of the 2008-2010 Antidumping Duty Administrative Review of the Antidumping Duty Order*, 76 FR 70706 (November 15, 2011) (*FSV 08-10 Final Results*), and accompanying IDM at Comment 1; and *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) (*OCTG from China Final Determination*), and accompanying IDM at Comment 13.

undertake "an item-by-item analysis in calculating factory overhead."[320] Further, the Courts have recognized Commerce's discretion when choosing appropriate companies' financial statements to calculate surrogate financial ratios.[321] Commerce generally prefers to rely on more than one surrogate financial statement, and, upon examining the financial statements submitted by interested parties on the record of this investigation, and taking parties' arguments into consideration, we have determined that four of the Russian statements for producers of fabricated structural steel (*i.e.*, ZOK Joint-Stock Company (ZOK JSC), Chelyabinsk Steel Structural Plant Joint-Stock Company (ChZMK JSC), Kashira Steel Structures and Boiler Building Plant Joint Stock Company (Kashira Steel), and Energostalkonstrucktsiya Open Joint-Stock Company (ESK OJSC)) represent the best information for calculating surrogate financial ratios for the final determination of this investigation.

ZOK JSC, ChZMK JSC, Kashira Steel, and ES OJSC all produce fabricated structural steel (*i.e.*, identical merchandise),[322] and, accordingly, a producer of identical merchandise is representative of an NME producer of fabricated structural steel's experience for the purpose of selecting surrogate financial statements and calculating surrogate financial ratios in the instant case. Additionally, these companies' financial statements are completely translated, publicly available, show a profit before taxes, do not contain countervailable subsidies, are sufficiently detailed to calculate financial ratios, and are from the primary surrogate country.[323]

The petitioner argues that there are a litany of issues with the Russian surrogate financial statements on the record; however, many of the issues the petitioner points to are irrelevant because they pertain to the financial statements not being used for the final determination (*i.e.*, the financial statements for Belebeevsky Zavod Avtonormal Joint-Stock Company and MMK-METIZ Magnitogotsk Hardware Calibration Plant OJSC). In that regard, we agree with the petitioner and we note that we did not propose to use those financial statements for the *Preliminary Determination* for precisely the reasons identified by the petitioner.

The petitioner argues that none of the Russian financial statements are contemporaneous, and that Commerce has regularly rejected countries for use as the surrogate country when there are no contemporaneous financial statements.[324] In addition, the petitioner argues that the financial statements for ChZMK JSC and Kashira Steel are missing pages and/or disclosures such as the Statement of Changes in Equity and Cash Flow statements, and that Commerce has previously

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[320] *See, e.g.*, *FSV 08-10 Final Results* IDM at Comment 1; *Certain Steel Wheels from the People's Republic of China: Notice of Final Determination of Sales at Less Than Fair Value and Partial Affirmative Final Determination of Critical Circumstances*, 77 FR 17021 (March 23, 2012), and accompanying IDM at Comment 3; and *OCTG from China Final Determination* IDM at Comment 13 (citing *Nation Ford Chemical Company v. United States*, 166 F. 3d 1373, 1377 (Fed. Cir. 1999) (*Nation Ford*); and *Magnesium Corp.*, 166 F. 3d 1364, 1372).

[321] *See, e.g.*, *FMC Corp. v. United States*, 27 CIT 240, 251 (CIT 2003) (*FMC Corp. I*) (finding that Commerce "has wide discretion in choosing among various surrogate sources"), affirmed in *FMC Corp. v. United States*, 87 Fed. Appx. 753 (Fed. Cir. 2004) (*FMC Corp. II*).

[322] *See* JCG and Modern Heavy First SV Comments at Exhibit 10; and JCG and Modern Heavy Second SV Comments at Exhibits 1, 2, and 5.

[323] *Id.* We note that the petitioner contends that certain financial statements are incomplete and none of the chosen financial statements are contemporaneous with the POI. We have addressed these comments, *infra*.

[324] *See* Petitioner's Case Brief at 23-24 (citing *Passenger Vehicle Tires 17-18 Prelim* PDM; *Hardwood Plywood Prelim* PDM; and *Multilayered Wood Flooring 12-13 Prelim* PDM).

refused to rely on incomplete financials.[325] Further, the petitioner argues that while ESK OJSC produces fabricated structural steel, the main business operations of the company is power transmission towers.[326] Finally, the petitioner argues that the Russian financial statements are not reliable because they preclude the separate valuation of CONNUM-specific labor costs, and instead capture labor within the surrogate financial ratios.[327] The petitioner contends that Commerce has previously rejected potential surrogate countries if their financial statements were not sufficiently detailed to break out manufacturing overhead.[328] Labor, the petitioner states, is one of the largest inputs in the production of fabricated structural steel, and due to the wide fluctuations in the amount of labor required based on the project, it is a "fundamental prerequisite" for any surrogate financial statement to be able to break out labor so that it is valued outside the surrogate financial ratios.[329] Thus, the petitioner asserts that the Russian financial statements are inferior to those of Brazil and Mexico and should be rejected.[330]

Section 773(c)(1)(B) of the act directs Commerce to value FOPs based on the "best available information." Further, the Courts have affirmed that "Commerce has broad discretion in deciding what constitutes the best available information," given that the term "best available information" is not defined by statute and provided that "the overall purpose of the statute…is to calculate accurate dumping margins."[331] Commerce's practice and preference is also to value all FOPs in a single surrogate country, when practicable.[332]

In accordance with section 773(c)(1)(B) of the Act, and in light of the discretion Commerce possesses in choosing the appropriate surrogate financial statements, we have determined that the Russian financial statements of ZOK JSC, ChZMK JSC, Kashira Steel, and ESK OJSC, constitute the best available information with which to value the surrogate financial ratios in the instant proceeding. We disagree with the petitioner that these Russian financial statements are inferior to those of Brazil and Mexico. As stated above, for the purposes of selecting surrogate producers, Commerce examines how similar a proposed surrogate producer's production experience is to the NME producer's experience.[333] Usually, the surrogate producer's production experience is considered similar to the NME producer's experience if they produce identical or comparable merchandise.[334] When there are multiple sources of such information on the record of the proceeding, Commerce generally has a preference for using data from producers of

[325] *Id.* at 23 and 25 (citing *Rebar from Belarus* IDM at Comment 2).
[326] *Id.* at 24.
[327] *Id.* at 21.
[328] *Id.* (citing *Steel Nails from China 16-17* IDM at Comment 2; *Garment Hangers from China 14-15* IDM at Comment 2; *Pneumatic Tires 13-14* IDM at Comment 2; and *Passenger Vehicle Tires Investigation* IDM at Comment 9).
[329] *Id.* at 22.
[330] *Id.* at 24.
[331] *See SolarWorld Americas, Inc. v. United States*, 273 F. Supp. 3d 1254, 1265 (CIT 2017); *see also QVD Food Co. v. United States*, 658 F. 3d 1318, 1323 (Fed. Cir. 2011) (*QVD Food Co.*).
[332] *See* 19 CFR 351.408(c)(2).
[333] *See, e.g.*, *FSV 08-10 Final Results* IDM at Comment 1; and *OCTG from China Final Determination* IDM at Comment 13.
[334] *See* 19 CFR 351.408(c)(4) ("For manufacturing overhead, general expenses, and profit, the Secretary normally will use non-proprietary information gathered from producers of identical or comparable merchandise in the surrogate country.").

identical merchandise.[335] Although the Courts have held that Commerce "need not duplicate the exact production experience of the Chinese manufacturers,"[336] the production experience must still be considered similar. However, the financial statements on the record for Brazil and Mexico that the petitioner argues are superior, do not approximate the experience of the Chinese respondents.

The consolidated 2018 financial statements of the Brazilian company, Empresa, demonstrate that Empresa is a construction conglomerate that undertakes "engineering works, acting in the construction of road, railway, and mining infrastructures, as well as in civil, industrial, and electromechanical constructions nationwide."[337] Thus, it is impossible to ascertain what portion, if any, of its portfolio relates to the production of fabricated structural steel. We do not believe that the experience of Empresa is comparable to that of the respondents, because it does not appear that Empresa manufactures a product. Instead Empresa provides a service (*i.e.*, construction of structures), which we do not believe to be comparable or identical to the experience of the Russian manufacturers of fabricated structural steel. In addition, we consider the Empresa statement to be unusable because it contains a qualified auditor's opinion. Commerce's practice is to generally reject surrogate financial statements that contain a qualified financial statement.[338] Specifically, in Empresa's financial statement, the auditors note the following:

> {Empresa} has accounts receivable from customers that have been overdue for over two years. Despite strong evidence of impairment, no provision for the loss of the balances at hand has been recognized. In this context, the Company's current assets and shareholders' equity are overstated.[339]

As such, Empresa's allowance for doubtful accounts and the related bad debt expense is understated so our selling, general, and administrative (SG&A) and profit ratios would also be understated. Thus, we find that Empresa's 2018 financial statements are not the best available information on the record.

Similarly, the 2018 consolidated financial statements of the Mexican company, Grupo Carso, are also for a large conglomerate with a diverse portfolio of activities.[340] The petitioner argues that the financial statements of Grupo Carso are for a producer of identical or comparable merchandise, publicly available, and contemporaneous with the POI.[341] However, the financial statements show that the majority of Grupo Carso's revenue is from retail operations, and not from the production of fabricated structural steel.[342] Thus, the production experience of Grupo Carso is dissimilar to that of the respondents. The respondents are exclusively manufacturers of

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[335] *See, e.g.*, *Persulfates from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 68 FR 68030 (December 5, 2003) (*Persulfates from China*), and accompanying IDM at Comment 1.
[336] *See Nation Ford*, 166 F. 3d at 1377.
[337] *See* Petitioner's Second SV Comments at Exhibit 3.
[338] *See, e.g.*, *Golden Dragon Precise Copper Tube Group, Inc. v. United States*, Slip Op. 16-80, at 9-10 (CIT 2016).
[339] *See* Petitioner's Second SV Comments at 308.
[340] *Id.* at Exhibit 7.
[341] *See* Petitioner's Case Brief at 38.
[342] *Id.* at 947 (showing 52.7 percent of Grupo Carso's revenue comes from retail sales).

fabricated structural steel and have no retail operations.[343] Thus, we find that the surrogate financial ratios calculated from the financial statements of a company that mainly engages in retail operations, would be significantly distorted from the surrogate financial ratios of a company whose primary operations relate to the production of identical or comparable merchandise. Further, while one of the Grupo Carso affiliates is involved in the production of fabricated structural steel (*i.e.*, Operadora CICSA, S.A. de C.V. Swecomex – Guadalajara (Swecomex)), we do not have useable financial statements for this company (*i.e.*, unconsolidated financial statements from this company) and we assigned Swecomex a countervailable subsidy rate in *Fabricated Structural Steel from Mexico Preliminary CVD Determination*.[344] Commerce's "usual practice is not to rely on financial statements where there is evidence that the company received countervailable subsidies and there are other, more reliable and representative data on the record for purposes of calculating surrogate financial ratios."[345] The period of investigation in the Mexico countervailing duty (CVD) investigation is calendar year 2018, which is contemporaneous with the financial statements of Grupo Carso. Thus, because we have determined that Swecomex received countervailable subsidies during the same time period covered by the financial statements, the consolidated financial statements of Grupo Carso would, therefore, include the countervailable subsidies. Thus, for the foregoing reasons, and in accordance with our practice, we are rejecting the financial statements of Grupo Carso as unusable. Moreover, as explained *supra*, we have available on this record subsidy-free financial statements from four Russian producers of identical merchandise, whose experience is representative of the Chinese respondents.

As stated above, Commerce generally has a preference for using data from producers of identical merchandise.[346] We have four statements on the record for Russian producers of identical merchandise (*i.e.*, fabricated structural steel). The petitioner argues that these statements are not contemporaneous and, in certain places incomplete, and that Commerce has regularly rejected statements with these deficiencies.[347] While it is true that Commerce has previously rejected statements that are missing critical information, Commerce has also reasoned that a financial statement being incomplete does not necessarily invalidate its use if no more reliable options are available, no critical information is missing from these statements, and they are the best available

[343] *See* Wison's Letter, "Fabricated Structural Steel from the People's Republic of China: Separate Rate Application," dated April 10, 2019, at Exhibit 9; and JCG's June 21, 2019 Section A Supplemental Questionnaire Response (JCG June 21, 2019 SAQR) at Exhibit SA-E-1.

[344] *See Certain Fabricated Structural Steel from Mexico: Preliminary Affirmative Countervailing Duty Determination, and Alignment of Final Determination with Final Antidumping Duty Determination*, 84 FR 33227 (July 12, 2019) (*Fabricated Structural Steel Mexico Preliminary CVD Determination*), and accompanying PDM, unchanged in the final determination. *See* unpublished *Federal Register* notice titled "Certain Fabricated Structural Steel from Mexico: Affirmative Countervailing Duty Determination," and dated concurrently with this memorandum.

[345] *See, e.g.*, *PET Resin China Preliminary* PDM at 13, unchanged in *Certain Polyethylene Terephthalate Resin from the People's Republic of China: Final Determination of Sales at Less Than* Fair Value, 81 FR 13331 (March 14, 2016) (*Resin LTFV Final*).

[346] *See, e.g.*, *Persulfates from China* IDM at Comment 1.

[347] *See* Petitioner's Case Brief at 23-25 (citing *Passenger Vehicle Tires 17-18 Prelim* PDM; *Hardwood Plywood Prelim* PDM; *Multilayered Wood Flooring 12-13 Prelim* PDM; and *Rebar from Belarus* IDM at Comment 2).

information,[348] and the CIT has affirmed this reasoning.[349] In addition, we note that in previous cases, Commerce has utilized non-contemporaneous financial statements when they constitute the best available information on the record,[350] and the CIT has held that contemporaneity may be considered a tie-breaker "when choosing between equally reliable datasets."[351]

Accordingly, we consider the financial statements of the four Russian producers of FSS to be the best available information on the record, because they are completely translated, publicly available, show a profit before taxes, do not contain countervailable subsidies, are sufficiently detailed to calculate financial ratios, and are from the primary surrogate country. Moreover, the fact that the Russian financial statements are incomplete does not, in this instance, disqualify them from use, as they are not missing any critical information that would be necessary for purposes of calculating the surrogate financial ratios and otherwise meet our selection criteria. Additionally, because there are no other usable financial statements on the record,[352] contemporaneity is not a disqualifying factor because it is not being used to determine what constitutes the best available information between otherwise equal datasets. In addition, as the Russian companies produce fabricated structural steel, which is "identical merchandise," Commerce's general preference is to use the financial statements of these producers as they closely match the experience of the NME respondents. Finally, with respect to the petitioner's arguments that the financial statements are unsuitable for the calculation of CONNUM-specific labor costs,[353] we consider these arguments to be moot. However, in the cases cited by the petitioner, Commerce either had other useable financial statements on the record,[354] or did use surrogate financial statements where labor or energy were not able to be broken out from

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[348] *See, e.g.*, *Ironing Tables from China 05-06 Final Results* IDM at Comment 1.
[349] *See Association of American School Paper Suppliers v. United States*, 791 F. Supp. 2d 1292, 1303-04 (CIT 2011) (*American School Paper Suppliers II*).
[350] *See, e.g.*, *Laminated Woven Sacks from the Socialist Republic of Vietnam: Final Determination of Less Than Fair Value*, 84 FR 14651 (April 11, 2009), and accompanying IDM at Comment 2; and *TRBs from China AD AR 16-17* IDM at Comment 10 ("while these statements are not contemporaneous with the POR, they are product-specific, publicly available, complete (including notes), for a profitable producer of {subject merchandise} located in the primary surrogate country…. We note that surrogate financial statements are used for calculation of ratios, as opposed to values and, therefore, are not subject to inflation. In other words, Commerce adjusts values for inflation over time, but ratios maintain the same proportionate correlation over time. In the past, Commerce has selected non-contemporaneous financial statements while the record has contained other less specific but contemporaneous financial statements." (citing *Folding Metal Tables and Chairs from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and New Shipper Review, and Revocation of the Order in Part*, 76 FR 66036 (October 25, 2011), and accompanying IDM at Comment 2)).
[351] *See Blue Field*, 949 F. Supp. 2d 1311, 1331 ("Commerce also erred in rejecting the 2006-2007 Indian data because they were not contemporaneous with the period of review. Indeed, Commerce may invoke contemporaneity as a tie-breaking factor when choosing between equally reliable datasets. But contemporaneity alone is an insufficient reason for dismissing alternative surrogates when Commerce's own surrogate appears flawed.").
[352] We note that the petitioner has also placed on the record the 2017 financial statements for Empresa and Grupo Carso. *See* Petitioner First SV Comments at Exhibits 10 and 18. However, the petitioner has not argued for their use in the final determination, and we note they suffer from the same deficiencies as the 2018 financial statements for these companies, as described above.
[353] *See* Petitioner's Case Brief at 21-22 (citing *Steel Nails from China 16-17* IDM at Comment 2; *Garment Hangers from China 14-15* IDM at Comment 2; *Pneumatic Tires 13-14* IDM at Comment 8; and *Passenger Vehicle Tires Investigation* IDM at Comment 9).
[354] *See Garment Hangers from China 14-15* IDM at Comment 2; *Pneumatic Tires 13-14* IDM at Comment 8; and *Passenger Vehicle Tires Investigation* IDM at Comment 9.

manufacturing overhead.[355] Further, Commerce has previously used financial statements that were not able to break out labor or energy where there were no other useable financial statements on the record.[356] As there are no other useable financial statements on the record, and labor costs are still being captured within the surrogate financial ratios, we disagree with the petitioner that this renders the Russian financial statements unusable for calculating the surrogate financial ratios. Consequently, as stated above, we have continued to use the financial statements for ZOK JSC, ChZMK JSC, Kashira Steel, and ESK OJSC to value the surrogate financial ratios for the final determination.

Accordingly, we continue to find Russia to be (1) at a comparable level of economic development as China; (2) a significant producer of merchandise comparable to fabricated structural steel; and (3) we find that Russia provides the best surrogate values in terms of specificity, contemporaneity, and quality of the data that is publicly available with which to value the respondents' FOPs and financial ratios.[357] Moreover, we find the Russian data to be superior to the Mexican and Brazilian data proffered by the petitioner because we have four useable financial statements from Russia for producers of identical merchandise, while there are no useable financial statements from Brazil and Mexico, satisfying our regulatory preferences pursuant to 19 CFR 351.408(c)(1), (2), and (4). As such, we find no basis to change our preliminary finding with respect to surrogate country selection and continue to consider Russia the primary surrogate country for the purposes of this final determination.

The petitioner argues that should Commerce persist in its use of Russia as the preliminary surrogate country, Commerce should exclude Ukrainian imports of steel into Russia from the Russian import data.[358] The petitioner contends that for multiple steel inputs, the vast majority of Russian imports were from Ukraine. However, the petitioner states that these should not be considered to represent market prices because the Russian occupation of Ukraine has significantly affected the Ukrainian steel industry and that this has distorted the price of Ukrainian imports of steel into Russia.[359] The petitioner points to evidence that many major steel facilities are located in the occupied Ukrainian territories, and that a number of these companies were seized as a result of the occupation, as evidence that the steel industry has been greatly affected. In addition, the petitioner notes that the Russian Navy's presence in the Azov Sea has had an effect on Ukraine's exports out of Mariupol, which provide about 25 percent of Ukraine's export revenue.[360] The clear effect can be demonstrated, the petitioner argues, by looking at Ukrainian prices, which are "systematically lower" than those of the other countries exporting to Russia.

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[355] *See Steel Nails from China 16-17* IDM at Comment 2 ("Although we agree with the petitioner that Saha Asia Industry's financial statements do not contain a breakout for energy either, when comparing the two financial statements overall, we continue to find Saha Asia Industry's statements are the better alternative.").
[356] *See, e.g.*, *PET Resin China Preliminary* PDM at 27; unchanged in *Resin LTFV Final*.
[357] *See, e.g.*, *Final Determination of Sales at Less Than Fair Value and Final Partial Affirmative Determination of Critical Circumstances: Diamond Sawblades and Parts Thereof from the People's Republic of China*, 71 FR 29303 (May 22, 2006), and accompanying IDM at Comment 1.
[358] *See* Petitioner's Case Brief at 38-40.
[359] *Id.* at 38-39.
[360] *Id.* at 39 (citing Petitioner's First SV Rebuttal Comments at Exhibit 25).

We disagree with the petitioner. As an initial matter, Commerce's well-established practice is to use the full GTA dataset. For example, in PET Film from China, we stated the following:

> excluding Indonesian imports from the Netherlands from our valuation of paper core would contradict {Commerce}'s well-established practice of using the full GTA dataset and would invite endless and distortive cherry picking of data. {Commerce} has "found WTA import data to represent the best information available for valuation purposes because when taken as a whole – after excluding non-market, unspecified, and subsidized data points – they represent an average of multiple price points within a specific period and are tax-exclusive."[361]

Thus, Commerce's general practice is not to rule out certain surrogate value data unless the data are clearly aberrational.

While the petitioner points to the ongoing situation in Eastern Ukraine and shows that Ukraine has relatively lower import prices for steel inputs into Russia, it does not provide a valid quantitative analysis establishing that these two sets of circumstances are causally linked. The petitioner attempts to benchmark the AUV of Ukrainian imports into Russia for five, six-digit HS codes that represent major steel input types to an "All Other" AUV and the AUVs for five individual countries (*i.e.*, China, South Korea, Belarus, India, and Indonesia) into Russia.[362] However, none of the five individual countries are appropriate for such a benchmarking exercise, as they are either NMEs or countries that Commerce has determined provide "broadly available, non-industry specific export subsidies."[363] Accordingly, Commerce would exclude these five countries' SVs from our surrogate value data. In addition, the petitioner implies that the Ukrainian AUVs are distorted merely by the fact that they are lower than other AUVs. As discussed above, the fact that one value is lower than others on the record does not demonstrate that the value in question is aberrational.[364] The Ukrainian AUVs are not aberrational merely by virtue of being lower than the other Russian import AUVs, nor do they vary by extreme percentages.[365] Accordingly, the petitioner has not provided sufficient evidence that the price of Ukrainian exports of steel into Russia has been distorted by the geopolitical situation in Eastern Ukraine.[366] Thus, the record lacks the evidence necessary to demonstrate that the Ukrainian AUVs are aberrational or otherwise distorted. Consequently, we have continued to include the Ukrainian data in our calculation of Russian SVs for the final determination.

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[361] *See Polyethylene Terephthalate Film, Sheet, and Strip from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2012-2013*, 80 FR 33241 (June 11, 2015), and accompanying IDM at Comment 3 (citing *Tapered Roller Bearings and Parts Thereof Finished and Unfinished, from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 74 FR 3987 (January 22, 2009), and accompanying IDM at Comment 7).
[362] *Id.* at 40.
[363] *See Preliminary Determination* PDM at 30-31.
[364] *See Quartz Surface Products from China* IDM at Comment 10.
[365] *See* Preliminary SV Memo at Exhibit 3; *see also* Petitioner's Case Brief at 40.
[366] For example, the record lacks an historical comparison of Russian import prices over time from Ukraine, matched against Russian import prices from the rest of the world; such data could potentially help to establish whether Ukrainian exports of steel into Russia were, in fact, distorted by the current situation in Ukraine.

Comment 3: Surrogate Value for Ocean Freight

JCG's Case Brief

- In the preliminary determination, Commerce used the simple average of 18 price data points to calculate an ocean freight SV. Within these 18 price data points, one price (*i.e.*, $2.2500 per kilogram (kg)) is aberrational, rendering the ocean freight SV used in the *Preliminary Determination* distorted.

- Statistical analysis shows there are large differences between two data sets (*i.e.*, all 18 price data points, and the 17 price data points excluding the aberrational one) as evidenced by: (1) resulting simple averages; (2) standard deviations; and (3) coefficient of determination (*i.e.*, R^2).

- A simple average of all 18 data points provides an average ocean freight price of $0.2150 per kg, compared to the simple average of the 17 data points (exclusive of the aberrational data point) of $0.0953. The addition of the aberrational data point causes a spike of the average by 115 percent, highlighting the distortion caused by the addition of the aberrational value.

- Further analysis using standard deviation methodology and R^2 (*i.e.*, the coefficient of determination) analysis, which provides an obverse of the standard deviation analysis, show to a greater extent how distorted the aberrational data causes the ocean freight SV to be.

- The primary factor causing this data point to be aberrational was Commerce's choice to calculate this data point using only an aberrationally low weight of 1,000 kg for a 40 foot container, as opposed to Commerce's practice to use a weight of 26,780 kg for a 40 foot container.[367] Further, this weight is inconsistent with Commerce's decision to use the 15,000 kg weight for a 20 foot container, as found in *Doing Business*, for the calculation of the truck freight and brokerage and handling (B&H) SVs. Thus, because the weight used to calculate the data point is aberrationally low, the resulting data point is aberrationally high.

- Commerce's practice, which has been affirmed by the Courts, is to not use aberrational or outlier data.[368] Commerce has, in previous cases, applied the standard deviation methodology to test the reliability of data, which was then upheld by the Courts.[369] Thus, Commerce should follow its settled practice, and revise the calculation of the ocean freight SV to exclude the aberrational data point, resulting in a rate of $0.0953 per kg.

[367] *See* JCG's Case Brief at 9 (citing *Hand Trucks and Certain Parts Thereof from the People's Republic of China: Final Results and Final Rescission in Part, of Antidumping Duty Administrative Review*, 76 FR 36083 (June 21, 2011) (*Hand Trucks from China 08-09 Final Results*), and accompanying IDM at Comment 8).
[368] *Id.* (citing *Tri Union Frozen Products, Inc. et al., v. United States*, 227 F. Supp. 3d 1387, 1394-95 (CIT 2017) (*Tri Union*)).
[369] *Id.* at 10 (citing *Association of American School Paper Suppliers v. United States*, 32 CIT 1196, 1202-03 (CIT 2008) (*American School Paper Suppliers*).

Petitioner's Rebuttal Brief

- In the *Preliminary Determination*, Commerce used 18 data points from three different origin/destination pairs (*i.e.*, Shanghai to the East Coast of the United States, Shanghai to the West Coast of the United States, and Tianjin to the United States) over the course of the six-month POI to calculate an ocean freight SV. JCG argues that Commerce should reject the data from one month (*i.e.*, October 2018) for shipments from Tianjin because it is aberrational. JCG's arguments should be rejected by Commerce because they are without merit.

- JCG argues that the 1,000 kg weight for a 40-foot container is abnormally low, and cites to a previously reported weight of 26,780 and the *Doing Business* methodology. However, JCG placed the very information it is arguing against on the record of this proceeding. In addition, the record shows that the respondents do ship containers with low weights when needed, proving that a 1,000 kg weight is not aberrational.[370]

- Commerce should continue to include the price data point for Tianjin to the United States for October 2018 in the final determination.

Commerce's Position:

We agree with the petitioner. For the final determination, we continue to rely on our surrogate value calculation from the *Preliminary Determination* to value ocean freight for the respondents. Specifically, we have continued to use the data point for October 2018 for Tianjin to the United States.

As we explained in the *Preliminary Determination*:

> To value ocean freight expenses, we used rates reported by Descartes for shipping 20-40 foot containers of various metal products (*e.g.*, "flanges and steel (oil pipe parts)," "steel not otherwise specified," "steel cylinders," "steel poles not otherwise specified') from ports in China to ports in the United States. We excluded any brokerage and handling expenses included in this rate to avoid double counting. We converted the per-container quotes to per-kg rates by dividing the total value of the quotes by the weights indicated in the quotes. We then took the simple average of the per-kg rates and calculated a surrogate ocean freight expense of 0.21498 U.S. dollars per kg.[371]

Specifically, we used 18 price data points over three different shipping routes (*i.e.*, Shanghai to the U.S. West Coast, Shanghai to the U.S. East Coast, and Tianjin to the United States) for the last six months of 2018 (*i.e.*, the POI). Thus, we had one price data point for each month of the POI for each of the three shipping routes. Further, as explained in our Preliminary SV Memo, for each quotation, we relied upon the total cost provided in the quotation, less brokerage and

[370] *See* Petitioner's Rebuttal Brief at 6-7 (citing Modern Heavy Verification Report at Exhibits 9 and 10; and Wison's Sales Verification Report at Exhibit 7A).
[371] *See* Preliminary SV Memo at 9.

handling expenses, and the total quoted shipment weight. Consequently, we consistently used the relevant numerator and denominator factors supplied on each quote.

JCG takes issue with how we calculated the October 2018 price data point for Tianjin to the United States (October 2018 data point), and, argues that we should exclude the October 2018 data point from our calculation of the ocean freight surrogate value for the final determination.[372] Specifically, JCG argues that the October 2018 data point is aberrationally high because it is distorted by Commerce's use of an aberrationally low weight (*i.e.*, 1,000 kg for a 40-foot container) in its calculation of a per-kg value for the October 2018 Tianjin ocean freight data.[373] JCG points to *Hand Trucks from China 08-09 Final Results* and to the *Doing Business* methodology used to calculate brokerage and handling and truck freight in the instant proceeding to demonstrate that a weight of 1,000 kg for a 40-foot container is aberrational.[374] Moreover, JCG explains, Commerce's settled practice is to not use aberrational data or data that is an extreme outlier, which has been repeatedly upheld by the Courts.[375] For the reasons explained below, we find these arguments unavailing.

We agree with JCG that Commerce's established practice is to not use aberrational data. However, we disagree with JCG that the weight is aberrational or otherwise abnormal. In *Tri Union* the CIT held that:

> Commerce considers data to be aberrational when it is an "extreme outlier," is distorted or misrepresentative, or is "somehow incorrect." Commerce has not affirmatively set forth a definition of reliable here. It implies that aberrational data, data shown to deviate from the norm, would be unreliable.[376]

In the instant case, the weight of 1,000 kg does not deviate from the norm. As the petitioner points out, the respondents ship containers with low weights when necessary.[377] There are multiple observed instances on the record of the respondents shipping containers with weights far below the weights JCG argues are within the norm.[378] Given the high degree of customization of fabricated structural steel projects,[379] the fabricated structural steel produced for

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[372] *See* JCG's Case Brief at 4-10.
[373] *Id.* at 9.
[374] *Id.* In *Hand Trucks from China 08-09 Final Results*, Commerce used the total capacity (*i.e.*, 26,780 Kg) of a 40-foot container to determine the per-unit brokerage and handling cost for a 40-foot container. *See Hand Trucks from China 08-09 Final Results* IDM at Comment 8. In the instant case, the *Doing Business* methodology assumes a standardized weight of 15,000 kg for a 20-foot container. *See* JCG's and Modern Heavy's Letter, "JCG's and MHI's First Surrogate Value Comments in the Antidumping Duty Investigation on Fabricated Structural Steel from the People's Republic of China," dated July 15, 2018 (JCG and Modern Heavy Initial SV Comments), at Exhibit 6B.
[375] *See* JCG's Case Brief at 9 (citing *Tri Union*, 227 F. Supp. 3d at 1394-95).
[376] *See Tri Union*, 227 F. Supp. 3d at 1394-95.
[377] *See* Petitioner's Rebuttal Brief at 6.
[378] *See* Modern Heavy's Verification Report at Exhibits 9-10; and Wison's Sales Verification Report at Exhibit 7A.
[379] *See* the Petition Volume I at 7 ("As {fabricated structural steel} is typically custom-manufactured for a specific project, {fabricated structural steel} produced for one project will differ from {fabricated structural steel} produced for another project.") and 18 ("{Fabricated structural steel} are customized products produced for specific project, and, with few exceptions, no two projects are exactly alike."); *see also* Corey S.A. de C.V.'s Letter, "Certain Fabricated Structural Steel from Canada, Mexico, and the People's Republic of China: Corey S.A. de C.V.'s

these projects often come in odd shapes and sizes. Thus, the potential for a particular piece of fabricated structural steel for a project to be of a low weight and bulky requiring a one-off shipment in a single container is not abnormal, as evidenced by the experience of the respondents here.[380] Thus, we find that the 1,000 kg weight does not "deviate from the norm," and is, therefore, reliable for use in our calculation of the October 2018 data point. We note that JCG does not take issue with the price on the Descartes quote for the October 2018 Tianjin to the United States shipment, only the weight on the quote and Commerce's calculated October 2018 data point. Thus, if the price of the quote is not aberrational, and given our finding that the weight is also non-aberrational either, then logic dictates that the calculated October 2018 data point is also non-aberrational.

JCG performs extensive statistical analysis of the October 2018 data point to explain how it is anomalous,[381] and contends that the Courts have endorsed Commerce's use of such an analysis in its determinations of whether data are aberrational.[382] We disagree that JCG's statistical analysis demonstrates that the October 2018 data point is aberrational. First, record evidence demonstrates that the weight used to calculate the October 2018 data point matches the respondents' experiences in certain situations and is therefore not outside the norm.[383] Second, the statistical analysis is performed on a small sample size of ocean freight quotes, hand-picked by the respondents[384] for use in this investigation, and not necessarily representative of all the possible weights producers of fabricated structural steel would ship at. JCG cites to *American School Paper Suppliers* to support its use of statistical analysis to confirm whether the October 2018 data point is aberrational.[385] In that case, the CIT affirmed Commerce rejecting the highest transaction-specific margin for use as an AFA rate as aberrational because it was "from a sale a single sale with a sales quantity that is less than two percent of the average sales quantity."[386] Likewise, Commerce determined that the second highest margin was not aberrational because "its quantity…is within one standard deviation of the mean quantity of merchandise in {the respondent's} reported transactions."[387] However, in that case the Court merely affirmed that statistical analysis is an appropriate method to confirm whether data are aberrational;[388] the Court did not rule that it was the only method to determine whether the data consists of outliers or are aberrational. In addition, it ruled that the second highest transaction-specific margin was not aberrational because it "reflects the recent commercial activity" by the respondent (*i.e.*, it

Comments on Product Characteristics for Purposes of Normal Value," dated March 18, 2019 ("{Fabricated structural steel} is produced through a length process and requires a variety of inputs, which will differ significantly from piece to piece and from project to project. The Department should consider the fact that subject {fabricated structural steel} are made-to-order products that are almost always sold through a bidding process. Each {fabricated structural steel} product sold is custom-made for a unique, large scale building project.").

[380] *See* Modern Heavy's Verification Report at Exhibits 9-10; and Wison's Sales Verification Report at Exhibit 7A.

[381] *See* JCG's Case Brief at 6-8 and Exhibit 1.

[382] *Id.* at 10 (citing *American School Paper Suppliers*, 32 CIT at 1202-03).

[383] *See* Modern Heavy's Verification Report at Exhibits 9-10; and Wison's Sales Verification Report at Exhibit 7A.

[384] *See* JCG and Modern Heavy Initial SV Comments at Exhibit 7.

[385] *See* JCG's Case Brief at 10.

[386] *See American School Paper Suppliers*, 32 CIT at 1202

[387] *Id.* at 1203. We note that "the respondent's" first and second transaction-specific dumping margins which were rejected and accepted for use as the AFA rate, respectively, is not the same respondent as to which AFA was applied.

[388] *Id.*

was representative of the experience of the respondents) despite being 600 percent higher than the actual calculated rate for the respondent.[389] Accordingly, despite being many times larger than the average per-kg price of the other 17 quotes, we find that the October 2018 data point is not aberrational because it is representative of the respondents' experience. Put differently, though the data point is not within the norm of the dataset, it is within the norm of the respondents' practice. Thus, we do not find JCG's arguments convincing that the statistical analysis is relevant.

We note that Modern Heavy and JCG placed the Descartes data on the record,[390] and JCG does not refute that the Descartes data are the best available information (despite, arguing a single data point is unreliable) nor did it provide alternative ocean freight expense information.[391] In addition, we note that in JCG and Modern Heavy's sample calculation of ocean freight, the respondents used the actual weight on the ocean freight quote for every single quote except the quote for Tianjin to the United States for October 2018.[392] Moreover, they provided this calculation with no narrative about what was placed on the record or how to use it in the *Preliminary Determination*. In addition, as stated above, JCG argues here that, in *Hand Trucks from China 08-09 Final Results*, Commerce used the total capacity (*i.e.*, 26,780 Kg) of a 40-foot container to determine the per-unit brokerage and handling cost for a 40-foot container.[393] However, in *Hand Trucks from China 08-09 Final Results* Commerce determined the brokerage and handling for a 20-foot container using the total capacity of a 20-foot container was 21,727 kilograms.[394] JCG has failed to explain why the 26,780 kg weight for a 40-foot container is reasonable. JCG is ignoring the fact that the 20,000 kg weight for a 20-foot container exceeds the capacity it argues is precedent, when, for its own calculation it has otherwise used the stated weight of the quotes, in direct contradiction to the case (*i.e.*, *Hand Trucks from China 08-09 Final Results*) it is citing to support not using the stated weight of the October 2018 Tianjin to the United States ocean freight quote.

In sum, we find JCG's arguments unpersuasive. Accordingly, for the final determination, we continue to rely on our surrogate value calculation from the *Preliminary Determination* to value ocean freight for the respondents.

Comment 4: Surrogate Value for Truck Freight

In the *Preliminary Determination*, Commerce valued inland freight charges using the World Bank's Doing Business 2019: Russian Federation (*Doing Business Russia*) which gathers

[389] *Id.* at 1204 ("Given the record before it, it cannot be said that Commerce was unreasonable in finding that the 23.17 percent AFA rate, which is nearly 600 percent greater than Kejriwal's rate, would encourage {the AFA respondents} to comply fully in future reviews and investigations.").
[390] *See* JCG and Modern Heavy Initial SV Comments at Exhibit 7.
[391] With respect to Modern Heavy's arguments concerning the surrogate value for ocean freight, we consider them moot because the arguments were in relation to only Modern Heavy's ocean freight surrogate value and we are basing Modern Heavy's dumping margin for the final determination on adverse facts available. *See* Comment 12 and 13, below.
[392] *See* JCG and Modern Heavy Initial SV Comments at Exhibit 7.
[393] *See* JCG's Case Brief at 9 (citing *Hand Trucks from China 08-09 Final Results* IDM at Comment 8).
[394] *See Hand Trucks from China 08-09 Final Results* IDM at Comment 8.

information concerning the distances and costs to transport products in a 20-foot container from Moscow and St. Petersburg, Russia to the border crossing at the Port of St. Petersburg. Commerce calculated a surrogate per-kg, per kilometer (km) inland freight rate of $0.001069, using the 15,000 kg weight provided in the *Doing Business Russia* report for a 20-foot container.[395]

JCG's Case Brief[396]

- The calculation of surrogate truck freight is a function of cost, weight, and distance. In this case, one data point used in Commerce's calculation of this expense (*i.e.*, the distance of St. Petersburg from the warehouse to the seaport of 8 km) is belied by record evidence showing that this distance is aberrational and; therefore, its use has resulted in an aberrational surrogate value.[397]

- The underlying basis for St. Petersburg's distance in the *Doing Business Russia* report remains unclear because it does not specify: (1) the warehouse where the export goods were loaded on a truck for transportation to the St. Petersburg seaport; and (2) the precise location or terminal at the seaport where the goods were unloaded.[398]

- Commerce has a longstanding practice to select a distance factor based on specific locations of the two points that are best supported by record evidence and for determining point(s) of origin of shipment or warehouse(s). Further, Commerce's selects, in the concerned business city, the designated industrial areas that are supported by the record evidence and thereafter average the distances from such industrial areas to the seaport(s) of export.[399] Thus, given that the record does not specify exact points of export for goods, Commerce should average all possible points of exports that are supported by record evidence to obtain an average distance factor.[400]

- According to a report published by the government of Russia, *Passport of St. Petersburg Industrial Zones*, there are 24 industrial zones and according to a decree issued by the

[395] *See* Preliminary SV Memo at 8.
[396] Modern Heavy also made arguments regarding the truck freight surrogate value, relying on the same arguments as JCG. *See* Modern Heavy Case Brief at 2 and 9-21. However, we find this issue as to Modern Heavy to be moot based on our decision to apply total AFA in determining Modern Heavy's dumping margin, as discussed in Comment 12 below.
[397] *See* JCG's Case Brief at 21.
[398] *Id.* at 12.
[399] *Id.* at 13 (citing *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China: Final Results of the 2013-2014 Antidumping Duty Administrative Review*, 81 FR 1396 (*TRBs from China 2013-2014*) (January 12, 2016), and accompanying IDM at Comment 3, stating "The Department relies on two factors in Doing Business reports for determining the distance used to calculate the truck freight surrogate value: the standardized company's location and the destination port.").
[400] *Id.* at 13-14 (citing *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China: Final Results of the Antidumping Duty Administrative Review and Final Results of the New Shipper Review; 2012-2013* (*TRBs from China 2012-2013*), 80 FR 4244 (January 27, 2015), and accompanying IDM at Comment 1.

Federal Agency for Maritime and River Transport[401] as well as another report *List of Container Terminals in St. Petersburg*,[402] there are 6 seaport terminals at the St. Petersburg seaport, where goods could be unloaded for exportation. Therefore, in the context of exports from St. Petersburg, there are 144 industrial zone-seaport terminal combinations with equal probability of usage.[403]

- Commerce should use the median or simple average distance, of 30.5 km[404] or 33.6 km,[405] respectively, averaged from all 144-industrial zone-seaport terminal combinations (based on distances from Google maps as outlined in a worksheet).[406] Using one of these two distances is consistent with Commerce's longstanding practice to select a SV that is based on a broad market average,[407] and has been adhered to in the context of truck freight.[408]

- Rejecting the 8 km distance for St. Petersburg is warranted, because record evidence shows this distance is anomalous and unreliable and, therefore, yields an aberrationally high truck freight. For instance, the average truck freight for St. Petersburg is 0.002050 $/kg/km, which is 23 times the average truck freight reported from Moscow of 0.000088 $/kg/km. Further, by comparing the truck freights for countries with two city surveys it is evident that the ratio between the two distances shows that the Russian ratio of 23.2 is an outlier compared to other similarly situated countries including the USA (1.4) and China (2.9).[409]

- Judicial precedent requires that when there are potentially aberrational SVs based on a low quantity (akin to small distance) Commerce must subject them to detailed scrutiny based on all record evidence[410] or reject the data entirely.[411] However, contrary to law, Commerce: (1) failed to benchmark St. Petersburg truck freight surrogate value against the Moscow truck freight data as well as all of the other truck freight data reported by World Bank from two different cities within a country; (2) failed to consider rebuttal distance information that included 144 distance data between an industrial area and a port terminal in St. Petersburg;

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[401] *Id.* at 13-14 (citing JCG's and Modern Heavy's Letter, "Certain Fabricated Structural Steel from the People's Republic of China: Surrogate Values Information," dated August 5, 2019 (JCG's and Modern Heavy's Second Surrogate Value Comments), at Exhibit 6H).
[402] *Id.* at Exhibit 6J.
[403] *Id.*
[404] *Id.* at 17.
[405] *Id.* at Exhibit 6A.
[406] *Id.* at Exhibit 6B-6G.
[407] *Id.* at 18 (citing *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results of the Fifth New Shipper Review*, 75 FR 38985 (July 7, 2010) (*Fish Fillets from Vietnam*), and accompanying IDM at Comment 1, stating that in determining what constitutes the best available information for valuing a factor of production, Commerce normally considers whether each potential surrogate value, amongst other things, represents a broad market average covering a range of prices).
[408] *Id.* at 18 (citing *MLWF China Final 2011-2012 AR* IDM at Comment 23).
[409] *Id.* at 19 and Exhibit 2.
[410] *Id.* at 21 (citing *Xinjiamei Furniture (Zhangzhou) Co. v. United States* 35 ITRD 1136 (CIT 2011) (*Xinjiamei Furniture*).
[411] *Id.* at 20 (citing *Trust Chem*, 791 F. Supp. 2d 1257, 1264-65; *Shakeproof Assembly Components Div. of Illinois Tool Works, Inc. v. United States*, 59 F. Supp. 2d 1354, 1360 (CIT 1999) (*Shakeproof*).

(3) failed to evaluate all data to determine what constitutes the best available information; and (4) explain why a particular data set is not methodologically reliable.[412]

- Thus, if Commerce had applied an average of all of the 144 distance factors to compute the surrogate value, the resulting truck freight would have been 0.00049 $/kg/km and would have lowered the Moscow to St. Petersburg ratio from 23.2 to 5.4, which, although high, is still comparable to the highest ratio (4.4 in Bangladesh). Thus, the alternative choices of 33.6 km (or, 30.5 km) afford significantly superior and far more reasonable alternatives.[413]

- In *Xinjiamei Furniture*,[414] in addressing an analogous situation, the CIT required that Commerce consider all of the benchmark information placed on the record. In this case, Commerce ignored a plethora of record evidence that contradicts the 8 km distance and demonstrated that the most reasonable and correct factor to be used for St. Petersburg is either 33.6 km or 30.5 km.

Petitioner's Rebuttal Brief

- Commerce should reject respondents' arguments regarding the St. Petersburg distance and maintain its calculation of truck freight for the final determination.

- Using the distances prescribed in *Doing Business Russia*, is consistent with Commerce's practice, reflects reasonable pricing on a pricing continuum, and represents an accurate measure of respondents' experience. Commerce based its determination on credible information contained in the *Doing Business Russia* publication, which respondents themselves placed on the record and which is consistently used in other cases.[415]

- Respondents' argument to reject the St. Petersburg distance in *Doing Business Russia* on the basis that it does not identify the port or the precise location of the warehouse is irrelevant because the *Doing Business Russia* report provides the exact distance (*i.e.*, 8 km), whereas previous editions[416] only listed the city and the port of exportation, forcing parties to guess the distance. Further, to the extent that respondents object to the *Doing Business Russia* report's use of St. Petersburg because the origin and destination points are not known, Commerce must reject all reports generated by *Doing Business* because these locations are never revealed.[417]

- The respondents use of a "ratio of truck freight" to discredit the St. Petersburg distance is meaningless since the exact points of origin and destination are not provided to calculate

[412] *Id.*at 23 (citing section 773(c)(1) of the Act; and *Olympia Industr. Inc. v. United States*, 22 CIT 387, 390, 7 F. Supp. 2d 997, 1000-01 (CIT 1998)).
[413] *Id.* at 21.
[414] *Id.* at 20 (citing *Xinjiamei Furniture*).
[415] *See* Petitioner's Rebuttal Brief at 1-2 and 7-12.
[416] *Id.* at 9 and 7-12.
[417] *Id.* at 9.

these distances (*e.g.*, the distance provided for Tokyo is 20 km, but the starting and ending points are not identified).[418]

- Although respondents insist that "Commerce's longstanding practice has been to select a distance factor based on the specific locations of the two points that are best supported by record evidence;" they overlook that the practice was only relevant when Commerce relied on prior editions of *Doing Business*,[419] which employed a different methodology, that did not provide exact distances.[420]

- The respondents' zone/terminal table corroborates the distance that a Russian exporter would use when exporting merchandise, showing that although the majority of zone/terminal combinations have a length greater than 8 km, nine different zone/terminal locations had distances that were smaller or identical to the distance provided in the *Doing Business Russia*.[421]

- The price per km per kg of truck freight is not aberrational. For instance, even when assessing the St. Petersburg rate of $0.0021 against all other rates, the next closest rate is also a short distance rate at $0.0011 per km per kg (*i.e.*, Tokyo's with a distance of 20). The higher unit values for both countries is likely a function of logistical challenges in each (including traffic) and the fact that the cities are relatively close to the port of exportation.[422]

- The St. Petersburg freight rates are arguably more representative of the costs that Chinese respondents incur in shipping subject merchandise to the United States, because they reflect similar distances.[423]

Commerce's Position:

We agree with the petitioner and, for the final determination, we continue to rely on the information published in *Doing Business Russia*. Specifically, we have continued to use the costs and distances explicitly stated in the *Doing Business* methodology to calculate a surrogate value for truck freight for the final determination.

As we explained in the *Preliminary Determination*, Commerce valued inland freight charges using *Doing Business Russia* for inland transportation relating to importing and exporting a standardized cargo of goods.[424] Thus, Commerce calculated a per-kg inland freight using the price to export a standardized cargo of 15 metric tons in a 20-foot container based on distances as published in *Doing Business Russia*. Specifically, the 2019 edition of *Doing Business Russia*

[418] *Id.* at 9-10.
[419] *Id.* at 10 (citing *Diamond Sawblades and Parts Thereof from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2013-2014*, 81 FR 38673 (June 14, 2016), and accompanying IDM at Comment 19.
[420] *Id.* at 10.
[421] *Id.* at 11.
[422] *Id.*
[423] *Id.* at 12.
[424] *See* Preliminary SV Memo at 8.

provides two distances for export: (1) from St. Petersburg to the port (in St. Petersburg) of 8 km; and (2) from Moscow to the port in St. Petersburg of 724 km.[425] Using the 15 metric ton weight and the distances, we calculated a simple-average cost per kg per km to truck goods in the primary surrogate country, Russia, based exclusively upon the information and assumptions provided in *Doing Business Russia*.[426] This is consistent with our practice where we have relied upon all of the assumptions specified in the *Doing Business* when calculating surrogate values.[427]

As an initial matter, we note that JCG placed the *Doing Business Russia* report on the record and it does not refute that *Doing Business Russia* is the best available information (despite, arguing a single data point is unreliable), and it did not provide alternative inland freight surrogate value information. Thus, JCG's argument that we should now calculate inland freight using an alternative distance (*i.e.*, combining data points from different sources) would result in creating a new, "hybrid" surrogate value. Consequently, we find that substituting the distance used in *Doing Business Russia* with the one proposed by JCG would introduce inaccuracies in calculating the inland freight, as discussed below.

In selecting surrogate values for inputs, section 773(c)(1) of the Act directs us to use the "best available information." In determining the "best available information," it is our practice to consider the following five factors: (1) broad market average; (2) public availability; (3) product specificity; (4) tax and duty exclusivity; and (5) contemporaneity of the data.[428] Based on these criteria, we find that in this investigation *Doing Business Russia* is the only reliable data source for Russia; no interested party placed alternative truck freight surrogate value information for Russia on the record of this investigation. *Doing Business Russia* provides a publicly available, broad market average freight rate, and we have consistently found the *Doing Business* publication to provide the best available information in other prior cases to value inland freight.[429] We prefer to value an FOP using prices that are broad market averages because "a single input price reported by a surrogate producer may be less representative of the cost of that input in the surrogate country."[430] The *Doing Business* publication contains data collected from local freight forwarders, customs brokers, port authorities and traders;[431] thus, it reflects the freight costs of multiple vendors and users and provides a broad market average.[432] Based on these facts and given that *Doing Business Russia* is a World Bank publication, we find the

[425] *See* JCG and Modern Heavy Initial SV Comments at Exhibit 6A at 73.
[426] *See* Preliminary SV Memo at Exhibit 6.
[427] *See*, *e.g.*, *Final Determination of Sales at Less Than Fair Value: Prestressed Concrete Steel Rail Tie Wire from the People's Republic of China*, 79 FR 25572 (May 5, 2014) (*Steel Rail Tie Wire*), and accompanying IDM at Comment 5.
[428] *See Preliminary Determination* PDM at 22; *see also Certain Activated Carbon from the People's Republic of China: Final Results of Antidumping Administrative Review; 2016-2017*, 83 FR 53214 (October 22, 2018), and accompanying IDM at Comment 2.
[429] *See*, *e.g.*, *An Giang Fisheries Import and Export Joint Stock Company v. United States*, 203 F. Supp. 3d 1256, 1284 (CIT 2017); *Steel Rail Tie Wire* IDM at Comment 4; and *Xanthan Gum from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 78 FR 33350 (June 4, 2013), and accompanying IDM at Comment 6-A.
[430] *See Honey from the People's Republic of China: Final Results and Final Rescission, in Part, of Antidumping Duty Order Administrative Review*, 71 FR 34893 (June 16, 2006), and accompanying IDM at Comment 1.
[431] *See* JCG and Modern Heavy Initial SV Comments at Exhibit 6A at 110.
[432] *See Polyester Staple Fiber from China* IDM at Comment 3.

quality of the data in this publication to be reliable and consistent with our decisions in other non-market economy proceedings.[433] Therefore, we find that it is not necessary to adjust the truck freight expense surrogate values on the basis of distance and would also introduce inconsistencies into the data reported in *Doing Business Russia*, which relies on a defined methodology.

JCG argues that the distance from the warehouse to the port of St. Petersburg (of 8 km) is disproven because the precise locations of the warehouse and port in St. Petersburg are unknown. Further, JCG argues that if Commerce were to consider the distance of all possible locations from the various warehouses and seaport terminals within St. Petersburg, it would find the distance for St. Petersburg, as listed in *Doing Business Russia*, is not an accurate representation of the distance from the warehouse to the port. Based on these facts, JCG argues that Commerce calculated a SV that is aberrational by using an aberrational distance (*i.e.*, 8 km).[434] Thus, JCG insists Commerce replace this distance with one that it has placed on the record that averages 144 possible distances of warehouses to ports within St. Petersburg. As outlined below, we find JCG's arguments are unpersuasive.

As an initial matter, we agree with the petitioner that the fact that *Doing Business Russia* does not specify precise locations of the warehouse and a sea terminal in St. Petersburg is irrelevant. Previous editions of the *Doing Business* report listed the port of exportation, not the exact distance, forcing parties to guess what the distance might be. However, the more recent versions of *Doing Business* list the distance as a guide to parties wishing to import or export. For this reason, we do not find that JCG's reliance on *TRBs from China 2012-2013*[435] and *TRBs 2013-2014*[436] supports its arguments, as the *Doing Business* publications used in these reviews did not identify a distance to the port, and Commerce was forced to make assumptions as to what the distance was. To the contrary, the 2019 edition of *Doing Business Russia* clearly provides the assumed distance to the port and Commerce is no longer forced to make its own assumptions about what such a distance may be. This is consistent with our experience in relying on the *Doing Business* publications in more recent cases.[437]

Further, to the extent that JCG argues the distance to the port (for St. Petersburg) is flawed because *Doing Business* does not identify either the exact warehouse origin or port terminal destination,[438] we note that *Doing Business* does not provide the exact warehouse origin or port

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[433] *See*, *e.g.*, *Diamond Sawblades 2011-2012* IDM at Comment 20.
[434] *See Polyester Staple Fiber from China* IDM at Comment 3.
[435] *See TRBs from China 2012-2013* IDM at Comment 1 (stating "unlike in *PC Tie Wire* and *Hand Trucks*, we do not have the distance from the port of Laem Chabang to the Bangkok Industrial Area on our record").
[436] *See TRBs from China 2013-2014* IDM at Comment 3.
[437] *See, e.g.*, *Certain Collated Steel Staples from the People's Republic of China: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Preliminary Affirmative Determination of Critical Circumstances, Postponement of Final Determination and Extension of Provisional Measures*, 85 FR 882 (January 6, 2020), and accompanying PDM at 28 (final determination not yet issued); *Ceramic Tile China Preliminary* PDM at 31 (final determination not yet issued); and *Certain Steel Nails from the People's Republic of China: Preliminary Results of the Antidumping Duty Administrative Review and Preliminary Determination of No Shipments; 2017-2018*, 84 FR 55906 (October 18, 2019), and accompanying PDM at 31 (final determination not yet issued).
[438] For example, *see* JCG's and Modern Heavy's Second Surrogate Value Comments at Exhibit 7B: *Doing Business Brazil* (showing the port of Santos); Exhibit 7C: *Doing Business China* (showing the port as Shanghai); and Exhibit

terminal destination for Moscow either, which is a point JCG does not note in its arguments. In essence, JCG rests its claim on the fact that because the St. Petersburg distance is short, it is unreliable and therefore, aberrational. We find this argument unconvincing and unsupported by record information. For instance, the "short" distance used for St. Petersburg is comparable to other large cities from the *Doing Business* reports on the record, which contain multiple warehouses and seaports (*e.g.*, Tokyo). In fact, the *Doing Business* report identifies comparably short distances for Indonesia, Japan, China, and Mexico of between 15 km to 31 km.[439] In particular, we find that the worksheet of distances showing all 144 industrial zone-seaport terminal combinations provided by JCG in its case brief, does not support its arguments and instead corroborates the distance identified in *Doing Business Russia*. For instance, the worksheet shows that at least nine of the industrial zone-seaport terminal combinations, have zone/terminal locations smaller or identical to the 8 km distance reported in the *Doing Business* report.[440] Finally, we note that the St. Petersburg distance from *Doing Business Russia* is a close representation of distances that the respondents use to transport goods from the warehouse to the port; thus, instead of being aberrational, they reflect the actual costs that one of the mandatory respondents – Wison – is likely to incur in the normal course of business.[441]

With respect to JCG's argument that we should accept its proposed distance information from its worksheet based on information contained in the reports *Federal Agency for Maritime and River Transport* and *List of Container Terminals in St. Petersburg* for St. Petersburg, we disagree. The *Doing Business* report assumes a cost ($246) that relates to exporting standardized cargo of 15 metric tons in a standard 20-foot container to a distance of 8 km. Because an alternative distance other than the 8 km from *Doing Business*: (1) is not a distance related to the costs reported in *Doing Business*; and (2) would result in a distortive per-unit cost, we find it appropriate to continue to calculate the surrogate inland freight expenses using 8 km as the denominator based on *Doing Business*. Specifically, the costs in *Doing Business* used to calculate the surrogate inland freight expenses were based upon the assumption that a 20-foot container that contained 15 metric tons of products were traveling a distance of 8 km. Using the distance in the per-unit calculation maintains the relationship between the costs and distance from the survey (which is important because the numerator and the denominator of the calculation are dependent upon one another) and makes use of data from the same source. Therefore, we continue to use 8 km to calculate the inland freight expenses to maintain the internal consistency of the calculation, *i.e.*, the numerator and the denominator of the calculation are from the same source and dependent upon one another. Additionally, it is not clear from the reports cited by JCG that they are based on the same assumptions as outlined in *Doing Business 2019* (*e.g.*, *Doing Business* considers the

7E: *Doing Business Indonesia* (showing that the port is Jakarta). In each case the *Doing Business* reports provide the distance but do not provide the "exact" origin point or sea port terminal.

[439] For example, for Indonesia, the distances calculated for Jakarta and Surabaya are both short distances of 21 and 15 km, respectively. In comparison, the distances for Moscow and St. Petersburg of 724 and 8 km, respectively, demonstrate that these distances are not aberrational. *See* JCG's and Modern Heavy's Second Surrogate Value Comments at Exhibit 7C: *Doing Business China*; Exhibit 7E: *Doing Business Indonesia*; Exhibit 7F: *Doing Business Japan*; Exhibit 7G: *Doing Business Mexico*. Thus, to the extent that we reject the St. Petersburg distance because *Doing Business Russia* provides a short distance for a large city, we must reject all of them with a short distance. Also, there is nothing unusual and exceptional about the short distance that applies to St. Petersburg, considering other big cities in *Doing Business* also have short distances. In each case, the *Doing Business* reports provide the distance but do not provide the "exact" origin point or sea port terminal.

[440] *See* JCG's Case Brief at 24-26.

[441] *See* Wison's July 8, 2019 Section D Questionnaire Response (Wison July 8, 2019 DQR) at Exhibit D-10.

time it takes to get to a border, exclusion of tariffs, traffic delays, police checks, the amount of merchandise shipped by truck).

We also do not find availing JCG's argument that the allegedly distortive and aberrational SV in Russia can be highlighted by a "ratio to truck" analysis which JCG uses to compare SVs calculated from two cities in the same country. With the exception of Mexico, Brazil and Russia, the remaining countries on this list are not economically comparable to countries in this investigation, and, as such, price data from them are not appropriate to use as a benchmark for determining the suitability for these particular SVs. Further, the chart provided by JCG does not state the starting or ending points for any of the distances for these cities, rendering a comparison of costs for different distances meaningless, especially because other factors (time of transport) can impact costs in different countries.[442] Even if we had determined this analysis to be a meaningful exercise, and all countries were economically comparable to China, the SV calculated for St. Petersburg of 0.0021 per km per kg is comparable to another city with a short distance reported in the *World Bank* report (*e.g.*, Tokyo) which has a reported SV of $0.0011 per km per kg.

Further, there is a very logical explanation for the price differences, and resulting ratio, between shipping merchandise a long distance versus a very short distance. Long-haul trucking and short-haul trucking require very different assumptions. Specifically, for short-haul, the amount of time spent by the trucker loading and unloading cargo, relative to the total trip time is much greater. Additionally, in a short-haul situation, more of the distance is likely to be covered within urban or industrial areas at slower speeds, resulting in a higher cost per kilometer traveled.[443] For example, if it takes two hours on either end to load and unload a truck (including time queuing), plus thirty minutes to traverse a distance of 8 km in an urban area, versus a long-haul trucker that requires the same time to load and unload but is able to traverse 724 km in eight hours, the resulting long-haul trucking fee will be much less per kilometer traveled than the short-haul fee. In this example, the short-haul driver would still have to devote 4.5 hours to only transport the merchandise 8 km, while the long-haul driver would have to devote 12 hours of time, plus the gasoline and additional wear-and-tear. This is further borne out by examining the *Doing Business Russia* truck freight data.[444] Essentially, it is the "fixed costs" related to loading, unloading, and traveling within the urban environment that increase the cost per kilometer of short-haul trucking. Thus, neither the short distance nor long distance values are aberrational; rather, they are representative of the separate experiences that they reflect.

JCG cites to *Fish Fillets from Vietnam* and *MLWF China Final 2011-2012 AR* contending that Commerce should replace the proposed St. Petersburg distance, because it has a practice to select SVs based on market averages. However, as noted above, we find that *Doing Business Russia*

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[442] *See* JCG and Modern Heavy Initial SV Comments at Exhibit 6A at 71-72 (showing that the *Doing Business* report considers time as well as other factors such as traffic delays and police checks in calculating costs).
[443] *See, e.g.*, JCG and Modern Heavy Second SV Comments at Exhibit 6B.
[444] *See* Preliminary SV Memo at Exhibit 6. Using the 2019 edition of *Doing Business Russia*, and assuming a high-way mile cost of $1.00 per kilometer traveled (*i.e.*, a total cost of $724), versus a short-haul rate of $1.50 per kilometer traveled (*i.e.*, a mileage cost of $12) the remaining "fixed" loading and unloading cost equates to $234. Thus, there is a reasonable explanation for the cost difference, and neither value is aberrational; they merely account for different costs and the resulting per-mileage value is reflective of the distance traveled.

represents the best available information and represents a broad market average because it contains data collected from local freight forwarders, customs brokers, port authorities and traders;[445] thus, it reflects the freight costs of multiple vendors and users. Thus, there is no reason to consider other sources. Here, JCG has not proposed an alternative SV to calculate inland freight but, instead, requests that we combine data from other sources with the SV proposed. Thus, we find that *Fish Fillets from Vietnam* and *MLWF China Final 2011-2012 AR*, do not apply.

Finally, respondents cite to *Shakeproof* and *Xinjiamei Furniture* to argue that (1) when a quantity (or in this case, distance) is small, Commerce must subject the data to detailed scrutiny[446] and (2) when presented with record evidence demonstrating that a surrogate value based on a small quantity is vastly different than the corresponding surrogate value based on larger quantities, Commerce rejects the data. As noted above, after analyzing the data we do not find that JCG has demonstrated that the data are aberrational and we find that the distance for St. Petersburg is a close representation to the distance one of the respondents use to transport goods from the warehouse to the port; thus, it is an accurate reflection of the inland freight expenses one of the respondents is likely to incur. While JCG implies that "shorter" is the same as "less accurate," there is no evidence on the record to support such a conclusion. Merely being a lower value than others on the record does not demonstrate that the value in question is aberrational.[447] Also, since we averaged SVs between two distances, one shorter and one much longer (*i.e.*, St. Petersburg at 8 km and Moscow at 724 km) we find that any alleged distortion would have evened out. Further, as noted in the above analysis, we continue to find that the information from *Doing Business Russia* is the best available information, and JCG did not provide an alternative SV in which to value inland freight.

In light of the aforementioned, we continue to find the SV for inland freight based on *Doing Business Russia* is the best available information. Therefore, because this SV meets all of our SV criteria, we have continued using it for the final determination.

Comment 5: Surrogate Value for Timber

In the *Preliminary Determination*, Commerce valued JCG's FOP for the packing material fumigation timber (*i.e.*, field TIMBER) using GTA data under Russian HS category 4408.90 (Veneer sheet, etc., Not over 6 mm, Non-coniferous NESOI).[448]

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[445] *See* JCG and Modern Heavy Initial SV Comments at Exhibit 6A at 110.

[446] JCG cites to *Xinjiamei Furniture* to argue that in the *Preliminary Determination*, Commerce impermissibly ignored record evidence demonstrating that the 8 km distance data was aberrational. We disagree that there was a failure to properly evaluate the data, because JCG failed to articulate how these various exhibits (*i.e.*, *Doing Business* reports from other countries, google maps documents, various sources on Russian industrial zones, etc.) were related to each other or how they pertained to *Doing Business Russia*. *See* JCG and Modern Heavy Second SV Comments at Exhibits 6 and 7.

[447] *See Quartz Surface Products from China* IDM at Comment 10, stating "merely being a larger value than others on the record does not demonstrate that the value in question is aberrational."

[448] *See* Preliminary SV Memo at Exhibit 1-B.

JCG's Case Brief

- Commerce should select the HS category proposed by JCG (*i.e.*, HS 4407 ("Wood Sawn or Chipped Lengthwise, Sliced or Peeled, More Than 6 Mm (.236 In.) Thick")[449] because this HS category represents a broad range of wood products and the factor TIMBER used by JCG bears a generic description, with no qualifications regarding the type of wood (whether non-coniferous or otherwise) or the category of end-product (veneer sheet or any other finished product) or thickness. On the other hand, the HS category Commerce selected (*i.e.*, 4408.90) covers a specific category of wooden products; and, thus is too narrow a category for JCG's input.[450]

- Further, since Commerce was unable to explain its decision for rejecting its proposed HS category, Commerce should select HS 4407 or, at a minimum, average the average unit values (AUVs) of the two HS categories together and apply the result for the final determination.[451]

Petitioner's Rebuttal Brief

- Commerce should continue to use HS 4408.90 to value the FOP for fumigation timber because JCG openly acknowledges that it failed to provide Commerce with accurate and important information to determine which HS category better represents this factor.[452] Further, it is the requesting party's obligation to provide an accurate and complete record to enable Commerce to make a determination.[453] Since the necessary information is missing from the record and Commerce can only render a determination based on the information at its disposal, Commerce has no reason to reverse its decision from the *Preliminary Determination*.[454]

Commerce's Position:

For the final determination, in order to value the timber packing FOP for JCG, we have simple-averaged together the AUVs of the two HS categories on the record (*i.e.*, 4407 and 4408.90). In this case, JCG failed to provide a sufficiently detailed description of its input and, at the same time, suggested only the extremely broad category HS 4407, which covers many different sawn wood products. In the alternative, the petitioner suggested a very specific category of wood products (*i.e.*, 4408.90, for veneer sheet), based upon JCG's limited description of its input, "fumigation timber." Because neither HS category appears to be more specific to the input in question, we agree with JCG's suggested alternative to average together the two HS categories

[449] *See* JCG's Case Brief at 28 (citing JCG and Modern Heavy Initial SV Comments at Exhibit 1A).
[450] *Id.* at 28-29.
[451] *Id.* at 29.
[452] *See* Petitioner's Rebuttal Brief at 21 (citing JCG's Case Brief at 28 where the petitioner notes that since JCG states that "TIMBER bears a generic description, with no qualifications regarding the type of wood…or category of end-product…or thickness" it has essentially admitted that it was intentionally vague and failed to provide Commerce with the requisite information to value this input).
[453] *Id.*
[454] *Id.* at 21-22.

for the final determination.[455] Consequently, for the final determination, we have simple-averaged the values under both HS categories 4407 and 4408.90 and used the resulting AUV to value JCG's "TIMBER" FOP.[456]

Comment 6: Surrogate Value for JCG's market economy input

In the *Preliminary Determination*, Commerce valued JCG's hot rolled large welded circular tube (*i.e.*, in the field LARGEWELDCIRT) as a market economy (ME) purchase price.[457]

JCG's Case Brief

- Commerce erroneously rejected the Korean ME purchase price for LARGEWELDCIRT, and instead valued it based on import data. Further, when selecting a surrogate value for this input, Commerce relied on an HS heading that is product-specific when no information supports that this heading covered the input JCG used. Thus, Commerce should use the ME purchase price provided by JCG to value LARGEWELDCIRT or revise its choice of import data to obtain a simple average between the HS category selected in the *Preliminary Determination* (*i.e.*, HS 730531 "Pipe Nesoi, Ov 16 in. Iron or Steel, Longitudinally Welded") and another category on the record that could also represent these pipes (*i.e.*, HS 7306.30.19.09 Other welded pipes, round cross-section, from iron or non-alloy steel – Precision pipes with a wall thickness of more than 2 mm, Other").[458]

- Commerce presumably rejected the ME purchase price based on presumption of subsidy under section 773(c)(5) of the Act,[459] which was introduced by Section 505 of the Trade Preferences Extension Act of 2015 (TPEA) stating that "Commerce has the discretion to reject price or cost values, without further investigation, if the administering authority has determined that broadly available export subsidies existed with respect to those price or cost values."[460] However, this law imposes no new requirements, but clarifies existing law.

- Existing law which describes Commerce's authority on this issue is the Omnibus Trade and Competitiveness Act of 1988, wherein Congress amended Section 773(c) to provide that Commerce: (1) "shall determine normal value of the subject merchandise on the basis of the values of the factors of production;" and (2) "the valuation…shall be based on the best

[455] *See* JCG's Case Brief at 28-29.
[456] *See* Memorandum, "Less-Than-Fair-Value Investigation of Certain Fabricated Structural Steel from the People's Republic of China: Surrogate Value Memorandum for the Final Determination," dated concurrently with this memorandum (Final SV Memo).
[457] We note that in the Preliminary SV Memo, and the accompanying Excel Exhibit, at Tab Exhibit-1B, we reference a surrogate value for input LARGEWELDCIRT hot rolled large welded circular tube. However, we also stated in the Preliminary SV Memo that we were using the market economy purchase price and, thus, did not use the surrogate value from the spreadsheet in JCG's margin calculation program. *See* Preliminary SV Memo at 5; and JCG Preliminary Analysis Memo at 173.
[458] *See* JCG's Case Brief at 2-3 and 25-28.
[459] *Id.* at 25-26 (citing 773(c)(5) of the Act, as amended by the TPEA).
[460] *Id.* at 25-26 (citing Section 505 of the Trade Preferences Extension Act of 2015, Pub. Law 114-27 (June 29, 2015)).

available information regarding the value of such factors in a market economy country or countries considered to be appropriate." The scope of these amendments was discussed in the corresponding Conference Report accompanying the 1988 Act, stating that the conferees did not intend for Commerce to conduct a formal investigation to ensure that such prices are not dumped or subsidized, but intended Commerce to base its decision on information generally available to it at that time.[461]

- While the law does not require Commerce to do a formal CVD investigation for the input in question, it still requires that the agency supports its subsidy determinations with particular and objective evidence, such as the test outlined in *Fuyao Glass*.[462] Here, Commerce failed to engage in this type of analysis describing why the ME price was subsidized (of which there is no evidence) and why it found the selected SV was the best available information, (*i.e.*, why the HS category was product-specific and superior to the ME price data).[463]

Petitioner's Rebuttal Brief

- Commerce is within its discretion to exclude Korean purchases because: (1) Commerce has a longstanding policy for not using surrogate values from countries that provide generally available export subsidies;[464] (2) Commerce has repeatedly found Korea provides generally available export subsidies;[465] and (3) the Trade Preferences Act of 2015 affords Commerce the discretion to reject SVs "without further investigation if it has determined that broadly available export subsidies existed, or particular instances of subsidization occurred with respect to those {surrogate values}."[466]

- Commerce has already conducted a CVD investigation of the product in question (*i.e.*, large diameter welded pipe from Korea) in which Commerce found subsidy margins up to 27.42, and 9.29 percent for the "all others" rate.[467] Thus, there is no support for JCG's assertion that Commerce must repeatedly investigate the existence of generally available export subsidies, when Commerce has found that the Korean government is providing direct subsidies to Korean producers of this input.[468]

[461] *Id.* at 26-27 (citing Conference Report to the 1988 Omnibus Trade & Competitiveness Act, H.R. Rep. No. 100-576, (1988), at 590, reprinted in 1988 U.S.C.C.A.N. 1547, 1623-24 (*Omnibus Trade & Competitiveness Act*)).
[462] *Id.* at 27 (citing *Fuyao Glass Industry Group Co. v. United States*, 29 CIT 109, 118 (CIT 2005) (*Fuyao Glass*)).
[463] *Id.* at 27.
[464] *See* Petitioner's Rebuttal Brief at 18 (citing *Fresh Garlic Producer Association v. United States*, 121 F. Supp. 3d 1313, 1318 (CIT 2015); *Fresh Garlic from the People's Republic of China: Final Results and Partial Rescission of the 18th Antidumping Duty Administrative Review; 2011-2012*, 79 FR 36721 (June 30, 2014), and accompanying IDM at Comments 3 and 4).
[465] *Id*.
[466] *Id.* (citing 773(c)(5) of the Act, as amended by the TPEA).
[467] *Id.* at 19 (citing *Large Diameter Welded Pipe from the Republic of Korea: Countervailing Duty Order*, 84 FR 18773 (May 2, 2019) (*Large Diameter Pipe from Korea CVD*)).
[468] *Id.* at 19.

- Further, JCG has recognized and adopted Commerce's policy with respect to excluding surrogate values from excluded countries in its SV submissions by excluding those data points from countries which includes Korea.[469]

- Finally, Commerce should reject JCG's proposal to adopt a blended surrogate value methodology because: (1) as stated by JCG, the record describes its input (*i.e.*, LARGEWELDCIRT) in generic terms, meaning that JCG failed to provide Commerce with the necessary detail to value this input;[470] and (2) evidence on the record indicates that the product in question is best represented by the HS category Commerce selected in the *Preliminary Determination.*[471]

Commerce's Position:

We have determined that it is appropriate to reject JCG's market economy purchase prices from South Korea for the final determination. As we stated in the *Preliminary Determination*, in accordance with the *Omnibus Trade & Competitiveness Act*, Commerce continues to apply its long-standing practice of disregarding surrogate values if it has a reason to believe or suspect the source data may be subsidized.[472] In this regard, Commerce has previously found that it is appropriate to disregard such prices from South Korea because we determined that South Korea maintains broadly available, non-industry specific export subsidies.[473] Based on the existence of these subsidy programs that were generally available to all exporters and producers in these countries at the time of the POI, Commerce finds that it is reasonable to infer that all exporters from South Korea may have benefited from these subsidies. This is consistent with past practice, where Commerce has rejected market economy purchase prices from South Korea.[474]

JCG argues that Commerce did not place on the record substantial evidence reflecting that Korea subsidized the inputs in question and cites to the CIT's decision in *Fuyao Glass*[475] to support its

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[469] *Id.* at 19 (citing JCG and Modern Heavy Initial SV Comments at Exhibit 2A).
[470] *Id.* at 20 (citing *Certain Cold-Drawn Mechanical Tubing of Carbon and Alloy Steel from Italy: Final Affirmative Determination of Sales at Less Than Fair Value, Final Affirmative Determination of Critical Circumstances*, 83 FR 16289 (April 16, 2018), and accompanying IDM at Comment 7, stating "the respondent has 'a statutory obligation to prepare an accurate and complete record in response to questions plainly asked by {the Department}.'").
[471] *Id.* (citing JCG's August 7, 2019 Section D Supplemental Questionnaire Response (JCG August 7, 2019 SDQR) at Exhibit SSD-15).
[472] *See Omnibus Trade Act* at 590.
[473] *See, e.g.*, *Forged Steel Fittings from the People's Republic of China: Affirmative Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination and Extension of Provisional Measures*, 83 FR 22948 (May 17, 2018), and accompanying PDM at 28, unchanged in *Forged Steel Fittings from the People's Republic of China: Final Determination of Sales at Less Than Fair* Value, 83 FR 50339 (October 5, 2018), and accompanying IDM.
[474] *See, e.g.*, *Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 75 FR 59217 (September 27, 2010), and accompanying IDM at Comment 17; *Final Determination of Sales at Less Than Fair Value: Certain Automotive Replacement Glass Windshields from the People's Republic of China*, 67 FR 6482 (February 12, 2002), and accompanying IDM at Comment 1; *Notice of Final Determination of Sales at Less Than Fair Value: Lawn and Garden Steel Fence Posts from the People's Republic of China*, 68 FR 20372 (April 25, 2003), and accompanying IDM at Comment 2 (citing *Omnibus Trade Act* at 590-91).
[475] *See Fuyao Glass* at 118.

contention. We disagree that Commerce must support its subsidy determination by engaging in an in-depth analysis such as the one laid out in *Fuyao Glass*. As an initial matter, Commerce is not required to conduct a formal investigation with respect to multiple countries to ensure that prices are subsidized.[476] Rather, it is sufficient if Commerce has "substantial, specific, and objective evidence in support of its suspicion that the prices are distorted."[477] In other CIT decisions, the CIT has sustained Commerce's exclusion of market economy purchases when Commerce has provided recent evidence of generally available export subsidies from the market economy in question and/or evidence of subsidization that was specific to the industry supplying the input.[478] Therefore, Commerce is instructed by Congress to base its decision on information that is available to it at the time it is making its determination.[479] Indeed, in the recently completed administrative review of the countervailing duty order on cold-rolled steel from Korea, Commerce found that the Government of Korea continues to provide loans contingent upon exports.[480] We find this fact sufficient to establish the existence of generally available export subsidies from Korea which may have been provided for JCG's Korean inputs – and JCG has not provided dispositive evidence to the contrary for its imports from Korea. We also note that the Trade Preferences Act of 2015 affords Commerce the discretion to reject SVs "without further investigation if it has determined that broadly available export subsidies existed, or particular instances of subsidization occurred with respect to those {surrogate values}},"[481] a fact that JCG recognizes in its Case Brief. Further, as noted by the petitioner, Commerce has recently conducted a CVD investigation of the product in question (*i.e.*, large diameter welded pipe from South Korea) in which Commerce found subsidy margins up to 27.42 percent and

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[476] *See China Nat'l Mach. Imp. & Exp. Corp. v. United States*, 293 F. Supp. 2d 1334, 1338-1339 (CIT 2003) (*China Nat'l Mach. Corp.*) ("The 'reason to believe or suspect' standard articulated in the *House Report*… establishes a lower threshold than what is required to support a firm conclusion... the agency's actions are entitled to deference as long as the agency points to substantial, specific, and objective evidence in support of its *suspicion* that the prices are distorted… a 'reason to believe or suspect requires less evidence than an actual finding of subsidies in fact.' Moreover, the *House Report* specifically points out that a 'formal investigation' is not necessary. *House Report* at 590. The statute further allows Commerce to act given 'best available information.' ...Therefore, it is clear that Congress provided the agency with ample discretion to disregard suspected distorted prices." (citations omitted)); *see also* HR. Rep. Conf. 100-576 at 590.

[477] *See China Nat'l Mach. Corp.*, 293 F. Supp. 2d 1334, 1339 (citing *Viraj Group, Ltd. v. United States*, 343 F. 3d 1371, 1377 (Fed. Cir. 2003) ("{E}ven though accurate calculation of dumping margins is an overarching goal of the antidumping duty statute, a recent decision from the United States Court of Appeals for the Federal Circuit emphasized that such a goal must necessarily be 'within the confines of the statutes, not in derogation of a statutory provision.'")); *see also* HR. Rep. Conf. 100-576 at 590.

[478] *See, e.g.*, *Gold East Paper (Jiangsu) Co. v. United States*, 121 F. Supp. 3d 1304 (CIT 2015); and *CS Wind Vietnam Co. v. United States*, 971 F. Supp. 2d 1271, 1291-1294 (CIT 2014) (*CS Wind*), as sustained by the Federal Circuit in *CS Wind Vietnam Co. v. United States*, 832 F. 3d 1367, 1375 (Fed. Cir. 2016) (Holding that the respondent had not challenged Commerce's finding that subsidies were available for export transactions in Korea, and that the respondent also failed to demonstrate that its purchases at issue were unaffected by generally available export subsidies from Korea; and therefore, Commerce could choose to use surrogate values for those components, rather than the prices of the Korean purchases.).

[479] *See Omnibus Trade Act* at 590.

[480] *See Certain Cold-Rolled Steel Flat Products from the Republic of Korea: Preliminary Results of Countervailing Duty Administrative Review, 2016*, 83 FR 51446 (October 11, 2018), and accompanying PDM at "Korea Development Bank (KDB) and Other Policy Banks' Short-Term Discounted Loans for Export Receivables," unchanged in *Certain Cold-Rolled Steel Flat Products from the Republic of Korea: Final Results of Countervailing Duty Administrative Review, 2016*, 84 FR 24087 (May 24, 2019).

[481] *Id.* (citing 773(c)(5) of the Act, as amended by the TPEA).

which were specific to the input in question.[482] Thus, for the foregoing reasons, we find no reason to conduct further analysis to demonstrate why South Korean prices may be subsidized.

Finally, with respect to the appropriate surrogate value, we disagree with JCG that it is appropriate to simple-average the two SVs that could represent this input. Commerce's practice when selecting the best available information for valuing FOPs, and in accordance with section 773(c)(1) of the Act, is to select, to the extent practicable, SVs which are product-specific, representative of a broad-market average, publicly available, contemporaneous with the POR, and tax and duty exclusive.[483] Further, the Courts have affirmed that Commerce has broad discretion in deciding what constitutes the best available information, provided that the agency makes a selection that will enable it to ultimately calculate accurate dumping margins.[484] In this investigation, the record contains evidence demonstrating that the HS category 7305.31 (*i.e.*, "Pipe Nesoi, Ov 16 in. Iron or Steel, Longitudinally Welded") is the most appropriate HS category to value this input and is most specific to JCG's input;[485] consequently, we have used 7305.31 to value LARGEWELDCIRT for the final determination because it is the best available information on the record and the most specific to this FOP.[486]

Comment 7: Surrogate Value for Angle and Channel Steel[487]

In the *Preliminary Determination*, Commerce valued JCG's FOP for angle and channel steel (*i.e.*, fields ANGLESTEEL and CHANNEL) using GTA data under Russian HS category 7216.50 (Oth Angls Shps Sec Ios Na Hot-Wkd).[488]

Petitioner's Case Brief

- Commerce should modify its HS categorization for angle and channel steel for JCG because it failed to provide accurate and specific information to value these inputs.[489]

- Commerce inappropriately used a basket category (*i.e.*, 7216.50.99, "Profile Of Iron Or Non-Alloy Steel, Only Hot-Rolled, Hot-Drawn Or Hot-Extruded, Other Than With A Cross-Section Which Is Capable Of Being Enclosed In A Square The Side Of Which Is <= 80 Mm,

[482] *See Large Diameter Pipe from Korea CVD*.
[483] *See Preliminary Determination* PDM at 29.
[484] *See, e.g.*, *Solarworld Ams., Inc. v. United States*, 273 F. Supp. 3d at 1265 (*Solarworld Ams*); and *QVD Food Co.*, 658 F.3d 1318, 1323.
[485] *See* JCG's August 23, 2019 Sections A, C, and D Supplemental Questionnaire Response (JCG August 23, 2019 SACDQR) at Exhibit SD-6 at pages 406-423; and JCG August 7, 2019 SDQR at Exhibit SSD-15.
[486] *See* JCG Final Calculation Memorandum at 2
[487] In its rebuttal brief, JCG incorporated Modern Heavy's rebuttal comments regarding the SVs for angle and channel steel. *See* JCG's Rebuttal Brief at 5. Some of the rebuttal arguments pertain solely to Modern Heavy and have not been addressed here.
[488] *See* Preliminary SV Memo at Exhibit 1A and 1B.
[489] *See* Petitioner's Case Brief at 51. We find that the arguments raised by the petitioner relate mostly to Modern Heavy. For instance, the HS category selected by Commerce in the *Preliminary Determination*, which the petitioner objects, is not the same HS category we selected for JCG's same inputs. However, since the petitioner requested that we use its proposed HS category to value inputs for JCG and Modern Heavy, we have addressed these comments as they relate to JCG.

And U-, I-, H-, L- Or T-Sections And Ribbed Sections") to value these inputs, which excludes common steel shapes and only includes specialized shapes. There is no evidence on the record showing JCG only used specialized shapes in the production process.[490]

- Commerce should value these inputs using the HS category 7216.31 (*i.e.*, 7216.31.00, "U Sec Ios Na Hot-Wkd 80Mm Or More High") instead of an "all others" category.[491]

JCG's Rebuttal Brief

- Petitioner's arguments are not supported by record evidence. In this case, an "all others" category is more appropriate because it encompasses many types of angle and channel steel; whereas, the other HS categories, including the one suggested by the petitioner, are too narrow to represent JCG's purchases of these FOPs.[492]

- Based on the foregoing, record evidence demonstrates that JCG's steel inputs were all properly classified in the *Preliminary Determination* and Commerce should continue to value JCG's under HS category selected for the *Preliminary Determination*.[493]

Commerce's Position:

We have not made any changes to the valuation of JCG's angle or channel steel (*i.e.*, ANGLESTEEL and CHANNEL, respectively) for this final determination. JCG defined its angle steel as "HR Non-alloy Angle Steel" and its channel steel as "HR Non-alloy Channel."[494] Further, record information shows that JCG purchased its angle and channel steel inputs in a variety of different sizes and shapes.[495] Therefore, in the *Preliminary Determination*, we selected HS category 7216.50 "Oth Angls Shps Sec Ios Na Hot-Wkd,"[496] a category that includes a variety of channel and angle steel products. At verification, we confirmed that JCG purchases different shapes and sizes of these inputs.[497] Thus, we continue to find that it is appropriate to value JCG's angle and channel steel using HS category 7216.50 "Oth Angls Shps Sec Ios Na Hot-Wkd."

Commerce's practice when selecting the best available information for valuing FOPs, and in accordance with section 773(c)(1) of the Act, is to select, to the extent practicable, SVs which are product-specific, representative of a broad-market average, publicly available, contemporaneous with the POR, and tax and duty exclusive.[498] Further, the Courts have affirmed that Commerce has broad discretion in deciding what constitutes the best available

[490] *Id*.
[491] *Id.*
[492] *Id*. (citing JCG's Verification Report at 17).
[493] *Id*. at 33-34.
[494] *See* JCG August 23, 2019 SACDQR at Exhibit SD-5.
[495] *Id.* at Exhibit SD-6, pages 393-395 and 404-405; and JCG August 7, 2019 SDQR at Exhibit SSD-13 at page 109.
[496] *See* Preliminary SV Memo at Exhibit 1-B and Exhibit 3-A.
[497] *See* JCG's Verification Report at 15 and Exhibit 10.
[498] *See Preliminary Determination* PDM at 29.

information, provided that the agency makes a selection that will enable it to ultimately calculate accurate dumping margins.[499]

We disagree with the petitioner that we should use Russian HS 7216.31 to value JCG's angle and channel steel, because there is no evidence suggesting that JCG only purchased angle and channel steel under the HS subheading 7216.31, which represents only "U" shaped channel steel. We also disagree with the petitioner that HS 7216.50 is necessarily an "all others" category. Although it covers "other angles shapes sections," it is not a typical catch-all basket category – *i.e.*, it is not a "not elsewhere specified or indicated" (or "NESOI") category. Further, based upon the large number of HS codes that appear to cover angles and channels, the petitioner's suggestion does not appear to be more specific to JCG's purchased angle and channel steel than the HS code we selected for the *Preliminary Determination*.[500] Additionally, the CIT has held that, when faced with a choice between imperfect options, it is within Commerce's discretion to determine which choice represents the best available information.[501] Therefore, out of the proposed HS categories to value these inputs, we find the HS category 7216.50, "Oth Angls Shps Sec Ios Na Hot-Wkd" (*i.e.*, Other angles, shapes and sections, not further worked than hot-rolled, hot-drawn or extruded), to be the most specific and most appropriate, based upon JCG's reported FOP description, for its angle and channel steel. Therefore, for the final determination, we continue to use Russian import data under HS subheading 7216.50[502] to value JCG's FOPs.

Comment 8: Surrogate Value for Steel Grating and Steel Skirting Board[503]

In the *Preliminary Determination*, Commerce valued JCG's FOPs for steel grating and steel skirting board (*i.e.*, fields STEELGRATING and STEELBOARD) using GTA data under Russian HS category 7308.90 (Structures And Parts Of Structures Others, Of Iron Or Steel).[504]

Petitioner's Case Brief

- JCG failed to provide accurate and specific information in order to benefit from lower SVs reported from broader HS categories. For instance, JCG identified HS 7308.90 as the proper Russian HS category, but HS 7308.90 has a number of subheadings that are at the 10-digit level. Given that specific categories exist, JCG, as the producer of the merchandise, should have been able to identify the specific HS category for these inputs.

[499] *See, e.g.*, *Solarworld Ams*; and *QVD Food Co*.
[500] *See* Preliminary SV Memo at Exhibit 1-B.
[501] *See CS Wind*, 978 F. Supp. 2d at 1288 (citing *Dorbest Ltd. v. United States*, 30 CIT 1671, 1687, 462 F. Supp. 2d 1262, 1277 (CIT 2006)).
[502] As noted above, petitioner argues that Commerce should not select HS category 7216.50.99, because it is an all-others category that excludes common shapes (*i.e.*, U, I, H, L, and T sections); and there is no record evidence showing that JCG purchased only specialized shapes. We note that in the *Preliminary Determination* for JCG, we used HS category 7216.50 (not 7216.50.99) to value JCG's angle and channel steel, which is a broader six-digit category that covers all shapes and does not exclude common shapes.
[503] In its rebuttal brief, JCG incorporated Modern Heavy's rebuttal comments regarding the SVs for steel grating and steel skirting board. *See* JCG's Rebuttal Brief at 5.
[504] *See* Preliminary SV Memo at Exhibit 1B.

JCG's Rebuttal Brief [505]

- The petitioner's argument that JCG should have proposed more specific 10-digit HS subheadings instead of the 6-digit heading (*i.e.*, 7308.90) for steel grating, steel skirting board, is unpersuasive because: (1) JCG was unable to locate particular sub-headings that unambiguously covered these inputs; (2) the petitioner failed to propose any appropriate 10-digits subheadings to value these inputs; and (3) the six-digit HS headings for these inputs were verified and accepted by Commerce.[506]

Commerce's Position

We continue to find that HS category 7308.90 for JCG's inputs of steel grating and steel skirting board represents the best available information on the record to value these inputs.

Commerce's practice when selecting the best available information for valuing FOPs, and in accordance with section 773(c)(1) of the Act, is to select, to the extent practicable, SVs which are product-specific, representative of a broad-market average, publicly available, contemporaneous with the POR, and tax and duty exclusive.[507] Further, the Courts have affirmed that Commerce has broad discretion in deciding what constitutes the best available information, provided that the agency makes a selection that will enable it to ultimately calculate accurate dumping margins.[508]

JCG described its steel grating as non-alloy hot rolled steel grating, used to protect steel structures and steel board as non-alloy hot rolled steel skirting.[509] For the *Preliminary Determination* we used GTA data under Russian HS category 7308.90, *i.e.*, Structures And Parts Of Structures Others, Of Iron Or Steel, to value these FOP inputs, as the best available information proposed by parties in this investigation that was specific to these inputs.[510] The petitioner asserts that JCG has proposed a broad six-digit HS category for these inputs with lower SVs, when more specific categories exist, and that JCG, as a producer, should have provided additional information for Commerce to designate a more specific HS category. While it is true that Commerce has a preference to use the most specific data available, in this case, the petitioner has not proposed other Russian HS categories that are more specific to the inputs in question, nor has the petitioner provided any alternative SV data.

Prior to the *Preliminary Determination*, parties were afforded the opportunity to comment on the surrogate value data.[511] The petitioner did not take this opportunity to provide SV data for more

[505] In its rebuttal brief, JCG incorporated Modern Heavy's rebuttal comments regarding the SVs for angle and channel steel. *See* JCG's Rebuttal Brief at 5.
[506] *See* Modern Heavy's Case Brief at 35.
[507] *See Preliminary Determination* PDM at 29.
[508] *See, e.g.*, *Solarworld Ams* and *QVD Food Co*.
[509] *See* JCG August 23, 2019 SACDQR at Exhibit SD-5.
[510] *See* Preliminary SV Memo at Exhibit 1-B.
[511] *See* Surrogate Country Letter.

specific Russian subheadings on the record.[512] Moreover, the petitioner does not disagree that the six-digit category 7308.90 is incorrect – it only asserts that Commerce could have chosen a more specific subcategory under that six-digit HS code.[513] However, because we do not have an alternative code (or codes) and because the petitioner has not suggested an alternative value, there is no basis for Commerce to revise its selection of Russian HS classification assigned to JCG's steel grating and steel skirting board for the final determination. Accordingly, for the final determination, we continue to value steel grating and steel skirting board using HS classification 7308.90.

Comment 9: Surrogate Value for Wison's Packing Input

Wison's Case Brief

- During the FOP verification, as a correction presented at the start of verification, Wison provided a corrected description and HS tariff code for the packing material toller fiber bandage (*i.e.*, field T_Fib). In its initial database, Wison described the packing factor as falling under HS code 5911.10, which primarily relates to fabric. As Wison explained at verification, the correct description is a "packing belt made from nylon fiber used to fasten merchandise," which is classified under HS code 3921.90.[514] During verification, Commerce also examined packing materials and did not note any inconsistencies with what was reported. Further, Commerce has previously allowed adjustments to the HS classification for FOPs based upon corrections reported as part of verification.[515] As a result, Commerce should revise the initial classification of this packing input and the corresponding surrogate value assigned to it.

Petitioner's Rebuttal Brief

- Wison refers to its packing input, identified as variable T_Fib, as a "fiber bandage" or "fabric bandage" in three previous submissions to Commerce.[516] Therefore, the record contradicts Wison's claim that the input was misclassified and Commerce should reject Wison's request to reclassify T_Fib from being a "fiber bandage", classified under HS code 5911.10, to a "nylon fiber" packing strap, classified under HS code 3921.90. In addition, even if T_Fib were to be reclassified, the record lacks the information required to value Wison's packing

[512] *See* Petitioner's Letters, "Certain Fabricated Structural Steel from the People's Republic of China: Petitioner's Initial Surrogate Value Comments," dated July 15, 2019, and "Certain Fabricated Structural Steel from the People's Republic of China: Petitioner's Final Surrogate Value Comments," dated August 5, 2019.
[513] *See* Petitioner's Case Brief at 41-42.
[514] *See* Wison's Case Brief at 11 (citing Wison FOP Verification Report at 18-19 and Verification Exhibit 1).
[515] *Id.* at 11 (citing *Final Affirmative Determination in the Less-Than-Fair-Value Investigation of Mattresses from the People's Republic of China*, 84 FR 56761 (October 23, 2019) (*Mattresses from China*), and accompanying IDM at V).
[516] *See* Petitioner Rebuttal Brief at 16 (citing Wison's Letter, "Certain Fabricated Structural Steel from the People's Republic of China: Surrogate Values Information," dated August 5, 2019 (Wison Surrogate Value Comments) at Exhibit SV-1; Wison's Letter, "Certain Fabricated Structural Steel from the People's Republic of China: Second Supplemental Questionnaire Response," dated September 3, 2019 (Wison SSQR), at Exhibit D-25; and Wison's Letter, "Certain Fabricated Structural Steel from the People's Republic of China: Supporting Documentation in Response to Question 29," dated July 30, 2019 (Wison Question 29 Comments), at Exhibit D-17.69).

input. The only data on the record is for HS code 5911.10 and neither Wison nor any other respondent has placed Russian surrogate value data on the record for imports under the subheading 3921.90.[517]

Commerce's Position:

With respect to Wison's packing input (*i.e.*, "T_fib"), for the final determination, we are valuing this input under HS code 3920.92 (*i.e.*, "Plates, sheets, film, foil, and strip of plastics, not self-adhesive, non-cellular, not reinforced or laminated, etc., of Polyamides).

In its questionnaire responses, Wison described its packing input T_fib as a "fiber bandage" or "fiber bandage used for packing."[518] Consequently, for the *Preliminary Determination*, based upon descriptions provided by Wison, we classified Wison's packing input under HS code 5911.10 (*i.e.*, "Textile fabrics, felt and felt-lined woven with layers of rubber, leather, etc. for card clothing, and similar fabric for other technical uses"). At verification, Wison presented, as part of its minor corrections, a corrected description of the input, as "packing belt made from nylon fiber used to fasten merchandise," which it stated should be classified under HS code 3921.90 (*i.e.*, "Plates, sheets, film, foil and strip of plastics, not elsewhere specified or included, non-cellular plastics, not elsewhere specified or included").[519] In its case brief, Wison argues that throughout the information-gathering phase of the investigation, Wison mistakenly described the packing input as a fiber bandage classified under HS 5911.10.[520] Further, Wison asserts that Commerce examined packing materials at verification and noted no discrepancies with the reported descriptions.[521]

The petitioner rebuts that Wison referred to the packing input as a fiber bandage in three separate submissions to Commerce and included pictures of the type of input.[522] The petitioner claims that even assuming Wison's changes to the description of the packing input are legitimate, there is no record evidence to change the value of the input. Moreover, the petitioner contends, Wison only describes the packing input now as "nylon fiber," and HS 3921.90 does not cover a nylon packing strap. In addition, the petitioner claims that there is no Russian surrogate value data on the record pertaining to imports under this HS code. Thus, even if HS 3921.90 were the correct HS code, Commerce has no surrogate value data with which to value this input. Therefore, the petitioner insists that the only relevant data on the record is for HS 5911.10, and Commerce should reject Wison's request to revise the surrogate value for its packing input.

As an initial matter, we note that the petitioner appears to take issue with Commerce accepting the revised description of this input at verification. We agree with Wison that Commerce has the

[517] *See* Petitioner Rebuttal Brief at 17.
[518] *See, e.g.*, Wison SSQR at Exhibit D-25.
[519] *See* Wison FOP Verification Report at 2 and Verification Exhibit 1 at MC-7.
[520] *See* Wison's Case Brief at 10.
[521] *Id.* at 11 (citing Wison FOP Verification Report at 18).
[522] *See* Petitioner's Rebuttal Brief at 16 (citing Wison Surrogate Value Comments at Exhibit SV-1; Wison SSQR at Exhibit D-25; and Wison Question 29 Comments at Exhibit D-17.

discretion to accept a revised FOP description as a minor correction at verification, and has done so previously.[523] In addition, we note that in our verification agenda we specifically state:

> Please note that verification is not intended to be an opportunity for submission of new factual information. New information will be accepted at verification only when: (1) the need for that information was not evident previously; (2) the information makes minor corrections to information already on the record; or (3) the information corroborates, supports, or clarifies information already on the record.[524]

We accept this type of new information, in general, due to the discretion provided to Commerce under section 782(e) of the Act to accept such information. At verification, we determined that Wison's minor corrections met the criteria established in section 782(e) of the Act. Therefore, we accepted them on the record. Further, the Courts have upheld this practice.[525]

We disagree with the petitioner that we should continue to value Wison's packing input under HS 5911.10. Notably, the petitioner does not argue that HS 5911.10 is the *correct* classification for Wison's packing input, only that it is the only classification for which Wison provided documentary evidence.[526] However, Wison provided documentary evidence at verification correcting the description provided in its questionnaire response.[527] We accepted the corrected description at verification, and noted no discrepancies at verification with respect to the new description.[528] HS 5911.10 is an obviously incorrect classification for plastic packing strap made from nylon fiber, as it encompasses "Textile fabrics, felt and felt-lined woven with layers of rubber, leather, et. for card clothing, and similar fabric for other technical uses." The materials and uses listed in this HS code are clearly not present in Wison's packing input and are not supported by record evidence. Thus, we cannot use HS 5911.10 for the final determination to value Wison's packing input T_fib.

Commerce's practice when selecting the best available information for valuing FOPs, and in accordance with section 773(c)(1) of the Act, is to select, to the extent practicable, SVs which are product-specific, representative of a broad-market average, publicly available, contemporaneous with the POR, and tax and duty exclusive.[529] Further, the Courts have affirmed that Commerce has broad discretion in deciding what constitutes the best available information, provided that the agency makes a selection that will enable it to ultimately calculate accurate dumping margins.[530]

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[523] *See, e.g.*, *Mattresses from China* IDM at section V. ("We adjusted certain Malaysia HTS classifications related to Zinus' FOP and adjusted Zinus' FOP database and U.S. sales database based on the on the minor corrections submitted at verification.").
[524] *See* Commerce's Letter to Wison, "Less-Than-Fair-Value Investigation of Certain Fabricated Structural Steel from the People's Republic of China: Factors Verification Agenda," dated September 6, 2019.
[525] *See, e.g.*, *Maui Pineapple Company, Ltd. v. United States*, 264 F. Supp. 2d 1244, 1257 (CIT 2003).
[526] *See* Petitioner's Rebuttal Brief at 17.
[527] *See* Wison FOP Verification Report at 3 and Verification Exhibit 1 at MC-7.
[528] *Id.* at 18. We noted no discrepancies at verification regarding packing inputs.
[529] *See Preliminary Determination* PDM at 29.
[530] *See, e.g.*, *Solarworld Ams.*; and *QVD Food Co.*

While we note that, contrary to the petitioner's assertion, there is surrogate value data on the record for HS 3921.90 (*i.e.*, the category proposed by Wison),[531] we disagree with Wison that this is the best HS code with which to value the nylon packing belt. Nylon is a synthetic plastic polymer with a polyamide structure.[532] HS 3921.90 refers to "Plates, sheets, film, foil and strip of plastics, not elsewhere specified or included, non-cellular plastics not elsewhere specified or included." However, polyamides are elsewhere specified in the HS code. Specifically, HS 3920.92 encompasses "Plates, sheets, film, foil and strip of plastics, not self-adhesive, non-cellular, not reinforced or laminated etc., of polyamides." There is no record evidence demonstrating that Wison's packing input is self-adhesive, cellular, reinforced, or laminated. Further, we have Russian surrogate value data on the record of this proceeding with which to value Wison's packing input under this HS code.[533] Therefore, we find that HS code 3920.92 constitutes the best available information, pursuant to 773(c)(1) of the Act. Accordingly, for the final determination, we have valued Wison's packing input, "T_fib," using Russian HS code 3920.92.[534]

Comment 10: Selling and Distribution Expenses

In the *Preliminary Determination*, Commerce calculated surrogate financial ratios using the financial statements of ZOK JSC, ChZMK JSC, Kashira Steel, and ESK OJSC. In each case, Commerce allocated the entire amount reported in the line item "Selling and Distribution Expenses" under the accounting category of "SGA & Interest."[535]

JCG's Case Brief[536]

- Commerce's allocation results in a distorted selling, general, and administrative (SG&A) expense ratio. "Selling and Distribution Expenses" is a hybrid category comprised of two distinct cost elements – (a) selling expenses and (b) distribution expenses. Distribution expenses ordinarily refer to the cost incurred in relation to the transportation of finished goods, including truck freight and brokerage and handling charges. This is further corroborated by the absence of any line item in the four financial statements that could be tied to either truck freight or brokerage and handling charges. It is Commerce's practice to exclude distribution expenses from the ratio calculations in order to avoid double counting of such expenses because they are already deducted from U.S. price. As such, including

[531] *See* Wison Surrogate Value Comments at Exhibit SV-2 and Preliminary SV Memo at Exhibit 3.
[532] The Oxford English Dictionary defines nylon as "Any of various synthetic thermoplastic polymers with a straight-chain polyamide structure, many of which are tough, lightweight, and resistant to heat and chemicals, may be produced as filaments, sheets, or molded objects, and are widely used for textile fabrics and industrially."
[533] *See* Wison Surrogate Value Comments at Exhibit SV-2; and Preliminary SV Memo at Exhibit 3.
[534] *See* Final SV Memo at Exhibit 1-B.
[535] *See* Preliminary SV Memo at 10 and Exhibits 10-A, 10-B, 10-C and 10-D.
[536] Modern Heavy also made arguments regarding this issue, relying on the same arguments as JCG. *See* Modern Heavy Case Brief at 2 and 21-23. However, we find this issue as to Modern Heavy to be moot based on our decision to apply total AFA in determining Modern Heavy's dumping margin, as discussed in Comment 12 below.

allocation of the "Distribution expenses" under the "SGA & Interest" results in an impermissible double counting of this expense.[537]

- To avoid distorting the ratio calculation and resulting AD margin calculation, Commerce should either (1) apply a 50:50 ratio to the selling and distribution expenses to exclude half of the distribution expenses; or (2) consider that distribution expenses are part of "SGA & Interest" and therefore not adjust the U.S. gross price for truck freight and brokerage and handling costs. Indeed, in the *Preliminary Determination*, Commerce addressed a similar situation for labor and electricity costs by considering the two costs as part of manufacturing overhead, and therefore did not separately value the FOPs for labor and electricity for the normal value buildup. Commerce should extend this methodology to "Distribution expenses" as well.[538]

Petitioner's Rebuttal Brief

- Commerce should continue to group selling and distribution expenses following the same methodology used in the *Preliminary Determination* and decline JCG's suggested allocation for the final determination.[539]

- The term "distribution expense" does not relate to the transportation of finished goods, and JCG fails to cite to a single case to support this assertion, because Commerce likely found it was incorrect. In fact, "distribution" is not "ordinarily" related to the cost of transporting finished goods.[540]

- For instance, in *Crystalline Silicon Photovoltaic Products from China*, Commerce found that the accounting term "distribution" can refer to "customer service and support of resellers, and thus is a selling expense."[541]

- Where there is a lack of clarity regarding a line item or group of line items in a financial statement, Commerce does not make assumptions regarding the allocation of costs to one cost center or another. For instance, in *Mattresses from the People's Republic of China*,[542] Commerce encountered several Malaysian financial statements where distribution costs were not explicitly identified or where they were bundled in SGA. Commerce stated that "{w}hen we are unable to isolate specific expenses within surrogate financial statements, our practice is to not make adjustments to the financial statements data, as doing so may introduce unintended distortions into the data rather than achieving greater accuracy."[543] In that same

[537] *See* JCG's Case Brief at 23-25 (citing Preliminary SV Memo at 10 and Exhibits 10-A, 10-B, 10-C and 10-D).
[538] *Id.* (citing Preliminary SV Memo at 10).
[539] *See* Petitioner's Rebuttal Brief at 12-15.
[540] *Id*. at 13.
[541] *Id*. (citing *Certain Crystalline Silicon Photovoltaic Products from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 79 FR 76970 (December 23, 2014) (*Crystalline Silicon Photovoltaic Products from China*), and accompanying IDM at Comment 2).
[542] *Id*. at 14 (citing *Mattresses from China* IDM at Comment 6).
[543] *Id*. (citing *Wooden Bedroom Furniture from the People's Republic of China: Final Results and Final Rescission, In Part*, 76 FR 49729 (August 11, 2011) (*Wooden Bedroom Furniture*), and accompanying IDM at Comment 19).

case, Commerce stated that "when calculating overhead and SGA, it is Commerce's practice to accept data from the surrogate producer's financial statements in total, rather than performing a line-by-line analysis of the types of expenses included in each category."[544]

- JCG has not cited to a single line item, table, or auditors' note to support that distribution costs apply equally to selling expenses. Without clear definition or guidance from the financial statements, Commerce cannot arbitrarily calculate a ratio of expenses that may be appropriate for exclusion from the calculation of a financial expense, as JCG suggests.[545]

- Commerce should also not reallocate selling and distribution expenses in the final determination, because: (1) "distribution" expenses are indirect, making it impossible to trace them to particular sales or projects; (2) allocating costs to bids and unsuccessful sales attempts would result in U.S. sales expenses being unabsorbed; (3) JCG provides no evidence that the large number of projects to which it cites and for which it claimed sales activities all resulted in revenue earning sales; (4) JCG's approach would require Commerce to go back in time and select certain sales expenses that were incurred prior to 2017 and allocate those expenses to company's reported sales; and to fairly apply JCG's proposed methodology, Commerce would need to collect indirect selling expense information dating back at least five years to capture successful sales during the POI, which is absent from the record.[546]

Commerce's Position:

We agree with the petitioner that the Russian financial statement's "selling and distribution expenses" should not be re-categorized from the SG&A ratio component of the financial ratio calculation for the final determination.

In deriving appropriate SVs for overhead, SG&A, and profit, Commerce typically examines the financial statements on the record of the investigation and categorizes expenses as they relate to materials, labor and energy, factory overhead, SG&A and profit, and excludes certain expenses (*e.g.*, movement expenses), consistent with Commerce's practice of accounting for these latter expenses elsewhere in the surrogate financial ratio calculation.[547] However, in NME cases, it is generally not possible for Commerce to dissect the financial statements of a surrogate company as if the surrogate company were the respondent under review in this proceeding, because Commerce does not seek information from, or verify the information of, the surrogate company.[548] Therefore, in calculating surrogate overhead and SG&A ratios, it is Commerce's practice to accept data from the surrogate producer's financial statements *in toto*, rather than

[544] *Id*.
[545] *Id*. at 14-15.
[546] *Id*. at 15.
[547] *See Certain New Pneumatic Off-The-Road Tires from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances*, 73 FR 40485 (July 15, 2008) (*OTR Tires from China Final Determination*), and accompanying IDM at Comment 18A.
[548] *Id.*

performing a line-by-line analysis of the types of expenses included in each category.[549] As stated by the CIT, Commerce is "neither required to 'duplicate the exact production experience of the Chinese manufacturers,' nor undergo 'an item-by-item analysis in calculating factory overhead.'"[550]

In the *Preliminary Determination*, Commerce classified "selling and distribution expenses" as SG&A. Because we do not go behind the financial statements in determining the appropriateness of including an item in the financial ratio calculation, we seek information within the financial statement to determine the nature of the activity generating the potential adjustment, to see if a relationship exists between the activity and the principal operations of the company.[551] In this instance, there is no other information on these items in the financial statements from ZOK JSC, ChZMK JSC, Kashira Steel, or ESK OJSC. Further, there are no explanatory notes or footnotes attached to this expense item. Therefore, because there is no clear detail in the Russian financial statements that the costs associated with "selling and distribution expenses" can be traced to a particular non-general operation of the company (such as truck freight or brokerage or handling), in accordance with Commerce's practice, "selling and distribution expenses" should be reflected in the SG&A expense ratio for this company. Consequently, for the final determination, we will continue to classify "selling and distribution expenses" as an SG&A expense.[552]

JCG argues that the Russian financial statements' distribution expenses portion of the "Selling and Distribution Expenses" line item relates to freight expenses (*i.e.*, truck freight and brokerage and handling charges) that need to be deducted from the calculation of the surrogate financial ratio to avoid double counting these expenses.[553] However, nothing on the record supports this claim. When we are unable to isolate specific expenses within surrogate financial statements, our practice is "to not make adjustments to the financial statements data, as doing so may introduce unintended distortions into the data rather than achieving greater accuracy."[554] JCG claims that truck freight and brokerage and handling charges are double counted is based on an assumption that the "Selling and Distribution Expenses" line item may include these expenses. There is no evidence on the record supporting this assumption. To the contrary, distribution costs may consist of numerous types of expenses including customer service, support of resellers, truck freight, and brokerage and handling expenses.[555] Moreover, there is no basis for Commerce to differentiate and exclude costs that may be double-counted without also excluding costs that are also included in the line item that may not be accounted for elsewhere.[556]

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[549] *See Rhodia, Inc. v. United States*, 240 F. Supp. 2d 1247, 1250-1251 (CIT 2002) (*Rhodia*); *see also Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Color Television Receivers from the People's Republic of China*, 69 FR 20594 (April 16, 2004), and accompanying IDM at Comment 15.
[550] *See Rhodia*, 240 F. Supp. 2d at 1250.
[551] *See, e.g.*, *OTR Tires from China Final Determination* IDM at Comment 18A.
[552] *Id.*
[553] *See* JCG's Case Brief at 24.
[554] *See Wooden Bedroom Furniture* IDM at Comment 19A, part iv (citing *OTR Tires from China Final Determination* IDM at Comment 18A).
[555] *See, e.g.*, *Crystalline Silicon Photovoltaic Products from China* IDM at Comment 2.
[556] *See, e.g.*, *Certain Activated Carbon from the People's Republic of China: Final Results and Partial Rescission of Second Antidumping Duty Administrative Review*, 75 FR 70208 (November 17, 2010), and accompanying IDM at Comment 4e.

Therefore, we continue to find that there is no record evidence supporting the JCG's claim that the Russian financial statements "Selling and Distribution Expenses" represent truck freight and brokerage and handling charges and continue to assign the Russian financial statements' "Selling and Distribution Expenses" to SG&A expenses.

Company-Specific Comments

Comment 11: JCG's U.S. Sale Classification

In the *Preliminary Determination* we stated "because the record currently does not contain complete information on the scope of the affiliates' involvement in the sale or on the expenses that they incurred in connection with it, we have accepted JCG's EP classification for purposes of the preliminary determination. However, we are currently collecting additional information from JCG and we will consider this information when determining whether it is more appropriate to treat JCG's sale as a CEP sale for the final determination."[557]

Petitioner's Case Brief

- Information obtained since the *Preliminary Determination* confirms that JCG's sale should be treated as a CEP sale.[558]

- In JCG's post-preliminary supplemental questionnaire response, JCG stated that it established a U.S. affiliate named JH Steel to assist its expansion into other countries' markets. This affiliate has a significant role in JCG's sales process including its U.S. sale of subject merchandise. For instance, JH Steel works on behalf of JCG by identifying business opportunities, making sales presentations, assisting JCG in the bidding process, and providing management assistance, including communication with U.S. customers. JCG also confirmed that for JCG's U.S. sale, it provided bid services and management services.[559]

- JCG explained that another affiliate was primarily responsible for obtaining the work for JCG's U.S. sale and ensuring that the project was completed as required. Thus, this company was instrumental in introducing JCG to the customer. Moreover, JCG stated that there was a contract between this company and the customer for providing various services that were integral to the sale, including acting as an importer of record.[560]

- Further, the verification reports of JH Steel and JCG's other affiliates demonstrate that there was a high level of engagement between JCG's affiliates and the unaffiliated customer in order to consummate the sale. For instance, at verification, Commerce confirmed the heavy involvement of JH Steel in supporting JCG's sales efforts. [561]

[557] *See Preliminary Determination* PDM at 26-27.
[558] *See* Petitioner's Case Brief at 58.
[559] *Id*.
[560] *Id*. at 59-62.
[561] *Id*.

- Thus, the record demonstrates, without question, that the sales transactions largely occurred between the U.S. customer and JCG's affiliates, not between the U.S. customer and JCG. Therefore, Commerce should apply its CEP methodology to JCG's reported U.S. sale.[562]

JCG's Case Brief

- In JCG's original questionnaire responses, JCG reported its sale to the United States, based on an EP methodology. At the request of Commerce, it also reported complete and accurate data regarding its affiliates involved in the production and/or sale of FSS, which includes one company that Commerce could potentially find affiliated with JCG, notwithstanding the fact that it operates at arms-length in their business dealings with the respondent. Commerce conducted on-site verifications and noted no discrepancies.[563]

- If Commerce treats JCG's sale as a CEP sale, Commerce must include any revenue, as well as expenses, from all parties it finds affiliated involved in that sales transaction.[564]

Petitioner's Rebuttal Brief

- Commerce should reject JCG's argument that it must include revenue received from the unaffiliated customers to the companies involved in the U.S. sales transaction. One of the companies received a commission by JCG that was already included in the price. The other company was not providing services for JCG; and, thus, it would be inappropriate to include that amount as part of JCG's revenue. Finally, the precise payments made under the arrangement for one of the companies is not on the record and neither is the information needed to allocate those payments. Therefore, JCG's request to add any commissions for the companies involved in the sale should be denied.[565]

JCG's Rebuttal Brief

- Petitioner fails to note that application of the CEP methodology would require that Commerce not only consider all of the expenses for companies involved in the sale, but also all revenue received from the unaffiliated customer.[566]

Commerce's Position:

After considering the information on the record and information examined at verification, we continue to determine that it is appropriate to classify JCG's sale as an EP sale. Section 772(a) and (b) of the Act defines export price and constructed export price, respectively, as follows:

[562] *Id.* at 62.
[563] *See* JCG's Case Brief at 58.
[564] *Id.* at 59-61.
[565] *See* Petitioner's Rebuttal Brief at 29-30.
[566] *See* JCG's Rebuttal Brief at 2.

> The term "export price" means the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States…
>
> The term "constructed export price" means the price at which the subject merchandise is first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter, to a purchaser not a affiliated with the producer or exporter…

Additionally, the SAA, at 822-23, states that if the first sale to the United States is made to an unaffiliated purchaser by the producer or exporter in the home market, Commerce will consider it an EP sale, but that if the first sale to an affiliated party is made in the United States, then Commerce will consider it a CEP sale.[567]

Documentation provided by JCG, and examined at verification, demonstrates that the unaffiliated U.S. customer (1) issued the purchase order;[568] (2) was identified on the commercial invoice and shipping documents;[569] and (3) paid JCG directly for the merchandise.[570] Further, based on the documentation examined at verification, Commerce did not find any evidence that JCG first sold the subject merchandise to its U.S. affiliates or that its U.S. affiliates took title to the subject merchandise or issued invoices re-selling the merchandise to the unaffiliated customer. Finally, verification exhibit 15 shows that the sale was invoiced on the date of shipment, which is prior to importation into the United States. Thus, the sale was finalized in China, prior to importation into the United States.[571] Consistent with section 772 of the Act, a sale made prior to importation could be classified as either a CEP sale or an EP sale.

Additionally, as emphasized in *AK Steel*,[572] when defining EP and CEP sales according to section 772 of the Act, the location of the sale is the critical factor in determining whether a sale is EP or CEP. Specifically, the Federal Circuit stated:

> Similarly, the statute also distinguishes the categories {EP and CEP} based on the participation of an affiliate as the seller. The definition of CEP includes sales made by either the producer/exporter or "by a seller affiliated with the producer or exporter." . . . . EP sales, on the other hand can only be made by the producer or exporter of the merchandise . . .. Consequently, while a sale made by a producer or exporter could be either EP or CEP, one made by a U.S. affiliate can only be CEP. Limiting affiliate sales to CEP flows logically from the geographical

[567] *See* SAA at 822-823.
[568] *See* JCG's May 13, 2019 Section A Questionnaire Response (JCG May 13, 2019 AQR) at Exhibit A-13 and A-14; *see also* JCG's Verification Report at Exhibit 15.
[569] *See* JCG's JCG May 13, 2019 AQR at Exhibit A-13 and A-14; *see also* JCG's Verification Report at Exhibit 15.
[570] *See* JCG June 21, 2019 SAQR at Exhibit SA-J-6; and JCG's Verification Report at Exhibit 15.
[571] *See* JCG June 21, 2019 SAQR at Exhibit SA-J-6; and JCG's Verification Report at Exhibit 15.
[572] *See AK Steel Corporation et al. v. United States*, 226 F. 3d 1361, 1370-74 (Fed. Cir. 2000) (*AK Steel*).

> restriction of the EP definition, as a sale executed in the United States by a U.S. affiliate of the producer or exporter to a U.S. purchaser could not be a sale "outside the United States." The location of the sale and the identity of the seller are critical to distinguishing between the two categories…[573]

In *AK Steel*, the Federal Circuit further stated:

> If Congress had intended the EP versus CEP distinction to be made based on which party set the terms of the deal or on the relative importance of each party's role, it would have not written the statute to distinguish between the two categories based on the location where the sale was made and the affiliation of the party that made the sale.[574]

Finally, the Federal Circuit stated:

> {I}n terms of the EP definition: if the sales contract is between two entities in the United States, and executed in the United States and the title will pass in the United States, it cannot be said to have been a sale "outside of the United States;" therefore the sale cannot be an EP sale.[575]

Based on the foregoing, the Federal Circuit held that the factor of critical importance in determining whether the sale is EP or CEP is where the sale was made and if the ownership of the merchandise passed title in the United States to an affiliated party for resale. In this case, the sale was made in China (*i.e.*, outside of the United States), [576] all sales documentation for FSS was between JCG and the unaffiliated importer,[577] the costs and revenue were tied to JCG's books and records,[578] the U.S. affiliates deferred to JCG on sales decisions,[579] and the U.S. affiliates did not receive title or resell the imported merchandise. Thus, the statutory criteria for a CEP sale under 772(b) of the Act have not been met and, consistent with the Federal Circuit's decision in *AK Steel*,[580] because the sale was made in China, prior to importation, and ownership of the FSS did not transfer to an affiliate in the United States, the sale is an EP sale. Therefore,

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[573] *Id.* at 1370-71 (internal citations omitted).
[574] *Id*. at 1372.
[575] *Id*. at 1374.
[576] *See* JCG's Verification Report at Exhibit 15.
[577] *Id.*
[578] *Id.*
[579] In other words, while JCG's affiliates helped facilitate price negotiations, JCG set the final price. *See* JCG's May 13, 2019 AQR at Exhibit A-13 and A-14, showing that the purchase order and sales documents were made between JCG and the unaffiliated customer. *See* JH Steel Verification Report at 7, stating "JH steel helped JCG develop final pricing (which JCG communicated to {the unaffiliated customer})." Further, JH Steel stated, "with respect to JH Steel's role in invoice and payment between JCG and {the unaffiliated customer}, Mr. Tong stated that JH Steel plays no role beyond facilitating communication between the parties."
[580] *See AK Steel*, 226 F. 3d 1361, 1370-1374 (stating: (1) the location of the sale and the identity of the seller are critical to distinguishing between the two categories;" and (2) "stated in terms of the EP definition: if the sales contract is between two entities in the United States, and executed in the United States and the title will pass in the United States, it cannot be said to have been a sale 'outside of the United States;' therefore the sale cannot be an EP sale.").

for the final determination, we have not reclassified JCG's U.S. sale through its affiliates as a CEP sale and we continue to consider the sale made by JCG to its unaffiliated customer as an EP sale.

Our consideration of the EP versus CEP selling factors here is consistent with other determinations where respondents have had U.S. affiliates and/or affiliated commissioned agents that assisted with the sales but where Commerce ultimately determined the sales were EP sales because the foreign producers/exporters ultimately set the price and the U.S. affiliates, though involved in the sales, did not control the terms of the sales, issue invoices as part of the sales, or take title to the merchandise.[581] Further, in other cases, the CIT has upheld our EP determination, where the foreign exporter made sales outside of the United States, all sales documentation was tied to the foreign exporter, the U.S. affiliate deferred to the foreign producer for all sales decisions, and the U.S. affiliate did not receive title to the imported merchandise.[582]

We disagree with the petitioner that because (1) JCG's affiliates provided services[583] to JCG and the unaffiliated customer; and (2) certain selling functions (*i.e.*, price negotiations, freight forwarding, customs support) were between the U.S. companies and not between the respondent and unaffiliated customer, Commerce must treat this sale as a CEP sale. We have determined in numerous other cases,[584] as upheld by the CIT (*e.g.*, *Corus Staal*),[585] that *AK Steel* made clear, the focus of the inquiry is on the location of the sale rather than the role played by the affiliated importer. While the U.S. affiliates were involved in the negotiation process to a limited extent, the negotiations took place in China and involved both JCG and the unaffiliated customer, and JCG ultimately set the price.

Further, we do not find the fact that the contract made between one of these U.S. companies and the unaffiliated customer to perform certain services (import/export and quality assurance) weighs heavily on our decision. Importantly, the contract also did not relate to the sale of merchandise, but rather to services related to the merchandise being imported from China. The Federal Circuit in *AK Steel* stated: "{w}e hold that if the contract for sale was between a U.S. affiliate of a foreign producer or exporter and an unaffiliated U.S. purchaser, then the sale must

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[581] *See Final Determination of Sales at Less Than Fair Value and Critical Circumstances: Certain Malleable Iron Pipe Fittings from the People's Republic of China*, 68 FR 61395 (October 28, 2003), and accompanying IDM at 15; and *Light-Walled Rectangular Pipe and Tube from Mexico: Notice of Final Determination of Sales at Less Than Fair Value*, 69 FR 53677 (September 2, 2004), and accompanying IDM at Comments 9, 10, and 18.

[582] *See USEC Inc. v United States*, 498 F. Supp. 2d 1337, 1350-52 (CIT 2007).

[583] *See* Petitioner's Case Brief at 58-62 (stating that JH Steel provided marketing, sales presentations, management assistance, and pricing advice and another affiliate introduced JCG to the unaffiliated customer as well as signed a contract with the unaffiliated customer, to act as an importer of record and provide various quality control services on behalf of the unaffiliated U.S. customer).

[584] *See, e.g.*, *Certain Steel Concrete Reinforcing Bars from Turkey: Final Results of Antidumping Duty Administrative Review*, 70 FR 67665 (November 8, 2005), and accompanying IDM at Comment 22; and *Notice of Final Results of Antidumping Duty Administrative Review and Recission of Administrative Review in Part: Canned Pineapple Fruit From Thailand*, 66 FR 52744 (October 17, 2001), and accompanying IDM at Comment 16 (stating "*AK Steel* established that 'the critical difference between EP and CEP sales is whether the sale or transaction takes place inside or outside the United States.'").

[585] *See Corus Staal BV v. U.S. Dept. of Commerce*, 259 F. Supp. 2d 1253, 1259 (CIT 2003) (*Corus Staal*).

be classified as a CEP sale."[586] However, the Federal Circuit made it clear "that the 'seller' referred to in the CEP definition is simply one who contracts to sell, and 'sold' refers to the transfer of ownership or title."[587] The ownership of the merchandise did not transfer to any of JCG's affiliates and JCG was the "seller" or the one "who contracts to sell." Thus, the seller and the buyer can only be JCG and the unaffiliated customer. We also note that the petitioner has not cited to any court cases or provided evidence from any other determinations that support its argument that this particular sale has met the statutory criteria for a CEP sale.

Finally, because we are continuing to classify JCG's U.S. sale as an EP sale, we find it is inappropriate to make the adjustments suggested by the JCG or the petitioner (*i.e.*, deducting selling expenses and profit or including revenue incurred by the U.S. affiliates on behalf of JCG) because these adjustments only relate to CEP sales under section 772(d) of the Act.

Comment 12: Modern Heavy's Verification Failures

Petitioner's Case Brief

- During Commerce's verification of Modern Heavy, Commerce identified three major issues with Modern Heavy's reporting of its FOPs: (1) the "difficulty variances," which affect the reporting of Modern Heavy's consumption of labor, auxiliary welding materials, electricity, and welding/cutting gases, could not be verified; (2) Modern Heavy failed to report excess steel that was consumed in production but was not included in the final product; and (3) Modern Heavy's reported packing materials could not be verified.

- Modern Heavy attempted to capture its consumption of FOPs on a project-specific basis, using a factor called a "difficulty variance," which was intended to capture the level of consumption of certain FOPs by adjusting consumption between Modern Heavy's projects by the relative complexity of each project. However, the petitioner believed Modern Heavy was using the "difficulty variances" to shift consumption of certain FOPs away from a specific U.S. sale of subject merchandise, which was confirmed in Commerce's verification report.[588]

- Commerce discovered multiple issues at verification with Modern Heavy's use of "difficulty variances," including varying accounts by company officials about how the difficulty variances are calculated, discrepancies on the documents Modern Heavy provided to substantiate the "difficulty variances", and the underreporting of the "difficulty variance" for one project.[589] In fact, these difficulty variances shifted labor hours, one of the most important FOPs to fabricated structural steel, away from its reported projects. Further, the difficulty variances are not supported by empirical data or record evidence. In total, Modern Heavy did not accurately report labor and was unable to substantiate its reporting, and, thus, the data cannot be used and Modern Heavy failed to cooperate to the best of its ability.[590]

[586] *See AK Steel*, 226 F. 3d 1361, 1370-1374.
[587] *Id*.
[588] *See* Petitioner's Case Brief at 43 (citing Modern Heavy's Verification Report at 2).
[589] *Id.* at 44-45 (citing Modern Heavy's Verification Report at 17-19).
[590] *Id.* at 46-48

- Modern Heavy systematically underreported the most important FOPs to fabricated structural steel, the steel FOPs, by excluding from its reporting steel that was assigned to a specific project and left over upon completion. In the case of one project, the leftover steel amounted to 10.9 percent of the total steel purchased for the project. Commerce's verification report shows that Modern Heavy tracked the leftover steel but did not report it as consumed. Although Modern Heavy might have found use for the leftover steel in subsequent projects, at least a portion of it had to have been scrapped. As steel is the most important input to fabricated structural steel, the underreporting of steel "constitutes a critical failure in {Modern Heavy's} reporting, further demonstrating that {Modern Heavy} has not acted to the best of its abilities."[591]

- At verification, Commerce discovered that Modern Heavy reported many of its packing FOPs based on purchases. However, Commerce requires that material inputs in NME cases be based on consumption, not purchases, of the material inputs. Commerce noted that Modern Heavy's use of purchases to report consumption of the packing FOPs led to large swings in reported consumption, but when given an opportunity to correct these distortions at verification by Commerce, Modern Heavy was unable to do so.[592]

- The three major components of Modern Heavy's FOPs (*i.e.*, raw materials, labor, and packing) failed verification. Because these factors are critical to fabricated structural steel production, Commerce must consider Modern Heavy's entire section D response unverified. These failures constitute a failure to cooperate to the best of its ability in providing accurate and verifiable information by Modern Heavy, and, thus, Commerce should apply total AFA to Modern Heavy, pursuant to sections 776(a)(2) and (b)(1) of the Act.

- Court precedent dictates that Commerce need not find motivation or intent to not act to the best of its ability by the respondent. Instead, the "best of its ability standard" requires Commerce to only find that a "reasonable and responsible respondent" would have known to maintain the requested information and is familiar with the rules and regulations that apply to antidumping investigations. Further, Commerce has discretion to apply adverse inferences to a respondent so that they may not benefit from their failure to cooperate.[593]

- The Courts have affirmed Commerce's decision to apply total AFA in past cases where respondents failed to cooperate to the best of their ability and provided information that was not verifiable.[594] Thus, Commerce should apply total AFA to Modern Heavy, and assign it the antidumping duty rate found in the Petition.

- If Commerce decides not to apply total AFA to Modern Heavy, it should instead apply partial AFA. As partial AFA, Commerce should apply the normal value (NV) found in the Petition

[591] *Id.* at 49-50.
[592] *Id.* at 50 (citing Modern Heavy's Verification Report at 27).
[593] *Id.* at 52-53 (citing *Nippon Steel* 337 F. 3d 1373, 1382-83; *Peer Bearing Co.-Changshan v. United States*, 766 F. 3d 1396, 1399-1400 (Fed. Cir. 2014) (*Peer Bearing*); and SAA at 870).
[594] *Id*. at 53 (citing *Steel Authority of India, Ltd. v. United States*, 149 F. Supp. 2d 921, 928 (CIT 2001)).

to all U.S. sales, such as how Commerce has in previous cases where major FOPs were unable to be verified.[595]

- If Commerce declines to apply partial AFA to Modern Heavy's NV, due to Modern Heavy's verification failures, Commerce should at the minimum: (1) use financial statements on the record of the investigation to calculate labor for Modern Heavy; (2) increase all reported consumption of steel FOPs by 10.9 percent; and (3) apply the highest reported packing materials FOPs to all U.S. sales.

Modern Heavy's Rebuttal Brief

- Modern Heavy in no way failed verification or failed to act to the best of its ability; Commerce was able to fully verify all of Modern Heavy's reported data, including the data submitted with respect to these issues. These claims made by the petitioner are unsupported by the facts or the law.

- While it is undisputed that the Act allows Commerce to rely on facts available (FA) and AFA under certain circumstances,[596] there is no record evidence to support the application of AFA, or even FA, to Modern Heavy. Modern Heavy cooperated to the best of its ability and did not withhold any requested information, impede the proceeding, or provide information that could not be verified.

- In each of Commerce's questionnaires, Commerce provided direct instructions to report certain data using different methodologies. In every instance, Modern Heavy complied with Commerce's instructions, and provided the requested data using the most reasonable methods available to it using its books and records. These data were accompanied by detailed explanations of the data being reported. Modern Heavy also directly stated its attempts to comply with Commerce's requests in its responses.[597] Had Commerce indicated that it wanted Modern Heavy to revise its reporting with respect to the issues raised by the petitioner it would have done so in a timely manner.[598] In addition, Modern Heavy was very transparent that it was using the most accurate methods to report the data reasonably available to it.[599]

- One of the cases petitioner cites to as precedent to apply to Modern Heavy actually supports not applying AFA to Modern Heavy.[600] The fact pattern in the instant proceeding is analogous to *Hand Trucks from China Final Determination*, in which Commerce declined to apply total AFA to the respondent because the respondent was cooperative, provided

[595] *Id.* at 53-54 (citing, *e.g.*, *Notice of Final Determination of Sales at Less Than Fair Value: Hand Trucks and Certain Parts Thereof from the People's Republic of China*, 69 FR 60980 (October 14, 2004) (*Hand Trucks from China Final Determination*), and accompanying IDM at 14.
[596] *See* Modern Heavy's Rebuttal Brief at 36-37 (citing section 776(a)(2) of the Act).
[597] *Id.* at 37-38 (citing Modern Heavy's Modern Heavy August 16, 2019 SCDQR at 9).
[598] *Id.* at FN 85.
[599] *Id.* at 39-41 (citing Modern Heavy July 3, 2019 SDQR at 2, 4-5, and 8).
[600] *Id.* at 41-42 (citing *Hand Trucks from China Final Determination* IDM at Comment 1).

complete and consistent responses in a timely manner, and provided FOP data that could be verified with few exceptions.[601]

- The other cases the petitioner cites to support their argument are clearly distinguishable from this case because, in those cases, Commerce was unable to verify any of the reported data. Here, Commerce was able to fully verify all of Modern Heavy's data.[602]

- Commerce should reject the petitioner's arguments that, because Modern Heavy's difficulty variances were not able to be verified, Modern Heavy failed to accurately report its labor hours, and, thus, the data cannot be used and Modern Heavy failed to act to the best of its ability. Commerce already rejected these same arguments at the preliminary determination.[603] Likewise, Commerce should also reject the petitioner's suggested partial AFA plug for Modern Heavy's Labor.

- In its supplemental questionnaire responses, Modern Heavy fully explained to Commerce how it uses difficulty variances in the normal course of business to record costs in its accounting system, and that using these difficulty variances were the most accurate and reasonable method to allocate labor hours, welding materials, and energy on a project-specific basis. In addition, Commerce never requested that Modern Heavy revise its methodology. In fact, in the first supplemental questionnaire, Commerce instructed Modern Heavy to "continue to use the difficulty variances in your calculations."

- Commerce officials may have been confused initially about how Modern Heavy calculates the difficulty variances; however, Commerce was able to fully verify each and every FOP for which Modern Heavy calculated using difficulty variances. As highlighted by the verification report, Modern Heavy cooperated fully with Commerce and provided accurate data.[604] Consequently, Commerce should not apply partial AFA to Modern Heavy's reported labor and should reject petitioner's suggested AFA plug.[605]

- The petitioner's argument that Modern Heavy systematically underreported its steel FOPs is incorrect and does not make any sense in light of the fact that Modern Heavy was fully transparent that its methodology for calculating consumption of steel FOPs was based upon the purchase quantity minus remaining inventory. The petitioner never raised Modern Heavy's steel reporting as an issue, and had Commerce asked Modern Heavy to change its methodology it would have complied. In addition, Commerce fully verified Modern Heavy's reported steel purchases, consumption, remaining inventory, and types of steel consumed,

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[601] *Id.* at 42.
[602] *Id.* at n.91 (citing *Certain Biaxial Integral Geogrid Products from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 82 FR 3284 (January 11, 2017) (*Biaxial Geogrids from China*), and accompanying IDM at Comment 3).
[603] *Id.* at 43 and n. 94 (citing Petitioner's Letter, "Certain Fabricated Structural Steel from China: Petitioner's Comments in Advance of the Preliminary Determination," dated August 15, 2019, at 30-34).
[604] *Id.* at 45-47 (citing Modern Heavy's Verification Report at 22 and 24-26).
[605] *Id.* at 47-50.

and noted no discrepancies.[606] Commerce should not apply AFA to Modern Heavy's reported steel FOPs and should reject the petitioner's suggested AFA plug.[607]

- Commerce should reject the petitioner's packing FOPs related arguments, as they are not supported by the evidence on the record. First, at verification, Commerce confirmed the methodology with which Modern Heavy calculated packing FOP consumption. Second, contrary to the petitioner's assertions, Modern Heavy reported all primary steel packing materials based on monthly consumption, not purchases. The only estimation that occurs in the calculation of packing materials consumed comes from the estimation of gross and net weights, because Modern Heavy does not weigh the actual quantity of packing materials consumed. Finally, Modern Heavy fully complied with Commerce's requests with respect to how to report packing materials, as evidenced by the three different ways in which Modern Heavy calculated its packing FOPs pursuant to Commerce's requests in the its initial and supplemental questionnaires.

- The petitioner accurately notes that Commerce asked at verification whether Modern Heavy could provide a revised calculation of packing materials and that Modern Heavy was not able to do so. However, this argument should not carry any weight, as Modern Heavy told Commerce that they would comply to a request to do so "with appropriate notice and given adequate time to gather the large volume of information that would be required to meet the request."[608] Modern Heavy remains willing to provide a recalculation at Commerce's request.

Commerce's Position:

We have determined that the use of facts otherwise available with an adverse inference is appropriate for the final determination with respect to Modern Heavy. As discussed below, the company withheld information requested by Commerce, failed to provide information by the deadlines for submission or in the form and manner requested, significantly impeded the proceeding, and did not provide verifiable information, within the meaning of section 776(a)(2)(A) through (D) of the Act, respectively. Furthermore, we find that Modern Heavy failed to cooperate by not acting to the best of its ability, within the meaning of section 776(b)(1) of the Act.

As discussed further above, section 776(a)(2) of the Act provides that:

> If an interested party or any other person (A) withholds information that has been requested by the administering authority or the Commission under this title; (B) fails to provide such information by the deadlines for the submission of the information in the form and manner requested, subject to subsections (c)(1) and (e) of section 782; (C) significantly impedes a proceeding under this title; or (D) provides such information but the information cannot be verified as provided in section 782(i), the administering authority and the Commission shall, subject to

[606] *Id*. at 50-52 (citing Modern Heavy's Verification Report at 20-21).
[607] *Id.* at 52-54.
[608] *Id.* at 58-59.

> section 782(d), use the facts otherwise available in reaching the applicable determination under this title.

Moreover, as discussed further above, section 776(b) of the Act provides that, "if Commerce finds that an interested party has 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."[609] 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."[610] Furthermore, affirmative evidence of bad faith on the part of a respondent is not required before Commerce may make an adverse inference.[611] 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.[612]

The Federal Circuit has stated that, "while the standard does not require perfection and recognizes that mistakes sometimes occur, it does not condone inattentiveness, carelessness, or inadequate record keeping."[613] The AFA standard, moreover, assumes that because respondents are in control of their own information, they are required to take reasonable steps to present information that reflects their experience for reporting purposed before Commerce.[614]

In our verification report for Modern Heavy's EP sales and FOPs, we noted three significant issues in the "Summary of Issues" section which pertain to Modern Heavy's reporting of FOPs.[615] These issues were pervasive and affected almost all of Modern Heavy's reported FOPs. Specifically, we noted that: (1) Modern Heavy underreported the primary steel FOPs for four out of the five reported projects by only reporting the steel incorporated into the finished product and excluding significant pieces of scrap and other leftover plate which was purchased specifically for each project to meet exacting project specifications;[616] (2) Modern Heavy was unable to, using documentary evidence, support that its difficulty variances are accurate and non-distortive, which affects all of Modern Heavy's reported labor, electricity and welding gas/supplies;[617] and (3) Modern Heavy failed to demonstrate the accuracy and completeness of

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[609] *See Notice of Final Results of Antidumping Duty Administrative Review: Stainless Steel Bar from India*, 70 FR 54023, 54025-26 (September 13, 2005) (*Stainless Steel Bar from India*); and *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).
[610] *See* SAA at 870; *see also, e.g.*, *Certain Polyester Staple Fiber from Korea: Final Results of the 2005-2006 Antidumping Duty Administrative Review*, 72 FR 69663 (December 10, 2007).
[611] *See, e.g.*, *Seamless Stainless Steel Hollow Products from Japan*; *Antidumping Duties, Countervailing Duties, Final Rule*, 62 FR 27296, 27340 (May 19, 1997); and *Nippon Steel*, 337 F. 3d 1373, 1382-83.
[612] *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 PDM at 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).
[613] *See Nippon Steel*, 337 F. 3d at 1382.
[614] *Id.* at 1382-83; s*ee also Peer Bearing*, 766 F. 3d at 1399-1400.
[615] *See* Modern Heavy's Verification Report at 2.
[616] The exact percentages vary by project and are BPI with the exception of the 10.9 percent under-reported quantity, disclosed in Modern Heavy's Verification Report at 20.
[617] *See* Modern Heavy's Verification Report at 2 and 17-19.

its 23 reported packing FOPs, or the gross weight of its shipments, for lack of proper record keeping.[618] We find that, when taken together, these issues render Modern Heavy's entire FOP database unreliable and, therefore, unusable when calculating a dumping margin. For these reasons, we find it necessary to resort to facts available in determining Modern Heavy's dumping margin under section 776(a)(2)(A) through (D) of the Act.

We also find it appropriate to resort to adverse inferences in selecting from the facts available under section 776(b) of the Act because these problems at verification were exacerbated by Modern Heavy's failure to cooperate to the best of its ability. According to *Nippon Steel*, while the "best of one's ability" standard under section 776(b) of the Act "does not require perfection and recognizes that mistakes sometimes occur, it does not condone inattentiveness, carelessness, or inadequate record keeping."[619] The standard assumes a company has familiarity with all of the records it maintains in its possession, custody, or control, and conducts 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.[620] Modern Heavy did not meet the "best of its ability" standard, based on a culmination of factors, as explained below.

With respect to Modern Heavy's steel inputs, Modern Heavy failed to provide critical information regarding its steel usage and reported a lower level of steel consumption (*i.e.*, the primary input into fabricated structural steel) in its questionnaire responses than it should have. In its questionnaire responses, Modern Heavy stated, "Modern Heavy relies on purchase minus inventory to capture project by project raw material consumption and report its steel."[621] In addition, "in its normal course of business, Modern Heavy also tracks the purchase quantity of {steel inputs} on a project-by-project basis, which is the most accurate and practicable method for reporting actual FOPs for each project. Thus, Modern Heavy relied on the more accurate project-specific purchase quantities (taking into account of inventory upon completion of a project, if any) to calculate the actual FOPs for each project."[622] We asked in a further supplemental questionnaire for Modern Heavy to account for steel withdrawn from inventory in its reporting. In response, Modern Heavy stated, "Modern Heavy has already reported all the materials consumed for a given project (*i.e.*, (a) inventory from other projects, plus (b) purchased for a particular project, (c) less inventory upon completion of that project) in its FOP reporting for each reported project."[623]

At verification, we discovered that Modern Heavy failed to report the total amount of steel which it purchased on a project-specific basis, as we discovered that the purchased steel was specific to project requirements and was typically not usable as prime material in future projects.[624] Fabricated structural steel is a unique product. Due to unique individual project requirements, producers typically place orders for specific grades and shapes of products for delivery before

[618] *Id.* at 2 and 27-28.
[619] *See Nippon Steel*, 337 F. 3d at 1382.
[620] *Id.*
[621] *See* Modern Heavy July 3, 2019 DSQR at 1.
[622] *Id*. at 2.
[623] *See* Modern Heavy August 16, 2019 CDSQR at 10.
[624] *See* Modern Heavy's Verification Report at 20-21.

construction begins.[625] This process requires that the producer is able to accurately calculate, in advance, the amount of the specific types of steel it believes will be consumed in production of a particular project. Further, as evidenced at Modern Heavy's verification, any remaining steel from a particular project is not readily transferable to other projects, as each individual project has different member-types (*e.g.*, plate, beam, channels, angles, etc.); grade requirements (including stainless versus carbon steel, strength requirements, and specifications for alloy or non-alloy steel); and dimension requirements (*i.e.*, thickness, width, and length requirements).[626] At verification, company officials explained that the leftover steel was held in a stock yard and, though it occasionally was reintroduced for other projects,[627] it was also used for in-factory toolings or sold for scrap (*i.e.*, not for production of subject merchandise). In Modern Heavy's questionnaire responses, it gave the impression that it had reported all steel FOPs which had been consumed in the production of project merchandise.[628] However, what was actually reported were all steel FOPs that were incorporated into the finished merchandise and shipped from the factory, and that Modern Heavy had failed to report significant amounts of (large) scrap and leftover steel that had been custom-purchased specific to the particular project specifications (*i.e.*, steel plate, channels, etc. that complied with exacting grade, dimensions, alloy content, etc. specific to each project) and which was not necessarily re-usable in future projects or returnable to Modern Heavy's supplier(s).[629] By reporting only the steel physically incorporated into the subject merchandise shipped to the United States – less a small offset for scrap from cutting, boring, and welding on the factory floor – and not the significant scrap and wastage resulting from the total purchases of steel inputs which were specific to each project, we find that Modern Heavy significantly under-reported its steel consumption and was not forthcoming with Commerce in its questionnaire responses with respect to the total raw materials related to each project and the per-kilogram factors of production that it reported. For these reasons, Modern Heavy withheld pertinent information that had been requested by Commerce, failed to provide the requested information by the deadline, and failed to provide complete, accurate, and verifiable information regarding the primary steel inputs within the meaning of section 776(a)(2) of the Act.

We agree with the petitioner that Modern Heavy systematically underreported its consumption of steel FOPs. Modern Heavy attempts to rebut this argument, claiming that it was fully transparent

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[625] *See* Petitioner's Letter, "Certain Fabricated Structural Steel from Canada, Mexico, and the People's Republic of China: Placing Petitioner's Presentation on the Record," dated March 21, 2019, and accompanying presentation at slides 12-13.

[626] *See* Modern Heavy's Verification Report at 20-21 and verification exhibits 16, 17, and 25. Further, an examination of Modern Heavy's year-on-year increase in inventory valuations indicates that it retained large amounts of additional plate from completed projects. *See* the balance sheets in Modern Heavy's audited 2017 and 2018 financial statements, in Modern Heavy's April 29, 2019 AQR at Exhibit A-10 and Modern Heavy's June 28, 2019, SAQR at Exhibit SA-7, respectively.

[627] Company officials explained that leftover pieces could only be reintroduced in subsequent projects where the new contract requirements do not require new material, the leftover material is good enough condition, and the leftover material meets the project specifications (*i.e.*, steel grade, chemistry, size, etc.). *Id.*

[628] *See* Modern Heavy's Verification Report at 20.

[629] *Id.* ("We noted that, for this project, the remaining materials were a mix of some leftover full-sized plates/pipes that Modern Heavy had purchased specifically for this project, as well as smaller sized portions of plate steel that had been cut off of larger plates (also purchased for the project). We observed both full-sized plates and smaller scrap plate pieces in the stock yard left over from this project and marked with the project number.").

in its questionnaire responses as to how it calculated its consumption of steel FOPs (*i.e.*, purchase quantity minus remaining inventory).[630] Although Modern Heavy did accurately describe its calculation method, we disagree that it was fully transparent in its questionnaire responses. Modern Heavy withheld vital information to the proceeding about how it tracks and uses leftover steel for from projects; information that was only uncovered at verification.[631] Missing from the record was any mention by Modern Heavy of the fact that Modern Heavy will reintroduce into inventory steel that had been withdrawn from inventory and partially incorporated in the project or that the leftover steel can and will be consumed internally (*e.g.*, for toolings or racks/jigs in the factory) or sold for scrap. The petitioner alleges that "while in some cases, {Modern Heavy} may have assigned the material to a subsequent project, there was no final accounting of this material, and at least some of it undoubtedly was scrapped."[632] Although Modern Heavy did not provide records of sale of leftover plate from inventory for scrap in the period 2017 through September 2019, we agree with the core idea of the petitioner's assertion, that undoubtedly some of the remaining material will be sold as scrap, as Modern Heavy officials confirmed that this was their practice in the normal course of business.[633]

The initial section D questionnaire issued to Modern Heavy contains detailed instructions with respect to reporting factors of production under part "I. General Explanation."[634] If Modern Heavy had questions about its reporting methodology, the questionnaire makes clear that the respondent (*i.e.*, Modern Heavy) should contact the officials in charge before preparing the response.[635] Further, even if Modern Heavy was confident in its reporting methodology, it is always incumbent upon the respondent to make clear in its response how it accounted for the inputs; in this case, it was incumbent upon Modern Heavy to clearly explain, well in advance of verification, that it had purchased significant additional materials that it was excluding from its FOP reporting.[636] Based upon Commerce's observations at verification, it is possible that all the leftover steel for the reported projects might never be reintroduced into production and it may all be sold for scrap; thus, we find that Modern Heavy should have also reported the leftover steel in its FOP reporting because it was specific to each project. To not do so, then the effect Modern Heavy's underreporting had was that Modern Heavy essentially granted itself a complete by-product offset for the unreported steel FOPs, without demonstrating that it was entitled for such an offset. Commerce's section D questionnaire has very specific requirements to obtain a by-product offset. Specifically, the initial questionnaire makes the following requirements in order to be eligible to obtain a by-product offset:

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[630] *See* Modern Heavy's Rebuttal Brief at 50-51.
[631] *See* Modern Heavy's Verification Report at 20.
[632] *See* Petitioner's Case Brief at 49-50 (citing Modern Heavy's Verification Report at 20-21).
[633] *See* Modern Heavy's Verification Report at 20 ("Company officials stated that, periodically, warehouse management reviews the remaining materials, and, if they are in poor condition, Modern Heavy sells them as scrap.").
[634] *See* April 1, 2019 Initial Questionnaire issued to Modern Heavy.
[635] *Id.* at D-1.
[636] *See, e.g.*, Commerce's Letter, "Investigation of Certain Fabricated Structural Steel from the People's Republic of China: Supplemental A, C, and D Questionnaire," dated June 7, 2019 (Commerce's June 7, 2019, ACD Questionnaire), at Attachment I page 9 ("Clarify whether you have reported the actual consumption of the primary input (*i.e.*, steel) in your FOP database…." and "{e}xplain your statement, reporting that Modern Heavy 'largely' relies on … to track and account for these inputs, and report any other methods you employ for this purpose.").

By-product/co-product offsets are only granted for merchandise that is either sold or reintroduced into production during the POI, up to the amount of that by-product/co-product actually produced during the POI. If you are claiming a byproduct or co-product offset in your FOP database, please report each by-product or co-product in a separate field. Further, in your narrative response, please:

i. Provide a description of the by-product/co-product;
ii. Provide an explanation why you have defined the products as by-products or co-products, as applicable;
iii. Complete the Excel chart at Appendix VII, identifying, by month, the quantity produced, sold, reintroduced into production, or otherwise disposed of (*e.g.*, sold, returned to production of the merchandise under consideration, discarded). You should complete a separate chart for each by-product or co-product.
iv. Provide production records demonstrating production of each by-product/co-product during one month of the POI. (Where possible, provide records for the same month for each byproduct/co-product for which an offset is claimed);
v. Provide evidence of the disposition of the by-products/coproducts:
    1) If sold, provide evidence of the sales (*e.g.*, invoices or internal records demonstrating the sale), as well as evidence of receipt of payment for the sale of the item for the largest month of sales for each by-product/co-product;
    2) If reintroduced into production, provide production records demonstrating this for the largest month of consumption for each by-product/co-product;
vi. Provide a detailed explanation of how you derived the claimed offset amount for each claim; and
vii. Provide the calculations used to derive each claimed amount.[637]

Modern Heavy did not do this with respect to the by-product/scrap steel which it purchased on a project specific basis, but which remained upon completion of its projects. At the very least, Modern Heavy should have reported total consumption of steel, plus the leftover steel in its FOP reporting, and requested a by-product offset because it tracks the production of the leftover steel.[638] Instead, we find that Modern Heavy withheld pertinent information and significantly impeded this investigation. Further, while we have information with respect to the difference between total steel purchased per project and the amount returned to inventory,[639] we do not have record evidence that is specific to the amounts returned which can be used to accurately calculate

[637] *Id.* at D-9 – D-10.
[638] *See* Modern Heavy's Verification Report at 21 ("Further, company officials stated that Modern Heavy does not record the remaining steel as an offset to costs but it remains on Modern Heavy's balance sheet as an asset (*i.e.*, remaining inventory).").
[639] *See* Modern Heavy July 3, 2019 DSQR at Exhibit SD-18.

the total amount of each steel FOP that is missing.

Moreover, we disagree with Modern Heavy that we were able to fully verify Modern Heavy's steel FOPs.[640] We were unable to fully verify Modern Heavy's steel FOPs because we were unaware that Modern Heavy underreported its steel FOPs until verification, where we discovered that Modern Heavy withheld information critical to these FOPs. Modern Heavy attempts to highlight that Commerce "noted no discrepancies" with respect to its steel FOP reporting. However, Modern Heavy's argument is misleading and without merit. In the verification report we noted no discrepancies to Modern Heavy's purchases of steel, and Modern Heavy's classification of the steel (*i.e.*, alloy or non-alloy) that it did report;[641] however, this portion was not a catch-all statement, and only applied to those items where we verified Modern Heavy's records and state that we noted no discrepancies. To the contrary, on pages 20-21 of Modern Heavy's Verification Report, under the heading "Primary Steel Inputs," we explained at length about how Modern Heavy compiled its steel FOPs and tracked and stored project-specific leftover materials, but we did not state that we "noted no discrepancies." To the contrary, we noted that "not all of the purchased quantity was accounted for in the FOP reporting as some of the purchased material was stored as overstock on Modern Heavy's factory site after completion of the project."[642]

With respect to Modern Heavy's use of difficulty variances, we find that Modern Heavy significantly impeded the proceeding and provided information that could not be verified. By way of background, Modern Heavy does not track labor, energy (*i.e.*, electricity), welding/cutting gases (*i.e.*, oxygen, carbon dioxide, nitrogen, helium, propane, and argon), or welding consumables (*i.e.*, welding wire and welding flux) on a project-specific basis and was thus unable to report them on a project-specific basis. Rather, Modern Heavy reported these FOPs using a difficulty variance, which it stated it uses in the normal course of business.[643] Prior to verification, Modern Heavy explained to Commerce that the difficulty variances are calculated using a "standard" number of hours needed to fabricate a beam as a baseline.[644] According to Modern Heavy, a master list contains the different difficulty variances assigned to typical components of the projects Modern Heavy undertakes, which Modern Heavy then uses to calculate the total difficulty variance of a project.[645] Thus, according to Modern Heavy, the difficulty variances are intended to capture how much more or less intense a project's labor is compared to the production of a beam. This is significant, in that Modern Heavy attempts to capture project-specific cost in terms of labor hours. However, Modern Heavy was unable to support this baseline – or the other difficulty variances – with substantiating documentation (*e.g.*, time studies showing the accuracy of the baseline or the other difficulty variances assigned to

[640] *See* Modern Heavy's Rebuttal Brief at 51-52 ("Additionally, Commerce fully verified the accuracy of every aspect of {Modern Heavy's} reported steel purchases, consumption, remaining inventory, and even the types of steel consumed.") (citing Modern Heavy's Verification Report at 20-22).
[641] *See* Modern Heavy's Verification Report at 21-22.
[642] *Id.* at 21.
[643] *See* Modern Heavy's July 3, 2019 DSQR at 4 ("In its normal course of business, Modern Heavy uses this method because it represents the production difficulty level of each project, and it is reasonable to use these variances to allocate certain inputs that Modern Heavy is unable to record on a project-by-project basis.").
[644] *See* Modern Heavy August 16, 2019 CDSQR at 13.
[645] *See* Modern Heavy's Verification Report at 17-18.

project components). We requested, in multiple supplemental questionnaires, that Modern Heavy support the use of the difficulty variances, and demonstrate that the difficulty variances it used to report FOPs for labor, energy, welding gases, and welding consumables were accurate and non-distortive.[646] However, despite our requests and notice to Modern Heavy of its deficient responses, Modern Heavy was unable to demonstrate the accuracy of its difficulty variance methodology or substantiate the information about the difficulty variances contained in its questionnaire responses at verification.[647]

The difficulty variances, at their core, are an allocation methodology. However, Modern Heavy only had to use an allocation methodology because they did not track certain FOPs on a project-specific basis. The use of an allocation methodology does not, in and of itself, preclude a respondent's reporting from being accurate and reliable. For instance, if Modern Heavy had tracked direct labor hours on a per-project basis and based its allocation on such a methodology, it could have provided project-specific costs based on labor hours worked. Such a methodology may have provided an accurate and reliable measurement of actual FOP consumption, because the FOPs being reported which relied on this methodology would have tied to the actual consumption of another FOP (*i.e.*, labor, which is directly proportional to the welding, cutting, and electricity consumption on a per-project basis). However, Modern Heavy's difficulty variance allocation methodology was based on numbers Modern Heavy could not substantiate with documentary evidence or tie to a tracked FOP. Instead, it was based on "knowledge of the industry" and "engineer's estimates,"[648] and, thus, was unable to be tied to any sort of actual project-specific costs that would have provided some validity to the methodology. Commerce has previously not accepted "industry knowledge" or estimates as substantiating evidence, because it does not clearly quantify the actual costs incurred,[649] which is necessary for Commerce to calculate an accurate dumping margin.

Moreover, at verification, Modern Heavy provided conflicting descriptions of how it calculates difficulty variances in the normal course of business. On the factory tour, company officials

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[646] *See* Commerce's June 7, 2019, ACD Questionnaire at Attachment I page 10 ("Provide a detailed explanation of the nature and source of the project-specific 'difficulty variances' you use to calculate equivalent production quantities for certain inputs…Provide documentation supporting the use of these variances for each project during the POI…Provide worksheets showing how the difficulty variance for each project was calculated."); *see also* Commerce's Letter, "Less-Than-Fair-Value Investigation of Certain Fabricated Structural Steel from the People's Republic of China: 2nd Supplemental Sections C and D Questionnaire," dated August 12, 2019 (Commerce's August 12, 2019, CD Questionnaire), at Attachment I page 6 (*e.g.*, "The narrative response to question 36 and documents provided in Exhibit SD-6 do not adequately show how Modern Heavy calculates its 'difficulty variances.'").

[647] *See* Modern Heavy's Verification Report at 2 ("Modern Heavy was unable to show that the difficulty variances assigned to the projects under investigation were appropriate based on the actual size, type, and fabrication complexity of the projects.") and 17-19.

[648] *Id*. at 18-19.

[649] *See, e.g.*, *Stainless Steel Bar from India* and accompanying IDM at Comment 1 ("Additionally, Chandan used a per-unit amount derived from "industry knowledge" in allocating costs to the angle grouping. We agree with the petitioners that, for {stainless steel flat bar (SSFB)} and angle grouping, we were unable to verify Chandan's reported allocations. In order for the Department to have confidence in Chandan's reported rolling costs for merchandise under review examined at verification (*i.e.*, bright bar), it is crucial that the Department be able to clearly quantify the costs allocated to merchandise not under review at verification (*i.e.*, SSFB and the angle grouping). The information provided by Chandan in allocating these costs could not be verified.").

explained that Modern Heavy takes into account three criteria when assigning difficulty variances: type, size/weight, and fabrication intensity (*i.e.*, the number of cuts, welds, punches, etc.).[650] Later at verification, company officials stated that in fact, Modern Heavy does not take into account the fabrication intensity of a project when it calculates a difficulty variance. Rather, it uses a master list of difficulty variances assigned to different types of components, from which it then selects various components from the list based on the requirements for a project and calculates the difficulty variances using these.[651] We further noted that, according to company officials, occasionally Modern Heavy will add an "other divisor" (*i.e.*, an additional factor other than the base difficulty variances assigned to each component, described above) to the difficulty variance to calculate the final difficulty variance of the project.[652] When we inquired further about the "other divisors," we again received conflicting accounts from company officials about when Modern Heavy uses the "other divisor." Ultimately, Modern Heavy was also unable to substantiate when it uses the "other divisor" or how it calculates it with documentation.[653]

Additionally, at verification, we observed that Modern Heavy was inconsistent in how it applied the difficulty variances from the master list to the projects,[654] and, for at least one project, the actual components of the project do not appear to match the descriptions of the difficulty variances assigned to them from the master list.[655] Moreover, we noticed that these same components appear to have required a higher level of fabrication intensity than assigned to them using the difficulty variances, which further indicates that Modern Heavy's difficulty variances are inaccurate and unreliable. Finally, at verification, we inquired as to the accuracy of the difficulty variances; we noted in our report that "company officials stated that {the difficulty variances} are, to a degree, rough estimates based on knowledge of the industry. They further acknowledged that, although Modern Heavy uses these difficulty variances for cost accounting purposes, they are not exact."[656]

Modern Heavy contends that the petitioner made many of the same arguments before the *Preliminary Determination* concerning Modern Heavy's difficulty variances, and that Commerce rejected them.[657] Commerce did not reject the petitioner's arguments for the *Preliminary Determination*; rather, we did not address the petitioner's arguments in the *Preliminary Determination* and initially used Modern Heavy's data as submitted. All decisions made in the *Preliminary Determination* were pending subject to verification and case briefs from interested parties.[658] Subsequent to the *Preliminary Determination*, we conducted verification to assess the

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[650] *Id.* at 17.
[651] *Id.* at 18.
[652] *Id.*
[653] *Id.*
[654] *Id.* ("We noted that for certain projects, the variance assigned to certain components on the direct labor allocation worksheet is lower than the variance which should be assigned to that type of components according to the difficulty variance master list.").
[655] *Id.* at 19.
[656] *Id.*
[657] *See* Modern Heavy's Rebuttal Brief at n.94 (citing Petitioner's Letter, "Certain Fabricated Structural Steel from China: Petitioner's Comments in Advance of the Preliminary Determination," dated August 15, 2019, at 30-34).
[658] *See Preliminary Determination* PDM at 39 ("As provided in section 782(i)(1) of the Act, we intend to verify the information from JCG, Modern Heavy, and Wison upon which we will rely in making our final determination.").

accuracy of the respondents' submitted data,[659] and have received case briefs on the issue. Thus, we find this argument unconvincing.

Modern Heavy insists that it fully explained how it uses the difficulty variances in the normal course of business, and that it explained why it believed that the difficulty variances were the most accurate and reasonable methodology with which to value labor, energy, welding gasses, and welding consumables.[660] Moreover, Modern Heavy argues that Commerce never requested it revise this methodology, and even instructed Modern Heavy to continue using the difficulty variances. Just because a respondent tracks consumption or costs a certain way in its normal course of business does not also necessarily make that method appropriate for reporting factors or costs to Commerce. For example, Modern Heavy also explained, at verification, that, in the normal course of business, it allocated galvanizing costs to all projects, regardless of whether the project required galvanized steel.[661] Thus, at verification, we confirmed that Modern Heavy's normal cost accounting operations do not appropriately quantify and allocate all costs to the appropriate projects which incurred those costs. We also disagree with Modern Heavy that it fully explained the difficulty variance methodology in its questionnaire responses. We issued two supplemental questionnaires requesting additional information about the difficulty variances due to concerns about the use of difficulty variances and how they are calculated.[662] Moreover,, the issues we found at verification with respect to Modern Heavy's difficulty variances, as noted in our report,[663] demonstrate that Modern Heavy's explanations were either incorrect or deliberately misleading. While it is true that we never asked Modern Heavy to revise its methodology before the *Preliminary Determination*, at the time we believed the difficulty variances constituted the best information on the record with which to value the inputs calculated with the difficulty variances (*i.e.*, labor, welding gasses, welding consumables, and energy). However, as noted above, despite using Modern Heavy's difficulty variances for the *Preliminary Determination*, we were unable to verify them as accurate and non-distortive.

Modern Heavy points to passages in our verification report to claim that Commerce was able to verify each of the FOPs calculated using the difficulty variances, and that there is nothing to suggest that Modern Heavy provided inaccurate information or that the FOPs assigned using the difficulty variances were "unreasonable or unverifiable."[664] However, the passages Modern Heavy identifies do not state that the actual FOP allocations were verified and reasonable. Instead, they note that we confirmed that the methodologies presented at verification were the same as those on our record and that we verified Modern Heavy's total consumption of these FOPs (*i.e.*, the total quantity Modern Heavy consumed for *all* projects over the reported period). The verification report makes clear that Modern Heavy was unable to substantiate its difficulty

[659] *See* 782(i) of the Act ("The administering authority shall verify all information relied upon in making—(1) a final determination in an investigation").
[660] *See* Modern Heavy's Rebuttal Brief at 44.
[661] *See* Modern Heavy's Verification Report at 17.
[662] *See, e.g.*, Commerce's Letter, "Less-Than-Fair-Value Investigation of Certain Fabricated Structural Steel from the People's Republic of China: 2nd Supplemental Sections C and D Questionnaire," dated August 12, 2019, at Attachment I page 6 ("The narrative response to question 36 and documents provided in Exhibit SD-6 do not adequately show how Modern Heavy calculates its 'difficulty variances.'").
[663] *See* Modern Heavy's Verification Report at 2 and 18-19.
[664] *See* Modern Heavy's Rebuttal Brief at 45-47 (citing Modern Heavy's Verification Report at 22 and 24-26).

variances or its use of them based on any evidence (*e.g.*, including calculations or other documentary evidence with respect to how the variances were derived and used in a consistent manner).[665] As the difficulty variance was the prime factor in Modern Heavy's allocations of labor, energy, welding gasses, and welding consumables, the fact that we were unable to verify the difficulty variances calls into question the reasonableness and accuracy of Modern Heavy's entire FOP reporting for these inputs. Thus, we disagree that we were able to fully verify these FOPs at verification.

With respect to its packing FOPs, at verification Modern Heavy failed to demonstrate the accuracy and completeness of its 23 reported packing FOPs, or the gross weight of its shipments, for lack of proper record keeping.[666] In our verification report, in the "Summary of Issues" section at the start of the verification report, we stated:

> We were unable to confirm that Modern Heavy's reported consumption of packing materials was complete or accurate, as Modern Heavy neither weighs nor tracks the packing materials consumed in the normal course of business. Rather, we noted that Modern Heavy determined its packing weights using estimates, and it based its reported packing FOPs based on the same estimated figures.[667]

At verification, we discovered that Modern Heavy does not track consumption of most packing FOPs on a project-specific basis, or even in general, in the ordinary course of business.[668] Instead, Modern Heavy tracks the purchases of the non-steel inputs, and consumption of steel packing materials (to make packing frames, though this consumption is not tied to actual shipments because the steel packing frames are produced irregularly), and reported them on this basis.[669] In addition, its shipments are packed in irregular packing materials which, based upon poor record keeping, were impossible to track or confirm.[670] Consequently, at verification, we were unable to confirm the accuracy or completeness of any of Modern Heavy's FOP reporting for any of its 23 separate packing materials, despite two supplemental questionnaires requesting that it adjust its packing material reporting methodology.[671] Further, at verification, we confirmed that Modern Heavy also does not weigh the packed merchandise at time of shipment, or otherwise accurately calculate the gross weight of the finished merchandise at the time of shipment, but rather only estimates the weight of the packing material and adds it to the weight of the fabricated structural steel shipped.[672]

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[665] *See* Modern Heavy's Verification Report at 2 and 18-19.
[666] *Id.* at 27-28.
[667] *Id.* at 2.
[668] *Id.* at 28 ("Company officials stated that Modern Heavy does not track packing material consumption in the ordinary course of business, nor does it weigh the packed merchandise prior to shipment.").
[669] *Id*. at 27 ("We noted that Modern Heavy records packing materials other than steel in its accounting system on a monthly purchase basis and records steel used in packing based upon monthly consumption.").
[670] *Id*. at 27 ("Modern Heavy purchased or consumed packing materials (including steel for packing) irregularly, which caused wide variations in packing materials consumed by each project, as each project has a different cost calculation period based upon when the project was under construction.").
[671] *Id.* at 2 and 27-28; *see also* Commerce's June 7, 2019, ACD Questionnaire at Attachment I pages 12-13; and Commerce's August 12, 2019, CD Questionnaire at Attachment I pages 4-5.
[672] *Id.* at 28. In a supplemental response, Modern Heavy stated, "Except for circumstances where the customer specifically instructed as to the packing method and the customer paid separately for such packing the gross weights

Modern Heavy contends that Commerce did not find anything different at verification than what Modern Heavy reported in its questionnaire responses, and that Commerce confirmed that the methodology explained at verification was consistent with that in Modern Heavy's responses.[673] We agree with Modern Heavy on this count, in part. We note that while we confirmed that the methodology Modern Heavy presented at verification was the same it used in its reporting, Modern Heavy did not disclose in its initial response,[674] or any supplemental response,[675] that its consumption of packing FOPs (excluding primary steel packing FOPs) were based on purchases, not consumption. Further, though we were able to confirm that Modern Heavy's allocation methodology was the same as the one on the record does not excuse the fact that we were unable to verify Modern Heavy's packing FOPs or methodology as accurate or reliable.

The petitioner argues that Commerce requires respondents in NME cases to report material inputs on the basis of consumption, not purchases, such as what Modern Heavy did.[676] Modern Heavy attempts to distinguish that it did base its calculation of the primary steel packing FOPs on the basis of consumption because it tracks the consumption of steel packing FOPs on a monthly basis.[677] We agree with the petitioner. Section 773(c)(3)(B) of the Act states that the FOPs include the "quantities of raw materials employed" in manufacturing the subject merchandise. Thus, basing consumption off purchases would not lead to an accurate assessment of the packing materials Modern Heavy actually consumed in the process of packing and shipping the subject merchandise, because it would exclude materials withdrawn from existing inventory during the POI. Further, as the petitioner points out, we noted in our verification report that, because Modern Heavy purchases packing FOPs on an irregular basis, it led to large variations in the packing materials reported for each project, because each project had a different cost calculation period based upon when the project was under production.[678] This is equally true for the steel packing FOPs. We noted that Modern Heavy would typically construct a large

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of the shipments are merely theoretical weights that are estimated per Modern Heavy's experience; it does not represent the actual gross weight of the shipment." *See* Modern Heavy July 3, 2019 DSQR at 10. Modern Heavy further stated that for the projects reported, it did not receive any specific instructions regarding packing from its customers. *See* Modern Heavy August 16, 2019 CDSQR at 10.

[673] *See* Modern Heavy's Rebuttal Brief at 55.

[674] *See* Modern Heavy May 15, 2019 CDQR at 14 and Exhibits D-10.1 and D-10.2 ("Modern Heavy did not record actual consumption of materials used to pack the merchandise under consideration on a project-by-project basis. Therefore, Modern Heavy uses the total consumption quantity divided by total production during the POI, arriving at the unit consumption of packing materials reported.").

[675] *See* Modern Heavy July 3, 2019 DSQR at 10 ("Modern Heavy believes it is not possible to report all packing material consumption on a project-specific basis for the following reasons: (1) Modern heavy did not record packing material consumption on a project specific basis in its normal business operations; instead, it records the total monthly consumption; (2) Modern Heavy usually conducts multiple project production at the same time, and it cannot specifically distinguish how much packing material was used on which project."); *see also* Modern Heavy August 16, 2019 CDSQR at 11 ("Because, as explained above, Modern Heavy did not track the packing materials on a project specific basis…Modern Heavy is unable to allocate the exact weight of packing materials to a specific project. Therefore, Modern Heavy allocates the consumption of packing materials according to the exported production in the corresponding production months for each project.").

[676] *See* Petitioner's Case Brief at 50.

[677] *See* Modern Heavy's Rebuttal Brief at 56-57.

[678] *See* Petitioner's Case Brief at 50 (citing Modern Heavy's Verification Report at 27).

number of packing frames in one month and none in the next,[679] further distorting the reported consumption of these FOPs because the frames were likely used outside the period reported for a project.

Modern Heavy argues that Commerce requested that it revise its reporting to factor in the gross weight of shipments to its packing FOP methodology.[680] Moreover, Modern Heavy contends that it reported its packing FOPs using three discrete methodologies over the course of the investigation, in compliance with Commerce's requests, and thus, the petitioner's characterization of this issue is without merit. Commerce did request multiple revisions of Modern Heavy's packing FOPs in supplemental questionnaires due to deficient responses, pursuant to section 782(d) of the Act.[681] This was done in conjunction with multiple other questions regarding Modern Heavy's packing FOPs as we attempted to ascertain the best way for Modern Heavy to report its packing FOPs for the *Preliminary Determination*. While Modern Heavy complied with our requests for further information, we were unable to verify the information. Though Commerce did use Modern Heavy's reported packing FOPs for the *Preliminary Determination*, it does not render them accurate for this final determination, particularly because we could not verify their accuracy. At the time of the *Preliminary Determination*, we used the packing FOPs calculated with the methodology reported in Modern Heavy's Modern Heavy August 16, 2019 CDSQR. However, at verification, we discovered further discrepancies, including that Modern Heavy does not track actual consumption of certain packing materials (*i.e.*, it tracks purchases),[682] which were not reported to Commerce in Modern Heavy's questionnaire responses. Consequently, because the information submitted for Modern Heavy's packing FOPs could not be verified, for the final determination, we are declining to use the submitted information, consistent with section 782(e) of the Act.[683]

The petitioner also notes that Modern Heavy was presented with an additional opportunity at verification to revise its packing FOPs at verification, and that it was unable to do so.[684] Modern Heavy counters that although Modern Heavy declined to provide an alternative packing calculation[685] because of time constraints at verification, it is willing to provide such

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[679] *See* Modern Heavy's Verification Report at 27-28 ("Company officials stated that the company will typically withdraw a significant portion of packing steel from inventory and construct a large number of standardized steel packing frames on a periodic basis (*i.e.*, not every month).").
[680] *See* Modern Heavy's Rebuttal Brief at 56.
[681] *See* Commerce's June 7, 2019, ACD Questionnaire at 1 ("After an analysis of your response, we have found deficiencies, omissions and areas where further clarification is needed.") and Attachment I pages 12-13; and Commerce's August 12, 2019, CD Questionnaire at 1 and Attachment I pages 4-5.
[682] *See* Modern Heavy's Verification Report at 2 and 27-28.
[683] Verification is the method from which a respondent's submitted data can be confirmed as accurate. *See, e.g.*, *Calcium Hypochlorite from the People's Republic of China: Final Decision to Rescind the Countervailing Duty New Shipper Review of Haixing Jingmei Chemical Products Sales Co., Ltd.*, 82 FR 15494 (March 29, 2017), and accompanying IDM at Comment 1 ("The purpose of verification is to confirm the accuracy of information previously submitted on the record.").
[684] *See* Petitioner's Case Brief at 50 (citing Modern Heavy's Verification Report at 27).
[685] *See* Modern Heavy's Verification Report at 27 ("In response, company officials stated that the information to calculate packing materials for each project on an annual basis was not readily available, as they would have needed to gather total exports for the year for all projects. Therefore, Modern Heavy did not provide the proposed recalculation.").

recalculations "in response to a request from {Commerce} with appropriate notice and given adequate time to gather the large volume of information that would be required to meet the request."[686] Further, Modern Heavy argues that the fact it declined to provide an alternative calculation carries little weight. We find this to be an inadequate excuse. As explained in the cover letter attached to the verification outline for Modern Heavy:

> To facilitate the verification process, we have described the types of source documents that we will require to support the submitted data. As you are aware, the time available for the verification is limited. Consequently, we ask that the necessary information be gathered by the appropriate personnel prior to the verifiers' arrival. … It is the responsibility of the respondent to be fully prepared for this verification. If your client is not prepared to support or explain a response item at the appropriate time, the verifiers will move on to another topic. If, due to time constraints, it is not possible to return to that item, we may consider the item unverified, which may result in our basing the results of this investigation on the facts available, possibly including information that is adverse to the interests of your client. … Please note that verification is not intended to be an opportunity for submission of new factual information. New information will be accepted at verification only when: (1) the need for that information was not evident previously; (2) the information makes minor corrections to information already on the record; or (3) the information corroborates, supports, or clarifies information already on the record.[687]

Thus, in our verification outline, which we issued to Modern Heavy three weeks prior to verification, we provided Modern Heavy ample notice of what was required of it at verification. As the supporting documentation needed to perform the requested calculation is similar to, if not in fact the same as, documentation needed to substantiate its existing packing FOPs and calculations, Modern Heavy should have been prepared for Commerce's request and had available the required documentation. To expect that Commerce should permit Modern Heavy to submit the requested recalculation at Modern Heavy's convenience is unreasonable and suggests that, in contravention of the statute, Commerce would rely upon unverified information for the final determination.[688] Thus, we find that Modern Heavy's failure to provide a recalculation of its FOPs at verification is significant, and that for the final determination we are left to consider the information already on the record of this investigation (*i.e.*, as discerned from Modern Heavy's questionnaire responses and our observations at verification). However, the information on the record with respect to Modern Heavy's packing FOPs was unable to be verified, and thus, warrants FA, pursuant to section 776(a)(2)(D) of the Act

For all of the reasons stated above, we find it necessary to resort to facts available in determining Modern Heavy's dumping margin under section 776(a)(2)(A), (B), (C), and (D) of the Act. As discussed above, the antidumping duty questionnaires issued in this investigation required

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[686] *See* Modern Heavy's Rebuttal Brief at 58-59.
[687] *See* Commerce's Letter, "Less-Than-Fair-Value Investigation of Certain Fabricated Structural Steel from the People's Republic of China: Verification Agenda," dated September 9, 2019.
[688] *See* section 782(i) of the Act ("The administering authority shall verify all information relied upon in making—(1) a final determination in an investigation.").

Modern Heavy to report the total quantity of raw materials employed, the hours of labor required, the amounts of energy and other utilities consumed to produce the subject merchandise, and to accurately and clearly report the methodologies used to calculate its consumption of these materials using its books and records. We afforded Modern Heavy multiple opportunities to provide this information, in accordance with section 782(d) of the Act, including through various supplemental questionnaires.[689] Still, Commerce uncovered pertinent information only at verification that should have been reported within Modern Heavy's responses. As a result, Modern Heavy withheld necessary information, failed to report information by the deadline and in the manner in which it was requested, and provided information which could not be verified within the meaning of sections 776(a)(2)(A), (B), and (D) of the Act. These failures, *in toto*, amount to Modern Heavy significantly impeding the proceeding, under section 776(a)(2)(C) of the Act by inhibiting Commerce from collecting accurate and reliable FOP data.

We also find that Modern Heavy failed to act to the best of its ability, which warrants the application of an adverse inference in selecting from the facts available under section 776(b) of the Act. Specifically, with respect to Modern Heavy's steel FOPs, because Modern Heavy possessed the necessary records to provide the total quantity of steel consumed, rather than the provided quantity which was exclusive of scrap and wastage, we find that Modern Heavy did not act to the best of its ability to comply with our request for information. At a minimum, Modern Heavy was careless or inattentive[690] by failing to report complete and accurate steel FOPs, and pertinent information was only uncovered at verification.[691] With respect to the difficulty variances and packing FOPs, we find that Modern Heavy's poor record keeping prohibited it from supplying Commerce with substantiating documentation and complete and accurate FOP data. Modern Heavy's inadequate records[692] failed to substantiate the use, accuracy, and reliability of the difficulty variances used to calculate and report project-specific FOPs for labor, energy, and welding gasses/consumables.[693] At a minimum, then, Modern Heavy did not do "the maximum it {was} able to do" to be prepared for Commerce's verification.[694] Moreover, Modern Heavy maintained such inadequate records of its packing FOPs and shipments of subject merchandise that it was impossible to determine the accuracy or reliability of its reported packing FOPs or total packed weights, which are used to calculate shipping costs.[695] Additionally, when asked for a revised calculation of its packing FOPs, Modern Heavy was unable to conduct a prompt, careful, and comprehensive investigation of all relevant records that related to the request to the full extent of its ability to do so.[696] Thus, we find that Modern Heavy

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[689] *See* Modern Heavy May 15, 2019 CDQR; Modern Heavy July 3, 2019 DSQR; and Modern Heavy August 16, 2019 CDSQR.
[690] *See Nippon Steel*, 337 F. 3d at 1382.
[691] *See* Modern Heavy's Verification Report at 2 and 20-22.
[692] *See Nippon Steel*, 337 F. 3d at 1382.
[693] *See* Modern Heavy's Verification Report at 2 and 17-19.
[694] *See Nippon Steel*, 337 F. 3d at 1382.
[695] *See* Modern Heavy's Verification Report at 2 and 27-28.
[696] *Id.* at 27 ("In response, company officials stated that the information to calculate packing materials for each project on an annual basis was not readily available, as they would have needed to gather total exports for the year for all projects. Therefore, Modern Heavy did not provide the proposed recalculation."). We note that Modern Heavy would have been able to provide the proposed re-calculation but for inadequate record keeping; *see also Nippon Steel*, 337 F. 3d at 1382 (explaining that the "best of its ability" standard under section 776(b) of the Act

did not act to the best of its ability to comply with our multiple requests for information. Given the above facts, we find, *in toto*, that Modern Heavy failed to cooperate by not acting to the best of its ability to comply with Commerce's requests for information, as provided in section 776(b) of the Act.[697]

As explained by the Federal Circuit:

> {b}efore making an adverse inference, Commerce must examine the respondent's actions and assess the extent of the respondent's abilities, efforts, and cooperation in responding to Commerce's requests for information. Compliance with the "best of ability" standard is determined by assessing whether respondent has put forth its maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation. While the standard does not require perfection, and recognizes that mistakes sometimes occur, it does not condone inattentiveness, carelessness, or inadequate record keeping.[698]

Modern Heavy argues that it "put forth its maximum effort to investigate and obtain the requested information from its records" and acted to the best of its ability under the standard set in *Nippon Steel*.[699] We disagree. As discussed above, we find that the scope of the failures and omissions identified at verification in Modern Heavy's data are the result of inattentiveness, carelessness, and inadequate record keeping. Even though Commerce does not require perfection in questionnaire responses and recognizes that mistakes sometimes occur, Commerce "does not condone submission of incomplete and misleading responses, which are replete with omissions and discrepancies."[700] Further, Commerce's practice to reject a respondent's data where it is "flawed and unverifiable"[701] has been upheld by the Courts,[702] as the petitioner argues.[703]

The failures identified in the verification report with regards to Modern Heavy's submitted FOPs are far-reaching and affect almost all of Modern Heavy's FOPs. A usable FOP database is core to our ability to calculate an accurate dumping margin for Modern Heavy. In the instant case, the culmination of Modern Heavy's various failures render the entire FOP database unusable.

"assumes that" companies "conduct prompt, careful, and comprehensive investigations of all relevant records that refer or relate to the imports in question to the full extent of the {companies'} ability to do so").

[697] We issued extensive supplemental section D (*i.e.*, FOP) questionnaires to Modern Heavy on June 7, 2019, and August 12, 2019.

[698] *See Nippon Steel*, 337 F. 3d at 1382-83.

[699] *See* Modern Heavy's Rebuttal Brief at 37-38 (citing *Nippon Steel*, 337 F. 3d at 1382-83).

[700] *See, e.g.*, *Quartz Surface Products from China* IDM at Comment 12 (where Commerce applied total AFA to a respondent's CEP sales and partial AFA to the same respondent's EP sales based upon significant failures discovered at verification).

[701] *See Extruded Rubber Thread from Malaysia; Final Results of Antidumping Duty Administrative Review*, 63 FR 12752, 12763 (March 16, 1998) ("{Commerce's} practice has been to reject a respondent's submitted information *in toto* when flawed and unverifiable cost data renders all price-to-price comparisons impossible.").

[702] *See Heveafil Sdn. Bhd. v. United States*, 25 CIT 147, 151 (CIT 2001).

[703] *See* Petitioner's Case Brief at 53 (citing *Steel Authority of India, Ltd. v. United States*, 149 F. Supp. 2d 921, 928 (CIT 2001)).

Thus, we find that the application of total AFA to Modern Heavy's dumping margin for the final determination is warranted and appropriate.

Modern Heavy argues that prior cases support not applying total AFA to Modern Heavy.[704] Like in *Hand Trucks from China Final Determination*, Modern Heavy contends it was fully cooperative, submitted timely questionnaire responses, provided verifiable FOP data, cooperated at verification, and it did not purposefully withhold information.[705] We disagree with Modern Heavy; the information on the record, and presented above, clearly refutes this argument. Unlike the respondent in *Hand Trucks from China Final Determination*, we find here that Modern Heavy did not cooperate to the best of its ability; as explained above, Modern Heavy provided an FOP database that was inaccurate and unverifiable. We also note that, in that case, Commerce applied partial AFA to the inputs that failed verification.[706] In this case, because the FOP issues pervade Modern Heavy's FOP database, partial AFA is not appropriate because, *in toto*, the FOP database was unverifiable and is unreliable, as explained above.

Petitioner cites *Biaxial Geogrids from China* as evidence of Commerce's practice of applying total AFA in cases where a respondent has failed verification on either sales or FOPs/cost.[707] Modern Heavy attempts to distinguish the instant proceeding from *Biaxial Geogrids from China*, explaining that in that case Commerce was unable to verify any of the reported data in the respondents accounting system or records. Here, Modern Heavy argues, Commerce fully verified all of Modern Heavy's "sales and production data to its accounting system and through to its financial reports."[708] While we agree with Modern Heavy that, in some instances, we were able to tie production data to its accounting system and financial reports, albeit on a high level (*e.g.*, total quantities consumed/purchased), we were generally unable to tie project-specific FOP consumption to the accounting systems or financial records. In addition, Modern Heavy was unable to substantiate its calculations of the reported FOPs as accurate and non-distortive, which would have served as sufficient to verify the reliability of Modern Heavy's reported FOPs. Thus, we find that Modern Heavy's verification failures are so substantial – affecting nearly all of Modern Heavy's FOPs – that, like in *Biaxial Geogrids from China*, total AFA is warranted.

We have therefore, as stated above, determined to apply total AFA in determining Modern Heavy's dumping margin for the final determination. As AFA, we are applying the highest non-aberrational transaction-specific dumping margin calculated for mandatory respondent Wison, as Modern Heavy's dumping margin. We disagree with the petitioner that the calculated normal value from the Petition would be appropriate to apply to Modern Heavy as AFA, because we were unable to corroborate the Petition rate, or the numerator and denominator of the Petition rate; thus, we were unable to corroborate the Petition normal value as required by section 776(c) of the Act. In the alternative, we have used the highest transaction-specific margin for Wison of 154.14 percent, which was derived from fully verified information provided by Wison in this investigation. Moreover, because the highest transaction-specific dumping margin for Wison

[704] *See* Modern Heavy's Rebuttal Brief at 41-42 (citing *Hand Trucks from China Final Determination* IDM at Comment 1).
[705] *Id.*
[706] *See Hand Trucks from China Final Determination* IDM at Comment 7.
[707] *See* Petitioner's Case Brief at 53 (citing *Biaxial Geogrids from China* IDM at Comment 3
[708] *See* Modern Heavy's Rebuttal Brief at FN 91.

constitutes primary information, the statutory corroboration requirement in section 776(c) of the Act does not apply.

Finally, with respect to the petitioner's remaining arguments concerning partial FA or AFA, and Modern Heavy's rebuttals to these arguments, we find them to be moot because we are applying total AFA to Modern Heavy's dumping margin for the final determination.

Comment 13: Modern Heavy's Moot Arguments

Modern Heavy and the petitioner raised a number of issues specific to Modern Heavy's margin calculation, including its final settled sales value, substantial completion date, by-product offset, and its FOPs and the appropriate SVs to value them.[709]

Commerce's Position:

Because we did not calculate a final dumping margin for Modern Heavy, these issues are moot and we have not addressed them.

Comment 14: Wison's Galvanizing Costs

Wison's Case Brief

- At verification, Commerce found that Wison inadvertently did not report galvanizing factors of production for one project, but because it was not identified as a minor correction at the start of verification, Commerce did not accept the information. However, the record contains sufficient information to allow Commerce to calculate galvanizing costs for the project for the final determination using facts available under section 776(a)(1) of the Act.[710]

- There are three FOPs related to galvanizing: zinc, labor, and electricity. Contract documentation already on the record specifies the amount of steel that for the project that requires galvanizing. From the weight of steel on the record that requires galvanizing, Commerce can calculate the amount of zinc used. During verification, Wison's galvanizing toller stated that galvanization typically adds five to six percent in weight. Commerce can use the average of 5.5 percent to derive the amount of zinc consumed, in kgs. Alternatively, Wison reported galvanizing FOPs for its other project, and Commerce can use the galvanizing rates from that project to derive the amount of zinc, energy, and labor required.[711]

- Commerce should use the information on the record to calculate the missing galvanizing costs. Wison's mistake was inadvertent and Wison attempted to provide the necessary information once it was discovered. Further, in its responses, Wison had provided

[709] *See* Modern Heavy's Case Brief at 3-9 and 23-24; *see also* Modern Heavy's Rebuttal Brief at 59-60; Petitioner's Case Brief at 54-57; and Petitioner's Rebuttal Brief at 22-26.
[710] *See* Wison's Case Brief at 1 and 3-4.
[711] *Id*. at 4-5.

information showing that the project was galvanized, and thus it is evident that Wison was not attempting to hide this issue or impede Commerce's investigation. Thus, using the available facts to calculate the galvanizing FOPs is the most appropriate course of action and would allow Commerce to most accurately calculate Wison's margin.[712]

Petitioner's Case Brief

- At verification, Commerce discovered that Wison had failed to include galvanizing costs for one project which required galvanizing. The failure to report FOPs is grounds for partial AFA. As partial AFA, Commerce should add to the project the per-ton galvanizing costs reported for Wison's other project which Wison did report as galvanized. Further, since Commerce has no verified record of the total weight of steel galvanized, Commerce should take the total weight of the project and multiply it by the average weight of zinc per weight of steel.[713]

Wison's Rebuttal Brief

- Commerce should not use adverse inferences when calculating galvanizing costs for the one project which required galvanizing, but Wison failed to report the associated costs. The petitioner argues that Commerce should use adverse inferences and the total weight of the project to calculate galvanizing costs.

- Under section 776 of the Act, however, Commerce has discretion in whether to apply AFA. To apply AFA in this circumstance would go against judicial precedent and the primary objective to be accurate and fair when calculating dumping margins.[714] Judicial precedent dictates that applying AFA is inappropriate in circumstances where Commerce can independently fill in gaps in the record.[715] In addition, Commerce is empowered to use AFA only when selecting from among facts otherwise available and cannot disregard information that is not missing or not deficient.[716]

- Commerce should not use the total weight of the project since information is on the record that indicates only a portion of the project required galvanization.[717] Using the portion of the project that was galvanized, rather than the total weight, would result in a more accurate margin.

[712] *Id.* at 5.
[713] *See* Petitioner's Rebuttal Brief at 26-28.
[714] *See* Wison's Rebuttal Brief at 2 (citing *Albemarle Corp. & Subsidiaries v. United States*, 821 F. 3d 1345, 1354 (Fed. Cir. 2016).
[715] *Id.* (citing *NEXTEEL Co., Ltd. v. United States*, 355 F. Supp. 3d 1336, 1362 (CIT 2019).
[716] *Id.* at 2 (citing *Zhejiang DunAn Hetian Metal Co., Ltd. v. U.S.*, 652 F. 3d 1333, 1348 (Fed. Cir. 2011) (citing *Gerber Food* (*Yunnan Co. v. United States*, 387 F. Supp. 2d 1270 (CIT 2005)).
[717] *Id.* at 2-3.

Petitioner's Rebuttal Brief

- Commerce should decline to use information on the record to estimate the usage factors for Wison's unreported galvanizing costs since Commerce could not verify the weight of the galvanized material. In the fabricated structural steel industry, contracts are often not reflective of the final materials sold to the customer because specifications change regularly. Therefore, the galvanized quantity in Wison's sales contract is not reliable and only the production records from its toller could establish the final amount – which Wison failed to provide prior to verification. Therefore, since Wison failed to place this information on the record, partial AFA is warranted and Commerce should use the method put forward in the case brief and assume that Wison galvanized the entire weight of the project.[718]

Commerce's Position:

At verification, we discovered that, for one project, Wison had failed to report galvanizing expenses (*i.e.*, including zinc consumption); we also declined to take new factual information with respect to the amount of zinc consumed for this project.[719] However, we agree with Wison that the record contains the necessary information to accurately ascertain the weight of the project that requires galvanizing,[720] and thus we disagree with the petitioner that AFA is warranted. Specifically, as part of its initial questionnaire response, Wison submitted project documentation for this project with the contract, and a change order, that reflect the weight of the steel that required galvanizing.[721] Further, Wison calculated the amount of zinc consumed per ton of steel galvanized based upon the weigh-in records for its other project for which it did report galvanizing, and which was verified by Commerce.[722] Consequently, for the final determination, with respect to the weight of the project which required galvanizing, we are relying on the record evidence (*i.e.*, the change order).[723]

With respect to the amount of zinc consumed per kilogram of steel galvanized, we find that necessary information is not available on the record under section 776(a)(1) of the Act. Thus, as facts available under section 776(a)(1) of the Act, we have relied upon the ratio of zinc consumed per kilogram of steel galvanized, that Wison calculated using its project for which it did report galvanizing; and thus the zinc consumption ratio is specific to Wison's experience.[724] Accordingly, based upon record evidence that is specific to Wison, we have added the additional zinc to Wison's FOPs for the project at issue.[725]

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[718] *See* Petitioner's Rebuttal Brief at 26-28.
[719] *See* Wison FOP Verification Report at 2 and 12-13.
[720] *See* Wison's Rebuttal Brief at 2-3 (citing Wison's May 28, 2019 Questionnaire Response at Exhibit 3, containing the change order dated June 3, 2018, which specifies the total amount of steel that required galvanizing for the project).
[721] *See* Wison's May 28, 2019 Questionnaire Response at Exhibit 3.
[722] *See* Wison's Case Brief at 5, FN. 9 ("This rate ends up being approximately [***] using the amount of galvanizing zinc used compared with the weigh-in numbers"); *see also* Wison FOP Verification Report at 12-13. The amount of zinc calculated by Wison, based upon its other project, is proximate to the range stated by Wison's galvanizing toller.
[723] *See* Wison's May 28, 2019 Questionnaire Response at Exhibit 3.
[724] *See* Wison's Case Brief at 5, FN. 9.
[725] *See* Wison Final Calculation Memorandum.

Comment 15: Wison's Further Manufacturing Costs

Wison's Case Brief

- For one of its projects, as explained in its Section E questionnaire responses, Wison North America Petrochemicals (NA) LLC (Wison NA) contracts out the on-site installation work. Wison NA accumulates the subcontractor costs in its accounting system based on the actual production costs on an accrual basis. As is common in the construction industry, and as evidenced by the multiple change orders associated with each project (between Wison NA and its customer and Wison NA and its subcontractor), the forecasted contract amount may vary throughout the life of the project and, as a result, the forecasted contract value and percentage of completion are not set until the contract is completed.[726]

- During the U.S. verification, Commerce requested that Wison NA update its Section E calculations to account for on-site work that had occurred up until verification, and to use actual payments made to the subcontractor as opposed to the normal cost accounting which uses an estimate based on the completion of the subcontract. In its verification report, Commerce suggests two alternative methods of calculating further manufacturing instead of how Wison NA's costs are booked in its accounting system; one includes payments actually booked and the other includes potential future payments.[727]

- Commerce should use the original reported Section E costs as booked in Wison NA's accounting system, as those are the amounts that tie to Wison's financial statements and other expenses. However, to the extent that Commerce does not use the recorded costs as they are booked in Wison NA's accounting system, Commerce should use the payments that have been made as they are the most accurate reflection of Wison NA's costs at the time of verification. Although there are potential remaining expenses Wison NA may end up paying the subcontractor, such theoretical future payments relate to the ongoing nature of the project and cannot be considered for the purpose of calculating further manufacturing costs. As demonstrated by the number of change orders, the contract value will continuously be adjusted as on-site work continues (as will the final sales contract value with the customer). Additionally, proposed change orders by the subcontractor may not be accepted by Wison NA or its customer. As a result, the most accurate picture would rely on actual further manufacturing payments that have resulted, as opposed to trying to determine what future additional manufacturing costs would be incurred.[728]

Petitioner's Rebuttal Brief

- Wison requested that Commerce use the further manufacturing costs paid to date and ignore the total estimated payments. Both options are inappropriate since neither would include the total further manufacturing costs for the total project or any additional costs which may be incurred. To ignore Wison's estimated further manufacturing costs would inflate the U.S.

[726] *See* Wison's Case Brief at 8-9.
[727] *Id*. at 9.
[728] *Id*. at 9-10.

price. Therefore, for the final determination, Commerce should dismiss Wison's request and use the recent information available to deduct the total estimated final further manufacturing costs from Wison's gross contract price.[729]

Commerce's Position:

We agree with the petitioner that it would be inappropriate to include all of Wison's projected revenue for the sale, including change orders, without also including all of the costs under the contract to install the project. At verification, upon review of Wison NA's costs reported for 2019 for the installation of one of Wison's projects, we observed that Wison NA's reporting methodology resulted in the omission of significant additional costs and requested that Wison NA provide both (1) all costs incurred up until verification and (2) all costs projected under the contract between Wison NA and its subcontracted installer.[730] We reviewed the contract and tracking documentation provided by Wison NA at verification and noted that, consistent with the terms of its contract, Wison NA owed (or expected to owe) its subcontractor (1) an amount invoiced but not yet paid; (2) the remaining balance on the contract; and (3) a hold-back retainage amount on the entire contract.[731] Pursuant to Commerce's request, at verification, Wison NA provided a revised calculation of further manufacturing costs for the project at issue using the total installation contract value (*i.e.*, including the amounts not yet paid to its subcontractor).[732] Previously, for the *Preliminary Determination* we included all of Wison's revenue for the project in question, including anticipated revenue under the contract and change orders. Thus, because we included anticipated revenue (*i.e.*, including change orders and hold-back/retainage), it is appropriate to match the anticipated revenue against the anticipated expenses. Further, we note that both the anticipated revenue and anticipated expenses are spelled out in contracts and associated change orders and are fixed and known amounts. Even though the complete contracts have yet to be settled, there is no evidence that the totals – both for Wison NA's contract with its ultimate customer and under Wison NA's contract with its installer – will not be honored, pursuant to the relevant contracts and agreements. Thus, it would be inappropriate for Commerce to ignore Wison NA's complete further manufacturing costs; accordingly, we have subtracted out Wison NA's total (and anticipated) further manufacturing costs for the final determination, in order to better match Wison NA's costs to its revenue.[733]

While we agree with Wison that the future costs are uncertain and there may still be more change orders, we do not have to speculate what the costs are under the existing change orders – because, as a result of the existing change orders between Wison NA and its customer, Wison NA also entered into additional change orders with its subcontracted installer and thus the costs match to the revenue. Further, we agree with Wison that, if both the contract with its customer and its installer had reached settlement we would have preferred to rely upon final settled values. However, based upon the facts, we are unable to do so and have, instead, relied on the most complete revenue and cost values on the record, including both anticipated final revenue

[729] *See* Petitioner's Rebuttal Brief at 28-29.
[730] *See* Wison CEP Verification Report at 2 and 12-13.
[731] *Id.* at 13; and CEP Verification Exhibit 14. Although the exact amounts are proprietary, we note that these remaining costs are small relative to the total contract value and that the majority of the costs pertain to (1) amounts already invoiced but not yet paid and (2) retainage, which is a common practice in the construction industry.
[732] *Id.*
[733] *See* Wison Final Calculation Memorandum.

amounts and anticipated final cost amounts. Further, Wison's argument that we should disregard anticipated costs under Wison NA's contract with its installer is inconsistent with Commerce's reliance upon Wison's anticipated revenue under its contract with its customer. Thus, in order to appropriately capture costs that are consistent with anticipated revenue, we have included all revenue and all costs in our final margin calculations for Wison's CEP sales.

Comment 16: Wison's Further Manufacturing General and Administrative Expenses

Wison's Case Brief

- For the final determination, Commerce should set the further manufacturing general and administrative expenses cost field (*i.e.*, FURGNA) to zero in order to avoid double counting. As demonstrated by the correction presented at Wison NA's CEP verification, the identical expenses included in FURGNA have already been accounted for in the indirect selling expenses for Wison's U.S. sales (INDIRSU). By setting FURGNA to zero for the final determination Commerce will avoid double counting these expenses.

Petitioner's Rebuttal Brief

- Petitioners did not rebut Wison's request.

Commerce's Position:

As a correction presented at the start of its CEP sales verification, Wison explained that Wison NA double counted its U.S. general and administrative (G&A) expenses, once as part of U.S. further manufacturing costs and again as U.S. indirect selling expenses.[734] Consequently, Wison requested that the G&A expenses reported as part of further manufacturing be set to zero. Further, at verification, we confirmed that the G&A figure used in Wison NA's further manufacturing calculation was the same as the figure used in its calculation of indirect selling.[735] Consequentially, in order to avoid double-counting Wison NA's G&A expenses, we have set the G&A expenses to zero in Wison NA's further manufacturing cost calculation, since the expenses are already fully accounted for as part of Wison NA's U.S. G&A expense.[736]

Comment 17: Wison's Steel Scrap Offset

In the *Preliminary Determination*, Commerce did not grant Wison a byproduct offset, stating that Wison did not maintain records demonstrating the production quantity of steel scrap during the POI.[737]

[734] *See* Wison CEP Verification Report at 3.
[735] *Id*. at 13-14.
[736] *See* Wison Final Calculation Memorandum.
[737] *See Preliminary Determination* PDM at 32.

Wison's Case Brief

- Wison has provided sufficient evidence demonstrating the steel scrap produced was sold, and is entitled to a byproduct offset.[738]

- Commerce has stated that its "practice with respect to scrap offsets to normal value (NV) is to allow such offsets based on the amount of scrap generated, once the generated scrap has been shown to have commercial value, through evidence of sales or reintroduction into the production process."[739] During verification, Wison officials explained that "Wison allocated the byproduct offset for steel scrap sold on a project-specific basis, based upon production data from the steel cutting stage of production."[740] Commerce was able to tie the scrap sales quantities from the weigh-slips to the sales invoices and to the scrap revenue recorded in Wison's accounting system. Commerce has previously allowed companies to use yield loss rates as support for scrap production in granting an offset.[741] Commerce should similarly find that Wison's allocation method is sufficient to support the reported amounts of produced scrap material and grant Wison a byproduct offset for the final determination.

Petitioner's Rebuttal Brief

- At verification, Commerce confirmed that Wison does not track scrap production by project.[742] Therefore, Commerce should continue to deny the scrap offset for the final determination in accordance with its practice to deny offsets where a respondent is unable to track production of scrap at the production stage.

- As clearly stated in Commerce's Section D questionnaire, Commerce's standard practice is to base byproduct offsets on the quantity of byproducts produced, not on the volume sold.[743] Commerce has repeatedly denied a respondent's scrap offset because the quantity of scrap sold in a given period was entirely disconnected from the amount of scrap generated in the respondent's manufacturing process.[744] Commerce only deviates from this practice where: (1) there is a close correlation between scrap or byproduct sales; and (2) the production of scrap does not vary significantly by specific products.[745]

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[738] *See* Wison's Case Brief at 3 and 11 (citing *Preliminary Determination* PDM at 32).
[739] *Id.* at 11-12 (citing *Final Results of the 2016-2017 Administrative Review of the Antidumping Duty Order on Certain Steel Nails from the Republic of Korea*, 84 FR 4770 (February 19, 2019) (*Steel Nails from Korea*), and accompanying IDM at Comment 1).
[740] *Id.* at 12 (citing Wison FOP Verification Report at 15).
[741] *Id.* (citing *Steel Nails from Korea* IDM at Comment 1 ("{W}e have reexamined the record and have determined to grant Daejin an adjusted scrap offset because the yield loss information submitted by Daejin allows us to calculate the quantity of steel scrap that Daejin could have reasonably produced.")).
[742] *See* Petitioner's Rebuttal Brief at 23 (citing Wison Verification Report at 15).
[743] *Id.* at 24 (citing Commerce's Letter, "Antidumping Duty Questionnaire," dated April 1, 2019, at D-9 and D-10).
[744] *Id.* (citing *e.g.*, *Large Diameter Welded Pipe from the Republic of Korea: Final Determination of Sales at Less Than Fair Value*, 84 FR 6374 (February 27, 2019), and accompanying IDM at Comment 12; and *Wind Towers China Final* IDM at Comment 17).
[745] *Id.*

- Wison's scrap offset should be rejected because: (1) Wison purchases raw materials on a project-specific basis, so it should be able to track scrap by project; [746] (2) at verification Commerce confirmed Wison does not track scrap production by project;[747] (3) the worksheet used to validate Wison's claimed scrap offset demonstrates that sales of scrap are inconsistent from month-to-month;[748] and (4) information examined at Wison's verification demonstrates that Wison is unable to establish a nexus between the scrap sold in a given month and projects undertaken in that same month.[749]

Commerce's Position:

In the *Preliminary Determination*, we denied a scrap offset to all three mandatory respondents because they failed to maintain sufficient records demonstrating the production quantity of steel scrap during the POI.[750] Further, we explained that it is Commerce's practice to deny claims for by-product offsets where companies are unable to provide by-product production data to support their claims, and in such instances we have not granted a scrap or by-product offset.[751] JCG did not contest Commerce's *Preliminary Determination* as to our denial of its scrap offset and, as explained in Comment 12 above, we have relied upon total AFA to determine Modern Heavy's dumping margin for the final determination. Thus, we have not re-addressed the question of a steel scrap offset for JCG and Modern Heavy. With respect to Wison's arguments, we note that the facts for the final determination are identical to those at the *Preliminary Determination*. Consequently, we disagree with Wison that it has provided sufficient documentation of scrap production on a project-specific basis to warrant an offset and, for this final determination we continue to deny Wison's request for a scrap offset.

The statute governing the calculation of normal value, section 773(c) of the Act, does not discuss the treatment of by-products or scrap. Commerce promulgated regulations stating that it may make adjustments to normal value, but that "{t}he interested party that is in possession of the relevant information has the burden of establishing to the satisfaction of the Secretary the amount and nature of a particular adjustment."[752] Accordingly, Wison bears the burden of establishing its entitlement to a scrap offset.

Commerce's practice, as reflected in the antidumping questionnaire issued to Wison, is to grant by-product offsets "for merchandise that is either sold or reintroduced into production during the POI/POR, up to the amount of that by-product/co-product actually produced during the POI."[753] Thus, to be eligible for an offset, a respondent needs to provide and substantiate the quantity of by-products it generated from the production of subject merchandise during the POI as well as

[746] *Id.* (citing Wison FOP Verification Report at 12).
[747] *Id.* (citing Wison FOP Verification Report at 15).
[748] *Id.* (citing Wison FOP Verification Report at Exhibit 19, page 2).
[749] *Id.* (citing Wison July 8, 2019 DQR at D-16 and Exhibit D-14).
[750] *See Preliminary Determination* PDM at 32.
[751] *Id.* (citing *TRBs from China 2012-13 AR* IDM at Comment 3 (where we denied claims for a by-product offset where the companies did not provide data of their, or their subcontractors', by-product production during the period of review).
[752] *See* 19 CFR 351.401(b).
[753] Commerce's original antidumping questionnaire was issued to Wison on May 17, 2019.

demonstrate that the by-product has commercial value. To that end, in this investigation, Commerce requested that Wison "{p}rovide production records demonstrating production of each by-product/co-product during one month of the POR."[754] In this case, Wison's requested steel scrap offsets are based on records of steel scrap sales and are unsubstantiated by production records.

In its initial questionnaire response, Wison stated that it "collected the quantity of steel scraps sold, and then allocated the quantity over all projects, based on the quantity of cut steel plates."[755] Further, in a supplemental questionnaire response, Wison acknowledged that it "does not record the scrap production quantity in their ordinary operation."[756] At verification, we found that Wison, at the design process phase, estimates the amount of scrap that will be produced, but during production, it does not track the actual production of steel scrap in the ordinary course of business.[757] Also at verification, company officials stated that Wison allocates the by-product offset for steel scrap sold on a project-specific basis, based upon production data from the steel cutting stage of production.[758] Nonetheless, Wison requested a scrap offset based purely off sales of scrap and did not maintain or provide, in its questionnaire responses, production records or documentation with respect to scrap generation to substantiate the amount of scrap generated in production of the projects examined in this investigation.

In NME proceedings, because we rely upon a FOP methodology, we do not grant claims for a by-product offset where the companies are not able to provide data for their scrap production during the POR.[759] This methodology ensures the accuracy of Commerce's dumping calculations. Specifically, providing the production quantity is important because, in considering a by-product offset, Commerce examines whether the by-product was produced from the quantity of the FOPs reported and whether the respondent's production process for the merchandise under consideration actually generated the amount of the by-product claimed as an offset. Commerce has stated that "{s}crap sold but not produced during the POI should not be included within the scrap offset because it would be unreasonable to offset the cost during the POI for scrap produced prior to the POI."[760] Furthermore, Commerce's practice ensures that a respondent does not receive a by-product offset for scrap generated in the production of non-

[754] *Id.*
[755] *See* Wison July 8, 2019 DQR at D-16.
[756] *See* Wison's August 5, 2019 Supplemental ACD Questionnaire Response (Wison August 5, 2019 SACDQR) at 14.
[757] *See* Wison FOP Verification Report at 15.
[758] *Id.*
[759] *See*, *e.g.*, *Steel Nails from China 2012-2013 Final* IDM at Comment 17; *Certain Oil Country Tubular Goods from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*; 2010-2011, 77 FR 74644 (December 17, 2012) (*OCTG 2010-2011*), and accompanying IDM at Comment 2; *Wind Towers China Final* IDM at Comment 17; and *Silicon Metal from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 77 FR 54563 (September 5, 2012), and accompanying IDM at Comment 3.
[760] *See TRBs from China 2012-13 AR* IDM at Comment 3; and *OCTG 2010-2011* IDM at Comment 2 (citing *Notice of Final Determination of Sales at Less Than Fair Value: Circular Welded Carbon-Quality Steel Pipe from the Sultanate of Oman*, 77 FR 64480 (October 22, 2012), and accompanying IDM at Comment 3).

subject merchandise. Moreover, Commerce's practice of denying a scrap offset when the respondent does not maintain scrap production records has been upheld by the Federal Circuit.[761]

We disagree with Wison that it is entitled to a scrap offset merely because we verified the scrap sales quantities and the corresponding revenue to Wison's accounting system. As noted above, Wison failed to demonstrate that there is a nexus between the scrap quantities produced and the scrap quantities sold in a given month. For example, at verification we found that Wison estimates the amount of scrap that will be produced, but during production, it does not track the actual production of by-products in the ordinary course of business.[762] Thus, because Wison does not track production quantities, it was not able to establish a sufficient link between its production of steel scrap and the subsequent sale of this by-product. In previous cases, where respondents were unable to provide production records demonstrating production of each by-product, we have denied a by-product offset.[763]

Finally, we disagree with Wison that *Steel Nails from Korea* supports Wison's arguments to accept its steel scrap offset. As an initial matter, *Steel Nails from Korea* is a market economy case and relies upon a respondent's reported costs, not FOPs. Further, In *Steel Nails from Korea*, Commerce conducted additional analysis of the data and only accepted the offset because the yield loss information submitted by the respondent allowed us to calculate the quantity of steel scrap that the respondent could have reasonably produced.[764] Commerce's practice, in NME cases, as upheld by the Federal Circuit, is to require documentation of production.[765] Further the Federal Circuit also recognized that this burden of record keeping is incumbent upon the respondent.[766] Thus, Wison failed to meet the requirements to obtain a scrap offset in this instance, based upon its own record-keeping failures. Consequently, we are not departing from Commerce's standard practice of rejecting a by-product offset where a respondent has failed to substantiate the by-product production amounts.

Comment 18: United Steel Structures Ltd.'s Separate Rate

United Steel's Case Brief

- In the *Preliminary Determination*, Commerce determined that United Steel failed to demonstrate the absence of *de facto* government control because one of United Steel's indirect majority shareholders has intertwined operations with the Government of China

[761] *See Am. Tubular Prods., LLC v. United States*, 847 F. 3d 1354, 1360-1362 (Fed. Cir. 2017) (*Am. Tubular Prods.*).
[762] *See* Wison FOP Verification Report at 15.
[763] *See, e.g.*, *TRBs from China 2012-13 AR* IDM at Comment 3.
[764] *See Steel Nails from Korea* IDM at Comment 1 (stating, "for the final results, we have reexamined the record and have determined to grant Daejin an adjusted scrap offset because the yield loss information submitted by Daejin allows us to calculate the quantity of steel scrap that Daejin could have reasonably produced…our review of the record indicates that, based on Daejin's yield losses, Daejin sold more scrap during the POR than it could have reasonably generated").
[765] *See Am. Tubular Prods.*, 847 F. 3d at 1358, 1361.
[766] *Id.* at 847 F. 3d 1354, 1362 ("{The respondent} simply failed to satisfy its evidentiary burden of establishing the requested offset, as the regulation requires. *See* 19 C.F.R. § 351.401(b).").

(GOC).[767] Further, Commerce also found that overlap exists between the management of United Steel, its parent company, and the indirect majority shareholder entity, thereby subjecting United Steel to government control.

- Commerce's analysis of the *de facto* government control is flawed. The *Preliminary Determination* overlooks the fact that United Steel's indirect majority shareholder is a publicly traded company, of which the GOC only indirectly owns a minority share. Thus, this shareholder is only remotely related to United Steel, as it is United Steel's parent company's parent company. Further, the publicly traded company is listed in both Hong Kong and Shanghai and, as a publicly traded company, it must operate under market principles and operate independently from the Chinese government. Publicly traded companies in China are subject to the Code of Corporate Governance for Listed Companies in China (CGLC Code).[768] According to Articles 22-27 of the CGLC Code, a listed company must be independent from its large shareholders in aspects of operations, assets, finance, premises, and personnel. Thus, the publicly traded company's minority shareholder is not in a position to control the publicly traded company because it has to be accountable to the public citizens who hold the publicly traded company's shares. The extent of this public ownership extinguishes its minority shareholder's ability to control United Steel's management.

- Commerce's practice with respect to control is different in circumstances where the Chinese government holds a majority ownership as opposed to a minority ownership. In a minority shareholding scenario, in order to find control, Commerce must analyze whether the state-controlled parent company has in fact exercised control (*i.e.*, Commerce requires "additional indicia of control prior to concluding that a respondent company could not rebut the presumption of *de facto* government control"[769]), which is not reflected in the record. In this investigation, United Steel demonstrated that it negotiated and conducted export sales independent of the government and without the approval of a government authority and that it was also free to make independent decisions regarding the disposition of profits or financing of losses. In sum, the state-owned shareholders of United Steel have very distant relations with United Steel, with no controlling power over United Steel's daily operations. Accordingly, Commerce should reverse its conclusion that United Steel is owned and controlled by the Chinese government and assign United Steel a separate rate in the final determination.

Petitioner's Rebuttal Brief

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[767] *See* United Steel Case Brief at 2 (citing *Preliminary Determination* PDM at 20; and the proprietary "Separate Rate Memorandum – United Steel Structures Ltd.," dated September 3, 2019 (United Steel Separate Rate Memorandum), at 6-7).
[768] *Id.* at 3 (citing United Steel's Letter, "Certain Fabricated Structural Steel from the People's Republic of China: Rebuttal to Petitioner's Comments on Separate Rate Application," dated April 29, 2019 (United Steel April 29, 2019 Rebuttal Comments), at 2-6).
[769] *Id.* at 4 (citing *Zhejiang Quzhou Lianzhou Refrigerants Co. v. United States*, 350 F. Supp. 3d 1308 (CIT 2018) (*Lianzhou Refrigerants*); and *An Giang Fisheries Imp. and Exp. Joint Stock Co. v. United States*, 284 F. Supp. 3d 1350 (CIT 2018) (*An Giang Fisheries*)).

- Commerce correctly found, in its *Preliminary Determination*, that United Steel is ultimately subject to government control due to the firm's ownership structure, since a company in United Steel's chain of ownership, through a minority ownership, is government-owned.[770] While United Steel states that there is no record evidence which contradicts its assertion that its sales were negotiated without direct involvement from the GOC, this is not sufficient to rebut a presumption of GOC control.[771] Minority ownership does not preclude the entity in question from being controlled by the GOC, but does require additional evidence that the GOC is able to exercise *de facto* control over United Steel.[772]

- Commerce is not required to determine whether the GOC actually exercised control. In past determinations, Commerce has found that minority, state-owned shareholders maintained *de facto* control after weighing evidence of potential control against the percentage of ownership.[773] The examples discussed in *Polyester Textured Yarn* indicate that the ability to nominate directors who control operations of the respondent is an important factor in determining *de facto* control in general, and in the case of United Steel.[774]

- United Steel argues that the entity in question is not controlled by the GOC because it is publicly traded and abides by market principles, based on Articles 22 through 27 of the Code of Corporate Governance for Listed Companies in China.[775] Commerce has previously determined, however, that companies can be both publicly-listed and government-controlled.[776] In addition, the CIT has previously found that Articles 22 through 27 of China's code "reveal little" when inquiring about government control over operations.[777]

Commerce's Position:

We disagree with United Steel regarding its eligibility for a separate rate in this investigation. For the final determination, we continue to find that United Steel is ultimately controlled by the GOC, and therefore, we find that United Steel has failed to rebut the presumption that it is

[770] *See* Petitioner's Rebuttal Brief at 41-42.
[771] *Id.* at 43 (citing *Hydrofluorocarbon Blends and Components Thereof from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances*, 81 FR 42314 (June 29, 2016), and accompanying IDM at Comment 8).
[772] *See* Petitioner's Rebuttal Brief at 43 (citing *An Giang Fisheries*, 284 F. Supp. 3d at 1350, 1359).
[773] *Id.* at 43 (citing *Certain Carbon and Alloy Cut-to-Length Plate from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value*, 82 FR 8510 (January 26, 2017) (*CTL Plate from China*), and accompanying IDM at Comment 2; and *Polyester Textured Yarn from the People's Republic of China: Final Determination of Sales at Less Than Fair Value, and Final Affirmative Determination of Critical Circumstances*, 84 FR 63850 (November 19, 2019) (*Polyester Textured Yarn*), and accompanying IDM at Comment 1).
[774] *Id*. (citing *Polyester Textured Yarn*).
[775] *Id*. at 46-47.
[776] *Id*. at 46 (citing *CTL Plate China* IDM at Comment 2).
[777] *Id*. at 47 (citing *Advanced Technology & Materials Co., Ltd. v. United States*, 885 F. Supp. 2d 1348, 1357 (CIT 2012) (*Advanced Tech. I*); and *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) (*SSSS from China*), and accompanying IDM at Comment 5).

subject to government control. Consequently, for the same reasons we found in the *Preliminary Determination*,[778] we continue to find that United Steel is ineligible for a separate rate.

Commerce considers China to be a non-market economy (NME) country under section 771(18) of the Act.[779] In antidumping proceedings involving NME countries, such as China, Commerce begins with a rebuttable presumption that the export activities of all firms within the NME country are subject to government control and influence.[780] In the *Initiation Notice*,[781] Commerce notified parties of the application process by which exporters may obtain separate-rate status in NME proceedings. It is Commerce's policy to assign all exporters of merchandise under investigation that are in an NME country a single weighted-average dumping margin, unless an exporter can affirmatively demonstrate an absence of government control, both in law (*de jure*) and in fact (*de facto*), with respect to exports.[782] Commerce analyzes whether each entity exporting the merchandise under consideration is sufficiently independent under a test established in *Sparklers*,[783] developed in *Silicon Carbide*,[784] and further developed in *Diamond Sawblades*.[785] According to this separate rate test, Commerce will assign a separate rate in NME proceedings if a respondent can demonstrate the absence of both *de jure* and *de facto* government control over its export activities. The consequences of failing to do so mean the exporter will be assigned the single rate given to the NME-wide entity.[786]

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[778] *See Preliminary Determination* PDM at 20; and the proprietary United Steel Separate Rate Memorandum.
[779] *See Antidumping Duty Investigation of Certain Aluminum Foil from the People's Republic of China: Affirmative Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 82 FR 50858, 50861 (November 2, 2017) (citing Memorandum, "Aluminum Foil from the People's Republic of China: China's Status as a Non-Market Economy," dated October 26, 2017), unchanged in *Certain Aluminum Foil from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 83 FR 9282 (March 5, 2018).
[780] *See*, *e.g.*, *Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2012-2013*, 80 FR 20197 (April 15, 2015), and accompanying IDM at Comment 1.
[781] *See Certain Fabricated Structural Steel from Canada, Mexico, and the People's Republic of China: Initiation of Less-Than-Fair-Value Investigations*, 84 FR 7330, 7335 (March 4, 2019) (*Initiation Notice*).
[782] *See, e.g.*, *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China: Final Determination of Sales at Less Than Fair Value, and Affirmative Final Determination of Critical Circumstances, in Part*, 77 FR 63791, 63793 (October 17, 2012), and accompanying IDM.
[783] *See Final Determination of Sales at Less Than Fair Value: Sparklers from the People's Republic of China*, 56 FR 20588 (May 6, 1991) (*Sparklers*) ("We have determined that exporters in nonmarket economy countries are entitled to separate, company-specific margins when they can demonstrate an absence of central government control, both in law and in fact, with respect to exports.").
[784] *See Notice of Final Determination of Sales at Less Than Fair Value: Silicon Carbide from the People's Republic of China*, 59 FR 22585 (May 2, 1994) (*Silicon Carbide*).
[785] *See Final Results of Redetermination Pursuant to Remand Order for Diamond Sawblades and Parts Thereof from the People's Republic of China* (May 6, 2013) in *Advanced Tech. I*, sustained, *Advanced Technology & Materials Co. v. United States*, 938 F. Supp. 2d 1342 (CIT 2013), aff'd, Case No. 2014-1154 (Fed. Cir. 2014) (*Advanced Tech. II*). This remand redetermination is on the Enforcement and Compliance website at http://enforcement.trade.gov/remands/12-147.pdf
[786] The Federal Circuit has upheld the application of the "NME presumption," in *Sigma Corp. v. United States*, 117 F. 3d 1401, 1405-06 (Fed. Cir. 1997) (*Sigma*). In setting forth its NME policy, "Commerce made clear the consequences to an exporter of not rebutting the presumption of state control and establishing its independence: the exporter would be assigned the single rate given to the NME entity (citation omitted)." *Transcom Inc. v. United States*, 294 F. 3d 1371, 1381-82 (Fed. Cir. 2002).

Commerce considers the following *de jure* criteria in determining whether an individual company may be granted a separate rate: (1) an absence of restrictive stipulations associated with an individual exporter's business and export licenses; (2) legislative enactments decentralizing control over export activities of the companies; and (3) other formal measures by the government decentralizing control over export activities of companies.[787]

Commerce typically considers four factors in evaluating whether a respondent is subject to *de facto* government control of its export functions: (1) whether the export prices are set by, or are subject to the approval of, a government agency; (2) whether the respondent has authority to negotiate and sign contracts and other agreements; (3) whether the respondent has autonomy from the government in making decisions regarding the selection of management; and (4) whether the respondent retains the proceeds of its export sales and makes independent decisions regarding the disposition of profits or financing of losses.[788] Companies which do not demonstrate an absence of both *de jure* and *de facto* government control are assigned the rate established for the China-wide entity, which applies to all imports from any exporter that has not established its eligibility for a separate rate.

The separate-rate test has been subject to litigation in the courts. In *Sigma*, the Federal Circuit affirmed that it was within Commerce's authority to employ a presumption for state control in an NME country and place the burden on exporters to demonstrate an absence of central government control.[789] The Federal Circuit found that section 771(18)(B)(iv)-(v) of the Act recognized a close correlation between an NME economy and government control of prices, output decisions, and allocation of resources and, therefore, Commerce's presumption of government control was reasonable.[790] In *Jiangsu 2015*, the CIT ruled that Commerce could "make reasonable inferences from the record evidence" when examining the totality of the circumstances in determining whether a respondent had demonstrated *de jure* and *de facto* control of its export activities.[791] The CIT has recognized that majority ownership by a

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[787] *See Sparklers*, 56 FR at 20589.

[788] *See Notice of Final Determination of Sales at Less Than Fair Value: Silicon Carbide from the People's Republic of China*, 59 FR 22586-87 (May 2, 1994) (*Silicon Carbide*); *see also Notice of Final Determination of Sales at Less Than Fair Value: Furfuryl Alcohol from the People's Republic of China*, 60 FR 22545 (May 8, 1995).

[789] *See Sigma*, 117 F. 3d at 1405-06 ("We agree with the government that it was within Commerce's authority to employ a presumption of state control for exporters in a nonmarket economy, and to place the burden on the exporters to demonstrate an absence of central government control. The antidumping statute recognizes a close correlation between a nonmarket economy and government control of prices, output decisions, and the allocation of resources. Moreover, because exporters have the best access to information pertinent to the 'state control' issue, Commerce is justified in placing on them the burden of showing a lack of state control." (internal citations omitted)).

[790] *Id.*; *see also Coalition for the Preservation of Am. Brake Drum & Rotor Aftermarket Mfrs v. United States*, 44 F. Supp. 2d 229, 243 (CIT 1999) (quoting *Sigma*, 117 F. 3d at 1405 ("Under the broad authority delegated to it from Congress, Commerce has employed 'a presumption of state control for exporters in a non-market economy'… Under this presumption, all exporters receive one non-market economy country (NME) rate, or country-wide rate, unless an exporter can 'affirmatively demonstrate' its entitlement to a separate, company-specific margin by showing 'an absence of central government control, both in law and in fact, with respect to exports'")).

[791] *See Jiangsu Jiasheng Photovoltaic Tech. Co. v. United States*, 121 F. Supp. 3d 1263, 1266 (CIT 2015) (*Jiangsu 2015*), citing *Jiangsu Jiasheng Photovoltaic Tech. Co., Ltd. v. United States*, 28 F. Supp. 3d 1317, 1339 (CIT 2014) (quoting *Certain Cut-to-Length Carbon Steel Plate from Ukraine*, 62 FR 61754, 61759 (November 19, 1997); and *Sigma*, 117 F.3d at 1405 (citation omitted), respectively; and citing *Daewoo Elecs. Co. v. United States*, 6 F. 3d

government entity, either directly or indirectly, precludes a respondent's ability to demonstrate an absence of *de facto* control.[792] Commerce has previously explained why evidence of indirect or direct government ownership is a sufficient evidentiary basis on which to conclude that an NME government has the ability to exercise control over a company such that the company is ineligible for a separate rate.[793] Commerce's application of the separate rate test in NME cases, post-*Advanced Tech. III*, has developed to address circumstances where the government entity holds either majority ownership (such that the potential for control exists based on ownership alone), or where the government entity holds minority ownership, but the government might also be able to exercise, or have the potential to exercise, control of a company's general operations through its minority ownership under certain factual scenarios.[794]

First, by stating that Commerce must analyze whether a state-controlled parent has "in fact exercised control", United Steel misunderstands Commerce's required examination of the *de jure* and *de facto* criteria in determining whether a company has rebutted the presumption of government control in a post-*Advanced Tech. III* environment.[795] In examining the totality of the circumstances and making reasonable inferences from the record evidence, we determine United Steel has not demonstrated an absence of such potential of government control.[796] Based on our analysis of United Steel's ownership structure, which can be found in the proprietary preliminary determination Separate Rate Memorandum - and for which the record of this investigation has not changed on this issue – Commerce concluded that United Steel is ultimately controlled by the GOC.[797] United Steel has not challenged the bulk of Commerce's analysis in the *Preliminary Determination* with respect to its eligibility for a separate rate. Importantly, United Steel did not attempt to rebut or re-characterize key passages we relied upon from the Articles of Association of United Steel's shareholders to demonstrate ultimate control of United Steel by the GOC.[798]

1511, 1520 (Fed. Cir. 1993) (explaining that substantial evidence may include "reasonable inferences from the record") (citation omitted)).

[792] *See Jiangsu 2015*, 121 F. Supp. 3d at 1267 (citing *Advanced Tech. & Materials Co. v. United States*, 938 F. Supp. 2d 1342 (CIT 2013) (*Advanced Tech II*) aff'd, 581 Fed. App'x 900 (Fed. Cir. 2014) (*Advanced Tech. III*) ("Specifically, as a result of litigation challenging Commerce's separate rate determinations in the diamond sawblades proceedings, Commerce has clarified its practice with regard to evaluating NME companies' *de facto* independence from government control. This revised practice, which was sustained by this Court and subsequently affirmed by the Court of Appeals, holds that 'where a government entity holds a majority ownership share, either directly or indirectly, in the respondent exporter {or producer},' such majority ownership holding 'in and of itself' precludes a finding of *de facto* autonomy").

[793] *See, e.g.*, *Carbon and Certain Alloy Steel Wire Rod from the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value and Preliminary Affirmative Determination of Critical Circumstances, in Part*, 79 FR 53169 (September 8, 2014), and accompanying PDM at "Separate Rates," unchanged in *Carbon and Certain Alloy Steel Wire Rod from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances, in Part*, 79 FR 68860 (November 19, 2014) (*Steel Wire Rod 2014*).

[794] *See, e.g.*, *1,1,1,2-Tetrafluroethane from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 79 FR 62597 (October 20, 2014) (*1,1,1,2-Tetrafluroethane China Final*), and accompanying IDM at Comment 1; and *Truck and Bus Tires From the People's Republic of China: Final Affirmative Determinations of Sales at Less Than Fair Value and Critical Circumstances*, 82 FR 8599 (January 27, 2017) (*China Truck and Bus Tires*), and accompanying IDM at Comments 1 and 8; and *Polyester Textured Yarn* IDM at 8.

[795] *See* United Steel's Case Brief at 3.

[796] *See Jiangsu 2015*, 121 F. Supp. 3d at 1266.

[797] *See* United Steel Separate Rate Memorandum.

[798] *Id*. at 5-7.

Nor did United Steel rebut the presumption of control demonstrated by shared management between United Steel and its GOC-controlled shareholders above it.[799]

For the final determination, the underlying record evidence is the same as at the *Preliminary Determination*. United Steel is a joint venture with two shareholders – Company A and Company B.[800] Company B owns, directly or indirectly, all of United Steel's shares and appoints, directly or indirectly, the entirety of United Steel's Board of Directors.[801] Therefore, Commerce continues to find that Company B controls United Steel. A percentage of Company B is owned by Company C, with the remaining shares divided among various other entities.[802] Company B's articles of association enable Company C to pass or veto all resolutions brought before the board of shareholders. Company C is also entitled to appoint directors to the board of directors of Company B, which makes decisions regarding Company B's budget, the acquisition and sale of assets, and the appointment and dismissal of management.[803] Therefore, Commerce continues to find that Company C controls Company B. Company C has two major shareholders – Company D and Company E – and a number of minor ones. Company D is a state-owned enterprise (SOE) that is wholly owned by the State-owned Assets Supervision and Administration Commission of the State Council (SASAC).[804] Meanwhile, Company E is a passive shareholder.[805] Company D's articles of association demonstrate that its business operations are thoroughly intertwined with the GOC and demonstrate the GOC's ability to control operations of that company. Therefore, Commerce continues to find that the GOC controls Company C through Company D.[806] The record shows overlap exists between management and the board of directors of Company B and Company C, as well as of Company B and United Steel.[807] For these reasons, Commerce continues to find that United Steel is ultimately controlled by the GOC.

United Steel argues that Commerce requires an additional indicia of control when minority government ownership exists.[808] It is mistaken, however, in its argument that Commerce

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[799] *Id*. at 7.

[800] We use generic company names here because the names of the companies that comprise United Steel's overall ownership structure are business proprietary information. The identities of these companies are included in a separate BPI memo. *See* Memorandum, "Final Affirmative Determination in the Less-Than-Fair-Value Investigation of Certain Fabricated Structural Steel from the People's Republic of China: United Steel Structures, Ltd. Ownership Structure," dated concurrently with this memorandum.

[801] *See* United Steel's Letter, "Certain Fabricated Structural Steel from the People's Republic of China: Separate Rate Application," dated April 3, 2019 (United Steel SRA), at Exhibit 7 and 9.

[802] *Id.* at Exhibit 7. We note that many of these other small shareholders have some extent of government ownership through various GOC entities. *See* United Steel's Letter, "Certain Fabricated Structural Steel from the People's Republic of China: Supplemental SRA Questionnaire Response," dated August 2, 2019 (United Steel Supplemental SRA Response), at 10-11.

[803] *See* United Steel Supplemental SRA Response at Exhibit Supp-4.

[804] *Id*. at 1 and 5.

[805] *See* the Full Member Subgroup of the American Institute of Steel Construction, LLC's Letter, "Certain Fabricated Structural Steel from the People's Republic of China: Petitioner's Comments on United Steel's Separate Rate Application," dated April 17, 2019, at 6.

[806] *See* United Steel Supplemental SRA Response at Exhibit Supp-3.

[807] *See* United Steel SRA at 15.

[808] *See* United Steel Case Brief at 4 (citing *Lianzhou Refrigerants*, 350 F. Supp. 3d 1308, 1317-1318 (CIT 2018) (citing *An Giang Fisheries*)).

determined an absence of *de facto* control based solely on the GOC's minority ownership.[809] As an initial matter, we clarify that Commerce is not limited in its evaluation of *de facto* evidence of government control only where government ownership exceeds 50 percent if there is other information on the record that demonstrates that there is potential to exert control, directly or indirectly, over a company's activities.[810] Although in *Advanced Tech. II* and *Advanced Tech. III* the respondent was majority-owned by a government entity, in other cases, consistent with *Jiangsu 2015*, Commerce has examined the totality of the circumstances where a respondent is not majority owned by a government entity, and made a reasonable inference that the respondent does not control its own export activities.[811]

Indeed, Commerce has made numerous *de facto* control determinations, where the SOE owned less than 50 percent of shares of a respondent.[812] For example, in *China Truck and Bus Tires*, we found that the top four shareholders of a respondent were SASAC entities, *i.e.*, SOEs. These shareholders did not own the majority of shares; they accounted for 49.06 percent of the respondent's ownership.[813] Commerce found that despite minority ownership, record evidence indicated that the respondent was controlled by an SOE, and we denied the respondent a separate rate.[814] In *Containers*, Commerce found that a respondent was indirectly controlled by an SOE, despite owning a minority of shares, and denied that company a separate rate.[815] In that case, two minority shareholders owned a combined 48.2 percent of the respondent, but in turn were 100-percent-owned by a China SASAC.[816] We examined the totality of the circumstances in *Containers* and made a determination that the China SASAC, through the minority shares it owned, exercised control over important management organizations, such as the board of directors, which had the authority to appoint managers that controlled the operations of the

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[809] *Id.*

[810] *See Jiangsu 2015*, 121 F. Supp. 3d at 1266; *see also An Giang Fisheries Imp. & Exp. Joint Stock Co. v. United States*, 284 F. Supp. 3d 1350, 1363-64 (CIT 2018) (*An Giang II*).

[811] *See, e.g.*, *1,1,1,2-Tetrafluroethane China Final* IDM at Comment 1 (Commerce did not grant a separate rate to Aerospace because it did not demonstrate an absence of *de facto* control. The company's controlling board members were also on the board of its largest single owner – a 100%-owned SASAC. The SASAC's board of directors actively participated in the day-to-day operations of the company and the government of China appeared to have final say on the ownership of Aerospace.); *see also China Truck and Bus Tires* IDM at Comments 1 and 8 (Commerce did not grant Aeolus a separate rate because the company was found to have 49.06 percent SOE ownership through its parent company and three other shareholders. The SOE shareholders were found to have control over decision-making and the selection of management and Aeolus could not demonstrate an absence of *de facto* control. Commerce also did not grant GTC a separate rate because an SOE that is 100-percent owned and supervised by a SASAC owned 25 percent of the company, making it the largest and controlling shareholder. GTC is the 100-percent sole owner of its affiliate and, therefore, the SOE has the ability to control the company's decision-making over the selection of management and profitability.).

[812] *See, e.g.*, *1,1,1,2-Tetrafluroethane China Final* IDM at Comment 1

[813] *See China Truck and Bus Tires* IDM at Comment 1.

[814] *Id.* ("Record information from the websites of China National Chemical Corporation and Aeolus demonstrates that state-owned China National Chemical Corporation controls Aeolus's operations through China National Chemical Corporation's wholly owned subsidiary China National Tire & Rubber Co., Ltd. The petitioner obtained copies of these websites…Aeolus's response to the petitioner's rebuttal does not dispute the veracity of the information contained on these websites.").

[815] *See 53-Foot Domestic Dry Containers from the People's Republic of China: Final Determination of Sales at Less Than Fair Value; Final Negative Determination of Critical Circumstances*, 80 FR 21203 (April 17, 2015) (*Containers*), and accompanying IDM at Comment 10.

[816] *Id.*

respondent.[817] Finally, in *Vietnam Fish Fillets*, Commerce determined that the respondent was under *de facto* government control, despite minority government ownership, because the government and the government-appointed general director of the company owned a combined percentage of 40.15 percent of the shares that provided them control over the Board of Directors nominations and approvals process.[818] In all of these cases, minority ownership by the SOE was not the controlling factor in the denial of a separate rate. Rather, other record evidence of potential control was weighed against the percentage of shares owned by the SOE. Similar facts are evident in the present case – as we discussed above in public summary form, and as discussed in full in the proprietary United Steel Separate Rate Memorandum, which we released concurrently with the *Preliminary Determination*.[819]

United Steel argues that Commerce's practice is to identify additional indicia of control prior to concluding that a respondent company cannot rebut the presumption of *de facto* control when there is minority government ownership.[820] United Steel further argues that the GOC did not exercise control over their business operations because they negotiated and conducted export sales without government intervention and made independent decisions regarding disposition of profits or financing of losses; and that there is nothing on the record to contradict these assertions.[821] However, as supported by the cases cited above, United Steel's argument that Commerce found an absence of *de facto* control based solely on minority government ownership is incorrect. Rather, Commerce continues to find, based on the analysis of United Steel's ownership structure discussed above and in the proprietary preliminary United Steel Separate Rate Memorandum, that the GOC controls United Steel through its control of Company C, which controls Company B, which owns, directly or indirectly, all of United Steel's shares and appoints, directly or indirectly, the entirety of United Steel's Board of Directors.

Lastly, United Steel argues that Commerce's analysis does not take into account the fact that Company C is a publicly traded company that is listed in Hong Kong and Shanghai and must, therefore, operate under market principles.[822] Further, United Steel argues that under Articles 22-27 of China's CGLC Code, a listed company must be independent from large shareholders in its operations, assets, finance, premises, and personnel.[823] Commerce previously decided, however, that a company can be both publicly-traded and government-owned in *CTL Plate from*

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[817] *Id.*
[818] *See Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results of Antidumping Duty Administrative Review*; 2012-2013, 80 FR 2394 (January 16, 2015) (*Vietnam Fish Fillets*), and accompanying IDM at Comment 1 ("Consistent with normal business practices, we would expect any majority shareholder, including a government, to have the ability to control, and an interest in controlling, the operations of the company, including the selection of management and the profitability of the company. While the combined holdings of the GOV and General Director are not a majority of shares, it is enough shares that these shareholders control who is nominated and approved to the Board of Directors.").
[819] *See* United Steel Separate Rate Memorandum at 5-7.
[820] *See* USSL Case Brief at 4 (citing *Lianzhou Refrigerants*, 350 F. Supp. 3d 1308, 1317-18 (CIT 2018) (citing *An Giang Fisheries Imp. and Exp. Joint Stock Co., v. United States*, 284 F. Supp. 3d 1350 (CIT 2018)).
[821] *See* United Steel Case Brief at 4.
[822] *See* United Steel Case Brief at 3 (citing United Steel April 29, 2019 Rebuttal Comments at 2-6 (citing the CGLC Code)).
[823] *Id.*

China.[824] In this case, like in *CTL Plate from China*, the rules governing the operations of Company C (*i.e.*, the company within the corporate structure which is both owned by a listed company and a 100 percent SASAC-owned company) indicate that the SASAC-owned company, and the GOC, exert ultimate control of Company C.[825] Additionally, in *Advanced Tech. I.*, the CIT noted that Articles 22-27 of China's CGLC Code "reveal little to an inquiry into 'government control' in the running of a company including its export operations."[826] Moreover, with respect to Article 20 of the Company Law in particular, the CIT stated that it "does not appear that this {article} may reasonably be construed to 'limit' the power of the state in the companies in which the state invests."[827] The structure of the Company Law provides controlling shareholders with direct and effectual control as "{s}hareholders have the ability to hire and fire each board member and decide their pay pursuant to Article 38, and each board member is thereby beholden."[828] That amounts to delegation, as opposed to separation, because the general manager, in point of fact, is selected by the same board of directors "in charge of overall business planning and the selection of upper management" that is "responsible to the shareholders" and can readily be replaced at the board's whim."[829] Therefore, consistent with our practice[830], we continue to find that Company C is government-controlled, even though it is also publicly traded and governed by the CGLC Code.

For the final determination, we continue to find that United Steel is not eligible for a separate rate, because it is ultimately controlled by the GOC and, thus, unable to rebut the presumption of government control. Because the record evidence is unchanged from the *Preliminary Determination*, our final determination to deny separate rate status to United Steel is based on the same facts that formed the basis of the *Preliminary Determination*.

[824] *See CTL Plate China* IDM at Comment 2.
[825] *See* United Steel Separate Rate Memorandum at 6 (citing to United Steel Supplemental SRA Response at Exhibit Supp-3, Articles of Association for Company C).
[826] *See Advanced Tech. & Materials Co. v. United* States, 885 F. Supp. 2d 1343, 1348, 1357 (CIT 2012) (*Advanced Tech. I*).
[827] *Id.* at 1354.
[828] *Id.* at 1355.
[829] *Id.*
[830] *See, e.g.*, *SSSS from China*; and *China Truck and Bus Tires.*

X. 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 in the investigation and the final weighted-average dumping margins in the *Federal Register*.

☒ Agree ☐ Disagree

1/23/2020

X _____

Signed by: JEFFREY KESSLER

Jeffrey I. Kessler
Assistant Secretary
for Enforcement and Compliance