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MEMORANDUM TO: Joseph Laroski
Deputy Assistant Secretary
for Policy and Negotiations

FROM: James Maeder
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Certain Steel Nails from the People's Republic of China: Issues and Decision Memorandum for the Final Results of the 2017-2018 Antidumping Duty Administrative Review

I. SUMMARY

The Department of Commerce (Commerce) analyzed comments submitted by interested parties in the administrative review of the antidumping duty (AD) order on certain steel nails (nails) from the People's Republic of China (China) covering the period of review (POR) August 1, 2017 through July 31, 2018.[1] Following the *Preliminary Results*,[2] based on our analysis of the comments received, we made certain changes to the margin calculations for the final results, as discussed below. We recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum. Below is a complete list of the issues for which we received comments and rebuttal comments from the interested parties:

General Issues

Comment 1: Sample Rate Calculation Methodology
Comment 2: Surrogate Financial Ratio Calculations
Comment 3: U.S. Selling Price and "Irrecoverable" Value Added Taxes (VAT)

[1] *See Notice of Antidumping Duty Order: Certain Steel Nails from the People's Republic of China*, 73 FR 44961 (August 1, 2008) (*Order*).
[2] *See 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) (*Preliminary Results*) and accompanying Preliminary Decision Memorandum.

Stanley[3] Issues

Comment 4: Stanley's Factors of Production (FOP) Database Error
Comment 5: Whether to Adjust Certain Movement Expenses
Comment 6: Whether Stanley B&D is Part of the China-Wide Entity

Pioneer[4] Issues

Comment 7: Application of Facts Available with Adverse Inferences

II. BACKGROUND

On October 18, 2019, Commerce published its *Preliminary Results*.[5] In accordance with 19 CFR 351.309, we invited parties to comment on the *Preliminary Results*. On November 25, 2019, Pioneer, Shanxi Hairui Trade Co., Ltd., SDC International Aust. Pty. Ltd, and S-Mart (Tianjin) Technology Development Co., Ltd. (collectively, Pioneer *et al.*),[6] Mid Continent Steel & Wire, Inc. (the petitioner),[7] Stanley,[8] and Building Material Distributors, Inc., Qingdao D&L Group Ltd., Shandong Qingyun Hongyi Hardware Products Co., Ltd., Dezhou Hualude Hardware Products Co., Ltd., and Mingguang Ruifeng Hardware Products Co., Ltd. (collectively Building Material Distributors *et al.*),[9] timely filed case briefs. On December 9, 2019, Pioneer,[10] the petitioner,[11] and Stanley[12] timely filed rebuttal briefs.

[3] The Stanley Works (Langfang) Fastening Systems Co., Ltd. and Stanley Black & Decker, Inc. (Stanley B&D) (collectively, Stanley) is a mandatory respondent in this review.
[4] Shanxi Pioneer Hardware Industrial Co., Ltd. (Pioneer) is a mandatory respondent in this review.
[5] *See generally Preliminary Results*.
[6] *See* Pioneer *et al*.'s Letter, "Certain Steel Nails from the People's Republic of China: Case Brief," dated November 25, 2019 (Pioneer Case Brief).
[7] *See* Petitioner's Letter, "Certain Steel Nails from the People's Republic of China: Case Brief, dated November 25, 2019 (Petitioner Case Brief).
[8] *See* Stanley's Letter, "Certain Steel Nails from the People's Republic of China; Tenth Administrative Review; Case Brief of The Stanley Works (Langfang) Fastening Systems Co., Ltd and Stanley Black & Decker, Inc.," dated November 25, 2019 (Stanley Case Brief).
[9] *See* Building Material Distributors *et al.*'s Letter, "Certain Steel Nails from the People's Republic of China, 10th Administrative Review; Administrative Case Brief," dated November 25, 2019 (Building Material Distributors *et al.* Case Brief).
[10] *See* Pioneer's Letter, "Certain Steel Nails from the People's Republic of China: Rebuttal Case Brief," dated December 9, 2019 (Pioneer Rebuttal Brief).
[11] *See* Petitioner's Letter, "Certain Steel Nails from the People's Republic of China: Rebuttal Brief," dated December 9, 2019 (Petitioner Rebuttal Brief).
[12] *See* Stanley's Letter, "Certain Steel Nails from the People's Republic of China; Tenth Administrative Review; Rebuttal Brief of The Stanley Works (Langfang) Fastening Systems Co., Ltd and Stanley Black & Decker, Inc.," dated December 9, 2019 (Stanley Rebuttal Brief).

III. SCOPE OF THE *ORDER*[13]

The merchandise covered by this order includes certain steel nails having a shaft length up to 12 inches. Certain steel nails include, but are not limited to, nails made of round wire and nails that are cut. Certain steel nails may be of one piece construction or constructed of two or more pieces. Certain steel nails may be produced from any type of steel, and have a variety of finishes, heads, shanks, point types, shaft lengths and shaft diameters. Finishes include, but are not limited to, coating in vinyl, zinc (galvanized, whether by electroplating or hot dipping one or more times), phosphate cement, and paint. Head styles include, but are not limited to, flat, projection, cupped, oval, brad, headless, double, countersunk, and sinker. Shank styles include, but are not limited to, smooth, barbed, screw threaded, ring shank and fluted shank styles. Screw-threaded nails subject to this order are driven using direct force and not by turning the fastener using a tool that engages with the head. Point styles include, but are not limited to, diamond, blunt, needle, chisel and no point. Finished nails may be sold in bulk, or they may be collated into strips or coils using materials such as plastic, paper, or wire. Certain steel nails subject to this order are currently classified under the Harmonized Tariff Schedule of the United States (HTSUS) subheadings 7317.00.55, 7317.00.65, 7317.00.75, and 7907.00.6000.[14]

Excluded from the scope are steel roofing nails of all lengths and diameter, whether collated or in bulk, and whether or not galvanized. Steel roofing nails are specifically enumerated and identified in ASTM Standard F 1667 (2005 revision) as Type I, Style 20 nails, inclusive of the following modifications: 1) Non-collated (*i.e.*, hand-driven or bulk), steel nails as described in ASTM Standard F 1667 (2005 revision) as Type I, Style 20 nails, as modified by the following description: having a bright or galvanized finish, a smooth, barbed or ringed shank, an actual length of 0.500" to 4", inclusive; an actual shank diameter of 0.1015" to 0.166", inclusive; and an actual head diameter of 0.3375" to 0.500", inclusive; 2) Wire collated steel nails, in coils, as described in ASTM Standard F 1667 (2005 revision) as Type I, Style 20 nails, as modified by the following description: having a galvanized finish, a smooth, barbed or ringed shank, an actual length of 0.500" to 1.75", inclusive, an actual shank diameter of 0.116" to 0.166", inclusive; and an actual head diameter of 0.3375" to 0.500", inclusive; and 3) Non-collated (*i.e.*, hand-driven or bulk), as described in ASTM Standard F 1667 (2005 revision) as Type I, Style 20 nails, as modified by the following description: steel nails having a convex head (commonly known as an umbrella head), a smooth or spiral shank, a galvanized finish, an actual length of 1.75" to 3", inclusive; an actual shank diameter of 0.131" to 0.152", inclusive; and an actual head diameter of 0.450" to 0.813", inclusive.

Also excluded from the scope are the following steel nails: Non-collated (i.e., hand-driven or bulk), two-piece steel nails having plastic or steel washers (caps) already assembled to the nail, having a bright or galvanized finish, a ring, fluted or spiral shank, an actual length of 0.500" to 8", inclusive; and an actual shank diameter of 0.1015" to 0.166", inclusive; and an actual washer or cap diameter of 0.900" to 1.10", inclusive.

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[13] On September 20, 2019, Commerce published the results of a changed circumstances review, in which we adopted exclusionary language relating to the *Order*. *See Certain Steel Nails from the People's Republic of China: Final Results of Antidumping Duty Changed Circumstances Review*, 84 FR 49508 (September 20, 2019).

[14] Commerce added HTS heading 7907.00.6000, "Other articles of zinc: Other," to the language of the scope of the AD order on Nails from China. *See Certain Steel Nails from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2012-2013*, 80 FR 18816, 18816 n.5 (April 5, 2018).

Also excluded from the scope of this order are corrugated nails. A corrugated nail is made of a small strip of corrugated steel with sharp points on one side. Also excluded from the scope of this order are fasteners suitable for use in powder-actuated hand tools, not threaded and threaded, which are currently classified under HTSUS 7317.00.20 and 7317.00.30. Also excluded from the scope of this order are thumb tacks, which are currently classified under HTSUS 7317.00.10.00.

Also excluded from the scope of this order are certain brads and finish nails that are equal to or less than 0.0720 inches in shank diameter, round or rectangular in cross section, between 0.375 inches and 2.5 inches in length, and that are collated with adhesive or polyester film tape backed with a heat seal adhesive. Also excluded from the scope of this order are fasteners having a case hardness greater than or equal to 50 HRC, a carbon content greater than or equal to 0.5 percent, a round head, a secondary reduced-diameter raised head section, a centered shank, and a smooth symmetrical point, suitable for use in gas-actuated hand tools. While the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of this order is dispositive.

IV. CHANGES SINCE THE *PRELIMINARY RESULTS*

We assigned Pioneer, pursuant to sections 776(a)(2)(A)-(C) and 776(b) of the Act, as facts available with an adverse inference, a dumping margin of 118.04 percent.[15] In addition, we calculated constructed export price (CEP) and normal value for Stanley using the same methodology as applied in the *Preliminary Results*, except as follows:

- We corrected an error in the spheroidizing FOPs for nails produced from high-carbon steel wire rod (SWR).[16]

- We eliminated the double counting of certain U.S movement costs.[17]

- With regard to the surrogate financial ratio calculations using Metalicplas ACTIV S.A.'s (Metalicplas') financial statements, we (1) used the detailed data in the "Analytical Balance" of the Metalicplas financial statement to calculate the surrogate financial ratios, (2) excluded the portion of "Consumables" which relates to packing materials, and (3) treated other operating income as an offset to selling, general and administrative (SG&A) expenses.[18]

[15] *See* Comment 7.
[16] *See* Comment 4.
[17] *See* Comment 5.
[18] *See* Comment 2.

V. DISCUSSION OF THE ISSUES

Comment 1: Sample Rate Calculation Methodology

In the *Preliminary Results*, we assigned a separate rate of 118.04 percent to Tianjin Universal Machinery Imp. & Exp. Corporation (Universal) based on adverse facts available (AFA) because it failed to respond to the AD questionnaire, and we calculated dumping margins for Pioneer and Stanley. We weight averaged the rates applicable to the three mandatory respondents to calculate the sample rate assigned to the companies granted separate rates in this review.

Building Material Distributors et al. Comments

- The plain language of the Tariff Act of 1930, as amended (the Act)[19] is unambiguous in requiring Commerce to calculate the all others rate by weight-averaging the margins established for mandatory respondents, excluding any zero or *de minimis* margin or any margin determined entirely based on facts available (FA).[20]
- Congress made no distinctions in the Act based on whether Commerce selected mandatory respondents by import volume or through a sampling methodology, nor did it indicate that this provision was inapplicable in non-market economy (NME) cases.[21] Although Commerce relies on sampling as a justification for including an AFA rate in the calculation of the all others rate in this review, Commerce has not shown that its methodology is permitted by the Act. Therefore, Commerce should exclude the AFA rate for Universal from the final calculation of the separate rate applicable to cooperative non-selected respondents.[22]
- Even if Commerce's calculation is permitted by the Act, Commerce has made no attempt to show that the ultimate margin applied to the separate rate companies bears a reasonable relationship to their actual dumping margins. As the courts have explained, "an overriding purpose of Commerce's administration of antidumping laws is to calculate dumping margins as accurately as possible" and the rate determined for non-mandatory, cooperative respondents must "bear some relationship to the actual dumping margins."[23]
- The courts have considered the all others rate to be representative of the experience of all other exporters -- regardless of whether the method used to select mandatory respondents is based on export volume or sampling. Therefore, the goal of "representativeness" is not a valid basis to distinguish sampling cases from cases with mandatory respondents selected based on export volume.[24]

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[19] *See* section 735(c)(5)(A) of the Act.

[20] *See* Building Material Distributors *et al.* Case Brief at 3 (citing *Allied International v. United States*, 795 F. Supp. 449 (CIT 1992) ("…the plain language of the {Act} is deemed controlling unless a clear cut contrary legislative intent dictates otherwise")).

[21] *Id.* at 4.

[22] *Id.*

[23] *Id.* at 5 (citing *Yangzhou Bestpack Fits & Crafts Co. Ltd. v. United States*, 716 F.3d 1370 (Fed. Cir. 2013) (*Yangzhou Bestpack*)).

[24] *Id.* at 5-6 (citing *Albemarle Corporation v. United States*, 821 F.3d 1345, 1353 (Fed. Cir. 2016) and *Nat'l Knitwear & Sportswear Ass'n v. United States*, 779 F. Supp. 1364, 1373074, 15 CIT 548, 559 (1991) (noting that "{t}he representativeness of the investigated exporters is the essential characteristic that justifies an all others rate based on the weighted average of such respondents.")).

Pioneer et al. Comments

- Commerce's sample rate methodology is contrary to the express terms of the Act,[25] which provides that the all others rate "shall" be a weighted average of the margins established for mandatory respondents excluding any zero or *de minimis* margins and any margins determined entirely based on FA.
- The only exception to the above-referenced provision is where all of the margins calculated for mandatory respondents were zero, *de minimis* or based entirely on FA.[26] This exception does not apply here because two of the margins are above *de minimis* and are not based on FA. Therefore, Commerce must calculate the separate rate by excluding margins based on total AFA.
- Further, the term "sample rate" appears nowhere in the Act and seems to have been created by Commerce for the sole purpose of avoiding its statutory obligations regarding "all others" or average rates.[27]
- Commerce' calculation of the separate rate is unreasonable.[28] There is no valid basis to distinguish between situations where Commerce selects respondents by import volume and situations where Commerce selects respondents using a sampling technique.[29] It has long been Commerce's practice, as recognized by the courts, to calculate separate rates in NME proceedings following the statutory method for determining the "all others rate" under section 735(c)(5)(A) of the Act.[30]
- The Court of International Trade (CIT) has previously considered the use of an AFA margin in the calculation of a separate rate in cases where the statutory exception applies, *i.e.* where all margins were zero, *de minimis*, or based entirely on FA.[31] While the courts have held that Commerce is theoretically allowed to average a *de minimis* rate and an AFA rate to determine the margin for cooperative non-mandatory respondents when the statutory exception is applicable, the courts have consistently found the methodology unreasonable in practice.[32]
    - In *Yangzhou Bestpack,* the Court of Appeals for the Federal Circuit (CAFC) held that Commerce's decision to assign cooperative separate rate respondents an average of a *de minimis* rate and the China-wide rate was not supported by substantial evidence. As the Court explained, "{a}n overriding purpose of Commerce's administration of antidumping laws is to calculate dumping margins as accurately as possible" and the rate determination for non-mandatory, cooperative respondents must "bear some relationship to the actual dumping margins."[33]
    - As the CIT explained in *Baroque Timber*, the method employed by Commerce "must be 'based on the best information and establish antidumping margins as

[25] *See* Pioneer Case Brief at 5.
[26] *Id.* at 7.
[27] *Id.*
[28] *Id.* at 8.
[29] *Id.* at 9.
[30] *Id.* at 7 (citing *Yangzhou Bestpack*, 716 F.3d at 1374).
[31] *Id.* at 8.
[32] *Id.* at 7 (citing *Yangzhou Bestpack,* 716 F.3d at 1374, *Navneet Publications (India) Ltd. v. United States*, 999 Fed. Supp. 2d 1354 (CIT 2014) (*Navneet*), and *Baroque Timber Industries (Zhongshan) Company Limited v. United States*, 971 F. Supp. 2d 1333 (CIT 2014) (*Baroque Timber*)).
[33] *Id.* at 8 (citing *Yangzhou Bestpack*, 716 F.3d at 1379-1380).

accurately as possible,'"[34] and "{t}he mere presence of non-cooperating parties fails to justify {Commerce's} choice of dumping margin for the cooperative uninvestigated respondents."[35]

- In this case, there is no question that the non-selected separate rate respondents fully cooperated and complied with all requests for information issued by Commerce.
- The Act and the courts consider the all others rate to be representative of the experience of all other exporters regardless of the method used to select mandatory respondents; therefore, the goal of "representativeness" is not a valid basis to distinguish mandatory respondents selected via using sampling from mandatory respondents selected based on export volume.[36]

The Petitioner's Rebuttal

- In order to address enforcement concerns in this review, Commerce departed from its typical practice of selecting mandatory respondents by examining the largest producers/exporters by volume, and instead used the sampling methodology.[37] As a result, it is reasonable for Commerce to depart from its typical discretionary practice of following section 735(c)(5) of Act.[38]
- If Commerce does not include AFA rates in the calculation of the sample rate, separate rate companies will undoubtedly continue their pattern of engaging in massive dumping under the radar, by benefiting from an artificially low separate rate. As the CIT recognized in *Asocolflores*, "excluding AFA rates from the sample rate would give respondents the ability to manipulate the all others rate."[39] Thus, including an AFA rate in the calculation of the sample rate serves the additional purpose of preserving the integrity of the sampling methodology and the accuracy of its results.[40]
- In *Laizhou*,[41] the CIT rejected the argument that Commerce made no finding that the separate rate companies were uncooperative in the eighth administrative review of the AD order on *Brake Rotors*[42] and rejected the assertion that the Act does not permit Commerce to assign these companies a sample rate based in whole, or in part, on AFA.[43]
- Therefore, Commerce should continue to include the AFA rate in the calculation of the sample rate in the final results.[44]

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[34] *Id.* at 8-9 (citing *Baroque Timber*¸ 971 F. Supp. 2d at 1343).
[35] *See Baroque Timber*, 971 F. Supp. 2d at 1343.
[36] *See* Pioneer Case Brief at 10.
[37] *See* Petitioner Rebuttal Brief at 8.
[38] *Id.*
[39] *Id.* (citing *Asociacion Colombiana de Exportadores de Flores v. United States*, 704 F.Supp. 1114, 1121 n.11 (CIT 1989) (*Asocolflores*)).
[40] *See* Petitioner's Rebuttal at 10.
[41] *Id.* (citing *Laizhou Auto Brake Equipment Co. v. United States*, Ct. No. 06-00430, Slip Op. 08-71 (June 26, 2008) (*Laizhou*), at 9).
[42] *Id.* (citing *Brake Rotors from the People's Republic of China: Final Results and Partial Rescission of the 2004/2005 Administrative Review and Notice Rescission of the 2004/2005 New Shipper Review*, 71 FR 6304 (November 14, 2006) (*Brake Rotors*)).
[43] *Id.* at 10.
[44] *Id.* at 11.

Commerce's Position: For the reasons discussed below, we continue to include the three mandatory respondents' margins in the sample rate calculation.

Section 777A(c)(2) of the Act allows Commerce the discretion to review a limited number of respondents in an administrative review, where it is not practicable to examine all known producers/exporters of subject merchandise, by either (1) examining a sample of exporters, producers, or types of products that is statistically valid based on the information available at the time of selection, or (2) exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that can reasonably be examined. On November 4, 2013, Commerce published its *Sampling Methodology Notice* in which Commerce explained that it was adopting a refinement to its practice regarding respondent selection.[45] In particular, Commerce noted that its practice, generally, had been to select respondents based on the exporters/producers accounting for the largest volume in proceedings where limited examination had been necessary. However, Commerce expressed its concern that:

> One consequence of this is that companies under investigation or review with relatively small import volumes have effectively been excluded from individual examination. Over time, this creates a potential enforcement concern in AD administrative reviews because, as exporters accounting for smaller volumes of subject merchandise become aware that they are effectively excluded from individual examination by the Department's respondent selection methodology, they may decide to lower their prices as they recognize that their pricing behavior will not affect the AD rates assigned to them. Sampling such companies under section 777A(c)(2)(A) of the Tariff Act of 1930, as amended (the Act), is one way to address this enforcement concern.[46]

Therefore, Commerce adopted a new practice in which it would normally rely on sampling for respondent selection purposes in AD administrative reviews when certain conditions are met: (1) there is a request by an interested party for the use of sampling; (2) Commerce has the resources to individually examine at least three companies; (3) the largest three companies (or more if Commerce intends to select more than three respondents) by import volume of the subject merchandise under review account for normally no more than 50 percent of total volume; and (4) information obtained by, or provided to, Commerce provides a reasonable basis to believe or suspect that the average export prices (EPs) and/or dumping margins for the largest exporters differ from such information that would be associated with the remaining exporters.[47] With respect to the fourth criterion, Commerce stated that "{s}uch a fact pattern supports the existence of potentially significant enforcement concerns, as variation in the dumping behavior of the population gives rise to concerns that a non-random means of respondent selection may systematically exclude certain dumping behavior."[48]

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[45] *See Antidumping Proceedings: Announcement of Change in Department Practice for Respondent Selection in Antidumping Duty Proceedings and Conditional Review of the Nonmarket Economy Entity in NME Antidumping Duty Proceedings*, 78 FR 65963 (November 4, 2013) (*Sampling Methodology Notice*).
[46] *Id.*
[47] *Id.*, 78 FR at 65964-65.
[48] *Id.*, 78 FR at 65968.

Commerce explained that it was adopting the "statistically valid" sampling methodology that is random, is stratified, and uses probability-proportion-to-size samples (PPS) which additionally furthered its goal of addressing enforcement concerns:

> Random selection ensures that every company has a chance of being selected as a respondent and captures potential variability across the population. Stratification by import volume ensures the participation of companies with different ranges of import volumes in the review, which is key to addressing the enforcement concern identified above. Finally, PPS samples ensure that the probability of a company being chosen as a respondent is proportional to its share of imports in the respective stratum.[49]

Lastly, the *Sampling Methodology Notice* explained that Commerce would calculate and assign sample rates as follows:

> After examination of selected respondents by the sampling method, the Department will need to assign a rate to all non-selected companies. To do so, the Department will calculate a "sample rate," based upon an average of the rates for the selected respondents, weighted by the import share of their corresponding strata. The respondents selected for individual examination through the sampling process will receive their own rates; all companies in the sample population who were not selected for individual examination will receive the sample rate.[50]

In this review, pursuant to section 777A(c)(2) of the Act, we found that the exporters or producers under review constitute a large number and that it was not practicable to calculate individual weighted-average dumping margins for each of those companies.[51] Additionally, based on a request by the petitioner to select respondents using the sampling methodology, we found that the conditions described in the *Sampling Methodology Notice* were satisfied such that it was appropriate to rely on sampling, pursuant to section 777A(c)(2)(A) of the Act.[52] In determining to base respondent selection on sampling, we found that the information provided by the petitioner (*i.e.*, company margins from previous segments of the proceedings) provided a reasonable basis to believe or suspect that the average dumping margins for the exporter who has consistently been examined as one of the largest exporters in each review (Stanley) differ from the dumping margins that would be associated with the remaining exporters. We explained:

> Specifically, in each of the nine prior administrative reviews under this order, Stanley has consistently been one of the largest exporters, and for this reason has been selected as a mandatory respondent in those prior reviews. Stanley consistently has been a cooperative respondent, its average calculated weighted-average dumping margin over the previous nine administrative reviews is 6.76 percent. In contrast, in each of the nine prior administrative reviews, the other

[49] *Id.*, 78 FR at 65964.
[50] *Id.*, 78 FR at 65965.
[51] *See* Memorandum, "Antidumping Duty Administrative Review of Steel Nails from the People's Republic of China: Sampling Pool for Selection of Respondents and Selection Methodology," dated April 1, 2019.
[52] *Id.*

> mandatory respondents either obtained a much higher calculated margin, did not qualify for a separate rate, or were otherwise non-cooperative and received a margin based on total {AFA}. We further note that, in the one new shipper review conducted under this order, the respondent received a calculated margin of 34.14 percent (significantly higher than Stanley's 15.43 percent margin for the partially-overlapping period of review). Thus, the average margin for respondents other than Stanley, including non-calculated margins, is 74.96 percent. Even when we do not include those non-calculated margins, the average margin for respondents other than Stanley is 57.00 percent through the preliminary results of the 2016-2017 administrative review. Moreover, throughout the history of the proceeding, the China-wide rate, assigned to those respondents who have failed to demonstrate their independence from the China-wide entity, has consistently been 118.04 percent.[53]

In short, we determined that, given the large disparity between Stanley's calculated margins and the margins calculated for the other respondents in prior administrative reviews, this proceeding raised the same evasion concerns that were identified in the *Sampling Methodology Notice*. In the ninth administrative review, where we relied on sampling, we found that the pattern of non-participation continued with one respondent failing to participate after being selected using the sampling method.[54] Therefore, in light of these concerns, we appropriately relied on a statistically valid sample to select respondents in this review.

Additionally, following the *Sampling Methodology Notice*, we included in our sample population only those companies that we determined to be eligible for a separate rate,[55] and we employed a stratified random PPS sampling procedure to select respondents for individual examination. We have received no new information since the *Preliminary Results* to warrant reconsideration of our separate rate determinations. As a result, for the purposes of these final results, we have continued to average the rates for all three selected respondents, weighted by the import share of their corresponding strata, in determining the sample rate. In particular, we note that one mandatory respondent, Stanley, has a weighted-average dumping margin which is above *de minimis*. The other two mandatory respondents, Universal and Pioneer, received margins based on AFA. Pursuant to the *Sampling Methodology Notice*, and consistent with our past practice, all determined rates will be included in the sample rate.[56] Accordingly, we have averaged the

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[53] *Id.* (internal citations omitted).

[54] *See 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), unchanged in *Certain Steel Nails from the People's Republic of China: Amended Final Results of the Antidumping Duty Administrative Review; 2016-2017*, 84 FR 24751 (May 29, 2019) (*Nails AR9*).

[55] *See Sampling Methodology Notice*, 78 FR at 65965 ("In NME cases, only those exporters who receive a separate rate will be included in the sample population. Companies that do not receive a separate rate will not be subject to review pursuant to the elimination of the conditional review of the NME entity practice described below. Therefore, in order to establish the appropriate sample population at the time of the sampling selection, it is necessary for {Commerce} to make its determinations regarding the separate rate status of the companies under review before the sample is determined. For the purpose of constructing the sample rate, {Commerce} expects that companies' separate rate status will remain unchanged once the sample is determined.").

[56] *Id.*, 78 FR at 65969; *see also Brake Rotors* Issues and Decision Memorandum (IDM) at Comment 1 (including a rate based on AFA in the sample rate calculation); and *Laizhou*, 32 CIT at 722-25 ("Computing a statistically valid sample rate that is representative of the population as a whole may include the margins determined for all selected

margin for the three selected respondents, weighted by the import share of their corresponding strata.[57]

We note that the Act does not address the establishment of a rate to be applied to individual companies not selected for examination where, as here, Commerce limits its examination in an administrative review pursuant to section 777A(c)(2) of the Act. Additionally, the Act does not address the establishment of a rate to be applied to individual companies not selected for examination in NME countries, which have otherwise demonstrated their eligibility for a separate rate. However, in administrative reviews involving NME countries, where Commerce does not employ sampling as discussed below, Commerce's practice has been to look to section 735(c)(5) of the Act, which provides instructions for calculating the all-others rate in investigations,[58] for guidance when calculating the separate rate for respondents not examined in an administrative review.

Section 735(c)(5)(A) of the Act states the general rule that "the estimated all-others rate shall be an amount equal to the weighted average of the estimated weighted-average dumping margins established for exporters and producers individually investigated, excluding any zero and *de minimis* margins, and any margins determined entirely under section 776." Section 735(c)(5)(B) of the Act provides an exception to the general rule, stating that, where all rates are zero, *de minimis*, or based entirely on facts available, Commerce may use "any reasonable method" to assign the rate to all-other respondents. The SAA states that "{t}he expected method in such cases will be to weight-average the zero and *de minimis* margins and margins determined pursuant to the facts available, provided that volume data is available."[59] The weighted-average margin selected as the all-others rate may contain elements of facts available, even if it includes adverse inferences.[60]

However, in this case, as discussed above, Commerce has selected respondents through sampling under section 777A(c)(2)(A) of the Act, as opposed to relying on the largest producers/exporters under section 777A(c)(2)(B) of the Act. While there are situations when it is not appropriate to

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respondents, even if that sample rate happens to be composed in part on a respondent's rate which is based on {AFA}.").

[57] *See* Memorandum, "Final Results of the 2017-2018 Antidumping Administrative Review of Certain Steel Nails from the People's Republic of China: Calculation of the Sample Margin for Respondents Not Selected for Individual Examination," dated April 15, 2020.

[58] *See Fresh Garlic from the People's Republic of China: Preliminary Results, Preliminary Rescission, and Final Rescission, in Part, of the 22nd Antidumping Duty Administrative Review and Preliminary Results of the New Shipper Reviews; 2015- 2016*, 82 FR 57718 (December 7, 2017), unchanged in *Fresh Garlic from the People's Republic of China: Final Results and Partial Rescission of the 22nd Antidumping Duty Administrative Review and Final Results and Rescission, in Part, of the New Shipper Reviews; 2015- 2016*, 83 FR 27949 (June 15, 2018); *see also Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China: Preliminary Results and Partial Rescission of the Antidumping Duty Administrative Review and Preliminary Results of the New Shipper Review*; 2012-2013, 79 FR 42758 (July 23, 2014), unchanged in *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, 80 FR 4244 (January 27, 2015).

[59] *See* Statement of Administrative Action accompanying the Uruguay Round Agreements Act (URAA), H.R. Doc. No. 103-316, vol. 1 (SAA) at 873.

[60] *See, e.g.*, *Navneet*, 999 F. Supp. 2d at 1359 (CIT 2014); *see also* sections 735(c)(5)(A) and (B) of the Act.

include AFA or zero/*de minimis* rates in the all others rate, Commerce's determination as to whether to include or exclude these rates in this case is made in light of Commerce's method of respondent selection through sampling and the fact that this is an administrative review and not an investigation.

Commerce's decision to include AFA rates in the sample rate has been affirmed by the CIT. In *Asocolflores*, the CIT explained that:

> {Commerce} properly included in its all other rate best information rates for companies selected for the sample who did not respond to questionnaires. Respondents must answer; {Commerce} must be in a position to judge who is properly covered by the investigation. Respondents may not make that choice. In a random sampling situation, to exclude such nonresponding companies from the all other rate would undermine the overall methodology. This case is distinguishable from non-random sampling cases on this point.[61]

The CIT recognized that excluding AFA rates from the sample rate would give respondents the ability to manipulate the all others rate. The CIT further acknowledged the importance of including AFA rates in the sample rate to maintain the validity of the sample – an issue that is not present when respondents are selected based on the largest volume. Where respondents are selected based on largest volume, the examination of the level of dumping of the largest exporters does not necessarily inform Commerce of the behavior of the remaining, non-selected firms in the same way as in a sampling context. In other words, the underlying methodology in a random sampling context creates an expectation that the dumping behavior of the selected firms is representative of the population as a whole. Thus, in investigations involving an NME where Commerce has limited its investigation by selecting the largest firms, in order to assign a rate to the firms that are not individually investigated, Commerce generally calculates an average of the individual rates, except for zero, *de minimis*, and AFA (unless applying "any reasonable method" as discussed above). This is an appropriate and reasonable method to assign a dumping margin to firms whose individual behavior remains unknown, and where the same expectations underlying the sampling methodology are not present.

The situation in prior reviews is therefore fundamentally different because Commerce has not simply chosen the largest exporters as mandatory respondents but has employed a statistically valid sampling technique for respondent selection. Moreover, this is an administrative review and Commerce is not calculating the "all others rate" pursuant to section 735(c)(5) of the Act. Under the sampling methodology described above, each exporter has a chance of being chosen that is proportional to that exporter's share of export volume. Under this methodology, unlike cases when Commerce chooses the largest respondents, the result is intended to be representative of the entire population, which is the pool of eligible separate rate exporters included in the administrative review. Since the selected companies form a statistical sample of the entire population, Commerce is correct to calculate a margin that is based on the results of all the selected companies, including the firms in the sample that received margins using AFA. Therefore, because a random sampling procedure was used, Commerce reasonably estimated, in accordance with statistical sampling principles, that other exporters in the population might also

[61] *See Asocolflores*, 704 F. Supp. at 1121 n.11.

have received these rates, had the non-selected firms been individually examined. Because Commerce is constructing a sample that is intended to be representative of the population as a whole, it has included all the observations in the sample rate, including the AFA rates. Disregarding these actual observations would be contrary to the very principle of random sampling and would invalidate the sample since the sample is supposed to be indicative of the population as a whole.

Our methodology here is consistent with our approach to the sample rate calculation in *Brake Rotors*,[62] which was affirmed by the CIT, and in *Shrimp from Vietnam*,[63] which was not challenged at the CIT. In affirming *Brake Rotors*, the CIT found it reasonable for Commerce to calculate the sample rate by weight averaging the individual rates of the mandatory respondents, which included *de minimis* rates, one rate based on AFA, and two calculated rates.[64] In *Shrimp from Vietnam*, the only other case in which Commerce has employed sampling since the *Sampling Methodology Notice*, Commerce included zero/*de minimis* rates in the sample rate. We note this approach is consistent with *Nails AR9*,[65] where one of the respondents withdrew its participation after being selected as a mandatory respondent. The withdrawal of participation for a respondent happened again in this review, with the non-participation of Universal.[66] Therefore, our experience in this review, and the prior review, further demonstrates that such behavior is indicative of the population.

In the *Sampling Methodology Notice*, we addressed comments wherein parties sought the exclusion of *de minimis* margins and margins based entirely on facts available from the sample rate; we explained:

> The aim of the sampling methodology is to obtain the population average (mean) dumping margin which is the trade-weighted average dumping margin across all firms under review. {Commerce} considered the approaches suggested by the commenters, but found that the methodology described herein remains the most appropriate approach. {Commerce} intends, however, to address any comments on how to assign rates on a case-by-case basis as they arise within a particular proceeding.

For the reasons discussed herein, Commerce finds that it is appropriate in this review to include all rates for individually reviewed exporters/producers. This approach allows us to address concerns that the average export price and/or dumping margin for the largest exporter (*i.e.*,

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[62] *See, e.g.*, *Brake Rotors* IDM at Comment 1 (including a rate based on AFA in the sample rate calculation).
[63] *See Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Final Results of Antidumping Duty Administrative Review, 2013–2014*, 76 FR 55328 (September 15, 2015) (*Shrimp from Vietnam*) and accompanying IDM.
[64] *See Laizhou*, 32 CIT at 722-25 ("Computing a statistically valid sample rate that is representative of the population as a whole may include the margins determined for all selected respondents, even if that sample rate happens to be composed in part on a respondent's rate which is based on {AFA}.").
[65] *See Nails AR9*.
[66] On May 10, 2019, Commerce selected Universal as one of the mandatory respondents. However, on June 25, 2019, Universal notified us that it would not be submitting a response to our questionnaire. *See* Memorandum, "Respondent Selection for Certain Steel Nails from the People's Republic of China: Sampling Meeting with Outside Parties," dated May 10, 2019; s*ee also* Universal's Letter, "Certain Steel Nails from the People's Republic of China, 10th Administrative Review," dated June 25, 2019.

Stanley) differs from prices or margins for the remaining exporters. Prior to our use of sampling, these companies maintained a "free-pass" by successfully obtaining a separate rate that would be based solely, or largely, on Stanley's margin.

Further, our prior experience in this proceeding, as outlined above, is that when we selected additional mandatory respondents, these companies either stopped cooperating after selection as mandatory respondent(s) or would be found dumping at margins much higher than Stanley's margin. Therefore, our use of sampling, and our decision to maintain all three rates in our sample rate calculation, including AFA rates, allow us to address the evasion concerns expressed in the *Sampling Methodology Notice* and our specific evasion concerns regarding the large disparity between Stanley's calculated margins and the margins assigned to the other respondents in past administrative reviews. Indeed, the fact that one of the three mandatory respondents in this review provided a separate rate response, then withdrew from participation after it was selected as a mandatory respondent based on sampling, is reflective of our experience of the respondents other than Stanley in the history of this proceeding, as outlined above. This further demonstrates that the inclusion of AFA rates in the sample rate is indicative of the population as a whole. Thus, Commerce will continue to include all three mandatory respondent margins in the sample rate calculation.

Comment 2: Surrogate Financial Ratio Calculations

In the *Preliminary Results,* we valued the respondents' financial ratios using data contained in the 2018 financial statements of Mecanica Sighetu S.A.'s (Mecanica) and Metalicplas, two Romanian producers of comparable merchandise.[67]

A. Petitioner's Proposed Revisions

The Petitioner's Comments

- Mecanica's 2018 financial statements contain a breakdown of operating expenses at Note 4 that details the values associated with production overhead, distribution, and general & administrative (G&A) expenses. Although this note allows for a more precise assignment of the operating costs to the appropriate raw material, overhead, and SG&A expenses categories, Commerce failed to account for this important breakdown; Commerce also failed to account for certain errors in the translated version of the financial statements.[68] Thus, Commerce should revise its calculation of Mecanica's financial ratios using the information in this note (as correctly translated).[69]
- Commerce relied solely on the broader profit and loss (P&L) line item amounts reported in Metalicplas's 2018 financial statements. However, the Metalicplas financial

[67] *See* Memorandum, "2017-18 Antidumping Administrative Review of Certain Steel Nails from the People's Republic of China: Surrogate Values for the Preliminary Results," dated October 10, 2019.
[68] *See* Petitioner Case Brief at 4 (stating "Petitioner notes that, when summed, the individual line item amounts listed at Note 4 of the translated versions provided by Stanley do not equal the total 1,411,027 indicated at Note 4, and the total at Note 4 does not tie to the P&L which reports operating profits at 1,411,077. By comparing back to the original financial {statements} as provided in Romanian, Petitioner was able to identify and correct the errors in Note 4 of the translated version, and has applied the correction to its revised financial ratio calculations").
[69] *Id.* at 5 and Exhibit 1.

statements contain an "Analytical Balance," which represents the company's trial balance. Therefore, Commerce should assign each specific amount from this breakdown to the appropriate category to calculate more precise financial ratios.[70]

- Commerce also did not take into account Note 7.c of Metalicplas' financial statements, which provides a breakdown of administrative and production personnel. Based on this, Commerce can more precisely account for labor in the financial ratio calculations by allocating labor costs between "Labor" and "SG&A" categories.[71]
- Thus, Commerce should revise its financial ratio calculations for the Romanian producers to account for the most detailed level of information available.[72]

Stanley's Rebuttal

- Note 4 of Mecanica's financial statements contains data that are less specific than the data Commerce relied on in the *Preliminary Results* to calculate financial ratios. Specifically, Note 4 breaks out operating expenses into five line items, while the information Commerce used to calculate the financial ratios breaks out these expenses into ten line items.[73]
- Moreover, none of the five line items in Note 4 contain a description that is sufficiently detailed to allow Commerce to assign expenses to the three categories of material, labor, or energy. Thus, Commerce should reject the petitioner's revised calculation of the surrogate financial ratios for Mecanica.[74]
- Commerce should also reject the petitioner's revised financial ratios for Metalicplas. The "Analytical Balance" on which those revised ratios are based is not covered by the independent auditor's opinion and, therefore, should be considered unaudited.
- If Commerce accepts the revised financial ratios, which are based on unaudited financial information, it should, in any event, correct several errors the petitioner made in its proposed calculation of the Metalicplas financial ratios.[75]
    - The petitioner incorrectly categorized "Account 602 – Consumables" as manufacturing overhead in its revised financial ratios. As a result, its calculation of a manufacturing overhead ratio leads to inappropriate double-counting of the costs of consumables and distorts the financial ratios.[76]
    - The petitioner incorrectly categorized "Account 703 – Sales of residual products" as raw materials in its revised financial ratios and provided no rationale as to why it did so. Commerce should continue to exclude all sales items in its financial ratio calculations for the final results.[77]
    - The petitioner incorrectly categorized "Account 609 – Trade discount received" as raw materials in its revised financial ratios, without providing a rationale as to

[70] *Id.* (noting that, similar to Mecanica's financial statements, "petitioner came across several erroneous numbers in the translated version of the "Analytical Balance" accompanying the Metalicplas statements).
[71] *Id.* at 6.
[72] *Id.*
[73] *See* Stanley Rebuttal Brief at 2-3.
[74] *Id.* at 4.
[75] *Id.* at 5.
[76] *Id.* at 6-7.
[77] *Id.* at 7.

why it did so. Commerce should continue to categorize this account as traded/finished goods in the final results.[78]

- The petitioner's proposal that Commerce rely on the number of employees to allocate wages and salaries leads to a distorted SG&A ratio. This allocation bares no rational resemblance to actual production experience of Stanley. Thus, Commerce appropriately categorized Metalicplas's cost of wages and salaries as labor and should continue to do so in the final results.[79]

Pioneer's Rebuttal

- There is no explanation provided in Note 4 of Mecanica's financial statement defining which operating costs are included in the various groupings; the statement, therefore, fails to provide the requisite transparency necessary for accurately categorizing these costs. Thus, there is no basis for the petitioner's claim that Note 4 provides for more precise assignment of Mecanica's expenses. [80]
- The petitioner admits to a serious shortcoming of Note 4, *i.e.* the total expenses from Note 4 do not reconcile to the audited income statement. Therefore, Commerce should follow its practice of disregarding financial information that contains errors or discrepancies when calculating the surrogate financial ratios.[81]
- Commerce's methodology for its *Preliminary Results* is consistent with the methodology used to calculate the surrogate financial ratios for Mecanica in the contemporaneous investigation of alloy and certain carbon steel threaded rod from China. The petitioner did not provide compelling evidence to deviate from this established methodology.[82]
- With regard to the Metalicplas statement, the petitioner made the following misclassifications in its proposed financial ratio calculations:[83]
    - As explained in Pioneer's case brief,[84] Commerce should include "other operating income" as an offset to SG&A, as these expenses relate to general operations.[85]
    - There is no indication that "trade discount received" relates to raw materials and, therefore, it should be excluded from the raw materials category.[86]
    - Commission expenses should be excluded.[87]
    - Insurance premiums should be excluded given that this item is captured in the U.S. sales database of the respondent, if incurred.[88]
- The petitioner's approach of applying an allocation ratio based on headcount to assign labor costs is inherently flawed. Specifically, this methodology does not take into

[78] *Id.*
[79] *Id.* at 8.
[80] *See* Pioneer Rebuttal Brief at 1-2.
[81] *Id.* at 2.
[82] *Id.*
[83] *Id.* (citing Petitioner Case Brief at Exhibit 1).
[84] We note that Pioneer made certain affirmative arguments relating to the Metalicplas statement in its case brief, and also commented on related issues raised by Stanley. Pioneer's arguments in this regard are addressed in subsection B, below.
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] *Id.*

account salary differentiations between the two groups of employees. Thus, Commerce should disregard the petitioner's proposed labor allocation methodology.[89]

Commerce's Position: We agree with the petitioner in part, and the respondents in part. With regard to the surrogate financial ratio calculations using Mecanica's financial statements, we agree with Stanley and Pioneer that the petitioner's suggested calculation, using Note 4, is inappropriate because Note 4 contains fewer details than the P&L statement. Note 4 breaks out operating costs into five line items which fit into three of the broader categories (*i.e.*, "raw materials," "manufacturing overhead," and "SG&A and Interest") used to calculate the financial ratios. However, the P&L statement breaks out operating costs into ten line items which fit into six of the broader categories (*i.e.* "raw material," "labor," "energy," "manufacturing overhead," "Traded/Finished Goods (TF) & Change in Finished Goods," and "SG&A and Interest"). In addition, the five line items in Note 4, *i.e.*, "main activity expenses," "auxiliary activities," "production overheads," "distribution expenses," and "general administration expenses," do not provide sufficient descriptions to allow Commence to adequately assign expenses to the three categories. For example, without knowing which expenses are included in "auxiliary activities," Commerce cannot confidently assign these expenses to the appropriate category in the surrogate financial ratio calculations. Therefore, for these final results, Commerce has not relied on Note 4 of Mecanica's financial statements to calculate the surrogate financial ratios.

With regard to the surrogate financial ratio calculations using Metalicplas's financial statements, we agree with the petitioner that the data contained in the "Analytical Balance" is more specific than the data contained in the P&L statement. Although Stanley criticizes the "Analytical Balance" data as being unaudited, we note that, as the CAFC has concluded, no statute or regulation requires Commerce to use audited data in calculating the surrogate financial ratios.[90] Moreover, Commerce compared the unaudited "Analytical Balance" with the audited notes of the Metalicplas financial statements and found that the operating expenses contained in the notes could be tied to the values reported in the "Analytical Balance." Accordingly, we find these data to be reliable, and we have used the detailed data in the "Analytical Balance" of the Metalicplas financial statement to calculate the surrogate financial ratios.

Stanley argues that the petitioner's proposed calculations relating to the Metalicplas financial statement contain errors, and that, specifically, Commerce should correct the assignments of expenses contained in Account 602, 703, and 609. With respect to account 602 (Consumables), it is Commerce's practice, absent any information to the contrary, to consider items such as "consumables" generally as an indirect material.[91] It is true, as Stanley claims, that Commerce does on occasion re-categorize certain materials expense items to avoid double counting. In this case, however, except as noted below, there is no information on the record indicating that account 602 "Consumables" includes direct materials, or materials that we would have treated as direct, in our build-up of normal value. Thus, there is no evidence that this line item, in total, is accounted for elsewhere in our normal value or is being double counted. Nonetheless, we did identify a sub-account of "Consumables" that includes "packing materials," which are covered

[89] *Id.* at 2-3.
[90] *See Ad Hoc Shrimp Trade Action Committee v. United States*, 618 F.3d 1316 (Fed. Cir. 2010).
[91] *See Persulfates from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 70 FR 6836 (February 9, 2005), and accompanying IDM at Comment 4.

by our direct materials build up; therefore, to avoid potential double counting, we have excluded the portion of "Consumables" which relates to packing materials.

We further agree with Stanley that the petitioner provided no rationale to categorize the items contained in accounts 703 and 609 ("Sales of residual Products" and "Trade Discounts Received," respectively) as "raw material" expenses and, therefore, have continued to exclude these items from the raw materials category.

Finally, we agree with the respondents that the petitioner's approach of applying labor costs using an allocation ratio based on employee headcount is flawed under these circumstances. This approach does not account for salary differences across employee types and, thus, would distort the surrogate financial ratios. Moreover, 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, because the information necessary to do so is typically not available.[92] Therefore, in cases where Commerce is unable to isolate specific expenses, *e.g.* labor expenses in this case, within the surrogate financial statement, Commerce's practice is "to not make adjustments to the financial statements data, as doing so may introduce unintended distortion into the data rather than achieving greater accuracy…."[93] In this instance, the Metalicplas financial statement does not allocate labor cost between production and administrative personnel. Thus, in keeping with Commerce practice, we have not adjusted the labor cost in the financial ratio calculation using the labor allocation ratio calculated by the petitioner.

B. Pioneer's Proposed Revisions

Pioneer's Comments

- Commerce should make certain adjustments to the surrogate financial ratios calculated using the Metalicplas statement. First, account 758, an "other operating revenue" account, relates to general company operations. Therefore, Commerce should offset this income against SG&A expenses in the surrogate financial ratio calculations.[94]
- Second, account 608 relates to packing costs, and, pursuant to Commerce's NME calculation methodology, packing costs are valued separately, and, therefore, are not captured in the financial ratio calculations. Thus, Commerce should exclude the value contained in this account, *i.e.*, Romanian Leu 102,331, from factory overhead.[95]
- Accounts 613, 622, and 624 relate to insurance premiums, commission and fees, and the transport of goods, respectively. These items are captured in the calculation of net U.S. price and should be excluded from the surrogate financial ratio calculations.[96]

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[92] *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 4045 (July 15, 2008) (*Tires from China*) and accompanying IDM at Comment 18A.
[93] *See Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from the People's Republic of China: Final Determination of Sales Less Than Fair Value*, 75 FR 59217 (September 27, 2010) and accompanying IDM at Comment 32.
[94] *See* Pioneer Case Brief at 2.
[95] *Id.* at 3.
[96] *Id.*

Stanley's Comments

- Commerce should correct its calculation of financial ratios based on the Metalicplas statement in the matter described in Pioneer's Case Brief.[97]

The Petitioner's Rebuttal

- In regard to account 758, Commerce cannot come to any conclusion as to the appropriate treatment of this item without knowing what type of operating revenues were covered in the account. Therefore, Commerce appropriately and conservatively excluded this item from consideration.[98]
- In regard to accounts 613 and 622, the descriptions are not sufficient to permit a conclusive determination of their nature. Specifically, these accounts appear to be dedicated to all of the company's "insurance" and "commissions and fees," *i.e.*, not just such expenses as they relate to sales, because there are no other accounts which mention insurance or commissions.[99]
- In regard to account 624, it would be reasonable to treat sub-account 624.2 "Transport – finished" (which presumably relates to the transportation of finished goods) as a direct selling expense. However, sub-account 624.3 "Transport – sundries" should remain as part of SG&A.[100]

Commerce's Position: We agree with the respondents that other operating revenues should be offset against SG&A expenses in the surrogate financial ratio calculations. It is Commerce's practice to include miscellaneous revenues as an offset to SG&A expenses when we cannot determine that the revenues are related to specific manufacturing or selling actives.[101] In this instance, we have not found any information in the Metalicplas financial statements, or other record information, to indicate that Metalicplas' other operating revenues (in Account 758) are not related to the general operations of the company or are related to specific manufacturing or selling actives. Therefore, we have treated other operating income as an offset to SG&A expenses in the surrogate ratio calculations.

We disagree with respondents that insurance and commissions, in Accounts 613 and 622, respectively, should be excluded from the calculation of the surrogate SG&A ratio. In *NSR Anhui Final Results*,[102] Commerce determined that, because sales commissions represent standard selling expenses, such commissions should be included in the surrogate SG&A calculation, irrespective of any sales commissions the respondents, in that case, incurred on the sales of subject merchandise. Commerce further found that whether a Chinese producer actually incurred sales commissions is irrelevant to Commerce's surrogate SG&A calculation because Commerce does not modify surrogate ratios to match the particular circumstances of the NME

[97] *See* Stanley Rebuttal Brief at 9.
[98] *See* Petitioner Rebuttal Brief at 14.
[99] *Id.* at 15.
[100] *Id.* at 16 (noting that transportation of sundries is unlikely related to transportation of finished goods).
[101] *See Tires from China* IDM at Comment 18B.
[102] *See Honey from the People's Republic of China; Notice of Final Results of Antidumping Duty New Shipper Reviews*, 70 FR 9271 (February 25, 2005) (*NSR Anhui Final Results*).

country.[103] Thus, Commerce includes all standard selling expenses in the surrogate SG&A calculation. Commerce has noted in prior cases that it is not possible to deconstruct surrogate financial ratios at the level of detail that would be necessary to make such adjustments because it is not known whether there is an exact correlation between the NME producer's expenses and the surrogate producer's expenses. Commerce "normally bases normal value… on factor values from a surrogate country on the premise that the actual experience in the NME cannot meaningfully be considered."[104] Therefore, we have continued to include insurance and commissions in the surrogate SG&A calculation for the final results.

Finally, we agree with the petitioner that the expenses in Account 624.2 – Transport of goods and personnel sub-account "transport – finished {products}" should be excluded from the financial ratio calculations. This represents an occasion where Commerce must re-categorize an expense item to avoid double counting. However, we further agree that the sub-account 624.3 ("Transport – sundries") should be included in SG&A because we cannot come to a conclusion as to the particular nature of this item, and it is Commerce's practice to not make adjustments to the financial statement data when doing so may introduce unintended distortion into the data. Accordingly, for the final results, we made these adjustments to the surrogate financial ratio calculations.[105]

Comment 3: U.S. Selling Price and "Irrecoverable" VAT

Stanley's Comments

- Commerce made a downward adjustment to Stanley's U.S. selling price in the *Preliminary Results* by deducing an amount equal to twelve percent of the export value of each shipment to account for VAT that is not refunded upon exportation of the merchandise, which Commerce characterizes as "irrecoverable VAT."[106] However, in several decisions, the CIT has held this reduction to U.S. selling price to be unlawful.[107]
- In *Qingdao Qihang Tyre I*, the court: (1) found that Commerce's rationale for the "irrecoverable VAT" adjustment does not rely on a factual finding that a respondent "actually paid value-added tax to the government of China 'on the exportation of' subject {merchandise} to the United States" and simply relies on the statement that "irrecoverable VAT '*amounts to* an export tax, duty, or other charge imposed on exported merchandise'… and is *incurred* on the export of subject merchandise";[108] (2) found Commerce's interpretation of section 772(c)(2)(B) of the Act to be unlawful on the basis

[103] *See Honey from the People's Republic of China: Final Results and Final Rescission, In Part, of Antidumping Duty Administrative Review*, 70 FR 38873 (July 6, 2005), and accompanying IDM at Comment 3.
[104] *See Tapered Roller Bearings and Parts Thereof, Finished or Unfinished, From the Republic of Romania; Final Results and Rescission in Part of Antidumping Duty Administrative Review*, 61 FR 51427, 51429 (October 2, 1996).
[105] We removed the expenses in account 608, related to packing costs, from the financial ratio calculations. This approach is consistent with the petitioner's revised proposed surrogate financial ratio calculations.
[106] *See* Stanley Case Brief at 10.
[107] *Id.* (citing *Qingdao Qihang Tyre Co., Ltd. v. United States*, 308 F. Supp. 3d 1329 (CIT 2018) (*Qingdao Qihang Tyre I*), *Jiangsu Senmao Bamboo and Wood Industry Co., Ltd. v. United States*, 322 F. Supp. 3d 1308 (CIT 2018) (*Jiangsu Senmao*), *Qingdao Qihang Tyre Co., Ltd. v. United States*, Slip Op. 18-176 (CIT 2018) (*Qingdao Qihang Tyre II*), and *China Manufactures Alliance, LLC et al. v. United States*, 357 F. Supp 3d 1364 (CIT 2019) (*China Manufactures Alliance*)).
[108] *Id.*

of the Act's plain meaning;[109] (3) found Commerce's interpretation of the Act to conflict with congressional intent, because, according to the SAA, "the only change to the export tax adjustment Congress intended to make in enacting the URAA was the change to the new terminology used to describe what was being adjusted";[110] and (4) concluded that Commerce's adjustment to account for irrecoverable VAT conflicted with the principle that dumping margins should be tax neutral "because the irrecoverable VAT is present in the home-market price of the foreign like product, and also in the U.S. price, the comparison is already tax-neutral, and no adjustment to the dumping margins is required or appropriate."[111]

- In *Qingdao Qihang Tyre I*, the court also concluded that, "{u}nder the correct implementation of the statute, irrecoverable VAT does not result in an increase or decrease in a dumping margin, regardless of whether the exporting country is a market economy country or a non-market economy country" because "Congress made no exception for the determination of EP or CEP for goods exported from non-market economy countries."[112] The court also rejected Commerce's attempt to distinguish China from other countries with respect to its VAT system, observing that, under Commerce's "flawed reasoning, Chinese irrecoverable VAT is within the scope of {section 772(c)(2)(B) of the Act} simply because it was irrecoverable."[113]
- Thus, consistent with the CIT's findings in *Qingdao Qihang Tyre I*, *Jiangsu Senmao*, *Qingdao Qihang Tyre II*, and *China Manufactures Alliance*, Commerce should not adjust Stanley B&D's U.S. selling prices to account for "irrecoverable" VAT in the final results.[114]

Pioneer's Comments

- The CIT has held that evidence does not support Commerce's ultimate finding that the tax in question "amounts to" an export tax, duty, or charge imposed by the exporting government on the exportation of the subject merchandise, as required by the Act.[115]
- The CIT held that, "{w}hether recoverable or not, a domestic value-added tax is not properly the subject of a downward, margin-increasing adjustment under {section 772(c)(2)(B) of the Act}."[116]
- The CIT found that Commerce's practice with respect to "irrecoverable VAT" was based on a misinterpretation of the Act that was unreasonable and contravened the Act's plain meaning, statutory history, and legislative history. Thus, "irrecoverable VAT" cannot be deducted from EP.[117]

The Petitioner's Rebuttal

[109] *Id.* at 11.
[110] *Id.* at 12 (stating "Congress did not provide for a margin adjustment, downward or upward for irrecoverable VAT…").
[111] *Id.* at 13.
[112] *Id.*
[113] *Id.*
[114] *Id.* at 14.
[115] *See* Pioneer Case Brief at 3-4 (citing *China Manufactures Alliance* and *Jiangsu Senmao*).
[116] *Id.*
[117] *Id.* at 4-5.

- Stanley and Pioneer deliberately did not discuss any case in which the CIT affirmed Commerce's practice of deducting irrecoverable VAT from EP. In fact, Commerce stated recently, in *Xanthan Gum from China*,[118] that there have been inconsistent CIT decisions regarding Commerce's irrecoverable VAT practice and that the court has "yet to speak in one voice" on the issue.[119]
- In *Aristocraft*,[120] the CIT determined that Commerce reasonably concluded that the phrase "export tax, duty, or other charge imposed by the exporting country on the exportation," in section 772(c)(2)(B) of the Act, could be read to include irrevocable VAT.[121]
- In *Xanthan Gum from China*, Commerce recently found it reasonable to interpret the above-refenced provision to encompass irrecoverable VAT because the irrecoverable VAT is a cost that arises as a result of export sales, and that 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.[122] Thus, the deduction is consistent with Commerce longstanding policy, and the intent of the Act which provides that dumping margin calculations must be tax-neutral.[123]
- For the same reasons discussed in *Xanthan Gum from China*, and as upheld by the CIT, Commerce should continue to deduct irrecoverable VAT from respondents' EPs in the final results.[124]

Commerce's Position: We disagree with the respondents' claim that irrecoverable VAT is not 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 recent practice in NME cases is to adjust EP (or CEP) for the amount of any unrefunded (*i.e.*, irrecoverable) VAT in certain NMEs in accordance with section 772(c)(2)(B) of the Act.[125] In changing this practice, Commerce explained that, when an NME government imposes an export tax, duty, or other charges on subject merchandise, or on inputs used to produce subject merchandise, from which the respondent was not exempted, Commerce will reduce the respondent's EP and CEP prices accordingly, by the amount of the tax, duty or charge paid, but not rebated.[126] Where the irrecoverable VAT is a fixed percentage of EP or CEP, Commerce

[118] *See* Petitioner's Rebuttal Brief at 4 (citing *Xanthan Gum from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final No Shipments; 2017-2018*, 84 FR 64831 (November 25, 2019), and accompanying IDM at 8 (*Xanthan Gum from China*)).
[119] *Id.* at 4.
[120] *Id*. (citing *Aristocraft of Am., LLC v. United States*, 269 F.Supp.3d 1316, 1324 (CIT 2017) (*Aristocraft*)).
[121] *Id.* at 4-5.
[122] *Id.* at 5.
[123] *Id.*
[124] *Id.* at 6.
[125] *See 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 (June 19, 2012).
[126] *Id.*; *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), and accompanying IDM at Comment 5.A.

explained that the final step in arriving at a tax neutral dumping comparison is to reduce the U.S. EP or CEP downward by this same percentage.[127]
VAT is an indirect, *ad valorem* consumption tax imposed on the purchase (sale) of goods. It is levied on the purchase (sale) price of the good, *i.e.*, it is paid by the buyer and collected by the seller. For example, if the purchase price is $100 and the VAT rate is 15 percent, the buyer pays $115 to the seller, $100 for the good and $15 in VAT. VAT is typically imposed at every stage of production. Thus, under a typical VAT system, firms: (1) pay VAT on their purchases of production inputs and raw materials (input VAT) as well as (2) collect VAT on sales of their output (output VAT).

Firms calculate input VAT and output VAT for tax purposes on a company-wide (not 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 goods for export or domestic consumption, and in the case of output VAT, on the basis of *all sales to all markets*, foreign and domestic. Thus, a firm 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 situation, however, the firm would remit to the government only $40 million of the $100 million in output VAT collected on its sales because of a $60 million credit for input VAT paid that the firm can claim against output VAT.[128] As result, the firm bears no "VAT burden (cost)": the firm, through the credit, is refunded or recovers *all* of the $60 million in input VAT it paid, and the $40 million remittance to the government is simply a transfer to the government of VAT paid by (collected from) the buyer with the firm acting only as an intermediary. Thus, the cost of output VAT falls on the buyer of the good, not on the firm.

This would describe the situation under Chinese law except that producers in China, in most cases, do not recover (*i.e.*, are not refunded) the total input VAT they paid. Instead, Chinese tax law requires a *reduction in or offset to* the input VAT that can be credited against output VAT. This formula for this reduction/offset is provided in Article 5 of the 2012 Chinese government tax regulation, *Notice of the Ministry of Finance and the State Administration of Taxation on VAT and Consumption Tax Policies for Exported Goods and Labor Services* (*2012 VAT Notice*):[129]

$$\textbf{Reduction/Offset} = (P - c) \times (T_1 - T_2),$$

where,
P = (VAT-free) free on board (FOB) value of export sales;
c = value of bonded (duty- and VAT-free) imports of inputs used in the production of goods for export;
T_1 = VAT rate; and,
T_2 = refund rate specific to the export good.

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[127] *Id.*
[128] The credit, if not exhausted in the current period, can be carried forward.
[129] *See* Memorandum, "Certain Steel Nails from the People's Republic of China: Placing Documents on the Record," dated October 10, 2019 at Attachment 3 (containing the *Notice of the Ministry of Finance and the State Administration of Taxation on VAT and Consumption Tax Policies for Exported Goods and Labor Services*, Article 5 (Ministry of Finance, State Administration of Taxation, [2012] No. 39, issued May 25, 2012)).

Using the example above, if P = $200 million, c = 0, T_1 = 17% and T_2 = 10%, then the reduction/offset = ($200 million - $0) x (17% - 10%) = $200 million x 7% = $14 million. Chinese law then requires that the firm in this example calculate creditable input VAT by subtracting the $14 million from total input VAT, as specified in Article 5.1(1) of the *2012 VAT Notice*:

Creditable input VAT = Total input VAT – Reduction/Offset

Using again the example above, the firm can credit only $60 million – $14 million = $46 million of the $60 million in input VAT against output VAT. Since the $14 million is not creditable (legally recoverable), it is not refunded to the firm. Thus, the firm 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 therefore functions as an "export tax, duty, or other charge" because the firm does not incur it *but for* exportation of the subject merchandise, and under Chinese law it must be recorded as a cost of exported goods.[130] 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.[131]

It is important to note that under Chinese law, the reduction/offset described above is defined in terms of, and applies to, total (company-wide) input VAT across purchases of all inputs, whether used in the production of goods for export or domestic consumption. The reduction/offset does not distinguish the VAT treatment of export sales from the VAT treatment of domestic sales from an input VAT recovery standpoint for the simple reason that such treatment under Chinese law applies to the company as a whole, not specific markets or sales. At the same time, however, the reduction/offset is calculated on the basis of the FOB value of exported goods, so it can be thought of as a tax on the company (*i.e.*, a reduction in the input VAT credit) that the company would not incur but for the export sales it makes, a tax fully allocable to export sales because the firm under Chinese law must book it as cost of exported goods.

The VAT treatment under Chinese law of exports of goods described above concerns only export sales that are *not* subject to output VAT, the situation where the firm collects no VAT from the buyer, which applies to most exports from China. However, the *2012 VAT Notice* provides for a limited exception in which export sales of certain goods are, under Chinese law, deemed domestic sales for tax purposes and are thus subject to output VAT at the full rate.[132] The formulas discussed above from Article 5 of the *2012 VAT Notice* do not apply to firms that

[130] Article 5(3) of the *2012 VAT Notice* states: "If the tax refund rate is lower than the applicable tax rate, the tax for the difference calculated accordingly shall be included in the cost of exported goods and labor services."

[131] Because the $14 million is the amount of input VAT that is not refunded to the firm, 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 the firm paid on purchases of inputs used in the production of exports. If that were the case, the value of production inputs, not FOB export value, would appear somewhere in the formula in Article 5 of the *2012 VAT Notice* 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 tax basis for the calculation. The $14 million is a reduction in or offset to what is essentially a tax credit, and it is calculated based on and is proportional to the value of a company's export sales. Thus, "irrecoverable input VAT" is in fact, despite its name, an export tax within the meaning of section 772(c) of the Act.

[132] *See 2012 VAT Notice*, Article 7. For these goods, the VAT refund rate on export is zero.

export these goods, and there is, therefore, no reduction in or offset to their creditable input VAT. For these firms creditable input VAT = total input VAT, *i.e.*, these firms recover all their input VAT. At the same time, export sales of these firms are subject to an explicit output VAT at the full rate, T_1.[133] Commerce must therefore deduct this tax from U.S. price[134] under section 772(c) of the Act to ensure tax-neutral dumping margin calculations.[135]

As such, in the initial questionnaires in this review, Commerce instructed the respondents to report VAT on the subject merchandise sold to the United States during the POR, and to identify which taxes are unrefunded upon export.[136] Information placed on the record of this review indicates that, according to China's VAT schedule, the standard VAT levied during the POR was 17 percent prior to May 1, 2018, and 16 percent thereafter, and the refund rate for the subject merchandise was five percent.[137] Consistent with our standard methodology, for purposes of these final results we based the calculation of irrecoverable VAT on the difference between those standard rates, applied to a FOB price at the time of exportation.[138] Thus, because the VAT levy and VAT rebate rates on exports are different for the POR, we adjusted Stanley's U.S. sales prices for irrecoverable VAT.

The respondents' reliance on the CIT's holdings in *Qingdao Qihang Tyre I*, *Jiangsu Senmao*, *Qingdao Qihang Tyre II*, and *China Manufactures Alliance* to support their position is misplaced.[139] 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."[140] For instance, in *Jacobi Carbons I*, the CIT recognized that the *2012 VAT Notice* 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 company-wide basis.[141]

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[133] *See 2012 VAT Notice*, Article 7.2(1).
[134] Commerce will divide the VAT-inclusive export price by (1 + T), where T is the applicable VAT rate.
[135] Pursuant to sections 772(c) and 773(c) of the Act, the calculation of NV based on factors of production in NME antidumping cases is calculated on a VAT-exclusive basis and, therefore, U.S. price must also be calculated on a VAT-exclusive basis to ensure tax neutrality.
[136] *See* Commerce's Letter, "Certain Steel Nails from the People's Republic of China: Request for Information," dated May 13, 2018 (AD Questionnaire).
[137] *See* Pioneer's June 26, 2019 Section C Questionnaire Response at 41; and Stanley's July 3, 2019 Section C Questionnaire Response at 74-75 (Stanley reported that the standard VAT levy during the POR was 17 percent, and the refund rate for the subject merchandise was five percent).
[138] *See, e.g.*, *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 5.
[139] *See* Pioneer Case Brief at 3-4; and Stanley Case Brief at 14.
[140] *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; *see also 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) (*Steel Racks*), and accompanying IDM at Comment 6. In *Steel Racks*, after the *Guizhou Tyre Co. v. United States*, 389 F. Supp. 3d 1350 (CIT 2019) (*Guizhou Tyre*) decision, Commerce also continued to adjust U.S. price by the reported amount of irrecoverable VAT.
[141] *See Jacobi Carbons AB v. United States*, 313 F. Supp. 3d 1308, 1340 n.49 (CIT 2018) (*Jacobi Carbons I*).

As discussed in detail above, the *2012 VAT Notice* establishes 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 (NV). Thus, section 772(c)(2)(B) of the Act is squarely applicable to the question at hand. Commerce agrees that the comparison of U.S. price with NV must be tax neutral, in order to ensure a fair comparison.[142] 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 for these final results, "{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 NV would be to require that it understate the margin of dumping."[143]

Accordingly, for these final results, Commerce has continued to adjust U.S. price for irrecoverable VAT, consistent with section 772(c)(2)(B) of the Act, to ensure a fair comparison of U.S. price with NV that is tax neutral.

Comment 4: Stanley's FOP Database Error

In October 2019, after the *Preliminary Results*, Stanley informed Commerce of a significant error in its FOP database.[144] Specifically, in Exhibit D-21 of Stanley's section D response, Stanley inadvertently substituted the letter "L" for the letter "H," which resulted in spheroidizing FOPs being applied to all nails made of low-carbon SWR, rather than only to nails made of high-carbon SWR, as intended. We acknowledged Stanley's October 17 Letter, explaining that there was no immediate avenue to correct the database and requesting that Stanley submit its argument in its case brief.[145]

Stanley's Comments

- Commerce should correct the error in Stanley's FOP database either by incorporating the lines of computer code that Stanley submitted[146] or by requesting that Stanley submit a corrected FOP database.[147]
- The database error is ministerial, inconsistent with the narrative in Stanley's section A and D questionnaire responses, and accounts for a substantial portion of the preliminary dumping margin calculated for Stanley.[148]

[142] *See* section 773(a) of the Act.
[143] *See Jacobi Carbons AB v. United States*, 365 F. Supp. 3d 1323, 1339 (CIT 2019) (*Jacobi Carbons II*) ("the principle that dumping margin calculations should be tax-neutral supports Commerce's adjustment").
[144] *See* Stanley's Letter, "Tenth Administrative Review of Certain Steel Nails from the People's Republic of China; Request of The Stanley Works (Langfang) Fastening Systems Co., Ltd. and Stanley Black & Decker, Inc. to Correct Error in its Factors of Production Database," dated October 17, 2019 (Stanley's October 17 Letter).
[145] *See* Memorandum, "Certain Steel Nails from the People's Republic of China: Stanley's FOP Database Error," dated October 24, 2019.
[146] *See* Stanley Case Brief at 2 (citing Stanley's October 17 Letter).
[147] *Id.*
[148] *Id.* at 5.

- The error involves the FOPs and movement cost calculations for the fourteen FOPs consumed in the process of "spheroidizing."[149] The spheroidizing process was only performed on high-carbon SWR; therefore, the FOPs for that process should only be assigned to the nails produced from high-carbon SWR.[150]
- Exhibit D-21 of Stanley's section D questionnaire response documents the calculation of FOPs for spheroidizing and reflects the calculation of spheroidizing FOPs in Stanley's database as submitted. However, as a result of a typographical error in that exhibit, the application of spheroidizing FOPs was not correct.[151] Instead of applying such FOPs to a limited volume of nails manufactured from high-carbon SWR, they were applied to a much larger volume of nails produced from low-carbon SWR.[152]
- The FOP database used by Commerce in the *Preliminary Results* overstated the NVs for all nails produced from low-carbon SWR and understated the NVs for the limited volume of nails made from high-carbon SWR.[153]
- The typographical error had a substantial impact on the *Preliminary Results*. Correcting the database to apply the spheroidizing FOP's only to those nails made with high-carbon SWR would result in a dumping margin of 8.84 percent.[154]
- Commerce has a duty "to determine dumping margins 'as accurately as possible.'"[155] Thus, Commerce should correct these errors, as failure to do so would be "punitive."[156]

The Petitioner's Rebuttal

- Commerce should deny Stanley's request to correct the error in its FOP database.[157]
- Stanley claims that it brought the error to Commerce's attention as soon as was practicable after the issuance of the *Preliminary Results*. However, this is simply not credible because the error was included in Stanley's original section D response, filed four months prior.[158]
- Following Stanley's original section D response, Commerce issued two separate supplemental questionnaires regarding Stanley's sections C & D response. In the process of preparing its supplemental response, Stanley would have presumably reviewed its prior reporting.[159]
- Petitioners and respondents alike routinely run margin calculations before the issuance of preliminary or final results; this process presumably would have raised a red flag for Stanley.[160] However, Stanley failed to observe an error that it describes as having "a substantial impact" on the *Preliminary Results.*[161]

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[149] *Id.*
[150] *Id.* at 7.
[151] *Id.*
[152] *Id.* at 8.
[153] *Id.*
[154] *Id*.
[155] *Id.* at 8 (citing *NTN Bearing Corp. v. United States*, 74 F.3d 1204,1208 (Fed. Cir. 1995), quoting *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990) (*NTN Bearing*)).
[156] *Id.* at 9.
[157] *See* Petitioner Rebuttal Brief at 12.
[158] *Id.*
[159] *Id.*
[160] *Id.* at 13.
[161] *Id.* at 14.

- In *Nippon*, the CAFC stated that "… {w}hile the standard {of reporting to Commerce} does not require perfection and recognizes that mistakes sometime occur, it does not condone inattentiveness, carelessness, or inadequate record keeping."[162] Thus, because of the history of this proceeding, which reflects a pattern of inattentive and careless reporting, Commerce should reject Stanley's request.[163]

Commerce's Position: We agree with Stanley that the error in its FOP database should be corrected to apply the spheroidizing FOPs only to nails produced from high-carbon SWR. As an initial matter, although the petitioner argues that we issued Stanley two separate supplemental questionnaires following this error, we note that neither questioned the underlying calculation of the spheroidizing FOPs.[164] Thus, we do not agree that there were ample opportunities for Stanley to correct the record. Furthermore, in its section D narrative response, Stanley repeatedly explained that it used tolling services to spheroidize high-carbon SWR to make nails.[165] Thus, we find the discrepancy between Stanley's section D narrative response and its FOP database to be an unintended error.

We also note that, in the *Nails AR5 Remand*, under analogous circumstances, the CIT directed Commerce to correct a transcription error in Stanley's Post-Verification FOP Database. In the Remand Order, the Court held that Commerce will "correct a respondent's error when that error is 'so egregious and so obvious' that failing to correct the error would be arbitrary and capricious…. {I}n light of the Stanly presentment, it is difficult to fathom how their ministerial error could have been concluded otherwise, especially given its impact on their overall dumping margin."[166] Likewise, we find the reporting error in this review to have a substantial impact on Stanley's dumping margin., Therefore, for these final results, we have corrected Stanley's FOP database error.

Comment 5: Whether to Adjust Certain Movement Expenses

Stanley's Comments

- Commerce double counted certain movement costs, once by subtracting them directly from U.S. gross price and again by subtracting them as part of a composite variable that included movement costs as adjusted for freight revenue.[167]
- It is incumbent on Commerce to correct this error as it has a duty "to determine dumping margins 'as accurately as possible.'"[168] To correct this error, Commerce should not deduct the movement expenses at issue directly, but instead only as an element of the composite variable.[169]

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[162] *Id.*
[163] *Id.* at 14 (citing *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003) (*Nippon*)).
[164] *See* Stanley's August 2, 2019 Supplemental Questionnaire Response, and Stanley's August 20, 2019 Supplemental Questionnaire Response.
[165] *See* Stanley's June 26, 2019 Section D Questionnaire Response.
[166] *See Xi'an Metals & Minerals Import & Export Co., Ltd. v. United States*, Consol. Court No. 15-00109, Slip Op. 17-120 (CIT September 6, 2017) (Remand Order).
[167] *See* Stanley Case Brief at 3-4.
[168] *Id.* (citing *NTN Bearing*, 74 F.3d at 1208).
[169] *Id.*

Commerce's Position: We agree with Stanley. We inadvertently deducted certain movement expenses twice when calculating U.S. price. We have corrected this error in the final results by removing the direct deduction from U.S. price.

Comment 6: Whether Stanley B&D is Part of the China-Wide Entity

Stanley's Comments

- Appendix I of the *Preliminary Results* lists Stanley B&D among the China-wide entity companies. However, Stanley B&D is a publicly-traded U.S. corporation incorporated in Connecticut.[170]
- Stanley B&D is the parent of Stanley Langfang and is the importer of record for nails manufactured by Stanley Langfang; it is the legal entity that sells nails manufactured by Stanley Langfang to unaffiliated customers in the United States.[171]
- Stanley B&D is not an exporter of subject nails from China, nor is it in any respect a Chinese entity. Therefore, Commerce should remove Stanley B&D from the list of China-wide entity companies.[172]

Commerce's Position: We agree that we inadvertently included Stanley B&D in Appendix I of the *Preliminary Results.* Because we did not intend for Stanley B&D to be included on this list, for the final results, we removed Stanley B&D from the list of China-wide entity companies.

Comment 7: Application of Facts Available with Adverse Inferences to Pioneer

The Petitioner's Comments

- While Commerce relied on Pioneer's data as reported for the *Preliminary Results*, the deficiencies in Pioneer's submissions render its data unreliable for the purposes of performing accurate margin calculations.[173]
- First, Pioneer failed to revise its FOPs to capture greater product specificity, despite Commerce's clear instructions in a supplemental questionnaire that it do so.[174]
    - Pioneer only indicated that it has always allocated costs based on its "product model," and claimed to have no records that would support another allocation methodology.[175]
    - Pioneer's refusal to develop more accurate and specific FOPs demonstrates a clear failure to report necessary information in the form and manner requested.[176]
    - Pioneer's failure to calculate specific FOPs is highly distortive as it allocates consumption equally across all control numbers (CONNUMs) and dilutes the margin calculations.[177]

[170] *See* Stanley Case Brief at 3.
[171] *Id.*
[172] *Id.*
[173] *See* Petitioner Case Brief at 6.
[174] *Id.* at 8.
[175] *Id.*
[176] *Id.*
[177] *Id.* at 9.

- Second, Pioneer indicated that it converted various FOPs for inputs to a per-kilogram basis. However, Pioneer does not detail its methodology, and certain of the revised values are clearly unreliable. Moreover, the lack of description as to how Pioneer calculated and applied the conversion factors prevents any assessment of the accuracy of the calculations and renders the data unsupported and unreliable.[178] Additionally, although Commerce instructed Pioneer to revise its reported FOPs and provide worksheets detailing the conversions, the submission only contains the final reported FOPs; this reflects a failure to submit necessary information in the form and manner requested.[179]
- Third, Pioneer failed to explain significant differences in its reported labor consumption rates.[180] Pioneer's reference to national festivals to explain significant differences in these rates does not address the variation in Pioneer's productivity over the same periods of time.[181]
- Fourth, Pioneer provided a worksheet that breaks down the reported manufacturing overhead into subcomponents. However, contrary to Commerce's specific instructions, Pioneer did not identify all expense items. This represents another failure to provide necessary information in the form and manner requested.[182]
- Fifth, one of the company's cost reconciliations failed to demonstrate how reported FOPs and total material consumption tie to the total POR costs. Thus, without the ability to tie reported FOPs to POR consumption amounts, the reliability of Pioneer's reported data is fundamentally undermined.[183]
- Sixth, Pioneer's failure to provide detailed descriptions of certain inputs undermines Commerce's ability to accurately value these inputs and, thus, to calculate the most accurate margins possible.[184]
- Pioneer failed to follow Commerce's clear instructions in numerous instances, and clearly failed to act to the best of its ability to respond to Commerce's request for information.[185] Thus, pursuant section 782(d) of the Act, Commerce should disregard Pioneer's submissions, and pursuant section 776(b) of the Act, it should assign the company a rate based on AFA.[186]

Pioneer's Rebuttal

- The alleged failures cited by the petitioner do not rise to the level of FA, much less AFA, and, thus, Commerce should reject the petitioner's arguments.[187]

[178] *Id.* at 7.
[179] *Id.*
[180] *Id.*
[181] *Id.* at 9.
[182] *Id.*
[183] *Id.* at 10.
[184] *Id.*
[185] *Id.* at 11.
[186] *Id.* at 7.
[187] *See* Pioneer Rebuttal Brief at 3.

- There is no information missing from the record, and Commerce found the record complete in the *Preliminary Results*, where it calculated a margin using the information submitted by Pioneer.[188]
- First, with respect to FOP specificity, Pioneer and its affiliated producer have no cost records or practical knowledge that would support any other allocation methodology. The records simply do not support the requested level of specificity. Thus, Pioneer cooperated to the best of its ability throughout the review in responding to Commerce's questions, and this is supported by documentation on the record.[189]
- Second, along with its revised database, Pioneer provided the conversions requested by Commerce. If Commerce believes that any conversion was incorrect, it has the ability to correct the conversion without resorting to AFA.[190]
- Third, the reported labor consumption rates were not significantly different, except in particular months that correspond with holidays, as explained in Pioneer's supplemental response.[191]
- Fourth, Pioneer identified all items included in manufacturing overhead in response to Commerce's supplemental questionnaire, and the petitioner cites no evidence showing that any items are actually missing.[192]
- Fifth, Pioneer's cost reconciliation is complete. Pioneer submitted certain revisions to the reconciliation. and also submitted additional exhibits, to render the reconciliation complete.[193]
- Sixth, Pioneer provided photos of the inputs, a description, and relevant specifications in a supplemental response; this information is more than sufficient to allow Commerce to confirm the proper Harmonized Tariff Schedule (HTS) heading for the input and, therefore, to select an appropriate surrogate value.[194]
- The petitioner's complaint seems to be that Commerce did not ask more questions, did not require more documentation, or did not verify Pioneer's data. However, the fact that the petitioner has various questions does not mean that there is a gap in the record.[195] Commerce was obviously satisfied with the information provided by Pioneer, given that it calculated a margin for Pioneer in the *Preliminary Results*.[196]
- Pioneer cooperated to the best of its ability during the review by responding to Commerce's questionnaires and providing the required information based on the records it keeps in the normal course of business. As none of the petitioner's complaints suggest otherwise, there is no basis to apply AFA to Pioneer.[197]

[188] *Id.* at 4-5 (citing section 776 of the Act).
[189] *Id.*
[190] *Id.* at 5.
[191] *Id.* at 6.
[192] *Id.*
[193] *Id.*
[194] *Id.*
[195] *Id.*
[196] *Id.*
[197] *Id.* at 7.

Commerce's Position:

In light of Pioneer's reporting deficiencies relating to its FOPs raised by the petitioner, we are revisiting our preliminary finding and applying AFA to Pioneer. Specifically, we find that Pioneer had notice of the general record-keeping requirements relating to this order, and we explicitly directed Pioneer to report FOPs on a CONNUM-specific basis on multiple occasions during this proceeding. Pioneer elected not to do so and, accordingly, AFA is warranted.

In our initial questionnaire, we requested that Pioneer "provide a detailed explanation of all efforts undertaken to report the actual quantity of each FOP consumed to produce the merchandise under review on a CONNUM-specific basis" and asked the company to provide "a detailed explanation of how you derived your estimated FOP consumption for merchandise under review on a CONNUM-specific basis and explain why the methodology you selected is the best way to accurately demonstrate an accurate consumption amount."[198] Pioneer simply responded that it could not provide FOPs on such a basis, because it does not record CONNUM/product-specific FOP consumption in its accounting system.[199] In a supplemental questionnaire, we again requested greater specificity in Pioneer's reported FOPs, and stated that

> {t}o the extent {Pioneer} does not track these material consumptions on a more specific basis, please develop a methodology that captures consumption differences based on the different sizes/weights of the nails produced.[200]

Pioneer again summarily responded that it had "no cost records that would support any other allocation methodology."[201]

In this context, Pioneer's failure to report FOPs on a more specific basis warrants AFA. As an initial matter, we have explicitly required CONNUM-specific reporting throughout the history of this order. After initially not requiring product-specific reporting in early segments of this proceeding, in the third administrative review, in 2013, we stated that

> Commerce "intends to require … {that} respondents for this case report all FOPs data on a CONNUM-specific basis using all product characteristics in subsequent reviews, as documentation and data collection requirements should now be fully understood."[202]

Pioneer, by its own account, did not heed our instructions to maintain appropriate data such that it could properly report FOPs.

Second, even in the absence of such record keeping, Pioneer had multiple opportunities in this proceeding to develop an alternate reporting methodology. As noted above, in our initial

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[198] *See* AD Questionnaire, at Section D, Part I.E.
[199] *See* Pioneer's June 26, 2019 Section D Response.
[200] *See* Commerce's Letter to Pioneer, dated August 13, 2019 at 5-6.
[201] *See* Pioneer's August 29, 2019 Supplemental Questionnaire Response.
[202] *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 5.

questionnaire, we required CONNUM-specific consumption reporting; to meet this requirement, Pioneer could have reported actual consumption or, alternatively, have provided a methodology that would reasonably capture product-specific consumption. Then, in a supplemental questionnaire, we again explicitly asked Pioneer to develop a methodology that would provide CONNUM-specific FOPs, and it did not.[203]

Therefore, Pioneer failed, on multiple occasions, to meet our clear reporting requirements. Pioneer made no attempt to revise its FOPs to capture greater product specificity despite our instructions, and simply claimed to have no records that would support another allocation methodology.[204] Pioneer's refusal to make any attempt to develop more accurate and specific FOPs demonstrates a clear failure to report necessary information in the form and manner requested.

Accordingly, we have determined that the use of facts otherwise available with an adverse inference is appropriate for the final results with respect to Pioneer, because the company repeatedly withheld requested information, significantly impeded the proceeding, and failed to cooperate by not acting to the best of its ability in supplying requested information.

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

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." 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."[205] Furthermore, affirmative evidence of bad faith on the part of a respondent is not required before Commerce may make an adverse inference.[206]

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[203] For instance, Pioneer could have assigned FOPs in a manner that takes distinctions in weight, size, or surface area into account because not all nails require the same amount of material inputs or processing.
[204] *See* Pioneer's June 26, 2019 Section D Response; and Pioneer's August 29, 2019 Supplemental Questionnaire Response.
[205] *See* SAA at 870.
[206] *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); *Antidumping Duties, Countervailing Duties, Final Rule*, 62 FR 27296, 27340 (May 19, 1997); and *Nippon*, 337 F. 3d at 1382-83.

The CAFC 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."[207] 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 purposes before Commerce.

By not reporting CONNUM-specific FOPs as requested, Pioneer has withheld information that has been requested of it, failed to provide data in the form and manner requested, and has significantly impeded this proceeding. Therefore, the application of facts available is appropriate pursuant to section 776(a) of the Act. Additionally, because Pioneer failed to cooperate by not maintaining adequate records and by not developing a methodology to report product-specific costs (information which is essential to the accurate calculation of Pioneer's dumping margin), Pioneer failed to act to the best of its ability to comply with a request for information. Therefore, we use an inference adverse in selecting the facts otherwise available pursuant to section 776(b) of the Act.

Applying AFA under these circumstances is appropriate, and consistent with past practice. For example, in a recent *Shrimp from India* review, we applied AFA to a respondent because it had several reporting deficiencies, the most significant of which was that it did not provide data that demonstrate the extent to which its submitted costs reasonably reflect differences to merchandise's physical characteristics (*i.e.*, CONNUM-specific reporting).[208] Similarly, in the specific context of FOPs, we have found that a failure to provide CONNUM-specific FOPs may warrant application of AFA. For instance, in *Copper Pipe from China*, we explained that "{b}ecause the Hailiang Group has continued to report FOP values that are identical for all CONNUMs despite {Commerce's} multiple requests to provide this data on a more specific basis, all the information necessary for the Department to calculate an accurate dumping margin for the Hailiang Group is not on the record and available for use in the final determination."[209] In these circumstances, application of AFA was appropriate.

Regarding Pioneer's argument that Commerce should not apply AFA because it reported its costs as recorded in its normal books, we find this argument to be without merit. Although Commerce will rely on a company's books and records to the extent possible, certain information must be obtained, regardless of a company's standard record-keeping process. For instance, Commerce establishes the CONNUM characteristics when questionnaires are first issued. These characteristics are set before a respondent company receives a questionnaire and, therefore, they have no relation to how a respondent records costs in its books. Nor does

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[207] *See Nippon*, 337 F. 3d at 1382.

[208] *See Certain Frozen Warmwater Shrimp from India: Final Results of Antidumping Duty Administrative Review; 2017-2018*, 84 FR 57847 (October 29, 2019) (*Shrimp from India*) and accompanying IDM at Comment 2.

[209] *See Seamless Refined Copper Pipe and Tube From the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 75 FR 60725 (October 1, 2010) (*Copper Pipe from China*) and accompanying IDM at "Use of FA and AFA"; *see also Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Critical Circumstances, in Part*, 75 FR 60725 (September 21, 2010) and accompanying IDM at Comment 27 (applying AFA in light of the respondent's "failure to provide the necessary information on the record that would substantiate its actual usage of steel strap on a CONNUM-specific basis, and our determination that TPCO failed to cooperate by not acting to the best of its ability.").

Commerce expect respondents to track in their normal books and records cost differences according to each CONNUM characteristic. However, we do expect respondents to act to the best of their ability to account for such cost differences by utilizing a reasonable method to identify and report them,[210] which Pioneer failed to do.

We find application of AFA appropriate here in light of our prior public statement regarding the FOP reporting requirements in this proceeding. As noted above, seven years ago we stated that respondents must report FOPs on a CONNUM-specific basis. This constituted notice to potential respondents, and since then, Commerce has consistently required FOP reporting on a CONNUM-specific basis. The CIT has affirmed Commerce's practice of putting respondents, and potential respondents, on notice of reporting requirements. For instance, in *An Giang Fisheries*, the CIT rejected respondents' assertions that CONNUM-specific reporting was not appropriate. There, the court observed that Commerce put respondents "on notice of future enforcement of the CONNUM-specific reporting requirement as early as the eighth administrative review," and explained that "{t}his is the eleventh administrative review … Given the advance notice afforded to respondents, the court cannot find that Commerce's request for CONNUM-specific reporting, here, was unreasonable."[211] Similarly, in *Thuan An Production*, the CIT explained that, where a respondent "made a decision not to collect data in accordance with Commerce's chosen methodology, despite being notified multiple times of the requirement … Commerce's requirement that {the respondent} provide CONNUM-specific FOP reporting is supported by substantial evidence."[212] Similarly, here, respondents were on notice of such requirements.

Therefore, pursuant to sections 776(a)(2)(A)-(C) and 776(b) of the Act, for these final results, we find that the application of facts otherwise available with an adverse inference to Pioneer is warranted. Specifically, Commerce has assigned Pioneer, as facts available with an adverse inference, a dumping margin of 118.04 percent.[213]

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[210] *See, e.g., Cast Iron Soil Pipe Fittings* IDM at Comment 10 ("{A}lthough neither company tracks consumption rates on a product-specific basis in the normal course of business, it is not uncommon to encounter this scenario in antidumping proceedings. However, Wor-Biz devised a reasonable methodology to estimate consumption rates on a CONNUM-specific basis.").

[211] *See An Giang Fisheries v. United States*, Court No. 16-00072, Slip. Op. 18-10 (CIT 2018) (*An Giang Fisheries*) at 7.

[212] *See Thuan An v. United States*, Court No. 17-00056 Slip Op. 18-152 (CIT 2018) (*Thuan An Production*) at 23-24.

[213] Because we have determined that the application of AFA is appropriate, we do not address the petitioner's numerous arguments regarding additional reporting deficiencies in detail. However, we do note that certain concerns raised by the petitioner have merit. For instance, Pioneer failed to provide worksheets regarding its unit conversions, as requested. Additionally, when specifically asked by Commerce to explain differences in per-unit labor productivity over time, Pioneer cited holidays, explaining: "{f}or example, in February 2018, China holds the Spring Festival, which is the most important festival in China. Labor productivity was usually lower in February than in the other months." Pioneer's August 29, 2019 Supplemental Questionnaire Response at 9. We find this explanation to be inadequate. Although the explanation relates to production and labor consumption, it does not address labor productivity.

VI. RECOMMENDATION

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

☒	☐
Agree	Disagree

4/15/2020

X 

Signed by: JOSEPH LAROSKI

Joseph Laroski
Deputy Assistant Secretary
for Policy and Negotiations