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MEMORANDUM TO: Joseph A. Spetrini
Acting Assistant Secretary
for Import Administration

FROM: Barbara E. Tillman
Acting Deputy Assistant Secretary
for Import Administration

DATE: February 2, 2005

SUBJECT: Issues and Decision Memorandum for the 2002-2003 Antidumping Duty Administrative Review of Persulfates from the People's Republic of China

Summary

We have analyzed the comments of the interested parties in the 2002-2003 administrative review of the antidumping duty order on persulfates from the People's Republic of China (PRC). As a result of our analysis, we have made changes in the margin calculations as discussed in the "Margin Calculations" section of this memorandum. We recommend that you approve the positions we have developed in the "Discussion of Issues" section of this memorandum. Below is the complete list of the issues in this administrative review for which we received comments and rebuttal comments by interested parties.

Comment 1: Use of financial statements from Asian Peroxides, Limited (APL) and National Peroxides Limited (NPL), producers of comparable merchandise
Comment 2: Use of financial statements of Gujarat and Calibre to calculate a surrogate SG&A ratio
Comment 3: Use of financial information from "potentially sick" companies
Comment 4: Categorization of "consumables consumed" in APL's financial statements
Comment 5: Offset of APL and NPL's SG&A expenses with interest and dividend income
Comment 6: SG&A labor
Comment 7: Use of NPL's most contemporaneous financial statements
Comment 8: Affiliation between Chinese exporter and U.S. customer
Comment 9: Surrogate labor rate
Comment 10: Treatment of non-dumped sales

Background

On August 6, 2004, the Department of Commerce (the Department) published the preliminary results of the 2002-2003 administrative review of persulfates from the PRC. *See Persulfates from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review*, 69 FR 47877 (August 6, 2004) (*Preliminary Results*). In these results the Department relied on the financial statements of a single Indian producer of identical merchandise, Gujarat, to calculate surrogate financial ratios for the respondent. On October 29, 2004, we recalculated our preliminary results to calculate surrogate financial ratios using the financial statements of two Indian producers of comparable merchandise. *See* Memorandum on Recalculation of Preliminary Results of Review from Jeffrey A. May, Deputy Assistant Secretary, to James J. Jochum, Assistant Secretary for Import Administration, dated October 29, 2004 (Recalculation Memo). We invited parties to comment on both the Preliminary Results and the Recalculated Preliminary Results. On December 8, 2004, FMC Corporation (FMC) and Shanghai Ai Jian Import & Export Corporation (Ai Jian) and its producer, Degussa-AJ (Shanghai) Initiators Co., Ltd. (Degussa-AJ) (collectively, the respondent), filed case briefs. On December 15, 2004, both parties filed rebuttal briefs. A public hearing was held on December 17, 2004. The period of review (POR) is July 1, 2002, through June 30, 2003.

Margin Calculations

We calculated export price and normal value using the same methodology stated in the preliminary results, except as follows:

1. We relied on the financial statements of APL and NPL to calculate surrogate financial ratios for the respondent in our Recalculation Memo. *See* Comments 1, 2, and 3. Based upon comments we received, we have made the following changes to the recalculation of surrogate financial ratios:

    - We have disregarded NPL's 2001-2002 financial statements in favor of its 2002-2003 financial statements. *See* Comment 7.
    - We have recategorized the line item "consumables consumed" in APL's financial statements as an overhead expense. *See* Comment 4.
    - We have removed the line item "dividend income" in NPL's financial statements as an offset to interest expense. *See* Comment 5.
    - We have recategorized the line item "director sitting fees" in APL's financial statements and the line item "commission to directors" in NPL's financial statements as direct labor expenses. *See* Comment 6.

2. We have disregarded sales from the respondent to its U.S. affiliate from our margin calculations. *See* Comment 8.

3. We have applied the Department's expected wage rate for China using 2002 income data. S*ee* Comment 9.

Discussion of Issues

Comment 1: Use of financial statements from APL and NPL, producers of comparable merchandise

The respondent contends that the Department has not adequately supported its decision to calculate the surrogate-value financial ratios for selling, general, and administrative (SG&A) expenses, factory overhead, and profit from the financial data of APL and NPL, Indian producers of comparable merchandise (peroxides) instead of from the financial data from Gujarat and Calibre, Indian producers of identical merchandise (persulfates).

The respondent asserts that the Department has never rejected a producer of identical merchandise as a surrogate because the production process of that producer differed from the production process used by the non-market-economy (NME) respondent. The respondent claims that, in each of the five previous administrative reviews of this order, the Department has explained that its practice for selecting surrogate producers was clear: "The Department's NME practice establishes a preference for selecting surrogate value sources that are producers of identical merchandise, provided that the surrogate data are not distorted or otherwise unreliable," citing *Final Results of Antidumping Duty New Shipper Administrative Review: Pure Magnesium from the People's Republic of China*, 63 FR 3085, 3088 (January 21, 1998).

The respondent contends that, in the instant review, the Department changed its longstanding practice in the persulfates proceeding and determined that Gujarat was no longer a valid surrogate company on the basis of new information provided by FMC, without explaining exactly what new information was submitted that would warrant the change in the Department's practice and the subsequent selection of APL and NPL as surrogate companies.

Furthermore, the respondent contends, the selection of a surrogate producer of identical merchandise is critical because of the significant differences between persulfates and peroxides. The respondent asserts that the fact that persulfates are produced and sold in powder form, whereas peroxides are sold in liquid form, is significant because it is easier to purify and handle liquids than solids. The respondent argues that the fact that liquid peroxides can be put in larger drums, whereas powder persulfates are sold in smaller bags, also has an effect on the production processes and cost structures.

The respondent argues further that the Department has not defined the terms "continuous" and "batch" as used by FMC to characterize Degussa-AJ as a large continuous-process producer and Gujarat as a batch-process producer. Moreover, the respondent asserts that those terms overlooked a more critical distinction that the Department recognized in previous reviews as most important, that persulfates are significantly different products compared to peroxides.

FMC asserts that the Department acknowledged that the information submitted by FMC warranted further clarification and development prior to issuance of the final results. Specifically, the new information and data provided by FMC supports the decision articulated by the Department to use the financial statements of producers of comparable merchandise, APL and NPL, to value factory overhead, SG&A and profit, citing the Recalculation Memo at 4.

> In the preliminary results, we noted that the FMC had raised significant issues about the appropriate surrogate company requiring further analysis…. Since publication, we requested and received additional information regarding possible surrogate companies for calculating financial ratios. Based on our review of this information and the comments of the parties, we have preliminarily concluded that our determination of the most appropriate surrogate company for Degussa-AJ should be changed.
>
> The record showed that the producer of merchandise subject to review, Degussa-AJ, is a large continuous-process producer.
>
> As in the past two reviews, we relied on Gujarat's financial information for the preliminary results. While we did not consider the information submitted by FMC sufficient to change our methodology at that time, we stated that, 'in a number of respects, the information FMC has provided is different from and expands upon the information submitted in prior reviews that the Department has addressed.'

FMC claims that its March 10, 2004, June 4, 2004, July 26, 2004, July 27, 2004, and September 15, 2004, submissions all contained information and data the Department had not received in earlier segments of the proceeding that demonstrate why the difference in size, scale, and production process between the Indian persulfates producer, Gujarat, and the respondent, Degussa-AJ, would not accurately reflect the production experience of Degussa-AJ. Thus, FMC stresses that this distortion would misinterpret overhead and SG&A ratios, if applied to Degussa-AJ.

According to FMC, those submissions illustrate that, because it uses a continuous process, Degussa-AJ has a higher fixed capital investment and therefore higher overhead than Gujarat, which uses a batch process. FMC states that the reason that Degussa-AJ has higher overhead expenses is because it must use dedicated equipment, while Gujarat has the ability to use the same pieces of equipment for multiple operations or to make multiple products.

Accordingly, FMC contends, Gujarat's level of fixed capital investment results in an overhead ratio that is lower than that for a continuous-process producer to such a degree that it cannot be used in calculating surrogate-value financial ratios for the respondent. Therefore, FMC asserts, Gujarat is not an appropriate surrogate company for the Department to use in valuing the cost structure of Degussa-AJ. Instead, FMC argues, the Department should continue to use the financial information of APL and NPL, two large Indian continuous-process producers of comparable merchandise that use production processes similar to that used by Degussa-AJ.

Department's Position:

In our August 6, 2004, Preliminary Results we stated that FMC had raised significant issues about the appropriate surrogate company to use for calculating financial ratios. In particular, the Department indicated that FMC's March 10, 2004, and June 4, 2004, submissions of new information on the record demonstrated that the use of Gujarat's financial statements would not reflect the production experience of Degussa-AJ accurately. Based upon information placed on the record prior to and subsequent to the Preliminary Results, we agree with FMC that Gujarat is

a batch-process producer and Degussa-AJ is a large continuous-process producer. We also agree that these differences are significant enough to cause us to rely on the financial data of the surrogate producers using the same type of production process as Degussa-AJ.

Normally, it is the Department's practice in NME proceedings to use, whenever possible, surrogate-country producers of identical merchandise for surrogate-value data, provided that the surrogate data is not distorted or otherwise unreliable. *See Notice of Final Determination of Sales at Less Than Fair Value: Pure Magnesium in Granular Form from the People's Republic of China*, 66 FR 49345 (September 27, 2001) (*Granular Magnesium from the PRC*). The facts placed on the record in this segment of the proceeding support a determination, however, that the significant difference in size, scale, and production process between Gurajat and Degussa-AJ would distort the factory overhead and SG&A ratios if Gujarat's production experiences were applied to Degussa-AJ. The Department's criteria for choosing surrogate companies are the availability of contemporaneous financial statements, comparability to the respondent's experience, and publicly available information. *See Notice of Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp From the People's Republic of China*, 69 FR 70997 (December 8, 2004), and accompanying Issues and Decision Memorandum at Comment 9F. The Department also has an established practice of rejecting financial statements of surrogate producers whose production process is not comparable to the respondent's production process. *See*, *e.g.*, *Notice of Preliminary Determination of Sales at Less Than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products From the People's Republic of China*, unchanged for the final determination, where the Department rejected the surrogate financial statements of a producer because "its financial information would be less comparable to that of the respondents." *See* 66 FR 22183, 22193 (May 3, 2001). Thus, in this instance, the decision to reject the financial statements of Gujarat is consistent with the Department's preference to match surrogate companies' production experience with the respondent's production experience.

FMC placed on the record abundant information outlining the differences between continuous-process and batch-process producers. These differences include significantly higher equipment costs, and thus higher fixed capital investment, for continuous-process producers and significantly higher raw materials, energy, and labor costs for batch-process producers. *See* FMC's September 15, 2004, submission. Although given several opportunities to do so, the respondent did not provide substantive comments on this information.

In addition, FMC placed on the record a statement dated August 31, 2004, from the managing director of Gujarat, Harshad Shah. Mr. Shah confirmed that Gujarat operates a batch process to manufacture persulfates and maintained that Gujarat would be inappropriate for use as a surrogate company for the respondent due to differences in the cost structure of batch- and continuous-process chemical producers. *See* FMC's September 15, 2004, submission at Exhibit 1. Similarly, the chairman and CEO of Calibre, Ranjit H. Bhavnani, commented that Calibre was not a good surrogate company for the respondent because of the difference in the production size between the two companies. Mr. Bhavnani explained that factory overhead and administrative and selling expenses for a small company such as Calibre were much lower than those experienced by a large producer such as Degussa-AJ. *See* FMC's May 27, 2004, submission.

Since we do not have financial information on the record for any continuous-process producers of identical merchandise, we determine that it is appropriate to look to producers of comparable merchandise that use production processes similar to that used by the respondent Degussa-AJ. While APL and NPL are not producers of identical merchandise, the record indicates that their production processes for hydrogen peroxide resemble most closely the continuous-production process for persulfates as experienced by Degussa-AJ. Both products require large capital outlays for production, storage, technical support, and special safety requirements.

In the context of the Department's surrogate-valuation methodology, the facts presented in this case mean that Degussa-AJ's capital costs would be vastly undervalued through the use of Gujarat's production costs. Further, these lower capital costs would not be offset by the corresponding increase in per-unit raw materials and labor-usage rates in a batch process, since we derive such rates from the respondent's actual experience and not from the surrogate. In these respects, the continuous-production process of hydrogen peroxide more closely resembles the continuous-production process of persulfates than does the batch-production process of persulfates. Accordingly, we have determined that there is a distortion created by valuing a continuous producer's costs by relying on Gujarat's batch-production costs. For the same reason, because the record indicates that Calibre is not a large continuous-process producer, its overhead ratio would likewise not be a reliable representation of Degussa-AJ's overhead ratio.

Instead, we find that the financial information of NPL and APL reflects more accurately the cost structure of Degussa-AJ as both companies are large continuous-process producers. *See Granular Magnesium from the PRC*.

Comment 2: Use of financial statements of Gujarat and Calibre to calculate a surrogate SG&A ratio

The respondent states that, even though the Department may find that differences in batch- and continuous-production processes have a distortive effect on the calculation of overhead expenses for Gujarat or Calibre, the Department has not demonstrated that this rationale also applies to the calculation of SG&A expenses because, unlike overhead expenses, SG&A expenses are calculated based on company-wide expenses rather than on product-specific costs. Therefore, the respondent argues, the Department should follow its preference for using the financial information of producers of identical merchandise and use Gujarat's and/or Calibre's information to calculate a surrogate SG&A ratio.

FMC rebuts the respondent's assertion that Gujarat's and Calibre's information is appropriate for calculating surrogate SG&A ratios by arguing that production-related differences are exactly what render both the factory overhead and SG&A ratios for batch and continuous processors incomparable.
First, FMC contends, continuous-process producers are more efficient users of raw materials, labor, and energy, all of which the Department uses in the denominator for calculating both overhead and SG&A ratios. Thus, attempting to apply the cost information of batch producers to a continuous-process producer, FMC claims, would be grossly distortive. Second, FMC continues, the selling expenses of a continuous producer are much higher than those of a batch

producer, which would not need to maintain a stock-and-sell network. Again, FMC argues, such differences in costs make batch- and continuous-process producers not comparable.

Finally, FMC maintains, even if the respondent's arguments regarding the applicability of Gujarat and Calibre's financial information is correct, the Department has a well-established practice of not mixing and matching surrogate financial ratios from different companies, citing, among others, *Notice of Final Determination of Sales at Less Than Fair Value: Silicon Metal From the Russian Federation*, 68 FR 6885 (February 11, 2003), and accompanying Issues and Decision Memorandum at Comment 9.

Department's Position:

We find that both the respondent's and FMC's arguments regarding the effects, or lack thereof, of specific production processes on SG&A are misplaced. As explained in the response to Comment 1 above, the Department has determined that the most appropriate financial statements overall for purposes of calculating surrogate financial ratios for the respondent are those of APL and NPL. Furthermore, as FMC observes, the Department has a clear preference for not using the financial statements of different companies to compute each financial ratio. *See*, for example, *Persulfates from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 64 FR 69494 (December 13, 1999), at Comment 5 and *Persulfates from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 68 FR 6712 (February 10, 2003), at Comment 9, where we explained that financial ratios are a function of each other and "mixing and matching" financial statements from different companies would result in financial ratios that bear no relationship to each other. Moreover, such an approach increases the risk of double-counting or under-counting as different companies may classify the same expenses differently. The respondent has not provided any arguments specific to the issues regarding the mixing of financial ratios that would persuade us do so in this instance. Therefore, we have continued to use the financial statements of APL and NPL to calculate a surrogate SG&A ratio for the respondent.

Comment 3: Use of financial information from "potentially sick" companies

The respondent contends that the Department should not continue to use the financial statements of APL because the company has suffered losses for several years and has been officially acknowledged by the Indian government as a "potentially sick" company.

The respondent observes that the Department has stated consistently that it will not use the financial statements of officially designated "sick" companies to calculate surrogate financial ratios and that, as APL has been designated as a "potentially sick" company, the Department should make a similar finding here. The respondent argues that information on the record supports such a finding. It points out that APL has lost nearly 65 percent of its net worth and has carried forward losses from 2001 to 2002, from 2002 to 2003, and from 2003 to 2004. In addition, the respondent asserts, APL's financial statements indicate that it has been unable to sell its products above cost or generate a profit even though it has been producing at a rate above its capacity. The respondent claims that, due to APL's financial difficulties, it has been designated by the Indian government to be restructured or sold. Therefore, the respondent

maintains, APL's financial statements are not useable for purposes of calculating surrogate financial ratios.

Furthermore, the respondent maintains, the Department has stated that it is its "preference not to use any of the financial information from a given year during which a company experiences a loss," citing *Notice of Final Determination of Sales at Less Than Fair Value: Barium Carbonate From the People's Republic of China*, 68 FR 46577 (August 6, 2003), and accompanying Issues and Decision Memorandum at Comment 6. Thus, the respondent argues, because APL suffered a loss during 2002-2003, the Department should not use its financial statements for calculating overhead and SG&A ratios.

FMC rebuts the respondent's argument that APL's financial condition renders its financial data inappropriate as a surrogate source for financial ratios. FMC asserts that the Department has never rejected an appropriate surrogate Indian company that may be designated as "potentially sick" and that it has relied consistently upon the financial statements of companies suffering losses as reliable sources of surrogate values for overhead and SG&A ratios. FMC asserts that the Department excludes from its calculation of overhead and SG&A ratios the financial data of Indian companies only if the financial data is not in accordance with the generally accepted accounting principles (GAAP) of India or the company has been classified as a "sick company" under Indian law.

Furthermore, FMC contends, in its description of APL's financial situation, the respondent has ignored several positive financial signals regarding the surrogate company. For example, FMC observes, both APL's capacity utilization and operating profit increased during the 2002-2003 year over the previous year. In addition, regarding the acquisition of APL by the Asset Reconstruction Company of India Ltd. to which the respondent alludes, FMC states that this possible acquisition was not announced until January 2004 and would not occur until March 2005 at the earliest, 20 months after the end of the POR.

Department's Position:

As both parties state correctly, it is the Department's practice not to use in the calculation of surrogate financial ratios the financial statements of companies officially designated as "sick" by the Indian government. *See*, for example, *Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Color Television Receivers From the People's Republic of China*, 69 FR 20594 (April 16, 2004), and accompanying Issues and Decision Memorandum (*CTVs from the PRC*) at Comment 14. As FMC claims, however, the Department has never declined to use the financial statements of a company that has been officially designated by the Indian government as "potentially sick." Furthermore, we find that the reasons underlying APL's designation as a "potentially sick" company do not lead us to determine that its financial statements are unreliable or so distorted to be unusable. First, regarding the financial losses suffered by APL, it is the Department's current practice to accept, for the purpose of calculating overhead and SG&A ratios, the financial statements of companies suffering losses, provided the financial statements are not otherwise unusable. *See*, for example, *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China: Preliminary Results of 2002-2003*

Administrative Review and Partial Rescission of Review, 69 FR 10424 (March 5, 2004), unchanged in final results.

Second, regarding the specifics of APL's financial situation, once we have identified appropriate surrogate financial statements, it is our practice not to take into account individual conditions, such as the level of residual value and capacity utilization, that parties claim differ from the respondent's financial situation or otherwise make the financial statements unreliable. *See Certain Preserved Mushrooms from the People's Republic of China: Final Results of Third New Shipper Review and Final Results and Partial Rescission of Second Antidumping Duty Administrative Review*, 67 FR 46173 (July 12, 2002), and accompanying Issues and Decision Memorandum at Comment 5, where the Department found that, because the specific financial problems suffered by the surrogate company had not rendered that company "sick," its financial statements were still usable. The respondent has not provided sufficient arguments that would compel us to reconsider our practice in this instance.

In addition, regarding the proposed acquisition of APL by the Asset Reconstruction Company of India Ltd., this event has not yet occurred and, if and when it does, it will be significantly after the end of the POR. Therefore, the effect of this possible event on the financial situation of APL during the 2002-2003 fiscal year is dubious. For all of the above reasons, we agree with FMC that we should not disregard APL as an inappropriate surrogate company and we have continued to use its financial statements in the calculation of financial ratios for overhead and SG&A.

Comment 4: Categorization of "consumables consumed" in APL's financial statements

With respect to APL's financial statements, FMC claims that the line item "consumables consumed," which the Department included in direct materials in its calculation of financial ratios in its Recalculation Memo, should instead be included in factory overhead in the final results. FMC asserts that "consumables consumed" represents indirect materials, as do "stores and spares consumed," which the Department categorized correctly as an overhead expense. According to FMC, note 10 on page 23 of APL's 2002-2003 financial statements makes this evident:

> Stores, spares and consumables include slow-moving and non-moving items inclusive of 'insurance spares' aggregating to Rs. 19,435 thousands (as certified by management), the carrying values of which are appropriate and hence no provision for obsolescence is considered necessary in these accounts.

In addition, FMC maintains that the respondent's list of direct material factors did not include "consumables consumed" and, therefore, the above adjustment is consistent with the respondent's reporting methodology.

The respondent asserts that, if the Department continues to use APL as a source of surrogate financial ratios, the Department should continue to classify the line item "consumables consumed" as part of APL's direct material cost. The respondent contends that FMC's argument that "stores and spares consumed" is linked to "consumables consumed" and that both line items should be treated as indirect overhead expenses is baseless and vague. Referring to the note in

NPL's financial statements, the respondent argues that the note does not define "consumables consumed" as what FMC has tried to claim, *i.e.*, an account line item that can only represent indirect material cost. Moreover, the respondent asserts that, even if "consumables consumed" are considered indirect materials by APL, the Department may still categorize certain indirect materials as direct depending on the factors reported by the NME respondent.

Department's Position:

Although we agree with FMC that APL's line item for "consumables consumed" is best categorized as an overhead expense, the reason for our decision to move this item from direct materials requires further clarification. We disagree with FMC that note 10 of APL's 2002-2003 financial statements provide evidence that "consumables consumed" must not represent direct material costs. Rather, it is the Department's practice, absent any information to the contrary, to consider items such as "consumables" generally as an indirect material. It is true, as the respondent claims, that, depending on which materials are reported as factors of production, the Department does on occasion re-categorize certain materials expense items as either direct or indirect in order to avoid double-counting. In this case, however, we do not have information on the record that would indicate that "consumables consumed" includes direct materials or materials that we would have treated as direct in our build-up of normal value. Further, we have stated previously that indirect materials are defined as:

> usually items used in the production process but not traceable to a particular product. This category also includes items that are added directly to products but whose cost is so small that the effort of tracing that cost to individual products would be greater than the benefit of accuracy (*e.g.*, the cost of glue used in furniture manufacturing).

See Notice of Final Determination of Sales at Less Than Fair Value: Polyvinyl Alcohol from the People's Republic of China, 68 FR 47538 (August 11, 2003), and accompanying Issues and Decision Memorandum at Comment 7. Here we have no evidence that the "consumables consumed" are traceable to a particular product. Therefore, we are taking a conservative approach and following our general practice by considering the line item "consumables consumed" to be indirect materials and are moving it from materials to overhead in the calculation of financial ratios using APL's financial statements.

Comment 5: Adjust APL's and NPL's SG&A expenses for interest and dividend income

FMC argues that the Department should not adjust APL's and NPL's SG&A expenses for the interest income reported in their financial statements. FMC asserts that, consistent with the Department's past practice, the interest expense incurred during the fiscal year should be adjusted only for interest income earned on short-term investments of working capital, citing *Persulfates from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 68 FR 6712 (February 10, 2003), and accompanying Issues and Decision Memorandum at Comment 11.

FMC argues that the interest income reported in APL's financial statements was not earned from short-term loans. FMC explains that over 80 percent of APL's loans and advances are to a subsidiary company and that there is no indication that the loan to the subsidiary company is short-term in nature. Therefore, FMC contends, the Department should not make this adjustment in its calculations.

Similarly, FMC argues, there is no indication in NPL's financial statements that its loans are short-term in nature and, therefore, the Department should not make this adjustment. In addition, FMC contends that the Department should not include dividend income as an adjustment to NPL's SG&A expenses because, FMC asserts, it does not constitute interest income.

The respondent asserts that the Department should continue to adjust the SG&A expenses of APL and NPL for interest income because there is no indication that the interest income of either company is long-term in nature. The respondent points out that the interest income derived from APL's loans and advances are classified under the line item "Current Assets, Loans and Advances" in APL's balance sheet and, by definition, current assets are "assets of a short-term nature that are readily convertible to cash," citing Merriam-Webster On-line Dictionary (www.m-w.com). The respondent also refers to *Barron's Accounting Handbook*, J. Siegel and J. Shim, 1990, at 348 ("current asset": "item having a life of one year or less"). Therefore, the respondent argues, APL's interest income is "of a short-term nature that are readily convertible to cash."

Similarly, the respondent contends that NPL's deposits and loans are also classified under "Current Assets, Loans and Advances" in its balance sheet. Therefore, the respondent asserts, this is clear evidence that NPL's deposits and loans are short-term in nature.

The respondent did not comment on whether the Department should make an adjustment for dividend income.

Department's Position:

It is the Department's practice to adjust interest expenses for interest income earned only on short-term loans. *See*, for example, *Notice of Final Determination of Sales at Less Than Fair Value: Wooden Bedroom Furniture From the People's Republic of China*, 69 FR 67313 (November 17, 2004), and accompanying Issues and Decision Memorandum (*Bedroom Furnit*ure) at Comment 3. There is no basis, however, to assume that, because 80 percent of APL's loans were to a subsidiary, they are necessarily long-term in nature. It is true that, as FMC claims, neither company's financial statements state explicitly that the interest income earned is on short-term loans. Yet, as the respondent observes, they do not state the income is on long-term loans. Nonetheless, the fact that both sets of statements include the "loans and advances," from which the interest income is derived, under "Current Assets, Loans and Advances" is telling. According to the definition of "current" in this context, such assets, loans, and advances are short-term in nature. Consequently, we are continuing to adjust each company's SG&A expenses for interest income in these final results.

Regarding dividend income, we agree with FMC that we should not adjust NPL's interest

expense for this line item. It is not the Department's practice to adjust SG&A expenses for income from dividends. Dividend income is generally investment income earned on equity investments. There is nothing in NPL's financial statements, however, to indicate that its equity investments are short-term in nature. Thus, we have not included this item in our calculation of the surrogate financial-ratio calculations for these final results.

Comment 6: SG&A labor

FMC asserts that the Department should subtract APL's managing directors' remuneration from the total direct expenses and add the amount to SG&A expenses. FMC observes that, in APL's financial statements, APL included in the line items "Salaries, Wages and Bonus" and "Contribution to the Provident Fund" the remuneration it made to its managing directors. FMC points out that the Department included the total of these line items in its calculation of direct labor expenses. Instead, FMC claims, the Department should classify the portion of these line items attributable to managing directors' remuneration as SG&A expenses.

FMC argues that the expenses associated with APL and NPL's compensation to their company directors should be classified as SG&A expenses. FMC asserts that, in order to avoid double-counting Degussa-AJ's SG&A labor expense, it is appropriate to exclude from the calculated SG&A labor factor any labor hours worked by company directors because this expense is captured in the SG&A ratio based on the Department's normal calculation methodology.

Citing the Department's response to comment 19 in *CTVs from the PRC*, FMC asserts that normally the Department classifies these expenses as SG&A expenses when calculating the financial ratios of the surrogate producer:

> As a result, we have taken the conservative approach for BPL, Kalyani and Matshushita and included in SG&A expenses only those labor-related expenses which are clearly identifiable as SG&A. These costs include managerial remuneration, directors sitting fees and directors' remuneration.

The respondent claims that, consistent with the Department's established practice in this case of not including any labor expense component in the factory overhead or SG&A rate, the Department should not reclassify APL's directors' remuneration as SG&A expenses.

The respondent points out that, in both the preliminary and recalculated preliminary results, the Department included a factor for SG&A labor in the calculation of normal value for both AJ and Degussa-AJ. Because the Department has treated the respondent's SG&A labor as a direct factor of production, in order to avoid double-counting the respondent contends that the Department should reject FMC's argument.

Furthermore, the respondent asserts that, if the Department continues to use APL and NPL's financial statements to calculate the surrogate SG&A ratios, in order to avoid double-counting the SG&A labor expenses, the Department should treat all expenses associated with compensation by APL and NPL to their company directors as labor expenses rather than as SG&A expenses.

Alternatively, the respondent maintains, the Department could include all identifiable SG&A labor expenses in the SG&A ratios for both APL and NPL and discontinue its calculation of a separate SG&A labor factor for the respondent in order to avoid any double-counting.

Department's Position:

Our treatment of SG&A labor in the recalculation of the preliminary results may have resulted in some double-counting. It was our intent to categorize all labor expense items in APL and NPL's financial statements, including SG&A labor, as direct labor because we continued to calculate a separate SG&A labor factor. Therefore, in these final results, we are moving the line item "director sitting fees" in APL's financial statements and the line item "commission to directors" in NPL's financial statements from SG&A expenses to direct labor expenses.

Regarding the respondent's suggestion that, alternatively, we categorize all SG&A labor items as SG&A expenses and no longer calculate a separate SG&A labor factor, we find that the reason we followed our current methodology in the preliminary results and in the 2001-2002 review of this order still exists. The Department's calculation of a separate SG&A labor factor for the respondent was prompted by the use of Gujarat's financial statements to calculate surrogate financial ratios in the 2001-2002 administrative review of this order. In the preliminary results of that review, we stated that, "{b}ecause we believe that SG&A labor is not classified as part of the SG&A costs reflected on Gujarat's financial statements, we have accounted for SG&A labor hours by calculating a dollar-per-MT labor hours amount and adding this amount to SG&A." *See Persulfates From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review*, 68 FR 44921 (July 31, 2003), at fn 3. This methodology was continued in the preliminary results of the instant review in which the Department continued to use Gujarat's financial statements as the basis for calculating an SG&A ratio. In the recalculated preliminary results of this review, we determined that APL and NPL were more acceptable surrogate companies for the respondent and we used the financial statements of these two companies to calculate financial ratios. We find that there are similar problems with APL and NPL's financial statements in the classification of SG&A labor expenses and, therefore, our methodology for calculating a separate SG&A labor factor is still appropriate.

Regarding FMC's suggested adjustments to the SG&A labor calculations, while we agree with FMC that it is our practice to categorize an item such as directors' remuneration as an SG&A expense, that is reasonable when the Department has not calculated a separate SG&A factor. FMC's basis for removing a portion of labor hours attributable to directors from the SG&A labor factor in order to avoid double-counting involves the directors' remuneration of only one of two surrogate companies and the labor hours of only one of two respondent companies. We find that such selective adjustment of expense items gives a false sense of increased accuracy and we have declined to make the suggested adjustments.

Comment 7: Use of NPL's most contemporaneous financial statements

The respondent asserts that the Department should use the 2002-2003 NPL financial statements, which fall within the POR, rather than the 2001-2002 NPL financial statements that the

Department used in the recalculated preliminary results. The respondent cites the Department's well-established practice of replacing the older surrogate financial statements with the most contemporaneous data available. Therefore, the respondent argues, if the Department continues to determine that NPL is an appropriate surrogate producer, it should use the most contemporaneous financial statements available for NPL.

FMC did not comment on this issue.

Department's Position:

We agree with the respondent. As stated in response to Comment 1 above, we continue to find NPL an appropriate surrogate company for purposes of calculating surrogate financial ratios and, therefore, following our well-established practice, we have used the financial statements on the record for NPL that are most contemporaneous with the POR, those for fiscal year ending March 31, 2003. *See,* for example, *Certain Preserved Mushrooms From the People's Republic of China: Final Results and Partial Rescission of the Fourth Antidumping Duty Administrative Review*, 69 FR 54635 (September 9, 2004), and accompanying Issues and Decision Memorandum at Issue 7.

Comment 8: Affiliation between Chinese exporter and U.S. customer

FMC argues, since it is the Department's practice to base its margin calculations on the U.S. sale to the first unaffiliated party in the United States, the constructed export price (CEP) sales to a U.S. affiliate reported by Degussa-AJ in its U.S. sales listing should be excluded from the Department's calculations for the final results.

FMC comments that the respondent stated in its March 17, 2004, supplemental questionnaire response that, although these sales were made to the affiliate in the United States during the POR, the affiliate did not resell these shipments until after the POR. Thus, FMC concludes, these sales are not relevant for the calculation of the dumping margin in the instant 2002-2003 administrative review.

Contrary to FMC's assertion that Degussa-AJ reported certain sales made during the POR, the respondent states that Degussa-AJ, the producer of the merchandise, did not have any U.S. export sales during the POR and that all sales during the POR, including those in question, were made by the exporter, Ai Jian. Furthermore, the respondent does not concede that the U.S. customer under discussion is an affiliate of Ai Jian. The respondent explains that, under the circumstances of the case, it was reasonable for the Department to include these sales in its margin calculations and to calculate an assessment rate for this U.S. customer. Therefore, the respondent claims, the Department should not remove these sales from its analysis for the final results.

Department's Position:

Based on the respondent's comments in its March 17, 2004, supplemental questionnaire response, in which the respondent stated that Degussa-AJ sold subject merchandise to its affiliate

in the United States during the instant review, we conclude that this particular U.S. customer is an affiliate of Degussa-AJ. We are not persuaded by the respondent's comment, raised for the first time in its rebuttal brief, that it did not concede that it was affiliated with a U.S. customer. The respondent provided no evidence to support its position.

Therefore, we agree with FMC that we should exclude sales the respondent made to this particular U.S. customer during the instant review from our calculations for the final results.

Comment 9: Surrogate labor rate

The respondent states that the PRC wage rate calculated by the Department is unreasonably high and distorted and is not in accordance with section 773(c)(4)(A) of the Tariff Act of 1930, as amended, (the Act) which directs the Department to value factors of production in a comparable surrogate country. The respondent argues that the wage rate calculated for the PRC ($0.93) is significantly higher than the wage rate for India ($0.14), the primary surrogate country in the instant review. According to the respondent, this distortion stems from the fact that the PRC wage rate is derived from the Department's regression analysis that includes wage data from non-comparable high-wage countries such as Switzerland, the United Kingdom, Norway, and Germany. The respondent contends that to value the PRC's wage rate the Department should use only the Indian wage rate or use an average of the wage rates of market-economy countries that are at an economic level comparable to the PRC

In addition, the respondent contends, the Department's calculation of the PRC wage rate is inherently flawed because the calculation relies in part on PRC prices. According to the respondent, the Department's regression analysis is derived from the nominal per-capita GNI for the PRC and, therefore, the Department must assume that the per-capita GNI data are valid. The entire NME methodology, the respondent asserts, however, is premised on the belief that prices in NME countries are not valid or usable. In order to avoid this problem, the respondent maintains, the Department should use either the Indian wage rate, or only economically comparable market-economy wage rates, to value the PRC's labor wage.

Finally, the respondent argues, the Department's application of the PRC wage rate is improper because the Department has not disclosed fully the methodology or the source documentation used in calculating it. Citing Comment 23 of the Issues and Decision Memorandum for *Bedroom Furniture*, the respondent points out that the Department acknowledged that it may need to expand the amount of data used in its regression analysis. Notably, the respondent claims, the Department had not included the wage data for Indonesia and Morocco, two countries which the Department has deemed potential surrogate countries for PRC. Without full disclosure, however, the respondent contends, it is unable to comment specifically on the flaws in the Department's regression analysis and offer possible solutions.

FMC argues that the Department relied properly upon the 2001 regression-based wage rate of $0.90 to value labor in the Preliminary Results. FMC observes, however, that because the Department has since revised the expected wage rates using 2002 data, the Department should apply the revised rate for the PRC, $0.93, in the final results of this review because this information is more contemporaneous with the POR. FMC rebuts the respondent's assertions by

stating that, as discussed in the Issues and Decision Memorandum for *Bedroom Furniture* at Comment 23, applying India's average wage rate of $0.14, or applying an average of the wage rates of economically comparable market-economy countries, as the surrogate value for PRC labor contradicts the Department's regulations at section 351.408(c)(3).

Department's Position:

As an initial matter, we do not agree with respondent that we should use countrywide wage rates from economically comparable countries as a surrogate value for PRC labor. Use of such data as a surrogate for PRC labor would be contrary to law. Section 351.408(c)(3) of the Department's regulations directs the Department to value labor in cases involving NME countries as follows:

> For labor, the Secretary will use regression-based wage rates reflective of the observed relationship between wages and national income in market economy countries. The Secretary will calculate the wage rate to be applied in non-market economy proceedings each year. The calculation will be based on current data, and will be made available to the public.

As obligated, we have calculated the regression-based expected wage rate for the PRC in accordance with section 19 CFR 351.408(c)(3), and we have used this calculated regression-based expected wage rate for the PRC in our calculation of the final margins in this review, as was done in *Bedroom Furniture*. *See* Issues and Decision Memorandum for *Bedroom Furniture* at Comment 23. Contrary to respondent's allegations, the Department has fully disclosed these calculations and the underlying data sources, which are available on the Department's website.

As articulated recently in *Bedroom Furniture*, the Department is considering reevaluating the basket of countries it includes in its regression analysis. Such a reevaluation requires more time than is currently available in this review to determine an accurate construction of a new dataset and to conduct a new regression analysis. Further, re-estimating the relationship between GNI and wage rates using a regression analysis on a different basket of countries would be a significant change in the dataset. Such a change should be subject to comment from the general public. Thus, as stated in *Bedroom Furniture,* it would be inappropriate to restrict this public-comment process to the context of the instant review, and, consequently, we will invite comments from the general public on this matter in a proceeding separate from the current review.

Therefore, for the final results of this review, the Department used the 2004-revised expected wage rate of $0.93/hour as a surrogate for PRC labor costs, which the Department derived using its long-established methodology for the determination of the wage rate for the PRC.

Comment 10: Treatment of non-dumped sales

The respondent argues that the Department's calculation of the weighted-average dumping margins, in which the Department includes U.S. sales that were not priced below normal value in the calculation of the weighted-average margin *(i.e.*, "zeroing") does not produce fair comparisons to determine margins as accurately as possible. The respondent contends that the

practice distorts the margin calculation, creating dumping margins where no dumping has occurred and inflating margins where none exists. Therefore, the respondent asserts, the Department should take into account negative and positive net margins in order to perform an accurate antidumping calculation.

Moreover, the respondent contends that a World Trade Organization (WTO) dispute settlement panel ruled, and the Appellate Body affirmed, that the U.S. practice of "zeroing" is in violation of the Antidumping Agreement. Thus, the respondent asserts, in the weighted-average margin for the final results in this administrative review, the Department should include "negative margins."

FMC rebuts the argument set forth by the respondent that the Department should recalculate the antidumping margins without applying the Department's "zeroing" practice. Citing *SNR Roulements v. United States*, 341 F. Supp. 2d. 1334 (CIT 2004), FMC asserts that the U.S. Court of International Trade specifically upheld the Department's practice of "zeroing," notwithstanding the WTO determination on the issue.

FMC cites *Timken Co. v. United States*, 354 F. 3d. 1334, 1345 (Fed. Cir. 2004) (*Timken 2004*), and asserts that the United States Court of Appeals for the Federal Circuit (CAFC) held that the Department's so-called "zeroing" practice is a reasonable and permissible interpretation of the statute and is therefore in accordance with U.S. law.

Department's Position:

The Department has determined not to change its calculation of the weighted-average dumping margin as suggested by the respondent for the final results of this review. As we have discussed in prior cases, our methodology is consistent with our statutory obligations under the Act. *See*, *e.g.*, *Notice of Final Results of Antidumping Administrative Review and Notice of Final Results of Antidumping Duty Changed Circumstances Review: Certain Softwood Lumber Products from Canada*, 69 FR 75921 (December 20, 2004), and accompanying Issues and Decision Memorandum at Comment 4; *Final Results of Administrative Antidumping Review: Certain Welded Carbon Steel Pipes and Tubes from Thailand*, 69 FR 61649 (October 20, 2004), and accompanying Issues and Decision Memorandum at Comment 7; and *Notice of Final Results of Antidumping Administrative Review: Carbon and Certain Alloy Steel Wire Rod from Canada*, 69 FR 68309 (November 24, 2004), and accompanying Issues and Decision Memorandum at Comment 8.

As FMC has argued, the CAFC has affirmed the Department's methodology as a reasonable interpretation of the statute. *See Timken 2004* at 1342 - 34 (covering an antidumping administrative review of tapered roller bearings from Japan). More recently, the CAFC again affirmed the Department's methodology as consistent with the statute with respect to an antidumping investigation in *Corus Staal BV and Corus Stall USA Inc. v. Department of Commerce et. al.*, 04-1107 (CAFC 2005) (*Corus Staal*), issued January 21, 2005, at 8-9, *publication pending*. The Court in *Corus Staal* held that the Department's interpretation of section {771(35) of the Act} to permit this methodology was permissible whether it be in the context of an administrative review or investigation. *See id.* at 7.

With respect to the respondent's arguments involving the WTO decision in *United States – Final Determination on Softwood Lumber from Canada*, the CAFC stated in *Corus Staal* that WTO decisions are in no way binding on U.S. law, absent the express implementation process provided for in the statute involving not only the Department, but also the U.S. Trade Representative and Congress. *See id.* at 8-9 (relying, in part, on 19 U.S.C. 3512(a) and 2504(a) (2000) and *Suramerica de Aleciones Lamindas, C.A. v. United States*, 966 F. 2d 660, 688 (Fed. Cir. 1992)). Additionally, the underlying decision at issue in *United States – Final Determination on Softwood Lumber from Canada* was an investigation, whereas here we are conducting an administrative review and the relevant legal and practical issues differ.

In implementing the URAA, Congress made clear that reports issued by WTO panels or the Appellate Body "will not have any power to change U.S. law or order such a change." *See SAA* at 660. The *SAA* emphasizes that "panel reports do not provide legal authority for federal agencies to change their regulations or procedures . . . . " *Id*. To the contrary, Congress has adopted an explicit statutory scheme for addressing the implementation of WTO dispute settlement reports. *See* 19 U.S.C. § 3538. As is clear from the discretionary nature of that scheme, Congress did not intend for WTO dispute settlement reports to automatically trump the exercise of the Department's discretion in applying the statute. *See* 19 U.S.C. § 3538(b)(4) (implementation of WTO reports is discretionary); *see also SAA* at 354 ("After considering the views of the Committees and the agencies, the Trade Representative *may* require the agencies to make a new determination that is "not inconsistent" with the panel or Appellate Body recommendations...") (emphasis added).

As discussed below, we include U.S. sales that were priced above normal value in the calculation of the weighted-average margin as sales with no dumping margin. The value of such sales is included in the denominator of the weighted-average margin along with the value of dumped sales. We do not allow U.S. sales that were priced above normal value to offset dumping margins we found on other sales.
Section 771(35)(A) of the Act defines "dumping margin" as "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." Section 771(35)(B) of the Act defines "weighted-average dumping margin" as "the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer." The Department applies these sections by aggregating all individual dumping margins, each of which is determined by the amount by which normal value exceeds export price or CEP, and dividing this amount by the value of all sales. The use of the term "aggregate dumping margins" in section 771(35)(B) is consistent with the Department's interpretation of the singular "dumping margin" in section 771(35)(A) as applying on a comparison-specific level and not on an aggregate basis. At no stage in this process is the amount by which the export price or CEP exceeds the normal value on sales that did not fall below normal value permitted to cancel the dumping margins found on other sales.

This does not mean, however, that we ignore non-dumped sales in calculating the weighted-average dumping margin. It is important to recognize that the weighted-average margin reflects any non-dumped merchandise we have examined; the value of such sales is included in the

denominator of the weighted-average dumping margin while no dumping amount for non-dumped merchandise is included in the numerator. Thus, a greater amount of non-dumped merchandise results in a lower weighted-average margin.

Furthermore, this is a reasonable means of establishing estimated duty-deposit rates and assessing duties in reviews. The deposit rate we calculate for future entries must reflect the fact that U.S. Customs and Border Protection (CBP) is not in a position to know which entries of subject merchandise are dumped and which are not. By spreading the liability for dumped sales across all examined sales, the weighted-average dumping margin allows CBP to apply this rate to all merchandise subject to review. Finally, as implemented through the Uruguay Round Agreements Act, U.S. law is fully consistent with our WTO obligations.

Recommendation

Based upon our analysis of the comments received, we recommend adopting the above positions. If this recommendation is adopted, we will publish the final results in the *Federal Register*.

Agree_____ Disagree_____

_____
Joseph A. Spetrini
Acting Assistant Secretary
for Import Administration

_____
Date