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DATE: January 9, 2006

MEMORANDUM TO: David M. Spooner
Assistant Secretary
for Import Administration

FROM: Stephen J. Claeys
Deputy Assistant Secretary
for Import Administration

SUBJECT: Issues and Decision Memorandum for the Final Results of Folding Metal Tables and Chairs from the People's Republic of China

Background

On July 11, 2005, the Department of Commerce (the Department) published *Folding Metal Tables and Chairs from the People's Republic of China: Notice of Preliminary Results of Antidumping Duty Administrative Review* 70 FR 39726 (July 11, 2005) ("*Preliminary Results*") in the *Federal Register*. The period of review ("POR") is June 1, 2003, through May 31, 2004. The respondents in this case are Feili Furniture Development Ltd. Quanzhou City, Feili Furniture Development Co., Ltd., Feili Group (Fujian) Co., Ltd., and Feili (Fujian) Co., Ltd. (collectively "Feili Group"), and New-Tec Integration (Xiamen) Co. Ltd. ("New-Tec"). Other interested parties are Meco Corporation ("Meco"), a domestic producer of the like product and Cosco Home and Office Products ("Cosco"), an importer of subject merchandise.

In the preliminary results the Department applied total adverse facts available ("AFA") to New-Tec. However, on December 1, 2005, the Department issued the calculation of a margin for New-Tec applying partial adverse facts available. *See* Memorandum to Joseph A. Spetrini; Calculation of an Anti-Dumping Duty Margin of Review and Application of Partial Facts Available with an Adverse Inference for New-Tec Integration (Xiamen) Co., Ltd. (December 1, 2005) ("New-Tec Memo"), *see also* Memorandum to Wendy J. Frankel; Factors-of-Production Valuation for New-Tec Integration (Xiamen) Co., Ltd. Post- Preliminary Results (December 1, 2005) ("New-Tec FOP Memo") and Memorandum to the File; Calculation Memorandum, New-Tec Integration (Xiamen) Co., Ltd. (December 1, 2005) ("New-Tec Calculation Memo").

Surrogate value information and data were filed by Meco and New-Tec on January 7, 2005, and by Feili Group on January 7, 2005 and August 9, 2005. Cosco filed surrogate value information and data on December 12, 2005. We gave interested parties an opportunity to comment on the *Preliminary Results*. On December 8, 2005, we received case briefs from Meco and the

respondents. On December 9, 2005, we received a case brief from Cosco.[1] We received rebuttal briefs from Meco and respondents December 13, 2005, and from Cosco on December 14, 2005.[2]

List of Comments

[1]This case brief was timely because one copy was originally filed on December 8, 2005 as "bracketing not final."

[2]This rebuttal brief was timely because one copy was originally filed on December 13, 2005 as "bracketing not final."

Discussion of Issues

I. ISSUES RELATED TO BOTH RESPONDENTS

Comment 1: Financial Ratios

A. Issues Raised by Parties

Feili Group and New-Tec argue that the Department made errors in its calculation of the surrogate selling, general and administrative expense ("SG&A"), profit, and overhead ratios that it derived from the 2003-2004 Godrej & Boyce Manufacturing Co., Ltd., ("Godrej & Boyce") annual report. First, they claim the Department erred when it recorded the total value of "raw materials consumed and goods purchased" in its calculation worksheet. Specifically, they contend the Department inadvertently recorded only the value for raw materials consumed (6,656,472,000 rupees) when it should have recorded the total value for raw materials consumed and goods purchased (8,039,651,000 rupees). Feili Group states that the correction should be made in the calculation of the total material, direct labor, and energy used in the denominator of the surrogate SG&A, profit, and overhead calculations. Second, both parties state that the Department made two errors when transcribing numbers and failed to convert them from thousands of rupees to actual rupees. The two categories are "purchase of traded goods" and "employee welfare expenses." *See* Feili Group Brief at 2-4 and New-Tec Brief at 18-19.

Cosco asserts that in the calculation of the financial ratios, the Department should not have included "freight transportation and delivery charges" in the numerator for SG&A ratios because they have already been accounted for in the Department's margin analysis in building up the respondents' normal value. Cosco also points out that the Department removed movement (or freight-out) expenses for finished goods, including domestic movement expenses and international movement expenses from the respondents' U.S. sales prices. Cosco states that the inclusion of "freight" again as SG&A expenses double counts freight. *See* Cosco Brief at 15. Meco did not address any of these issues in its rebuttal brief.

Meco alleges that the Department understated the SG&A costs when it failed to include "Development and Construction Expenses" from Schedule Q (Property Development and Construction Expenses) of the Godrej and Boyce financial statements. It points out that this is contrary to the Department's established practice of including all expenses related to the operation of the company and asserts that there is no evidence that these expenses are not related to the operation of the company. *See* Meco Brief at 14.

In its rebuttal brief, Feili Group states that the Department's calculation of the surrogate SG&A ratio correctly did not include property development and construction expenses because these expenses relate only to construction in progress and cannot be attributed to production or sales activities that took place during Godrej & Boyce's relevant fiscal period. Feili Group then goes on to point out what it claims are additional errors in Meco's SG&A, profit, and overhead

calculation worksheet. *See* Feili Group Rebuttal Brief, at 3-4 citing Meco's Case Brief at 14 and Attachment A. First, Feili Group states that Meco incorrectly included "freight, transport, and delivery charges" and "motor car and lorry expenses" in the ratios, and contends it is the Department's normal practice in non-market economy (NME) proceedings to avoid double-counting certain expenses that already are deducted from U.S. price by not including in the calculation of the surrogate SG&A or overhead ratios any rebates, discounts or transportation expenses that might be reflected in the surrogate financial statement.[3] Second, Feili Group asserts that Meco did not offset total SG&A expenses by the total amount of "other income from operations" in Schedule M of the Godrej & Boyce financial statement. Feili Group maintains it is the Department's normal practice in NME proceedings to offset total SG&A expenses by any amount of non-operating income.[4] Finally, Feili Group argues that Meco incorrectly included "rates and taxes" in its calculation of the SG&A ratio. Feili Group claims it is the Department's normal practice in NME proceedings to deduct any taxes from its calculation of the surrogate SG&A ratio.[5] *See* Feili Group Rebuttal Brief at 3-5.

New-Tec adds that the Department should not include the line item "property development and construction expenses" in the calculation of the surrogate G&A ratio because in the profit and loss accounts of the Godrej and Boyce annual report, the auditor clearly specified that the line item "property development and construction expense" was an expense incurred for "commercial projects." New-Tec also points out that in Schedule Q of the profit and loss accounts notes, the auditor stated that all of the expenses included in the line item "property development and construction expense" were incurred for construction work-in-progress. New-Tec acknowledges that the Department generally includes all of the G&A expenses incurred from the general operations of the company in calculating the surrogate G&A ratio, but that the expenses that will be capitalized as fixed assets should not be included. New-Tec claims it is a commonly accepted accounting treatment that all of the expenses incurred related to the construction of fixed assets should be captured and capitalized as part of the asset's value when the construction is completed. New-Tec asserts that the fact that the Department did not include "decrease/increase in stocks of finished goods and work-in-process" and "expediter transferred to capital accounts" support this reasoning. *See* New-Tec Rebuttal Brief at 12-13.

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[3] *See* Feili Group Rebuttal Brief at 4 citing *Initiation of Antidumping Duty Investigations: Certain Lined Paper Products from India, Indonesia, and the People's Republic of China*, 70 FR 58374 (October 6, 2005), and other cases.

[4] *See* Feili Group Rebuttal Brief at 3-4 citing *Brake Rotors from the People's Republic of China: Final Results and Partial Recision of the Sixth Antidumping Duty Administrative Review and Ninth New Shipper Review,* 69 FR 42039 (July 13, 2004), and accompanying Issues and Decision Memorandum at Comment 1.

[5] *See* Feili Group Rebuttal Brief at 4 citing *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 Fed. Reg. 20594 (April 16, 2004), and accompanying Issues and Decision Memorandum at Comment 15.

B. Whether to Include Employee Benefits in the Overhead Ratio Calculation

On December 27, 2005, the Department invited interested parties to comment on the Department's proposal to include in the final results factory overhead calculation four items[6] from the surrogate financial statements. These items were treated as direct labor for purposes of calculating the surrogate overhead and SG&A ratios in the preliminary results. New Tec, Feili Group and Meco filed comments on December 30, 2005. In its December 27, 2005, letter the Department explained that it reconsidered the appropriate treatment of these items while addressing parties' comments an other aspects of the financial ratio calculations used in the preliminary results. In light of the statutory deadline for completion of this review, we informed parties that there would be no opportunity for rebuttal comments on this issue.

Meco argues that it is appropriate to move the four items in question from direct labor to manufacturing overhead in order to be consistent with the Department's regression-based methodology for calculating the expected PRC wage rate. First, Meco states that the Department relies on four data series in performing its regression analysis, the first of which is obtained from Chapter 5 of the International Labour Organization's ("ILO") *Yearbook of Labour Statistics* ("*YLS*").[7] Next, Meco points out that the explanatory notes to Chapter 5 of the *YLS* state that ". . .{e}arnings exclude employers' contributions in respect of their employees paid to social security and pension schemes and also the benefits received by employees under these schemes."[8] Meco states that it is, therefore, clear that the wage data the Department uses to calculate expected NME wage rates include wages and other remuneration paid directly to employees, but do not include employee benefits paid by the employer to employee retirement or welfare funds, adding that, in the surrogate financial statements used in this review, the four relevant expenses are distinct from salaries, wages and bonuses.

New-Tec contends that regardless of the substantive effect the proposed changes may have on the calculation of the surrogate overhead ratio, the timing of the Department's proposed changes significantly impedes parties' due process because they did not have an adequate opportunity to address the issue. New Tec also suggests that, given the due date for the final results, the Department may not have adequate time to consider parties' comments on this issue.

According to New-Tec, although several parties commented on the surrogate financial ratios, no party addressed this particular change to the surrogate financial ratios. Furthermore, New-Tec claims that the proposed change cannot be characterized as a response to an inadvertent error but,

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[6] The four labor cost items are: employees provident and other funds, employees gratuity trust fund, workman and staff welfare expenses, and voluntary retirement compensation.

[7] *See Expected Non-Market Economy Wages: Request for Comment on Calculation Methodology*, 70 FR 37761, 37762 (June 30, 2005) (*Request for Comment on Calculation Methodology*).

[8] *See* Meco's December 30, 2005, submission citing Chapter 5, "Wages," and specifically Table 5b, "Wages in Manufacturing" of the *YLS* at 871.

rather, represents an intentional methodological change that is inconsistent with the Department's past practice, where the Department has recognized employee benefits categories as labor expenses and not as overhead expenses.[9] Finally, New Tec asserts that the proposed change is problematic in the sense that it can only increase the surrogate overhead ratio, without providing any offset to some other factor or expense that would serve to neutralize the effect of the proposed change.

Feili Group states that the Department should not change its long-standing practice of including employee benefits in the labor component of surrogate producers' costs of production.[10] Feili Group maintains that the *YLS* states that the wage rates used in the Department's regression analysis are comprehensive wage rates that include overtime, bonuses, holiday pay, incentive pay, pay for piecework, and cost-of-living allowances. In support of its claim that the wage rates used in the Department's regression analysis are comprehensive, Feili Group submitted establishment surveys obtained from the ILO website for the countries identified as potential surrogate countries for this review.[11] (Feili Group stated that it was not practical to submit establishment surveys for all of the countries that form the basis of the Department's expected PRC wage rate.) Feili Group argues that the wages reported to the ILO by these countries include remuneration for overtime, bonuses and gratuities, family allowances, provident and welfare funds, and other types of social security payments.

Department's Position:

A. Issues Raised by Parties

We agree that we should include "purchase of traded goods" with "raw materials consumed" but then include the "purchase of traded goods" in the denominator of only SG&A and profit, but not in the denominator of the overhead expense. We also agree that we inadvertently transcribed two numbers and failed to convert them from thousands of rupees to actual rupees. The two categories are "purchase of traded goods" and "employee welfare expenses." We have corrected these for the final results. *See* Factors-of-Production Valuation for Final Results Memorandum from Marin Weaver, Cathy Feig, and Frances Veith to Wendy Frankel, January 9, 2006.

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[9] *See* New-Tec's December 30, 2005, submission citing *Sebacic Acid From the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 64 FR 69503, 69505 (December 13, 1999) ("*Sebacic Acid*").

[10] *See* Feili Group's December 30, 2005 submission citing *Pure Magnesium From the People's Republic of China: Final Results of Antidumping Duty New Shipper Administrative Review* 63 FR 3085, 3091 (January 21, 1998) ("*Pure Magnesium*") (where the Department stated: "Therefore, consistent with Department practice, we have not included provident fund payments and employee welfare expenses in the numerator of the factory overhead rate calculation"), and *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China; Final Results of 1997- 1998 Antidumping Duty Administrative Review and Final Results of New Shipper Review*, 64 FR 61837, 61842 (November 15, 1999) ("*TRBs*") (where the Department stated that the wage rates used in its regression analysis were fulyl-loaded and declined to adjust the regression-based wage rates used to value labor).

[11] Feili Group submitted information on India, Indonesia, the Philippines, Sri Lanka and Egypt.

Further, consistent with past practice, we will exclude movement expenses related to the sale of finished goods, but not movement expenses related to the manufacturing of products. Therefore, we determine that it is correct to exclude from the calculation "freight transportation and delivery charges," but not to exclude "motor car and lorry expenses" because the latter category is not related to the sales of finished goods.

We will include "property development and construction expenses" in the financial ratios because it is an expense, not assets. Additionally, we will also include "less expenditure transferred to capitalization account" as a reduction to this expense. The Department includes development and construction expense-related items if they are recorded as an expenses, but not if they are recorded as an asset. Consistent with the Department's past practice, we included the change in "Work in Progress" in the denominator used to calculate the manufacturing overhead ratio. However, we separated the depreciation expense amount between manufacturing overhead and SG&A. Depreciation for "Vehicles and Machinery" was allotted to SG&A and the other depreciation expenses were allotted to manufacturing overhead.

We have also included deductions for "leave and license dues and rent," "ground rent," "provision for service contract expense written back," and "profit on sale of immoveable property." We have excluded the following income items: "sales including excise duty," "excise duty," "dividends from subsidiary companies," "other dividends," "sundry receipts," "excess provisions of previous year written back," "export incentives," and "profit on sale of investments."

The Department's practice is to exclude excise and/or sales tax, but to include other taxes that are a necessary part of business operation. Specifically the Department's standard practice is to calculate surrogate values net of taxes, and include a value for "rates and taxes" in the calculation of SG&A. Therefore, to remain consistent with past practice, the Department will include rates and taxes in its calculation of SG&A.[12]

Finally, in the *Preliminary Results* the Department included "Employees Provident and Other Funds," "Employees Gratuity Trust Fund," "Workman and Staff Welfare Expenses," and "Voluntary Retirement Compensation" under direct labor on the surrogate financial ratios spreadsheet. The Department annually calculates an expected NME hourly wage rate that includes "Worker Coverage" (*e.g.*, wage earners or salaried employees) and "Type of Data" (*e.g.,* per hour, per month). However, the expected NME hourly wage rate calculation does not include employee benefits. Therefore, employee benefits should be included in manufacturing overhead. In the *Preliminary Results* we excluded wages and earnings from the overhead calculation, but also inadvertently excluded employee benefits. In order to be consistent with the Department's methodology for the calculation of the expected NME wage rate, we have included the

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[12] *See, e.g.*, *Notice of Amended Final Determination and Antidumping Duty Order: Manganese Metal from the People's Republic of China*, 61 FR 4415, (February 6, 1996) at Allegation 8, where the Department found that rates and taxes are properly included in SG&A.

aforementioned items in the manufacturing overhead calculation. However, we did not correctly apply this methodology in the *Preliminary Results* and no parties commented on it in the briefs; therefore, we issued a letter to interested parties seeking comments. *See* Letter from Wendy Frankel to All Interested Parties Regarding Surrogate Financial Ratios (December 27, 2005)

B. Whether to Include Employee Benefits in Overhead Calculation

Moving the relevant employee benefits categories from direct labor to manufacturing overhead is consistent with our regression-based expected PRC wage rate calculation. The Department based its calculation of the expected PRC wage rate on the ILO's categorization of information provided by the countries it surveys. Information from the ILO website defines separately wages and labor costs. Specifically, Chapter 5, "Wages," are defined thusly:

> The concept of earnings, as applied in wages statistics, relates to remuneration in cash and in kind paid to employees, as a rule at regular intervals, for time worked or work done together with remuneration for time not worked, such as for annual vacation, other paid leave or holidays. Earnings exclude employers' contributions in respect of their employees paid to social security and pension schemes and also the benefits received by employees under these schemes. Earnings also exclude severance and termination pay.[13]

On the same web page, Chapter 6, "Labour Costs," are defined as including employee benefits:

> For the purposes of labour cost statistics, labour cost is the cost incurred by the employer in the employment of labour. The statistical concept of labour cost comprises remuneration for work performed, payments in respect of time paid for but not worked, bonuses and gratuities, the cost of food, drink and other payments in kind, cost of workers' housing borne by employers, employers' social security expenditures, cost to the employer for vocational training, welfare services and miscellaneous items, such as transport of workers, work clothes and recruitment, together with taxes regarded as labour cost. . . .[14]

It is clear that the wages category (Chapter 5) is exclusive of employee benefits such as pension and social security, while the labor cost category (Chapter 6) is inclusive of these employee expenses. As we stated in the *Request for Comment on Calculation Methodology,* the Department based its calculation of the regression-based expected PRC wage rate on data from Chapter 5B of the *YLS*. In the instant review, the detailed and well-defined surrogate financial data permitted the Department to easily segregate labor expenses into "Wages" (which corresponds to Chapter 5B of the ILO database and, therefore, to the Department's expected

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[13] http://laborsta.ilo.org/ (emphasis added).

[14] *Id.*

NME wage rate), and the other aforementioned labor costs (which are not included in the Department's calculated NME wage rate). Accordingly, to be consistent with the methodology employed in calculating the expected PRC wage rate, we have determined that, in this instance, it is appropriate to include these employee benefit categories in factory overhead in order to ensure that they are captured in our calculation of normal value.

New Tec and Feili have argued that the Department's practice has been to include such employee benefits items in its direct labor calculation. We are not convinced by the cases they cite that we should treat these items as direct labor in the instant review. For example, the respondents in *Sebacic Acid* argued that indirect labor was included in the surrogate factory overhead calculation and, as a result, the Department was double-counting by also including separately indirect labor in its calculation of normal value. The Department determined that the surrogate financial data indicated that labor costs, whether direct or indirect, were reported under separate categories (*i.e.*, Salaries, Wages and Bonuses, Provident Fund, and Employees' Welfare Expenses). As a result, the Department concluded that there was no basis to believe that cost elements included in the factory overhead calculation contained labor costs associated with production; therefore, there was no reason to believe that including reported indirect labor hours would lead to the double-counting of unskilled labor factors. Accordingly, consistent with prior segments of the case, the Department followed its precedent by "including indirect labor hours as reported by the respondent in {the} normal value calculation."[15] Therefore, the Department determined in *Sebacic Acid* that it should add an amount for indirect labor in the calculation of normal value. Similarly, in the instant review, because our regression-based expected PRC wage rate does not include indirect labor components, and because the employee benefit categories are listed separately in the surrogate financial statements, it is appropriate that we add them to our normal value calculation. We have determined that the appropriate methodology for doing so is to include these items in factory overhead. The important distinction between the two cases is that in *Sebacic Acid* the Department was able to capture indirect labor costs by requiring respondents to report indirect labor hours, whereas in the instant review we are capturing indirect labor costs by virtue of the specific items identified in the surrogate financial statements.

In *Pure Magnesium*, the Department stated that information contained in the *YLS* stated that

> the Indian wage rate is a comprehensive wage rate which also includes employers' social security expenditures and welfare services. Therefore, consistent with Department practice, we have not included provident fund payments and employee welfare expenses in the numerator of the factory overhead rate calculation.

This indicates that in *Pure Magnesium* the Department's determination as to whether employee benefits should be treated as labor or overhead was based on a consideration of the *YLS* description of Indian wage rates. In the instant review, we have made that determination based on Chapter 5 of the *YLS*, which is based on a basket of countries, not Indian wage rates alone.

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[15] *Sebacic Acid*, 64 FR 69503, 69505 (December 13, 1999).

Consequently, because Chapter 5 does not include these employee benefit categories, it is appropriate that we add them to our overhead calculation.

In *TRBs*, the Department stated that, according to the *YLS*, the wage rates used to calculate the regression-based expected wage rate "are comprehensive wage rates" which include overtime, bonuses, holiday pay, incentive pay, pay for piecework, and cost-of-living allowances. Therefore, the Department stated that for purposes of the final results in that case, it did not adjust the regression-based wage rate used in the preliminary results. For the instant review we have determined that the wage rates as defined by Chapter 5 of the *YLS* do not include, *inter alia*, employee benefits. Importantly, because the surrogate financial statements used in the instant review clearly identify line items that represent labor costs that are not part of the items included in Chapter 5 of the *YLS*, we have determined that it is appropriate to include these items in the overhead calculation.

Finally, we note that there are instances in previous cases where the Department did find it necessary to add to its overhead calculation an amount for labor where it determined that the surrogate factory overhead did not include a labor component, and indirect labor would otherwise not be captured in the calculation of normal value.[16] Thus, the question of whether or not to add amounts for labor to the overhead calculation is dictated by the record evidence and must be considered on a case-by-case basis.

Comment 2: Use of Market-Economy Purchase Prices

Meco makes two arguments regarding market-economy (ME) purchases by Feili Group and New-Tec. First, Meco argues that the Department should only value those inputs actually purchased from ME countries with ME prices, noting the statutory provision[17] that stipulates that the Department normally uses an NME respondent's actual purchase prices only when they are in an ME currency and from suppliers located in ME countries. Additionally, Meco argues that the transaction volumes must be meaningful and the sales price must be *bona fide*.

According to Meco, the Department's current methodology does not create a normal value as the statute intended, and this review is an appropriate place to correct this and implement a policy change. Meco claims that only the portion of inputs sourced from an ME country and paid for in an ME currency can be categorized as inputs purchased at market prices. It points out that those inputs purchased in the PRC do not constitute ME purchases. Therefore, contends Meco, to apply the ME prices of an input to the portion of that input purchased in the PRC "fails to account appropriately for the distortions inherent in the prices for the Chinese-produced

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[16] *See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Manganese Metal From the People's Republic of China*, 60 FR 56045, 56050 (November 6, 1995) (where normal value was referred to as fair market value).

[17] *See* Meco Brief at 1 citing sections 771(18)(A) and 773(c)(A) of the Tariff Act of 1930, as amended (the Act").

inputs."[18] Meco maintains that this contradicts sections 771(18)(A) and 773(c)(A) of the Act, which mandate that the Department value factors of production (FOPs) using prices from am ME country at a similar level of development compared to that of the NME country (in this case, the PRC).

Meco asserts that with the Department's publication of the *Federal Register* (FR) notice soliciting comments on its ME input practice,[19] the Department expressed concerns that its current methodology allows for margin manipulation through the sourcing of only a portion of an input from an ME country. Meco points out that the Department is considering whether to either set a specific threshold for finding an ME purchase "meaningful" or to value only the portion purchased from ME countries with ME prices and use a surrogate value for the portion of the input purchased domestically.

Second, Meco argues that the Department should not use any of the respondents' ME purchase prices without first finding that they are representative of what the ME supplier normally charges. It acknowledges that while the Department currently will not use prices (either ME or surrogate) from countries where there is reason to believe or suspect the prices are dumped or subsidized, the Department requires specific evidence of an antidumping duty order or evidence of subsidies to make these exclusions. According to Meco, these criteria ignore situations where a respondent price paid is "clearly aberrant to prices in other countries."[20] Meco argues that, especially because there was no verification, the Department should carefully examine all of the respondent ME purchases and ensure that they are comparable to prices normally paid for those inputs. Additionally, Meco maintains that the Department has not ensured the respondents are not affiliated with their suppliers and that purchases through trading companies were of items produced in ME countries. This can be done, Meco states, by comparing the respondent's ME prices to publicly available world prices. Meco asserts that if the Department uses the ME data, at a minimum, only "those prices that are representative of prices that {ME} suppliers usually charge"[21] should be used.

In its rebuttal, New-Tec argues that Meco erroneously stated that New-Tec had purchases of numerous inputs from both ME and NME sources. New-Tec explains that only its purchases of polyurethane foam were from both ME and domestic suppliers.[22] Even for that input, New-Tec

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[18] *See* Meco Brief at 2.

[19] *See* Meco Brief at 3 citing *Market Economy Inputs Practice in Antidumping Duty Proceedings Involving Non-Market Economy Countries: Request for Comments*, 70 FR 30418 (May 26, 2005) (*ME Input FR).*

[20] *See* Meco Brief at 3.

[21] *See* Meco Brief at 3.

[22] *See* New-Tec's Rebuttal at 2 citing New-Tec's September 24, 2005, Section C and D response at Exhibit 4 (A); New-Tec's June 22, 2005, Response at Exhibits 3 and 4; and New-Tec's FOP Memo at 3 and Attachment 2.

states that nearly all of its purchases were from ME countries. New-Tec maintains that for the final results of this review, the Department should use New-Tec's ME purchase prices consistent with section 351.408(c)(1) of the Department's regulations and the Department's normal and established practice as discussed in *Antidumping Duties; Countervailing Duties; Final Rule*, 62 FR 27296, 27366 (May 19, 1997) (*Preamble*).

In response to Meco's second argument, New-Tec states that Meco is wrong in claiming that the Department must establish that ME purchase prices are consistent with those normally charged by ME suppliers. Further, New-Tec points out that Meco has not shown that New-Tec's ME purchase prices are not representative.

Feili Group states that it provided all of the necessary information on its ME purchases, and asserts that the Department should use all purchases, even these from countries the Department excludes for having "generally available export subsidies." *See* Comment 10, below. Feili Group argues that the Department's *Preliminary Results* do not mention a need to limit ME prices to those raw materials sourced from ME suppliers. Feili Group acknowledges that although the Department is in the middle of soliciting public comments regarding a change in how it handles surrogate values, the Department is still considering these comments and should only apply any changes to proceedings initiated after such a change in policy is announced. *See* Feili Group Rebuttal at 2.

Finally, Feili Group counters Meco's comments that the Department should use Feili Group's ME raw material purchases only to the extent that the prices Feili Group paid are "representative of prices that ME suppliers normally charge," arguing that there is no evidence on the record that Feili's ME prices are not representative or that they are aberrational. *See* Feili Group Rebuttal, at 2.

Department Position:

In antidumping proceedings involving NME countries, the Department calculates normal value by valuing the NME producers' FOPs, to the extent possible, using prices from an ME that is at a comparable level of economic development and that is also a significant producer of comparable merchandise. The goal of this surrogate factor valuation is to use the "best available information" to determine normal value. *See* section 773(c)(1) the Act; *Shangdong Huraong General Corp. v. United States*, 159 F. Supp.2d 714, 719 (CIT 2001).

Where a portion of the input is purchased from an ME supplier and the remainder from an NME supplier, the Department will normally use the price paid for the inputs sourced from ME suppliers to value all of the input,[23] provided the volume of the ME inputs as a share of total purchases from all sources is "meaningful." The term "meaningful," used in the Preamble to the Regulations, is interpreted by the Department on a case-by-case basis. *See Preamble*, 62 FR at

[23] *See* 19 CFR 351.408(c)(1)

27366. *See also Shakeproof v. United States*, 268 F.3d 1376, 1382 (Fed. Cir. 2001) (*Shakeproof*). This ME input price must also reflect arm's-length, *bona fide* sales. *See Shakeproof,* 268 F.3d at 1382-83.

Additionally, the Department disregards ME input purchases when the prices for such inputs may be distorted or when the facts of a particular case otherwise demonstrate that ME input purchase prices are not the best available information. For example, the Department disregards all input values it has reason to believe or suspect might be dumped or subsidized. *See China National Machinery Import & Export Corporation v, United States*, 293 F. Supp. 2d 1334 (CIT 2003), *aff'd*, 104 Fed. Appx. 183 (Fed. Cir. 2004). The Department has also disregarded the prices of inputs that could not possibly have been used in the production of subject merchandise during the period of investigation or review. *See, e.g., Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp from the Socialist Republic of Vietnam*, 69 FR 71005 (December 8, 2004), and accompanying Issues and Decision Memo at Comment 8A.

The Department further does not accept ME input purchase prices when the input in question was produced within an NME. *See Final Determination of Sales at Less Than Fair Value: Polyethylene Retail Carrier Bags from the People's Republic of China*, 69 FR 34125, and the accompanying Issues and Decision Memorandum at Comment 4 (June 18, 2004), and Polyethylene Retail Carrier Bag Committee v. United States, Slip Op. 05-157 (CIT December 13, 2005). As Meco asserts, the Department is soliciting comments on changing its methodology for considering ME purchase prices. However, the Department is still in the process of collecting and analyzing comments, so it has not yet finalized this analysis. Therefore, in terms of valuing inputs with at least a portion from an ME supplier, the Department will continue to follow its past practice. Regarding Meco's comment that the Department should first determine if the ME prices are representative prices, the Department has typically considered ME purchases made from an unaffiliated supplier to be acceptable ME purchases absent evidence to the contrary. The Department has no reason to question the viability of such transactions in this case as no party has provided evidence that these are not reliable prices. Therefore, in this case, we will continue to value ME purchases as we did in the *Preliminary Results*.

Comment 3: Surrogate Labor Rate

Feili Group argues that for the final results the Department should continue to use the 2002 PRC expected hourly wage rate used in the *Preliminary Results*. According to Feili, the surrogate 2003 expected wage rate for the PRC does not adhere to the statutory requirement that the Department use "the prices or costs of factors of production in one or more market economy countries that are – A) at a level of economic development comparable to that of the nonmarket economy country, and B) significant producers of comparable merchandise."[24]

[24] *See* Feili Case Brief at 5 citing 19 USC 1677b(c)(4).

Feili asserts that, on one hand, the Department's proposed use of the 2003 wage rate contradicts the statute because the majority of countries used in the regression analysis are not at a level of economic development comparable to that of the PRC and/or are not significant producers of comparable merchandise. On the other hand, Feili claims that the Department's corrected regression analysis excludes, without explanation, 14 market economy countries, and that the exclusion of these countries conflicts with the rationale expressed by the Department when it adopted the regression-based wage rate regulation, *i.e.*, that more data are better than less data and, accordingly, the regression-based approach yields a more accurate result because it relies on multiple countries. Therefore, Feili submits, if for the final results the Department applies its 2003 regression-based surrogate wage rate to value Feili's reported labor hours, it should use all available country data. Finally, Feili states that it incorporates by reference the labor-rate related arguments made by New-Tec.[25]

New-Tec also asserts that the Department's 2003 wage rate is flawed because it includes rates from countries that are not economically comparable to the PRC and excludes rates from countries that are. New-Tec argues that for the final results the Department should correct its surrogate labor rate to properly include all, and only, those countries that are economically comparable to the PRC. Specifically, New-Tec maintains that the expected wage rate for the PRC is unreasonably high because the Department's regression analysis includes non-comparable high-wage countries, such as Switzerland, the United Kingdom, Norway, and Germany, and excludes comparable countries.

According to New-Tec, the Department has acknowledged that its original 2002 wage rate was erroneous, and has taken remands in two cases[26] for the purpose of recalculating the expected wage rate for the PRC. While the Department's corrected wage calculation properly included source data from the correct time period, New-Tec argues, the Department improperly based the revised wage rate on the same data points from the same non-comparable source countries used in the original calculation. New-Tec points out that in promulgating the current regulation the Department explained that the regression-based methodology "enhances the accuracy, fairness, and predictability" of the Department's margin calculations in NME cases. New-Tec maintains that the Department cannot achieve its goal of predictability where it arbitrarily includes or excludes certain countries' wage data from the calculation of the surrogate wage rate for the PRC. Moreover, New-Tec asserts that for the reasons stated above the Department's current surrogate wage rate lacks a rational economic basis, and argues that the Department should add economically comparable countries and remove non-economically comparable countries from the

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[25] *See* Feili Case Brief at 6.

[26] *See* New-Tec Case Brief at 15 citing *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 Furniture*) at Comment 23; and *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) (*Shrimp*).

wage rate calculation used for the final results.[27]

Meco states that for the final results the Department should use the current 2003 expected NME wage rate for both respondents. Meco also points out that the case brief deadline for this review is more than 14 days after the rates were published (November 9, 2005), and the Department's stated policy is to use the rates currently posted on its web site in all segments of NME proceedings in which the rates were posted more than 14 days before the deadline for submission of case briefs.[28]

Department's Position:

For the final results, consistent with the Department's regulations, we have applied to both respondents the most recent surrogate wage rate posted to the Department's web site.

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.

In the *Preambl*e, the Department explained the rationale for its calculation of expected NME wages, stating that, in general, more data are better than less data, and that averaging multiple data points (or regression analysis) should lead to more accurate results in valuing any factor of production.[29]

Accordingly, recalculating the regression analysis by using a different basket of countries would amount to a significant change in the Department's current methodology. The Department declines to do so in the context of the current review. We note that the Department has invited and received comments from the general public on this matter in a proceeding separate from the current review of this order.[30]

Since the *Preliminary Results*, the Department has revised its calculation of expected wages of

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[27] *See* New-Tec Case Brief at 14-18.

[28] *See* Meco Rebuttal Brief at 19.

[29] *See Preamble*, 62 FR at 27367.

[30] *See Expected Non-Market Economy Wages: Request for Comment on Calculation Methodology*, 70 FR 37761 (June 30, 2005).

selected NME countries. *See* http://ia.ita.doc.gov. The Department's revised calculation of expected NME wages is consistent with its normal methodology and is based on the most current data available as of November 2005. Furthermore, the Department believes that its current calculation of expected NME wages is reasonable and correct. Accordingly, for the final results of this review, the Department has valued labor with its expected NME wage rate for the PRC at USD $0.97 per hour.

II. ISSUES SPECIFIC TO NEW-TEC

Comment 4: Treatment of Zero-Priced Transactions

New-Tec argues that the Department incorrectly determined that New-Tec's zero-priced transactions should be included in the margin calculation as U.S. sales. New-Tec points out that in the *Preliminary Results* the Department applied total AFA, stating that it lacked sufficient documentation to provide a reliable basis for deciding on the proper treatment of New-Tec's zero-priced transactions. At the time, according to New-Tec, the Department acknowledged that supplemental questionnaire references to sample sales "may have been a source of confusion because parties may have understood the term 'sales' to refer only to transactions with remuneration."[31]

While acknowledging that the Department ultimately has the legal authority to determine whether certain transactions should be excluded as samples, New Tec submits that it should not be held accountable for the alleged response deficiencies identified by the Department in the revised preliminary results. New-Tec argues that it never had the opportunity to address alleged deficiencies in its questionnaire responses because the Department's supplemental questionnaires did not specifically articulate or identify such alleged deficiencies. Further, New-Tec and Cosco maintain that the Department failed to address the substantial evidence provided by New-Tec; evidence that they claim was fully responsive to all of the Department's supplemental questionnaires. New-Tec and Cosco add that this included not only information that was within their control, but also additional information that was not within their control (*e.g.*, import documentation associated with the shipment of "samples").

Given that the Department stated in the *Preliminary Results* that New-Tec's reporting deficiencies may have been attributable – at least in part – to possible confusion over terminology used in supplemental questionnaires, the Department stated that it would allow New-Tec the opportunity after the preliminary results to substantiate its claim that the transactions in question were "sample transactions at zero value." In so doing, New-Tec claims that the Department specifically articulated the standard for establishing the transactions as samples was whether New-Tec could provide documentation to demonstrate that the transactions

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[31] New Tec Case Brief at 3.

were "at zero value" or "samples for which no payment was required."[32] New-Tec notes that while preparing responses to the Department's July 1, September 7, and September 16, 2005 supplemental questionnaires, all issued after the preliminary results, it made special efforts to consult with the Department to ensure that it was providing information that was responsive to the Department's requests for information.

New-Tec asserts that in issuing amended preliminary results the Department noted that New-Tec had provided enough information to allow the Department to calculate a margin. The Department included an analysis of the purported sample transactions, which, according to New-Tec, is proof that New-Tec had remedied any reporting deficiencies regarding the claimed sample transactions such that the Department now had confidence that the potential universe of New-Tec's U.S. sales had been adequately reported. However, in deciding that New-Tec had failed to demonstrate that the claimed transactions were indeed samples, New-Tec maintains that the Department identified issues that had not been raised in any of the three post-preliminary supplemental questionnaires.

New-Tec disagrees with the Department's suggestion that New-Tec had merely labeled these transactions as samples. New-Tec argues that its supplemental questionnaire responses provided details supporting its claim that these transactions were samples. New-Tec and Cosco state that record evidence demonstrates that these transactions represented a very small percentage of the total reported U.S. sales. Further, New-Tec provided affidavits from its customers attesting to the non-commercial nature of these transactions, detailed sales reconciliation worksheets showing that these sales had to have been provided free of charge, and factor reconciliation worksheets showing that the material, labor and energy consumption associated with these transactions was fully reported. Cosco adds that the size and manner of shipment differ significantly between samples and commercial sales.

New-Tec also declares that the Department was wrong to focus on language from *NSK Ltd. v. United States,* 217 F. Supp. 2d 1291, 1312 (CIT July 8, 2002) (*NSK 2002*), where the CIT questioned why a product would be provided as a sample following a commercial bulk purchase. New-Tec states that while it originally described its samples as prototypes for the development of new products, it later clarified the record and explained in its July 29, 2005, supplemental questionnaire response that it also provided samples of existing products for use in testing and for demonstration and display purposes. According to New-Tec, the Department chose not to question those explanations despite the fact that it issued two additional supplemental questionnaires that included other questions related to samples.

Cosco agrees that the facts of the instant review are clearly distinguishable from those in *NSK 2002*. Cosco points out that it is not the final link in the distribution chain for New-Tec's products, and that the multiple units of samples sent by New-Tec serve as an instrument by which New-Tec can advertise/promote its products for customers in the United States. Cosco

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[32] New Tec Case Brief at 4 citing *Preliminary Results*, 70 FR at 39729.

claims in its case brief that, according to its normal business practice for selling consumer products, it frequently asks New-Tec "to modify the design for any product to accommodate the demands of its own customers, to improve its product and to lower costs." *See* Cosco Brief at 7 and 8. According to Cosco, it is a common practice for a producer to absorb costs in the form of free samples in order to solicit orders from its U.S. customers. Cosco adds that there is no evidence that New-Tec's provision of free samples of non-subject merchandise compromises the fact that it received no consideration for the samples of subject merchandise sent to its U.S. customer, and that the number and type of free non-subject samples were related to the business arrangements for products outside the scope of this review.

New-Tec claims that there is affirmative record evidence – in the form of declarations submitted by New-Tec's customers – attesting to the fact that no consideration was given by New-Tec's customers for the samples. Moreover, according to New-Tec, the Department identified nothing that suggests that consideration was offered for these samples and, at a minimum, the information provided by New-Tec and its customers is sufficient to shift the burden to the Department to explain why the record evidence supports a finding that these transactions are sales.

According to New-Tec, the Department's unwillingness or inability to articulate what additional information would have been enough to prove the negative, *i.e.*, that no consideration was given for these transactions, is particularly troubling in view of the "substantial volume of documentation" that New-Tec did provide. New-Tec claims that the Department is now penalizing New-Tec for not providing information it does not have or control. Citing section 351.308(a) of the Department's regulations, New-Tec notes specific circumstances in which the Department can make determinations based on facts available: 1) if necessary information is not on the record, or 2) a party fails to provide information as requested by the Department, impedes a proceeding, or provides information that cannot be verified. However, New-Tec maintains that the Department cannot penalize a respondent for not providing information that does not exist.[33]

New-Tec and Cosco argue that to be consistent with its prior practice, the Department should find that New-Tec has provided enough information proving that the sample transactions in question should be excluded from the U.S. sales database. New-Tec asserts that the factual record in the instant review is similar to the facts in *PET Resin from Indonesia* – where the Department concluded than the transactions at issue were samples and were excluded from the Department's analysis.[34] However, New-Tec claims it has provided even more information in

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[33] *See* New Tec Case Brief at 8, citing *Peer Bearing Co. v. United States,* 25 C.I.T. 1199, 1204 (2001) (citing *Olympic Adhesives v. United States*, 899 F.2d 1565 (Fed. Cir. 1990)).

[34] *See* New Tec Case Brief at 9 - 10 citing *Notice of Final Determination of Sales at Less Than Fair Value: Bottle-Grade Polyethylene Terephthalate (PET) Resin From Indonesia*, 70 FR 13456 (March 21, 2005) (*PET Resin from Indonesia*), and accompanying Issues and Decision Memorandum at Comment 8; *See also,* Cosco Case Brief at 9 citing *Notice of Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp From Ecuador*, 69 FR 76913 (December 23, 2004).

support of its argument than was considered by the Department in *PET Resin from Indonesia*. Cosco points out that this practice has been affirmed by the courts.[35] As a result, New-Tec feels that the Department should likewise find New-Tec's zero-priced transactions to be samples and exclude them from the margin calculation.

Meco argues that if the Department does not apply total AFA to New-Tec, it should at a minimum affirm its determination that New-Tec's post-preliminary results submissions were deficient and that New-Tec did not sufficiently establish that all of its purported sample transactions were for no consideration.[36] Meco then lays out the Department's findings from New-Tec's submissions, including:

- New-Tec's failure to provide CONNUMs for any of the purported samples;

- not identifying sales as samples even though they had product codes identical to subject merchandise in the U.S. sales database, but were not accounted for in the air shipment log;[37] and

- failing to provide sufficient information on certain samples, making it impossible for the Department to assign a CONNUM and compare these pieces to the appropriate FOPs.[38]

Meco argues that because the Department found that New-Tec "withheld information the Department requested and failed to report some U.S. transactions" the Department should resort to "facts otherwise available in determining a margin" for these sales and apply an adverse inference.[39]

Meco then supports the Department's determination that New-Tec did not substantiate all of its claimed sample transactions. Meco provides examples of such information and states that it is reasonable for the Department to expect that New-Tec should have been able to substantiate all purported sample transactions in its air shipment log, based on the court determination that the party in possession of the information has the burden of producing that information to obtain a

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[35] *See AK Steel Corp. v. United States*, 226 F.3d. 1361, 1371 (Fed. Cir. 2000); *NSK et al., v. United States*, 115 F.3d. 965, 975 (Fed. Cir. 1997); *See also, FAG (UK) Ltd. et. al. v. United States*, 24 F. Supp. 2d 297, 301 (CIT 1998); *See also, SKF USA, Inc. v. United States*, 23 C.I.T. 402, 409 (1999).

[36] *See* Meco Rebuttal Brief at 8 citing Department Memorandum, Calculation of an Antidumping Duty Margin of Review and Application of Partial Facts Available with an Adverse Inference for New-Tec Integration (Xiamen) Co., Ltd., at 2 (December 1, 2005) citing NTN Bearing Corp. v. United States, 248 F. Supp. 2d 1256, 1287 (CIT 2003).

[37] Meco Rebuttal Brief at 9 citing New-Tec's July 29, 2005, Supplemental Questionnaire Response at 1 explaining that all of its purported samples were shipped by air.

[38] Meco Rebuttal Brief at 9 citing New-Tec's July 29, 2005, Supplemental Questionnaire Response at 5-6.

[39] Meco Case Brief at 12-13.

favorable adjustment or exclusion.[40] Meco states that it was, therefore, equally reasonable for the Department to conclude that purported samples with the same product codes as subject merchandise reported in the sales database, but for which there was no record in the air shipment log, were unreported sales that should be included in the sales database.[41]

Meco points out that the Department provided New-Tec an extraordinary number of opportunities to provide the necessary data and documents, but asserts that it repeatedly failed to submit complete and accurate information. Meco reiterates that legal precedent clearly places the burden on the respondent to provide necessary information and states that New-Tec's experienced counsel could readily have determined the Department's practice regarding the treatment of sample sales by reviewing previous determinations in other antidumping proceedings.[42]

Finally, Meco maintains that New-Tec's reliance on the Department's decision in *PET Resin from Indonesia* to claim that its samples should be excluded from its sales database is misplaced.[43] Meco states that in *PET Resin from Indonesia*, the Department noted that its practice is to "exclude transactions from the margin calculation if we determine such transactions did not receive consideration, based on our evaluation of all the circumstances particular to the sales in question" (emphasis added).[44] Meco contends that information in *PET Resin from Indonesia* was timely submitted in full and that the Department verified that all costs were accounted for in the respondent's indirect selling expenses. Meco compares this to New-Tec, which it claims did not timely submit all information that the Department requested, and which was not verified by the Department. Therefore, Meco asserts the Department properly determined that New-Tec did not establish that these transactions were samples that should be excluded from its U.S. sales database. Meco states that if the Department does not apply total AFA to New-Tec in the final results, it should continue to treat the previously mentioned transactions as U.S. sales and apply AFA in calculating a margin for those sales.

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[40] Meco cites *NTN Bearing Corp. V. United States*, 248 F. Supp. 2d 1256,1287 (Ct. Int'l Trade 2003).

[41] *See* Meco Rebuttal Brief at 10-11 citing *Memorandum to Joseph A. Spetrini; Calculation of an Anti-Dumping Duty Margin of Review and Application of Partial Facts Available with an Adverse Inference for New-Tec Integration (Xiamen) Co., Ltd.* at 7 (December 1, 2005).

[42] *See* Meco Rebuttal Brief at 11 citing *Ball Bearings and Parts Thereof from France, Germany, Italy, Japan and Singapore, Final Results of Antidumping Administrative Reviews, Recision of Administrative Review in Part, and Determination Not to Revoke Order in Part,* 68 FR 35623 (June 16, 2003).

[43] *See* Meco Rebuttal Brief at 11-12 citing New Tec Case Brief at 9-10 citing *Bottle-Grade Polyethylene Terephthalate (PET) Resin from Indonesia* ("*PET Resin from Indonesia*"), 70 FR 13456 (March 21, 2005), and the accompanying Issues and Decision Memorandum at Comment 8.

[44] *See* Meco Rebuttal Brief at 11-12 citing to New-Tec Case Brief at 9-10.

Department Position:

At the time of the preliminary results, New-Tec had refused to provide any documentation regarding its purported sample transactions, and had provided no information regarding the products described as "samples," the quantities provided, or the number of relevant transactions. However, due to the unique circumstances of this case, the Department determined that it was appropriate to take the unusual steps of requesting additional information after the preliminary results. In response to all of the supplemental questionnaires issued on this subject, New-Tec did submit a substantial amount of information. Only after review of the information did the Department determine that a) it was able to calculate a margin using the information on the record, and b) New-Tec had not sufficiently established that it received no consideration for the provision of all of the merchandise involved in the purported sample transactions.[45]

We do not agree with New-Tec that the fact that the Department calculated a margin after the preliminary results is proof that New-Tec had remedied its reporting deficiencies regarding the claimed sample transactions. Neither do we agree with New-Tec's and Cosco's assertion that the Department failed to address the substantial evidence provided by New-Tec in its post-Preliminary Results supplemental questionnaire responses. On the contrary, we address the information provided by New-Tec by virtue of the fact that, in the New-Tec Memo, the Department stated that New-Tec had provided enough information regarding its purported sample transactions that we found it to be eligible for a separate rate, and that we were able to calculate a margin for New-Tec using the information on the record. The mere fact that the Department issued no less than two supplemental questionnaires after the preliminary results is clear evidence of continued deficiencies in New-Tec's reporting. Furthermore, New-Tec still failed to report the complete universe of purported sample transactions or to provide documentation for all of the transactions it did report. Accordingly, we continue to find deficiencies.

On this latter point, New-Tec suggests that the reason for continued deficiencies was due to the Department's "unwillingness or inability to articulate what additional information" was required of New-Tec to demonstrate that it received no consideration for the transactions in question. New-Tec suggests that the burden had shifted to the Department to explain why the record evidence supports a finding that these transactions are sales. However, the Courts have consistently ruled that the burden rests with a respondent to demonstrate that it received no consideration in return for its provision of purported samples. See *Zenith Electronics Corp. v. United States*, 988 F. 2d 1573, 1583 (Fed. Cir. 1993) (explaining that the burden of evidentiary production belongs "to the party in possession of the necessary information").[46] Moreover, "{e}ven where the Department does not ask a respondent for specific information that would

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[45] *See* New-Tec Memo.

[46] *See, also*, *Tianjin Mach. Import & Export Corp. v. United States*, 806 F. Supp. 1008, 1015 (CIT 1992) ("The burden of creating an adequate record lies with respondents and not with {the Department}.")(citation omitted).

enable it to make an exclusion determination in the respondent's favor, the respondent has the burden of proof to present the information in the first place with its request for exclusion."[47]

The Department properly included all U.S. sales in the margin calculation, including the sales labeled by New-Tec as "sample transactions." As stated by the CIT, the Department is not required by statute or regulation to exclude zero-priced or *de minimis* sales from its analysis. *See e.g.*, *FAG U.K. Ltd. v. United States*, 20 CIT 1277, 1281 (1996). Unlike the definition of normal value, the definition of export price contains no requirement that the prices used in export price calculations be the prices charged "in the ordinary course of trade." *Id*. Therefore, the Department only excludes zero-priced sample transactions if they are not properly considered to be "sales." The Court has defined a sale as requiring "both a transfer of ownership to an unrelated party and consideration." *NSK Ltd. v. United States*, 115 F.3d 965, 975 (Fed. Cir. 1997). Since New-Tec has not claimed that it retained ownership of these U.S. transactions, the only issue here is whether these transactions lacked consideration. Consideration can take both monetary and non-monetary forms. *See*, *e.g.*, *NTN Bearing Corp. of American v. United States*, 25 CIT 664, 687 (2001). Therefore, in addition to demonstrating that these transactions were actually zero-priced, New-Tec bore the burden of also demonstrating there was no non-monetary consideration. New-Tec failed to demonstrate that these products were samples that lacked consideration. Simply labeling these sales as samples and stating they were zero-priced sales is insufficient to demonstrate that no consideration was provided for these sales. *See*, *e.g., NTN Bearing Corp. of America v. United States*, 248 F. Supp. 2d 1256, 1286 (CIT 2003).

There was substantial evidence on the record supporting the Department's decision to include these purported sample transactions as "sales." First, New-Tec provided many pieces of the same product, indicating that these "samples" did not primarily serve for evaluation or testing of the merchandise. However, New-Tec provided significant numbers of the same product to its U.S. customer while that customer was purchasing that same product. *See* New-Tec Memo; *see also,* New-Tec's July 29, 2005, response at 1 and U.S. sales database newtus06; *see also* New-Tec Final Calculation Memo at 2. Second, New-Tec provided "samples" to the same customers to whom it was selling the same products in commercial quantities. *See* New-Tec Memo at 4; *see also,* Final Calculation Memorandum, New-Tec Integration (Xiamen) Co., Ltd. (January 9, 2006) ("New-Tec Final Calculation Memo") at 2. In fact, New-Tec eventually acknowledged that it gave these products at zero price to its U.S. customers (already purchasing the same items) to sell to their own customers. New-Tec was not providing samples to entice its U.S. customers to buy the product. Moreover, the transactions relevant to the Department's analysis are between New-Tec and its customers, not between New-Tec's customer and its customer.

As we stated in the New-Tec Memo, the Court in *NSK 2002* stated that it saw "little reason in

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[47]*See Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, Singapore, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews*, 70 FR 54711 (September 16, 2005), and accompanying Issues and Decision Memorandum at Comment 8 (citing *NTN Bearing Corp. of Am. v. United States*, 997 F. 2d 1453, 1458 (Fed. Cir. 1993).

supplying and re-supplying and yet re-supplying the same product to the same customer in order to solicit sales "if the supplies are made in reasonably short periods of time." *See NSK 2002,* at 1311-1312. The Court also stated that "it would be even less logical to supply a sample to a client that has made a recent bulk purchase of the very item being sampled by the client." *See NSK 2002*, at 1312. Neither New-Tec nor Cosco has provided any argument that causes us to reconsider the relevance of this decision with respect to New-Tec's sales to Cosco.

With respect to Cosco's attempts to distinguish this case from *NSK 2002*, we find it unpersuasive that Cosco frequently asks New-Tec "to modify the design for any product to accommodate the demands of its own customers, to improve its product and to lower costs," and that these prototypes had to be approved by Cosco before it issued a purchase order. These claims are wholly unsupported by any record evidence. New-Tec never identified which sample transactions were prototypes. Furthermore, the product codes reported by New-Tec for the purported samples were the same as the product codes for products already being purchased by Cosco. If Cosco's claim was accurate, either New-Tec or Cosco should have been able to supply supporting documentation of the request for modification of the product and subsequent changes; yet none was provided.

We are also not persuaded by New-Tec's claims that the customers' declarations established that it "did not purchase the samples from New-Tec and thus no consideration is paid for these samples." *See* New-Tec Case Brief at 6 (emphasis added). The declarations were written in very general terms and did not address any of the specific transactions. In fact, this particular statement only provides evidence that the customer did not give any money to New-Tec for the samples, because no consideration was *paid*. It does not, however, provide evidence that no non-monetary consideration was given.

New-Tec claims that the Department changed the standard for finding samples not to be sales by claiming that the Department only directed New-Tec to "provide factual documentation to demonstrate that the sample transactions were 'at zero value' or 'samples for which no payment was required.'" *See* New-Tec Case Brief at 4. This claim is not accurate because the Department repeatedly asked New-Tec to demonstrate these were true sample transactions and to support its claim that they should not be included in the database. Specifically, in the *Preliminary Results*, the Department charged New-Tec with explaining, "in detail, how the documentation demonstrates that the transactions involved samples for which no payment was required, not sales transactions, and why they should not be included in the sales database." The legal standard for determining what constitutes a "sale" when assessing zero-priced transactions is well-established. *See, e.g., NSK Ltd. v. United States*, 115 F.3e at 975. New-Tec failed to meet its burden of proof.

In the fourth and sixth supplemental questionnaires and in the *Preliminary Results*, the Department requested New-Tec provide *all* documentation related to these purported sample transactions. In response, New-Tec failed to provide *any* documentation for the sample transactions. Then in the seventh supplemental questionnaire, the Department again asked for

"*all* documentation related to {New-Tec's} POR sample transactions . . . ." Only then did New-Tec provide some documentation for these sales. However, none of the documents was between New-Tec and its customer. Instead, New-Tec only provided documents that were given to third parties, such as Chinese export forms and some shipment documents. New-Tec provided no documentation to show the terms or purposes of the purported sample transactions.

Finally, with regard to *PET Resin from Indonesia*, we cannot comment on whether New-Tec provided more information in the instant review in support of its argument than was submitted by the respondent in *PET Resin from Indonesia*, nor do we consider it relevant. It is not a question of how much information New-Tec provided, but whether the information is sufficient to establish that New-Tec received no consideration for the provision of its purported samples. It is also not clear whether the respondent in *PET Resin from Indonesia* continued to provide free merchandise to the same customer after the customer made bulk purchases of the same product. *PET Resin from Indonesia*. In every case the Department bases a decision on whether transactions "did not receive consideration" on its evaluation of "all the circumstances particular to the sales in question." *See PET Resin from Indonesia,* at Comment 8. As this is a sale-specific determination, the Department's determination that one sample has no consideration has no bearing on whether another sample was provided for consideration. For the foregoing reasons, New-Tec failed to meet its burden of establish the purported sample transactions were given for no consideration and the Department has, therefore, continued to include them as U.S. sales in its calculations.

Comment 5: Application of Total Adverse Facts Available

Meco argues that the Department should apply total AFA to New-Tec for the final results of this review. It maintains that New-Tec repeatedly failed to provide usable information to the Department despite the unique steps the Department took of issuing supplemental questionnaires after the preliminary results. Meco claims that the Department's acceptance of New-Tec's submission and application of AFA to only a portion of New-Tec's sales is not supported by law or practice and the Department should affirm its decision from the *Preliminary Results* and apply total AFA to New-Tec for the final results.

Meco chronicles the numerous supplemental questionnaires[48] sent to New-Tec before the *Preliminary Results* and contends that the Department supplied ample opportunity to New-Tec to provide the requested information. It also points out the problems the Department found with New-Tec's response that caused the application of total AFA in the *Preliminary Results*. *See* Meco Brief at 7. Meco emphasizes that the Department found that "New-Tec's entire U.S. sales database is unusable for purposes of the preliminary results. Moreover, because there is no acceptable U.S. sales database to which we can compare New-Tec's FOP information, we are

[48] *See* Meco Brief at 6.

also unable to use that information"[49] and found that New-Tec had not acted to the best of its ability. Meco argues that "the Court of Appeals for the Federal Circuit has held that compliance with the "best of its ability" standard "does not condone inattentiveness, carelessness, or inadequate record keeping."[50] Although this case pertained to a U.S. importer, Meco argues that the CIT[51] has held the analysis applies to exporters and requires that companies take reasonable steps to keep and maintain complete records, know their records, and conduct prompt and thorough investigations of their records. Meco claims that as New-Tec exports significant quantities to the United States and has experienced counsel, it is reasonable to expect a "timely and forthcoming response" to the Department's questionnaires. It states that New-Tec had not met the standard of acting to the best of its ability and that it was completely appropriate and in keeping with legal precedent to apply total AFA to New-Tec.

Meco also argues that the Department erred in a troublesome way after the *Preliminary Results* by issuing additional supplementals to New-Tec. These steps, Meco contends, "undermines the 'well settled' principal that 'the party in possession of the information has the burden of producing that information in order to obtain a favorable adjustment or exclusion.'"[52] Meco notes that New-Tec's response to the Department's July 1, 2005, supplemental questionnaire stated the number of subject "samples" it said it had sent but provided only "sporadic" supporting documentation. Meco states that the Department found both multiple deficiencies in this response and that New-Tec still had not proven it had reported the total universal of purported samples or all related documents. Meco points out that another supplemental questionnaire was then issued and that the Department "went to tremendous lengths to examine New-Tec's supplemental responses in an effort to extract usable information to calculate a margin."[53] Meco argues that, despite all this, the Department found that discrepancies remained between the documents submitted to substantiate the purported samples and New-Tec's U.S. sales database. Meco Brief, at 10 citing the New-Tec Memo at 5.

According to Meco, New-Tec:

> (1) continued to withhold information; (2) repeatedly failed to provide information by the deadlines and in the forms requested (despite being given numerous opportunities to do so); (3) significantly impeded this review by requiring the Department to expend

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[49] *See* Meco Brief at 7 citing *Preliminary Results* at 70 FR 39729.

[50] *See* Meco Brief at 8 citing *Nippon Steel Corp. v. United States,* 337 F.3d. 1373, 1382 (Fed. Cir. 2003)

[51] *See* Meco Brief at 8 citing *Shandong Juarong General Group Corp. v. United States,* 2003 CIT Lexis 153, Slip Op. 03-135 at 35, n. 18 (CIT 2003) (*Shandong Juarong*).

[52] *See* Meco Brief at 9 citing the New-Tec Memo that cites *NTN Bearing Corp. v. United States*, 248 F. Supp. 2d 1256, 1287 (CIT 2003) (*NTN 2003*).

[53] *See* Meco Brief at 10.

considerable resources in multiple attempts to obtain information and then analyze; and (4) provided information that could not be verified.[54]

Meco acknowledges that the Department cannot decline to consider information a respondent has submitted if it meets the criteria, under 19 U.S.C. 1677m(e), that "parties that choose to participate in {an investigation} must cooperate by complying with {the Department's} request for information."[55] But it maintains that, according to *Ta Chen Stainless Steel Pipe, Inc. v. United States*, "the respondent ultimately bears the burden of creating an accurate record in an antidumping duty investigation."[56] Meco argues that New-Tec's failure to provide a usable and complete dataset does not comply with New-Tec's legal obligation. Meco counters that not only is the Department not obliged to provide never-ending chances for a respondent to "get it right" and to struggle to turn incomplete information into a dataset, the Department should not do so.[57] Meco argues that in this case the Department relieved New-Tec of its legal responsibility, under *NTN 2003*, as the one in possession of the information to provide that information.

This shift of legal burden has disturbing implications for the future, according to Meco. It argues that this sets the precedent of allowing respondents to repeatedly fail or to not provide information with little to no consequences if information is eventually submitted. Meco also states that it will be harmed by the failure of the Department to apply a margin that creates a proper deterrent to not-cooperation.[58] Meco further contends that respondents will be able to manipulate the proceeding if they have little incentive to meet their statutory obligation to provide information requested by the Department because it is willing to issue multiple supplementals and accept untimely information.

Meco also maintains that New-Tec's repeated failure to provide requested information raises critical concerns about the accuracy and completeness of all the information New-Tec submitted. Since New-Tec was not verified, Meco claims the Department has not ensured that New-Tec completely reported its U.S. sales and FOPs. Meco states that the fact that the Department was forced to issue so many supplementals[59] raises concerns about the information New-Tec submitted, suggesting that unreliable information has been submitted and New-Tec did not act to the best of its abilities. As a specific example, Meco notes that it has previously raised the

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[54] *See* Meco Brief at 10.

[55] *See* Meco Brief at 10 citing *Shandong Juarong*, 2003 CIT LEXIS 153 at 30.

[56] *See* Meco Brief at 10 citing *Ta Chen Stainless Pipe Inc., v. United States,* 298 F.3d 1330, 1336 (Fed. Cir. 2002).

[57] *See* Meco Brief at 10 citing *China Steel Corp. v. Unites States*, 306 F. Supp. 2d 1291, 1307 (CIT 2004) (*China Steel Corp.*).

[58] *See* Meco Brief at 11 citing *China Steel Corp.*, 306 F. Supp. 2d at 1311.

[59] Meco states the Department issued seven supplementals. *See* Meco Brief at 12. However, in this review eight supplementals were actually issued to New-Tec. *See* footnote 50.

concern that the number of non-subject samples sent compared to the number of subject samples strongly suggests that New-Tec may have either: (1) provided a high number of non-subject free "samples" in return for "artificially higher U.S. prices for subject merchandise" or (2) "reached price accommodations on non-sample non-subject merchandise."[60] Without a verification in this review or any previous segments of this proceeding, Meco claims there are no grounds for concluding that New-Tec accurately and completely reported its FOPs and sales information to the Department.

Cosco argues that the transactions in question should be deemed zero-priced sample transactions and excluded from the margin, and that the record does not support the application of total AFA for the final results. *See* Comment 4 above. New-Tec and Cosco argue that since the *Preliminary Results*, New-Tec has "remedied any reporting deficiencies underlying the Department's preliminary AFA decision." Cosco and New-Tec both point out that the reasons the Department applied total AFA at the *Preliminary Results* relate specifically to New-Tec's purported sample transactions. According to New-Tec, Meco's argument basically ignores New-Tec's responses to the post-Preliminary Results supplementals, which Cosco points out were timely. New-Tec acknowledges that prior to the *Preliminary Results* it had not supplied enough information regarding its purported samples, which resulted in the application of total AFA. It points out, though, that the Department acknowledged the potential confusion over the term "sample sale," which resulted in an amendment to the NME questionnaire and argues that Meco has overlooked this. New-Tec summarizes its post-Preliminary Results history in which it responded to "three"[61] supplemental questionnaires[62] and claims it made a special effort to consult with the Department to ensure the provision of responsive information. New-Tec and Cosco claim New-Tec provided all the information within its control related to the purported sample transactions. Cosco argues that New-Tec reported the total quantity of all its purported samples[63] for both subject and non-subject merchandise and acted to the best of its ability in providing this information. It would, Cosco claims, be inappropriate to reject all of New-Tec's responses.

New-Tec and Cosco note that, in light of New-Tec's responses to these supplementals, in the New-Tec Memo the Department stated that New-Tec had provided enough information to

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[60] *See* Meco Brief at 13.

[61] The Department issued supplemental questionnaires on July 1, 2005, and August 18, 2005, after the *Preliminary Results*. In granting an extension for the August 18, 2005, supplemental questionnaire on September 7, 2005, we added additional questions. We have counted these as 2 supplemental questionnaires, while New-Tec has counted these as 3 supplemental questionnaires.

[62] *See* New-Tec Rebuttal at 6.

[63] Cosco Rebuttal at 3 acknowledging that the Department did deem some transactions to be unreported or inadequately reported and applied partial AFA to these transactions in its December 1, 2005, New-Tec margin calculation.

determine the total universe of sample sales and was able to use the U.S. database to calculate a margin for New-Tec. According to New-Tec and Cosco, the Department was correct in its finding that the reporting deficiencies related to the claimed samples were remedied. New-Tec argues that Meco's lack of comment on the post-Preliminary Results responses and on any specific deficiencies suggest Meco realizes the "factual record" regarding New-Tec's purported samples has been "satisfactorily developed."[64] According to Cosco, Meco cannot point to record evidence that would discredit what New-Tec reported about the U.S. transactions, which it claims are samples. New-Tec argues that the deficiencies noted by the Department in the *Preliminary Results* have been corrected and the decision not to apply total AFA in the December 1, 2005, release of the New-Tec calculations is in accordance with the law.

Additionally, New-Tec argues that the Department should reject Meco's assertions regarding the issuance of post-Preliminary Results supplemental questionnaires because they are based on a misunderstanding of the Department's past practice. New-Tec and Cosco assert that antidumping law does not bar the Department from seeking information from respondents after the *Preliminary Results* are issued. New-Tec points out that 19 CFR 351.301(c)(2)(I) specifically allows for the Department to request the submission of factual information at any time.[65] According to New-Tec, although the Department is not obligated to provide multiple opportunities for respondents to "get it right," the Department has the authority to do so. New-Tec cites multiple cases were the Department has issued post-preliminary supplementals.[66] It argues that, contrary to Meco's claims, by issuing post-Preliminary Results supplementals to New-Tec, the Department has not established a new precedent but, rather, has followed an established practice. New-Tec also argues that the Department is mandated to calculate as accurate a margin as possible and it is up to the Department to discern the extent of information collection needed to do this.[67]

New-Tec also argues that the Department's efforts to collect "sample" information after the *Preliminary Results* placed the burden of reporting on New-Tec and should not be seen as a shift of the legal burden to create an accurate record away from respondents. New-Tec and Cosco assert that, not only was the burden to provide information on New-Tec throughout the proceeding, but that it satisfied this burden.

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[64] *See* New-Tec Rebuttal at 7.

[65] *See also,* Cosco Rebuttal at 1 citing 19 U.S.C. 1677m(d).

[66] *See* New-Tec Rebuttal at 8 and 9 citing, *e.g., Certain Preserved Mushrooms From the People's Republic of China: Final Results and Final Rescission, in Part, of Antidumping Duty Administrative Review*, 70 FR 54361 (September 14, 2005); *Honey from the People's Republic of China: Final Results and Final Recision, In Part, of Antidumping Duty Administrative Review,* 70 FR 38873 (July 6, 2005); and *Certain Non-Frozen Apple Juice Concentrate from the People's Republic of China: Final Results, Partial Rescission and Termination of a Partial Deferral of the 2002-2003 Administrative Review*, 69 FR 65148 (November 10, 2004).

[67] *See* New-Tec Rebuttal at 9 citing *Bethlehem Steel Corporation v. United States,* 24 CIT 375, 378 (CIT 2000), and *NTN Bearing Corp. V. United States,* 74 F.3d 1204, 1208 (Fed. Cir. 1995).

New-Tec argues that Meco's claims that doubt has been cast on the completeness and accuracy of all the information it submitted on the record is based on speculation. Cosco asserts that Meco has not established how New-Tec's pre-Preliminary Results deficiencies have tainted all the information submitted by New-Tec given that New-Tec's post-Preliminary Results responses remedied or explained the deficiencies in question. New-Tec maintains that Meco's argument is contradicted by the record evidence, which supports the completeness and accuracy of information it submitted. According to New-Tec, completeness and accuracy should be measured by the information submitted not by the number of questionnaires issued. New-Tec claims the Department clarified that New-Tec's responses regarding sample transactions "may have resulted in part from confusion in terminology." It asserts that the Department clarified any remaining confusion over terminology after the *Preliminary Results* and, more importantly, New-Tec "addressed and remedied any reporting deficiencies" through its post-Preliminary Results supplemental questionnaire responses. Additionally, New-Tec and Cosco contend that the number of purported sample transactions of subject merchandise was *de minimis* compared to the total number of New-Tec U.S. sales transactions of subject merchandise during the POR.

Finally, New-Tec and Cosco maintain that Meco has not provided record evidence to support its allegation that non-subject merchandise "samples" are exchanged for either higher prices for subject merchandise or for price accommodation on non-subject non-sample U.S. merchandise, nor has it addressed how the record evidence supports finding the transactions in question not to be *bona fide.* Cosco contends that Meco focused on the difference between the number of subject and non-subject merchandise "samples" and that this is misleading.[68] Further, Cosco notes that even if price accommodation on non-sample non-subject merchandise exists, this would relate to merchandise outside the scope of the review. New-Tec argues that none of its other submitted information "was found deficient or discrepant and the reporting deficiencies regarding its purported sample transactions were the only reason noted for the application of total AFA in the *Preliminary Results,* and that Meco has failed to point out any such other deficiencies in either the pre- or post-Preliminary Results responses. Both it and Cosco assert that, after New-Tec submitted post-Preliminary Results responses "clarifying all its sample transactions"[69] the Department found there was enough information regarding the transactions in question for a dumping margin analysis and Meco's argument should be rejected.

Cosco claims that "certain specific knowledge of the documents required for export" for New-Tec's commercial sales is not applicable to New-Tec's purported sample transactions and that the Department does not normally penalize a respondent for not providing information that is not under the control of the respondent or does not exist. Cosco Rebuttal Brief at 3.

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[68] *See* Cosco Rebuttal at 5 providing further detail of this business proprietary argument.

[69] *See* New-Tec Rebuttal at 11.

Department Position:

Section 776(a)(1) and (2) of the Act provides that the Department shall apply "facts otherwise available" if, *inter alia*, necessary information is not on the record or an interested party or any other person (A) withholds information that has been requested, (B) fails to provide information within the deadlines established, or in the form and manner requested by the Department, subject to subsections (c)(1) and (e) of section 782 of the Act, (C) significantly impedes a proceeding, or (D) provides information that cannot be verified as provided by section 782(i) of the Act.

As we acknowledged in the *Preliminary Results* "the reference to "sample sales" in our supplemental questionnaires in this case may have been a potential source of confusion because parties may have understood the term "sales" to refer only to transactions involving remuneration." *See Preliminary Results* at 29729. Additionally, the Department stated that, "{a}lthough the NME questionnaire indicated that parties were to report all sales, implying that the provisions of samples should also be included, it did not explicitly reference the reporting of samples." Due to these reasons we issued a supplemental questionnaire on July 1, 2005, requesting information on New-Tec's "sample transactions" in order to provide New-Tec an opportunity to provide information on these sample transactions free of any potential terminology confusion. As noted in the briefs, we then issued an additional supplemental on August 18, 2005, to which we added questions on September 7, 2005.

We note that New-Tec provided responses to all of the Department's questionnaires and supplemental questionnaires within the established deadlines. However, although New-Tec claims in its briefs that it provided all information within its control related to the purported sample transactions and clarified the nature of all of these transactions, this is incorrect. The Department requested, but did not receive, all documentation related to the purported samples requested in its July 1, 2005, supplemental questionnaire. Rather, New-Tec submitted *some* documentation related to the purported samples it identified. For this reason, we could not be certain that New-Tec had reported the complete universe of purported sample transactions. Where the Department determines that a response to a request for information does not comply with the request, section 782(d) of the Act provides that the Department will so inform the party submitting the response and will, to the extent practicable, provide that party the opportunity to remedy or explain the deficiency. Therefore, we issued another supplemental on August 18, 2005, to which we added additional questions to on September 7, 2005.

If the party fails to remedy the deficiency within the applicable time limits and subject to section 782(e) of the Act, the Department may disregard all or part of the original and subsequent responses, as appropriate. However, section 782(e) of the Act provides that the Department "shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all applicable requirements established by the administering authority" if the information is timely, can be verified, is not so incomplete that it cannot be used, and if the interested party acted to the best of its ability in providing the information. Where all of these conditions are met, the statute requires the Department to use the

information if it can do so without undue difficulties.

In comparing New-Tec's July 29, 2005, response to its September 16, 2005, response the Department found that New-Tec had not reported a certain number of U.S. transactions to which we applied partial AFA in our December 1, 2005, New-Tec margin calculation. *See* New-Tec Memo. While we found (and continue to find) that partial AFA is warranted for the unreported U.S. transactions and for New-Tec's failure to provide information necessary to classify certain U.S. sales, New-Tec provided, pursuant to section 782(e) of the Act, enough information related to the remaining U.S. sales transactions that we could use the information without undue difficulties.

With regard to section 776(a)(2)(c) of the Act, prior to the *Preliminary Results* we were significantly impeded by the lack of information on the record for New-Tec's purported sample transactions. However, as discussed immediately above and in the New-Tec Memo, New-Tec submitted sufficient information in response to our post-Preliminary Results supplementals to warrant using its data. While the Department was obliged to expend considerable resources to obtain this information, the fact that this information is now on the record allows us to use it without undue difficulties. Finally, with regard to section 776(a)(2)(D) of the Act, although Meco alleges that the information could not be verified, it neither explains why it thinks the information could not be verified nor provides record evidence to support this contention. Consistent with section 782(i)(3) of the Act, the Department was not required to conduct on-site verification in this review, nor did it elect to do so. For these reasons, we find that there are no grounds for the application of total facts available.

Cosco is correct that it is not the Department's practice to penalize a respondent for information that is not within its control or does not exist. However, the Department *does* expect a respondent to have specific knowledge of the documents related to all of its transactions, regardless of the transaction type and to provide the documents over which it has control or has the ability to obtain. *See, e.g.*, *Zenith Electronics Corp. v. United States*, 988 F. 2d at 1583 ("The burden of production should belong to the party in possession of the necessary information."); *Banco Peres Citrus v. United States*, 25 CIT 1170, 1188 (2001) (finding that a reasonable respondent knew or should have known it would be required to maintain certain cost documents). Just because a transaction is not labeled a "commercial sale" does not alleviate a respondent's burden to know and provide information related to that transaction. Meco is correct in stating that respondents "ultimately bear the burden of creating an accurate record in an antidumping duty investigation." The issuance of post-Preliminary Results supplemental questionnaires has not alleviated that burden. It was New-Tec's responsibility to supply enough information about the U.S. sales transactions it claimed were samples to overcome the deficiencies identified in the *Preliminary Results*. As discussed above, we believe that New-Tec met the burden sufficiently for us to calculate a margin for its U.S. sales, but not sufficiently to avoid the application of partial facts available.

Meco claimed that New-Tec's repeated failure to provide requested information raises critical

concerns about the accuracy and completeness of all the information. However, we have throughly examined all of New-Tec's responses (including its three reconciliations) and other than the deficiencies noted in the December 1, 2005, New-Tec Calculation Memo and New-Tec Memo, we do not find any information that calls into question the accuracy of the information reported by New-Tec. The specific concerns that Meco raises are not supported by evidence on the record and, therefore, are speculation.

The issuance of supplemental questionnaires after the *Preliminary Results,* while not the Department's preference, is not a new practice. *See, e.g.*, *Certain Preserved Mushrooms From the People's Republic of China: Final Results and Final Rescission, in Part, of Antidumping Duty Administrative Review,* 70 FR 54361 (September 14, 2005). In the instant review, as stated in the *Preliminary Results*:

> Although the NME questionnaire indicated that parties were to report all sales, implying that the provisions of samples should also be included, it did not explicitly reference the reporting of samples. Therefore, the Department sent New-Tec two additional supplemental questionnaires specifically requesting information on New-Tec's sample sales. New-Tec continued to deny the existence of sample "sales," arguing that its purported samples transactions were at zero value and, therefore, do not constitute sales.
>
> Further, the Department recognizes that the reference to "sample sales" in our supplemental questionnaires in this case may have been a potential source of confusion because parties may have understood the term "sales"

This unique situation resulted in the amendment of the NME questionnaire to specifically request information on "sample transactions" in order to avoid confusion on this issue in the future and to ensure that it is clear that information on such transactions is required. In this situation, because of the potential confusion of the terminology, we felt that it was appropriate to issue post-Preliminary Results supplemental questionnaires in order to resolve the issue. For these foregoing reasons, we did not apply total AFA to New-Tec.

Comment 6: International Freight Surrogate Value

Both New-Tec and Cosco argue that for international air freight the Department should not rely on the surrogate value obtained from UPS used in the December 1, 2005, margin calculation for New-Tec. Both parties argue that the Department should use a surrogate value contemporaneous with the POR rather than a deflated post-POR value. They maintain that the deflator[70] used by the Department does not adequately adjust for the rate increases imposed by international freight

[70] The source of the deflator is the U.S. Department of Labor, available at http://www.bls.gov/cpi/. *See* New-Tec FOP Memo at Attachment 1.

carriers since 2005. New-Tec cites a press release which states there are increases to the "normal" fee mainly driven by oil price increases. *See* New-Tec Brief at 12 and Exhibit 1. Cosco also argues that it is "common knowledge" that jet fuel costs have increased dramatically and cites an article entitled *Shortage Looms if Jet-Fuel Disruption Not Fixed Soon*. *See* Cosco Brief at 12 and Exhibit 1. Cosco states that the jet fuel prices "far exceeded the general inflation factor in the United States," which were used by the Department to deflate the international air freight value to POR levels. New-Tec also argues that international air freight should cover the whole POR not only the surcharge-affected peak season, which it defines as "August/September through December."[71] New-Tec asserts that the Department should either use non-peak season international air freight or adjust international freight downward to remove peak season surcharges.

In addition, Cosco states that the rate used was "overtly punitive," a conclusion it reached by comparing the price-per piece of one product to the per-piece air freight cost. Cosco contends that the Department should not use the UPS rate since it is a U.S. company and therefore, not a proper surrogate for the PRC. According to Cosco, a surrogate value from a country economically comparable to the PRC, such as India, which it points out is the surrogate county in this review, should be found. Cosco claims that an Indian surrogate value for this factor would be lower that the UPS rates. Specifically, Cosco argues the Department should use a rate it has located for shipping fresh flowers from India to the Unite States of $2.70 per kilogram.[72]

New-Tec notes that the Department used a simple average of three types of international air freight services, of which two guarantee one- to two-day delivery and one that guarantees five-to six-day delivery. New-Tec states that its so-called samples are non-perishable and are not normally time sensitive. Further, it contends that it is "not feasible to ship such small volumes" by ocean and, for this reason and not for speed, it ships by air.[73] According to New-Tec, its normal practice is for the air shipment to arrive within a week of shipment.

Meco argues that, if the Department does not apply total AFA, it should continue to use the international air freight rates used in its December 1, 2005, New-Tec margin calculation. Meco counters New-Tec and Cosco by arguing that the Department's methodology closely approximated the actual expenses associated with shipping the U.S. sales transactions purported to be samples by relying on the average of published rates for international air delivery between the PRC and the United States. Meco maintains that this is consistent with the methodology the

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[71] *See* New-Tec Brief at 12 and Exhibit 1.

[72] *See* Cosco Brief at 13 and Exhibit 2.

[73] *See* New-Tec Brief at 11.

Department uses to value international ocean freight expenses.[74] Additionally, Meco points out that New-Tec does not cite any record evidence to support claims that it normally has its products delivered within a week. Therefore, Meco states, the Department's use of an average of the UPS international air freight tariffs is both reasonable and consistent with past practice.

Meco also argues that the Department rarely deviates from using consumer price index ("CPI"), producer price index, wholesale price index, or other broad-ranged indices to adjust for inflation. According to Meco, in the case of honey from the PRC, the Department only used an inflation factor calculated from honey prices on the record after it found the WPI to be non-representative of honey for the months in questions. *See* Meco Rebuttal at 14 citing *Final Results of the New Shipper Review of the Antidumping Order on Honey from the People's Republic of China,* 68 FR 62053 (October 31, 2003), and accompanying Issues and Decision Memorandum at Comment 2. Meco points out that neither New-Tec nor Cosco provided evidence that the U.S. CPI used to deflate international air freight does not already reflect fuel price changes or that the Department's reliance on the U.S. CPI is distortive.

Finally, Meco argues that the Department should reject Cosco's December 12, 2005, submission providing international air freight from India because the issuance on December 1, 2005, of a New-Tec margin calculation does not constitute a "preliminary result" that allows for the submission of surrogate value information. It claims that 19 C.F.R. 351.301(c)(1) allows "the submission of factual information to rebut, clarify, or correct factual information" only for responses to factual information submitted by other interested parties, not the information used by the Department to supplement information not on the record. *See* Meco Brief at 14. Meco maintains that, per 19 CFR 351.301(c)(3)(ii), the deadline for new factual information was August 1, 2005.

Department Position:

We agree that 19 C.F.R. 351.301(c)(1) allows for "{a}n interested party {to} submit factual information to rebut, clarify, or correct factual information submitted by any other interested party at any time prior to the deadline provided in this section." However, neither this regulation nor 19 CFR 351.301(c)(3)(ii) precludes the Department from allowing parties to submit information to rebut, clarify, or correct factual information the Department has placed on the record. In this case, because the international air freight surrogate value information was first placed on the record by the Department on December 1, 2005, it is appropriate to allow parties time to respond to this information. Therefore, we have accepted Cosco's December 12, 2005, submission as a timely rebuttal to this information.

However, New-Tec's assertion that its normal practice is to ship samples to arrive within one

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[74] *See* Meco Rebuttal at 13 citing *e.g., Final Results if Antidumping Duty Administrative Review: Fresh Garlic from the People's Republic of China,* 70 FR 34082 (June 13, 2005), and accompanying Issues and Decision Memorandum at Comment 11.

week of shipment is not supported by the facts on the record. Neither New-Tec's narrative nor the DHL air freight shipment documents[75] indicate the shipping time frame for New-Tec's U.S. sales shipped by air. Therefore, the Department will continue to use the average of the three rate quotes provided by UPS.

In valuing the FOPs, section 773(c)(1) of the Act instructs the Department to use "the best available information" from the appropriate ME country. The Department considers several factors when choosing the most appropriate surrogate values, including the quality, specificity, and contemporaneity of the data. *See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Carbazole Violet Pigment 23 from the People's Republic of China,* 69 FR 67304 (November 17, 2004), and accompanying Issues and Decision Memorandum at Comment 4 (*CVP-23 from the PRC*); and *Notice of Final Determination of Sales at Less Than Fair Value: Polyethylene Retail Carrier Bags from the People's Republic of China*, 69 FR 34125 (June 18, 2004), and accompanying Issues and Decision Memorandum at Comment 9 (*Polyethylene Bags*).

New-Tec ships certain U.S. transactions via air freight using an international air freight service. In its case brief, Cosco proposed a rate for shipping flowers from India as a surrogate value for international freight. However, this rate has no supporting detail to show how it was calculated and is from an unspecified supplier. Subsequently, in a December 12, 2005, surrogate value submission (discussed above), Cosco proposed the use of the domestic cargo rate for shipping on a domestic passenger plane, and applied that rate to get a kilogram-per-kilometer rate and then applied that rate to the distance between Shanghai, PRC and a location in the United States. This does not approximate the actual expenses associated with shipping via international air freight by an international delivery company between Xiamen, PRC and the delivery location for the shipments in question.

With international ocean freight, it has been a longstanding practice by the Department to use rate quotes from Maersk, a Danish-owned shipping company. *See, e.g., Fresh Garlic from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 70 FR 34082 (June 13, 2005), and accompanying Issues and Decision Memorandum at Comment 11; and *Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: CVP-23 From the PRC* 69 FR 35287, at 35292 (June 24, 2004) (valuation of ocean freight using rates from Maresk unchanged in the final. *See CVP-23 from the PRC* 69 FR 67304)). International ocean freight and international air freight are the same type of service. Therefore, as with international ocean freight, the use of a quote from international air freight supplier, in this case UPS, most closely approximates the actual expenses associated with shipping the U.S. sales transactions in question. The surrogate value from UPS is more specific to the service (international air freight) being used by New-Tec, is specific to the point of embarkation and the delivery location, and accounts for the weight of the products in question. While it would be ideal to have an international air freight price quote from the POR, this information is not publicly available and accessible to the Department. Therefore, as is our

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[75] *See* New-Tec's July 29, 2005, Response at Exhibit 2 .

normal practice when using a surrogate value that post-dates the POR, we have deflated the November 2005 price quotes to be contemporaneous with the POR. In this case we find the UPS quotes are the best available information for valuing international air freight.

Cosco concludes from comparing the per-unit price of a product to the per-unit air shipment cost of the product that the international air freight rate used in the *Preliminary Results* was "overtly punitive." The comparison of a per-unit price of a product to the per-unit air shipment cost is irrelevant. Not only does the Department not compare "apples and oranges" to determine if a rate is appropriate, in this case New-Tec reported it shipped certain U.S. transactions by air. Therefore, the Department must use an international air freight rate to value this factor.

Cosco and New-Tec argue that the deflator used to make the international air freight surrogate value contemporaneous with the POR does not appropriately adjust for rising jet fuel prices. However, these parties provided no evidence to support this statement or to prove that the Department's deflator does not account for rises in fuel prices. As Meco points out, the use of a broad-range index, here the U.S. Department of Labor ("DOL") CPI, to calculate inflators/deflators is the Department's normal practice. *See*, *e.g.*, *Certain Preserved Mushrooms from the People's Republic of China: Preliminary Results of the Eighth New Shipper Review,* 70 FR 42034 (July 21, 2005) (WPI indices used to adjust for inflation unchanged in *Certain Preserved Mushrooms from the People's Republic of China: Notice of Final Results of the Eighth New Shipper Review,* 70 FR 60789 (October 19, 2005)); *Initiation of Antidumping Duty Investigation: Certain Artist Canvas From the People's Republic of China,* 70 FR 21996 (April 28, 2005); and *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China: Final Results of 2002-2003 Administrative Review and Partial Rescission of Review*, 69 FR 42041 (July 13, 2004) (using the Reserve Bank of India's price index to inflate Indian electricity prices). Furthermore, the deflator used by the Department includes an "energy" category. *See* http://www.bls.gov/cpi/. We believe that the inclusion of this category in the DOL CPI captures any fluctuation of fuel costs since the POR. We also believe any other changes to the prices of items included in the DOL CPI due to a fluctuation of fuel costs since the POR will be reflected in our deflator.

Additionally, New-Tec contends that the Department should either use a non-peak season rate or adjust for peak season surcharges, which it claims to be 10 to 35 percent New-Tec claims that peak season is "August/September through December," however, there is no evidence on the record that defines a peak season Furthermore, record evidence shows that U.S. transaction shipments via air were made throughout the POR, with almost half being made in August through December. *See* New-Tec's July 29, 2005, response at Exhibit 1. Therefore, it is not unreasonable to use a rate from November (the purported "peak season"). As stated above, we find the UPS price quotes to be the best available surrogate value for international air freight and will continue to use them for these final results of this review.

Comment 7: Application of the International Freight Surrogate Value

New-Tec and Cosco argue that the Department mis-calculated the international air freight. Specifically, they state that the Department's calculation of the international air freight (Quantity (QTYU) * Weight (WEIGHTU) * International Air Freight Surrogate Value (INTMSV (1-6))) should not include QTYU. They point out that this calculation yields a gross international air freight cost that is then subtracted from a per-unit sales price. New-Tec maintains using QTYU in this equation exaggerated the unit international air freight and that QTYU was double counted in the December 1, 2005, New-Tec margin calculation.

Department Position:

The Department intended to calculate a unit (per-piece) cost for international movement expenses, which for the sales in question, consists of international air freight. Adding QTYU to the international movement expenses calculation resulted in a total or gross international movement expense for the observations in question. This total international movement expense was then subtracted from the per-unit price (GRSUPRU). For the final results we have revised the calculation of international movement expenses for these observations so that QTYU is not included and a per-unit international movement expense is calculated (*e.g.,* WEIGHTU*INTMSV(1-6)).

III. ISSUES SPECIFIC TO FEILI GROUP

Comment 8: Wood/Pallet Surrogate Value

In the *Preliminary Results*, the Department valued the wood that Feili Group consumed in the production of wooden pallets using a surrogate value for completed pallets, not the wood that Feili Group used to make pallets. Feili Group argues that in the final results, the Department should use the surrogate value for wood that Feili Group submitted to the Department in its submission dated August 9, 2005.[76] Feili Group states that in its Section C questionnaire response, it submitted complete packing material consumption information, including consumption data for the wood that the company consumed to produce pallets. It also provided the consumption data for the nails required to construct the pallets, and the total amount of the labor required to pack the subject merchandise, which Feili Group claims includes the labor required to construct finished pallets.[77] Feili Group contends that the Department not only applied an incorrect surrogate value when assigning a value for completed pallets, but in so doing also double-counted the packing labor and nail consumption that Feili Group had reported in its Section D questionnaire response. Feili Group states that the Department is required to use the "best available information" to value Feili's pallet wood FOPs. Feili Group contends that the

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[76] Feili Group Surrogate Value Submission, at Attachment 1 (August 9, 2005).

[77] *See* Feili Group Section C and D Questionnaire Response, at Exhibits 9 and 10 (September 24, 2004).

"best available information" on the record is Feili Group's questionnaire response and the company's August 9, 2005, surrogate value submission, which included a surrogate value for wood, not finished pallets.

Meco counters that the record does not clearly demonstrate that Feili Group makes its own pallets, or has accounted for all costs associated with making them. To support this, Meco states that in its Section C and D questionnaire response, Feili Group failed to include pallets in its narrative descriptions of (1) the packing stage of the production process, or (2) unskilled packing labor.[78] Furthermore, Meco points out that Feili Group did not discuss making its own pallets in any of its subsequent supplemental questionnaire responses. Rather, it did not mention that it makes its own pallets until its August 9, 2005, surrogate value submission, which was after the preliminary results. Furthermore, Meco argues that the Indian import data for harmonized tariff schedule (HTS) number 4412.99.09, "plywood, other" is not contemporaneous with the POR and Feili Group did not provide an explanation as to why this HTS category would be the appropriate category to value wood used to make pallets. Additionally, Meco points out that this classification now reports wood in cubic meters and states that Feili Group did not report use of pallets on that basis, therefore Meco claims the data is unuseable.[79] Finally, Meco points out that the HTS number the Department used for wood pallets (HTS 4415.20.00) has a description that includes load-bearing boards of wood such as those that could be used to construct pallets ("palets, palets (box, colrs)& other load bo{a}rds of wood"). Meco maintains that this is the only appropriate surrogate value data for wood pallets on the record of this proceeding that is contemporaneous with the POR.

Department's Position:

Meco is correct in stating that Feili Group did not mention that it manufactured its own pallets in its description of its production process in the responses to either the Department's original or supplemental questionnaires. Further, the surrogate value information submitted by Feili Group on January 7, 2005, provided no new information to use for valuing wood, although it provided sources for valuing other packing materials. Additionally, the surrogate value information provided by Feili Group on August 9, 2005, was from the period 2002-2003, not 2003-2004.[80]

However, in its Section C response Feili Group provided consumption of "wood" and "nails." It also provides a kilogram/set or piece consumption of wood for pallets and nails. Although Feili Group did not provide information in its production process description that it made pallets, it did provide enough information elsewhere in its submission for us to be able to account for pallet

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[78] See Meco Rebuttal Brief at 15 citing Feili Group's Section C&D Questionnaire Response, at 29, 41 (September 24, 2004).

[79] The data provided by Feili Group from the non-contemporaneous time period was in kilograms, but the contemporaneous data is in cubic meters.

[80] *See* Feili Group Surrogate Value Submission at Attachment 1 (August 9, 2005).

making. *See* Feili Group Section D response at Exhibit 10 (September 24, 2005).

In its surrogate value submission after the *Preliminary Results*, on August 9, 2005, Feili Group stated that it made its pallets and furnished an HTS number of 4412.99.09 ("plywood, other") as the correct HTS category to use. There is no record evidence to suggest that wood included in this HTS category is the type of wood used by Feili Group to make pallets. Furthermore, in conducting research on this issue the Department found publicly available information indicating that composite wood pallets (composite woods include "materials like plywood, Oriented Strand Board, particle board, and laminated veneer lumber") represent only 2 - 4 percent of the pallet market.[81] In addition, the Department has institutional knowledge that pallet components are covered by the scope of the antidumping duty order on softwood lumber from Canada.[82] Accordingly, we believe that HTS category 4407.10, "coniferous, other," which includes a broad range of softwood lumber products of the type typically used as pallet components, is the most appropriate HTS category with which to value Feili Group's wood for pallets.

Comment 9: Billing Adjustments to U.S. Prices

Feili Group contends that in the *Preliminary Results*, the Department incorrectly concluded that the addition of Feili Group's reported origin receiving charge ("ORC") and automated manifest system ("AMS") billing adjustments to U.S. price was not warranted because these additional movement expenses "were ultimately paid by Feili Group's customers" and Feili Group "billed the customer for reimbursement in a separate invoice charge and did not include this charge in its reported gross unit price."[83] Feili Group explains that during the POR, Feili Group paid for all inland freight and brokerage expenses, including certain additional ORC and AMS charges in Chinese NME currency and that Feili Group considers these charges when it negotiates the sales price with its client. Feili Group then bills these as a separate line item on the invoice to the U.S. customer, who pays the fee in U.S. dollars. In the *Preliminary Results*, the Department did not apply these charges as it determined that the customer was merely repaying Feili Group for an expense that Feili Group incurred on its behalf. Feili Group states, however, that the Department's NME rules do not allow for ME currency payments to "offset" expenses incurred in the PRC and paid for in Chinese renminbi ("RMB"), and argues that revenue earned in U.S. dollars cannot be used to "directly reimburse" RMB-incurred expenses. Feili Group therefore argues that the Department should reexamine the approach in the *Preliminary Results* and, where applicable, add the amount reported taken in the "BILLADJU" field to Feili Group's reported U.S. sales price.

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[81] *See* http://www.palletenterprise.com

[82] *See, e.g., Notice of Final Results of Antidumping Duty Administrative Review: Certain Softwood Lumber Products From Canada*, 70 FR 73437, 73438 (December 12, 2005).

[83] *See* Memorandum to the File: Calculation Memorandum, Feili Furniture Development Ltd., Quanzhou City, Feili Furniture Development t Co., Ltd, Feili Group (Fujian) Co., Ltd and Feili (Fujian) Co., Ltd., at 2 (June 30, 2005) (Feili Group Calculation Memo).

Meco rebuts that the Department correctly disregarded these adjustments because they were additional movement expenses not reflected in the agreed-upon sales terms, and that since they were separately invoiced to the customer for reimbursement, they were not reflected in the reported gross unit price. Meco points to prior exclusion of such charges in *Ironing Tables* where the Department did not include the billing adjustments in the calculations since there was no indication that they were part of the surrogate value for brokerage and handling.[84]

Department's Position:

In the *Preliminary Results*, the Department determined based on information provided by Feili Group, that the ORC and AMS which Feili Group reported as billing adjustments were in fact, movement expenses that were not included in the invoice price and were ultimately paid by Feili's customers.[85] Because, in the cases where Feili Group initially paid the ORC and AMS, it billed the customer for reimbursement in a separate invoice charge and did not include this charge in its reported gross unit price, the effect on the reported gross unit price is neutral. Therefore, we did not include the billing adjustment variable in our margin calculation, and will continue to make no adjustment for these charges for the final results.

Comment 10: Exclusion of Certain Market-Economy Purchases

In the *Preliminary Results*, the Department did not include Feili Group's purchase prices from two ME countries because the Department stated that it had "reason to believe or suspect" that these exports benefitted from general export subsidies.[86] Feili Group claims that the Department's conclusion that these export subsidies exist is not supported by any "particular and objective evidence" on the record in this proceeding and cites *Fuyao Glass Industry Group Co., et al v. United States*, 2005 Ct. Intl. Trade LEXIS 29, Slip. Op. 05-6 (CIT 2005) (*Fuyao*). Feili Group further claims that the Department has not provided specific and objective evidence to support a reason to believe or suspect that the prices were subsidized. Because of this, Feili Group feels the Department should not continue to exclude Feili Group's ME raw material purchases from these countries in the final results and should value Feili Group's consumption of the three ME-sourced raw materials referenced in the Feili Group Calculation Memo using the complete ME purchase information that Feili Group provided.

Meco counters Feili Group's argument saying that the Department has found in other proceedings that these countries maintain "broadly available, non-industry-specific export

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[84] *See* Meco Rebuttal Brief at 17 citing *Notice of Final Determination of Sales at Less Than Fair Value: Floor-Standing, Metal-Top Ironing Tables and Certain Parts Thereof from the People's Republic of China*, 69 FR 35293 (June 24, 2004) (*Ironing Tables*).

[85] *See* Feili Group Supplemental Response, at 15-16 (November 19, 2004); *See also,* Feili Group Response to Sections C and D, at 14-15 (September 24, 2004).

[86] *See* Feili Group Calculation Memo at 4 (June 30, 2005).

subsidies, and therefore, it is reasonable to infer that all exports to all markets from these countries are subsidized."[87] Meco states that the Department is not required to have "specific and objective evidence" on the record in this proceeding, but may rely on information available to it.

Department's Position:

Legislative history advises the Department to avoid using prices it has reason to believe or suspect may be subsidized. See H.R. Rep. 100-576 at 590 (1988). The Department has repeatedly found in other proceedings that certain countries, namely, Korea, Indonesia, Thailand and India, maintain broadly available, non-industry specific export subsidies. *See, e.g.*, *Notice of Final Determination of Sales at Less Than Fair Value: Certain Ball Bearings and Parts Thereof From the People's Republic of China*, 68 FR 10685 (March 6, 2003), and accompanying Issues and Decisions Memorandum at Comment 1 (declining to use ME input prices from Korea or India); *Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, From the People's Republic of China: Final Results of Antidumping Duty Administrative Review of the Order on Bars and Wedges*, 68 FR 53347 (September 10, 2003), and accompanying Issues and Decisions Memorandum at Comment 2 (declining to use ME input prices from India); and *Automotive Replacement Glass Windshields from the PRC: Final Results of Administrative Review*, 69 FR 61790 (October 21, 2004), and accompanying Issues and Decision Memorandum at Comment 5 (declining to use input prices from Indonesia, Korea and Thailand). Because these subsidies are available to any business that exports, the Department reasonably infers that all exports from these countries may be subsidized.

The Department finds Feili Group's reliance on *Fuyao* to be misplaced. First, the Department disagrees with the Court's conclusion in *Fuyao* that the record does not contain sufficient evidence to support the Department's finding in that case. Second, the *Fuyao* decision is further distinguishable because, in its original float glass determination, the Department inadvertently stated that it had "reason to believe or suspect" that prices "are" subsidized. *Final Determination of Sales at Less Than Fair Value: Certain Automotive Replacement Glass Windshields From the People's Republic of China*, 67 FR. 6482 (February 12, 2002), and accompanying Issues and Decision Memorandum at Comment 1. The Court found that because the Department stated that prices "are" subsidized, it held itself to a higher standard than that required by the legislative history, and was therefore required to demonstrate with record evidence that prices "were" in fact subsidized. *Fuyao v. United States*, 2005 Ct. Int'l Trade Lexis 6-7. In the instant case, by contrast, we made clear in our *Preliminary Results*, and again in these final results that in determining whether to disregard prices, we look to whether we have reason to believe or suspect such prices *may* be subsidized. Moreover, the *Fuyao* decision is not final and conclusive, and the Department has not yet exhausted all of its appellate remedies with respect to this decision.

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[87] Meco cites *Tapered Roller Bearings and Parts Thereof, Finished or Unfinished, from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review and Notice of Intent to Rescind in Part*, 70 FR 39744, 39754 (July 11, 2005).

Because the information before the Department demonstrates that Korea, Indonesia, Thailand and India maintain broadly available export subsidies, and because the parties in this case have put forth no information to demonstrate otherwise, we continue to have reason to believe or suspect that prices from these countries may be subsidized. Therefore, we continue, in our final results to disregard prices from those countries.

Recommendation

Based on our analysis of the comments received, we recommend adopting all of the above positions. If these recommendations are accepted, we will publish the final results of this investigation and the final dumping margins for New-Tec and Feili Group in the *Federal Register*.

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Agree Disagree

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David M. Spooner
Assistant Secretary
for Import Administration

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Date