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July 20, 2009

MEMORANDUM TO: Ronald K. Lorentzen
Acting Assistant Secretary
for Import Administration

FROM: John M. Andersen
Acting Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Certain Kitchen Appliance Shelving and Racks from the People's Republic of China: Issues and Decision Memorandum for the Final Determination

SUMMARY

We have analyzed the comments submitted in the antidumping ("AD") investigation of certain kitchen appliance shelving and racks ("KASRs") from the People's Republic of China ("PRC"). As a result of our analysis, we have made changes from *Certain Kitchen Appliance Shelving and Racks from the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 74 FR 9591 (March 5, 2009) ("*Preliminary Determination*").

Additionally, the Department of Commerce ("the Department") conducted verifications of both respondent companies and one separate rate applicant ("SRA") between April 13, 2009, and May 26, 2009. Upon the release of the verification reports, we invited parties to comment on our *Preliminary Determination*. Based on our analysis of the comments received and the results of verification, we have made changes from the *Preliminary Determination*.

We recommend that you approve the positions described in the "Discussion of the Issues" section of this Issues and Decision Memorandum. Below is the complete list of the issues in this antidumping duty ("AD") investigation for which we received comments on the *Preliminary Determination*.

DISCUSSION OF THE ISSUES

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[1] New King Shan (Zhuhai) Co., Ltd. ("New King Shan").
[2] Nashville Wire Products Inc., SSW Holding Company, Inc., United Steel, Paper and Forestry, Rubber Manufacturing, Energy, Allied-Industrial and Service Workers International Union, and the International Association of Machinists & Aerospace Workers, District Lodge 6 (Clinton IA) (hereafter referred to as the "Petitioners").
[3] Guangdong Wireking Housewares & Hardware Co., Ltd. ("Wireking").

Comment 17: New King Shan

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General Issues

Comment 1: Double Remedy, Antidumping Duties and CVD Duties

The Government of China ("GOC") contends that under the Department's new interpretation of the countervailing duty ("CVD") law, the Department's AD and CVD methodologies serve to remedy the same underlying problem and thus result in a double remedy. Though AD and CVD investigations are meant to address different behaviors,[4] the GOC argues that their similar purpose[5] and the fact that relief is affected in the same way[6] results in a double remedy.[7] The GOC argues that the statute recognizes the potential for double remedy as it provides for an adjustment to the export price in the dumping calculation for CVD duties assessed due to export subsidies.[8] The GOC contends that under the non-market economy ("NME") AD methodology used in NME cases, any offset to address an unfair advantage is reflected in the NV ("NV") and that in CVD cases, the offset is affected through a CVD. The GOC states that this results in two remedies to substantially the same problem. Furthermore, the GOC questions whether countervailable subsidies are even cognizable in an NME.[9]

The GOC takes issue with any presumption that domestic subsidies do not necessarily result in a

[4] *Badger-Powhatan, Div. of Figgie Intern. v. United States*, (CIT 1985), 608 F. Supp. 653, 656 (antidumping law is intended to offset unfairly low prices in the U.S. market) and *Zenith Radio Corp. v. United States*, 437 U.S. 443, 455-56 (1978) (CVD law is intended to offset unfair economic advantages bestowed by a government).
[5] *Wheatland Tube v. United States*, 495 F.3d 1355, 1364 (Fed. Cir. 2007).
[6] 19 U.S.C. §§ 1671 and 1673.
[7] *Certain Cold-Rolled Carbon Steel Flat Products from Korea: Notice of Final Determination of Sales at Less Than Fair Value*, 67 FR 62124, 62125 (October 3, 2002).
[8] 19 U.S.C. § 1677a(c)(1)(C).
[9] *Georgetown Steel v. United States*, 801 F.2d 1308, 1317-18 (Fed. Cir. 1986).

lower price while export subsidies are presumed to lower export prices.[10] The GOC contends that these presumptions are unrealistic and conflict with the Department's prior position that domestic subsidies lower prices in both the home and U.S. markets[11] and its position of not granting an adjustment in the AD calculation for ME cases. Additionally, the GOC asserts that the NME methodology results in the passing through of subsidies to NV in that it accounts for some distortions that are countervailable subsidies.[12] Thus, the GOC states that the NV has been increased relative to the export price by the amount of the subsidies. Placing an additional duty on that import in the form of CVD duty would result in a double remedy, according to the GOC.

The GOC argues that the only remedy to the situation is to either use the actual costs reported by respondents or offset the AD margin in a NME case by the subsidy margin, and that the Department's suggestion of forcing the respondents to provide precise adjustments to the calculations to avoid a double remedy[13] is unrealistic. The GOC contends that given the more macro focus of NME AD methodology it would be impossible in many circumstances for respondents to identify the specific subsidies and demonstrate a double remedy. The GOC contends that placing the burden on respondents to prove double remedy is unreasonable. Further, the GOC argues that though the Department originally stated that subsidies were a market phenomenon and not applicable to NME countries,[14] the Department has since changed its position and now states that it can identify countervailable subsidies in NME countries. The GOC argues as the broad focus of the NME AD methodology is meant to account for all distortions and because the Department recognizes that those distortions now include subsidies, a double remedy is inevitable. The GOC asserts that the Department uses the imprecise NME AD methodology because it would be impossible to disentangle and quantify market distortions in NME countries.[15] The GOC states now, however, the Department is saying it can do just that with regard to CVD investigations by distinguishing countervailable subsidies.[16] The GOC states that such a position denies respondents the ability to demonstrate a double remedy to the precision demanded by the Department.

Given this, the GOC contends that in the absence of substantial evidence demonstrating that no

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[10] *Certain New Pneumatic Off-Road Tires from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Market Value and Partial Affirmative Determination of Critical Circumstances,* 73 FR 40, 485 (July 15, 2008), and accompanying Issues and Decision Memorandum at Comment 2 ("*Tires from the PRC*").
[11] *Notice of Final Results of Antidumping Duty Administrative Review: Low Enriched Uranium From France*, 69 FR 46501, 46506 (August 3, 2004) ("Enriched Uranium"); and *Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products from Korea: Final Results of Antidumping Duty Administrative Reviews*, 62 FR 18404, 18422 (April 15, 1997).
[12] *Low Enriched Uranium From France*, 69 FR at 46506.
[13] *Tires from the PRC,* at Comment 2.
[14] Memorandum from Shauna Lee-Alaia and Lawerence Norton to David M. Spooner, RE: Countervailing Duty Investigation of Coated Free Sheet Paper from the People's Republic of China – Whether the Analytical Elements of the Georgetown Steel Opinion are Applicable to China's Present-Day Economy (March 29, 2007) at 9-10 ("Georgetown Steel Applicability Memo"); *Carbon Steel Wire Rod from Czechoslovakia: Final Negative Countervailing Duty Determination*, 49 FR 19370, 19372 (May 7, 1984).
[15] Georgetown Steel Applicability Memo at 9-10.
[16] *Id.*

double remedy exists, a single remedy should be chosen or there should be global adjustments to the Department's AD methodology. The GOC argues that electing a single remedy is consistent with the equitable doctrine of election of remedies and solves the problem of giving two remedies to the same underlying problem.[17] The GOC asserts alternatively, the Department could avoid double remedies either by offsetting the AD margin by the subsidy margin or by using respondents' actual costs in constructing a NV.

The GOC then argues that even under the Department's requirement that respondents prove the existence of a double remedy, a double remedy exists in this situation with regard to the valuation of wire rod. The GOC states as a surrogate value ("SV") was used for wire rod, any subsidy had already been accounted for in constructing the NV. Nevertheless, the GOC asserts a CVD duty was placed on the product due to its low cost of wire rod, which is a double remedy.

The GOC contends that it is within the Department's power to avoid double remedies. The GOC states that the Department's suggestion that it lacks the ability to adjust tandem AD and CVD rates results from the statute's inclusion of an offset for export subsidies but its silence on the possibility of an offset for domestic subsidies. The GOC asserts that the statute's silence on the matter is not necessarily meaningful as Congress did not anticipate that NME AD cases and CVD bases would be brought against the same country. The GOC points to the analysis in *Georgetown Steel* as support for the contention that Congress did not foresee this scenario when writing the law. Additionally, GOC asserts that Court of Appeals for the Federal Circuit ("CAFC")'s decision in *Wheatland Tube* gives the Department the necessary authority to avoid collecting a double remedy and shows that conceptual arguments instead of real world evidence are sufficient evidence of double remedies.

The GOC asserts that, at a minimum, the Department should use Wireking's actual wire rod costs. The GOC points to the Department's determination that 90 percent of the products traded in China have their prices determined by the market.[18] The GOC also asserts that in the parallel CVD proceeding, the Department determined that there were hundreds of wire rod producers in China and that the level of wire rod production attributable to state-owned enterprises was below the level of what is considered to be a distorted market.[19] The GOC contends that in such situations, where there are numerous actors and no price controls, the price reflects market terms.[20] Thus, the GOC contends that the Department should find that the wire rod market is not distorted and use Wireking's actual wire rod costs in the AD calculations and thereby avoid a double remedy.

Wireking argues that the Department has consistently avoided application of double remedies of

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[17] *Canadian Lumber Trade Alliance v. United States*, 30 CIT 391, 419, 425 F. Supp. 2d 1321, 1351 (2006); 25 Am. Jur. 2d Election of Remedies §3 (2004); Dan B. Dobbs, Law of Remedies § 9.4 (2nd ed. 1993); 28A Corpus Juris Secumdum Election of Remedies or Rights or Theories of Discovery §1(2008).

[18] Georgetown Steel Applicability Memo at 5.

[19] *Countervailing Duties: Final Rule*, 63 FR 65348, 65377 (Nov. 25, 1998).

[20] Scherer and Ross, *Industrial Market Structure and Economic Performance*, Third Edition, Houghton Mifflin Company (1990), at 277.

antidumping duties and safeguard/countervailing duties. Wireking argues that simultaneous application of antidumping and countervailing duties in this case results in duplicative calculation methodologies to address a single Wireking action. Wireking contends that trade laws are supposed to be remedial and not punitive or retaliatory.[21] As such, Wireking argues that respondents should have an opportunity to be able to remedy its behavior such that it eliminates or reduces its future dumping or subsidy margins. Wireking points out that the Department and the Courts have recognized the risk of double counting and have decided not to deduct antidumping duties, safeguard duties or countervailing duties from the US price.[22] Wireking further argues that in the past, the Department has taken steps to avoid double counting without requiring proof of actual double counting and that the Department's insistence of such proof[23] is a departure from such practice. Wireking points to the Department's practice of adjusting surrogate financial ratios by excluding certain expenses in order to avoid double counting without requiring specific proof from respondents of such double counting.[24] Thus, Wireking argues that if the Department is already engaging in analysis to prevent double counting, it should not arbitrarily decide to ignore double counting with respect to AD and CVD duties and that doing so produces punitive results.

In this proceeding, Wireking contends that the Department has applied double remedies because both the NME AD methodology and the CVD methodology "correct" the valuation of the wire rod factor of production ("FOP"). In the AD investigation, Wireking notes that the Department disregarded the prices that Wireking reported paying for wire rod as it was purchased from a NME source using a NME currency. The Department then used a SV, which Wireking claims

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[21] *Nucor Corp. v. United States*, 414 F.3d 1331, 1336 (Fed. Cir. 2005) *citing Charparral Steel Co. v. United States*, 901 F.2d 1097, 1103-04 (Fed. Cir. 1990); *C.J. Tower & Sons v. United States*, 71 F.2d 438, 445 (CPA 1934).

[22] *Bethlehem Steel v. United States*, 27 F. Supp. 2d 201, 208 (CIT 1998); *U.S. Steel Group v. United States*, 15 F. Supp. 2d 892, 895 (CIT 1998) ("*U.S. Steel*"); *AK Steel v. United States*, 988 F. Supp. 594, 607-8 (CIT 1997) ("*AK Steel*"); *Hoogovens Staal BV v. United States*, 4 F. Supp. 2d 1213, 1220 (CIT 1998) ("*Hoogovens Staal*"). *Citing also* Statement of Administrative Action on the Uruguay Round Agreement Act, ("SAA"), H.R. Doc. No. 103-316, at p. 885 (1994); *Wheatland Tube v. United States*, 495 F.3d 1355, 1362 (Fed. Cir. 2007) ("*Wheatland Tube*"); *Certain Cold-Rolled Carbon Steel Flat Products from the Netherlands: Final Results of Antidumping Duty Administrative Review*, 62 FR 18476, 18486 (Apr. 15, 1997) and accompanying Issues and Decision Memorandum; *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews*, 62 FR 54043, 54079 (Oct. 17, 1997) and accompanying Issues and Decision Memorandum; *AK Steel*, 988 F. Supp. at 607-08 & n.12; *Hoogovens Staal*, 4 F. Supp. 2d at 1220; *Stainless Steel Wire Rod from the Republic of Korea: Final Results of Antidumping Duty Administrative Review*, 69 FR 19153, 19159 (April 12, 2004) and accompanying Issues and Decision Memorandum, n.22; *Certain Hot-Rolled Lead and Bismuth Carbon Steel Products from the United Kingdom: Final Results of Antidumping Duty Administrative Review*, 60 FR 44009, 44010 (August 24, 1995) at accompanying Issues and Decision Memorandum; *PQ Corp. v. United States*, 652 F. Supp. 724, 737 (CIT 1987); *U.S. Steel*, 15 F. Supp. 2d at 895.

[23] *Citric Acid and Certain Citrate Salts from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 74 FR 16836 (Apr. 13, 2009) and accompanying Issues and Decision Memorandum at Comment 2.

[24] *Polyethylene Terephthalate Film, Sheet, and Strip from the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 73 FR 55039 (September 24, 2008)* and accompanying Issues and Decision Memorandum at Comment 3 *("PET Film from the PRC")*; *Certain Frozen Warmwater Shrimp from the People's Republic of China: Antidumping Duty Administrative and New Shipper Reviews*, 72 FR 52049 (Sept. 12, 2007) and accompanying Issues and Decision Memorandum at Comment 3B.

was substantially higher than the price it paid, thereby resulting in an increase in the NV. In the CVD investigation, Wireking states that the Department used benchmark prices for wire rod calculated from steel industry sources that were higher than those paid by Wireking. Wireking states this comparison with benchmark prices resulted in a less than adequate remuneration ("LTAR") finding that accounted for the vast majority of Wireking's overall subsidy margin. In both cases, Wireking contends the duty margins are driven substantially by the findings with regard to wire rod costs. Wireking states that the punitive effect of this is shown by the fact that Wireking could not reasonably attempt to remedy the situation because attempting to solve the problems associated with antidumping calculations would not alter the CVD determination and vice versa.

In rebuttal, Petitioners argue that no double remedy exists with respect to domestic subsidies. Petitioners assert that AD and CVD proceedings are separate regimes that provide for distinct remedies and that, by statute, AD duties are calculated the same way regardless of the existence of a parallel CVD proceeding. Further, Petitioners state the Department has stated its policy of calculating full AD and CVD duties and rejected arguments that countervailing duties should be deducted from U.S. prices in AD proceedings because such a deduction would increase the dumping margin above the margin that would otherwise be found, absent any parallel CVD case and the CIT has deferred to the Department's interpretation.[25] Petitioners argue that the only exception allowed by statute is the offsetting of NV for export subsidies.[26] Further, Petitioners contend that the legislative history of the statue shows that Congress did not intend for there to be an adjustment based on domestic subsidies,[27] and cite previous determinations by the Department in which it found that Congress did not intend for such an adjustment.[28]

Petitioners dispute the contentions that Chinese export prices would be higher or lower as a result of subsidies and that SVs are presumed to be higher than Chinese prices. Petitioners point to a past case where the Department has stated that the connection between domestic subsidies and export prices is indirect and influenced by many factors.[29] Petitioners also assert that the Senate Report shows that while export subsidies affect price comparability, domestic subsidies affect prices in both markets.[30]

Petitioners claim that the argument that domestic subsidies increase NV is incorrect and that they may instead lower NV in NME AD proceedings. Petitioners argue that domestic subsides could

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[25] *Wheatland Tube Co. v. United States*, 495 F.3d 1355, 1365 (Fed. Cir. 2007).
[26] 19 USC 1677a(c)(1)(C).
[27] Trade Agreements Act of 1979, Report of the Committee on Finance on H.R. 4537, Senate Report No. 96-249, 96th Cong. July 17, 1979 at 79 ("Senate Report").
[28] *Notice of Final Results of Antidumping Duty Administrative Review: Low Enriched Uranium from France*, 69 FR 46,501 (Aug. 3, 2004); *Ad Hoc Committee v. United States*, 13 F.3d 398, 401-03 (Fed. Cir. 1993); *Circular Welded Carbon Quality Steel Pipe: Final Affirmative Countervailing Duty Determination and Final Affirmative Determination of Critical Circumstances*, 73 FR 31,966 (June 5, 2008).
[29] *Final Determination of Sales at Less Than Fair Value: Coated Free Sheet Paper from the People's Republic of China*, 72 FR 60632 (Oct. 25, 2007).
[30] Senate Report at 79.

lower NV by affecting the factors used in calculating NV, like the quantity of factors consumed. Domestic subsidies could also lower the prices of imported inputs that are used in the production of merchandise as the imports must compete against the subsidized Chinese suppliers.

As for the burden of proof, Petitioners contend that it should remain with the respondents as they are in possession of the relevant data. Petitioners argue that the law states that the party with possession of the data has the burden of proving the amount and nature of any adjustment.[31]

Lastly, Petitioners argue that the Department should not use Wireking's actual wire rod costs. Petitioners claim that because Wireking did not request market-oriented industry status, it is thus barred from requesting the Department's use of its actual costs. Additionally, Petitioners argue that the GOC failed to support its claims regarding China's wire rod industry during verification, by failing to provide company specific data on wire rod production.[32]

Department's Position:

The Department disagrees with the GOC and Wireking that the concurrent application of AD duties calculated under the Department's NME methodology and CVDs creates a double remedy for domestic subsidies in China, for which the statute automatically requires a full offset, thus nullifying the CVDs (or, if the dumping margin is smaller than the CVD rate, the antidumping duties). We reject these arguments for the following reasons.

First, we note that the statute is silent with respect to this issue. The GOC and Wireking have not even attempted to identify any provision of the statute that addresses this question, and there is none. Construed favorably to petitioners, the automatic offset that Section 772(c)(1)(C) of the statute provides for CVDs to offset export subsidies, combined with the absence of any such offset for CVDs to offset domestic subsidies, would imply that Congress did not intend for any offset to be made for CVDs to offset export subsidies. Thus, even construed favorably to the position advanced by the GOC and Wireking, the issue is left to the Department's discretion.

The AD and CVD laws are separate regimes that provide separate remedies for distinct unfair trade practices. The CVD law provides for the imposition of duties to offset foreign government subsidies. Such subsidies may be countervailable regardless of whether they have any effect on the price of either the merchandise sold in the home market or the merchandise exported to the United States. AD duties are imposed to offset the extent to which foreign merchandise is sold in the United States at prices below its fair value. With one exception, AD duties are calculated the same way regardless of whether there is a parallel CVD proceeding.

The one point of contact between the AD and CVD regimes is Section 772(c)(1)(C) of the AD

[31] 19 CFR 351.401(b)(1).

[32] June 19, 2009 *Verification Report of the Foshan Municipal Government, Shunde District Government and the Guangdong Provincial Government of the People's Republic of China* at 2 in the companion countervailing duty investigation.

law, 19 U.S.C. 1677a(c)(1)(C). This provision requires that the price used to establish the export price shall be increased by the amount of any CVD imposed on the subject merchandise . . . to offset an *export subsidy*. . . (emphasis supplied). Chinese respondents have argued that the Department erred in refusing to interpret this provision as if it actually read. . . to offset an export subsidy *or, where the NME antidumping methodology is applied, a domestic subsidy* (emphasis supplied). Plainly, the highlighted language is not in the statute, which does not provide the automatic offset sought by the GOC. If anything, as the Department noted in *Notice of Final Results of Antidumping Duty Administrative Review: Low Enriched Uranium from France*, 69 FR 46501 (August 3, 2004), the absence of this additional language implies that Congress intended not to provide the additional offset.

Second, although the GOC and Wireking have asserted that the Department should require petitioners to choose between application of countervailing duties or application of antidumping duties using the NME methodology, they cite no statutory provision that would be a basis imposing such a choice, nor any provision that would be a basis for either terminating the concurrent CVD investigation or adjusting the CVD rate found therein. Indeed there are no such provisions in the statute. Section 701 of the statute requires the Department to impose CVDs equal to the full amount of the subsidy. The Department does not see how any matter related to dumping could alter this statutory command. Thus, the Department has always considered that this issue of a potential offset arises under the AD law, rather than the CVD law.

Third, we disagree with the GOC's characterization of the Department's previous practice with respect to NME countries and, by implication, of the decision of the Federal Circuit in *Georgetown Steel*. The GOC implies that the Department did not apply the CVD law to NMEs concurrently with the NME AD methodology before 2007, because the distortions allegedly offset by the NME methodology remedied any distortions from countervailable subsidies.[33] In fact, the Department declined to apply the CVD law to the Soviet Bloc countries in the mid-1980s because the whole exercise appeared to be meaningless in the context of those economies at that time.

Georgetown Steel v. United States, 801 F.2d 1308 (Fed. Cir. 1986), concerned potash imported from the USSR and the German Democratic Republic, and carbon steel wire rod from Czechoslovakia and Poland. In those proceedings, the Department determined that those governments had not bestowed any subsidy (referred to under the statute at that time as a bounty or grant) upon the exported merchandise, because the concept of a subsidy had no meaning in an economy that had no markets and in which activity was controlled according to central plans.[34]

In the administrative determinations leading up to *Georgetown Steel*, the Department found that the governments of the Soviet Bloc countries controlled their commerce so completely that subsidies could not be separated out from the amalgam of government directives and controls, so that an alleged subsidy essentially involved one arm of the government giving money to another

[33] GOC case brief, at p. 12.
[34] *Georgetown Steel*, 801 F.2d at 1310.

arm. In other words, there was no identifiable financial contribution, or in the nomenclature of the 1980s, no identifiable bounty or grant. Moreover, in an economy essentially comprised of a single entity, it made little sense to attempt to analyze the distribution of benefits for the purpose of applying the specificity test. In this environment, the Department essentially found that the very concept of the government transferring a benefit to a producer or exporter distinct from the government had no meaning.

The Federal Circuit noted the broad discretion due the Department in determining what constituted a subsidy (then called a bounty or grant), and held that:

> We cannot say that the administrations' conclusion that the benefits the Soviet Union and the German Democratic Republic provided for the export of potash to the United States were not bounties or grants under section 303 was unreasonable, not in accordance with law, or an abuse of discretion.

Georgetown Steel, 801 F.2d at 1318. As the Court noted, even if one were to label these incentives as a subsidy, in the loosest sense of the term, the governments of these nonmarket economies would in effect be subsidizing themselves.[35] Thus, *Georgetown Steel* did not hold that the CVD law could never be applied to exports from a NME country. It simply upheld the Department's determination that it could not identify a subsidy in the conditions of the Soviet Bloc that were before it.

China's economy today differs significantly from that of the Soviet Bloc countries in the 1980s, in ways that no longer make the bestowal of a benefit upon individual producers or exporters a meaningless act.[36] Accordingly, applying the CVD law to China today is a meaningful exercise.

Because the Department's previous refusal to apply the CVD law to NME countries was not based on the theory that the NME AD methodology already remedied any domestic subsidies in NME countries, the Department's current practice of applying the CVD law to exports from China is not inconsistent with that earlier practice. The simple fact is that applying the CVD law to China is not a meaningless exercise.

Fourth, given the statute's relative silence (at most) regarding the issue, the Department has quite properly asked respondents in combined AD and CVD proceedings to substantiate their theory that the concurrent application of such measures automatically results in a double remedy to the full extent that any CVDs are imposed upon domestic subsidies in China. This is especially true in light of the highly theoretical and hypothetical nature of the respondents' claim, which is explained below. Respondents have declined to submit any positive evidence on the subject.

Respondents, including the GOC, have declined to submit any evidence to support their claims.

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[35] *Georgetown Steel*, 801 F.2d at 1316.

[36] Memorandum for David M. Sooner, Antidumping Investigation of Certain Lined Paper Products from the People's Republic of China: China's Status as a Non-market Economy, (Aug. 30, 2006).

Instead, they refer to the alleged double remedies as if they were an adjustment specifically provided by the AD law, such as the adjustment for CVDs imposed to offset export subsidies. In the case of export subsidies, the argument that the Department would be required to explain how the adjustment should be made would be strong. Where the adjustment is a novel and highly theoretical construct fashioned by respondents, with little, if any, discernable connection to the statute, the situation is the reverse. The respondents must provide some concrete evidence to support their novel theory.

Fifth, the various theories advanced by respondents to support their claim for an automatic 100 percent offset of any CVD duties against AD duties determined under the NME methodology are based on dubious and mistaken premises. Accordingly, the Department has quite properly rejected these claims.

One initial theory, to which the GOC apparently still ascribes, is that domestic subsidies automatically lower export prices, *pro rata*, thereby increasing dumping margins.[37] Thus, in concurrent AD and CVD proceedings in NME countries, subsidies are remedied twice: once by CVDs, and a second time by the increase in the AD duties assessed. The Department has rejected this proposition.

China's presumption about the effect of domestic subsidies on export prices is derived from what China considers to be the presumption that Congress made concerning export subsidies in amending Section 772 of the statute to require the automatic addition to U.S. prices of CVDs to offset export subsidies – that export subsidies automatically reduce export prices, *pro rata*. The implication is that Congress did not provide an adjustment for domestic subsidies because Congress considered them to reduce both export prices and domestic subsidies, *pro rata*, not affecting the dumping margin. Thus, Congress allegedly built into the law the presumption that domestic subsidies lower export prices, *pro rata*.

In fact, the legislative history of the adjustment establishes only that Congress considered it to satisfy the obligations of the United States under Article VI:5 of the GATT. The legislative history does not appear to be based on any specific assumption about whether foreign government subsidies lower prices in the United States and, in fact, is not solely concerned with the effects of subsidies in the United States.[38] Thus, although the statute requires a full adjustment for CVDs to offset export subsidies in all AD proceedings, it provides no basis for concluding that Congress's action was based on any specific assumptions about the effect of subsidies upon export prices. It may be simply that Congress recognized the complexity of the issues that would have had to have been to be resolved in order to provide anything less than a complete offset for export subsidies, and simply opted for a full offset to avoid those potential problems.

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[37] GOC case brief, at pp. 7 - 8).

[38] Trade Agreements Act of 1979, Report of the Committee on Finance United States Senate on H.R. 4537, July 17, 1979, 96th Cong., 1st Sess. Rep. No. 96-249; Trade Agreements Act of 1979, Statement of Administrative Action, H. Doc. No. 96-153, Part II (1979), at 412.

Whether Congress considered the economic assumptions that might have been behind the failure of the GATT contracting parties to address domestic subsidies in Article VI:5 is not clear. In any event, all the contracting parties may have assumed was that domestic subsidies had a symmetrical effect upon export and domestic prices. This presumed symmetrical impact may have been a *pro rata* or *de minimis* reduction in these prices. Thus, it is not correct to conclude that Congress assumed that the GATT contracting parties assumed that domestic subsidies lower export prices, *pro rata,* still less that Congress built any assumptions about the price effects of domestic subsidies into the antidumping law.

The GOC is similarly mistaken about the Department's statement in *Low Enriched Uranium from France*, 69 Fed. Reg. 46,501 (Aug. 3, 2004) that "domestic subsidies presumably lower the price of the subject merchandise in the home and the U.S. markets." This statement does not stand for the proposition that domestic subsidies are passed through into export prices, *pro rata*. Taken at face value, the statement is that "domestic subsidies presumably lower the price of the subject merchandise in export markets . . . ." This is no more than a presumption, and a very limited presumption at that – the reductions in price could be one percent of the subsidy in each market. Commerce's point was not that all domestic subsidies are presumed to be fully passed through into domestic and export prices, but that the effect of domestic subsidies on the price in each market presumably was the same.

The Department has explained that the effect of domestic subsidies upon export prices depends upon many factors (such as the supply and demand for the product on the world market, and the exporting countries' share of the world market), and is therefore speculative.[39] Thus, the Department has correctly refused to assume that domestic subsidies automatically reduce export prices, *pro rata*. There is substantial support for the Department's position in the economic literature.[40]

In considering the impact of domestic subsidies upon export prices, the form of the subsidy is again important because, like export subsidies, some domestic subsidies give domestic producers a greater incentive to increase production than others. A production subsidy (for example, the provision of raw materials at reduced prices) reduces the unit cost of producing that merchandise and, therefore increases the producer's profit on sales of that merchandise. This may give the producer a commercial incentive to increase production of that merchandise. In a NME, however, it is not necessarily safe to assume that economic decisions are made on the basis of such market forces. In any event, more general subsidies (such as general grants or debt forgiveness) would not provide that direct incentive. A foreign producer might use a general subsidy to modernize its plant, pay higher dividends, fund research and development, clean up the environment, make severance payments, increase the production of some other product, or

[39] *Certain New Pneumatic Off-the-Road Tires from China*, 73 FR 9278, 9287 (February 20, 2008).

[40] World Trade Organization, World Trade Report 2006 (page 57), Alex F. McCall and Timothy E. Jostling, Agricultural Policies and World Markets, MacMillan Pub. Co., 1985, p. 126-7.

waste the money. Consequently, this type of domestic subsidy will not necessarily result in any increase in production and, therefore, will not necessarily result in any reduction in export prices, still less an automatic *pro rata* reduction.

Even if a producer attempted to respond to a domestic subsidy exclusively by increasing production, it might not be able to do so, at least in the short or medium term. Various constraints (such as limits on the supply of raw materials, energy, or transportation) might limit its ability to do so. Moreover, adding capacity takes time. Thus, it would be incorrect to claim that domestic subsidies automatically result in increased production.

Additionally, even if all producers in an NME country do respond to domestic subsidies by increasing production, it is by no means certain that this increase would result in lower export prices. If the world market price is going up, it is not realistic to assume that an NME producer that receives a domestic subsidy automatically will reduce its export prices by the full amount of the subsidy, as allocated under the Department's CVD methodology. Increased production and exports will tend to lower export prices *over time*, but this reduction will be neither automatic nor necessarily *pro rata*. In fact, during the years preceding prior Department investigations, some Chinese producers raised their prices in line with world market prices, despite having received substantial subsidies.[41] Increased export sales will reduce the price of the subject merchandise on world markets only to the extent that the producer or producers in question supply a substantial share of the world market, so that the additional production will drive down prices in that market. Even this will take time and will not occur if other producers in the market reduce production to avoid a price war. In sum, as the Department concluded in *Certain New Pneumatic Off-the-Road Tires from China*, the relationship of domestic subsidies to export prices is speculative.[42]

The argument that domestic subsidies inflate dumping margins by automatically lowering export prices presumes that domestic subsidies in NME countries do not affect NV. There is no basis for this assumption. Put simply, while NME subsidies may not affect the factor *values* used to calculate NV in an NME proceeding, such subsidies may easily affect the *quantity* of factors consumed by the NME producer in manufacturing the subject merchandise.

The simplest example would be where a domestic subsidy in an NME country enables an investigated producer to purchase more efficient equipment, lowering its consumption of labor, raw materials, or energy. When the surrogate factor values are multiplied by the NME producer's lower factor quantities, they result in lower NVs and, hence, lower dumping margins.[43] Any reduction in factor usage by NME producers would reduce NV in a second

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[41] *Certain New Pneumatic Off-the-Road Tires from China, ITC Final Report* (Publ. 4031, August 2008), pages IV-5 (Table IV-2), E-3 (Table E-1) and E-6 (Table E-4) and *Circular Welded Carbon-Quality Steel Pipe from China, ITC Preliminary Report*, (Publ. 3938, July 2007), pages V-12 ((Table V-3) V-14 (Table V-5), and V-19, showing rising average unit values on imports from China for the years 2005-2007.

[42] 73 Fed. Reg. 9278, 9287 (February 20, 2008).

[43] Section 773(c)(3) of the Act, 19 U.S.C. 1677b(c)(3).

manner, because the final factor values are also used to calculate the amounts to be added to NV for overhead, SG&A, and profit.[44]

Moreover, in determining NV in NME cases, the Department does not exclusively use factor quantities in the NMEs valued in the surrogate, ME country. Some factors' values are based on the prices of imported inputs (priced in the currency of the country from which the inputs were obtained or in dollars). Given that the input suppliers in these countries are often competing with Chinese suppliers of those same inputs, it is by no means safe to assume that those prices are not influenced by subsidies in China.

Finally, in at least some cases, the NME exports of the subject merchandise will account for a significant share of the world market, enough to influence prices in world markets. In such cases, particularly where the industry is export oriented or has excess capacity (a chronic problem in China), subsidies could increase output and exports from China, which, in turn, would reduce the prices of the good in question in world markets. These lower prices would reduce profits for producers selling in these markets, which, in turn, would reduce the profit the Department derives from their financials and, thus, reduce NV.

The GOC's second theory that concurrent AD and CVD proceedings against NME countries automatically result in the application of a double remedy is even more vague and more automatic than the first. This theory, also advanced by Wireking, posits that the Department's NME methodology mechanically concludes that the effects of countervailable subsidies pass through to NV, so that AD duties on Chinese exports, by themselves, remedy all subsidies attributable to that merchandise.[45] In other words, the GOC and Wireking assert that the NME methodology inherently provides a remedy for any and all countervailable subsidies such that concurrent application of CVDs is necessarily duplicative. Apparently, the GOC concludes that the NME methodology arrives at this conclusion mechanically because of the lack of any statutory provision that requires or achieves this result. Wireking expressly agrees that no such statutory provision exists.

It appears that the general theory of this argument is that concurrent ADs and CVDs do not create automatic double remedies in ME proceedings, because domestic subsidies automatically lower NV, and hence the dumping margins, *pro rata*. The NME AD methodology, on the other hand, produces a NV that is not affected by subsidies in any way, so that it necessarily exceeds what would have been the ME dumping margin by the full amount of the subsidy, thus creating a double remedy, which the statue requires the Department to offset. We reject this proposition.

There are several reasons why subsidies in ME cases would not necessarily lower the NV calculated by the Department, *pro rata,* below what it would have been absent any subsidies. Subsidies often come with conditions attached that reduce the cost savings to the recipient below

[44] *Hebei Metals & Mineral v. United States*, 366 F. Supp. 2d at 1277 (citation omitted); *Dorbest Ltd. v. United States*, 462 F. Supp. 2d 1262, 1300 - 01 (Ct. Int'l Trade 2006).
[45] GOC case brief, at pp. 2, Wireking case brief, at pp. 33-35

the nominal amount of the benefit received. For example, subsidy recipients may be required to retain redundant workers, maintain higher levels of production than would be optimum, remain in economically disadvantageous locations, reduce pollution, obtain supplies from favored sources, and so forth. Even if subsidies come with no strings attached, there is no guarantee that they will result in a lower cost of production. Subsidies could be paid out as dividends, used to increase executive pay, or wasted in any number of ways.

Moreover, the statute provides that NV in ME cases is to be based on home market prices, where possible. Where NV is based on prices, the relationship of subsidies to NV becomes yet more tenuous. Not only is the extent to which the subsidies will affect costs uncertain, but, even to the extent that subsidies may lower costs, the extent to which the producer will pass these cost savings through to home market or third country prices is uncertain. Basic economic principles indicate that the prices are a function of the supply and demand for the product in the relevant market, so that any cost savings will be reflected in prices only indirectly.

Finally, to the extent that domestic subsidies lower NV in ME cases, they may lower export prices commensurately, so that the dumping margins may not change. Thus, it is not safe to conclude that subsidies in market economies automatically reduce dumping margins, still less that they automatically reduce dumping margins, *pro rata.*

The counterpoint to the argument that domestic subsidies automatically lower NVs (and, thus, dumping margins) in ME cases, *pro rata*, is that domestic subsidies have no effect whatsoever on NVs (and, thus, dumping margins) dumping margins determined under the NME methodology. The GOC argues that domestic subsidies do not affect NV in NME cases because NV is essentially imported from surrogate, ME, countries. As explained above, this premise is also incorrect there are several ways in which subsidies can lower NME NVs.

Moreover, the whole idea of comparing AD margins under the NME methodology to the theoretical margins that the Department would find if it treated China as a ME country is dependent upon other things being equal, so that any actual difference could be attributed to the difference in the distortion from subsidies. But this is not the case. The most obvious difference between NVs determined in ME and NME situations involves exchange rates. In ME proceedings, NVs are converted from the home market currency to the currency of the importing country at prevailing exchange rates. In NME proceedings, however, are derived from the actual factors of production that are valued based on information from the surrogate country using the currency of the surrogate country. Thus, NVs in NME proceedings are not influenced by the exchange rate between the exporting country and the importing country. How the different roles that currencies play in NME and ME antidumping proceedings affect any difference in dumping margins calculated under the two methodologies is uncertain, and highly complex. What is certain, however, is that this key difference would prevent any simple comparison of NME and ME AD margins.

The GOC asserts (case brief, at p. 8) that the fact that the Department may find that an input for a particular product was provided for less than adequate remuneration in a CVD case, and then

used a SV for that input in the AD case, proves that the subsidy lowered NV, *pro rata*. This conclusion is not logical. NME methodology involves more than the simple addition of input costs. It is a complex calculation that takes into consideration operating efficiencies, administrative expenses, the cost of capital, and numerous other factors. A SV for one factor of production that is higher than the price actually paid by the respondent company does not necessarily result in a higher dumping margin, nor does a lower SV for one factor of production necessarily result in a lower dumping margin. The individual elements of the NME methodology do not exist in a vacuum; the various elements necessarily work together.

Sixth, the GOC and Wireking argue that the Department's refusal to provide an automatic offset for CVDs in NME AD proceedings is inconsistent with its decisions not to deduct CVDs from export prices to prevent double remedies. This is also incorrect because there is no inconsistency. Because the statute provides two distinct remedies, the Department's purpose in those cases was to collect both remedies in full, and no more. The Department refused to deduct CVDs from U.S. prices because this would have resulted in the collection of total AD duties and CVDs that would have exceeded both independent remedies in full. The Federal Circuit has upheld this position.[46] Similarly, the Department's refusal to treat antidumping duties and safeguard duties as a cost in AD calculations reflects the Department's effort to collect these distinct remedies in full, but no more. Adoption of the offset proposed by the GOC and Wireking would prevent application of antidumping and countervailing duties in full as distinct remedies, one for pricing below NV, and the other to countervail receipt of subsidies.

In the *China Tires* proceeding, the Department preserved this same principle, refusing to interpret the statute to require the automatic addition to U.S. prices in NME proceedings of domestic subsidy CVDs. Such an addition would not have preserved both remedies in full, but would have reduced the AD duty below the dumping margin -- a reduction for which no sound theory or statutory basis was advanced. The Department is following it practice from *Tires from the PRC* here.[47]

Wireking's reliance on the Department efforts to avoid double counting in its NME dumping margin calculations is misplaced. The Department is charged with calculating dumping margins as accurately as possible. Wireking fails to identify any item in the dumping margin calculation that is being counted twice. Thus, Wireking contends that, even if the NV and export price have been determined accurately, the difference between these amounts should not be treated as margin of dumping. Rather, the margin of dumping would be determined as the difference between the NV and export price ("EP") (or constructed export price ("CEP")), less the amount of the CVD determined in a concurrent investigation of subsidies. Contrary to Wireking's assertions, nothing is being double counted in the dumping margin calculation. Accordingly, the accurately calculated dumping margin should be collected in full as the remedy for pricing at less than NV.

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[46] *Wheatland Tube Co. V. United States*, 495 F.3d 1355 (Fed. Cir. 2007) (reversing *Wheatland Tube v. United States*, 414 F. Supp. 2d at 1271 (Ct. Int'l. Trade 2006).
[47] *Tires from the PRC*, 73 FR 40485 at Comment 2.

Wireking alleges that the application of the NME AD methodology and the CVD methodology using benchmark prices effectively precludes Wireking from modifying its behavior to eliminate the dumping or subsidy margins. Wireking's argument fails to recognize that dumping may be eliminated by setting export prices in excess of NV, and countervailing duties resulting from purchases of inputs at less than adequate remuneration would typically be eliminated by not purchasing inputs from public authorities. In any event, the purpose of dumping margin calculations is to accurately measure the dumping that has occurred, not to provide respondents with a one-step program to eliminate dumping.

Seventh and lastly, we reject the notion that Congress passed the AD and CVD laws to correct unspecified economic distortions, and that, to the extent that these unspecified economic distortions may overlap, the Department is required to measure this overlap and provide an offset. Congress established two separate remedies for what it evidently regards as two separate unfair trade practices. The only point at which the statute requires the Department to reconcile these separate remedies is in the case of CVDs to offset export subsidies. Because neither AD nor CV duties are concerned with economic distortion, as such, but are simply remedial duties calculated according to the detailed specifications of the statute, it follows that no overall economic distortion cap for concurrent proceedings can be distilled from the statute.

The theory advanced by the GOC and Wireking would not result in a reduction in AD or CVD duties assessed in concurrent proceedings by some fraction of the CVD duties. The theory is that the NME AD methodology entirely replaces subsidized, below market, costs with purely market-determined costs, creating a double remedy to that full extent. Thus, accepting this theory would result in the complete nullification of CVDs for China, as long as the NME methodology is applied. The Department does not accept this nullification.

In the alternative, the GOC argues that the Department should use Wireking's actual wire rod costs to determine NV in this investigation. For the reasons previously set forth in the Department's preliminary determination and in the instant determination, the Department has determined that NV of the subject merchandise in this case cannot be determined under subsection 773(a) of the Tariff Act of 1930, as amended ("Act"). In any case, the Department also finding in the instant determination that Wireking's submitted information cannot be relied upon to calculate a dumping margin in this investigation.

Comment 2: New King Shan's Antidumping Duty Margin

New King Shan requests that the amount of any countervailable subsidy attributable to export subsidies should be added to the export price. New King Shan states that this is stated in the *IA AD Manual*.[48] New King Shan contends that the *Preliminary Determination* of the companion CVD proceeding for this case stated that producers in China were benefiting from export

[48] *Import Administration Antidumping Manual*, at Ch. 7, pp 12-13 ("*IA AD Manual*").

subsidies.[49] As such, New King Shan states that the Department should add the amount of the export subsidies to the CEP.

In rebuttal, Petitioners dispute New King Shan's assertion that its export price should include an addition for export subsidies. Petitioners claim that the *IA AD Manual* actually states that in cases where there is an ongoing CVD investigation but no outstanding CVD order, the Department should adjust the estimated weighted-average AD margin calculated for Customs and Border Protection ("CBP") bonding or cash deposit purposes. Petitioners claim that this is what the Department did in this situation[50] and thus no change is merited. Further, Petitioners argue that New King Shan's concerns regarding "inappropriate submissions with spurious arguments" should apply here as Petitioners allege New King Shan super-copied a non-applicable argument from a separate proceeding into its Case Brief and that a simple reading of the *Import Administration Manual* that was cited would show the error of New King Shan's argument.

Department's Position:

The Department disagrees with New King Shan with respect to adding the amount attributable to an export subsidy to the export price. Section 772(c)(1)(C) of the Act, which describes the upward adjustments to export price, states the following:

The price used to establish export price and CEP shall be

(1) increased by

(C) the amount of any CVD imposed on the subject merchandise under subtitle A to offset an export subsidy.

In the concurrent CVD investigation, the Department is continuing to find that subject merchandise, exported and produced by Wireking, benefitted from an export subsidy.[51] This rate is also used as the CVD "all others" rate, which is applicable to New King Shan.

Although New King Shan argues that we should add this export subsidy to the export price, this is inconsistent with our precedent. As explained in the *IA AD Manual*, "where there is an ongoing CVD investigation, but no outstanding CVD order, instead of adding the CVD amount for export subsidies to the EP or CEP, we adjust the estimated weighted-average dumping margin calculated for Customs bonding (for investigations only) or cash deposit purposes to

[49] *Certain Kitchen Appliance Shelving and Racks From the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Countervailing Duty Determination With Final Antidumping Duty Determination*, 74 FR 683 (January 7, 2009).
[50] *Preliminary Determination*, 74 FR at 9603.
[51] *Certain Kitchen Appliance Shelving and Racks From the People's Republic of China: Final Affirmative Countervailing Duty Determination*, (July 20, 2009) available at http://ia.ita.doc.gov/frn/index.html.

reflect the impact of these duties on the dumping margin calculation."[52] Because the transactions under examination in this investigation relate to subject merchandise imported prior to the imposition of any CVD, there is no CVD amount imposed to offset export subsidies associated with sale prices at issue within the meaning of Section 772(c)(1)(C) of the Act. Accordingly, the Department will not add the amount of the export subsidy to the CEP.[53] Instead, the Department will continue to instruct U.S. Customs and Border Protection ("CBP") to require an AD cash deposit or the posting of a bond for each entry equal to the weighted-average AD margin adjusted for the export subsidy rate. To do otherwise, the Department finds, would be improperly accounting for this amount with respect to our collection of the CVD deposit rates in the concurrent CVD investigation.[54]

Comment 3: Treatment of Petitioners' Submissions

New King Shan argues that the Department unfairly favored the Petitioner by not rejecting certain submissions. New King Shan states that the Department should have rejected submissions by Petitioners that lacked certificates of factual accuracy and completeness. New King Shan states that it alerted the Department to this issue in numerous letters. New King Shan states that Petitioners argued that the information they submitted was self-authenticating and therefore did not require certification. New King Shan argues that statute and regulations require certification of all factual information, regardless of whether the facts are publicly available. New King Shan asserts that regulations require any information that has not been previously submitted to the record to be certified to ensure the validity of the information. Furthermore, New King Shan argues that the un-certified information submitted by Petitioners goes beyond what was authored by the respondent, and includes factual information from an outside party, specifically noting the February 3, 2009 letter from Petitioners to the Department, containing information that New King Shan asserts was mischaracterized by Petitioners. New King Shan argues the Department's regulations require that certification must be made by the person who prepared or gathered the information and submitted it. New King Shan argues that in this case that means counsel for Petitioners should certify the information and it is unacceptable for a client or interested party to certify it. New King Shan argues that the failure of Petitioners to certify the information indicates that Petitioners are aware that the information is incomplete or inaccurate. New King Shan asserts that because the Department did not reject Petitioners un-certified submission, New King Shan was forced to divert resources to address improper filings, and this requirement, coupled with the fact that they were selected late as a respondent, impaired New King Shan's ability to participate in the review.

Additionally, New King Shan asserts that Petitioners made filings during the Department's verification of New King Shan with the intention of disrupting verification. New King Shan

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[52] *IA AD Manual*, at Ch. 7, pp 12-13. See also *Notice of Final Determination of Sales at Less Than Fair Value: Carbazole Violet Pigment 23 From India*, 69 FR 67306, 67307 (November 17, 2004) and accompanying Issues and Decision Memorandum at Comment 1 ("*CVP 2004*").
[53] *Preliminary Determination*, 74 FR at 9603.
[54] *CVP 2004* at Comment 1.

states that Petitioners filed a submission containing business proprietary information during the Department's verification of New King Shan in Zhuhai. New King Shan asserts that Petitioners were aware that officials in Zhuhai would be informed of the nature of the filing, but would be unable to view the confidential version because of the Department's procedures regarding the transmission of business proprietary information. New King Shan argues that in the filing, Petitioners were resubmitting previously addressed information and intended to disrupt verification by suggesting in the public version of the document that it contained new information. New King Shan asserts that this was a successful attempt to divert resources and distract Department officials during verification, and it argues that the Department should consider the impact of these improper filings by Petitioners in considering the results of verification.

In rebuttal, Petitioners argue that New King Shan's complaints that it filed numerous letters regarding Petitioners' failure to certify factual information lack the specifics needed in order for the Department to address its claims. Additionally, Petitioners argue that New King Shan does not contest the factual assertions made in the submissions. Moreover, Petitioners state that although they disagree that the submissions required certifications they submitted the certifications in order to avoid distracting respondents from Petitioners' substantive responses.[55] Therefore, Petitioners argue, the Department should consider this argument moot because Petitioners submitted certifications and New King Shan has no arguments regarding Petitioners factual submissions. Additionally, Petitioners argue that the Department should consider New King Shan's numerous letters on procedural and administrative matters to be an indication that it had plenty of time to participate fully in the investigation.

Additionally, in rebuttal, Petitioners assert that New King Shan's claim that Petitioners submitted information during verification in order to disrupt verification is unfounded. Petitioners argue that because New King Shan's supplemental questionnaire response was submitted so late, Petitioners had only four days to review and comment on it and Petitioners intentionally filed comments so that they would be available to analysts at verification. Furthermore, Petitioners argue that the second filing alluded to by New King Shan was a letter that included bracketing errors that was refiled as soon as possible by Petitioners. Petitioners state that it is unclear what allegations are being made by New King Shan regarding the content or type of "improper filing" concerning these submissions. Moreover, Petitioners assert that the Department routinely rejects filings that do not comply with regulations and the Department did not reject Petitioners' submission in this case and therefore the Department should reject New King Shan's complaint. Petitioners also contend that New King Shan exhausted their ability to make this argument because they did not raise this issue at the time when the Department accepted Petitioners' submission.

In rebuttal, New King Shan argues that the Department must reject certain portions of Petitioners' case brief as new factual information. Specifically, New King Shan asserts that Petitioners' statement that New King Shan could have easily used its product specific production

[55] Petitioners February 17, 2009 Letter at 3, 7-8.

records to submit FOP data on the most specific basis possible but chose not to was a categorical statement as to what New King Shan could or could not do and was presented as a statement of fact rather than an argument. New King Shan asserts that Petitioners' statement that the product specific workshop records could have been easily verified was presented as an unsupported fact rather than argument. New King Shan asserts that Petitioners' statement that the U.S. warehousing documents presented during verification were all from outside the POI was presented as an unsupported fact rather than argument. New King Shan argues that Petitioners' statement regarding Indian financial statements and the practice of withholding certain forms from public availability is not based on any facts on the record and represents new factual information and not argument. New King Shan contends that Petitioners' statement that gratuities in the context of Indian corporate practice, supported by a reference to a website maintained by a private third party, represents new factual information and not argument. New King Shan argues that the Department should reject the arguments and SVS presented by Petitioners and instead use the SVs submitted by respondents.

Department's Position:

The Department disagrees with New King Shan with respect to Petitioners' submissions that were filed without certifications of factual accuracy. Although New King Shan is correct that Petitioners originally filed these submission without certifications of factual accuracy, the Department notes that Petitioners have filed supplemental submissions that contain certifications of factual accuracy for the previously submitted filings, pursuant to 19 CFR 351.303(g) of the Department's regulations, on February 17, 2009.[56] Thus, the Department finds that Petitioners' submissions are not in violation of the Department's regulations, pursuant to 19 CFR 351.303, and therefore there is no basis for rejecting these submissions.

However, the Department wishes to clarify the meaning of 19 CFR 351.303(g) of the Department's regulations regarding certification of factual accuracy of information that is within the public domain. As stated in 19 CFR 351.303(g) of the Department's regulations, "a person must file with each submission containing factual information the certification in paragraph (g)(1) of this section, … {that} the information contained in this submission is, to the best of my knowledge, complete and accurate." The Department finds that that nowhere in 19 CFR 351.303(g) of the Department's regulation is a party excused from filing a certification of factual accuracy because the information was within the public domain. Accordingly, the Department notes that all future submissions, including ones containing factual information obtained from the public domain, must contain a certification of factual accuracy, pursuant to 19 CFR 351.303(g) of the Department's regulations.

Additionally, the Department disagrees with New King Shan regarding Petitioners' comments filed during New King Shan's verification. Although New King Shan is correct that Petitioners filed comments on April 21, 2009, once verification had commenced on April 20, 2009, the Department notes that New King Shan was allowed to file its pre-verification supplemental

[56] *Id.*

verification responses three days before the start of verification.[57] Accordingly, because Petitioners' April 21, 2009, comments, in rebuttal to New King Shan's April 17, 2009 submission, were filed within 10 days of New King Shan's submission, the Department finds that Petitioners' April 21, 2009, comments were timely filed, pursuant to 19 CFR 351.301(c)(1). Additionally, the Department finds that Petitioners' comments did not disrupt New King Shan's verification because, besides for New King Shan's inability to substantiate its reported U.S. customs duties calculation and U.S. warehousing, the Department was able to complete verification of all items on the verification agenda.[58]

Moreover, the Department disagrees with New King Shan regarding certain portions of Petitioners' case brief. With respect to Petitioners' statement that New King Shan could have used product-specific production records to submit FOP data on a more specific basis, the Department finds that this constitutes an argument regarding New King Shan's production records obtained at verification. Thus, the Department finds that this does not constitute new, untimely and unsolicited information, pursuant to 19 CFR 351.302(d) because it is argument based on factual evidence already on the record, pursuant to 19 CFR 351.309(b)(1). Additionally, with respect to Petitioners' statement that the product specific workshop records could have been easily verified, the Department finds that this constitutes an argument regarding New King Shan's production records obtained at verification. Thus, the Department finds that this does not constitute new, untimely and unsolicited information, pursuant to 19 CFR 351.302(d). Moreover, with respect to Petitioners' statement that the U.S. warehousing documents presented by New King Shan at verification were from outside the POI, the Department finds that this constitutes an argument regarding verification of New King Shan's U.S. warehousing. Thus, the Department finds that this does not constitute new, untimely and unsolicited information, pursuant to 19 CFR 351.302(d). Furthermore, with respect to Petitioners' statement regarding Indian financial statements and the practice of withholding certain forms from public availability, the Department finds that this is an argument regarding whether certain financial statements are publicly available. Thus, the Department finds that this does not constitute new, untimely and unsolicited information, pursuant to 19 CFR 351.302(d). Finally, with respect to Petitioners' statement regarding the definition of gratuities in India, the Department finds that this is an argument regarding how gratuities should be treated in the surrogate financial ratios. Thus, the Department finds that this does not constitute new, untimely and unsolicited information, pursuant to 19 CFR 351.302(d). Accordingly, in totality, the Department finds that Petitioners' case brief does not contain new, untimely and unsolicited information, pursuant to 19 CFR 351.302(d). As such, the Department finds that there is no basis to not consider portions of Petitioners' case brief for the final determination.

Comment 4: Rejection of New King Shan's Minor Corrections

[57] New King Shan's April 17, 2009, response.
[58] For further discussion of New King Shan's U.S. customs duties calculation and U.S. warehouse, please *see* the Department's positions at Comments 17H and 17K.

New King Shan argues that the Department should not have rejected the minor correction presented at the start of verification that provided a break-down of the types of steel wire rod used by New King Shan in the production process. New King Shan argues that the minor correction was not a proposed methodological change as the Department stated, but rather data that would enable parties to discuss a possible methodological change. New King Shan also states that the correction was minor, as it had a minimal impact on the SV data and would have had a minimal impact on the calculation.

New King Shan also argues that the Department incorrectly rejected a minor correction submitted at the start of verification in Taipei, Taiwan. New King Shan states that in the submission it corrected its reported allocation of indirect selling expenses because it had reported all operating expenses as selling expenses, rather than expenses related to the selling process. New King Shan argues that the Department was wrong to reject this submission as argument rather than a minor correction, because although part of the submission could be characterized as argument, there was also a factual correction based on the characterization of an expense as either operating or selling related.

In rebuttal, Petitioners argue that the Department properly rejected new information that New King Shan attempted to submit at verification. Petitioners argue that it the Department's long-standing precedent is not to accept new information at verification. Petitioners maintain that the Department rejection of New King Shan's break-down of the types of steel wire rod at verification was proper because it proposed a new methodological change. Petitioners also assert that the rejection of New King Shan's minor correction related to its indirect selling expense calculation prior to the verification in Taiwan was also proper. Petitioners argue that New King Shan alleged minor correction was not a minor correction but an attempt to have the Department accept new information at verification. Petitioners hold that the Department correctly rejected this information, and should continue to find that this rejection was appropriate.

Department's Position:

The Department agrees with Petitioners with respect to New King Shan's two minor corrections that were not accepted by the Department at verification. It is standard Departmental precedent to accept corrections of minor errors identified by the respondents at the outset of verification if the information corrects information already on the record, or the information corroborates, supports, or clarifies information already on the record.[59] However, unlike other corrections, (*i.e.*, such as clerical errors in the denominators for the FOPs), submitted by New King Shan that corrected information already on the record, the Department finds that it was appropriate not to accept the steel wire rod correction and the indirect selling expense correction because these were not minor corrections. With respect to New King Shan's proposed change of reporting

[59] *Notice of Final Determination of Sales at Less Than Fair Value: Static Random Access Memory Semiconductors from Taiwan*, 63 FR 8909, 8929 (February 27, 1998); *Notice of Final Results of Antidumping Duty Administrative Review: Carbon and Certain Alloy Steel Wire Rod from Mexico*, 70 FR 25809 (May 16, 2005) and accompanying Issues and Decision Memorandum at Comment 1.

steel wire rod by diameter size, the Department finds that this is a methodological change, which was not requested by the Department, for reporting steel wire rod that was not previously on the record. While New King Shan argues that it was separating out the steel wire rod data to propose alternative SVs for parties to discuss, the Department finds that this constitutes a correction to the steel wire rod reporting methodology and thus is not a minor correction. Additionally, with respect to New King Shan's proposed correction of the operating expenses for its U.S. affiliate and wanting to confirm that it did not incur indirect selling expenses, the Department finds that this is not a minor correction because New King Shan wanted to make this correction to confirm that the affiliate had no indirect selling expenses. Accordingly, the Department will not accept the change to New King Shan's steel wire rod FOP and New King Shan's argument that its U.S. affiliate incurred no indirect selling expenses as minor corrections for the final determination.

Comment 5: Rejection of New King Shan's Surrogate Value Rebuttal Submission

New King Shan states that the Department's rejection of part of its SV rebuttal submission was without merit. New King Shan argues that the financial statements it submitted were a rebuttal to the Petitioners' argument that steel wire rope producers should be used to calculate the surrogate financial ratios. New King Shan reiterates that the financial statements were submitted in order to show that the financial statement of the steel wire rod producer submitted by Petitioners were not representative of the industry. New King Shan asserts that its submission was a valid use of financial statements and a proper rebuttal. Furthermore, New King Shan argues that it was unreasonable for the Department to reject its submission, and its determination was without support in law or regulation.

Petitioners argue that the Department did not act unreasonably when it refused to grant the extension for SV submissions and rebuttals requested by New King Shan to 14 days after the issuance of the verification reports. Petitioners state that the request indicates that New King Shan is oblivious to the timelines in AD cases, and the Department's regulations require that all new factual information be submitted seven days prior to the start of verification.[60] Therefore, Petitioners argue that the Department granted a 10 day extension in spite of its regulations. Moreover, Petitioners state that because the schedule for case briefs and rebuttal briefs are triggered by the issuance of verification reports, if the Department had granted the full extension requested by New King Shan to 14 days after the issuance of the verification reports the deadline for SV submissions would have coincided with the deadline for case briefs and parties would not have been able to discuss them in their case briefs. Petitioners also argue that New King Shan had ample time to prepare its SV submissions as the Department issued its preliminary analysis memoranda on February 27, 2009, giving parties almost two months to prepare and submit SV data.

In rebuttal, Petitioners argue that the Department's rejection of the new factual information in New King Shan's SV rebuttal comments was appropriate and is consistent with the Department's

[60] 19 CFR 351.301(b)(1).

precedent. Petitioners rebut New King Shan's claim that it was prejudiced by the rejection stating that the Courts require a particularized showing of substantial prejudice.[61] Petitioners argue that New King Shan placed financial statements on the record in its SV rebuttal comments which did not rebut, clarify, or correct information already on the record, and thus was inappropriate. Petitioners cite to a case where the Department stated that the submission of new surrogate financial ratios placed on the record in a rebuttal submission will generally not fall within the meaning and applicability of 19 CFR 351.301(c)(1), which is the regulation that concerns placing information on the record to rebut, clarify, or correct factual information submitted by any other interested party.[62]

In rebuttal, Petitioners maintain that the Department's rejection of the new factual information in King Shan's SV rebuttal comments is proper and is consistent with the Department's stated precedent. Petitioners argue that New King Shan possessed the data well in advance of the rebuttal SV deadline, and could have affirmatively submitted those financial statements on the record, and later used them for rebuttal purposes. Petitioners contend that New King Shan failed to do so because it was interested in submitting new financial ratios, not rebuttal comment, and therefore the rejection of those financial statements by the Department was proper.

Department's Position:

The Department agrees with Petitioners that our rejection of the financial statements contained within New King Shan's SV rebuttal comments was appropriate. Although we agree with New King Shan that parties are allowed to submit information to rebut, correct, or clarify the information submitted by other parties within 10 days, as 19 CFR 351.301(c)(1) states, in the context of SV submissions, the regulation does not provide an opportunity to submit wholly new SVs or financial ratios, such as the financial statements at issue here. Rather, the regulation permits new information only insofar as it rebuts, clarifies, or corrects information recently placed on the record; it does not envision the submission of additional, previously absent-from-the-record alternative SV or financial ratio information. New surrogate financial ratios are clearly new alternative information rather than information that rebuts, clarifies, or corrects information already on the record. Moreover, the submission of wholly new SV information under the pretext of this regulation can generate further submissions of yet more "rebuttal" information which does not constitute a rebuttal, and has the potential to seriously erode the finality of the record necessary for interested parties to make complete assessments of the record for the purposes of the submission of complete briefs, in accordance with long-standing Department precedent. As stated in the preamble to the regulations, "at this point in the proceeding, the Department and the parties have an interest in finalizing the addition of new factual information to the record."[63] Moreover, as explained in *Glycine from the PRC*, financial

[61] *PAM S.p.A. v. United States*, 463 F.3d. 1345, (Fed. Cir. 2006).

[62] *Glycine from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final Rescission, in Part*, 72 FR 58809 (October 17, 2007), and accompanying Issues and Decision Memorandum at Comment 1 ("*Glycine from the PRC*").

[63] *Antidumping Duties; Countervailing Duties; Final Rule*, 62 FR 27296, 27332 (May 19, 1997).

statements that are introduced as rebuttal to a SV submission of financial statements generally will not fall within the meaning and applicability of 19 CFR 351.301(c)(1).[64] Therefore, the Department finds that our rejection of the financial statements contained in New King Shan's SV rebuttal submission was appropriate. Accordingly, we will not consider these financial statements in selecting the best available information on the record for calculating the surrogate financial ratios for the final determination pursuant to 773(c)(1) of the Act.

Surrogate Values

Comment 6: Wire Rod

Wireking argues that the Department should use import data from the World Trade Atlas ("WTA") instead of data from the JPC to value wire rod. The problem with the wire rod data from the Indian Joint Plant Committee ("JPC"), Wireking contends, is that the data are from companies that receive countervailable subsidies and as such should not be used. Wireking argues that in the past, the Department has stated that there is a low threshold for rejecting market prices when there is a reason to believe or suspect that those prices are subsidized[65] and that the Department's own CVD determination can serve as a basis for that belief or suspicion. Furthermore, Wireking contends that the Department's determination of the existence of a countervailable subsidy need not be specific to the input as long as the determination deals with the general class of products to which the input belongs. Specifically, Wireking points to the Department's decision in *Helical Spring Washers*, in which the Department decided that even though its CVD determinations were for a specific type of carbon steel plate, its determinations provided a valid basis to believe or suspect that steel wire rod was also subsidized.[66] Similarly, Wireking argues that in *China National 2003*, the court affirmed the Department's determination that its CVD determinations applied to steel products because the supplier in that case was "a member of a subsidized industry."[67] Wireking argues that this means that as long as a subsidy has been found for a steel producer, all steel products made by that producers should be presumed to be subsidized.

Thus, Wireking argues, the Department should consider the prices listed in the JPC to be subsidized for two reasons. First, Wireking contends that the Department has previously determined that the producers whose data appears in the JPC have received subsidies related to

[64] *Glycine from the PRC*, 72 FR 58809 at Comment 1.
[65] *Preliminary Determination*, at 9600; *Certain Activated Carbon From the People's Republic of China: Notice of Preliminary Results of Antidumping Duty Administrative Review and Extension of Time Limits for the Final Results*, 74 FR 21317, 21327 (May 7, 2009); *Certain Tissue Paper Products From the People's Republic of China: Preliminary Results and Partial Rescission of the 2007-2008 Administrative Review and Intent Not to Revoke Order in Part*, 74 FR 15449, 15456 (April 6, 2009); *Frontseating Service Values from the People's Republic of China: Final Determination and Final Negative Determination of Critical Circumstances*, 74 FR 10886 (March 13, 2009) , and accompanying Issues and Decision Memorandum at Comment 8.
[66] *Helical Spring Lock Washers from the People's Republic of China*, 69 FR 12119 (March 15, 2004) and accompanying Issues and Decision Memorandum at Comment 1 ("*Helical Spring Washers*").
[67] *China National Machinery Imp. & Exp. Corp. v. United States*, 293 F. Supp. 2d 1334, 1339 (CIT 2003) ("*China National 2003*").

their steel production.[68] Second, Wireking states that the financial statements of Steel Authority of India ("SAIL") and TATA Iron and Steel Co., Ltd. ("TATA") show participation in various programs that the Department has considered to be countervailable benefits.[69] Wireking contends that these companies, which have been found to be receiving benefits, are major producers of wire rod and as such their prices are included in the JPC data. Wireking alleges that it is the Department's longstanding precedent to reject prices that are subsidized and that the Department has given no reason why that precedent should be abandoned.

Additionally, Wireking asserts that the Department should look at the issue of subsidies in determining the appropriateness of a proposed SV before considering any other factors such as specificity, quality and contemporaneity. Wireking contends that it is the Department's stated precedent not to use prices that have been distorted by subsidies.[70] As such, Wireking requests that the Department not use data from JPC to value wire rod and instead use data from WTA. The data from WTA, Wireking argues, is the best available information on the record as it does not reflect subsidized prices and includes the range of diameters of wire rod used by Wireking to produce the subject merchandise. Furthermore, Wireking points to the fact that the Department has used data from WTA to determine a value for the vast majority of its inputs in this case.

New King Shan argues that the Department should use official Indian import statistics in order to value steel wire rod. New King Shan contends that the official Indian import statistics are the best available data for valuing steel wire rod. New King Shan argues that it is the preferred data used by the Department in cases where India has been selected as the surrogate country. Next, New King Shan states the data are national, POI-contemporaneous and specific to the input. Moreover, New King Shan argues that it specifically covers the type of steel used to manufacture the subject merchandise. New King Shan argues that specificity of type is more important than specificity of size as type is more determinative of the price than size.

Though data from the JPC has been suggested as an alternative steel wire rod SV, New King Shan argues that this is not an appropriate source for valuing steel wire rod because it would present an artificially high value. The primary problem with the JPC data, according to New King Shan, is that while it is more specific as to the size of the steel wire rod, it does not specify the type or grade of the steel. This is significant, New King Shan contends, as the steel wire coil used to produce the subject merchandise is less expensive than other types that are included in the JPC data. Thus, New King Shan argues that using the JPC data as a SV would serve only to

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[68] *Certain Hot-Rolled Carbon Steel Flat Products Final Affirmative Countervailing Duty Determination*, 66 FR 49635 (Sept. 28, 2001) ("*HRC from India*"); *Final Results of Countervailing Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products from India*, 71 FR 28665 (May 17, 2006) ("HRC from India 2AR"); *Certain Hot-Rolled Carbon Steel Flat Products from India: Final Results of Countervailing Duty Administrative Review*, 73 FR 40295 (July 14, 2008) ("*HRC from India 3AR*"); *Certain Hot-Rolled Carbon Steel Flat Products from India: Final Results and Partial Rescission of Countervailing Duty Administrative Review*, 74 FR 20923 (May 6, 2009) ("*HRC from India 4AR*").

[69] *HRC from India* and *HRC from India 3AR*.

[70] *Coated Free Sheet Paper from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 72 FR 60632 (Oct. 25, 2007), and accompanying Issues and Decision Memorandum at Comment 17.

inflate the price. Additionally, New King Shan contends that the fact that the data from JPC is more specific as to size is not particularly relevant given that there is no correlation between size and price.

However, if the Department chooses to use the JPC data, New King Shan requests that alternative data gathered by JPC be used. New King Shan argues that the relevant data are for landed cost for "Wire Rod IS 2062 6 mm" and that the Department should use a cost, insurance and freight ("CIF") value. New King Shan contends that this is more specific than the general JPC data propose by Petitioners and as such will give a more accurate SV.

In rebuttal, Petitioners argue that the Department should continue to use JPC data as a SV for carbon wire rod as it did in the *Preliminary Determination*. Petitioners argue that should the Department accept Wireking's position and reject the JPC data due to possible subsidization of prices, the Department must then also reject *Chemical Weekly* as a source to value hydrochloric acid, another input, as Petitioners reason that the Indian chemical industry would be no less effected by the existence of subsidies that the Department has found to be countervailable.[71] Petitioners also point out that *Chemical Weekly* does not provide any measure of total volumes traded. Conversely, however, Petitioners argue that the Department's recent approval of data from *Chemical Weekly* supports the continued use of the JPC data as the existence of countervailable subsidies did not disqualify the data from *Chemical Weekly* and the same should be true for the JPC data. Petitioners point to the fact that in *Helical Spring Washers* the Department approved of the use of *Chemical Weekly* for valuation purposes, focusing on the fact that the data are in the public realm independent of antidumping considerations.[72] Petitioners argue that the same logic should be used to approve the use of JPC data as they are similarly public and independent.

Petitioners also contend that the existence of some subsidies to steel producers is not relevant as the data in JPC reflects the total Indian market of carbon wire rod, not the prices of any given entity. Furthermore, Petitioners take issue with the implications of Wireking's arguments regarding the existence of subsides as it implies that any data that could possibly reflect subsides should be rejected. Petitioners contend that, for example, publically available data regarding U.S. steel prices would then also be rejected as the U.S. engages in certain protectionist measures, as would all WTA data where subsidies or NME imports were found to exist. Petitioners argue that this logic could then be extended further to reject all data from India and eventually result in rejecting India as a surrogate country as the existence of subsidies in India would taint all data coming from there. Further, Petitioners argue that the existence of subsidies should result in lower prices, not higher prices as Wireking asserts. Petitioners also assert that the Department has rejected Wireking's argument regarding subsidies in another recent case, stating that there is no CVD order in place against steel wire rod from India and there has been

[71] *Notice of Final Determination of Sales at Less Than Fair Value: Carbozole Violet Pigment 23 From India*, 69 FR 67304 (Nov. 17, 2004); *Final Results of Expedited Sunset Review of Countervailing Duty Order: Sulfanilic Acid from Acid from India*, 70 FR 53168 (Sept. 7, 2005).
[72] *Helical Spring Washers* at Comment 22.

no relevant change in facts.[73]

Aside from the issue of subsidies, Petitioners argue that the JPC data should be used because the JPC data are specific, contemporaneous and national. Unlike WTA, Petitioners assert, the JPC data are specific to size of wire rod and thus more relevant. Additionally, Petitioners assert that the WTA data includes non-subject bar products as well.

Petitioners also disagree with New King Shan's assertion that Indian import statistics under HTS 7213.91.90 should be used to value wire rod. Petitioners claim that the import data should not be used as it covers types of inputs that were not specific to the subject merchandise produced by Respondents and is not specific to the size of the wire rod. Petitioners point to New King Shan's assertion that the appropriate size of wire rod is 6.5mm and 8mm.[74] Petitioners also assert that the differences in price between 6mm and 8mm are meaningful and that difference only increases as the sizes are more divergent. These price differences are important, Petitioners argue, as the Department's goal is to calculate the AD margin as accurately as possible.[75] Petitioners also assert that New King Shan's arguments ignore the fact that JPC prices are from four national marketplaces and that New King Shan's examples are taken out of context and misinterpreted.

Petitioners also urge the Department to reject New King Shan's suggestion of using the JPC landed value as it is based on all imports from all countries and there is no way to isolate the impact of imports from NME countries or countries with widely available export subsidies. Finally, Petitioners assert that the JPC domestic pricing data for 6mm and 8mm prime carbon steel wire rod is superior because it is official data, POI and steel specific, wire rod specific, size specific, and is free of the influence of NME pricing.

Department's Position:

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's criteria for selecting SV information are normally based on the use of publicly available information ("PAI"), and the Department considers several factors when choosing the most appropriate PAI, including the quality, specificity, and contemporaneity of the data.[76]

Additionally, it is the Department's precedent to carefully consider the available evidence in light of the particular facts of each industry when undertaking its analysis of valuing the FOPs on

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[73] *Nails from the PRC*, 73 FR 33977 at Comment 10.
[74] *Verification of the Sales and Factors Response of New King Shan Co., Ltd. In the Antidumping Investigation of Certain Kitchen Appliance Shelving and Racks from the People's Republic of China* (June 8, 2009) at 3.
[75] *Rhone Poulene, Inc. v United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990).
[76] *Notice of Final Determination of Sales at Less Than Fair Value, and Affirmative Critical Circumstances, In Part: Certain Lined Paper Products From the People's Republic of China*, 71 FR 53079 (September 8, 2006) and accompanying Issues and Decision Memorandum at Comment 3.

a case-by-case basis.[77] As there is no hierarchy for applying the above-mentioned principles, the Department must weigh available information with respect to each input value and make a product-specific and case-specific decision as to what the "best" available SV is for each input.[78]

We find that, of the options available on the record, the JPC data for 6mm and 8mm steel wire rod best satisfy the Department's SV criteria, and will continue to be used to value the steel wire rod input. The JPC data are publicly available, specific to the input in question, represent a broad market average, and are tax-exclusive. With regard to specificity, we note that the JPC data are more specific than the WTA data because the JPC data are reported on more specific sizes (*e.g.* 6mm and 8mm steel wire rod).

Additionally, we note that the JPC price data have an official nature, in that they represent national-level steel monitoring by a joint government/industry board. In past cases, we have found government publications to be reliable and credible sources of information.[79] Additionally, the price data reflect the overall market price and are maintained on a regular basis (*i.e.*, the data represent bi-weekly price information collected by the JPC from the steel industry).[80] The Department finds that the JPC data are, therefore, representative of the Indian market, in that they contain data points for four different markets in India (Kolkata, Delhi, Mumbai and Chennai) covering all bi-weekly price reports during the POI.

We find that New King Shan's argument regarding the JPC data for "Wire Rod IS 2062 6 mm" is not supported by the record. Beyond their statements that such JPC data are more specific than the general JPC data we note that respondents have only submitted information from an unofficial third source indicating that "Wire Rod IS 2062 6 mm" is steel wire rod that can be drawn into steel wire. Additionally, in *Laminated Woven Sacks*, the Department stated that the "burden is on the respondents" to establish that a proposed SV "is not an appropriate source."[81] Accordingly, in keeping with our decisions in *Laminated Woven Sacks* and *Retail Carrier Bags*, the burden is on respondents to show that the JPC data used in the *Preliminary Determination* was not specific to the steel wire rod used by the respondents, despite the indication on the JPC's

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[77] *Certain Preserved Mushrooms from the People's Republic of China: Final Results and Final Partial Rescission of the Sixth Administrative Review*, 71 FR 40477 (July 17, 2006) and accompanying Issues and Decision Memorandum at Comment 1 ("Mushrooms"), see also *Freshwater Crawfish Tail Meat from the People's Republic of China; Notice of Final Results of Antidumping Duty Administrative Review, and Final Partial Rescission of Antidumping Duty Administrative Review*, 67 FR 19546 (April 22, 2002) and accompanying Issues and Decision Memorandum at Comment 2 ("Crawfish")

[78] *Id.*

[79] *Sebacic Acid From the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 69 FR 75303 (December 16, 2004) and accompanying Issues and Decision Memorandum at Comment 1.

[80] *Id.*, at Exhibit 6; http://www.jpcindiansteel.nic.in/.

[81] *Laminated Woven Sacks from the People's Republic of China: Final Determination of Sales at Less than Fair Value and Partial Affirmative Determination of Critical Circumstances*, 73 FR 35646 (June 24, 2008) ("*Laminated Woven Sacks*"), and accompanying Issues and Decision Memorandum at Comment 2; *Polyethylene Retail Carrier Bags from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Partial Rescission of Review*, 73 FR 14216 (March 17, 2008) ("*Retail Carrier Bags*"), and accompanying Issues and Decision Memorandum at Comment 6.

website were specific to the size used by respondents and are actual market prices.[82] Respondents have not met this burden. The fact that the alternative JPC data are specific to one type of steel wire rod used by respondents does not conclusively demonstrate that this data are more specific to the input than the JPC data used in the *Preliminary Determination*. Additionally, we do agree that the JPC data for "Wire Rod IS 2062 6 mm" is not more specific because it only covers one diameter size of wire rod, whereas, the respondents use more than one diameter size of wire rod in their production of KASRs during the POI.

Respondents further allege: (1) that the Department should consider the prices listed in the JPC to be subsidized; and (2) WTA is the preferred data used by the Department in cases where India has been selected as the surrogate country. While respondents raise the issue of subsidies affecting the domestic Indian price of steel wire rod, specific information as to how any subsidy may potentially influence the price data for steel wire rod is absent. All of the CVD proceedings to which respondents cite relate to products other than steel wire rod. Finally, we note that the Department has no CVD order on steel wire rod from India.[83]

Additionally, while Respondents contend that the prices within the JPC data used in the *Preliminary Determination* are higher in comparison to the price of the type of steel wire coil used in the production of KASRs, the burden is on respondents to demonstrate that these prices are in fact aberrational. The Department finds that the record evidence does not indicate that the JPC data used in the *Preliminary Determination* are necessarily distorted and do not represent actual transactions.[84] Moreover, while respondents contend that the WTA data are as specific as the JPC data, we note that significant differences do exist. Specifically, the JPC data offer data for two gauges of wire rod (6mm and 8mm) that very closely match the input used by respondents. Unlike the JPC data, the narrative description for HTS category 7213.91.90, which they advocate using, is "Bars and rods, hot-rolled, in irregularly wound coils, of iron or non-alloy steel; Of circular cross-section measuring less than 14mm in diameter; Other." Thus, this HTS category represents a non-specific basket category that includes not only iron products (both bar and rod), but also steel bars and larger gauge wire rod, none of which are used by either respondent to produce the subject merchandise. We, therefore, find that specificity is a compelling reason that supports using the JPC data to value the steel wire rod input.

While the Department commonly uses Indian import statistics to value inputs, we do not have a precedent of always choosing this one source over other sources. Rather, we seek to use the best

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[82] We note that the Department has used similar market price data (as opposed to data directly representing transactions) to value material inputs in other cases. *Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Final Results of the First Antidumping Duty Administrative Review and First New Shipper Review*, 72 FR 52052 (September 12, 2007), and accompanying Issues and Decision Memorandum at Comment 1; *Nails from the PRC*, 73 FR 33977, and accompanying Issues and Decision Memorandum at Comment 10.

[83] *Certain Steel Nails from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances*, 73 FR 33977 (June 16, 2008), and accompanying Issues and Decision Memorandum at Comment 10 ("*Nails from the PRC*").

[84] *Retail Carrier Bags*, 73 FR 14216, and accompanying Issues and Decision Memorandum, at Comment 6.

available information for each input.[85] For all of the foregoing reasons, we find that the JPC data, as used in the *Preliminary Determination*, represent the best available information on the record for valuing the steel wire rod input in this AD investigation, and, therefore, we will continue to use the JPC data to value steel wire rod in the final determination.

Comment 7: Hydrochloric Acid

Wireking argues that the Department should use data from *Chemical Weekly* instead of WTA data for obtaining a SV for hydrochloric acid (HCL) because WTA's data regarding HCL is unreliable and aberrational. Wireking contends that *Chemical Weekly* should be used instead of WTA for two reasons. Wireking states that the Department's past precedent shows that WTA is not a reliable source for obtaining SVs of HCL. Wireking points to *HSLW 2005* and *CVP 23 2004* and states that in both proceedings, the Department used the values in *Chemical Weekly* for HCL instead of WTA as the Department found the values in WTA to be aberrational.[86] Furthermore, Wireking points to the fact that the Department has found WTA import value to be aberrational in cases where parties have not even put any information on the record to show the unreliability of the data.[87]

Additionally, Wireking contends that the evidence placed on the record in this proceeding establishes the unreliability of WTA's data regarding HCL. The quantity of imports reflected in the WTA data are small and only comes from one country.[88] Wireking argues that it is not surprising that Indian import quantities are small, as India is a major producer of chemicals. However, Wireking argues that data are nevertheless less reliable as a result. By contrast, Wireking points to the fact that *Chemical Weekly*'s data reflects major chemical markets and is distributed throughout India for the entire industry. Next, Wireking contends that the imports of HCL into India are not generic HCL designed for industrial use or sold in sizes consistent with industrial use and are thus dissimilar from the HCL used by Wireking to produce the subject merchandise.[89] Moreover, Wireking argues that a benchmark comparison of prices of HCL from WTA and import data from other potential surrogate countries shows that the price data from WTA is abnormally high.[90] Additionally, Wireking contends that a benchmark comparison

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[85] *Helical Spring Lock Washers From the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 73 FR 4175 (January 24, 2008), and accompanying Issues and Decision Memorandum at Comment 2 ("*Lock Washers 2008 Final*").

[86] *Certain Helical Spring Lock Washers from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 70 FR 28274 (May 17, 2005) and accompanying Issues and Decision Memorandum at Comment 10 ("*HSLW 2005*") and *Carbazole Violet Pigment 23 from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 69 FR 67304 (Nov. 17, 2004) and accompanying Issues and Decision Memorandum at Comment 74 ("*CVP 23 20042005*").

[87] *Certain Steel Nails from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Affirmative Determinations of Critical Circumstances*, 73 FR 33977 (June 16, 2008), and accompanying Issues and Decision Memorandum at Comment 18.

[88] *Preliminary Determination*, Surrogate Value Memorandum, WTA HCL Attachment.

[89] Wireking's Letter of April 24, 2009 at 2 and Exhibit 6.

[90] *HSLW*, 73 FR 4174 (Jan. 24, 2008), I&D memo at Cmt. 4; Wireking's Letter of April 24, 2009 at Exhibit 5; Wireking's Letter of January 26, 2009 at Exhibit 2; *Preliminary Determination*, Surrogate Value Memo at 11.

between WTA data and import values from other countries again shows that the WTA data are aberrational.[91] Finally, Wireking points to the fact that the Department recently declined to use WTA data to value HCL in the preliminary results of a recent administrative review, *ISOS from the PRC 2009*.[92]

In rebuttal, Petitioners contend that the quantity of HCL reflected in the WTA import data are sufficient and representative of a commercially usable amount. Petitioners argue that it is larger than the minute quantities that the Department has rejected in the past. Petitioners state that the Department's preference for data from one surrogate country means that the WTA should be used to value HCL.

Department's Position:

Because the Department is applying total AFA to Wireking for the final determination, and this argument only applies to SV for Wireking's hydrochloric acid and does not address the SV for New King Shan's hydrochloric acid, Wireking's argument regarding the SV for its hydrochloric acid FOP is moot.

Comment 8: Trisodium Phosphate

Petitioners argue that the Department should value trisodium phosphate using import data for Trisodium Phosphate instead of Sodium Triphosphate. Petitioners allege that they originally submitted import data regarding Trisodium Phosphate under HTS 2835.23.00 but that during the *Preliminary Determination*, the Department incorrectly used information regarding sodium triphospate under HTS heading 2835.31. These products are not only very different from a chemical standpoint, Petitioners contend, but the difference in valuation is also significant. Thus, Petitioners urge the Department to use valuation information regarding Trisodium Phosphate under HTS 2835.23.00 during the final determination.

Respondents did not comment on this issue.

Department's Position:

Because the SV for trisodium phosphate [93] is only applicable to Wireking and we have applied total adverse facts available ("AFA") to Wireking for the final determination, Petitioners'

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[91] *HSLW*, 73 FR 4174 (Jan. 24, 2008) and accompanying Issues and Decision Memorandum at Comment 4.

[92] *Chlorinated Isocyanurates from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review*, 74 FR 27104, 27107 (June 8, 2009) ("*ISOS from the PRC 2009*").

[93] Although we stated in the Surrogate Value Memorandum for the *Preliminary Determination* that we valued trisodium phosphate for both Wireking and New King Shan, we wish to clarify that only Wireking reported consumption for trisodium phosphate. Thus, this argument does not apply for New King Shan for the final determination. *Citing* Preliminary Determination Surrogate Value Memorandum at 8; *citing* also New King Shan's Partial Supplemental D Questionnaire Response, (February 13, 2008) at Exhibit SD-2; Wireking's Supp D Questionnaire Response, at Exhibit SD-4.

argument with respect to the SV selection for trisodium phosphate is moot.

Comment 9: Nickel Anode

New King Shan argues that nickel anode should not be classified as a precious metal under HTS 7115.90, as Petitioners requested in their January 16, 2009, SV submission. New King Shan asserts that the case cited as support for Petitioners' argument was taken from a publically available general interest database (faqs.org) and not the official CBP database of CBP rulings. New King Shan contends that when the case is retrieved from the CBP database, one can see that the ruling has been revoked. Additionally, New King Shan notes the ruling deals with a product that contains precious metals as well as nickel, whereas nickel anode contains no precious metals, so even if the ruling was valid, it is not applicable to this case. Additionally, New King Shan argues that according to Indian law, nickel anode could not be classified under Chapter 71, as it is limited to products actually containing precious metals. As nickel is not listed as a precious metal and nickel anode is made of pure nickel, New King Shan argues that it could not be classified under Chapter 71.

In rebuttal, Petitioners state they support the use of HTS 7505.11 as the category to value nickel anode and that to the extent that the New King Shan has verified that its anodes do not contain precious metal, whether the use of HTS 7505.90 is moot. Petitioners take issue, however, with New King Shan's exclusion of Russian imports as Russia was not categorized as a NME country in 2008[94] and the Department does not categorize it as a country with widely available export subsidies.

Department's Position:

The Department agrees with New King Shan with regard to valuing nickel anode with Indian import data from HTS 7505.11. The Department finds that HTS 7505.11 is the most appropriate classification for nickel anode because it defines nickel anode as "unalloyed nickel bars and rods,"[95] which is specific to the type of nickel anode used by New King Shan for producing KASRs during the POI.[96] , The goal of the surrogate factor valuation is to use the "best available information" to determine NV. See section 773(c)(1) of the Tariff Act of 1930, as amended ("the Act"). Consequently, the Department finds that Indian import data under HTS 7505.11 is the best information available for valuing New King Shan's nickel anode for the final determination.

Additionally, the Department agrees with the Petitioners that Russian imports should be included in the calculation of the nickel anode SV. Since April 1, 2002, when the Department's decision to consider Russia as a ME took effect, the Department has no longer treated Russia as an NME country.[97] As it is our precedent to use data from market economies, the Department will include

[94] http://www.ia.ita.doc.gov/download/russia-nme-status/russia-nme-final.htm
[95] New King Shan's Case Brief, at 9.
[96] New King Shan's Case Brief, at Exhibit BR-6.
[97] Memorandum to Faryar Shirzad, Assistant Secretary, Import Administration, from Albert Hsu, Senior Economist,

the import data from Russia in our calculation of the nickel anode SV for the final determination.[98]

Surrogate Financial Ratios

Comment 10: Surrogate Financial Companies

New King Shan states that since the issuance of the *Preliminary Determination*, Wireking submitted four financial statements for the record: Bansidhar Graites Private Limited ("Bansidhar"), Hardwin Fasteners Pvt. Ltd ("Hardwin"), Hex Nuts Pvt limited ("Hex Nuts"), and Shivalik Wire Pvt Limited ("Shivalik"). New King Shan argues that the Department should use these financial statements as the basis for the calculating the surrogate financial ratios because they are integrated producers who produce products similar to KASR.

New King Shan argues that if the Department continues to use three financial statements that were used in the *Preliminary Determination*—Sterling Tools Limited ("Sterling"), Nasco Steel Private Limited ("Nasco") and Lakshmi Precision Screws Limited ("Lakshmi")—that the 2007 financial statement of Lakshmi should not be included. New King Shan contends that unlike the Sterling and Nasco financial statements that were from 2007/08, the Lakshmi financial statement was from 2006/07 and therefore pre-dates the POI and should not be included. Additionally, New King Shan argues that the Department should not use the 2007/08 Lakshmi financial statement because the complete statement was never placed on the record. Furthermore, New King Shan contends that Lakshmi is a recipient of benefits under the Export Promotion Capital Goods program ("EPCG"), which has been found by the Department to be a countervailable program, and therefore the Lakshmi financial statement should not be used.

New King Shan argues that the Department should reject the financial statements of Usha Martin and Hercules Hoist that were submitted by Petitioners. New King Shan argues that neither company produces a comparable product to KASR. New King Shan states that Usha Martin produces a wide range of products that are mostly wire rods and bars, billets, pig iron and sponge iron, which New King Shan asserts are not similar to KASR. New King Shan also argues that Hercules Hoist belongs to the capital goods industry and makes a range of pulleys, hoists, winches, etc. New King Shan argues that Hercules Hoist's financial statement does not list steel wire rope as one of the products it produces. Additionally, New King Shan states that there is nothing in Hercules Hoist's financial statement that indicates that it has drawing machines or produces steel wire rope, and instead the financial statement indicates that it only has machine shops, assembly lines and testing facilities. Moreover, New King Shan also argues that Usha Martin is an integrated producer with blast furnaces, power plants and steel melt shops used to

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Barbara Mayer, Policy Analyst and Christopher Smith, Analyst, Subject: Inquiry into the Status of the Russian Federation as a Non-Market Economy Country Under the U.S. Antidumping Law, (June 6, 2002). Available at http://ia.ita.doc.gov/download/russia-nme-status/russia-nme-decision-final.htm.

[98] Memorandum to the File, from Katie Marksberry, Case Analyst, Office 9, AD/CVD Operations, Import Administration, Subject: Investigation of Certain Kitchen Appliance Shelving and Racks from the People's Republic of China: Surrogate Values for the Preliminary Determination, (Feb. 26, 2009) at 1.

produce steel wire rod, whereas New King Shan buys its steel wire rod and does not have a business model similar to Usha Martin's.

New King Shan argues that the financial statements of both Usha Martin and Hercules Hoist indicate that they are recipients of export subsidies. New King Shan asserts that if the Department finds that all possible surrogate financial statements contain some export subsidies, that the Department should only use financial statements that quantify the amount of subsidies received. New King Shan argues that financial statements that do not quantify export subsidies, specifically the EPCG program, should not be used, because the Department would be unable to adjust the ratio by the amount of the subsidies. Moreover, New King Shan argues that it is particularly important in this case that the export subsidies be removed from the calculation of the ratios because the subject merchandise is also subject to a separate countervailing proceeding.

In its rebuttal case brief, New King Shan argues that the Department should have rejected the financial statement of Hercules Hoist that was submitted by Petitioners because it is not representative of the Indian steel wire rope industry. New King Shan asserts that the financial statements that it submitted from Bedmutha Wire Co., Ltd ("Bedmutha") and Bansal Wire Industries, Ltd ("Bansal"), both of which were rejected by the Department as untimely filings of new information, indicate that the Hercules Hoists financial statement varies significantly from the industry as a whole. Therefore, New King Shan argues that if the Department decides to use the financial statement of Hercules Hoist, it should normalize the results using the results from Bedmutha and Bansal to better represent the values of the Indian wire rope industry as a whole.

Petitioners argue that the Department should not have used Nasco in calculating financial ratios for the *Preliminary Determination*. Petitioners argue that unlike the other two companies used in the *Preliminary Determination*, Nasco is not mainly a producer of long-products from wire rod, but rather primarily produces products such as hinges, washers, tawas (cookware) and agricultural blades, which use hot-rolled steel sheet as the main input. Petitioners argue that the products manufactured by Nasco are unlike KASRs in nature and production process, and while Nasco's products require individual working, they are not as value-added as the subject merchandise. Furthermore, Petitioners argue that the "Raw Material Consumption" and "Finished Goods Sales" portions of Nasco's financial statement show that 69 percent of Nasco's inputs were flat-rolled steel, 28 percent was M.S. wire and nail wire, and only three percent was wire rod. Petitioners assert that this is the opposite of how major inputs should be ranked to be comparable to respondents. Moreover, Petitioners argue that because nails make up only a quarter of sales volume and 17 percent of sales value, Nasco specialized in producing flat products and its few long products were made directly from purchased wire. Petitioners assert that this is different from the process of drawing wire rod into wire that was reported by respondents. Petitioners argues that Nasco's small production of nails, and the fact that the remainder of its production was made up of hinges and other flat steel products does not provide any indication that Nasco could manufacture high-quality fasteners as the other two companies used by the Department in the *Preliminary Determination* could. Therefore, Petitioners argue that the operating structure of the company and the nature and proportion of its inputs are unlike

the respondents and inferior to other surrogate companies who manufacture fasteners or wire rope. Furthermore, Petitioners contend that the Department has noted that a significant factor in determining the appropriateness of a surrogate company is the proportion of comparable products.[99]

Petitioners state that Nasco's financial statement shows that it is an unprofitable company, taking into account Rs. 649,197.25 in debt, to the Bihar State Financial Corporation ("B.S.F.C."), which is a state financial institution. Petitioners argue that if this debt is recognized it increases Nasco's total financial expenses, which negates their profits before taxes. Petitioners assert that it is the Department's policy not to use unprofitable companies as surrogates, and therefore Nasco should be rejected.

Petitioners argue that the Department's position in the *Preliminary Determination* that wire rope does not undergo comparable manufacturing processes to KASR is incorrect. Petitioners assert that they demonstrated in their final affirmative SV submission that wire rope undergoes similar value-added fabrication to KASR.[100] Furthermore, Petitioners assert that wire rope producers incur similar costs to KASR producers, such as using other materials, painting, degreasing, etc., and are therefore appropriate to use as surrogate companies in calculating financial ratios. Moreover, Petitioners assert that to the extent that both Usha Martin and Nasco produce and stock wire, if Usha Martin is excluded as a surrogate company, Nasco should also be excluded in order to maintain equal treatment and consistent methodology.

Petitioners cite to the article *"What is Wire Rope?"* which they submitted in their April 24, 2009 SV Letter at Attachment 1, wherein wire rope is described as highly complex and comprised of multiple wires that are draw to very specific sizes and are held in contact at multiple points. Furthermore, Petitioners state that the United States wire rope industry has recognized the conversion of wire to strand as a complex transformation. Petitioners state that wire rope can also have multiple finishing treatments, similar to the different finishing treatments that can be applied to KASR. Petitioners argue that because of the variety of finished types of wire rope, the complexity of the production process, and the fact that the finished product is comprised of multiple wires unlike fasteners which are formed from a single piece of wire, that wire rope producers are most comparable to respondents.

Petitioners argue that even the small portion of Nasco's production that is made up of nails, which were found to be a comparable product to KASR in the *Preliminary Determination*, is less processed and value added than wire rope. Additionally, Petitioners argue that the nails produced by Nasco are less complex and less processed than the precision fasteners produced by the other surrogate companies used in the *Preliminary Determination*, Lakshmi and Sterling.

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[99] *Folding Metal Tables and Chairs from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 74 FR 3560 (January 21, 2009) and accompanying Issues and Decision Memorandum at Comment 1.

[100] Petitioner's April 24, 2009 Surrogate Value Submission.

Petitioners argue that the financial statements of Bansidhar, Hardwin, Hex Nuts, and Shivalik that were placed on the record by Wireking appeared to be publicly available and complete, but were not. Petitioners assert that on May 5, 2009 they placed on the record the publicly available financial statements for these four companies, obtained by Petitioners from the Registrar of Companies in India, and that these public versions do not contain the profit and loss portion of the statement. Petitioners state that recently the Ministry of Corporate Affairs in India began to allow privately held Indian companies to withhold profit and loss data from the public, which Bansidhar, Hardwin, Hex Nuts, and Shivalik opted to do for their 2007/2008 statements. Petitioners assert that the Wireking must have submitted the complete financial statements of these four companies by obtaining the missing profit and loss portions by private means. Therefore, Petitioners argue that the publicly available financial statements for these four companies are incomplete and should not be considered by the Department.[101]

Petitioners argue that the products produced by Bansidhar, Hardwin, Hex Nuts and Shivalik are less comparable to the production of subject merchandise than Usha Martin, Sterling, or Lakshmi. Petitioners state that Hardwin makes only high-tensile alloys and stainless steel products, Hex Nuts produces hot-forged, cold-forged and drop-forged steel alloy items, and Shivalik produces a wide variety of products such as welding electrodes and washers. Moreover, Petitioners argue that none of the financial statements of these companies are as comparable to the respondents as Usha Martin, which makes wire rope, a multiple-wire, value-added product.

In rebuttal, Petitioners argue that the financial statements of Lakshmi should not be rejected due to lack of contemporaneity and that if they are, Nasco's financial statements should also be rejected due to their lack of specificity. As for Nasco's financial statements, Petitioners contend that the products that they primarily manufacture are different than the subject merchandise and as such, the company does not have a production process that is comparable to that of the subject merchandise. Thus, Petitioners contend that if a marginal lack in contemporaneity with regard to Lakshmi's statements disqualifies them, then Nasco's financial statements should also be disqualified as they are even less comparable.

As for the financial statements of Lakshmi, Petitioners claim that the EPCG benefits are so small that they are insignificant to its operations and that they could be deducted from Lakshmi's total revenues to adjust the profit calculation. Additionally, Petitioners contend that the subsidy benefits are less distortive than the incompatibility of Nasco's products.

With regard to the financial statements of Usha Martin, Petitioners assert that the specificity of its final products should be viewed as the most important selection criteria. Petitioners point to the fact that almost half of Usha Martin's production is wire products, with wire rope and wire

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[101] *Frontseating Service Valves From the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Final Negative Determination of Critical Circumstances*, 74 FR 10886 (March 13, 2009) and accompanying Issues and Decision Memorandum at Comment 1; and *Notice of Final Determination of Sales at Less Than Fair Value: Steel Concrete Reinforcing Bars From Belarus*, 66 FR 33528, (June 22, 2001) and accompanying Issues and Decision Memorandum at Comment 2.

strand sales accounting for 30.4 percent of Usha Martin's gross turnover. Petitioners argue that that should prevent the Department from excluding Usha Martin's data. Conversely, Nasco's production of wire rod accounts for 17 to zero percent of its total production and as such should disqualify Nasco from consideration. Petitioners also dispute Wireking's assertion about wire rope not being a comparable product. Petitioners contend that wire rope is a complex wire product and that wire rope and wire strand account for a more significant portion of Usha Martin's sales than Nasco's production of nails. Petitioners also argue that wire racks can be considered to be processed into other downstream products in the same way that wire rope can. Additionally, Petitioners argue that while Usha Martin may be more integrated as New King Shan points out, that integration must be balanced against the fact that Usha Martin's main product is the most comparable to the subject merchandise.

As for the benefits received by Usha Martin from the duty entitlement pass book ("DEPB") program, Petitioners claim that they are too small to distort Usha Martin's profitability and that any such distortion is smaller than the distortion caused by the incomparability of Nasco's products. Furthermore, Petitioners point to the fact that New King Shan conceded that adjustments could be made to negate the distortions. In the case of both companies, Petitioners contend that the amount of the benefit could be easily deducted from total revenues to adjust the profit calculation. Furthermore, Petitioners allege that any distortions pale in comparison to the lack of incompatibility with Nasco's products.

Petitioners allege that the financial statements of Bansidhar, Shivalik, Hex Nuts and Hardwin, should be rejected as the companies do not produce comparable products, use comparable inputs or have comparable processes.

As for the use of Hercules Hoist's financial statements, Petitioners contend that should the Department agree with New King Shan and reject them due to lack of comparability, the Department should also reject the use of Godrej & Boyce Mrg's financial statements. Petitioners contend that Hercules Hoist's products are at least one stage more comparable than those made by Godrej & Boyce.

Finally, Petitioners state that Sterling Tools' financial statements are the only ones of all those proposed that have not been criticized with respect to comparability, integration, contemporaneity or potential subsidies. Thus, in order to choose the best available information, Petitioners argue that the Department should use the annual report of Sterling Tools.

In rebuttal, Wireking argues that Nasco's financial statements should be used as the company produces comparable products and is profitable. Wireking asserts that Nasco's products are downstream, value-added products and that Petitioners have failed to demonstrate that Nasco's products are not value-added. Additionally, Wireking argues that Petitioners did not explain how the products are not comparable to the subject merchandise. Wireking also disputes that the amount of nails, a product which is comparable, made by Nasco should disqualify it as the Department has generally accepted such amounts before and has specifically approved Nasco's

use by the Department with regard to its nail production.[102] Further, Wireking contends that Nasco's production of hinges, another comparable product, accounts for over half of its sales.

Wireking also argues that Nasco is a profitable company. Wireking states that Nasco's financial statements, which were properly audited and consistent with generally accepted accounting standards in India, indicate that it was profitable. Wireking urges the Department not to recognize Nasco's potential debt obligation as Nasco has disputed this claim and there is pending litigation to resolve the matter. Wireking requests that the Department not pre-judge that outcome of the litigation and instead refuse to recognize the debt.

Wireking contends that the Department should continue to reject Usha Martin's financial statements because Usha Martin has received subsidies that the Department has found to be countervailable. Additionally, Wireking contends that the majority of Usha Martin's sales are of steel, a downstream finished product that is not comparable to kitchen racks. With regard to Usha Martin's other products, wire and wire rope, Wireking contends that Petitioners have not shown that a product with multiple wires is more comparable, that additional material and processing costs occur, or that the product uses the similar galvanizing and/or vinyl coating referred to by Petitioners. Wireking also asserts that there is no basis for Petitioners statement that Nasco produces wire: rather, the records show that Nasco stocks wire that is then used in its manufacturing process.

Wireking contends that contrary to Petitioners' assertions, the financial statements of Bansidhar, Hardwin, Hex Nuts and Shivalik are complete and publicly available. All of the statements were obtained from the Indian Register of Companies, a public Indian government source. While the profit and loss statements of private companies may be kept confidential, if the statements are filed with the company's balance sheet then the statements are released to the public.[103] Additionally, Wireking asserts that the Department has stated that financial statements placed on the public record of an AD proceeding are public information.[104] Wireking also asserts that the statements and notes are stamped and dated by a member of each company's Board of Directors and are consistent with the other portions of the statements.

Further, Wireking disputes Petitioners' contention that Bansidhar, Shivalik, Hardwin and Hex Nuts make products that less comparable than Sterling Tools, Lakshmi and Usha Martin, and claim that Petitioners failed to support such a contention. Wireking argues that the Department approved the use of Bansidhar's financial statements in an earlier case, noting that it was an integrated producer of nails that draws wire from wire rod.[105] With regard to Shivalik, Wireking states that Petitioners did not indicate how Shivalik's products differ in comparability from those

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[102] *Nails from the People's Republic of China*, 73 FR 33977 at Comment 11 ; *Persulfates from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 68 FR 68030 (Dec. 5, 2008), I&D Memorandum at comment 1.
[103] *2005-2006 Administrative Review of Folding Metal Tables and Chairs from the People's Republic of China*, 72 FR 71355 (Dec. 7, 2007) and accompanying Issues and Decision Memorandum at Comment 8.
[104] *Id.*
[105] *Nails from the PRC.*

produced by Lakshmi and/or Sterling Tools. As for Hardwin, Wireking contends that Petitioners' assertion regarding its products comes from an unknown obscure website that should not be trusted. Finally, with regard to Hex Nuts, Wireking argues that while its facilities include hot, cold and drop forging equipment as Petitioners state, there is no evidence that its facilities include only that equipment and that the financial statements show that Hex Nuts produces nuts, bolts, washers and studs. Thus, Wireking asserts that the information supplied by Wireking shows that these companies produce comparable product and have complete, audited and public financial records that are contemporaneous with the POI.

Wireking cites to the Department's prior determinations in *Hangers from the PRC* and *Steel Threaded Rod from the PRC*, when arguing that the Department should use the financial statements of Bansidhar, Shivalik, Hex Nuts and Hardwin in its final determination. Wireking argues that the financial statements of Bansidhar, Shivalik, Hex Nuts, and Hardwin are the best available information because all are producers of comparable downstream products, with comparable production processes, and each company's financial statement covers the POI.

In rebuttal, New King Shan disputes Petitioners' claim regarding the financial records of Bansidhar, Shivalik, Hardwin and Hex Nuts. New King Shan argues that the Petitioners are claiming that the financial statements are not public because they are not available in their entirety from the Ministry of Corporate Affairs. New King Shan argues that available from one official source does not define what is public and thus the statements should be considered public.

In rebuttal, Wireking argues that, in the final determination, the Department should not use the financial statement of Lakshmi because it is not contemporaneous with the POI and the Department has other suitable financial statements on the record that are contemporaneous and, therefore, present better information than the Lakshmi financial statement. Additionally, Wireking argues the Lakshmi financial statement reveals that it received benefits under an Indian program which the Department has previously found to convey subsidies. Therefore, Wireking argues the Department should reject the Lakshmi financial statement because it is not contemporaneous, contains subsidies, and is therefore not representative nor the best available information.

In rebuttal, Wireking argues that the Department should continue to reject the financial statement of Usha Martin in the Final Determination because the majority of Usha Martin's revenues came from sales of steel which is not a downstream finished product and, therefore, not a comparable product to subject merchandise. Additionally, Wireking contends the Department should reject Usha Martin's financial statement because the company received benefits from the Indian DEPB program, which the Department has previously found to convey subsidies. Therefore, Wireking argues the Department should continue to reject the Usha Martin financial statement because it is not a producer of comparable merchandise and received subsidies during the POI.

Further, in rebuttal, Wireking contends that the Department should reject the financial statement of Hercules in the final determination because Hercules produces large, industrial machinery

equipment which is not a comparable product to subject merchandise. Additionally, Wireking asserts the Department should reject Hercules' financial statement because it shows that Hercules received benefits under an Indian program, which the Department has previously found to convey subsidies.

Department's Position:

Of the financial statements on the record of the investigation, the Department has determined that only the 07/08 Sterling Statement and 07/08 Bandsidhar Statement are appropriate sources for the purposes of calculating the surrogate financial ratios. In selecting SVs for factors of production, section 773(c)(1) of the Act instructs the Department to use "the best available information" from the appropriate market-economy country. In choosing surrogate financial ratios, it is the Department's policy to use data from market-economy surrogate companies based on the "specificity, contemporaneity, and quality of the data."[106] Moreover, for valuing factory overhead, SG&A, and profit, the Secretary normally will use non-proprietary information gathered from producers of identical or comparable merchandise in the surrogate country.[107]

The Department's criteria for choosing surrogate companies are the availability of contemporaneous financial statements, comparability to the respondent's experience, and publicly available information.[108]

The Department also rejects financial statements of surrogate producers whose production process is not comparable to the respondent's production process when better information is available.[109]

Moreover, Congress indicated the Department should "avoid using any prices which it has reason to believe or suspect may be dumped or subsidized prices."[110] Therefore, where the Department has a reason to believe or suspect that the company may have received subsidies, the Department may consider that the financial ratios derived from that company's financial statements are less representative of the financial experience of that company or the relevant industry than the ratios derived from financial statements that do not contain evidence of

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[106] *Notice of Final Determination of Sales at Less Than Fair Value and Affirmative Critical Circumstances, In Part: Certain Lined Paper Products From the People's Republic of China*, 71 FR 53079 (September 8, 2006) and accompanying Issues and Decision Memorandum at Comment 1.

[107] 19 CFR 351.408(c)(4) and section 773(c)(4) of the Act; *Final Determination of Sales at Less Than Fair Value and Final Partial Affirmative Determination of Critical Circumstances: Diamond Sawblades and Parts Thereof from the People's Republic of China*, 71 FR 29303 (May 22, 2006) and accompanying Issues and Decision Memorandum at Comment 12 ("*Diamond Sawblades*").

[108] *Notice of Final Determination of Sales at Less Than Fair Value: Chlorinated Isocyanurates From the People's Republic of ChinaIsos*, 70 FR 24502 (May 10, 2005) ("*Chlorinated Isos*") and accompanying Issues and Decision Memorandum at Comment 3.

[109] *Persulfates from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 70 FR 6836 (February 9, 2005) ("*PRC Persulfates*") and the accompanying Issues and Decision Memorandum at Comment 1.

[110] *Omnibus Trade and Competitiveness Act of 1988*, H.R. Rep. No. 576, 100th Cong., 2nd Sess., at 590-91 (1988).

subsidization.[111] Additionally, as we stated in *Tires from the PRC,* it is the Department's precedent to disregard financial statements where we have reason to suspect that the company has received actionable subsidies, and where there is other usable data on the record.[112] Specifically, we stated,

> {T}he Department does not rely on financial statements where there is evidence that the company received countervailable subsidies and there are other sufficient reliable and representative data on the record for purposes of calculating the surrogate financial ratios.

Based on the criteria discussed above, for the final determination, the Department has disregarded the following financial statements: 06/07 Lakshmi, 07/08 Usha Martin, 07/08 Hercules, 07/08 Nasco, 07/08 Shivalik, 07/08 Hardwin, 07/08 Hex Nuts, and 07/08 Godrej and Boyce. *See* the discussion below for more a detailed explanation of why each financial statement has been disregarded.

Consistent with the Department's past precedent, the Department has rejected the 06/07 Lakshmi, 07/08 Usha Martin, and 07/08 Hercules financial statements for the purposes of calculating the surrogate financial ratios, as the companies are recipients of Indian subsidies that the Department has previous deemed countervailable.[113] Specifically, the Lakshmi,[114] and Hercules[115] financial statements identify the companies' participation in the EPCG subsidy, while Usha Martin[116] participates in the DEPB program.[117] Additionally, because the Department has rejected these financial statements in their entirety as the companies are recipients of Indian subsidies that we have previously deemed countervailable, and there are other usable financial statements on the record, pursuant to *Tires from the PRC*, there is no need to make adjustments in the surrogate financial ratios for these subsidies.[118]

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[111] *Wooden Bedroom Furniture from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and New Shipper Review*, 73 FR 49162 (August 20, 2008), and accompanying Issues and Decision Memorandum at Comment 1C.

[112] *Tires from the PRC*, 73 FR 40485 at Comment 17A.

[113] *Certain Iron-Metal Castings From India: Preliminary Results and Partial Recission of Countervailing Duty Administrative Review*, 64 FR 61592, 61597 (November 12, 1999) (unchanged in final results); *Certain Frozen Warmwater Shrimp From the People's Republic of China: Notice of Final Results and Rescission, in Part, of 2004/2006 Antidumping Duty Administrative and New Shipper Reviews*, 72 FR 52049 (September 12, 2007); *Freshwater Crawfish Tail Meat from the People's Republic of China: Notice of Final Results And Rescission, In Part, of 2004/2005 Antidumping Duty Administrative and New Shipper Reviews*, 72 FR 19174 (April 17, 2007), and accompanying Issues and Decision Memorandum at Comment 1.

[114] 2006–2007 Lakshmi financial statement at Schedule 19, Part B Contingent Liabilities (Liabilities against legal undertakings/bonds executed in favor of DGFT on account of export obligation undertaken by the Company against advance and import licenses under EPCG sheme).

[115] 2007-2008 Hercules financial statement at Schedule 11 (export incentives, VAT set off and other claims) and Schedule 20 at Item 2 Contingent Liabilities (Bonds Issued Under EPCG Scheme).

[116] 2007-2008 Usha Martin financial statement at Schedule 17(Notes to Accounts) at item 22vii (DEPB/Pass Book Gain).

[117] http://ia.ita.doc.gov/esel/eselframes.html.

[118] *Tires from the PRC*, 73 FR 40485 at Comment 17A.

With respect to the 07/08 Shivalik financial statement, although the financial statement identifies wire rod as the main input, which is used in the production of KASRs, the Shivalik financial statement does not identify what types of finished goods are produced by Shivalik. Finished KASRs are a downstream product of wire requiring additional manufacturing processes beyond wire drawing and cutting of the wire, including welding, and powder coating/plating.[119] Accordingly, the Department is not using the Shivalik financial statement because the financial statement does not identify whether the finished goods produced by Shivalik consist of value-added finished merchandise or only wire products that would not capture all the costs beyond wire reported by the respondents in the production of KASRs.[120]

Additionally, with respect to 07/08 Hardwin, 07/08 Hex Nuts, and 07/08 Godrej and Boyce, the Department finds that the financial statements of these companies do not clearly identify wire rod as a raw material, which, in addition, is consistent with our findings for the 06/07 Godrej and Boyce financial statement in *Hangers from the PRC.*[121] Because none of these companies' financial statements identify wire rod as a material input, which would support a determination that the company produces wire products by drawing its own wire from wire rod, the Department finds that these companies' financial statements do not accurately reflect the production experience of the respondents, which use wire rod to produce KASRs.

With respect to the 07/08 Nasco financial statement, the Department finds that the wire rod and wire amount by quantity listed in Nasco's total raw materials that are purchased/manufactured[122] represents an insignificant amount of Nasco's total raw material purchases/manufactured quantity. In contrast, the Department notes that hot-rolled sheet accounts for the majority of Nasco's total raw material purchases/manufactured by quantity.[123] Accordingly, because Nasco is primarily a producer of products manufactured from hot-rolled sheet, the Department finds that Nasco's production experience is not comparable to the production experience of the respondents.

Additionally, with respect to Petitioners' argument that Nasco is an unprofitable company because it has debt to the B.F.S.C., the Department finds that Nasco, while not a comparable producer, is not an unprofitable company. Although Nasco's financial statement does not indicate that it has an outstanding debt to the B.S.F.C., the Department finds that there is no evidence in the financial statement that Nasco would be required to pay for the entirety of this debt in 07/08. Accordingly, the Department finds that there is no basis to deduct the entirety of this debt from Nasco's profit after depreciation, Rs. 33,689 in lakhs. Therefore, because the

[119] New King Shan's January 12, 2009, Response, at Exhibit D-1; New King Shan's February 13, 2009, Response, at Exhibit D-6; Wireking's December 2, 2008, Response, at Exhibit D-2.
[120] *Steel Wire Garment Hangers from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 73 FR 47587 (August 14, 2008) ("*Hangers from the PRC*"), and accompanying Issues and Decision Memorandum at Comment 3.
[121] *Hangers from the PRC*, 73 FR 47587 at Comment 3.
[122] Total raw materials that are purchased/manufactured includes hot-rolled sheet, m.s. wire, nail wire, and wire rod. Listed in Annexure to Schedule 16 of the Balance Sheet & Manufacturing Trading & Profit & Loss for Nasco 07/08.
[123] Wireking's January 26, 2009, submission, at Exhibit 1.

07/08 Nasco financial statement shows as profit, the Department finds that Nasco is a profitable company. However, we will not use the Nasco financial statement, as discussed above, because Nasco is not a comparable producer.

Finally, with respect to 07/08 Usha Martin, the Department has also rejected the 07/08 Usha Martin statement because it is not a comparable producer of a high value-added product, such as KASRs. Specifically, there is no evidence on the record to show that wire and wire rope producers' costs, (*i.e.*, drawing, forming the wire rope, and coating of nickel), are as significant as KASR producers, (*i.e.*, drawing, straightening, cutting, spot-welding, plating/powder-coating (which involves numerous chemicals), and packing).[124] Although Petitioners argue that wire rope producers, such as Usha Martin, are a complex product that are comparable to KASRs, the Department finds that wire and wire rope producers do not accurately reflect the highly complex production experience of KASRs.

Of the remaining financial statements (07/08 Bansidhar and 07/08 Sterling Tools), the Department notes that none of the companies are manufacturers of products that are identical to subject KASRs. Although Petitioners argue that the 07/08 Bansidhar financial statement is incomplete, the Department notes that the complete financial statement is on the record, including the profit and loss statement.[125] While Petitioners argue that the 07/08 Bansidhar financial statement is not publicly available because they were unable to obtain the full financial statement, Wireking stated that it obtained this financial statement from the Indian Registrar of Companies. It is our precedent to find that financial statements filed with the Indian Registrar of Companies to be within the public realm because these statements are either published on the Indian Registrar of Companies' website or the public, for a fee, can obtain the hardcopy at the registrar's office.[126] Accordingly, the Department finds that the 07/08 Bansidhar financial statement is complete and publicly available.

In this case, to determine the best available information, the Department must determine the comparability of the products they manufacture in the absence of producers of identical merchandise to subject KASRs. As there is no hierarchy for applying the above-mentioned criteria for determining comparability for the purposes of selecting which financial statements to use, the Department's decisions in such situations must necessarily be case-by-case. For the final determination, in terms of comparability, absent additional record evidence to evaluate the difference between high-tensile fasteners produced by Sterling Tools, and the fasteners produced by Bansidhar, the Department finds that both companies are producers of merchandise comparable to the subject KASRs. The Department finds that the production of fasteners is a significant portion of the business of Sterling Tools and Bansidhar. Moreover, steel wire rod and steel wire account for a significant portion of the raw materials used by Sterling Tools and Bansidhar in their production of fasteners. Furthermore, the Department finds that both financial

[124] Petitioner's Surrogate Value Case Brief, at 8; New King Shan's January 12, 2009, Response, at Exhibit D-1; New King Shan's February 13, 2009, Response, at Exhibit D-6; Wireking's December 2, 2008, Response, at Exhibit D-2.
[125] Wireking's April 24, 2009, submission, at Exhibit 1.
[126] *Notice of Final Determination of Sales at Less Than Fair Value and Affirmative Critical Circumstances: Certain Lined Paper Products from the People's Republic of China*, 71 FR 53079 (September 8, 2006) at Comment 1.

statements are appropriate sources given that no usable financial statements are available for producers of identical merchandise. Finally, while the 07/08 Sterling Tools and Bansidhar financial statements do not cover the entirety by month of the POI, the Department finds that a three-month difference is not a basis upon which to exclude these financial statements as a SV source.[127] Accordingly, for the final determination, the Department finds that Sterling Tools and Bansidhar are producers of high-valued wire products, which are comparable to the subject merchandise, are contemporaneous for most of the POI, and thus constitutes the best available information.

For the final determination, the Department finds that the 07/08 Sterling Tools, and 07/08 Bansidhar financial statements are contemporaneous, publicly available, and specific to the merchandise, and thus constitute the best available information pursuant to section 773(c)(1) of the Act. As such, we will average financial ratios from the financial statements of Sterling Tools and Bansidhar, both of whom are integrated wire fastener producers, to calculate the surrogate financial ratios.

Comment 11: Treatment of Gratuity Benefits

Petitioners argue that the Department should not have included gratuity benefit costs in the manufacturing, labor and energy ("MLE") denominator for Sterling Tools. Petitioners assert, citing to a third party source,[128] that in Indian financial statements gratuity and gratuity contribution refer to a scheme of retirement benefits that is particular to Indian accounting systems and is funded as a welfare/retirement liability. Petitioners argue that although the Department, in agreement with the International Labour Organization ("ILO"), has found that earnings are inclusive of wages, bonuses and gratuities (as a component of wages, such as tips)[129], in this context gratuities do not have the same meaning. Therefore gratuity benefits should be excluded from the MLE denominator and included in factory overhead.

In rebuttal, Wireking argues that the Department should continue to include gratuity benefits in the MLE denominator for Sterling Tools, despite Petitioners' request to exclude it. Wireking asserts that this is the first time that this issue has been raised by Petitioners and relies on information that has not been presented in this case or any other case. Wireking argues that Petitioners have provided no authority or Departmental precedent that would support their position and instead even acknowledge that it contradicts past decisions by the Department. Thus, Wireking requests that gratuity be included in the MLE dominator.

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[127] *Zhejiang Native Produce & Animal By-Products Import & Export Group Corp., et. al. v. United States*, Court No. 06-00234; Slip Op. 08-68 at 42 (CIT June 16, 2008) ("*Zhejiang v. United States*"), where the Court found that a several month difference in contemporaneity is not material.

[128] Petitioners' Case Brief, at 13, footnote 6 refers to the following website, http://www.mercer.com/referencecontent.htm?idContent=1303935.

[129] *Amended Final Results of Antidumping Duty Administrative Review and New Shipper Reviews: Wooden Bedroom Furniture From the People's Republic of China*, 72 FR 46957 (August 22, 2007) and accompanying Issues and Decision Memorandum at Comment 20.

In rebuttal, New King Shan disputes Petitioners' claim that gratuity benefits should be placed in factory overhead and not MLE. New King Shan argues that Petitioners have offered no support from any official government site or law or regulation and that Petitioners' citation to an unofficial third party source should be disregarded.

Department's Position:

The Department disagrees with Petitioners with respect to gratuity benefits. Although Petitioners have provided third party evidence that gratuity benefits refer to a scheme of retirement benefits that is funded as a welfare/retirement liability, the Department does not find the definition from the unofficial, (*i.e.*, website from a company without supporting documentation of this website) third-party information submitted by Petitioners to be sufficient evidence to not treat gratuities as indirect costs, which is consistent with our regression-based expected PRC wage rate calculation and our current precedent.[130] The Department bases its calculation of the expected PRC wage rate on the ILO's categorization of information provided by the countries it surveys. The Department also notes that the ILO defines "earning" under Chapter 5B of its Yearbook of Labour Statistics ("YLS") as being inclusive of "wages," and as including both bonuses and gratuities. It further defines earnings to "exclude employer's contributions in respect of their employees under these schemes. Earnings also exclude severance and termination pay." In order to ensure that our calculation of expected NME wage rates accurately reflects the remuneration received by workers, we rely on "earnings," not "wages," when deriving our regression-based wage rate. Accordingly, as we stated in *AD Methodologies-NME Wages* (2006):

> In order to ensure that labor costs not included in the ILO defined "earnings" are accounted for in its calculation of NV, it is best to adjust, where possible, the surrogate financial ratios employed by the Department to value overhead expenses, selling, general and administrative expenses ("SG&A"), and profit. Accordingly, it is the Department's precedent to categorize all individually identifiable labor costs not included in the ILO's definition of "earnings" under Chapter 5 of the Yearbook of Labour Statistics as overhead expenses.[131] Such adjustments are fact-specific in nature and subject to available information on the record. Specifically, where warranted, individually identifiable labor costs in the surrogate financial statements which are included in "earnings" are categorized as overhead or SG&A expenses for purposes of the Department's calculation of surrogate financial ratios.[132]

Based on the above, it is clear that the earnings category (Chapter 5) is exclusive to employee benefits such as pension and social security, while the labor cost category (Chapter 6) is inclusive of these employee expenses. Because the Department based its calculation of the

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[130] *Tires from the PRC*, 73 FR 40485 at Comment 18G.18I.
[131] *See Folding Metal Tables and Charis from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 71 FR 2905 (January 18, 2006) and accompanying Issues and Decision Memorandum at Comment 1.
[132] *Antidumping Methodologies: Market Economy Inputs, Expected Non-Market Economy Wages, Duty Drawback; and Request for Comments*, 71 FR 61716 (Oct. 16, 2006) ("*AD Antidumping Methodologies-NME Wages* (2006)").

regression-based expected PRC wage rate on "earnings" data from Chapter 5B of the YLS, in the instant investigation, we find that the gratuity benefits listed in the Sterling Tools financial statement are indirect labor costs and are included in the MLE denominator.

Comment 12: Treatment of Commissions

Wireking argues that the Department should not include "commissions on sales" in the 07/08 Nasco financial statement as SG&A expenses because they are treated as direct selling expenses and should be excluded from the calculation.[133]

In rebuttal, Petitioners urge the Department to reject the adjustments suggested by Wireking. Petitioners argue that Nasco's commissions should not be deducted as it is the Department's precedent to include all selling expenses in SG&A. Petitioners point to a case where the Department specifically affirmed its precedent of including commissions in SG&A expenses.[134]

Department's Position:

Because the Department is not using the 07/08 Nasco financial statement to calculate the surrogate financial ratios, Wireking's argument regarding commission expenses within the Nasco financial statement is moot.

Comment 13: Treatment of Advertising

Wireking argues that the Department should not include "advertisement and publicity" or "sales promotion" as SG&A expenses in the 07/08 Sterling Tools financial statement because they are treated as direct selling expenses and should be excluded from the calculation.[135]

In rebuttal, Petitioners argue that the adjustments referenced by Wireking are not applicable to NME cases as foreign sales in China are not the basis for calculating NV.[136] Petitioners argue that Sterling Tools' advertising expenses should not be excluded as it is the Department's precedent to include all selling expenses in SG&A expenses.[137] Petitioners argue that any deviation from the Department's precedent, such as *PET Film from the PRC*, in this regard is an aberration that should not be followed.[138] Even if, however, *PET Film from the PRC* is

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[133] P*ure Magnesium from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 73 FR 76336 (December 16, 2008) and accompanying Issues and Decision Memorandum at Comment 7A.
[134] *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China*, 63 FR 63842, 63852-53 (Nov. 17, 1998) at Comment 18.
[135] *Id.*
[136] *Antidumping Policy Manual*, Chapter 8, NV, at 37-43.
[137] *Final Determination Notice of Final Determination of Sales at Less Than Fair Market Value and Negative Final Determination of Critical Circumstances: Antidumping Duty Investigation of Certain Color Television Receivers from the People's Republic of China*, 69 FR 20594, 20597 (Apr. 16, 2004) and accompanying Issues and Decision Memorandum.
[138] *Final Determination of Sales at Less Than Fair Market Value: Polyethylene Terephtalate Film, Sheet and Strip from the People's Republic of China*, 73 FR 55039 (Sept. 24, 2008) ("*PET Film from the PRC*") at Comment 3.

considered a new policy, Petitioners argue that it should be restricted to reported direct selling expenses for CEP sales in NME countries, and should not be followed here.[139]

Department's Position:

The Department disagrees with Wireking with respect to excluding advertising expenses, such as advertisement expenses and sales promotion expenses, from SG&A expenses. In *Honey*, the Department clarified its position with respect to deducting expenses from the surrogate SG&A calculation.[140] It is the Department's precedent to include all expenses that are standard sales expenses in the surrogate company's home market and deductions will only be made when there is an exact correlation between the expenses incurred by the respondent in the US and those incurred by the surrogate in the US. Absent proof of this correlation, advertising expenses and other such expenses will not be deducted from SG&A.[141] This position is a result of the fact that the Department must rely solely on the publicly available financial statements of surrogate companies for its calculations. As these surrogate companies are not interested parties in the proceedings, the Department has no authority to gather additional information regarding their expenses. Thus, the Department refrains from making deductions that could distort the calculations as the Department does not have sufficient information about the surrogate companies to make such deductions accurately.[142]

The Department also acknowledges that its decision, in *PET Film from the PRC*, with respect to advertisement expenses[143] was a misinterpretation of the Department's decision in *Tires from the PRC*.[144] In *Tires from the PRC*, the Department mentioned advertising and sales promotion expenses while discussing making a deduction in the financial ratios for discounts and rebates. The Department did not, however, state that those advertising and sales promotion expenses should be deducted from SG&A expenses. Despite this, in *PET Film from the PRC*, we found that such expenses were to be deducted, pursuant to the reasoning in *Tires from the PRC.*[145] Thus, the interpretation of the *Tires from the PRC* decision in *PET Film from the PRC* was incorrect. It remains the Department's position not to deduct such expenses when there is a lack of information of the record to find a correlation between the expenses incurred by the respondent's affiliate in the United States and expenses incurred by the surrogate company in a third county.

Comment 14: Treatment of Job Work Charges

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[139] *Id.; PET Film from the PRC*, at Comment 3.
[140] *Final Results of Redetermination Pursuant to Court Remand* , at 8 (Ct. No. 05-00439, available at http://ia.ita.doc.gov/remands/index.html) affirmed by *Shanghai Eswell Enter Co., Ltd. v. United States*, 2008 Ct. Intl. Trade Lexis 123 .(CIT 2008).
[141] *Id*..
[142] *Tires from the PRC*, 73 Fed. Reg. 40,485 (July 15, 2008) I&D Memorandum at Comment 18C.
[143] *PET Film*, 73 FR 55039 at Comment 3.
[144] *Tires from the PRC*, 07/08 Final at Comment 18C.
[145] *PET Film from the PRC*, at Comment 3.

Wireking asserts that if the Department decides to use the 06/07 Lakshmi financial statement in spite of the fact that it is not contemporaneous with the POI and the fact that Lakshmi received subsidies, the Department should adjust the "job expenses." Although in the *Preliminary Determination* the Department excluded the "job expenses" in the amount of Rs. 226,060,056, Wireking argues that in the past the Department has considered these charges labor and included them in MLE.[146]

In rebuttal, with regard to job work charges, Petitioners assert that the Department's findings in *PET Film from the PRC* are incorrect and that such a methodology presumes parity between the factor build-up of the cost of manufacturing and the financial ratios applied to the factor build-up and that only in cases where a respondent has reported these expenses does that reasoning apply. Thus, Petitioners contend that job work expenses should not be included in the MLE dominator of the financial ratios because neither Wireking nor New King Shan reported job work expenses. Instead, in order for there to be consistency for the repondents' cost of materials, which do not include toll manufacturing, Petitioners argue that the Department should include such expenses in manufacturing overhead as "facts available".

Department's Position:

Because the Department is not using the 06/07 Lakshmi financial statement to calculate the surrogate financial ratios, Wireking's argument regarding "job expense" charges within the Lakshmi financial statement is moot.

Comment 15: Treatment of Labor Expenses

Wireking argues that the Department should include in the surrogate financial ratio calculation denominator the line items in the financial statements that relate to SG&A labor. Wireking asserts that it included SG&A labor in its submission, as requested by the Department,[147] and therefore it should be included in the denominator to ensure a SG&A ratio calculation that accurately corresponds to the factor data reported by Wireking. Accordingly, Wireking argues that the Department should include the following line item labor expenses: "directors' remuneration" (Nasco), "committee meeting sitting fees" (Sterling), "managerial remuneration" (Laskshmi), and "Director's Salary" (Bansidhar). Wireking asserts that these should be included to avoid inflated surrogate financial ratios. Wireking states that in the past the Department has required respondents to include SG&A labor in their reports and has rejected the argument that managerial and administration labor should be excluded.[148] Furthermore, Wireking states that the Department has, in the past, included SG&A labor expenses in the calculation of the financial ratio denominator regardless of whether respondents had reported administrative and managerial

[146] *Id*.
[147] Wireking's Supplemental Section D Questionnaire Response, Questions 73 and 74.
[148] *Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances: Certain Polyester Staple Fiber from the People's Republic of China*, 72 FR 19690 (April 19, 2007) and accompanying Issues and Decision Memorandum at Comment 16.

labor in their total labor hours, because the respondents did have administrative and labor costs that were not captured.[149] Therefore, Wireking asserts that if the Department includes SG&A labor expenses when the respondent has not reported SG&A labor in its total labor hours, the Department should also include SG&A labor expenses when the respondent has reported SG&A labor as part of its total labor hours.

In rebuttal, Petitioners dispute Wireking's claim that including indirect direct labor for SG&A cost (INDLAB2) as part of the total MLE would constitute double counting, as the hours reported there represent only the wage earner portion of general and administrative labor and not salaried SG&A staff hours. Petitioners claim that as the surrogate company's expenses for managers and directors are not in Wireking's reported indirect labor hours and total MLE, they should not be placed in the surrogate ratio MLE denominators and instead remain in the SG&A numerator.

Department's Position:

Because the Department is applying total AFA to Wireking for the final determination, and this argument only applies to Wireking's reported INDLAB2 and none of New King Shan's reported labor FOPs, Wireking's argument regarding treatment of Wireking's indirect management labor resulting in double counting of MLE in the surrogate financial ratios is moot.

Company-Specific Issues

Comment 16: Wireking

A. Total Adverse Facts Available ("AFA") for Wireking

Petitioners argue that because Wireking chose to report its factors of production ("FOPs") using a broad allocation when Wireking possessed the information to report product-specific FOPs, the Department should apply total AFA to Wireking for the final determination, pursuant to section 776 of the Tariff Act of 1930, as amended ("the Act").[150] Petitioners state that despite the Department's repeated requests that Wireking report its FOPs on a KASR basis, that Wireking reported that it was unable to provide KASR-specific FOP data.[151] However, at verification, Petitioners argue that the Department found that Wireking's claim was false. At verification, Petitioners contend that the Department found that Wireking maintains product-specific production records.[152] Petitioners contend that because Wireking's submitted a less accurate, more distortive allocation for reporting its FOPs when product-specific data was available, the

[149] *Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Color Television Receivers From the People's Republic of China*, 69 FR 20594 (April 16, 2004) and accompanying Issues and Decision Memorandum at Comment 19.
[150] *Nippon Steel Corp. v. United States*, 337 F. 3d 1373, 1381 (Fed. Cir. 2003) (*"Nippon Steel").*
[151] Wireking's March 30, 2009, Response, at 20.
[152] Wireking's Verification Report, at 18.

Department should apply total AFA to Wireking.[153]

As required by *NSK*, Petitioners contend that Wireking failed to show that its allocation of FOPs across KASRs and non-KASR products produced a more accurate and less distortive result.[154] According to Petitioners, in an effort to prevent the revelation that its FOPs are incorrect, Wireking only acknowledged that it maintains production records for "unfinished products" but not for finished products.[155]

In determining whether Wireking acted to the best of its ability, Petitioners argue that the Department must assess whether Wireking "put forth its maximum effort to provide Commerce with full and complete answers," which does not require "perfection" but does not "condone… inadequate record keeping."[156] In reviewing Wireking's responses, which are certified to be complete and accurate, Petitioners contend that verification demonstrated that Wireking's attestations that it does not have product-specific records are false. As found at verification, Petitioners note that Wireking does possess "standard" production records that Wireking could have used to report the FOPs on a product-specific basis for the few KASR models that Wireking produced during the POI. Additionally, as found at verification, Petitioners contend that Wireking could have reported product-specific FOPs using the actual production records for its unfinished products and made adjustments for incomplete production operations. Moreover, Petitioners argue that Wireking could have retained production records for finished KASRs subsequent to when the Department first requested Wireking to provide product-specific FOP data. Finally, Petitioners state that Wireking could have disclosed the fact that it maintained standard and actual production records and sought the Department's guidance as to how to use these documents for calculating its FOPs.

Petitioners argue that by failing to disclose the existence of these production records, Wireking prevented parties from having the opportunity to comment on the appropriateness of their use for FOPs. Additionally, Petitioners argue that Wireking manipulated this proceeding by forcing the Department to rely on its less-specific FOPs for the *Preliminary Determination*. In assessing Wireking's level of cooperation, Petitioners argue that the Department should consider that Wireking's original FOP database included FOP data for Wireking's separate garden branch facility, which had separate production and accounting records, in order to submit a less accurate, broad FOP database.[157] In response, Petitioners note that the Department, not knowing that Wireking possessed production records, requested that Wireking report FOPs on a KASR-specific basis and provided various allocation methods for doing such.[158] Therefore, because Wireking never informed the Department that it had the ability to calculate product specific

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[153] *Rhone Poulenc, Inc. v. United States*, 899 F. 2d 1185, 1191 (Fed. Cir. 1990) ("*Rhone Poulenc").*

[154] *NSK Ltd. v. United States*, 481 F. 3d 1355, 1359-61 (Fed. Cir. 2007) ("*NSK*").

[155] Wireking's Verification Report, at 18.

[156] *Nippon Steel*, 337 F. 3d at 1382.

[157] Wireking's December 2, 2008, Response, at R-3.

[158] Letter from Catherine Bertrand, Program Manager, Office 9, Import Administration, to Adams Lee, Counsel for Wireking, Subject: Antidumping Duty Investigation of Certain Kitchen Appliance Shelving and Racks from the People's Republic of China, (January 14, 2009) at 2.

FOPs, Petitioners argue that the Department should apply total AFA to Wireking for the final determination.[159]

Petitioners also argue that because Wireking failed to provide complete and accurate responses and in the manner requested by the Department, that we should apply total AFA to Wireking for the final determination. Rather than report FOPs based on actual consumption recorded in Wireking's accounting records, Petitioners contend that Wireking created FOP allocations that did not rely on the most specific records maintained in its accounting system. According to Petitioners, Wireking never contacted the Department regarding any questions in preparing its FOP response and never disclosed the existence of its production records. Therefore, Petitioners contends that the Department should find that Wireking failed to report its FOP data in the form and manner required, and thus significantly impeded this investigation.

Based on court precedent, Petitioners argue that the Department is required to find that Wireking was an uncooperative respondent and thus this behavior necessitates the application of total AFA for the final determination. Pursuant to *Nippon Steel*, Petitioners state that the Department should find that Wireking, as a reasonable and responsible respondent, failed to use the maximum effort to obtain the requested FOP information.[160] Additionally, pursuant to *NSK*, Petitioners contend that the Department should apply total AFA to Wireking because failed to show that its FOP allocations were on the most specific basis possible.[161]

Based on the Department's prior precedent, Petitioners argue that the Department should apply total AFA to Wireking for the final determination. Petitioners argue that, as in *Steel Threaded Rod from the PRC*, where the Department found that the respondent's failure to report FOPs in a manner that reflected actual consumption necessitated total AFA, there is a sufficient basis to do the same for Wireking for here.[162] Additionally, Petitioners argue that, as in SDGE from the PRC, where the Department found at verification that the respondent could have reported FOPs on a more specific basis, Wireking's failure to report FOPs on a more specific basis affects the ability to calculate NV.[163] Therefore, in keeping with the Department's precedent, Petitioners conclude that the Department should apply total AFA to Wireking. As total AFA, Petitioners state that the Department should apply the simple average of the petition margins, 96.45 percent, to Wireking for the final determination.

In its rebuttal brief, Wireking argues that the Department should not apply total AFA because the

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[159] *Reiner Brach GmbH & Co. KG v. United States*, 206 F. Supp. 2d 1323, 1332-38 (CIT 2002); *Nails from the PRC*, 73 FR 33977 at Comment 22E, F, and G.
[160] *Nippon Steel*, 337 F. 3d at 1382-3.
[161] *NSK*, 481 F. 3d at 1359-61.
[162] *Certain Steel Threaded Rod from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 74 FR 8907, 8908-9 (February 27, 2009) and accompanying Issues and Decision Memorandum at Comment 5 ("*Steel Threaded Rod from the PRC*").
[163] *Final Determination of Sales at Less Than Fair Value and Affirmative Determination of Critical Circumstances: Small Diameter Graphite Electrodes from the People's Republic of China*, 74 FR 2049, 2051-2 (January 14, 2009) and accompanying Issues and Decision Memorandum at Comment 1 ("*SDGE from the PRC*").

production notes only refer to the amount of cut steel wire, and not the amount of wire rod, the actual primary material input and thus the reported factor of production used in its production of subject-KASRs. Additionally, Wireking stated that its production notes/BOMs do not link in any way to any actual material withdrawal records and for that reason could not have been used to report product-specific FOP data. Moreover, Wireking contended that it does not maintain its production notes/BOMs in the normal course of business thus it is inappropriate to suggest that Wireking should have used its production notes/BOMs to report its FOP data on a product-specific basis. Furthermore, Wireking argues that the record evidence shows that the weights reported by Wireking for the steel wire rod and finished products used to derive the FOP database are not distortive. Finally, Wireking argues that it should not received total AFA for not providing documents that it does not maintain in the normal course of its business and cited to *Olympic Adhesives* as evidence of its protection from application of total AFA.

Wireking states that the production notes and BOM could not be used to report per-unit consumption of steel wire rod because they only record the amount of cut wire used in production rather than the amount of steel wire rod used. Therefore, Wireking argues, neither the BOM nor production notes can be used to calculate the steel wire rod FOP. Wireking further maintains that its "standard" production notes/BOMs are essentially a standard template or "recipe" for the specific product code used to identify the number, length, and weight of each piece of cut wire needed to produce the product, but that these do not identify the total weight of the finished product, do not relate to any specific production run nor relate in any way to any actual consumption of raw materials related to the actual production of a specific product code. Additionally, Wireking claims that the Department incorrectly noted in it is verification report that Wireking's "actual" production notes/BOMs reflect the total weight of the finished product, when these actually only reflect the sum of the weights of the individual cut wire lengths used to produce the specific product but omit the quantities or weights of other various inputs that are to be used.

Additionally, Wireking argues that neither its "standard" or "actual" production notes/BOMs provide any information about the amount of steel wire rod needed, whether theoretical or actual, to produce the quantity of the specific product ordered, rather these reflect the input quantity at an intermediate production stage and thus do not identify the amount of steel wire rod inputted or outputted from the wire drawing stage. Wireking further explains that it does not draw wire rod into wire in order to meet the quantity of cut wire identified on a specific production notes/BOM and, therefore, it is not possible to link the amounts of steel wire rod inputted in the wire drawing and cutting stages with the quantities of cut steel wire indicated on its production notes/BOMs. Therefore, Wireking asserts that it would be inappropriate for the Department to suggest that Wireking should have used its production notes/BOMs to report its FOP data on a product-specific basis when its production notes/BOMs only refer to the weights of cut wire used in an intermediate production stage and cannot be traced to the weight of the actual factor of production, wire rod, used in the production process.

Moreover, Wireking contends that its production notes/BOMs do not link in any way to any actual material withdrawal records and for that reason could not have been used to report

product-specific FOP data. Wireking further explains that its steel wire rod records related to raw material inventory withdrawals do not contain any references to any specific production notes/BOMs which creates a disconnect between these raw material withdrawal records and Wireking's production notes/BOMs and makes it impossible to trace the information on a specific production note/BOM to any specific material withdrawal as reflected in Wireking's raw material warehouse sub-ledger and vouchers.

Wireking also argues that it does not maintain its production notes/BOMs in the normal course of business thus it is inappropriate to suggest that Wireking should have used its production notes/BOMs to report its FOP data on a product-specific basis. Wireking claims the Department incorrectly noted in its verification report that Wireking maintains records of the production notes for unfinished products but does not maintain production notes for finished records. Wireking seeks to clarify the record by stating that it does not "maintain" production notes/BOMs in the normal course of business, but instead "generates" and "uses" these production notes/BOMs, but only until the finished products are completed, upon which time these production notes/BOMs for unfinished products are destroyed. Wireking asserts that it would be inappropriate and unreasonable for the Department to conclude that it was necessary for Wireking to maintain its production notes/BOMs in the normal course of business, when it has been demonstrated that Wireking's production notes/BOMs do not tie to into Wireking's cost accounting records (*i.e.*, actual raw material withdrawals) and, therefore, could not be used to report its FOP data on a product-specific basis.

Wireking asserts that the primary purpose of its production notes/BOMs is to facilitate the planning of its production schedule, including which machines and workers are to be used at what times, but that, in its normal course of business, it did not need to maintain the production notes/BOMs because Wireking did not track production quantities or costs on a job-order basis. Wireking claims that it accurately monitors its production costs on a more general level by analyzing the costs of its overall total wire rod consumption allocated over its total finished products production, and which is demonstrated in Wireking's cost accounting records and reconciliation. Additionally, Wireking specifically explains that it allocated its total steel wire rod consumed by the total weight of the steel wire rod of all products as it was the most specific allocation Wireking could report. Wireking argues that it would be inappropriate to allocate total wire rod consumption over total finished goods weight because wire rod would have been allocated to products that did not consume wire rod and, therefore, distortive. Furthermore, Wireking cites to *Hangers from the PRC* and *Washers* as examples of previous cases where the Department has approved this methodology of allocating total raw material consumption over total weight of all finished goods or the total weight of components that consumed the raw material.[164] Wireking argues that in both *Hangers from the PRC* and *Washers*, the Department acknowledged that the respondent did not track its raw material consumption on a job-order or product-specific basis and that the allocation methodology was reasonable and not distortive, and

[164] *Steel Wire Garment Hangers from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 73 FR 47587 (August 14, 2008); *citing also Helical Spring Lock Washers From the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 73 FR 4175 (January 24, 2008). ("*Washers*")

that the Department should make the same finding with regard to the methodology used by Wireking in reporting its FOP database in the current case.

Wireking argues that, even if the Department finds that its production notes/BOMs are production documents maintained by Wireking in the normal course of business, the record evidence shows that the weights reported by Wireking for the steel wire rod and finished products used to derive the FOP database are not distortive. Wireking posits that, although the production note/BOM weights for individual product codes differed from the reported FOP weights, the difference was insignificant, which demonstrates that the Wireking's FOP database weights for steel wire rod were reasonably and accurately derived. Wireking argues that it should not be punished for not providing documents that it does not maintain in the normal course of its business and cited to *Olympic Adhesives* as evidence of its protection from such punishment.[165]

Department's Position:

The Department agrees with Petitioners that we should apply total AFA to Wireking for the final determination.

Facts

On October 8, 2008, the Department selected Wireking as a mandatory respondent in this investigation and released the Investigation Questionnaire to Wireking. Wireking submitted its Original Section A response to the Department on November 12, 2008, and its Original Section C and D responses on December 2, 2008.

In its response, Wireking explained that it produced both subject-KASRs and non-subject products at the same facility.[166] Because it produced both subject-KASRs and non-subject products at both the main facility and the garden branch of Wireking, and did not keep separate consumption records of any input for subject-KASRs, Wireking informed the Department that it had allocated its FOPs, such as steel wire rod, based on the total amount of the input consumed for the POI over the corresponding weight of both subject-KASRs and non-subject product.[167] To obtain the consumption of each FOP per piece of subject-KASRs for the POI, Wireking stated that it then multiplied the per unit consumption of that input for all products multiplied by the standard, model-specific weight of the subject-KASRs (steel wire rod weight for drawing FOPs, powder-coated steel weight for FOPs in the powder-coating stage, and total finished weight).[168] Additionally, in explaining its submitted cost reconciliation, because the garden branch facility's separate production and accounting records are consolidated into Wireking's accounting system, Wireking stated that it has reported its FOP database by combining the FOPs

[165] *Olympic Adhesives*, 899 F. 2d at 1573.
[166] Section D response, at D-3.
[167] Section D response, at D-7 and D-8.
[168] *Id*.

from both the main facility and the garden branch facility.[169]

Based on these statements and pursuant to section 782(c)(1) of the Act, the Department attempted to analyze Wireking's responses according to the methodology proposed by Wireking. In its first deficiency letter to Wireking, the Department noted that Wireking's submitted cost reconciliation contained separate accounting and production records for Wireking's main facility and the garden branch because: (1) Wireking had submitted separate cost of production calculation worksheets for Wireking's main facility and garden branch; (2) the finished goods sub-ledger records separate cost of production for Wireking's main facility and the garden branch; (3) Wireking had submitted separate cost of sales calculation worksheets for Wireking's main facility and the garden branch; (4) the cost of sales sub-ledger records separate cost of sales for Wireking's main facility and the garden branch; (5) Wireking had submitted a POI consumption worksheet that records separate monthly quantities of each input consumed by Wireking's main facility and the garden branch; and (6) Wireking had submitted separate material consumption worksheets that identifies the total quantity consumed for January 2008 for Wireking's main facility and garden branch.[170] Because the Department noted that Wireking kept separate production and accounting records for the main facility where all the subject-KASRs are produced, the Department requested that Wireking resubmit its FOP database and only report the FOPs used to produce the subject-KASRs. In this request, the Department noted that Wireking could calculate the total steel wire rod used to produce the subject-KASRs using the data that Wireking had already submitted for the main facility.[171] Additionally, if Wireking did not track consumption on a CONNUM-specific basis, the Department provided a sample formula that Wireking could use to allocate its total consumption of the FOPs, such as steel wire rod, on a CONNUM-specific basis.

Based on the Department's request for a FOP database that reported consumption on a KASR-specific basis, Wireking submitted its supplemental FOP database on January 22, 2009. In its January 22, 2009, response, Wireking stated that it was submitting a revised FOP database removing the garden branch data and limited to FOP consumption at Wireking's main facility.[172] In its response, Wireking stated that it had reported the FOPs to differentiate the FOPs used for subject-KASRs and non-subject products by using a ratio of the weight of the subject-KASR over the total weight of all products. This ratio was applied to the total consumption for each FOP, and then divided by the total weight of the subject-KASRs to obtain a per-unit consumption amount for each FOP.[173]

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[169] Section D response, at R-3.
[170] Section D response, at Exhibits R3-R7.
[171] Department's January 14, 2009, letter, at 2.
[172] Wireking's January 22, 2009, response, at 1.
[173] *Id*., at Exhibit 1. *See* Memorandum to the File, through James C. Doyle, Director, Office 9, AD/CVD Operations, and Catherine Bertrand, Program Manager, Office 9, AD/CVD Operations, from Julia Hancock, Senior Case Analyst, Office 9, AD/CVD Operations, Subject: Business Proprietary Information of Adverse Facts Available for Guangdong Wireking Housewares & Hardware Co., Ltd. in the Final Determination of the Antidumping Duty Investigation of Certain Kitchen Appliance Shelving and Racks from the People's Republic of China, (July 20, 2009) ("Wireking BPI in AFA Analysis") at Bullet 1 for further discussion of this allocation methodology and the

Prior to receipt of Wireking's revised FOP database, the Department also issued its first deficiency questionnaire to Wireking posing numerous questions regarding how Wireking tracks consumption in its books and records, the allocation of consumption amounts to specific products, and the weights used in denominators of the FOPs.[174] In its February 5, 2009, First Deficiency Response ("First Deficiency Response"), while Wireking was asked to provide a list of documents generated in the normal course of business where the actual or standard costs and quantities are recorded, the Department notes that Wireking only provided a list of documents, (*i.e.*, purchase invoices, warehouse sub-ledgers, monthly material consumption summaries, finished goods warehouse sub-ledgers, and monthly cost of production allocation worksheet), where it records in its accounting books and records the actual costs and quantities used in production.[175] However, Wireking did not provide any documentation or data in response to the Department's request for detail of all standard cost records maintained by Wireking.[176] Additionally, while Wireking was requested to demonstrate how it accounted for the yield loss in the reported usage rate for steel wire rod, Wireking reported that it does not maintain records to measure the yield loss of wire rod. Instead, as the most appropriate way to account for yield loss in production, Wireking explained that it has adjusted the numerator for the steel wire FOP for beginning and ending work-in-process ("WIP") balances.[177] Moreover, when requested to show the calculation of steel wire rod used to produce one kilogram of subject-KASRs, Wireking reported that it could not perform the proposed calculation because it does not track the amount of wire drawn from steel wire rod.[178] Furthermore, when requested to explain why Wireking was using the weight of the steel wire rod as the denominator instead of the finished production quantity of KASRs or the finished production quantity of steel wire, Wireking stated that it did not believe that it was appropriate to use finished production quantity as the denominator because it would distort the consumption ratio of the inputs by allocating consumption to products that did not actually consume that input.[179]

After receipt of Wireking's First Deficiency Response, the Department subsequently calculated an AD margin for Wireking in the *Preliminary Determination* of this investigation.[180] However,

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similarity in results when applying this methodology using total steel wire rod for all products divided by the total steel wire weight for all products.

[174] First Deficiency Questionnaire, (January 16, 2009) at questions 3, 7, 13, 14, 19, 20, 21, 22, 23, 24, 25, 26, 31, 33, 35, 39, 44, 49, 53, 57, 63, and 84.

[175] First Deficiency Response, at 4.

[176] *Id*.

[177] First Deficiency Response, at 6.

[178] First Deficiency Response, at 9.

[179] First Deficiency Response at 9. The Department notes that Wireking was requested to explain why finished production quantity of subject merchandise was not an appropriate denominator, but instead Wireking chose to answer the question regarding finished production of all products (both subject-KASRs and non-subject products). The Department also notes that Wireking was requested to explain why the finished production of steel wire was not an appropriate denominator but Wireking did not explain why the finished production quantity of steel wire was not an appropriate denominator.

[180] *Certain Kitchen Appliance Shelving and Racks from the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination,* 74 FR 9591 (March 5, 2009)

in the *Preliminary Determination*, we determined that the reported weights used to conversion of Wireking's FOPs to a per-piece basis for each model were understated and thus we increased the weights by the difference from the packing list weight for each model.

After the *Preliminary Determination*, we issued a second deficiency questionnaire to Wireking posing numerous questions regarding how Wireking tracks consumption in its books and records, the allocation of consumption amounts to specific products, and the weights used in the denominators of the FOPs.[181] In its March 30, 2009, Second Deficiency Response ("Second Deficiency Response"), while Wireking was requested to explain why it was only able to report the FOPs on a KASR-specific basis using a weight allocation over all products, Wireking stated that the unit weights for each product are not used in Wireking's accounting cost records.[182] Additionally, when requested to explain all efforts it undertook to report the actual quantity of FOPs consumed for each model of KASRs, Wireking stated that it did not track whether raw material from inventory was withdrawn for the production of a specific quantity of a particular product and thus had to allocate consumption over all products.[183] Moreover, when asked whether it maintains workshop record, cost-center codes, etc., Wireking stated that it does not keep any record that tracks consumption of materials on a product-specific basis.[184] Finally, when requested to explain why it was not the finished quantity of each model of KASRs as the denominator for the FOPs of that model, Wireking stated that using the finished quantity of each model as the denominator would understate the per-unit FOP consumption amounts.[185]

Between April 13-17, 2009, we conducted verification of Wireking's sales and FOP responses.[186] At verification, we found that Wireking generates, and at least for a time maintains bills of materials ("BOMs") and actual production notes on a product-specific, and production run-specific basis.[187] Additionally, at verification, we found that the actual production notes, which record the production quantity, the product number, and weight of the steel wire actually used to produce the product in a specific production run are issued every time Wireking produces a product.[188] We noted that this was the "first time that Wireking stated that it maintains {bill of materials} and actual production notes for each production run."[189]

("*Preliminary Determination*").
[181] Second Deficiency Questionnaire, (March 16, 2009) at questions 28, 31, 32, 33, 36, 37, 38, 41, and 44.
[182] Second Deficiency Response, at 19.
[183] Second Deficiency Response, at 20.
[184] Second Deficiency Response, at 24 and 29.
[185] Second Deficiency Response at 27.
[186] Memorandum to the File through Catherine Bertrand, Program Manager, Office 9, from Julia Hancock, Senior Case Analyst, and Kathleen Marksberry, Case Analyst: Verification of the Sales and Factors of Guangdong Wireking Housewares & Hardware Co., Ltd. ("Wireking") in the Antidumping Duty Investigation of Certain Kitchen Appliance Shelving and Racks from the People's Republic of China, (June 8, 2009) ("Wireking Verification Report").
[187] Wireking Verification Report, at 18.
[188] Wireking Verification Report, at 6, 18, and 28.
[189] Wireking Verification Report, at 18.

Use of Facts Available

The Department finds that the use of facts otherwise available is warranted with respect to Wireking, pursuant to section 776(a) of the Act. In general, section 776(a)(1) and (2) of the Act provides that, if an interested party (A) withholds information that has been requested by the Department; (B) fails to provide such information in a timely manner or in the form or manner requested subject to sections 782(c)(1) and (e) of the Act; (C) significantly impedes a proceeding under the antidumping statute; or (D) provides such information but the information cannot be verified, the Department shall, subject to subsection 782(d) of the Act, use facts otherwise available in reaching the applicable determination.

Pursuant to section 776(a)(2) of the Act, the Department finds that the information necessary to calculate an accurate and otherwise reliable margin is not available on the record with respect to Wireking. As stated in section 773(c)(1) of the Act, the Department shall determine NV of the subject merchandise based on the factors of production utilized in producing the merchandise. In the Investigation Questionnaire, Wireking was instructed to report the "actual inputs" used to produce the subject-KASRs, and was instructed "to contact the official in charge" if Wireking had any questions regarding how to compute its FOPs.[190] However, in its Section D response, because of its claim that it did not maintain records that tracked consumption on a KASR-specific basis, Wireking stated that it had reported consumption for its inputs over the corresponding weight of both subject-KASRs and non-subject product.[191]

After reviewing Wireking's broad allocation of its FOPs over both subject-KASRs[192] and non-subject products, the Department issued one deficiency letter and two deficiency questionnaires specifically inquiring into Wireking's FOP reporting methodology. In the deficiency letter, First Deficiency Questionnaire, and Second Deficiency Questionnaire, the Department issued detailed questions regarding Wireking's production record keeping on both an actual and standard basis, Wireking's allocation methodology of FOPs, and provided sample formulas for allocating the FOPs on a more specific basis. The First Deficiency Questionnaire sent to Wireking requested the following information:

- Question 7: Please provide a list of documents generated in the normal course of business by Wireking during the production of subject merchandise and whether the actual or standard costs and quantities are recorded.
- Question 20: Please submit a worksheet showing the calculation of steel wire rod input used to produce 1 kilogram of subject merchandise (*i.e.*, a multiplier). Please see the chart below as a guide for this calculation.
- Question 21: Please explain with supporting documentation why Wireking is using steel wire rod actual weight as the denominator for calculating the usage rate for Wireking's consumption of steel wire rod and other FOPs during the drawing stage. Specifically,

[190] Investigation Questionnaire, at General Explanation of Section D.
[191] Section D response, at D-7 and D-8.
[192] Wireking BPI in AFA Analysis at Bullet 7 for further discussion of the number of subject-KASR models.

please explain with supporting documentation why Wireking is not using the finished production quantity, *i.e.*, total finished production quantity of subject merchandise, or the finished production quantity of steel wire.

- Question 31: Please explain and provide supporting documentation of how Wireking records the usage rate of steel wire rod in the main facility and in its garden branch in the normal course of business.
- Question 33: Please state with supporting documentation whether Wireking is able to track its consumption of steel wire rod on a diameter-specific basis in its production records.

Additionally, the Second Deficiency Questionnaire requested this information:

- Question 31: Please provide a detailed explanation with supporting documentation for why Wireking is only able to report the FOPs on a subject merchandise specific basis using a weight allocation over all products, when Exhibit 8 of your 2DQR shows that records specific to the merchandise under consideration is available.
- Question 36: Please state with supporting documentation whether you maintain records that tracks the quantity of the product that enters each workshop and the quantity of the product that leaves each workshop.
- Question 41a: Please explain with supporting documentation why Wireking is not using the finished production quantity of each product code of the merchandise under consideration as the denominator for calculating the usage ratios of each FOP.
- Question 41b: Please explain with supporting documentation why Wireking is not using the ratio of finished production quantity of a specific product code divided by total finished production quantity of the merchandise under consideration to obtain the quantity of each input consumed to produce that specific product code. For instance, the calculation to obtain the numerator could be the following:

  (Total Production QTY of Product Code A/Total Production QTY of Merchandise under Consideration) * Total Steel Wire Rod Consumed for All Merchandise Under Consideration = Total Quantity of Steel Wire Rod Consumed by Product Code A.
- Question 44: Please state with supporting documentation whether Wireking maintains material consumption worksheets, cost-center codes, etc., that track the monthly consumption of materials on a product-specific basis.

In its questionnaire responses, Wireking repeatedly stated that it does not track consumption of its FOPs on a product-specific basis in its production records and thus it could not report FOPs on a subject-KASR basis.[193] Additionally, in its questionnaire responses, Wireking stated that it does not maintain any records for production or material-consumption on a workshop-specific basis, cost-center code basis, etc.[194] Moreover, Wireking stated that it could not report the FOPs that were consumed only for the subject-KASRs because it does not track whether the material

[193] Second Deficiency Response, at 20.
[194] Second Deficiency Response, at 24 and 29.

was withdrawn from inventory for a specific production run of a particular product.[195] Furthermore, Wireking stated that it does not record the amount of wire drawn from wire rod resulting for the initial stage of the production process.[196] Finally, while Wireking was requested to provide detail of both actual or standard costs that are recorded in its books and records, Wireking only provided a list of the records that track actual cost of materials used in production.[197]

However, after repeated attempts by the Department to obtain more specific FOPs on a subject-KASR basis and detail about Wireking's production records, at verification, for the first time, the Department found that Wireking maintained bill of materials ("BOMs") and actual production notes. These BOMs and actual production notes had never previously been disclosed in Wireking's questionnaire responses, even to explain why their use would be inappropriate.[198] The BOM is the standard weight specifications for each product, and records the surface treatment, diameter of each wire component, quantity, and unit weight. Additionally, the actual production note is generated whenever there is a production run for each product, which records the product code, shipment quantity, production quantity, various inputs used in production, quantity of each wire component, unit weight of wire component, and total weight of the steel wire.[199] Additionally, contrary to Wireking's statements that it does not track whether the material was withdrawn from inventory for specific production run for a specific product, Wireking stated that they know based on the BOM/production note the quantity of wire rod needed to produce that type of product and will withdraw the materials based on the BOM/production notes.[200]

Based on the Department's findings at verification, the Department finds that the necessary information, *i.e.*, accurate factors of production utilized in producing the subject-KASRs, are not on the record. Further, by not informing the Department of this information until verification of its responses, Wireking failed to provide information within the deadlines established by the Department in this investigation, and significantly impeded our ability to calculate an accurate margin for Wireking. Taken together, we find that Wireking's data are unreliable. The scale of the problem is such that the Department cannot use Wireking's questionnaire responses to determine an accurate dumping margin. Therefore, we must resort to facts available.

Section 782(c)(1) of the Act provides that if an interested party "promptly after receiving a request from {the Department} for information, notifies {the Department} that such party is unable to submit the information requested in the requested form and manner, together with a full explanation and suggested alternative form in which such party is able to submit the information," the Department may modify the requirements to avoid imposing an unreasonable burden on that party. Companion section 782(c)(2) of the Act similarly provides that, the

[195] Second Deficiency Response, at 20.
[196] Second Deficiency Response, at 25.
[197] First Deficiency Response, at 4.
[198] Wireking's Verification Report, at 18.
[199] Wireking's Verification Report, at 18 and 28.
[200] Wireking's Verification Report, at 6.

Department shall consider the ability of the party submitting the information and shall provide such interested party assistance that is practicable. Pursuant to section 782(c)(1) of the Act, in its original Section D response, Wireking promptly notified the Department of its inability to submit the FOP information in the requested form and manner and suggested an alternate methodology to the Department. However, Wireking bore the responsibility to report complete and accurate information pursuant to this alternate methodology.

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

In accordance with section 782(d) of the Act, as discussed in further detail in the Wireking AFA Memo, the Department issued multiple deficiency questionnaires to Wireking specifically inquiring into Wireking's FOP reporting methodology and full accounting of all actual and standard production records maintained by Wireking. These inquiries provided Wireking ample opportunity to provide accurate and complete FOP data, and alerted Wireking that its derivation of its reported FOPs was a matter of critical interest to the Department.

Additionally, where the request for information was clear and relates to one of the central issues in an antidumping case, the Court of International Trade ("CIT") has found that the respondent has "a statutory obligation to prepare an accurate and complete record in response to questions plainly asked by Commerce."[201] Further, the CIT has stated that the terms of sections 782(d) and (e) do not give rise to an obligation for the Department to permit a remedial response from the respondent where the respondent has not met all of the criteria of 782(e).[202]

This is not a case where the request for information was not clear and the respondent can claim that it was unaware of its obligation to submit the data and thus required further notification by the Department. Record evidence clearly shows that Wireking was aware of its obligation to report its FOPs based on the "actual inputs" used to produce the subject-KASRs. Accordingly, the Department posed detailed questions, particularly regarding Wireking's production records and how it tracked quantities of its inputs, to determine whether Wireking's proposed allocation of FOPs across both subject-KASRs and non-subject products was the most accurate and reliable

[201] *Tung Mung Dev. Co. v. United States*, 25 CIT 752, 758 (CIT 2001) ("*Tung Mung*"); *Reiner Brach GmbH & Co. KG v. United States*, 206 F. Supp. 2d 1323, 1332-3 (CIT 2002) (stating that, where the initial questionnaire was clear as to the information requested, where Commerce questioned the respondent regarding the information, and where Commerce was unaware of the deficiency, Commerce is in compliance with 782(d), and it is the respondent's obligation to create an accurate record and provide Commerce with the information requested).

[202] *Tung Mung*, 25 CIT at 789 (stating that the remedial provisions of 782(d) are not triggered unless the respondent meets all of the five enumerated criteria of 782(e)).

methodology. It is also clear on the record from Wireking's responses that it was aware of the requirement to report its FOPs on the most accurate and reliable basis possible.[203] Therefore, the Department finds that Wireking had ample notification of the centrality of the issue, as well as ample opportunity to disclose the existence of the BOMs and actual production notes as requested in the deficiency questionnaires, but it chose to not do so until verification.[204]

Section 782(e) of the Act states that the Department shall not decline to consider information deemed "deficient" under section 782(d) if: (1) the information is submitted by the established deadline; (2) the information can be verified; (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination; (4) the interested party has demonstrated that it acted to the best of its ability; and (5) the information can be used without undue difficulties.

In the present case, complete and accurate information regarding the FOPs used to produce the subject-KASRs and Wireking's production records was not submitted by the deadline established for in its submissions. Specifically, Wireking did not disclose the information regarding its BOMs and actual production notes until verification, which was after the deadline for submitting new factual information in an investigation, pursuant to 19 CFR 351.301. The Department must set a date certain to close the administrative record in order to be able to meet its obligations for completing any segment of a proceeding. Such deadlines are established to facilitate the Department's ability to administer the antidumping law.[205] The Department afforded Wireking numerous opportunities to provide complete and accurate information for the calculation of its antidumping margin. This information is critical because it affects the Department's ability to ascertain whether Wireking has accurately reported its FOPs. Specifically, because Wireking failed to provide the BOMs and actual production notes in timely manner prior to verification, the Department did not have the opportunity to fully investigate whether Wireking could have reported its FOPs on a more specific basis, nor did the Department have the opportunity to obtain and analyze this data

Further, Wireking's reported information cannot serve as a reliable basis for reaching the applicable determination. *See* section 782(e) of the Act. While Wireking is correct that the BOMs and actual production notes do not record the actual quantity withdrawn from inventory, the Department finds that this information could have been used to obtain FOPs on a more specific basis than the broad allocation over one thousand products reported by Wireking, and therefore Wireking has withheld information that was requested by the Department in the deficiency questionnaires.[206] Specifically, the Department notes that the actual production notes record, for each production run, the total finished weight of the steel wire, which is an intermediate input to step in the production of the finished product. Contrary to Wireking's statements that it does not record the amount of steel wire, the Department finds that the BOMs

[203] First Deficiency Response, at 10
[204] Wireking Verification Report, at 18.
[205] *Reiner Brach*, 206 F. Supp. 2d at 1334.
[206] First Deficiency Response, at 9.

and actual production notes show that Wireking does record the amount of steel wire used in each KASR model.[207] Moreover, as discussed above, the Department finds that Wireking knows the quantity of steel wire rod needed to produce each type of product based on the BOM/production note.[208]

Because the actual production notes record the total weight of the steel wire needed to produce the finished product and Wireking knows from the BOM/production note the quantity of steel wire rod needed to produce each type of product, the Department finds that the actual production notes would have served as a reliable basis for obtaining accurate FOPs on a KASR-specific basis. Although the Department requests that respondents report the "actual inputs" used in the production of the merchandise subject to each proceeding, pursuant to section 782(c)(1) of the Act, the Department may modify the requirements to avoid imposing an unreasonable burden on that party. Additionally, as discussed above, the Department modified this reporting requirement for Wireking. However, by failing to disclose the BOMs and production notes until verification, Wireking prevented the Department from having a full understanding of its complete production records and thus prevented the Department from informing Wireking that these records were a basis upon which to obtain the most accurate FOPs on a KASR-specific basis and prevented the Department for providing any assistance to Wireking in demonstrating how more accurate reporting of FOPs could have been derived from Wireking's production records.

Additionally, while Wireking argues that the weights reported by Wireking for the steel wire rod and finished products used to report its FOPs are not distortive, the Department finds that this is not the case. Specifically, in comparing the reported steel wire rod weight and the total steel wire weight from the actual production note of one KASR model, the Department finds that there is a difference.[209] While this is the only actual production note on the record, the Department finds that not only is this discrepancy itself significant, especially given the centrality of the wire rod FOP, but also that we cannot rule out the existence of significant differences in the reported steel wire rod weights of other KASR models from the actual steel wire weights of these models. Moreover, while Wireking has stated that its reported FOP allocation has fully captured the yield loss of steel wire rod required to produce one kilogram of subject-KASR, the Department finds that the difference between the reported steel wire rod weight and the actual weight for the one representative sample shows overall yield loss is not accurately captured.[210] Furthermore, because the record evidence shows that there is difference in the yield loss, which can vary significantly across products, and there is a difference in the steel wire weight, which impacts Wireking's significant input, steel wire rod, and accounts for the supermajority of cost of materials, the Department finds that Wireking's data are inaccurate and unreliable.[211]

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[207] Second Deficiency Response, at 20.
[208] Wireking's Verification Report, at 6 and VE 4.
[209] Wireking's Verification Report, at VE 4 and VE 13; Wireking BPI in AFA Analysis at Bullet 2 for further discussion of the difference in weight for this model. .
[210] Wireking BPI in AFA Analsysis at Bullet 3 for further discussion of the difference in reported yield loss and actual yield loss for steel wire rod.
[211] *Non-Malleable Cast Iron Pipe Fittings from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 71 FR 69546 and accompanying Issues and Decision Memorandum at Comment 1 ("*Pipe*

Although Wireking is correct that the Department has previously accepted weight-based FOP allocations, such as in *Hangers from the PRC* and in *Washers*, the Department finds that that we only accept allocations, weight-based or otherwise, when the facts of the case make their use appropriate. However, as discussed above, the Department finds that using Wireking's weight-based FOP allocation is not appropriate, which is why the facts of this case, as compared to *Hangers from the PRC*, and *Washers* are dissimilar. Unlike here, in *Hangers from the PRC*, the Department did not find that the respective respondent had records that would have allowed the respondent to the report the FOPs on a more product-specific basis.[212] Moreover, unlike in *Activated Carbon from the PRC*, where the Department used the respective respondent's data because the majority of NV was reliable, in this case, the distortions in Wireking's FOP allocation methodology renders the overwhelming majority of NV, and thus the entirety of its Section D responses, unreliable.[213]

Furthermore, as explained below, the Department finds that Wireking did not act to best of its ability in providing the information.[214] In fact, Wireking's rebuttal brief states that it had actual production notes all along, but merely attempts to explain that it did not possess the actual production notes for the POI.[215] However, the Department notes that the actual production note on the record is for the same model, which was produced for the same customer as in the POI.[216] Moreover, while Wireking argues that it could not have provided the actual production notes for the POI, the Department notes that the reported steel wire rod and finished product weights that were the basis for Wireking's FOP allocation were also from outside the POI. Accordingly, the Department finds that Wireking's failure to state that it had actual production notes, even ones outside the POI, is important because these could have been of use in calculating a product-specific allocation for use in the reported FOPs.[217] Thus, Wireking's failure to provide the BOMs/production notes significantly impeded the Department's ability to calculate an accurate

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Fittings from the PRC"); *Floor-Standing, Metal-Top Ironing Tables and Certain Parts Thereof from the People's Republic of China: Final Results of Antidumping Duty Administrative*, 74 FR 11085 (March 16, 2009) and accompanying Issues and Decision Memorandum at Comment 1 ("*Tables from the PRC*"); and *Freshwater Crawfish Tail Meat from the People's Republic of China: Notice of Preliminary Results of Antidumping Duty Administrative Review*, 70 FR 58672, 58675-6 (October 7, 2005) (unchanged in *Freshwater Crawfish Tail Meat from the People's Republic of China: Notice of Final Results of Antidumping Duty Administrative Review*, 71 FR 7013 (February 10, 2006) ("*Crawfish from the PRC*"); Wireking BPI in AFA Analysis at Bullet 4 for further discussion of the amount that steel wire rod accounts for cost of materials.").

[212] *Steel Wire Garment Hangers from the People's Republic of China*, 73 FR 47587 (August 14, 2008) and accompanying Issues and Decision Memorandum at Comment 8A ("*Hangers from the PRC*").

[213] *Final Determination of Sales at Less Than Fair Value: Certain Activated Carbon from the People's Republic of China*, 72 FR 9508 (March 2, 2007) and accompanying Issues and Decision Memorandum at Comment 7 ("*Activated Carbon from the PRC*").

[214] Section 782(e)(4) of the Act.

[215] Wireking's Rebuttal Brief, at 12.

[216] Wireking's Verification Report, at VE 4.

[217] *Nippon Steel Corp. v. United States*, 337 F. 3d 1373, 1384 (Fed. Cir. 2003) ("*Nippon Steel*"); *Shandong Huarong Gen. Group Corp. v. United States*, Slip Op. 2003-135 at 53 (stating that the fact that the respondent had certain information and eventually produced the information afterwards showed failure to act to the best of its ability in the review) ("*Shandong Huarong").*

dumping margin and further significantly impeded the proceeding.

Based on our analysis of the above points, we find that, pursuant to sections 776(a)(2)(A) through (C) of the Act, Wireking withheld information specifically requested by the Department in its initial Investigation Questionnaire and deficiency questionnaires, failed to submit information by the deadlines required, and significantly impeded the proceeding. The information withheld was significant, impacting the supermajority of Wireking's cost of materials, and fundamental to the Department's analysis of determining whether Wireking's FOPs are accurate and reliable. Moreover, the impact of this information is pervasive enough to conclude that Wireking's Section D responses, as a whole, are unreliable[218]. Therefore, pursuant to sections 776(a)(2)(A) through (C) of the Act, the Department is applying total facts available to Wireking in this investigation

Use of Adverse Inferences

Section 776(b) of the Act states that if the Department "finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from the administering authority or the Commission, the administering authority or the Commission ..., in reaching the applicable determination under this title, may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." Furthermore, "affirmative evidence of bad faith, or willfulness, on the part of a respondent is not required before the Department may make an adverse inference."[219]

The U.S. Court of Appeals for the Federal Circuit has held that the "best of its ability" standard "requires the respondent to do the maximum it is able to do."[220] The Court further elaborated:

> While the standard does not require perfection, and recognizes that mistakes sometimes occur, it does not condone inattentiveness, carelessness, or inadequate record keeping. It assumes that importers are familiar with the rules and regulations that apply to the import activities undertaken and requires that importers, to avoid a risk of an adverse inference determination in responding to Commerce's inquiries: (a) take reasonable steps to keep and maintain full and complete records documenting the information that a reasonable importer should anticipate being called upon to produce; (b) have familiarity with all of the records it maintains in its possession, custody, or control; and (c) conduct prompt, careful, and comprehensive investigations of all relevant records that refer or relate to the imports in question to the full extent of the imports' ability to do

[218] *Pipe Fittings from the PRC*, 71 FR 69546 Comment 1; *Tables from the PRC*, 74 FR 11085 at Comment 1; *Crawfish from the PRC*, 70 FR 58672, 58675-6; *Activated Carbon from the PRC*, 72 FR 9508 at Comment 7.

[219] *Antidumping Duties; Countervailing Duties; Final Rule*, 62 FR 27296, 27323 (May 19, 1997).
[220] *Nippon Steel*, 337 F. 3d at 1382.

so.[221]

The Department finds that Wireking did not act to the best of its ability to furnish the requested information in this investigation. The Department finds that Wireking was in possession of the required information but failed to submit it to the Department.[222] The record shows that, at best, Wireking did not thoroughly investigate its own records to ensure that it was providing the Department with complete and accurate data. At verification, the records in question were readily produced upon request. Within the meaning of section 776(b) of the Act, and despite Wireking's contention that it did cooperate fully with the Department's investigation, we find that Wireking failed to cooperate by not acting to the best of its ability to comply with the Department's requests for information, as noted above, and that the application of total AFA is warranted.

The Act provides that the Department shall determine NV of the merchandise subject to the proceeding based on the FOPs utilized in producing the merchandise, pursuant to section 773(c)(1) of the Act. The record in this case shows that the FOPs have not been reported accurately. First, Wireking reported the consumption of the FOPs broadly across both subject-KASRs and non-subject products. The Department finds that this results in the overwhelming majority of NV (which includes cost of materials), (*i.e.*, steel wire rod), being allocated over one thousand products without any variation in consumption.[223] Second, the respondent has stated, contrary to prior statements on the record, that it does have standard BOMs and actual production notes on a product-specific basis. These records were not previously disclosed to the Department prior to verification, despite the Department's numerous questions in the deficiency questionnaires requesting further detail of Wireking's production and workshop records, and could have been used to obtain FOPs on a KASR-specific basis. Third, contrary to prior statements on the record, at verification, Wireking acknowledged that it does record the quantity and weight of steel wire it uses in each production run for KASRs. This disclosure is important because if Wireking had provided such information in its responses before verification, the Department could have used this information and worked with Wireking to devise an allocation methodology that captured the actual and/or standard cost of the KASRs on a more accurate basis. Fourth, the difference in the actual steel wire weight of the representative sample on the record and the reported steel wire rod weight of that model demonstrates that Wireking's reported FOP allocation methodology has not accurately captured either yield loss for steel wire rod or the actual weight of the inputs used to manufacture the KASRs and thus is unreliable.[224]

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[221] *Id.*

[222] *Nippon Steel*, 337 F. 3d at 1382 ("the 'best of ability' standard does not condone inattentiveness, careless, or inadequate record keeping"); *Shandong Huarong*, Slip. Op. 03-135 at 36 (stating that the fact that the respondent had certain information and eventually found the information afterwards showed failure to act to the best of its ability initially).

[223] Wireking BPI in AFA Analysis at Bullet 5 for further discussion of the amount that steel wire rod accounts for cost of materials, NV, and variations in consumption.

[224] Wireking BPI in AFA Analysis at Bullet 6 for further discussion of steel wire rod weight by model.

Wireking's contention that it only tracks raw material consumption based on withdrawals and thus the disclosure of the BOMs and actual production notes would not have resulted in a more accurate result, does not preclude utilization of AFA under the statute.[225] Contrary to Wireking's claims, it is not its record-keeping methodology that led to inaccurate and incomplete responses to the Department's questionnaires, but rather, the failure to look beyond the company's accounting documents to all source documents, in order to provide the necessary and requested information regarding production. Wireking's failure to look beyond its immediate accounting and inventory records, given the presumption that a company is familiar with its own records, is not an excuse for providing inadequate responses to the Department's requests for information.[226] In sum, despite the Department's detailed and very specific questionnaires, Wireking gave insufficient attention to its statutory duty to reply accurately and completely to requests for information regarding its FOPs, which affects the supermajority of NV.

Wireking has claimed that there is no basis for application of an adverse inference because its methodological selection was motivated by a desire to submit the most accurate data possible. However, the Department notes that Wireking had the burden on demonstrating that its FOP methodology was the most complete and accurate methodology possible using all records available to Wireking, which is not the case. Moreover, as noted above, Wireking indicated on several different occasions that it did not maintain documentation that it later admitted it did maintain. Despite the Department's very specific questions, Wireking gave insufficient attention to its statutory duty to reply accurately and completely to requests from the Department and to provide an accurate and reliable FOP database.[227] Because Wireking failed to do the maximum it was able to do based on data that it had in its possession, the Department finds that Wireking failed to cooperate to the best of its ability, pursuant to section 776(b) of the Act. Therefore, the Department finds it appropriate to apply AFA to Wireking for this final determination.

Additionally, we disagree with Wireking that *Olympic Adhesives* provides no basis for the application of AFA because it does not maintain the BOMs and actual production notes in the normal course of business. As explained in *Olympic Adhesives*, total AFA may arise "only under circumstances in which it is reasonable for Commerce to expect that more forthcoming responses should have been made, *i.e.*, under circumstances in which it is reasonable to conclude that less than full cooperation has been shown."[228] In this case, as explained above, the Department asked numerous questions regarding Wireking's reported FOP allocation methodology to ascertain whether it was complete and accurate, including information regarding Wireking's production records, yield loss, and the recording of steel wire. However, at verification, the Department found that Wireking maintained BOMs and actual production notes that could have been used to obtain FOPs more specific to KASRs, which had not been disclosed in the submissions. Additionally, as explained above, the Department found that the difference in the actual steel

[225] *Nippon Steel*, 337 F. 3d at 1382.
[226] *Id.*, at 1383.
[227] *Activated Carbon from the PRC*, 72 FR 9508 at Comment 27.
[228] *Olympic Adhesives*, 899 F. 2d at 1565 (under the predecessor to the facts available statute, a failure to comply with a request for information must be evaluated in the context of the request before an adverse inference may arise).

wire weight and the reported steel wire rod weight for one model demonstrates that Wireking's reported FOPs do not accurately capture yield loss. Moreover, the Department finds that the difference in weight of the one model and the fact there are records showing that Wireking could have reported more specific FOPs shows there is no information upon the record to support the accuracy of any of Wireking's reported FOPs. Therefore, the Department finds that the application of AFA, pursuant to the standard outlined in *Olympic Adhesives*, is appropriate because Wireking failed to report complete and accurate FOPs, and the extent of Wireking's failure to cooperate is unknown.[229]

Application of Total Adverse Facts Available

We also agree with Petitioners that total AFA should be applied to Wireking given that there is unusable FOP information for the supermajority of Wireking's NV. We find that the application of partial AFA in this instance (*e.g.*, the application of the highest reported factor) would not provide an appropriate incentive for more accurate and complete reporting. The application of total AFA in this instance is also consistent with the Department's precedent of applying total AFA when the missing information affects a significant portion of the reported NVs, as it does in the case of Wireking.[230] For further discussion of the business proprietary information in our analysis of applying total AFA to Wireking, *see* Wireking BPI in AFA Analysis Memo.

Selection of the Adverse Facts Available Rate

In deciding which facts to use as AFA, section 776(b) of the Act and 19 CFR 351.308(c)(1) authorize the Department to rely on information derived from: (1) the petition; (2) a final determination in the investigation; (3) any previous review or determination; or (4) any information placed on the record. In the *Preliminary Determination*, the Department applied as AFA to the PRC-wide entity using a simple average of the corroborated margins from the petition.[231] However, in the final determination, the Department is now applying as AFA to the PRC-wide entity and Wireking, which is also receiving as total AFA, the highest corroborated margin from the petition. The Court of International Trade and the Federal Circuit have consistently upheld the Department's precedent.[232]

The Department's precedent when selecting an adverse rate from among the possible sources of

[229] *Olympic Adhesives*, 899 F. 2d 1565; *Myland Industrial, Ltd. v. United States*, Slip. Op. 2007-154 at 20 (CIT 2007).
[230] *Pipe Fittings from the PRC*, 71 FR 69546 Comment 1; *Tables from the PRC*, 74 FR 11085 at Comment 1; *Crawfish from the PRC*, 70 FR 58672, 58675-6; *Activated Carbon from the PRC*, 72 FR 9508 at Comment 7.
[231] *Preliminary Determination*, 74 FR at 9596.
[232] *Rhone Poulenc*, 899 F.2d at 1190; *NSK Ltd. v. United States*, 346 F. Supp. 2d 1312, 1335 (CIT 2004) (upholding a 73.55 percent total AFA rate, the highest available dumping margin from a different respondent in an less than fair value investigation); *see* also *Kompass Food Trading Int'l v. United States*, 24 CIT 678, 689 (2000) (upholding a 51.16 percent total AFA rate, the highest available dumping margin from a different, fully cooperative respondent); *Shanghai Taoen*, 360 F. Supp. 2d at 1345 (upholding a 223.01 percent total AFA rate, the highest available dumping margin from a different respondent in a previous administrative review).

information is to ensure that the margin is sufficiently adverse "as to effectuate the purpose of the facts available role to induce respondents to provide the Department with complete and accurate information in a timely manner."[233] The Department's precedent also ensures "that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully."[234] Consistent with the Department's precedent and the purposes of section 776(b) of the Act, as AFA, we are applying a rate of 95.99 percent to Wireking.

Corroboration

Section 776(c) of the Act requires that, when the Department relies on secondary information rather than on information obtained in the course of an investigation as facts available, it must, to the extent practicable, corroborate that information from independent sources reasonably at its disposal. Secondary information is described in the SAA as "information derived from the petition that gave rise to the investigation or review, the final determination concerning the subject merchandise, or any previous review under section 751 concerning the subject merchandise."[235] The SAA also states that the independent sources may include published price lists, official import statistics and customs data, and information obtained from interested parties during the particular investigation.[236] The SAA also clarifies that "corroborate" means that the Department will satisfy itself that the secondary information to be used has probative value.[237] As explained in *Tapered Roller Bearings from Japan*, to corroborate secondary information, the Department will, to the extent practicable, examine the reliability and relevance of the information used.[238]

The Department had limited information from which to corroborate the selected AFA rate. In the final determination, only one mandatory respondent, New King Shan, received an individually calculated weighted-average margin. We also have little independent information from other sources. This conclusion is supported by proprietary information set forth in a separate memorandum.[239]

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[233] *Notice of Final Determination of Sales at Less Than Fair Value: Static Random Access Memory Semiconductors from Taiwan*, 63 FR 8909, 8932 (February 23, 1998).
[234] SAA at 890; *Notice of Final Determination of Sales at Less than Fair Value: Certain Frozen and Canned Warmwater Shrimp from Brazil*, 69 FR 76910, 76912 (December 23, 2004), and accompanying Issues and Decision Memorandum at Comment 22.
[235] SAA at 870.
[236] *Id*.
[237] *Id*.
[238] *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, from Japan; Preliminary Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews*, 61 FR 57391, 57392 (November 6, 1996), unchanged in *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan: Final Results of Antidumping Duty Administrative Reviews and Termination in Part*, 62 FR 11825 (March 13, 1997) ("*Tapered Roller Bearings from Japan*").
[239] *Memorandum to the File: Corroboration* of the PRC-Wide Facts Available Rate for the Final Determination in the Antidumping Duty Investigation of Certain Kitchen Appliance Shelving and Racks from the People's Republic

In determining the extent to which the petition margins are reliable and relevant we examined the methodology used in the petition to calculate U.S export price and NV which the Department relied upon for purposes of the initiation of this investigation.[240] Specifically, we found that the petition relied on seven U.S. price quotes for shelving and racks manufactured in the PRC and offered for sale in the United States. The U.S. prices quoted were for four types of refrigerator shelving and three types of oven racks.[241] The petition deducted from these prices to arrive at an ex-works price.[242] The petition based NV on one of the petitioning company's consumption rates for producing seven models of shelving and racks from the PRC during the POR.[243] The petition stated that the production experience of the U.S. industry is representative of the production process used in the PRC because all of the material inputs and processing are not necessarily materially different for a Chinese producer of racks and shelving.[244] The information on the record of the investigation for the Chinese producers under investigation support the finding that the production processes and all of the material inputs and processing are in fact similar to the ones described in the petition. Additionally, we found that the petition margins were calculated using the Department's NME methodology as required by 19 CFR 351.202(b)(7)(i)(C) and 19 CFR 351.408. Thus, we have found nothing on the record during the course of the investigation to permit us to conclude that the petition margins are not reliable or relevant.

After determining that the underlying data utilized in the petition was reliable and supported the seven calculated margins in the petition, we examined the petition margins themselves as compared to New King Shan's transaction-specific margins.[245] To assess the probative value of the total AFA rate selected for the PRC-wide entity and the total AFA rate chosen for the other mandatory respondent, Wireking, we compared the transaction-specific rates calculated for New King Shan to the margins contained in the petition. The Department concludes that the New King Shan transaction specific margins constitute a limited range of information from which to draw conclusions about the margins that may exist for the PRC-wide entity and for Wireking. In the absence of the New King Shan information the Department would have had no basis upon which to conclude that any of the petition margins, as supported by the record information cited above, should not be used as AFA because they were not corroborated within the meaning of section 776(c) of the Act. Nevertheless, the Department concludes that by using New King Shan's highest transaction specific margin as a limited reference point, the highest petition margin that can be corroborated is 95.99 percent. This margin is not so much greater than the limited reference point of New King Shan's highest transaction specific margin that it can be considered not to have probative value.

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of China, (July 20, 2009) ("Final Corroboration Memo").
[240] *Initiation Notice*, 73 FR at 50598-99.
[241] Petition, Volume II, at Exhibits 8 & 11.
[242] Petition, Volume II, at Exhibits 10, 13 & 14; Second Supplement to the Petition at Exhibit 3.
[243] Petition, Volume II, at 4-5 and Exhibit 1; Second Supplement to the Petition at Exhibit 3; and Initiation Checklist.
[244] Petition, Volume II, at 5; Supplement to the Petition at 2.
[245] Attachment 1 of *Final Corroboration Memo*.

Furthermore, the Department's practice, when selecting an AFA rate from among the possible sources of information, has been to ensure that the margin is sufficiently adverse "as to effectuate the statutory purposes of the adverse facts available rule to induce respondents to provide the Department with complete and accurate information in a timely manner."[246] In accordance with the SAA, the information used as AFA should ensure an uncooperative party does not benefit by failing to cooperate than if it had cooperated fully.[247]

In order to ensure that the uncooperative companies do not benefit from their failure to cooperate, we have assigned a rate of 95.99 percent to Wireking and the PRC-wide entity. The Department finds that this rate is sufficiently high as to effectuate the purpose of the AFA rule (*i.e.*, we find that this rate is high enough to encourage participation in future segments of this proceeding in accordance with section 776(b) of the Act).

Accordingly, among the Petition margins we find that 95.99 is reliable and relevant considering the limited information available and thus has probative value. Therefore, we find that the rate of 95.99 percent is corroborated within the meaning of section 776(c) of the Act.[248] Thus, we determine that 95.99 percent is the single AFA antidumping rate for the PRC-wide entity, and that 95.99 percent is also the single AFA AD rate for Wireking for this final determination.

B. Partial AFA for Factors of Production ("FOPs")

Petitioners argue that if the Department chooses to not apply total AFA to Wireking for Wireking's failure to report product-specific FOPs, Petitioners argue that the Department should apply partial AFA to Wireking's FOPs. At verification, Petitioners state that the Department noted that Wireking possessed production records on a workshop-specific basis that would have allowed Wireking to report product-specific FOPs. Accordingly, Petitioners argue that the Department should apply partial AFA to Wireking's FOPs by selecting the highest reported FOP as the AFA rate for the final determination. However, Petitioners contend that partial AFA should not be applied to Wireking's steel wire rod because continuing to increase the steel wire rod FOP by the difference in the reported standard weight and net packing weight corrects Wireking's reporting error for steel wire rod. Additionally, Petitioners argue that partial AFA should not be applied to Wireking's packing FOPs, which were verified by the Department, and Wireking's steel scrap, which the Department determined at verification could not allocated to subject merchandise alone.

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[246] *Notice of Final Determination of Sales at Less Than Fair Value and Final Negative Critical Circumstances: Carbon and Certain Alloy Steel Wire Rod from Brazil*, 67 FR 55792, 55796 (Aug. 30, 2002); *Notice of Final Determination of Sales at Less Than Fair Value: Static Random Access Memory Semiconductors From Taiwan*, 63 FR 8909, 8932 (Feb. 23, 1998).

[247] SAA at 870.

248 See Certain Frozen Warmwater Shrimp from India: Preliminary Results and Preliminary Partial Rescission of Antidumping Duty Administrative Review, 73 FR 12103 (March 6, 2008), unchanged in final results, see Certain Frozen Warmwater Shrimp From India: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 73 FR 40492 (July 15, 2008).

In rebuttal, Wireking disputes Petitioners' arguments, claiming that they are based on an incorrect understanding of Wireking's records. Wireking asserts that it did not need to report the production notes/BOMs because they cannot generate product specific information, do not reflect an intermediate input, do not tie to raw material consumption records and are not maintained in the normal course of business. Wireking argues further that the record contains only some of the subject merchandise products codes produced during the POI. Wireking contends that the production notes/BOMs are representative of the steel wire weights used for the codes represented as they are standard and used as a template. Thus, Wireking argues that for the codes represented, the Department could use as partial AFA the steel wire unit weights reported in Wireking's FOP database. Wireking contends that the Department could take the average difference between the production note/BOM weights and Wireking's FOP database for those codes represented and apply that ratio to adjust the reported steel wire rod weight for Wireking's other product codes.

Department's Position:

Because the Department is applying total AFA to Wireking for the final determination, Petitioners' argument with respect to applying partial AFA to Wireking's FOPs is moot.

C. Partial AFA for Labor

If the Department chooses to not apply total AFA to Wireking for Wireking's failure to report product-specific FOPs, Petitioners argue that the Department should apply partial AFA to Wireking's labor FOPs for Wireking's. According to Petitioners, at verification, the Department noted that Wireking's allocation methodology resulted in labor FOPs being underreported. Therefore, Petitioners contend that the labor FOPs should be corrected before the Department selects the highest reported labor FOP for each labor category to apply as partial AFA to Wireking for the final determination.

Wireking did not comment on this issue.

Department's Position:

Because the Department is applying total AFA to Wireking for the final determination, Petitioners' argument with respect to applying partial AFA to Wireking's labor is moot.

D. Partial AFA for Underreported Weight-per-Piece FOPs

If the Department chooses to not apply total AFA to Wireking, Petitioners argue that the Department should apply partial AFA to Wireking's underreported weight-per-piece FOPs. In the *Preliminary Determination*, Petitioners state that the Department appropriately found that Wireking's reported product weights are not supported by record evidence. Using Wireking's submitted packing lists, Petitioners contend that the Department found that Wireking's reported

weights were understated and that this also demonstrated that Wireking's reported FOPs were unreliable based on these inaccurate weights. Additionally, using their own production experience, Petitioners argue that they showed that Wireking's weights were significantly underreported.[249] Petitioners argue that moreover, as demonstrated by their weight analysis of KASR models, the empirical weights when compared to the weights from Wireking's packing lists for the same model shows that Wireking's reported weights are again significantly understated.[250]

Although Wireking will argue that the Department's weight test at verification demonstrated that its reported weights were correct, Petitioners contend that there is no certainty that Wireking made available KASRs that were produced during the POI and in fact below normal weights. At verification, Petitioners state that the Department obtained an actual production record that confirms the accuracy of the packing list weights and not Wireking's reported weights.[251] Additionally, Petitioners note that the standard production notes for the products weighed by the Department do not tie to specific production runs and thus are not representative of true product weights. Accordingly, Petitioners argue that based on the contradictory evidence on the record of Wireking's reported weights, the totality of the record evidence shows that Wireking's reported weights are inaccurate. Furthermore, Petitioners conclude that given Wireking's failure to disclose the existence of production records, the Department should apply partial AFA to Wireking's reported FOPs by the increasing the FOPs by the difference in weight between the reported weight and packing weight for the final determination.

Wireking argues that the Department should use its reported weight-per-piece FOPs without making any adjustment to the weights for the final determination. Since the *Preliminary Determination*, Wireking argues that it has addressed the Department's concerns about the accuracy of its reported weights. In its post-preliminary responses, Wireking argues that it explained that the weights recorded in the packing lists are not reliable because the product weights were an estimated weight slightly higher than the actual weight that Wireking's sales personnel used for preparing shipment documents. Wireking stated that it reports a weight slightly higher than the actual weight to ensure that the container is not able to clear U.S. Customs because it weighed more than the reported weight and thus resulted in increased cost to Wireking. Moreover, the product weights listed on the packing lists are not an essential term of the transaction, Wireking argues because all products sold by Wireking were paid on a piece basis and not by weight.

Additionally, Wireking argues that it did not report the product weights listed in packing lists and other shipment documents because this would have resulted in an inaccurate reported unit weight of finished product. Wireking states that instead, to obtain the most accurate actual weight of the merchandise subject to this investigation, it weighed samples of the merchandise sold during the POI and reported these actual weights in its FOP database. According to Wireking, the

[249] Petitioners February 17, 2009, Submission, (February 17, 2009) at 6.
[250] *Id*.
[251] Wireking's Verification Report, at Exhibit VE-4.

Department tested the reported actual weights of certain models at verification and found that the difference between the reported weights and the weights for the selected models was minimal.[252] Wireking concludes that because the record evidence shows that Wireking's reported weights were accurately reported, the Department should use the reported weights without making any adjustment for the final determination.

In rebuttal, Wireking requests that should the Department use the production note/BOM weights for steel wire, the Department should not also use the packing list weights to make an additional upwards adjustment. Wireking asserts that failing to do this would result in double counting as both adjustments are targeted to reporting a more accurate unit weight for Wireking's product weights.

Wireking also rebuts Petitioners' claim that Wireking's reported unit weights were under-reported, arguing instead that, in light of the Department's verification findings regarding its weighing of a randomly selected sampling of Wireking's products, none of Petitioners' findings merit the Department applying AFA to Wireking's reported unit weights. Wireking maintains that the product weights listed on the packing lists were merely an estimated weight that was slightly higher than the actual. Wireking argues that given that Wireking's freight charges are on a container basis, rather than on a weight basis, there was no cost difference for slightly overstating the weight of its containers, and by doing so it avoids a significant risk of containers being unable to clear customs because it weighed more than the reported weight. Additionally, Wireking asserts that all the products it sold were paid by quantity (pieces) instead of weight, and so the product weight listed on the shipping documents was not an essential term of sale. Furthermore, Wireking contends that it applied the same methodology of how it reported its weights for all of its products, and not only subject merchandise, as alleged by Petitioner. Wireking also argues that the Department found in its verification report that the difference between the reported weights and finished weights for each model and the weights determined for each model during the Department's test was minimal, and that this finding indicates that Wireking's FOP database had accurately reported the finished product weights.

Additionally, Wireking rebuts Petitioners' comparisons of weights of its own products with allegedly identical products produced by Wireking, and its comparisons of Wireking's reported weights with the weight of allegedly identical shelves from a freezer that allegedly contained Wireking shelves, as being of questionable relevance and self-serving. Wireking questions how Petitioner identified a specific Wireking part number from a freezer when even Wireking does not know which freezer model of Wireking's customer actually uses which specific Wireking part number. Additionally, Wireking rebuts Petitioners' claim that the Department's verification results of weighing a sample of Wireking's products do not constitute "substantial evidence" by citing to *Maui Pineapple* as evidence that the Department has significant discretion in how it administers its verification procedures and, specifically, may rely findings from a limited sampling at verification if the time available for verification prevents a more thorough or

[252] Wireking's Verification Report, at 29.

comprehensive examination.[253] Therefore, Wireking argues that it would be inappropriate for the Department to disregard its own verification findings and instead rely on Petitioners' submissions referring to its own production experience or its purchases of a freezer that allegedly contains Wireking's products. Wireking asserts that the Department should disregard all of Petitioners' claims and use Wireking's reported FOP weights to calculate the margins for the final determination.

Petitioners rebut Wireking's argument that its packing weights were estimates, arguing instead that these weights were submitted by Wireking with no suggestion that they were not completely accurate and that, given the high costs of shipping steel products, Wireking would necessarily be as accurate as possible in its weighing to avoid being charged overly excessive shipping fees. Additionally, Petitioners rebut Wireking's claim that it overstated its packing weights so as to avoid any container being refused for loading because it weighed more than its reported weight, instead contending that Wireking never submitted any evidence of any container being rejected for overweight lading. Petitioners argue that Wireking's packing weights were consistent across multiple packing lists and customs documents which provide evidence of an internally standardized weight used in the normal course of business. Petitioners also assert that Wireking's "margin of error" argument is not supported by the record evidence, which reveals discrepancies much higher. Petitioners maintain that Wireking has not submitted any factual information to rebut the actual product weights, as supplied by Petitioners, which draws into question the accuracy of the Department's selection of three subject shelves for weighing during verification. Finally, Petitioners argue that one of Wireking's unreported production notes confirms the accuracy of the net packing weights, which underscores the proprietary of continuing to rely on net packing weights in the final.

Department's Position:

Because the Department is applying total AFA to Wireking for the final determination, Petitioners' argument with respect to applying partial AFA to Wireking's underreported weight-per-piece FOPs is moot.

E. Partial AFA for Yield Loss

Petitioners argue that the Department should apply partial AFA to Wireking's reported yield losses for the final determination. Instead of reporting FOPs on a product-specific basis, Petitioners state that Wireking used a broad allocation methodology that failed to account for yield loss at each production stage. However, at verification, Petitioners contend that the Department found that Wireking possessed production records that could have been used for product specific FOPs and production stage-specific yield loss. According to Petitioners, these production records show that Wireking recorded yield loss by stage but did not report such to the Department. Moreover, Petitioners state that these records show that Wireking's FOP allocation is incorrect for the denominator should have been shipment product quantity. Therefore,

[253] *Maui Pineapple Co., Ltd. v. United States*, 27 CIT 580, 264 F. Supp. 2d. 1244, 1259 (2003).

Petitioners conclude that the Department should apply partial AFA to Wireking's FOPs by increasing the reported yield losses by the percentages identified in these production records for the final determination.[254]

Wireking did not comment on this issue.

Department's Position:

Because the Department is applying total AFA to Wireking for the final determination, Petitioners' argument with respect to applying AFA to Wireking's yield loss is moot.

F. Partial AFA for Market Economy Movement Expenses

In the *Preliminary Determination*, Petitioners state that the Department applied partial AFA to Wireking's U.S. sales for ME movement expenses incurred under sales term X.[255] Because of Wireking's refusal to provide these ME movement expenses, Petitioners argue that the Department's application of partial AFA to these expenses was constrained to the use of data from one sample document that skewed the results in Wireking's favor. Petitioners contend that public data submitted in Petitioners' responses shows that the ME expenses contained in the sample document provided by Wireking were not representative of these expenses for the POI.[256] At verification, Petitioners contend that the Department found that Wireking did incur ME movement expenses for sales made under term X and that Wireking could tie these charges to the source documents.[257] Petitioners argue that the Department also found that movement expenses contained in the sample document were an unrepresentative sample because freight documents for the sales traces showed that movement expenses for other sales made under term X were higher than the sample document.[258] Based on the Department's findings at verification, Petitioners contend that it is apparent that Wireking chose to ignore its responsibility as a respondent to report the actual, ME movement expenses. Instead, Petitioners state that Wireking chose to submit an unrepresentative value knowing that this would limit the Department's application of partial AFA and assist Wireking in the provisional measures cap. According to Petitioners, Wireking's self-selective reporting of movement expenses and hiding of data warrants the application of total AFA to Wireking for the final determination.

If the Department chooses to not apply total AFA to Wireking for the final determination because of Wireking's self-selective reporting of movement expenses, Petitioners argue that the Department should continue to apply partial AFA to movement expenses for sales incurred under

[254] Wireking's Verification Report, at Exhibit VE-4.
[255] These sales terms are business proprietary information. *See* Memorandum to the File from Julia Hancock, Case Analyst: Analysis Memorandum of Preliminary Determination of Antidumping Duty Investigation of Certain Kitchen Appliance Shelving and Racks from the People's Republic of China:Wireking, (February 26, 2009) at 9for more information regarding these sales terms.
[256] Petitioners' April 6, 2009, Response, at 3-4 and Attachment 3.
[257] Wireking's Verification Report, at 23.
[258] *Id*. at Exhibits VE-24A and VE-24B.

term X. However, as partial AFA, Petitioners contend that the Department should replace the AFA value used at the *Preliminary Determination* with the highest movement expenses now on the record.[259]

Taking the individual line item of each expense from the freight invoice that is being used as partial AFA, Petitioners argue that the Department should divide each expense by the total net packing list weight for the final determination. Petitioners contend that these expenses should be divided by the total net packing list weight because the Department found at verification that all international freight charges and entry forms are based on the weights declared in the packing lists.[260] To then obtain a freight expense on a per piece basis, Petitioners argue that the Department should continue to adjust Wireking's underreported weights by the difference between the reported weight and the weight listed for each product in the packing lists. However, if the Department chooses to use the reported weights with no adjustment, Petitioners contend that the Department must then recalculate the freight charges using the reported weights.

In rebuttal, Wireking requests that the Department not use the highest ME international freight expenses found at verification. Wireking contends that the Department's precedent is not clear with respect to expenses for material inputs or services as ME or NME if the supplier is physically located in the PRC. Though the Department cited to a case where it found such expenses to be ME expenses, Wireking alleges that the Department has classified them as NME expenses in other cases.[261] Wireking asserts that in this case, the supplier is located in the PRC and a supplier located in a NME country is usually considered to be a non-market supplier, regardless of any affiliation with ME companies. Wireking requests that the Department apply SVs for brokerage and handling, marine insurance, and international freight for all sales terms.

Additionally, Wireking argues that the Department did not ask Wireking about providing documentation for its international movement expenses in supplemental questionnaires and that when Wireking asked the Department about this issue, the Department told Wireking that any submission would be considered untimely factual information. Thus, Wireking contends that AFA should not be applied as the Department did not provide Wireking with an opportunity to remedy or explain the deficiency.[262]

Wireking then contends that while the Department did not request documentation for its ME international movement expenses, but the Department did request documentation regarding its international movement expenses for the shipment documentation that was designated as corresponding with the pre-selected and surprise U.S. sales transactions. Wireking argues for certain cases, the documentation shows that the expenses were paid through the supplier.

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[259] Wireking's Verification Report, at VE-24A.
[260] Wireking's Verification Report, at VE-24A and VE-24B.
[261] *Certain Non-Frozen Apple Juice Concentrate from the People's Republic of China*, 65 Fed. Reg. 19873 (April 6, 2000) at comment 3.
[262] 19 USC §1677m(d); *China Kingdom Import & Export Co., Ltd. V. United States*, 507 F. Supp. 2d 1337 (CIT 2007).

Wireking argues that the Department should use neither the highest international movement expenses nor those calculations provided by Petitioners. Wireking alleges that Petitioners' calculations should be rejected as they have not been broken out so as to exclude other expenses that were already reported. Further, Wireking argues that the calculations are not representative as the transaction was a less-than container load shipment. While Wireking maintains that the Department should treat the expenses as NME expenses, should the Department choose to classify them as ME expenses, Wireking states that they have provided a breakdown of movement expenses for the Department's use in updating its figures.

Department's Position:

Because the Department is applying total AFA to Wireking for the final determination, Petitioners' argument with respect to applying partial AFA to Wireking's ME freight expenses is moot.

G. Facts Available ("FA") for PVC Buffer

If the Department chooses to not apply total AFA to Wireking, Petitioners argue that the Department should apply facts available to PVC buffer. At verification, Petitioners state that the Department noted that the reported FOP for PVC buffer was the standard weight and not the correct usage rate. As facts available, Petitioners argue that the Department should apply facts available to PVC buffer by using the correct usage rate multiplied by the conversion factor as the FA plug.

Wireking did not comment on this issue.

Department's Position:

Because the Department is applying total AFA to Wireking for the final determination, Petitioners' argument with respect to applying FA to Wireking's PVC buffer FOP is moot.

H. Water

Wireking argues that the Department should use the water consumption rate as established at verification rather than the value originally submitted. Initially, Wireking stated that it reported its water consumption based on the company's monthly water bills. During verification, Wireking states that the Department found that the monthly water bills include the water used for administrative and living areas and that the amount of water used for manufacturing could be separated from the total water consumption.[263] Wireking argues that based on this and that the Department already has asked Wireking to report this amount in its most recent FOP database, the Department should use this water consumption for the final determination.

[263] Wireking Verification Report, at 34.

At verification, Petitioners argue that the Department noted that Wireking could have separated water consumption for manufacturing from overall consumption, which included consumption for living and fire prevention. Petitioners state that no adjustment should be made for Wireking's water consumption because water usage in the surrogate financial statement is a single line item and is not differentiated by various uses. Therefore, Petitioners argue that adjusting Wireking's water consumption to only account for manufacturing consumption would result in Wireking's water consumption not having parity with the total materials, labor, and energy ("MLE") calculated for the surrogate financial ratios.

In rebuttal, Wireking argues that the Department could use those water consumption figures that represent only water consumed for manufacturing purposes. Wireking states that Petitioners have failed to provide any support for their position that no adjustments should be made to the water consumption figures. Further, Wireking argues that it is the Department's precedent to identify per-unit consumption amounts and that it will break out factor consumption amounts that are not related to production activities. Wireking reiterates that the Department noted that the water consumption figures could be broken down and has reviewed and verified the new figures. Additionally, the Department has requested that Wireking revise its FOP database to reflect water consumption for production alone. Thus, Wireking requests that the Department use the revised water consumption figures in its final determination.

Department's Position:

Because the Department is applying total AFA to Wireking for the final determination, Wireking's argument with respect to Wireking's calculation for water is moot.

I. Unreported U.S. Sales

For the final determination, Wireking argues that the Department should find that Wireking's U.S. sales are accurate and should no longer make any adjustment for unreported sales to Wireking's U.S. sales. In the *Preliminary Determination*, given that Wireking's reported U.S. sales were based on Invoice A[264] sales date, Wireking states that the Department expressed concern that Wireking had not fully reported its POI universe of sales. Accordingly, Wireking notes that the Department applied FA to Wireking's weighted-average margin for these alleged unreported sales.

Since the *Preliminary Determination*, Wireking argues that it has provided a detailed step-by-step reconciliation of the quantity and value of its reported U.S. sales.[265] Using this step-by-step reconciliation at verification, Wireking contends that the Department was able to fully reconcile the shipments from Wireking to the U.S. customer to Wireking's reported POI universe of sales

[264] Because of the business proprietary nature of this information, for further discussion of Invoice A, please *see* Wireking's Section C Supp, at 14

[265] Wireking's March 24, 2009, Response, at questions 12-17.

based on Invoice A.[266] Additionally, Wireking states that the Department was able to fully reconcile Wireking's reported U.S. sales to Wireking's accounting records and its' affiliate, Affiliate A's, accounting records and found no discrepancies with Wireking's reporting of its U.S. sales.[267] Therefore, given that Wireking addressed all of the Department's concerns about the completeness and accuracy of its reported U.S. sales, Wireking concludes that the Department should calculate Wireking's weighted-average margin using Wireking's U.S. sales without any additional adjustment for the final determination.

Petitioners rebut Wireking's suggestion that verification of its middleman entity is sufficient proof of accuracy of Wireking's reconciliations regarding the totality of its volume and sales with its customer, arguing instead that these reconciliations are incomplete because it is not possible to fully trace and document the transactions between Wireking's middleman entity and its customer. Therefore, Petitioners assert that this short-fall in completeness should be accounted for in the final determination by means of facts available with an adverse inference. Specifically, Petitioners urge the Department, that if it uses total AFA then the volume of sales unaccounted for by the sales response should be included in the total potential uncollected dumping duties ("PUDD") for the POI; and if the Department uses partial AFA calculated for reported sales, then the highest single calculated margin should be applied to the volume of the missing sales.

Department's Position:

Because the Department is applying total AFA to Wireking for the final determination, Wireking's argument with respect to applying partial AFA to its theoretical unreported U.S. sales in the *Preliminary Determination* is moot.

J. Distance

Instead of the original reported distance, Wireking argues that the Department should use the distance found at verification as the distance between Wireking and the closest port.[268]

Petitioners did not comment on this issue.

Department's Position:

Because the Department is applying total AFA to Wireking for the final determination, Wireking's argument with respect to using the correct distance from the factory to the port is moot.

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[266] Because of the business proprietary nature of this information, for further discussion of Invoice A, *see* Wireking's Section C Supp, at 14.
[267] Wireking's Verification Report, at 20-21.
[268] Wireking Verification Report at 36.

K. Name Correction

Wireking requests that the Department ensure that its full name is correctly spelled in any further Federal Register notices so as to avoid future confusion. Wireking contends that in the *Preliminary Determination* and the corresponding CBP instructions, its full name was spelled "Guandong Wireking Housewares & Hardware Co., Ltd.," whereas the correct spelling is "Guangdong Wireking Housewares & Hardware Co., Ltd."

Department's Position:

The Department agrees with Wireking that it made a clerical error in the *Preliminary Determination*. In the *Preliminary Determination* and in the corresponding CBP instructions, the Department listed Wireking's full name spelled as "Guandong Wireking Housewares & Hardware Co., Ltd."[269] However, in Wireking's responses, the Department finds that the correct spelling is "Guangdong Wireking Housewares & Hardware Co., Ltd."[270] Accordingly, the Department will correct this clerical error and list the correct spelling for Wireking in the final determination and in any additional instructions issued to CBP.

Comment 17: New King Shan

A. Total AFA for New King Shan

Petitioners argue that because New King Shan reported its FOP data in a broad, distorted and inaccurate way in spite of having product-specific production data available, the Department should apply total AFA, pursuant to section 776 of the Act.[271] Petitioners argue that section 776(a) of the Act requires the Department to resort to facts available if requested information is withheld or not available on the record, and that the record in regard to New King Shan demonstrates that necessary information is missing. Petitioners argue that although the Department requested multiple times that New King Shan report its FOPs on a product specific basis New King Shan argued that it was unable to do so.[272] Petitioners state that at verification the Department found a number of production, workshop and labor records that are kept by New King Shan on a product-specific basis.[273] Petitioners assert that because the Department found at verification that this was untrue, and because FOP data are essential data that is completely controlled by the respondent, this is not a case for partial AFA. Petitioners assert that because the Department must calculate AD margins as accurately as possible, and because allocations of usage rates are less accurate, the Department should, and has, applied partial AFA when

[269] *Preliminary Determination*, 74 FR at 9603.
[270] Wireking's November 12, 2008, response, at 1.
[271] *Nippon Steel*, 337 F.3d at 1381.
[272] New King Shan's April 3, 2009 Supplemental Section D Questionnaire Response ("New King Shan SDQR April 3, 2009") at 8 and 12-13.
[273] Verification of the Sales and Factors Response of New King Shan Co., Ltd. ("New King Shan") in the Antidumping Duty Investigation of Certain Kitchen Appliance Shelving and Racks from the People's Republic of China ("PRC") ("New King Shan Zhuhai Verification Report") at 2.

respondents cannot demonstrate that they are using the most accurate and least distortive allocation possible.[274] Petitioners argue that the Department can resort to partial AFA when a respondent fails to show that its allocation methodology is more specific than another methodology proposed by the Department. In this case New King Shan submitted an allocation methodology that was less specific than the product-specific method recommended by the Department and failed to even assert that it was more specific or less distortive.[275] Furthermore, Petitioners assert that because in this case the less specific allocation methodology is applied to all FOPs, the Department should apply total AFA.

Petitioners assert that New King Shan failed to show that its method of allocating FOPs across KASRs and other non-KASR products was more specific because it never acknowledged that it possessed the product specific production records that were seen by the Department at verification.[276] Furthermore, Petitioners argue that New King Shan did not cooperate to the best of its ability. Petitioners assert that while the Department cannot apply AFA simply from a failure to respond, the Department can consider an adverse inference based on failure of the respondent to cooperate to the best of its ability.[277] Petitioners argue that the Department must assess the burden placed on New King Shan to provide information to the Department and whether it cooperated to its maximum ability. Petitioners state that in its questionnaire responses New King Shan claimed that it was unable to perform more specific calculations related to product weights, actual cost of finished products, and reporting of raw materials and FOPs.[278] Petitioners assert that at verification the Department found documentation that New King Shan does keep records that would allow it to calculate consumption of FOPs on a product specific, and subject merchandise specific basis. Furthermore, Petitioners assert that because New King Shan's workshops each maintain product-specific production records it would have been able to submit product specific FOPs, which would have been more specific and less-distortive than the allocation methodology that was submitted by New King Shan. Petitioners argue that New King Shan deliberately withheld the product-specific production records in an effort to manipulate the investigation process, and therefore the Department should apply total AFA in the final determination.

Petitioners contend that New King Shan significantly impeded the investigation by failing to provide information to the Department by the established deadlines and in the form requested. Petitioners argue that when the Department requested that New King Shan provide calculated per-unit FOP amounts based on actual consumption New King Shan created allocation methodologies that did not reflect the available product-specific workshop records. Petitioners also assert that New King Shan was told by the Department to contact the official in charge of the investigation before reporting its FOP response if it had any questions about the computation of FOPs. Petitioners state that New King Shan did not contact the Department on this issue or

[274] *Rhone Poulenc*, 899 F.2d at 1191 and *NSK*, 481 F.3d at 1359-61.
[275] *Id.*; New King Shan SDQR April 3, 2009, at 12-13.
[276] New King Shan Zhuhai Verification Report at 2.
[277] *Nippon Steel*, 337 F.3d at 1381.
[278] New King Shan's February 13, 2009 Supplemental Section D Questionnaire Response ("New King Shan SDQR February 13, 2009") at 3-4; New King Shan SDQR April 3, 2009 at 12-13 and 14.

told the official in charge about the product-specific workshop records. Petitioners contend that this makes New King Shan's submissions questionable, and also shows that it was uncooperative and impeded the investigation.

Petitioners state that in order to apply AFA, the Department must show that the respondent, as a reasonable and responsible company, would have the requested information available, and must show that the respondent failed to maintain adequate records or provide the information. Furthermore, Petitioners argue that New King Shan failed to report its FOPs in the most specific or accurate basis as possible based on its product-specific production records. Petitioners assert that if the Department determines that New King Shan could have provided more specific FOP allocations based on its own records but failed to do so, that the Department must apply total AFA.[279] Petitioners also argue that recent Department precedent requires that the Department apply AFA to New King Shan because of its failure to justify its allocation methodology and failure to show that it provided FOP data on the most specific basis possible.[280]

Petitioners argue that the Department's recent precedent in NME cases requires the application of total AFA in this case. Petitioners argue that the Department has applied total AFA to respondents when information found at verification contradicts information submitted in questionnaire responses, specifically regarding the reported consumption of FOPs.[281] Petitioners assert that because New King Shan's allocation methodology included non-subject products and did not accurately report the consumption of FOPs for subject products, and because this failure is at the heart of the investigation and affects every reported FOP and every component of NV, total AFA should be applied to New King Shan.[282]

Petitioners assert that the Department should consider that it would not have been burdensome for New King Shan because its production of subject merchandise is limited in the number of product codes and all subject product codes were produced in the same facility.[283] Petitioners argue that statements made by company officials during verification indicate that subject merchandise is produced in discrete and easily identifiable production runs and that production is based on the shipping schedule, which lists purchase order and quantity, and therefore New King Shan should have been able to easily provide product-specific FOP data.[284] Moreover, Petitioners state that New King Shan did not provide FOP information on the most specific basis possible by choice.[285] Petitioners argue that the verification report shows that New King Shan maintains product specific production records, such as a bill of material for each product, workshop records kept by product code, workshop-specific ledgers recording product codes and customer names, and product weight records, and that these findings demonstrate without doubt

[279] *Nippon Steel*, 337 F.3d at 1381.
[280] Id. and *NSK*, 481 F.3d at 1359-61.
[281] *Steel Threaded Rod from the PRC* at Comments 19-27 and 23-25.
[282] *SDGE from the PRC* at Comment 3.
New King Shan's January 12, 2009 Section D Questionnaire Response ("New King Shan SDQR January 12, 2009") at 1 and Exhibit D-2.
[284] New King Shan Zhuhai Verification Report at 9.
[285] *NSK Ltd. v. United States*, 481 F.3d 1355, 1359-61 (Fed. Cir. 2007).

that New King Shan maintains product-specific production records in the normal course of business. Furthermore, Petitioners assert that it would have been easier for New King Shan to use the available production records to submit FOP data on a product specific basis than it was to create allocation methodologies.[286] Petitioners also assert that in addition to the failure to provide the most specific allocation possible, New King Shan failed to justify why the overall allocations submitted in the questionnaire responses were the best possible method. Petitioners state that New King Shan only offered one justification which was that the weight allocation method is acceptable under general accounting principles. Furthermore, Petitioners state that New King Shan failed to cite any specific accounting principles or acknowledge that the Department requested product-specific information. Petitioners therefore assert that New King Shan failed to justify its methodology and show that it was the most specific method possible.[287] Petitioners conclude that the Department should apply total AFA to New King Shan. As the AFA rate, Petitioners state that the Department should use the simple average of the corroborated petition margins, 96.45 percent, which was the PRC-wide rate in the *Preliminary Determination*.

New King Shan argues that because it was selected as a mandatory respondent later than other respondents in this investigation it has had to spend the whole investigation trying to catch up. Furthermore, New King Shan asserts that while it believes that its responses were complete, to the extent that they were incomplete, it is a consequence of their late selection and subsequent lack of time.

New King Shan states that because the Department refused to grant the full extension of the deadline for SV submissions that it requested, they were forced to prepare for verification and prepare SV submissions concurrently. As a result, New King Shan asserts that it had to decide whether to focus on one item to the detriment of the other, or focus less completely on both and risk failure.

In rebuttal, Petitioners argue that New King Shan's failure to report product-specific FOP data undermined the Department's ability to conduct an accurate analysis and calculate an accurate constructed price and therefore warrants the application of total AFA. Petitioners state that New King Shan claims that an overall allocation of inputs other than steel wire rod was appropriate because the records were not used as a basis for the cost accounting system, the records were maintained on paper and did not show raw material consumption and that a response based on the paper documentation would have been impossible and unverifiable. Petitioners assert that because New King Shan produced subject merchandise in separate and easily identifiable production runs it should have been able to use the production notes from the production runs of the subject products and it would have been simple for the Department to trace and test the data from those records.

Additionally, in rebuttal, Petitioners argue that New King Shan's late selection as a mandatory respondent is not a factor in New King Shan's failure to submit a complete and accurate

[286] New King Shan Zhuhai Verification Report at 13 and 15-16.
[287] *NSK Ltd. v. United States*, 481 F.3d 1355, 1359-61 (Fed. Cir. 2007).

questionnaire response, that New King Shan had more than three months to submit questionnaire responses prior to the *Preliminary Determination* and five months prior to verification, and that the Department granted every extension request in whole or in part to the detriment of Petitioners and resulting in an inaccurate and artificially low margin for New King Shan in the *Preliminary Determination*.[288] Furthermore, Petitioners argue that it should have been simple for New King Shan to prepare its questionnaire responses and it could have used its product-specific production records. Petitioners assert that the fact that New King Shan did not submit product-specific FOP data was not a result of its delayed selection but instead was a deliberate decision to withhold information from the record. Petitioners assert that New King Shan's persistence in stating that it believes that it submitted "complete and accurate" questionnaire responses indicates that it would not have reported product-specific FOP data even if it had been selected at the outset of the investigation. Additionally, Petitioners argue that New King Shan intentionally withheld ocean freight and indirect selling expenses until after the *Preliminary Determination* in order to receive a lower margin. Petitioners assert that New King Shan's decision not to submit product-specific FOP data, ocean freight and indirect selling expenses indicate a pattern of non-cooperation that the Department should consider in evaluating whether New King Shan cooperated to the best of its ability.

In rebuttal, New King Shan argues that the Department should not apply total AFA because Petitioners' argument is based on a mis-characterization of its questionnaire responses and a mis-reading of the verification reports. New King Shan asserts that the Department did not discover product-specific production records at verification and either Petitioners are misinterpreting the report or the Department erred in the report. New King Shan explains that the allocation methodology used for steel wire rod was based on the bill of materials, which is the basis of calculation suggested by Petitioners. Additionally, New King Shan explains that the bill of materials only shows the usage of steel wire rod and there are no other consumption records recording the usage of accessory materials. New King Shan asserts that the accessory materials used in the drawing of wire and in the plating process were allocated because their usage is not tied and cannot be traced to the bill of materials or production records.

New King Shan argues that the FOP allocation of accessory materials was properly reported. New King Shan argues that the first set of accessory materials are used in drawing wire from steel wire rod and the production records only record product codes reflecting the size of wire produced, not the end products. Moreover, New King Shan asserts that even if the records did show the specific end product, it would still be necessary to allocate because the consumption of accessory materials is not recorded with the production records. New King Shan asserts that using multiple allocations, allocating the production of a specific size of wire to production of wire racks and then allocating accessory materials to the wire allocated to the production of wire racks, cannot be shown to be more accurate than the method used by New King Shan that ties to the accounting records. Furthermore, New King Shan argues that the same situation applies to the plating workshop, where the only other accessory materials are used, and the plating workshop records do not even record the amount of time allocated to the production of KASR.

[288] *PAM S.p.A. v. United States*, 463 F.3d 1345, 1349 (Fed. Cir. 2006).

In sum, New King Shan asserts that detailed production records could not be used to calculate FOPs more specifically because they do not include consumption records.

New King Shan further argues that it properly reported labor. New King Shan argues that production records only show the total quantity of each product code produced and do not record the amount of time spent on each product. New King Shan asserts that using the production records would require a manual compilation of all production records and would still require allocation. New King Shan argues that the detailed production records do not support the argument that it could have calculated the consumption of accessory materials and other factors to KASR but instead the lack of consumption information supports New King Shan's methodology as appropriate and reasonable and the only methodology that could tie to the financial records.

New King Shan also argues that the Department did not "discover" product specific production records at verification and it did not withhold the existence of the records prior to verification. New King Shan argues that if the Department had known about the records it would have requested a different methodology, and because it did not then it follows that the Department believes that New King Shan's methodology is reasonable. New King Shan asserts that it did submit the product-specific production records well before verification in its supplemental section D questionnaire response on February 13, 2009. Therefore, the Department was aware of the detailed production records. Additionally, New King Shan argues that the production reports do not report the consumption of materials, the use of energy, or a sufficient breakdown of labor.

New King Shan asserts that the Department verified its use of steel wire rod based on the bill of materials, and the overall use of accessory materials, energy inputs, direct and indirect labor and the production of each workshop as part of its cost reconciliation. Furthermore, New King Shan asserts that the information was found to be complete and accurate and the FOPs were reported on the only records that reconcile to the financial records.

New King Shan further argues that the precedent cited by Petitioners in support of total AFA do not actually support total AFA for New King Shan. Responding to the reference by Petitioners to *Nippon Steel*, New King Shan argues that it did provide a complete factual record and therefore this case is not applicable and there is no basis for resorting to facts available. Responding to the reference by Petitioners to *Nails from the PRC*, New King Shan argues that there are stark differences between the application of adverse facts to the respondent in that case and the facts on the record for this case, specifically because in *Nails from the PRC*, the respondent failed to report three FOPs, failed to report indirect labor, and failed to report MEPs. New King Shan asserts that it reported all of its FOPs and production records and the Department only found that the previously-disclosed production records contained product specific information, which does not correlate to the situation in *Nails from the PRC*. Similarly, New King Shan responds to the reference by Petitioners to the case of *Small Diameter Graphic Electrodes "SDGE" from the PRC* in which Petitioners state that the Department applied adverse facts to a respondent that "could have reported FOPs based on the diameter and length of the graphite electrode." New King Shan asserts that the respondent in that case had numerous other

failures, including failure to report tollers, failure to report CONNUM specific data and reporting deficiencies, none of which apply to the facts in the case of New King Shan, making the case inapplicable. Furthermore, New King Shan argues that in *SDGE from the PRC*, the Department found five major failures that made it impossible to calculate an accurate NV. Additionally, New King Shan argues that Petitioners' argument based on precedent from *Steel Threaded Rod from the PRC* is also inappropriate for New King Shan. In *Steel Threaded Rod from the PRC*, New King Shan argues, the respondent's failure to provide factors in the form and manner requested by the Department was very significant, involving failure to report the sales reconciliation, failure to complete sales traces, failure to report some FOP consumption, failure to verify some FOP consumption, and failure to report FOPs in a way that reflects actual consumption. New King Shan asserts that the additional aggravating factors present in the *Steel Treaded Rod from the PRC* are not present in this case, and therefore the *Steel Threaded Rod from the PRC* does not support the use of AFA for New King Shan.

In closing, New King Shan argues that if the Department decides to apply total AFA then the Department must examine the selected AFA rate to determine if it has been corroborated for reliability and relevance.

Department's Position:

The Department disagrees with Petitioners and we find that the application of total AFA for New King Shan is not appropriate based on its reported allocation of FOPs or based on the production records that Petitioners argue were found by the Department at verification. Section 776(a)(2) of the Act states that if an interested party or any other person: (A) withholds information that has been requested by the administering authority; (B) fails to provide such information by the deadline, or in the form or manner requested; (C) significantly impedes a proceeding; or (D) provides such information that cannot be verified, the Department shall use, subject to sections 782(d) and (e) of the Act of 1930, facts otherwise available in reaching the applicable determination.

If, after being notified by the Department of a deficiency, the party fails to remedy the deficiency within the applicable time limits, the Department may, subject to section 782(e) of the Act, disregard all or part of the original and subsequent responses, as appropriate. Section 782(e) of the Act states that the Department shall not decline to consider information deemed "deficient" under section 782(d) if: (1) the information is submitted by the established deadline; (2) the information can be verified; (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination; (4) the interested party has demonstrated that it acted to the best of its ability; and (5) the information can be used without undue difficulties. Furthermore, section 776(b) of the Act provides that the Department, in selecting from the facts otherwise available, may use an inference adverse to the interests of a party that has failed to cooperate by not acting to the best of its ability to comply with the Department's requests for information.[289]

[289] Section 776(b) of the Act; SAA at 870, reprinted in 1994 U.S.C.C.A.N. at 4199.

In this case, we find that the application of total AFA for New King Shan is not appropriate. The Department must first assess whether the use of facts available is justified, and then, whether the criteria for an adverse inference have been met, pursuant to section 776(b) of the Act. Based on all of the data on the record, we find that the application of facts otherwise available is not warranted under section 776(a) of the Act because New King Shan: (A) submitted examples of its production records as requested by the Department; (B) allocated its major input (steel wire rod) to the production of subject merchandise during the POI; (C) did not significantly impede this proceeding under the antidumping statute; and (D) satisfied the Department as to the overall consumption of New King Shan's FOPs, including accessory materials, energy inputs and labor as part of the cost reconciliation conducted at verification.

We note that, while New King Shan did not report all of its FOPs as specifically as it could have based on its production records, it did report steel wire rod, its most significant input, based on an allocation across only subject merchandise. *See* Department's Position at Comment 17B for further discussion. Although Petitioners contend that New King Shan intentionally and deliberately impeded this investigation by failing to provide the information requested in the form and by the deadline requested, we do not find that New King Shan's responses significantly impeded this investigation, and all of New King Shan's responses were filed in a timely manner. Additionally, we note that we were able to complete a Q&V reconciliation for New King Shan at verification and the difficulties surrounding FOP allocations do not impugn the accuracy and reliability of New King Shan's reported Q&V because we were able to verify these figures to the key source documents for sales, such as invoices and inventory in- and out-slips. *See* Department's Position at Comment 17F for further discussion. Additionally, although Petitioners argue that New King Shan refused to report ocean freight expenses prior to verification, we note that New King Shan did report ocean freight prior to verification. *See* Department's position at Comment 17L for further discussion.

We do not agree with Petitioners that Department precedent allows for the application of total AFA in this case. We find that the case precedent cited by Petitioners, specifically decisions made in *Steel Threaded Rod from the PRC*, *Nails from the PRC* and *SDGE from the PRC*, is based on respondent failures that were more significant than the omissions in New King Shan's data. Specifically, in *Steel Threaded Rod from the PRC*, the Department found that "Ningbo Yinzhou gave insufficient attention to its statutory duty to reply accurately and completely to requests for information regarding its sales reconciliation, sales documentation for sales traces, factors consumed in production, total production, and FOPs for each model."[290] Additionally, the Department found that in the case of Ningbo Yinzhou the "U.S. sales database and the FOP database for Zhonghuan's production, accounting for a majority of U.S. sales, are both wholly unreliable. As such, using any U.S. sales prices or FOPs contained in the submitted sales and FOP databases would result in a dumping margin based on unreliable information."[291]

[290] *Steel Threaded Rod from the PRC* at Comment 6B.
[291] *Id*.

We find, that although there were some discrepancies at verification concerning some of New King Shan's reported factors (*e.g.* U.S. Warehousing, Credit Expenses, U.S. Customs Duty and Indirect Selling Expenses), we were able to reconcile the overall consumption of New King Shan's FOPs to its accounting records and perform a complete Q&V reconciliation. *See* Department's Position at Comments 17H-K for further discussion. Specifically, the Department was able to: (1) tie the reported overall consumption of steel wire rod and accessory materials to the warehouse in and out slips for the POI; (2) tie the warehouse movement records to the general cost ledger; (3) tie the general cost ledger to finished goods inventory; and (4) tie finished goods inventory to the general ledger. Additionally, we were able to trace the overall consumption of energy inputs and the overall labor hours from the POI through New King Shan's records to its financial records. Therefore, because New King Shan's overall consumption of FOPs was verified and New King Shan's reported Q&V of U.S. sales were verified, we find that New King Shan provided FOP and U.S. sales data, in a timely manner, which the Department was able to verify.[292] Therefore, the Department finds that, pursuant to section 776(a) and (b) of the Act, there is not a sufficient basis for applying total AFA to New King Shan for the final determination. Additionally, because the data submitted by New King Shan comply with the criteria outlined in section 782(e), we have determined that there is sufficient reliable information to accurately calculate a dumping margin for the final determination and will not apply total AFA for New King Shan for the final determination.

As we do not find that the described circumstances warrant application of total AFA, it is not necessary to address New King Shan's argument that its late selection as a mandatory respondent should be considered in evaluating this issue.

B. Partial AFA for FOPs

New King Shan states that, based on verification, the Department inferred from the workshop-specific production records that New King Shan could have reported actual consumption of its FOPs. New King Shan contends that this is incorrect because the production records are not the basis of the accounting system, which was used as the basis for the allocation of FOPs. Furthermore, New King Shan asserts that the accounting records are maintained by New King Shan in the normal course of business. Regarding steel wire rod, New King Shan states that it was allocated directly to the production of KASR. New King Shan argues that the remaining accessory materials, which were allocated to the drawing workshop, are less significant than steel wire rod and are properly allocated. In regard to the remaining accessory materials, New King Shan asserts that they were correctly allocated to the plating workshop, and furthermore states that there are no reports maintained that tie the amounts of specific chemicals to production. New King Shan states that the allocation of labor and energy are based on similar issues.

New King Shan argues that although production records are maintained by the workshops, they are maintained on paper and it would have been impossible to produce an allocation of FOPs

[292] New King Shan Zhuhai Verification Report.

based on such records. New King Shan also stated that because the production records do not show the consumption of raw materials, it would still be necessary to allocate consumption.

If the Department does not apply total AFA to New King Shan based on its failure to report product-specific FOP consumption data, Petitioners argue that the Department should at least apply partial AFA to the FOPS submitted by New King Shan.[293] Petitioners assert that unlike Wireking, the verification report for New King Shan does not contain the production records necessary for the Department to calculate an adjustment factor to apply to the inputs and therefore the Department should use the highest percentage adjustments for Wireking to apply partial AFA to New King Shan. Petitioners specifically argue that in cases where New King Shan has inputs that are similar to Wireking, the Department should apply the highest percentage increase determined for Wireking's inputs to New King Shan's inputs, and where New King Shan has reported an input that was not reported by Wireking, the Department should apply the highest percentage increase determined for any of Wireking's inputs. Petitioners assert that this method will keep New King Shan from benefitting as a result of its failure to cooperate.

In rebuttal, New King Shan argues that the Department should not apply partial AFA to its FOPs because it reported accurate and complete FOPs using a legitimate and appropriate reporting methodology. New King Shan asserts that Petitioners did not identify any problems with the reported FOPs and only argues for a different calculation on a different basis, which does not warrant the application of partial AFA.

Department's Position:

The Department agrees with New King Shan that the application of facts otherwise available or AFA is not warranted for New King Shan's FOPs. Section 776(a)(2) of the Act provides that if an interested party: (A) withholds information that has been requested by the Department; (B) fails to provide such information in a timely manner or in the form or manner requested, subject to subsections 782(c)(1) and (e) of the Act; (C) significantly impedes a determination under the antidumping statute; or (D) provides such information but the information cannot be verified, the Department shall, subject to subsection 782(d) of the Act, use facts otherwise available in reaching the applicable determination.

The Department does not agree that the application of AFA is warranted for New King Shan's steel wire rod FOP because the Department has determined that New King Shan sufficiently reported its steel wire rod FOP. New King Shan reported steel wire rod, its most significant input, based on an allocation across only subject merchandise. Specifically, New King Shan divided the input quantity of steel wire rod by the weight of subject products in finished goods inventory. The Department verified the reported amounts and was able to tie the consumption and production to monthly steel wire rod inventory, monthly consumption summaries, and cost ledgers. Additionally, the Department was able to verify the standard weight of the finished

[293] *Id.* at 2

products.[294]

It is the Department's precedent to accept reporting methodologies that are reasonable and are based on the records the respondent maintains in the normal course of business.[295] New King Shan provided a reasonable explanation why it was unable to allocate the consumption of steel wire rod to only the production of subject merchandise, and proposed a reasonable method of allocating the consumption based on the total output of the relevant workshops. Therefore, we are not applying partial AFA to New King Shan's steel wire rod as suggested by Petitioners, and the Department will continue to use New King Shan's reported FOP to value steel wire rod for the final determination.

The Department also does not agree that the application of AFA is warranted for New King Shan's accessory material FOPs because the Department has determined that New King Shan sufficiently reported its accessory material FOPs. New King Shan reported 36 accessory materials that are used in the drawing and plating workshops as well as water. At verification, the Department verified the usage of hydrochloric acid, protection powder, nickel and water.[296] Although New King Shan maintains production records that track the inventory of the various accessory materials, and records that track the production of merchandise on a workshop- and product-specific basis, we do not find that New King Shan's allocation methodology is unreasonable. New King Shan explained in its questionnaire responses that it is not possible to track the consumption of accessory materials on a product-specific basis because it only tracks overall consumption and the same input materials are used to make many subject and non-subject products. Additionally, at verification the Department noted that in the drawing and plating workshops the use of accessory materials is tracked overall, and there are daily production records per workshop by product number. The Department noted that there are no consumption records maintaining information on how much of each accessory material is used by product number, however there are inventory out slips that designate the workshop they will be used in, as well as production records recorded by customer on a monthly basis.[297] Therefore the Department has determined that although it would have been possible to allocate the usage of New King Shan's accessory materials to subject merchandise on a more specific basis, the Department has determined that it has the information necessary to calculate this more specific allocation only for nickel, based on verification findings.[298] Therefore, the Department will use the more specific allocation methodology for nickel based on the available information, but will continue to use New King Shan's reported FOPs for the remainder of the accessory materials.[299]

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[294] New King Shan Zhuhai Verification Report at 23 and Exhibit VE-27.
[295] *Folding Metal Tables and Chairs from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 72 FR 71355 (December 17, 2007) ("FMTCs"), and accompanying Issues and Decision Memorandum at Comment 3.
[296] *Id*.
[297] New King Shan Verification Zhuhai Report at Exhibit VE 17 and 25.
[298] New King Shan Zhuhai Verification Report at Exhibit VE-14.
[299] Memorandum to the File, from Katie Marksberry, Case Analyst, Office 9, AD/CVD Operations, Import Administration, Subject: Analysis Memorandum for the Final Determination of the Antidumping Duty

Because the Department only verified certain accessory materials, (*i.e.*, nickel, hydrochloric acid, and protection powder) the Department finds that there is insufficient information, such as monthly consumption quantities for the POI on the record, to allocate each accessory material to only subject-KASRs. Therefore, where the record does not contain the necessary information to allocate the monthly consumption quantities for those accessory materials to only subject-KASRs, the Department will not make any adjustment to the reported FOP for these accessory materials. However, for nickel, which is the only verified accessory material, where there is the necessary information to allocate the monthly consumption quantities to subject-KASRs, the Department will use the more specific allocation methodology for nickel based on the available information.[300]

New King Shan argues that it accurately explained in its responses that it reported actual water consumption[301]. The Department verified invoices for the complete POI showing that New King Shan separately tracked water used for administrative and office purposes, and the only water used in the production process was included in the reported allocation.[302] Because, the Department has determined that New King Shan correctly allocated and reported its POI water consumption, we will continue to use the reported consumption rates in the final determination.

The Department does not agree with Petitioners that the application of AFA is warranted for New King Shan's energy FOPs because the Department determined that New King Shan properly reported its energy FOPs. New King Shan reported gas and electricity as its energy inputs. In its questionnaire responses New King Shan initially reported its usage of gas and electricity FOPs using total steel wire rod as the denominator,[303] and provided a more specific allocation at the Department's request using the weight of finished subject merchandise as the denominator.[304] At verification the Department was able to verify the total amount of both electricity and gas used by New King Shan during the POI.[305] Therefore, the Department has determined that New King Shan correctly allocated and reported its POI gas and electricity consumption and will continue to use the reported amounts for the final margin calculation.

The Department does not agree with Petitioners that the application of AFA is warranted for New King Shan's labor inputs because the Department has determined that New King Shan properly reported its labor inputs. New King Shan reported direct, packing and indirect labor. In

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Investigation of Certain Kitchen Appliance Shelving and Racks from the People's Republic of China: New King Shan (Zhu Hai) Co., Ltd., (July 20, 2009).

[300] Memorandum to the File, from Katie Marksberry, Case Analyst, Office 9, AD/CVD Operations, Import Administration, Subject: Analysis Memorandum for the Final Determination of the Antidumping Duty Investigation of Certain Kitchen Appliance Shelving and Racks from the People's Republic of China: New King Shan (Zhu Hai) Co., Ltd., (July 20, 2009).

[301] New King Shan Supplemental Section D Questionnaire Response (February 13, 2009)

[302] New King Shan Zhuhai Verification Report at 26 and Exhibit VE-15.

[303] New King Shan Section D Questionnaire Response (January 12, 2009)

[304] New King Shan Supplemental Section D Questionnaire Response (February 13, 2009)

[305] New King Shan Zhuhai Verification Report at 25-26 and Exhibits VE-9 and VE-31.

its questionnaire responses, for direct and packing labor, New King Shan calculated its total labor for each of its product numbers using the workshop-specific production and wage records.[306] For indirect labor, New King Shan totaled all indirect labor hours and allocated them to the production of subject merchandise. At verification, the Department verified the underlying records kept by New King Shan that were used in its labor calculation. Because the Department verified that New King Shan used the available workshop-specific labor records to report actual direct and packing labor hours, and to appropriately allocate indirect labor hours, the Department has determined that New King Shan correctly reported its POI labor inputs and will continue to use the reported amounts.

As detailed above, we find that New King Shan sufficiently reported and allocated all of its inputs. It is the Department's precedent to accept reporting methodologies that are reasonable and are based on the records the respondent maintains in the normal course of business.[307] New King Shan provided a reasonable explanation as to why it was unable to allocate the consumption of its inputs to only the production of subject merchandise, and proposed a reasonable method of allocating the consumption based on the total output of the relevant workshops. The court has held that the Department's authority to apply facts available does not extend to situations in which the information or data requested is not able to be produced because these data do not exist.[308] In addition, the court has noted in *Nippon Steel* that the Department must find that a reasonable respondent "would have known that the requested information was required to be kept and maintained" in order to apply an adverse inference.[309] Based upon all the reasons discussed above, the Department's verification findings, and case precedent, the Department has determined that New King Shan's reporting methodologies are reasonable and thus we are not applying partial AFA to New King Shan's inputs.

This final determination also serve as a notice to New King Shan, and for any other company, such as Wireking, that, should it participate in subsequent administrative reviews of certain kitchen appliance shelving and racks from the PRC, the Department expects New King Shan and all other respondents to maintain their inventory and books and records in such a manner that the reporting of FOPs on a product-code specific basis, as required by the Department, is facilitated. We clarify that, by asking for the reporting of inputs on a product-code specific basis, due to the nature of the CONNUM established in the investigation, this means that we are requiring the respondents to track consumption for each input either on an actual or standard basis by product-code in each workshop.

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[306] New King Shan Zhuhai Verification Report at Exhibit VE-10.

[307] *Folding Metal Tables and Chairs from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 72 FR 71355 (December 17, 2007) ("FMTCs"), and accompanying Issues and Decision Memorandum at Comment 3.

[308] *Olympic Adhesives*, 899 F. 2d at 1565,1572-3.

[309] *Nippon Steel*, 337 F. 3d at 1373, 1382-1383; *see also Final Determination of Sales at Less Than Fair Value: Certain Activated Carbon from the People's Republic of China*, 72 FR 9528 (March 2, 2007) and accompanying Issues and Decision Memorandum at Comment 11.

C. Yield Loss and Steel Scrap

Petitioners state that New King Shan only reported scrap losses that occurred during the process of drawing wire rod into wire, however, they argue that New King Shan reported that there are yield losses during other steps of the production process, which was confirmed during verification.[310] Petitioners argue that although the multi-stage process involved in producing KASR should include losses from scrap, damage or defects at every stage, New King Shan officials only record yield losses at the wire drawing stage because the losses at other stages are minimal. Petitioners assert that the statement made by company officials that the edges that are cut off are not sold as scrap because they are used in the production of smaller products is significant and indicates that the losses at the cutting stage are significant. Moreover, Petitioners argue that whether or not New King Shan keeps records of losses at each stage of production, the losses should be accounted for. Petitioners argue that the Department should take the reported yield loss from the wire drawing stage and apply the same percentage loss to each stage of production; drawing, straightening, cutting and spot welding. In that way, Petitioners argue, the total loss from the production process will be accounted for, and Petitioners state that it is reasonable because New King Shan failed to accurately report its yield losses.

In rebuttal, New King Shan asserts that Petitioners' argument that the Department should apply yield loss to each of the four stages of production is only based on selective quotes from the verification report and does not reflect the actual loss. New King Shan states that it consistently reported a standard yield loss and the Department did not find any unreported yield losses at verification. New King Shan states that the nature of production process means that yield loss should be minimal; wire is cut to length, bent and welded from pre-cut pieces, and nothing is removed during the plating process. Additionally, New King Shan states that because the accessory materials used in the plating process are based on the total quantity of chemicals used any yield loss is already included in the calculation.

Department's Position:

The Department disagrees with Petitioners that an adjustment for yield loss should be made at each stage of production. In its questionnaire responses, New King Shan reported that incurred yield loss for steel wire rod during the wire drawing stage, which is captured in the steel wire rod calculation.[311] During verification, the Department found that the yield loss at the drawing stage was reported accurately, that there was insignificant yield loss in the form of dust during straightening/cutting and spot welding stages, and that there was no yield loss during the plating stage. In the past, the Department has not made adjustments for yield loss when the effect of those adjustments would be negligible due to the amount of yield loss involved.[312] The

[310] *Id*. at 14 and New King Shan's April 3, 2009, response, at 5.
[311] New King Shan's February 13, 2009, response, at 8.
[312] *Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, From the People's Republic of China: Final Results of Antidumping Duty Administrative Reviews, Final Partial Rescission of Antidumping Duty Administrative Reviews, and Determination Not To Revoke in Part*, 69 FR 55581, 55585 (Sept. 15, 2004).

Department finds that the record evidence shows that the additional yield loss incurred by New King Shan beyond the drawing stage is minimal. Thus, because the Department has determined that the additional yield loss found in this case is minimal, and because it is the Department's practice not to make adjustments to yield loss when the effect would be negligible, the Department declines to make the requested adjustment.

Although the Department did not receive any comments from interested parties regarding New King Shan's scrap allocation, we noted at verification that the denominator used to allocate scrap was based on all steel wire rod input used for KASR sold to all markets.[313] However, we find that it is more appropriate to allocate scrap based on only KASR sold to U.S. customers because this leads to a more accurate margin calculation.[314] For further discussion, please *see* New King Shan Final Analysis Memo.

D. Allocation of Stainless Steel and Steel Plate Products

New King Shan argues that the Department determined at verification that there was a misallocation of stainless and steel plate products to steel wire rod, which had an effect on two denominators, all KASR production and all products using steel wire rod (finished inventory). New King Shan asserts that all KASR production was used only to allocate labor and steel wire rod, and the difference was minimal and the proper information is on the record. Additionally, New King Shan asserts that the finished inventory denominator is only used to allocate scrap and that the originally reported value was adverse to New King Shan.

Petitioners did not comment on this issue.

Department's Position:

The Department agrees with New King Shan, consistent with our verification findings, that there was a misallocation of stainless and steel plate products to steel wire rod, which had an effect on two of New King Shan's FOP denominators.

At verification, we found that there was a misallocation of stainless and steel plate products to steel wire rod, which had an effect on two denominators.[315] As we stated in the verification report:

> We found in examining the master cost ledger that a number of denominators used to allocate the factors of production were reported incorrectly because of misallocation of some stainless and steel plate products to the calculation of steel wire rod products. The

[313] New King Shan Zhuhai Verification Report at 28.
[314] Memorandum to the File, from Katie Marksberry, Case Analyst, Office 9, AD/CVD Operations, Import Administration, Subject: Analysis Memorandum for the Final Determination of the Antidumping Duty Investigation of Certain Kitchen Appliance Shelving and Racks from the People's Republic of China: New King Shan (Zhu Hai) Co., Ltd., (July 20, 2009).
[315] New King Shan Zhuhai Verification Report at 28.

> denominators that changed included the finished inventory of all steel wire rod products, the total of kitchen appliance shelving and racks production, and the steel wire rod input to subject merchandise. Company officials provided us with a revised cost ledger reflecting the correct allocation of production.[316]

When the stainless and steel plate products were removed from the denominators in question, as requested by the Department at verification, we found that the change in the denominators was not distortive, in fact, it is minimal.[317] Additionally, we found that there were no other discrepancies noted in New King Shan's master cost ledger and thus, no other denominator was affected by this misallocation. Furthermore, because New King Shan was able to correct the misallocations in the master cost ledger, as requested by the Department, and was able to and provide the Department with the correct denominators, the Department finds that the necessary information is on the record to adjust the denominators to only include steel wire rod products. Therefore, because we have all relevant supporting information on the record, the Department finds that it is appropriate to adjust the denominators in question based on the corrected master cost ledger figures for all KASR production and finished inventory of all products using steel wire rod. Accordingly, the Department will adjust the denominator for steel scrap to reflect only steel wire rod products, which is the only FOP impacted by this change, for the final determination.

However, because New King Shan allocated total scrap sold that was generated from production of all products to only subject-KASRs, the Department will need to reallocate total scrap sales generated from production of subject-KASRs, the numerator, using the new denominator of only steel wire rod products. In reviewing the calculation, at verification, the Department noted that New King Shan allocated total scrap sales generated from production of subject-KASRs using the steel wire rod of KASRs sold both to the United States and other countries.[318] Because only KASRs sold to the United States are subject to this investigation, the Department has reallocated total scrap sales generated from production of subject-KASRs using only the amount of steel wire rod of subject-KASRs. For further discussion, *see* New King Shan Final Analysis Memo.

E. Date of Sale

New King Shan argues that the Department should consider the date of sale from New King Shan to its United States customer to be the date of the invoice to the unaffiliated customer rather than the date of shipment. New King Shan asserts that although it has an annual contract with the customer, the terms of sale, such as the unit price, are not set until the time that the goods are withdrawn from the warehouse and the invoice is issued.

Petitioners argue that information on the record indicates that the date of shipment from the PRC may be the proper date of sale.

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[316] New King Shan Zhuhai Verification Report at 2, 22 and Exhibit VE-27.
[317] New King Shan Zhuhai Verification Report at 22 and 28.
[318] New King Shan Zhuhai Verification Report at 28.

Department's Position:

The Department agrees with New King Shan with respect to New King Shan's date of sale and continues to find that the invoice date is the appropriate date of sale for New King Shan's sales to customers in the United States. 19 CFR 351.401(i) states that, "in identifying the date of sale of the merchandise under consideration or foreign like product, the Secretary normally will use the date of invoice, as recorded in the exporter or producer records kept in the normal course of business." In *Allied Tube*, the CIT noted that a "party seeking to establish a date of sale other than invoice date bears the burden of producing sufficient evidence to satisf{y}" the Department that a different date better reflects the date on which the exporter or producer establishes the material terms of sale."[319] Additionally, the Secretary may use a date other than the date of invoice if the Secretary is satisfied that a different date better reflects the date on which the exporter or producer establishes the material terms of sale.[320] The date of sale is generally the date on which the parties agree upon all substantive terms of the sale. This normally includes the price, quantity, delivery terms and payment terms.[321]

New King Shan reported that the date of sale was determined by the invoice issued by the affiliated importer to the unaffiliated United States customer.[322] Additionally, New King Shan reported that the material terms of sale did not change between the issuance of the purchase order or sales contract and the date of invoice.[323] At the *Preliminary Determination*, the Department determined that it had found no evidence contrary to New King Shan's claims that the invoice date was the appropriate date of sale, and therefore, the Department used invoice date as the date of sale for the *Preliminary Determination*.[324] However, in New King Shan's post-*Preliminary Determination* Supplemental Section C Questionnaire, the Department requested an alternative U.S. sales database using the date of shipment from China as the date of sale to be used, "in the event that the Department determines that the appropriate date of sale is other than what has been reported."[325] At verification of New King Shan's affiliate in Taiwan, company officials stated that they use the date of invoice issuance as the date of sale in their books and records.[326] Additionally, the Department found that the quantity of the sale is set upon withdrawal by the U.S. customer from the U.S. warehouse.

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[319] *Allied Tube & Conduit Corp. v. United States* 132 F. Supp. 2d at 1090 (CIT 2001) (quoting 19 CFR 351.401(i)) ("*Allied Tube*").
[320] 19 CFR 351.401(i); see also *Allied Tube*, 132 F. Supp. 2d 1087, 1090-1092.
[321] *Carbon and Alloy Steel Wire Rod from Trinidad and Tobago: Final Results of Antidumping Duty Administrative Review*, 72 FR 62824 (November 7, 2007) and accompanying Issue and Decision Memorandum at Comment 1; *Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Flat-Rolled Carbon Quality Steel Products from Turkey*, 65 FR 15123 (March 21, 2000) and accompanying Issues and Decision Memorandum at Comment 1.
[322] New King Shan Section A Questionnaire Response (December 19, 2008).
[323] New King Shan Supplemental Section A Questionnaire Response (February 20, 2009).
[324] *Preliminary Determination*, 74 FR 9603 (March 5, 2009).
[325] New King Shan's Supplemental Section C Questionnaire Response (April 2, 2009).
[326] New King Shan Taiwan Verification Report at 8.

Although 19 CFR 351.401(i) states that we "normally will use the date of invoice," the regulation also specifies that we "may use a date other than the date of invoice if the Secretary is satisfied that a different date better reflects the date on which the exporter or producer establishes the material terms of sale." The regulation makes clear that while the date of invoice is the preferred date of sale, the Department will consider a different date if it is satisfied that the material terms of sale are established on a date other than the invoice date. In determining the date of sale, the Department considers which date best reflects the date on which the exporter/producer establishes the material terms of sale (*e.g.*, price and quantity).[327]

As discussed in the *Preliminary Determination* and above, it is the Department's normal precedent to use the date of invoice, as recorded in the respondent's records kept in the ordinary course of business, as the date of sale. As explained below, the facts in this case do not warrant a departure from the Department's normal date-of-sale methodology.

For the sales we examined at verification, we found that the sales volumes were not fixed by New King Shan's agreement with the U.S. customer. Instead, we find that the quantity was fixed by the quantity withdrawn or picked-up by the U.S. customer. Once the U.S. customer picks up the goods, which New King Shan can identify by the quantity withdrawn from the U.S. customer's on-line system, New King Shan's U.S. affiliate will issue the commercial invoice, which is also the basis for the total value paid by the U.S. customer for each sale.[328] Based on this record information, we find that a material terms of sale, (*i.e.*, quantity and total value), were not established on the contract or agreement date. These facts are distinct from cases such as *Pipe and Tube from Turkey*, in which the Department determined that an alternative date (*e.g.*, date of email correspondence) reflected the date upon which the material terms of sale were established.[329] Accordingly, because all essential terms of sale are not set until the issuance of the commercial invoice from New King Shan's affiliate, we will continue to use the date of invoice from New King Shan's U.S. affiliate to the first unaffiliated U.S. customer as New King Shan's date of sale for the final determination.

F. Verification of Quantity and Value of U.S. Sales

At verification, New King Shan argues that the Department should not have required New King Shan to tie all of their sales from New King Shan through intermediate companies to the final customer. New King Shan states that in the verification report, the Department suggested that New King Shan failed to fully prepare for this requirement. New King Shan asserts that because the date of sale from New King Shan has been considered to be the date of invoice from the

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[327] *SeAH Steel Corp. v. United States*, 25 C.I.T. 133, 134-35 (2001); *Certain Hot-Rolled Carbon Steel Flat Products from Thailand: Final Results of Antidumping Duty Changed Circumstances Review and Reinstatement in the Antidumping Duty Order*, 74 FR 22885 (May 15, 2009) and accompanying Issues and Decision Memorandum at Comment 2.

[328] New King Shan's Taiwan Verification Report at 7-8 and 19-21.

[329] *Notice of Final Results of Antidumping Duty Administrative Review: Certain Welded Carbon Steel Pipe and Tube from Turkey*, 70 FR 73447 (December 12, 2005) and accompanying Issues and Decision Memorandum at Comment 1 ("*Pipe and Tube from Turkey*").

United States entity to the unrelated customer, which is based on inventory, tying the specific shipment of products is irrelevant. New King Shan also asserts that it is impractical and maybe impossible to create such a tie, and uses the example of a CONNUM of items that sell extremely slowly. Furthermore, New King Shan argues that it is irrelevant for the Department to consider the transfer cost between various entities because it does not affect the calculation of duties. Moreover, New King Shan argues that in addition to being unreasonable, the Department should not have expected New King Shan to be prepared to tie its inventory during the POI to sales to its related entities before the POI.

New King Shan states that the verification outlines issued by the Department do request a reconciliation of sales from intermediate companies to sales by the affiliated United States entity and state that it may include sales from outside the POI. However, New King Shan argues that when it submitted reconciliations showing that it could reconcile sales to inventory using inventory levels at the beginning and end of the POI, the Department failed to indicate that there was a problem with the submitted method. Because of this, New King Shan argues that it had no reason to believe that its reconciliation method was unacceptable to the Department, and furthermore, had the Department wanted a different reconciliation methodology, it should have stated so directly in order to allow New King Shan to prepare accordingly. New King Shan asserts that it was prepared to reconcile sales during the POI as was required based on the verification outline. Furthermore, New King Shan argues that it was prepared to tie sales made after the POI to shipments during the POI, which it considers to be the reconciliation method relevant to using date of shipment as the date of sale. New King Shan also argues that it could not have reasonably anticipated that the Department would require it to tie sales during the POI to shipments before the POI because in the case of fungible goods such as KASR, such a tie is unnecessary.

New King Shan states that the verification outline issued by the Department contained a number of errors that made it exceptionally difficult for it to prepare for verification. New King Shan lists the errors made in the outline as including references to an incorrect subject product, the misidentification of entities involved, and time periods being incorrectly defined. Furthermore, New King Shan argues that the nature of the verification as conducted by the Department was unnecessarily detailed. New King Shan asserts that while the Department's regulations state that sampling is appropriate in verification, the Department attempted to review documents with audit-like examination. New King Shan states that Department analysts requested multiple copies of documents, copies of every warehouse document in spite of samples checking out, and every sale invoice from the POI. New King Shan asserts that because the Department decided to conduct verification as an audit rather than a sample, and expected preparation that was not accurately represented in the verification report, the Department cannot draw negative conclusions as to New King Shan's participation as a respondent.

In rebuttal, Petitioners argue that New King Shan failed several portions of the quantity and value reconciliation part of verification. Despite New King Shan's argument to the contrary,

Petitioners state that the Courts have noted that "verification is *like an audit*."[330] Additionally, Petitioners state that New King Shan's claim that it was unclear what the Department expected at verification is baseless because the standard verification cover letter put New King Shan on notice that they must be prepared to follow the procedures in the verification outline and should contact the Department if they have any questions or cannot perform the verification procedures. However, Petitioners argue that New King Shan never informed the Department that any of the verification procedures could not be performed.

Next, Petitioners argue that quantity and value reconciliations and sales completeness tests are standard, and major, elements in all of the Department's verifications. According to Petitioners, New King Shan should have known that the Department would require New King Shan to tie sales through its affiliates to the final customer. Additionally, Petitioners state that the Department's conduct of verification as an audit is without merit because it is normal verification procedure is to carefully review source documents to determine whether a respondent has reported all costs and expenses and whether they were reported accurately.

Department's Position:

The Department disagrees with New King Shan with respect to the Department's method for conducting the quantity and value reconciliation of New King Shan's U.S. sales at verification. In reporting its U.S. sales for the POI, New King Shan stated that it sold the merchandise through a sales channel that comprised multiple related resellers to the first unaffiliated U.S. customer.[331] Additionally, in identifying the date of sale for its POI universe of sales, New King Shan stated that it was reporting the date of invoice from the last reseller, *i.e.*, U.S. affiliate to the first unaffiliated U.S. customer. Because New King Shan was reporting the date of invoice from the last reseller as the date of sale, in order to ensure that the entire universe of sales was not overreported or underreported, the Department finds that New King Shan should have been aware that it would need to reconcile shipments made before the POI from its affiliates to the last reseller's sales.[332] While New King Shan argues that tying shipments from the affiliates to the last reseller's purchases and subsequent reported sales is irrelevant, the Department disagrees. Because New King Shan has reported that the date of sale as the date of invoice from the last reseller, in order to ensure that the total reported quantity and value of the U.S. sales database is complete and accurate, the Department finds that tying shipments from New King Shan's shipments from the affiliates to the last reseller's purchases and subsequent reported sales is relevant to reconciling New King Shan's reported U.S. sales.

Additionally, the Department disagrees with New King Shan that it was unreasonable to expect New King Shan to prepare to tie its inventory during the POI to sales to related entities before the POI. New King Shan reported that the commercial invoice is generated when the U.S.

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[330] *U.S. Steel Group v. United States*, 22 CIT 104, 107 (1998) (quoting *Bomont Indus. v. United States*, 14 CIT 208, 209, 733 F. Supp. 1507, 1508 (1990) (emphasis added)).
[331] New King Shan's December 19, 2008, response, at 5.
[332] *Steel Threaded Rod from the PRC* at Comment 5.

customer withdraws goods from the U.S. warehouse. Because New King Shan has stated that the date of this invoice to the U.S. customer is the date of sale, the Department finds that it is necessary to tie the reported POI from inventory withdrawals back to inventory entries and through each of the related entities in order to ensure that the entire universe of sales for the POI is complete and accurate as reported.[333] Furthermore, the Department finds that because of the nature of New King Shan's sales process, it was reasonable to require New King Shan to reconcile inventory movements and sales between affiliated companies that occurred before the POI because it is necessary in order to confirm that the beginning and ending inventory balances and total POI sales reconcile to New King Shan's U.S. sales database.

Moreover, the Department disagrees that New King Shan had no reason to believe that the Department would expect New King Shan to reconcile its reported POI sales through to the sales of the affiliated entities, which may include sales from outside the POI. Specifically, in the supplemental Section C questionnaire, the Department emphasized that the reconciliation information being requested in relation to each affiliated entity could include months outside the POI.[334] Additionally, because the Department had noted problems with previously submitted reconciliations, we specifically instructed New King Shan that the "total reported quantity of sales" of the U.S. affiliate should reconcile to the "total reported quantity of purchases," which could include data from outside the POI, and that New King Shan should use the total quantity of purchases of the U.S. affiliate and follow this back through the affiliated entities' sales.[335] As such, the Department finds that New King Shan should have been aware of the Department's expectations of how its sales reconciliation should be prepared. Therefore, the Department finds that New King Shan had more than a month's notice prior to verification of how the Department expected it to reconcile New King Shan's reported POI sales, and the fact that New King Shan was not prepared to reconcile its sales as expected by the Department was because New King Shan chose not to follow the Department's very clear instructions in how to prepare its sales reconciliation.[336] Accordingly, if New King Shan continues to operate using the same sales process as it is reporting in this investigation, the Department is placing New King Shan on notice that New King Shan will be expected to reconcile its reported U.S. sales back through the sales and purchases, which may include sales outside the period, of these other affiliated resellers for all future proceedings.

Finally, the Department disagrees with Petitioners that New King Shan failed verification of its reported quantity and value of U.S. sales. We note that, while New King Shan did experience difficulties during the verification, they were able to prepare the ultimate packages used to reconcile New King Shan's reported quantity and value of U.S. sales, as instructed by the verifiers. Although Petitioners contend that New King Shan failed portions of the quantity and value section of verification, we find that New King Shan was able to reconcile the reported quantity and value of the U.S. affiliate's sales to its accounting records and we were able to

[333] New King Shan's Zhuhai Verification Report, at 9.
[334] New King Shan's March 24, 2009, Supplemental Section Questionnaire at Question 38A-F.
[335] New King Shan's April 3, 2009, response, at 27.
[336] New King Shan's Taiwan Verification Report, at 9-10.

reconcile the quantity of sales to inventory withdrawals.[337] Additionally, although New King Shan was not able to make a one-to-one link of the U.S. affiliate's purchases and withdrawals because certain purchases were split into multiple withdrawals, we find that it was able to reconcile the U.S. affiliate's estimated universe of purchases to inventory entries and inventory withdrawals, and tied these also to the accounting records.[338] Moreover, we also find that we reconciled the U.S. affiliate's universe of purchases through the accounting records and shipment documents of the other affiliated entities back to New King Shan's accounting records.[339] While we acknowledge that we could not make an exact tie of shipments to withdrawals in conducting reconciliation of New King Shan's reported U.S. sales, we find that we reconciled as closely as possible New King Shan's reported U.S. sales to the inventory records, accounting records, and other source documents. Accordingly, the Department finds that the fact we cannot make a one-to-one link of shipments and withdrawals, which is not atypical for CEP sales, does not impugn the accuracy and reliability of New King Shan's reported U.S. sales because we were able to verify these figures to the key source documents for sales. Therefore, despite Petitioner's arguments, we do not find that the New King Shan's reported U.S. sales were unverifiable.

G. Interest Rate for Sales Expenses

Petitioners argue that the Department should revise New King Shan's average U.S. interest rate to reflect all of the U.S. interest rates that were in effect during the entire POI. Petitioners assert that New King Shan and the Department failed to include one interest rate that was in effect during the POI in calculating the average. Petitioners list five interest rates (5.00 percent, 5.25 percent, 6.00 percent, 6.50 percent, and 7.25 percent) that were in effect from December 11, 2007 to April 30, 2008 which average to 6.00 percent. Petitioners contend that these are appropriate because the Department should include the interest rate that was in effect at the beginning of the POI for the calculating the relevant selling expenses.

In rebuttal, New King Shan argues that if the Department decides to use all five interest rates in effect during the POI, the Department should use the day-weighted rate of 5.6384 percent instead.

Department's Position:

The Department agrees with New King Shan with respect to the short-term interest rate used for sales expenses. At verification, we reviewed the list of short-term interest rates for different periods in 2007 and 2008 that New King Shan obtained from Bank of America for calculating the short-term interest rate for the POI.[340] In reviewing New King Shan's list of short-term interest rates, we found that the reported simple average of the four rates was correct, however, we found that there were actually five interest rates (December 11, 2007, to April 30, 2008) that

[337] New King Shan's Taiwan Verification Report at 12.
[338] New King Shan's Taiwan Verification Report at 13-14.
[339] New King Shan's Taiwan Verification Report at 12-17.
[340] New King Shan's Taiwan Verification Report, at VE8.

were in effect during the POI. Because there were five interest rates in effect during the POI, the Department has determined that it is more accurate to include all five interest rates in the calculation of an average for the entire POI. However, although Petitioners are correct that the short-term interest rate from December 11, 2007, should be included in the calculation, the Department finds that we should not calculate a simple average of the short-term interest rates in effect during the POI because using this methodology would include data from outside the POI in that average. Accordingly, in keeping with our precedent in prior cases, the Department will calculate a weighted-average interest rate by the number of days of the short-term interest rates in effect during the POI.[341] The Department will use this interest rate, 5.6384 percent, in calculating New King Shan's relevant selling expenses for the final determination. For further discussion of the Department's calculation, please *see* New King Shan Final Analysis Memo.

H. U.S. Warehousing

Petitioners argue that the Department should adjust New King Shan's reported U.S. warehousing costs to account for New King Shan's failure to correct errors discovered at verification. Petitioners contend that New King Shan's Taiwan verification report states that the Department examined one observation and found that the warehousing cost per piece was not that which was reported for that observation by New King Shan. Petitioners argue that the verification report states that the per piece warehousing fees matching to the correct amount for only some observations. Petitioners assert that the report indicates that there was not sufficient time to return to this issue prior to the end of verification for company officials to determine the cause of the error.

Petitioners argue that New King Shan failed to verify its reported U.S. warehousing and therefore urge the Department to apply the highest per-piece U.S. warehousing cost reported by New King Shan in its U.S. warehousing cost worksheet. Further, Petitioners argue that New King Shan understated the actual warehousing costs for many of its sales because it truncated, rather than rounded, the amounts. Petitioners contend that the Department should correct this understatement by applying the highest per-piece U.S. warehousing costs reported by New King Shan in its warehousing cost worksheet to all the observations in the U.S. sales database.

Petitioners also argue that New King Shan failed to report all the U.S warehousing costs that it incurred during the POI. Petitioners state that New King Shan excluded certain items from the costs it reported to the Department and that it failed to report the actual total warehousing costs incurred to provide warehousing services to its U.S. customer. Petitioners maintain that the documentation on the record demonstrates that New King Shan's U.S. warehousing costs included certain amounts that were then excluded from the U.S. warehousing costs reported to

[341] *Certain Cut-to-Length Carbon-Quality Steel Plate Products from the Republic of Korea: Final Results of Antidumping Duty Administrative Review*, 74 FR 19046 (April 27, 2009) and accompanying Issues and Decision Memorandum at Comment 4; *Stainless Steel Sheet and Strip in Coils from Mexico: Final Results of Antidumping Duty Administrative Review, 69 FR 6259 (February 10, 2004*) and accompanying Issues and Decision Memorandum at Comment 7.

the Department. Petitioners urge the Department to calculate revised U.S. warehousing costs by multiplying the highest rate reported in New King Shan's warehousing costs worksheet by a certain factor and apply the resulting amount to each U.S. sale.

New King Shan states that the error noted in the verification report in regards to the U.S. warehousing in and out fees was the result of an error in the worksheet rather than in the calculation. New King Shan states that the error in the worksheet made it appear that it incorrectly reported the total fee for certain observations. New King Shan states that it disagrees with the verification report, and states that the Department returned to the issue of warehousing fees and was provided with an explanation of the error. Additionally, New King Shan states that regardless of the explanation at verification, the mistake in the worksheet was obvious, and that the error was not reflected in the computer data. New King Shan asserts that it was a clerical error that had no real impact on the underlying calculation.

In rebuttal, Petitioners contend that the Department should revise New King Shan's reported U.S. warehousing costs to include all of the U.S. warehousing costs New King Shan incurred during the POI. Petitioners note that New King Shan stated that the discrepancy noted in the Taiwan verification report regarding New King Shan's U.S. warehousing costs was simply an error in New King Shan's worksheet and that New King Shan states that the error was only in the final column of its worksheet and had no impact on the underlying calculations because it was not reflected in the computer data.[342]

Additionally, in rebuttal, Petitioners state that in its case brief, New King Shan claims there were no errors in its reported U.S. warehousing costs, but argue that a review of this worksheet shows that New King Shan failed to report all of the U.S. warehousing costs it incurred during the POI. Petitioners state that the sample U.S. warehousing invoices obtained at verification show that certain charges were excluded from the U.S. warehousing costs it reported to the Department.[343] Petitioners argue that for its final analysis, the Department should correct for King Shan's failure to submit all of its U.S. warehousing costs by multiplying the highest rate reported on King Shan's warehouse cost worksheet by a certain proprietary factor and should apply the resulting amount to each of New King Shan's U.S. sales.

New King Shan rebuts Petitioners' allegations that New King Shan's In-Out Worksheet contained errors and that New King Shan "understated" its warehouse costs are misplaced because, although there was an error in the summation of the final calculations on the In-Out Worksheet, the data was reported properly in the computer data response. New King Shan states that the alleged "understatement" of warehousing costs only occurred in the print-out version of the data because New King Shan truncated its sales database but that the underlying computer data was reported to a much greater number of decimal places, eliminating any "trivial" difference that may have existed from calculations based on the truncated version of the data.

[342] New King Shan Case Brief at 27-28.
[343] New King Shan Taiwan Verification Report at Exhibit 18; New King Shan's Feb. 27, 2009, response, at Exhibits SC-29 and SC-31.

Additionally, New King Shan argues that Petitioner miscalculated the warehouse expenses incurred by New King Shan which resulted in Petitioner greatly overstating these expenses. Specifically, New King Shan maintains that it calculated its warehousing expenses in the proper manner by allocating the in-fees on a piece basis and then multiplying the number of pieces withdrawn by the per piece in-fee and that Petitioners' calculation methodology improperly allocates the entire warehouse in-fee to each shipment. New King Shan also asserts that Petitioner double counted the out-fees by summing them both together despite the fact that the entire fee of one is included in the other in the calculations provided by New King Shan.

Department's Position:

The Department disagrees with Petitioners that the use of facts otherwise available is warranted with respect to New King Shan's U.S. warehousing, pursuant to section 776(a) of the Act. In general, sections 776(a)(1) and (2) of the Act state that the Department may use facts otherwise available in reaching the applicable determination if: (1) The necessary information is not available on the record, or (2) an interested party or any other person (A) withholds information that has been requested by the administering authority or the Commission under this subtitle, (B) fails to provide such information by the deadlines for submission of the information or in the form and manner requested, (C) significantly impedes a proceeding under this subtitle, or (D) provides such information but the information cannot be verified.

The statute requires that certain conditions be met before the Department may resort to facts available. 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 inform the party submitting the response and will, to the extent practicable, provide that party the opportunity to remedy or explain the deficiency.

As discussed below, pursuant to section 776(a)(2)(D) of the Act, the Department determines that the use of facts otherwise available is not warranted for New King Shan's U.S. warehousing in this final determination because the necessary information is already on the record and was accurately reported by New King Shan. We originally noted in our verification report that there were some problems during the verification with respect to the U.S. warehousing calculation; however we have now determined that the problem existed only with regard to the worksheet used at verification and with respect to the per-piece conversion on that worksheet.

With regard to the verification problems, we stated, in our verification report, that due to the respondent's lack of preparedness, significant delays were experienced by the Department in completing the verification of New King Shan's reported U.S. warehousing calculation, and ultimately the Department was unable to complete verification of the U.S. warehousing expenses. As stated in the verification report, "{f}or U.S. warehousing, when we compared the worksheet provided by company officials for in/out fees to the submitted database, the final fees in and out per piece only matched for some of the observations. Company officials were

requested to determine the cause of the error in the provided worksheet; however, there was not sufficient time to return to the issue before the end of the verification."[344] However, we find that the Department was still able to collect all warehousing invoices for each month of the POI and verify the underlying data used in the U.S. warehousing calculation prior to verifying the per-piece conversion worksheet that was provided to the Department.

We find the basis for the underlying U.S. warehousing calculation used by New King Shan to be reasonable. Despite our inability to verify the individual per-piece converted values listed for each observation in the worksheet presented at verification, we can continue to utilize the data itself in our margin calculation.[345] Therefore, we find the only error with respect to the U.S. warehousing calculation occurred in the verification worksheet regarding the per-piece conversion, and not in the actual U.S. warehousing expense calculation. Further, we find that the per-piece converted figures in the database are the correct figures because they are consistent with the verified underlying data upon which the U.S. warehousing calculation is based. Accordingly, we find that we do not need to make any adjustments to the warehousing expenses contained in the database, and that the application of facts other available is not appropriate with respect to New King Shan's reported U.S. warehousing expenses.

Furthermore, at verification, New King Shan stated that the U.S. warehousing expenses were calculated using the following formula: the fees IN per withdrawal are added to the fees OUT per withdrawal to equal the total U.S. warehousing expenses in and out per withdrawal. The result is then divided by the customer withdrawal quantity to calculate the fees in and out per piece. In order to examine New King Shan's reported U.S. warehousing, we reviewed the calculation by testing an observation, which verified. However, when we checked additional sales observations, we noted that some of the listed results were incorrect and we requested that New King Shan to explain this error. Because there was no time at verification to return to the issue of U.S. warehousing, therefore the Department was unable to completely tie the underlying calculation used by New King Shan to determine the per-observation U.S. warehousing.[346] However, the Department was able to collect all warehousing invoices for each month of the POI and tie the data used in the calculation prior to the per-piece conversion. Additionally, we find that the basis for the underlying calculation used by New King Shan was reasonable, despite our inability to tie the individual per-piece values listed for each observation in the worksheet presented at verification.[347] Moreover, the Department notes that when we calculated U.S. warehousing using the verified U.S. warehousing invoices and the calculation used by New King Shan, the results were consistent with the per-piece U.S. warehousing submitted in New King Shan's U.S. sales database.

Moreover, the Department does not find that the application of an adverse inference to New King Shan would be appropriate, pursuant to section 776(b) of the Act. Although we were unable to

[344] New King Shan Taiwan Verification Report at 24-25.
[345] *Id*. at Exhibits 17 and 18.
[346] *Id*.
[347] *Id*. at Exhibits 17 and 18.

completely verify the calculation used by New King Shan in reporting its per-piece U.S. warehousing, we find that the underlying data, all of which is on the record, was complete and accurate.[348] The Department finds that an adverse inference is not warranted, due to New King Shan's ability to put forth information regarding U.S. warehousing for the entire POI confirming that the overall total value of reported U.S. warehousing incurred for the POI is accurate, and reliable. Additionally, the Department disagrees with Petitioners that the application of an adverse inference to New King Shan's U.S. warehousing would be appropriate because New King Shan failed to report certain other warehousing fees in the total value paid by New King Shan for warehousing during the POI. At verification, we found that New King Shan did not incur any additional warehousing fees during the POI.[349]

I. U.S. Indirect Selling Expenses

Petitioners argue that the Department should deduct indirect selling expenses ("ISEs") from the reported U.S. price as incurred by New King Shan's U.S. affiliate and other affiliated companies. Petitioners maintain the record indicates that New King Shan sold subject merchandise through its affiliated companies to the unaffiliated U.S. customer. Further, Petitioners note that the verification report confirms that New King Shan's U.S. affiliate is involved in the sale of subject merchandise. Petitioners note that the statute directs the Department to deduct ISEs in the calculation of the new price for CEP sales. Petitioners argue that for the final determination, the Department should deduct the amount indicated on the June 30, 2008, statement of profit and loss which indicates the expenses as a percent of total income.

Petitioners argue that the Department should also deduct ISEs for activities provided by New King Shan's other affiliates in connection with New King Shan's U.S. sales. Petitioners assert that the verification reports demonstrate the connection between these other affiliates and the U.S. affiliate. Petitioners note that the Department's regulations state that the Department will make adjustments to CEP associated with commercial activities in the United States no matter where or when paid.[350] Petitioners also cite to a CIT decision that held that the Department has the authority to deduct ISEs that are associated with the sales of exports in the United States from CEP, whether incurred in the United States or the home or third country markets.[351] Petitioners assert that the Department should subtract the indirect selling expenses of the affiliated companies from the sales prices as CEP ISEs for the final determination.

New King Shan argues that although New King Shan has a related entity in the United States, and technically its sales of KASR to its United States customer are conducted through the related entity, none of the expenses incurred in the United States are related to subject merchandise. New King Shan argues that the entity in the United States was established in order to facilitate sales of all non-subject merchandise to a completely different customer and all of the expenses

[348] New King Shan Taiwan Verification Report at 25 and Exhibit VE 25.
[349] New King Shan Taiwan Verification Report at 25 and Exhibit VE 25.
[350] 19 CFR 351.402(b).
[351] *Mitsubishi Heavy Industry v. United States*, 23 CIT 326 (1999)

that were confirmed in verification were unrelated to KASR. New King Shan asserts that all sales of KASR to the United States customer were facilitated outside of the United States and therefore no expenses were incurred in the United States.

In rebuttal, Petitioners argue that the Department should deduct ISEs from New King Shan's CEPs. Petitioners disagree with New King Shan's characterization that its sale are "technically" made through its related U.S. entity; and its argument that the Department should not deduct ISEs from its CEPs because none of the expenses incurred in the United States were related to sales of subject merchandise. Petitioners contend that the Department must deduct an amount from New King Shan's CEP prices to account for ISEs that were incurred by all of King Shan's affiliated companies that were involved in the sales process for New King Shan's U.S. sales.

In rebuttal, Petitioners cite to the statute stating that section 772(d)(1)(D) of the Act directs the Department to deduct ISEs in the calculation of the net price for CEP sales, and that the Department's regulations state that the Department "will make adjustments for expenses associated with commercial activities in the United States that are related to the sale to unaffiliated purchases, no matter where or when paid."[352] Petitioners assert that record evidence makes it clear that New King Shan's affiliated companies were involved in the sales process for the merchandise under consideration.[353] Petitioners argue that the Department should deduct an amount for ISEs incurred by these affiliates because they are involved in the sales process for New King Shan's sales.

In rebuttal, Petitioners also cite to the verification report which they claim supports their contention that all of New King Shan's companies are involved in the sales process and accounting and administrative functions for New King Shan's U.S. sales.[354] Petitioners further assert that the Court of International Trade has determined that the Department has the authority to deduct ISEs that are associated with the sales of exports in the United States from CEP, whether incurred in the United States or the home or third country markets.[355] Petitioners provide the business proprietary figures that they assert would be the most appropriate figures to use to deduct as ISEs from the CEP prices.

In rebuttal, New King Shan cites to the determination in *Micron Technology* that only selling expenses resulting from or bearing relationship to selling activities in the United States can be deducted in the context of a CEP calculation.[356] New King argues that expenses either related to the administration of New King Shan's U.S. affiliate outside the United States or related to the sale of non-subject merchandise are of the type in *Micron Technology* and as such should not be included as indirect selling expenses.[357] Additionally, New King Shan rebuts Petitioners' claim that the Department should include the expenses incurred by New King Shan's other affiliates as

[352] Section 772(d)(1)(D) of the Act, and 19 CFR 351.402(b); January 9, 2009 Section C questionnaire response.
[266] New King Shan's Section C questionnaire response (Jan. 9, 2009) at 30.
[354] New King Shan's Taiwan verification report at 3-4 and New King Shan's China verification report at 6.
[355] *Mitsubishi Heavy Indus. v. United States*, 23 CIT 326 (1999) ("*Mitsubishi*").
[356] *Micron Technology, Inc. v. United States*, 243 F. 3d 1301 (Fed. Cir. 2001) ("*Micron Technology*").
[357] *NSK Ltd. v. United States*, 245 F. Supp 2d 1335 (2003).

indirect selling expenses, instead arguing that these expenses were not associated with commercial activities in the United States and would have occurred whether the product was sold through a related distributor in the United States or directly to an unrelated customer. Therefore, New King Shan argues that the Department should not include these expenses as ISEs in the context of its CEP calculation.

Department's Position:

The Department agrees with Petitioners that we should deduct ISEs for New King Shan's U.S. affiliate and other affiliated companies from New King Shan's CEP price. Specifically, 19 CFR 351.402(b) states that "the Secretary will make adjustments for expenses associated with commercial activities in the United States that relate to the sale to the unaffiliated purchaser, no matter where or when paid." Contrary to New King Shan's argument that we can only deduct ISEs incurred in the United States for sales of subject merchandise, the regulations do not specify that ISEs can only be deducted for expenses related to sales of subject merchandise incurred within the United States.

Although New King Shan cites to *Micron Technology* as support for its argument that we cannot deduct ISEs incurred outside the United States, the Court in *Micron Technology* indicated that the Department has in the past "deducted {US ISEs} physically incurred overseas because they were 'associated with economic activities occurring in the United States.'"[358] Besides the Court's findings in *Micron Technology*, the Department notes that the court in *Mitsubishi* also found that "expenses incurred outside of the United States could still be 'associated with economic activities occurring in the United States."[359] Therefore, pursuant to *Micron Technology* and *Mitsubishi*, the Department finds that it can deduct the ISEs for New King Shan's U.S. affiliate and other affiliated parties for those expenses incurred, regardless of geographic location, that are related to New King Shan's sales of the subject-KASRs to the United States. Accordingly, the Department has analyzed the record evidence of this proceeding to determine whether New King Shan and its affiliated companies incurred ISEs related to New King Shan's sales of the subject-KASRs.

The Department notes that it is not normally our precedent to deduct ISEs incurred in the foreign market if they support sales to the affiliated purchasers and not the unaffiliated U.S. customer.[360]

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[358] *Micron Technology*, 243 F. 3d at 1313-14.
[359] *Mitsubshi*, 23 CIT at 327.
[360] *Notice of Final Results of the Twelfth Administrative Review of the Antidumping Duty Order on Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea*, 72 FR 13086 (March 20, 2007) and accompanying Issues and Decision Memorandum at Comment 4D; *Certain Small Diameter Carbon and Alloy Seamless Standard, Line, and Pressure Pipe From Romania: Final Results of Antidumping Duty Administrative Review and Final Determination Not To Revoke Order in Part*, 70 FR 7237 (February 11, 2005) and accompanying Issues and Decision Memorandum at Comment 4; *Stainless Steel Sheet and Strip in Coils From Mexico; Final Results of Antidumping Duty Administrative Review*, 70 FR 3677 (January 26, 2005) and accompanying Issues and Decision Memorandum at Comment 7.

However, the Department finds that New King Shan's sales process is a unique consignment scenario with the U.S. affiliate and other affiliated parties being involved in the sales process to the unaffiliated customer and thus they incur ISEs for commercial activities in the United States.

In its questionnaire responses, New King Shan reported it sold the subject KASRs through its affiliated companies to the unaffiliated U.S. customer. However, New King Shan stated that these affiliated companies did not incur any ISEs for its U.S. sales of subject-KASRs.[361] New King Shan stated that it did not report ISEs for its U.S. affiliate and other affiliated companies because they only "did paperwork, so there are no {ISEs}."[362] Moreover, for an additional affiliated company located in Taiwan, New King Shan stated that this affiliated company does not share office, facilities, or employees, and is not involved in the business activities of the other affiliated companies.[363]

However, at verification, we found that New King Shan's U.S. affiliate did in fact incur ISEs related to New King Shan's U.S. sales of subject-KASRs to the unaffiliated customer. Specifically, we found that the executive director of the U.S. affiliate conducts all of the sales negotiations with the first unaffiliated U.S. customer at the office space of one of New King Shan's affiliates' in Taiwan. Additionally, we found that the executive director will occasionally travel to the physical location of the U.S. affiliate in the United States, but that all sales are conducted in Taiwan by the executive director and all accounting records are maintained in Taiwan.[364] We also found at verification that payment for the U.S. sale from the first unaffiliated customer is sent by the U.S. customer to Taiwan, where the U.S. affiliate will issue the invoice and record the invoice in its records.[365] Moreover, we were informed by New King Shan that all of the U.S. affiliate's warehousing records for the subject-KASRs are maintained in Taiwan.[366] Accordingly, we find that New King Shan's U.S. affiliate conducts almost all activity for the subject-KASR sales process in Taiwan, though some activity may occur during the executive director's visits to the United States[367] and thus, the U.S. affiliate incurred ISEs related to sales of the KASRs.

Additionally, at verification, we found that New King Shan's affiliated companies that issue back-to-back invoices also incurred ISEs related to New King Shan's U.S. sales of subject-KASRs. At verification, we found that when New King Shan issues the invoice for the goods that will ship to the United States, these companies will also issue invoices for the subject-KASRs.[368] We also found that when the U.S. affiliate receives payment from the unaffiliated U.S. customer, payment will follow through these affiliated companies back to New King

[361] New King Shan's January 9, 2009, response, at 9 and 11.
[362] New King Shan's February 26, 2009, response, at 52
[363] New King Shan's February 20, 2009, response, at 15-16.
[364] New King Shan's Taiwan Verification Report at 3 and 7; New King Shan's Zhuhai Verification Report at 6.
[365] New King Shan's Taiwan Verification Report at 7.
[366] New King Shan's Zhuhai Verification Report at 8.
[367] New King Shan's U.S. Affiliate Verification Report at 8.
[368] New King Shan's Zhuhai Verification Report at 8.

Shan.[369] Moreover, we found at verification that the accounting for these companies is conducted by personnel at the same office space shared by the executive director for the U.S. affiliate, for another affiliated company in Taiwan.[370] Although New King Shan argues that these companies are only involved in the paperwork of the sales process, we found that one of the affiliated companies incurs freight expenses for the reloading of the subject-KASRs.[371] Accordingly, for the affiliated companies that issue back-to-back invoices during the sales process, we find that these affiliated companies are involved in the U.S. sales process in Taiwan and thus, incur ISEs related to New King Shan's sales of the KASRs.

Moreover, at verification, for another affiliated company located in Taiwan, we found that this affiliate also incurred ISEs related to New King Shan's U.S. sales of subject-KASRs. At verification, we found that this company maintained the records and performed all accounting for the U.S. affiliate and the other affiliated companies that are involved in the sales process.[372] Additionally, we found that employees for this company perform the accounting for the U.S. affiliate and the other affiliated companies; the executive director of the U.S. affiliate conducts all sales activities related to the subject-KASRs at this company's office in Taiwan; and this company controls the bank account, (*i.e.*, payment is received), for one of the affiliates involved in the subject-KASR sales process. Accordingly, for the affiliated company located in Taiwan, we find that this company was involved in the U.S. sales process of the KASRs and thus incurred ISEs related to New King Shan's sales of the KASRs. Therefore, because New King Shan's sales process involved an unique consignment scenario where the U.S. affiliate, the affiliated companies that issue back-to-back invoices, and the other affiliated company located in Taiwan are all involved in some capacity, either directly or indirectly, in the sales process and incur expenses for these sales of KASRs, the Department will deduct the ISEs for these companies from New King Shan's CEP for the final determination.

The Department notes that New King Shan has submitted calculated ISEs ratios for New King Shan's U.S. affiliate and the other affiliated companies that issue back-to-back invoices during the sales process.[373] Although New King Shan has provided a calculation for ISEs based on total operating expenses for the POI divided by total quantity of product sold, the Department finds that: 1) it is the Department's normal precedent to base the ISE ratio calculation on total sales value; 2) we have accepted other allocations in the past, but we have departed from our precedent only where the respondent provides a sufficient reason to do so; and, 3) we would accept an allocation basis other than relative sales value provided the methodology was reasonable.[374] Because it is our precedent to base the ISE ratio on total sales value, and we do

[369] New King Shan's Zhuhai Verification Report at 9.
[370] New King Shan's Taiwan Verification Report at 4-5.
[371] New King Shan's Taiwan Verification Report at 7.
[372] New King Shan's Taiwan Verification Report at 3 and 7.
[373] New King Shan's Additional Information February 27, 2009, Response, at Exhibit SC-54.
[374] *Notice of Final Determination of Sales at Less Than Fair Value: Bottle-Grade Polyethylene Terephthalate (PET) Resin From Indonesia*, 70 FR 13456 (Mar. 21, 2005) and IDM at Comment 4; *Notice of Final Results of Antidumping Duty Administrative Reviews: Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products From Korea*, 67 FR 11976 (Mar. 18, 2002), IDM at Comment 1; *Stainless Steel Wire Rod from Spain;*

not find New King Shan's calculation of using total quantity of product sold a reasonable allocation methodology, we are not calculating the ISE ratios for New King Shan's U.S. affiliate and the other affiliated companies using the total quantity of product sold as the denominator.

Because the information submitted by New King Shan regarding the total ISEs for New King Shan's U.S. affiliate and the other affiliated companies includes expenses for activity not associated with the U.S. sales, the Department finds that it does not have the necessary information to quantify the portion of the ISEs only associated with U.S. sales, pursuant to section 776(a)(1) of the Act.[375] Accordingly, the Department finds that application of facts otherwise available is appropriate for calculating the indirect selling expense ratios for New King Shan's U.S. affiliate and the other affiliated companies that issue the back-to-back invoices, pursuant to section 776(a)(1) of the Act. The Department further finds that the application of an adverse inference is not appropriate because New King Shan did not fail to cooperate to the best of its ability, pursuant to section 776(b) of the Act. Specifically, the Department finds that New King Shan complied with the Department's requests and provided the Department with the requested information regarding the ISEs, (*i.e.*, total operating expenses), of New King Shan's U.S. affiliate and the other affiliated companies that issue back-to-back invoices, thus no adverse inference is warranted.

Although the record contains a list of expenses that comprise the total ISEs[376] for New King Shan's U.S. affiliate and the other affiliated companies that issue back-to-back invoices, the Department finds that it should not include all of these as ISEs incurred for commercial activities in the United States. As explained in *Mitsubishi 1998*, "in the absence of evidence to the contrary, it would be unduly punitive to presume that {all expenses} were associated with economic activities in the United States."[377] The record here demonstrates that the ISEs incurred by New King Shan's U.S. affiliate and the other affiliated companies that issue back-to-back invoices does not identify line items for the expenses incurred for commercial activities in the United States. Because New King Shan reported its sales on a CEP basis and the record demonstrates that these companies incurred ISEs for commercial activities in the United States, at the very least the selling expenses applicable to those sales to unaffiliated parties in the United States must be deducted from the CEP price as ISEs. However, the record does not indicate which ISEs are related to these and other sales to the first unaffiliated customer in the United

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Final Results of Antidumping Duty Administrative Review, 66 FR 10988 (Feb. 21, 2001), IDM at Comment 2.; *Dynamic Random Access Memory Semiconductors of One Megabit or Above From the Republic of Korea; Final Results of Antidumping Duty Administrative Review*, 61 FR 20216, 20217 (May 6, 1996).

[375] *Mitsubshi*, at 328.

[376] These are total sales and management expenses listed in each company's income statement. *See* New King Shan Taiwan Verification Report at VE 5, 7a, and 7b.

[377] *Mitsubishi Heavy Industries, Ltd. v. United States*, 15 F. Supp. 2d 807, 819 (CIT 1998) ("*Mitsubshi 1998*"); *Certain Corrosion-Resistant Carbon Steel Flat Products from Canada: Final Results of Antidumping Duty Administrative Review*, 69 FR 2566 (January 16, 2004) and accompanying Issues and Decision Memorandum at Comment 3; *Notice of Final Results of the Eleventh Administrative Review of the Antidumping Duty Order on Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea,* 71 FR 7513 (February 13, 2006) and accompanying Issues and Decision Memorandum at Comment 11.

States. Thus, it would be unreasonable to treat all of these items as general selling expenses, given that the record supports the conclusion that only certain of these expenses are associated with economic activity in the United States. In the absence of information on the record that precisely distinguishes these expenses, as FA, pursuant to section 776(a) of the Act, the Department will calculate the total ISEs incurred by New King Shan's U.S. affiliate and the other affiliated companies that issue back-to-back invoices for U.S. sales by multiplying total sales and management expenses for each company by the ratio of total U.S. sales of subject-KASRs divided by total sales revenue for 2008, which results in total ISEs incurred by each company for U.S. sales of subject-KASRs.

Finally, for New King Shan's other affiliated company located in Taiwan that incurred ISEs for commercial activities in the United States, the record contains the total amount of operating expenses[378] from the income statement for this company for fiscal year ("FY") 2007.[379] The Department finds that it does not have the necessary information to quantify the portion of the ISEs associated with New King Shan's U.S. sales of subject-KASRs, pursuant to section 776(a)(1) of the Act.[380] Because we did not request this information from New King Shan in the supplemental questionnaires and at verification, the Department finds that the application of an adverse inference is not appropriate. Specifically, the Department finds that New King Shan did not fail to cooperate to the best of its ability for information that was not requested by the Department, pursuant to section 776(b) of the Act. Additionally, as discussed above, the Department finds that it should not deduct all of the operating expenses for this company as ISEs incurred for commercial activities in the United States. As we are doing for the other companies, in the absence of information on the record that precisely distinguishes these expenses, as partial FA, pursuant to section 776(a) of the Act, the Department will calculate the total ISEs incurred by this company by multiplying total operating expenses for this company by the ratio of total U.S. sales of subject-KASRs divided by total sales revenue for 2007. However, because the record does not contain the necessary information to break out this company's total sales revenue by market, as partial FA, the Department has weight-averaged the ratios of total subject-KASRs divided by total sales revenue for the three other companies. We then applied this ratio to this company's total operating expenses to obtain total ISEs incurred for this company for U.S. sales of subject-KASRs.[381] Then, once we obtained the total ISEs incurred for U.S. sales of subject-KASRs for all four companies, we then summed the total ISEs for the four companies and divided the total by the total sales revenue for these four companies to obtain the ISE ratio that

[378] The total operating expenses listed in the FY 2007 Income Statement. *See* New King Shan's February 20, 2009, Response, at Exhibit SA-24.

[379] Because the FY 2008 financial statement was unavailable for this company, the Department is using the FY 2007 income statement to calculate the total indirect selling expenses incurred for commercial activities in the United States. *See* New King Shan's Taiwan Verification Report at 4 (Although New King Shan's Taiwan Verification Report states that "we requested to see the income statement and balance sheet for Company X for 2007," we are clarifying this statement to indicate that we requested to FY 2008 income statement and balance sheet for Company X).

[380] *Mitsubshi*, at 328.

[381] *Mitsubshi*, 21 CIT at 328; *Notice of Final Results of the Eleventh Administrative Review of the Antidumping Duty Order on Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea*, 71 FR 7513 (February 13, 2006) and accompanying Issues and Decision Memorandum at Comment 11.

will be multiplied to the gross unit price for each of New King Shan's sale.[382] Because of the business proprietary information contained within the calculation, for the calculation of indirect selling expenses deducted from New King Shan's CEP price, please *see* New King Shan Final Analysis Memo.

J. Credit Expenses

Petitioners argue that New King Shan should calculate its credit expenses using the number of days between the date of shipment and the date of payment by the U.S. customer because all of the merchandise was singularly destined for one customer and could only be used by that one customer, which was confirmed at verification, and credit expenses should reflect the opportunity cost incurred between when the merchandise was produced to the customer's specifications to when payment was received. Petitioners argue that the current methodology of calculating credit expenses from when the merchandise was withdrawn from the warehouse is incorrect because it does not reflect the actual credit period.

Petitioners argue that New King Shan also understated its credit expenses when the Department asked for a second credit variable using the date of shipment because it used the period from the date of shipment to the date of entry into the U.S. warehouse. Therefore, Petitioners argue that the Department should recalculate the CREDITU2 field in the database to reflect the correct number of days between shipment and payment.

Petitioners argue that if the Department does not recalculate credit expenses, it should revise inventory carrying costs based on the number of days between shipment from the PRC factory and withdrawal from the U.S. factory in order to reflect the costs incurred by New King Shan in maintaining merchandise in finished goods inventory and in financing the just-in-time inventory arrangement with the U.S. customer.

In rebuttal, New King Shan argues that the Department should not expand the credit period to the period requested by Petitioner because it would result in double-counting. New King Shan asserts that because the goods are sold from inventory and the inventory carrying cost is calculated from the date of shipment from the PRC to the date of sale if the Department expands the credit period it would double count the cost of the goods while they are inventory.

Department's Position:

The Department disagrees with Petitioners with respect to calculating credit expenses using the number of days between the date of shipment from the PRC and the date of payment by the U.S. customer. As stated in the Department's questionnaire, the methodology used for calculating credit expenses is the period between the date of shipment and the date of payment by the U.S.

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[382] *Mitsubshi*, 21 CIT at 328; *Notice of Final Results of the Eleventh Administrative Review of the Antidumping Duty Order on Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea*, 71 FR 7513 (February 13, 2006) and accompanying Issues and Decision Memorandum at Comment 11.

customer.[383] The Department finds that New King Shan properly reported its credit expenses because New King Shan reported that the date of shipment is the date that the product leaves the U.S. warehouse and is picked up by the U.S. customer. This information was verified by the Department.[384] Moreover, if we were to change the date of shipment from the date that the merchandise was withdrawn from the warehouse to the date that the merchandise was shipped from the PRC, the Department finds that this would result in double counting of the cost that is already reported in the U.S. inventory carrying costs.[385] Accordingly, the Department is making no revisions to New King Shan's credit expenses and will continue to use New King Shan's reported credit expenses based on the number of days between date of shipment of goods withdrawn from the U.S. warehouse and the date of payment for the final determination.

Additionally, the Department disagrees with Petitioners with respect to calculating U.S. inventory carrying costs using the number of days between date of shipment and withdrawal from inventory. The Department finds that U.S. inventory carrying costs should not be calculated using the number of days between shipment from the PRC factory and withdrawal from the U.S. warehouse because this includes the cost of time-on-the-water. As explained in *Taiwan Fittings 2003 Final*, time-on-the-water is an in-transit cost that is not included in the reported inventory carrying costs because in-transit inventory carrying costs are indirect selling expenses relating to the sale to the affiliate.[386] And thus, consistent with our precedent, the Department finds that these expenses are not associated with U.S. economic activity or related to the resale of the merchandise.[387] Therefore, pursuant to section 351.402(b) of the Department's regulations and in keeping with Departmental precedent, the Department will not include the time-on-the-water in the calculation of New King Shan's inventory carrying cost.

K. U.S. Customs Duty

New King Shan states that in the verification report the Department stated that it was unable to verify U.S. customs duty because there was a cleaning fee that was not included in the calculation. New King Shan asserts that the amount of duty is set by law, and all parts of the duty that are required by law were reported. Additionally, New King Shan asserts that because the error is detrimental to New King Shan, it should not be treated adversely by the Department. Moreover, New King Shan states that because of the complicated nature of the verification and the limited amount of time given by the Department to complete the verification that small issues and discrepancies should be expected.

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[383] Department's Investigation Questionnaire, (October 8, 2008), at Section C Field Number 34.0.
[384] New King Shan's February 27, 2009, Response, at 29; New King Shan's Taiwan Verification Report at 20.
[385] *Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Bar from Italy*, 67 FR 3155 (January 23, 2002) and accompanying Issues and Decision Memorandum at Comment 14.
[386] *Stainless Steel Sheet and Strip in Coils: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 69 FR 5960 (February 9, 2004) and accompanying Issues and Decision Memorandum at Comment 18 ("*Taiwan Fittings 2003 Final*").
[387] *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Sweden and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews*, 64 FR 35590, 35619 (July 1, 1999).

In rebuttal, Petitioners agree with the Department's conclusion in the verification report that the U.S. Customs duty could not be verified because the duty included a "cleaning" fee that was not explained by King Shan. Petitioners argue that New King Shan officials were not able to explain and document where the import cleaning fee was derived from and, as a result, the Department was unable to verify the U.S. customs duties calculations. Petitioners assert that King Shan's failure at verification was the fault of New King Shan and the proper remedy is to add the cleaning fee to the U.S. customs duties for all of New King Shan's U.S. sales because King Shan failed to demonstrate that the cleaning fee was limited only to the particular sale that was examined by the Department during verification.[388]

In rebuttal, Petitioners argue that the Courts have held that the Department, not a respondent, has the discretion to "determine the extent of the investigation and the information it needs." [389] Petitioners assert that the Department provided King Shan with an agenda it intended to follow during verification, and this agenda included sample sales traces. Petitioners state that it was New King Shan's responsibility to be prepared to provide documents that confirm the amounts King Shan reported in its questionnaire response. Petitioners argue that the Department should apply an adverse inference and must use facts available where information is missing from the record.[390]

Department's Position:

The Department agrees with Petitioners that the application of partial AFA is appropriate to new King Shan's U.S. customs duties. The Department must first assess whether the use of facts available is justified, and then, whether the criteria for an adverse inference have been met. *See* section 776(a) of the Act, as discussed in Comment 16A. The Department finds that the application of facts otherwise available is warranted under section 776(a) of the Act. Between January 2008 and February 2008, we received New King Shan's Section C questionnaire responses, which included their submitted calculation for U.S. customs duties. Based on the information on the record of this proceeding, the Department relied on all of the reported U.S. sales information submitted by New King Shan in the *Preliminary Determination*.

The Department conducted its verification of New King Shan's CEP selling expenses, including U.S. duties, between April 27, and April 29, 2009. At verification, the Department discovered that New King Shan was not prepared to conduct verification of the U.S. duties because the company was unable to explain the source of one of the fees, the cleaning fee, included in the U.S. duties calculation, and this unpreparedness impeded the Department's ability to conduct a

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388 *NSK Ltd. v. United States*, 481 F.3d 1355, 1359-61 (Fed. Cir. 2007) (authorizing Commerce to make an adverse inference where respondent fails to demonstrate its reporting methodology is the most specific, and least distortive, method possible).

389 *Polyethylene Retail Carrier Bag Comm. v. United States*, 29 CIT 1418, 1433, 2005 Ct. Int'l Trade LEXIS 175 at *39 (2005) (quoting *PPG Indus., Inc. v. United States*, 978 F.2d 1232, 1238 (Fed. Cir. 1992)).

390 *NTN Bearing Corp. v. United States*, 368 F.3d 1369, 1376-77 (Fed. Cir. 2004).

thorough verification of New King Shan's reported U.S. duties calculation. Consequently, New King Shan failed to substantiate its calculation of U.S. duties by failing to support data reported in its questionnaire responses with source documents.

The Department finds that the use of facts otherwise available is warranted with respect to New King Shan's reported U.S. duties, pursuant to section 776(a) of the Act. Specifically, the Department finds that reliable information is not available on the record with respect to New King Shan's reported U.S. duties. Despite the Department's attempts during verification to substantiate New King Shan's reported data regarding U.S. duties, as reported in New King Shan's questionnaire responses, the Department was unable to verify New King Shan's U.S. duties calculation. Specifically, the verifiers found that New King Shan's presented verification package for U.S. duties was not prepared as requested in the verification outline, (*e.g.*, missing source documents for the cleaning fee and) for the U.S. customs duties.

The Department also finds that New King Shan failed to provide the information requested by the Department in a timely manner and in the form or manner requested, making the application of facts available appropriate, pursuant to section 776(a)(2)(B) of the Act. Specifically, New King Shan failed to follow the instructions detailed in the Department's verification outline. The purpose of submitting a verification outline to respondents is to give respondents sufficient notice about the types of information and source documents that the Department will examine, and to afford respondents sufficient time to compile the information.

On April 17, 2009, the Department informed New King Shan that it intended to verify the CEP information submitted by New King Shan between April 27, and April 29, 2009. The verification outline sent to New King Shan on April 17, 2009, 10 days prior to the start of verification, stated that "the purpose of providing this agenda in advance of the actual verification is to allow you to brief the appropriate company personnel on the items to be covered and the type of documentation required to verify each item. The enclosed agenda is not necessarily *all inclusive* and we reserve the right to request any additional information or materials necessary for a complete verification." The Department also requested that counsel for New King Shan "reiterate to your client the statutory requirement for verification and note that… it is in your client's interest to cooperate since failure to permit verification may result in the Department relying on adverse "facts available" under section 776 of the Tariff Act of 1930, as amended (the Act)."[391] In addition, the verification outline stated the following:

> To facilitate the verification process, we have described the types of source documents that we will require to support the submitted data. As you are aware, the time available for the verification is limited. Consequently, we ask that the necessary information be gathered by the appropriate personnel **prior** to the verifiers' arrival. The verifiers will require copies of certain documents for the verification report. Copies of supporting documentation, along with **English**

[391] Letter from Catherine Bertrand to David Riggle, counsel for New King Shan, (May 19, 2008) ("New King Shan Outline") at 1-2.

> **translations** of all pertinent information, should be made **prior** to the verification… .
>
> [I]t is the **responsibility** of the respondent to be **fully prepared** for this verification. If your client is not prepared to support or explain a response item at the appropriate time, the verifiers will move on to another topic. If, due to time constraints, it is not possible to return to that item, we may consider the item unverified, which may result in our basing the results of this administrative review on the facts available, possibly including information that is adverse to the interests of your client.

See id. (emphasis added in original).

At no time prior to the verification did New King Shan contact the Department seeking additional time to prepare for verification, or asking questions about the verification procedures, or which documents to prepare for verification.

During verification, the Department found that, when we attempted to verify New King Shan's U.S. duties, the package did not contain any underlying source documents for the cleaning fee beyond the calculation worksheet. When questioned about this fee, New King Shan did not know how the fee was derived and did not have documentation to reconcile this fee to the U.S. duty calculation.[392] The Department informed New King Shan that the prepared U.S. duty package was not prepared in the manner requested in the verification outline and requested that this package be revised according to the verifier's instructions. The verifier informed New King Shan that we would continue on to the next verification item and return to verifying the U.S. duties, if time permitted. However, the Department was unable to verify the U.S. duties calculation because when we returned to this item, New King Shan stated that it still did not know where this fee was documented. While New King Shan requested additional time to obtain the source documents for this fee, we noted that we had already granted New King Shan additional time to explain the U.S. duties calculation with source documents.[393] Accordingly, the Department finds that use of facts otherwise available is appropriate because the U.S. duties calculation was unverified, and New King Shan failed to provide the information requested in the verification outline, pursuant to sections 776(a)(2)(B) and (D) of the Act.

The Department additionally finds that the use of facts otherwise available is warranted pursuant to section 776(a)(2)(C) of the Act when the respondent "significantly impedes a proceeding." In the instant case, New King Shan was unprepared to complete the verification of New King Shan's U.S. duties calculation. This unpreparedness, as detailed above, significantly impeded the verification. Specifically, we note that Department officials began examining the U.S. duties calculation, but had to discontinue work on those items as information for them was not ready. As a result, Department officials moved on to other verification items from the outline. We gave

[392] New King Shan Taiwan Verification Report at 23.
[393] New King Shan Taiwan Verification Report at 23-24.

New King Shan this additional opportunity to gather the necessary data for the unprepared items, with the intention that the verifiers could revisit those presumably rectified items, time permitting. However, the verifiers did not have time to revisit again and complete verification of those items within the verification's time constraints.[394] The U.S. duties package presented to the Department officials did not include source documents for all fees included in the calculation that the verifiers were attempting to verify and New King Shan could not explain where all fees were derived from. The use of facts otherwise available is intended to "induce respondents to provide Commerce with requested information in a timely, complete, and accurate manner."[395] Here, New King Shan was provided with an outline of the required information 10 days prior to the Department's arrival at New King Shan. Instead, New King Shan significantly impeded the verification process and failed to respond to the Department's requests in a timely manner, resulting in the Department's inability to complete the verification of New King Shan's U.S. duties calculation.

Section 776(b) of the Act states that if the Department "finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from the administering authority or the Commission, the administering authority or the Commission ..., in reaching the applicable determination under this title, may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." Furthermore, "affirmative evidence of bad faith, or willfulness, on the part of a respondent is not required before the Department may make an adverse inference."[396]

As described in detail above, New King Shan's U.S. duties calculation could not be verified, and thus the application of facts available is required. Additionally, because New King Shan failed to act to the best of its ability in providing the requested information that was in its sole possession, the application of an adverse inference is appropriate, pursuant to section 776(b) of the Act. While New King Shan contends that its inability to complete preparing the package for this item was a result of the time available for verification, the Department notes that New King Shan's failure to prepare the package, as instructed in the verification outline, for this expense, is not minor. Moreover, the Department notes that the cleaning fee arose in the context of New King Shan's reported U.S. duties, an amount for which New King Shan included in its U.S. sales database. In addition to the clear requirements in the verification outline, New King Shan has the obligation to be able to explain and document the full derivation of the figures it reported to the Department, and it was unable to do so in this instance.

New King Shan should have had these documents on site but was not prepared, despite the Department's instructions and despite New King Shan's presumed inclusion of information from those documents in the databases it reported to the Department, thereby significantly impeding the verification. *See* section 776(2)(c) of the Act. We note that the Department did not elect to

[394] We note that "complete" in this context means completing the items started rather than verifying the entire response.
[395] *Nat'l Steel Corp. v. United States*, 870 F. Supp. 1130, 1134 (CIT 1994).
[396] *Antidumping Duties; Countervailing Duties; Final Rule*, 62 FR 27296, 27323 (May 19, 1997).

forego verification of this item on the outline due to time constraints, but was impeded from doing so by New King Shan's failure to cooperate to the best of their ability. Therefore, we find the application of partial AFA is warranted.

For the reasons discussed above, we have determined that New King Shan failed to cooperate by not acting to the best of its ability to comply with a request for information and an adverse inference is warranted, pursuant to section 776(b) of the Act, with respect to New King Shan's U.S. duties. Therefore, as partial AFA for New King Shan's U.S. duties, we have assigned the highest reported U.S. duty to all of New King Shan's sales for the final determination. *See* New King Shan Final Analysis Memo for the Department's calculation.

L. Reporting for Ocean Freight

Petitioners argue that New King Shan failed to report to the Department that it had incurred ocean freight charges until after the *Preliminary Determination* and that the Department should revise its computer program to include ocean freight charges for the final analysis.

In rebuttal, New King Shan argues that it did report ocean freight charges in its first supplemental questionnaire response, filed on February 27, 2009. Additionally, New King Shan argues that because of its late selection it responded as quickly as feasible.

Department's Position:

The Department agrees with New King Shan and in part with Petitioners with respect to New King Shan's ocean freight charges. Although Petitioners are correct that New King Shan did not report ocean freight charges in its original responses used at the *Preliminary Determination*, the Department finds that New King Shan did report ocean freight charges in its first supplemental Section C questionnaire response after being questioned by the Department regarding its freight expenses, which was received by the Department on February 27, 2009.[397] Because the Department received this response on the signature date of the *Preliminary Determination*, the Department did not have adequate time to evaluate this response for the *Preliminary Determination* and thus chose to not use this response for the *Preliminary Determination*. However, since the *Preliminary Determination*, the Department has had adequate time to evaluate these responses, request additional data and explanation of these charges, and verified New King Shan's ocean freight charges.[398] Accordingly, the Department will include New King Shan's reported ocean freight charges in New King Shan's margin calculation for the final determination.

M. Affiliate's Market Economy ("ME") Purchases

[397] New King Shan's February 27, 2009, response, at 41.
[398] New King Shan's Taiwan Verification Report at 23-3 and VE 10; New King Shan's April 3, 2009, Response, at 19 and Exhibit 2SC-14.

Petitioners argue that the Department should review the ME purchases that were claimed by New King Shan and were not valued with ME prices by the Department in the *Preliminary Determination*. Petitioners contend that although the Department found supporting documentation for the submitted ME purchases at verification, New King Shan failed to provide evidence that the prices paid to its affiliate for the ME purchases were arm's-length prices. Therefore, Petitioners assert that the Department should apply an arm's-length test to the prices New King Shan paid to its affiliate for soap filament and protection powder, compare these prices to the assessed SV, and apply the higher value to the inputs for the final determination.

New King Shan did not comment on this issue.

Department's Position:

The Department agrees in part with Petitioners regarding New King Shan's ME purchases. In the *Preliminary Determination*, we did not value New King Shan's ME purchases of soap filament and protection powder because the invoices did not identify the reported inputs, protection powder and soap filament, and thus, we could not ascertain whether this purchase from the ME supplier was for these inputs.[399] Since the *Preliminary Determination*, we have obtained information that New King Shan purchased soap filament and protection powder through an affiliate located in a ME country, and paid for these FOPs in a ME currency. Additionally, we obtained information from New King Shan's affiliate that shows that this affiliate purchased these inputs from another affiliate located in the same ME country, which was also paid for in ME currency.[400] Accordingly, the Department finds that the record evidence demonstrates that New King Shan made affiliated ME purchases of soap filament and protection powder during the POI.

The Department does not agree with Petitioners that we should perform an arm's-length test comparing these ME purchases to the appropriate SV. Although Petitioners are correct that it is our policy to only rely on transfer prices charged by affiliated parties only where the prices were charged at arm's length, the Department notes that we use the ME purchases only when they reported the transactions between their affiliates and the suppliers and we are able to determine with this data that the ME purchases were made at arm's length.[401] In instances, where we do not have the transactions between the respondent's affiliates and the suppliers, the Department will disregard the ME purchases and instead use the appropriate SVs. Accordingly, where we do not have the data to perform an arm's-length test of the ME purchases against the prices charged by the unaffiliated suppliers, the Department finds that it is not our precedent to perform an

[399] Memorandum to the File, through Catherine Bertrand, Program Manager, Office 9, from Kathleen Marksberry, Case Analyst, Subject; Analysis Memorandum for the Preliminary Determination of Certain Kitchen Appliance Shelving and Racks from the People's Republic of China: New King Shan (Zhu Hai) Co., Ltd., (February 26, 2009) at 3.
[400] New King Shan's Taiwan Verification Report, at VE 22.
[401] *Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Color Television Receivers from the People's Republic of China*, 69 FR 20594 (April 16, 2004) and accompanying Issues and Decision Memorandum at Comment 8.

arm's-length test of the ME purchase prices to the SV.

In this case, although we have the underlying information of the transactions between New King Shan and its affiliates, the Department does not have the information regarding the transactions between New King Shan's affiliate and the first unaffiliated supplier. The Department notes that the record is not clear about whether New King Shan's affiliate produced the protection powder and soap filament or purchased these inputs from an unaffiliated supplier. Additionally, if New King Shan's affiliate did purchase these inputs from an unaffiliated supplier, the Department also finds that the record does not contain the necessary information to ascertain whether this supplier is located in a ME country and whether it was paid in a ME currency. Although the Department did not request this information, the Department notes that, in *Koyo Seiko*, the court found that the "interested party in possession of the relevant information has the burden of establishing to the satisfaction of the Secretary," that we should make such a calculation, such as using New King Shan's ME purchases.[402] Because New King Shan requested that we use its ME purchase for valuing protection powder and soap, the Department finds that the burden rested with New King Shan to provide all the relevant information, including information from the first unaffiliated supplier, to show that these purchases were charged at arm's length.[403] Accordingly, due to New King Shan's failure to provide all underlying information regarding these ME purchases, the Department finds that it does not have the necessary information on the record to determine that these are ME purchases and made at arm's length. Therefore, the Department will use the appropriate SV for valuing New King Shan's protection powder and soap filament FOPs for the final determination.

N. Period for Credit Expenses

New King Shan asserts that the use of 360 days for calculating interest rate is in compliance with Federal Reserve Standards, and is actually detrimental to New King Shan.

Petitioners did not comment on this issue.

Department's Position:

The Department notes that New King Shan argued whether the Department should use the 360 day period for calculating the interest rate, which the Department is calculating using a weighted-average of interest rates for the POI, as discussed above in Comment 17G. The 360 day period was an issue at verification for credit expenses because the Department found that New King Shan calculated credit expenses using a 360 day period, not a 365 day period.[404] Accordingly, the Department is addressing New King Shan's argument with the respect to the

[402] *Koyo Seiko Co. v. United States*, 551 F. 3d 1286, 1292 (December 16, 2008) ("*Koyo Seiko*").
[403] 19 CFR 351.401(b) and *Polyethylene Retail Carrier Bags from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Partial Rescission of Review*, 73 FR 14216 (March 17, 2008), and accompanying Issues and Decision Memorandum at Comment 7.
[404] New King Shan Taiwan Verification Report at 25.

use of 360 days for calculating credit expenses.

The Department agrees with New King Shan that credit expenses should continue to be calculated using a 360 day period for the final determination. Since verification, the Department finds that there is record evidence to show that using a 360 day period is in compliance with Federal Reserve Standards.[405] Additionally, the Department finds that using a 360 day period to calculate credit expenses is keeping with our precedent in several cases including *Pasta from Turkey*.[406] Accordingly, because it has been Department precedent to use the 360 day period to calculate credit expense and this period is in compliance with Federal Reserve Standards, the Department finds that it is appropriate to calculate credit expenses using a 360 day period. Therefore, the Department will continue to calculate New King Shan's credit expenses using a 360 day period for the final determination.

RECOMMENDATION:

Based on our analysis of the comments received, we recommend adopting all of the above changes and positions, and adjusting the margin calculation programs accordingly. If accepted, we will publish the final results of this review and the final weighted-average dumping margins in the *Federal Register*.

AGREE_____ DISAGREE_____

_____
Ronald K. Lorentzen
Acting Assistant Secretary
for Import Administration

_____
Date

[405] New King Shan's Case Brief at Exhibit BR-17.
[406] *Certain Pasta from Turkey: Final Results of Antidumping Duty Administrative Review*, 70 FR 6834 (February 9, 2005) and accompanying Issues and Decision Memorandum at Comment 6.