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May 13, 2015

MEMORANDUM TO: Christian Marsh
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

FROM: Abdelali Elouaradia *AE*
Office Director, Office VI
Enforcement and Compliance Operations

SUBJECT: Issues and Decision Memorandum for the Affirmative Final
Determination in the Less than Fair Value Investigation of Certain
Nails from Taiwan

SUMMARY

The Department of Commerce (the Department) has analyzed the comments submitted by the Petitioner¹ and the mandatory Respondents² in the antidumping investigation of certain nails from Taiwan. Following issuance of the *Preliminary Determination*,³ verification, and the analysis of the comments received, we made changes to the margin calculation for the final determination. We recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum. Below is a complete list of issues for which we received comments and rebuttal comments from parties.

General Issues

- Comment 1: Taiwan Nails CV Profit and the Use of Financial Statements
- Comment 2: The Department Should Rely on the Average-to-Average Methodology without Zeroing in the Final Determination
- Comment 3: The Department Should Determine that Quick Advance and PT are Affiliated with Their Respective Largest U.S. Customers

¹ Petitioner is Mid Continent Steel & Wire, Inc. (Petitioner).

² The mandatory respondents are PT Enterprise, Inc. (PT) and its affiliated manufacturer, Pro-Team Coil Nail Enterprise, Inc. (Proteam); and Quick Advance, Inc. (Quick Advance) and its affiliated manufacturer, Ko's Nail, Inc. (Ko) (collectively, Respondents).

³ See *Certain Steel Nails from Taiwan: Negative Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 79 FR 78053 (December 29, 2014) (*Preliminary Determination*).



- Comment 4: Whether a Middleman Dumping Investigation is Warranted
- Comment 5: The Department's Calculation of Constructed Value for PT and Quick Advance
- Comment 6: The Department's Calculation of Surrogate Credit Expense Ratio
- Comment 7: The Department's Calculation of Indirect and Direct Selling Expense Ratio to Categorize Chun Yu's Works & Co.'s Selling Expenses
- Comment 8: The Department's Calculation of Indirect and Direct Selling Expense Ratio to Properly Account for OFCO's Selling Expenses
- Comment 9: The Department's Treatment of PT's and Quick Advance's U.S. Prices for Commission/Compensation Paid to its Unaffiliated Taiwanese Selling Agent and Unaffiliated Taiwanese Trading Company

Issues Pertaining to PT and Proteam

- Comment 10: The Department Should Assign Partial AFA to PT's Unreported Sales of Subject Merchandise
- Comment 11: Transactions Disregarded – Tolling Activities
- Comment 12: Threading Costs
- Comment 13: General and Administrative Expense

Issues Pertaining to Quick Advance and Ko

- Comment 14: The Department Should Rely on Quick Advance/Ko's Section C Database Submitted After Verification
- Comment 15: Ko's Raw Materials
- Comment 16: Ko's Phosphate Coating Costs

BACKGROUND

On December 29, 2014, the Department published in the *Federal Register* the notice of its negative *Preliminary Determination* in this investigation.⁴ The period of investigation (POI) is April 1, 2013, through March 31, 2014. Both mandatory Respondents preliminarily received a zero margin. On December 29, 2014, we received timely-filed allegations from Respondents that the Department made ministerial errors in calculating their dumping margins in this proceeding.⁵ Also on the same day, we received allegations from Petitioner that the Department made significant ministerial errors in calculating the dumping margins for the *Preliminary Determination*.⁶

In addition, Petitioner requested a disclosure meeting.⁷ Subsequently, Respondents also requested to attend the disclosure meeting.⁸ On January 7, 2015, the Department held disclosure

⁴ See *Preliminary Determination*.

⁵ See Letter from Respondents, regarding "PT Enterprise and Quick Advance, Request to Correct Clerical Errors in Preliminary Determination; Antidumping Duty Investigation of Certain Steel Nails from Taiwan," dated December 29, 2014 (Respondents Allegations Letter).

⁶ See Letter from Petitioner, regarding "Certain Steel Nails from Taiwan: Allegations of Significant Ministerial Error and Request for Disclosure Meeting," dated December 29, 2014 (Petitioner Allegations Letter).

⁷ *Id.*

meetings with both parties.⁹ Between January 26, 2015, and February 6, 2015, the Department conducted verifications in Taiwan of the sales and cost information submitted by Quick Advance, Ko, PT and Proteam. In accordance with 19 CFR 351.309(c)(1)(i), we invited parties to comment on our *Preliminary Determination*.

On March 20, 2015, the Department addressed Petitioner's and the Respondents' ministerial error allegations.¹⁰ On March 31, 2015, Petitioner and Respondents submitted case briefs. Each of these parties submitted rebuttal briefs on April 9, 2015.

SCOPE OF THE INVESTIGATION

The final version of the scope, reflecting the changes referenced in the "SCOPE COMMENTS" section, below, appears in Appendix I of the *Final Determination*.

V. SCOPE COMMENTS¹¹

On March 17, 2015, the Department invited interested parties to submit additional comments on certain scope issues that had been raised on the record of this and the concurrent antidumping and countervailing investigations of certain steel nails from the Republic of Korea, Malaysia, the Sultanate of Oman, Taiwan, and the Socialist Republic of Vietnam (All Nails Investigations).

On March 23, 2015, two interested parties, The Home Depot (Home Depot) and Target Corporation (Target) requested in a joint submission that the Department exclude certain nails from the scope of All Nails Investigations. On that same day, another interested party, IKEA Supply AG (IKEA), made the very same request, using identical language to that in the Home Depot/Target submission. On March 26, 2015, Petitioner submitted a response that agreed with the exact scope exclusion language proposed by the aforementioned parties in their March 23, 2015 submissions. The exclusion language proposed by those parties and Petitioner is referenced below as "Interested Parties' Proposed Exclusion." That language reads as follows:

Also excluded from the scope are certain steel nails with a nominal shaft length of one inch or less that are (a) a component of an unassembled article, (b) the total number of nails is sixty (60) or less, and (c) the imported unassembled article is described in one of the following current HTSUS subheadings: 4418.10, 4418.20, 9401.30, 9401.40, 9401.51, 9401.59, 9401.61, 9401.69, 9403.30, 9403.40, 9403.50, 9403.60, 9403.81 or 9403.89.

⁸ See Letter from Respondents, regarding "PT Enterprise and Quick Advance, Request to Attend Disclosure Meeting; Antidumping Duty Investigation of Certain Steel Nails from Taiwan," dated January 6, 2014.

⁹ See Memoranda to the file from Scott Hoefke, "Certain Steel Nails from Taiwan," regarding ex parte disclosure meetings with Petitioner and Respondents, dated January 8, 2014.

¹⁰ See the Department's March 20, 2015, Memorandum entitled, "Ministerial Error Allegations in the *Preliminary Determination* of the Antidumping Duty Investigation of Certain Steel Nails from Taiwan" (ministerial error memorandum).

¹¹ In several of the investigations of certain steel nails, The Home Depot and Target Corporation submitted a case brief and IKEA Supply AG submitted a rebuttal brief that reiterate those parties' requests for an additional scope exclusion, which those parties requested in scope comments they made in separate submissions, as discussed below.

On April 10, 2015, the Department provided interested parties in All Nails Investigations the opportunity to comment on a proposed revised version of the scope. That Department proposal modified the language proposed in the Interested Parties' Proposed Exclusion to include narrative from the Harmonized Tariff Schedule of the United States (HTSUS) describing the merchandise referenced in the HTSUS subheadings identified in Interested Parties' Proposed Exclusion, and which altered the reference to "described in one of the following current HTSUS subheadings" to "currently classified under the following HTSUS subheadings." The Department proposal also contained two other revisions.¹² In addition, the Department indicated it was considering including language in the scope to address mixed media and non-subject merchandise kit ("mixed media and kits") analysis criteria.

On April 15, 2015, Home Depot, Target, IKEA, and Petitioner submitted comments objecting to the Department's proposed modification to Interested Parties' Proposed Exclusion. Those parties noted that it was unnecessary to attempt to incorporate language from the HTSUS into the scope itself because the HTSUS chapters in question are on the record and, therefore, can by reference be reflected in any interpretation of the desired scope exclusion.¹³ Those parties also commented that language related to "mixed media and kits" analysis would be unnecessary and inappropriate, and would introduce ambiguity that would be burdensome for the Department, importers, and Petitioner. None of those parties commented on the two other minor revisions the Department had proposed.

No parties provided rebuttal comments to those submitted by Home Depot, Target, IKEA, and Petitioner.

The Department has determined that inclusion of language from the HTSUS for the additional exclusion is appropriate, as modified in the Department's April 10, 2015 memorandum to incorporate narrative from the HTSUS. The Department notes it is important for such exclusions to include descriptions of the products in question, instead of relying only upon references to HTSUS subcategory numbers. The Department references HTSUS categories for convenience and customs purposes only, and such references are not intended to be dispositive of the scope. The Department's preference to rely on the physical description of the merchandise to determine the scope of an investigation provides greater clarity should there be future HTSUS number or categorization changes, and allows better enforcement of any order.

As noted, the April 10, 2015 version proposed by the Department incorporates two other modifications. No parties have raised objections to those other modifications, and the Department determines they are appropriate for clarification purposes.

¹² The other two other proposed revisions were: moving and altering a sentence that referred to an existing exclusion to account for the additional exclusion language, and an adding a reference noting subject merchandise may enter under HTSUS subheadings other than those listed with the scope.

¹³ Home Depot and Target also noted that use of "described in one of the following current HTSUS subheadings" ties the complete language of the HTSUS regarding those subheadings to the scope, while use of "currently classified under the following HTSUS subheadings" fails to achieve that goal.

The Department also determines that it would not be appropriate to introduce language into the scope to address “mixed media and kits.” We note no interested parties have requested such language, and those that commented in fact opposed such language.

Discussion of the Issues:

Comment 1: Taiwan Nails CV Profit and the Use of Financial Statements

Neither PT nor Quick Advance has a viable home or third-country market, and, thus, normal value (NV) is based on constructed value (CV) for this proceeding. CV profit and selling expenses are necessary components of CV. For the *Preliminary Determination*, we calculated Respondents’ CV profit and selling expenses in accordance with section 773(e)(2)(B)(iii) of the Tariff Act of 1930, as amended (the Act), that is, based on any other reasonable method. We based CV profit on the 2013 fiscal year (FY) audited financial statements for two Taiwanese producers of merchandise comparable to that of the merchandise under investigation. Specifically we used information from the financial statements of Chun Yu Work and Co., Ltd. (Chun Yu) and OFCO Ltd. (OFCO).¹⁴

Petitioner contends that the Department should revisit its decision at the *Preliminary Determination*, and instead use a third Taiwanese producer of comparable merchandise, Sumeeko Industries Co., Ltd. (Sumeeko), to calculate CV profit and selling expenses for the final determination.¹⁵ The Department declined to use the Sumeeko statement for purposes of determining CV profit at the *Preliminary Determination* because only a partially translated version was placed on the record by Petitioner.

Petitioner argues that the Department improperly declined to use the partially translated Sumeeko statements. Petitioner emphasizes that the Department’s decision did not rely on any qualitative analysis of the company or its data. Petitioner argues that the Department should have conducted a qualitative analysis to determine whether Sumeeko’s financial statements were a viable surrogate source. Petitioner asserts that it translated all pertinent portions of the Sumeeko financial statement, consistent with the regulatory requirement, and submitted information sufficient to fully evaluate Sumeeko as a source of CV profit and selling expense data and to calculate those values. Petitioner refers to the *Preliminary Determination* citation of section 782 of the Act, for the requirements that are to be met in order for submitted information to be considered:

- (1) the information is submitted by the deadline established for its submission;
- (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

¹⁴ See Petitioner’s submission dated October 31, 2014 at exhibits 2A and 11C for the financial statements of Chun Yu and Sumeeko. See Respondent’s submission dated October 31, 2014 at exhibits 1A and 2A for the financial statements of OFCO and Chun Yu.

¹⁵ See Petitioner’s case brief from pages 1 through 18, and page 90-91.

in providing the information and meeting the requirements established by the Department with respect to the information; and
(5) the information can be used without undue difficulties.

Petitioner asserts that these five criteria have been met in its submission of the Sumeeko financials. First, Petitioner asserts that the first two criteria were clearly met. Next, Petitioner claims that the Sumeeko financial statement is “not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination” in the Department’s CV profit and selling expense analysis. Petitioner argues that the financial statement presented on the record is complete. Further, it asserts that all of the sections pertinent to the evaluation of the company and to the calculation of its profit and selling expenses are fully and accurately translated. Petitioner’s translation includes accounting statements, nearly all of the auditors’ notes, and all accounting schedules that provide detailed break-outs for all of the line items related to profit and selling expenses.

Petitioner claims that the Department has previously used partially translated financial statements as long as all pertinent parts have been translated.¹⁶ In addition, Petitioner argues that the financial statements that were rejected in *Ironing Tables from China*¹⁷ had no translated auditor notes, which is not the case here. According to Petitioner, this is different than the Sumeeko financial statements, which had the pertinent auditor notes translated.

As to acting to the best of its ability, Petitioner claims that it acted to its best ability in responding to the Department’s 14-day time period to submit factual information on CV profit and selling expenses. Finally, as to the use of the information without undue difficulties, Petitioner asserts its translation provides everything the Department needs to calculate CV profit and selling expenses. In addition, Petitioner timely provided a CV profit and selling expense worksheet based on only the translated portions of the Sumeeko financial statement.¹⁸ Furthermore, Petitioner argues that the CIT decision in *American School Paper Suppliers* supports using the Sumeeko financial statements.¹⁹

Petitioner also argues that the Department should have requested supplemental translation, as it has in other cases, in order to evaluate the un-translated sections on the record.²⁰ Petitioner states that any additional translation of the Sumeeko statement would only confirm that all pertinent portions of the document have already been translated on the record and that the additional translations would have added nothing to the data needed to calculate CV profit and

¹⁶ See *Certain Steel Nails From the People’s Republic of China: Final Results of the Fourth Antidumping Duty Administrative Review*, 79 FR 19316 (April 8, 2014), and accompanying Issues and Decision Memorandum at comment 2; *Helical Spring Lock Washers From the People’s Republic of China: Preliminary Results of Antidumping Duty Administrative Review; 2012-2013*, 79 FR 66356 (November 7, 2014), and accompanying Issues and Decision Memorandum at page 20 (*Helical Spring Washers*).

¹⁷ See *Floor-Standing, Metal-Top Ironing Tables and Certain Parts Thereof From the People’s Republic of China: Final Results of Antidumping Duty Administrative Review*, 77 FR 14499 (March 12, 2012), and accompanying Issues and Decision Memorandum at comment 2 (*Ironing Tables*).

¹⁸ See exhibit 1 of the Petitioner’s Case Brief.

¹⁹ See *Ass’n of Am. Sch. Paper Suppliers v. United States*, 791 F. Supp. 2d 1292 (CIT 2011) (*American School Paper Suppliers*).

²⁰ See Letter from Scot Fullerton to The Stanley Works (Langfang) Fastening Systems Co., Ltd. (Stanley Langfang), and Stanley Black & Decker, Inc. (SBD) (collectively, Stanley), dated January 8, 2015.

selling expenses. Petitioner claims that the Department should have exercised administrative discretion for the purpose of evaluating whether the limited translation provides all pertinent portions of the document. Moreover, compelling good cause supports the exercise of the Department's administrative discretion to either rely on the existing translation or to permit supplemental translation for the limited purpose described above. Such an exercise of administrative discretion is consistent with actions taken by the Department to avoid inequitable consequences in the course of parallel investigations. In particular, in the concurrent *Certain Steel Nails from Malaysia AD* and *Certain Steel Nails from the Sultanate of Oman CVD* investigations, the Department rejected untimely filed questionnaire responses, but then recognized the disproportionate consequences that rejection of the questionnaire responses would have, subsequently exercised its discretion and accepted the untimely response on the record. As a matter of consistent administrative policy, and discretion and good cause as reflected in the determinations made in the Malaysia AD and the Oman CVD investigations, Petitioner respectfully requests that the Department either accept the partially translated financial statements for consideration and use, or afford Petitioner the opportunity to submit translations of the remaining portions of the Sumeekeo financial statements for the limited purpose of evaluating what already has been provided.

Petitioner adds that the Department incorrectly characterized another set of financial statements that Petitioner had submitted on the record as a CV profit and selling expense option, Sundram Fasteners Limited (Sundram). Petitioner disagrees with the Department's assertion that Sundram produced a larger proportion of automobile parts, which are not comparable to nails. Petitioner argues that the relative proportion of automobile fasteners produced by Sundram was not evident on the record. Petitioner further argues that the Department used Sundram's earlier financial statements as a surrogate for the Nails from China proceeding, so it can also use them here.²¹ Therefore, Petitioner argues that if the Department continues not to use the Sundram financial statement, it should not rely on an unsupported finding.

If the Department decides to rely on the Sumeekeo information, Petitioner asserts that record evidence demonstrates that Sumeekeo provides an equally reliable – if not a superior – source of surrogate data than the surrogate data of OFCO and Chun Yu. Petitioner argues that, in determining which financial statements to use for calculating CV profit under section 773(e)(2)(B)(iii) of the Act, the Department's practice is to weigh factors including: (1) the similarity of the potential surrogate companies' (or company's) business operations and products to the respondent; (2) the extent to which the financial data of the surrogate companies (or company) reflects sales in the United States as well as the home market; (3) the contemporaneity of the surrogate data to the relevant period; and (4) the similarity of the customer base.

For the first factor, Petitioner explains that record evidence demonstrates that the fasteners sold by Sumeekeo, just like those by Chun Yu and OFCO, are of the "same general category of products as the subject merchandise" produced by PT and Quick. Just like Chun Yu and OFCO, Sumeekeo produces screws and/or bolts, which are other types of fasteners that the Department has repeatedly found to be "comparable" to steel nails. In fact, Petitioner asserts that record

²¹ See *Certain Steel Nails From the People's Republic of China: Final Results and Final Partial Rescission of the Second Antidumping Duty Administrative Review*, 77 FR 12556 (March 1, 2012), and accompanying Issues and Decision Memorandum at Comment 2 (*China Nails*).

evidence indicates that Sumeeko is a better source of these data than Chun Yu. The Sumeeko financial statement indicates that 88.6 percent of its 2013 operating revenue came from production and sales of comparable merchandise, whereas Chun Yu's data show that at least 42.6 percent of its revenue was from the non-comparable merchandise in 2013. Thus, Petitioner believes that Sumeeko's financial statement experience is more similar to the experiences of PT and Quick, whose businesses are dedicated to production and sale of nails.

For the second factor – the geographical composition of the sales used, a large portion of Sumeeko's sales were to non-U.S. customers. Petitioner points out that because record evidence demonstrates that, just like Chun Yu and OFCO, Sumeeko produces screws and bolts, as opposed to nails, concerns that the company's financial statement experience could be negatively influenced by dumped U.S. sales of subject merchandise (*i.e.*, low-priced sales of steel nails in the United States that would reduce the company's profit) are not present.

For the third factor, contemporaneity, Sumeeko's financial statement covers the same time frame as that covered by the Chun Yu and OFCO statements. Therefore, Petitioner argues that these statements are equally contemporaneous. For the final factor, customer base, Petitioner asserts that Sumeeko, similar to Chun Yu and OFCO, sold comparable products to customers comparable to those of one another and to those of PT and Quick – manufacturers and builders who use fasteners, whether they be nails, screws, or bolts, to fasten materials together while manufacturing or constructing a wide variety of finished products. For all of these companies, sales may have been made directly to end-users, or through one or more levels of distribution to the ultimate end-user.

Respondents assert that the Department should affirm its *Preliminary Determination* to value CV profit based on the financial statements of Chun Yu and OFCO and reject Petitioner's arguments that CV profit should be computed based on the profit of Sumeeko²². Respondents contend that the linchpin of Petitioner's argument is that Sumeeko's financial statements on the record at this time includes translations of all pertinent portions, and all sections necessary for the Department to both accurately evaluate the propriety of Sumeeko as a source of CV profit and selling expenses, and to accurately perform all calculations required to arrive at those values, assuming those portions of the Sumeeko financial statements that have not been translated are not pertinent to the Department's analysis and calculations. Respondents assert that Petitioner's argument fails. Specifically, Respondents highlight that 32 of 70 pages of the Sumeeko financial statements are not translated, including the auditor's report, short-term and long-term borrowing schedules, other payables information, related party transaction information, and other assorted unknown information.

Respondents contend that this information is critical to the Department's analysis. First, an "accountant audit report" reveals whether the accounting firm which audited this statement qualified its findings in any manner. Second, Sumeeko may have received loans bearing zero rates or rates that are lower than commercial interest rates or with no call time period specified therein from related parties, which skew its financial performance. Third, Sumeeko's statement includes extensive "financial report notes" in pages 11 – 53, many of which are not translated. Fourth, Sumeeko may have participated in government programs which Petitioner has alleged

²² See Respondents' rebuttal brief from pages 7 through 22, and pages 66-67.

are countervailable. Fifth, the untranslated portion may contain information evidencing that Sumeeko is primarily a producer of merchandise which is not comparable to nails.

Finally, and most significantly, Respondents contend that the only way the Department can determine whether the 32 untranslated pages in the Sumeeko statement are pertinent to the Department's analysis is to examine translations of these pages – translations which Petitioner did not submit in a timely manner, and which Petitioner did not even attempt to submit to the Department in the five month period beginning October 31, 2014 to the date it filed its Case Brief. The fact that over 45 percent of Sumeeko's financial statement is untranslated renders it impossible for the Department to properly evaluate whether Sumeeko's statement meets Departmental guidelines for use as a surrogate.

Respondents argue that the Department acted in accordance with its longstanding policy of rejecting financial statements that are not adequately translated.²³ Respondents also point to 19 CFR 351.303(e), which expressly provides that “a party must obtain the Department's approval for submission of an English translation of only portions of a document prior to submission to the Department.” Respondents assert that Petitioner did not make such a request prior to submitting a financial statement, which was merely 55 percent translated, and whose untranslated pages included the auditor's report and notes to the financial report. Petitioner was aware of its right to request an extension of time to file the financial statements, with full translation for CV profit. Nowhere did Petitioner demonstrate that it was not possible to submit the complete translation that it now seeks to include on the record. Therefore, Respondents protest Petitioner's last minute attempt to ask to resubmit the Sumeeko financial statements, at this point, with full translation. Respondents further consider it notable that, in the parallel Nails from Oman AD investigation, Petitioner relied on this argument as the reason why the Department should reject the Respondents' request to file a translation after the filing deadline. Respondents rebut the relevance of the cases cited by Petitioner. Respondents question Petitioner's reference to the fourth administrative review of *Nails from China*, claiming that the referenced case does not discuss the degree to which any of the statements in that case were translated, which means that the completeness of a translation was not an issue in that case. Respondents dispute Petitioner's reference to *Helical Spring Washers* because in that scenario there was only the last page of the surrogate financial statements that was not translated, whereas there are 32 pages of Sumeeko's financial statements that are untranslated. Respondents also dispute Petitioner's reference to *American School Paper Suppliers* as it presumes the untranslated sections are clearly not vital. Respondents argue that the sheer volume of untranslated sections renders it impossible for the Department to find that the financial statements are not missing key sections that are vital to its analysis and calculations.

Regarding Petitioner's good cause allegation, Respondents describe the scenarios that occurred in the Malaysia AD and Oman CVD cases which Petitioner referred to. Respondents surmise that in Malaysia AD and Oman CVD the Department found that good cause existed to accept

²³ See *High Pressure Steel Cylinders From the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 77 FR 26739 (May 7, 2012), and accompanying Issues and Decision Memorandum at comment II.A.; *Third Administrative Review of Frozen Warmwater Shrimp From the People's Republic of China: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 74 FR 46565 (September 10, 2009), and accompanying Issues and Decision Memorandum at comment 2.

Respondents' submissions, taking into account the unanticipated, technical nature of the mistake, the culpability of the parties, the fact that the documents in issue were filed within two hours of the deadline, and the fact that the parties attempted to advise the Department of their technical difficulties either before the deadline (Oman) or immediately thereafter (Malaysia). Based on these facts, Respondents suggest that the Department acted in a reasonable manner, appropriate to the circumstances. Respondents contrast that to the instant case, where the Department is faced with a request by a party to be allowed a second chance to meet a deadline because of a defect in an initial submission, which the party could easily have avoided if it had followed unambiguous Department regulations and longstanding, well known Department practice.

Finally, Respondents assert that if the Department decides that there is merit to Petitioner's good cause argument, Respondents contend that the Department should allow Respondents ten days to rebut the new factual information to be submitted by Petitioner. In addition, Respondents note that Petitioner did not provide the Department with an analysis worksheet of Sumeeko's CV profit when it submitted the financial statements on October 31, 2014 (in the same manner as Petitioner and Respondents provided an analysis for all other financial statements submitted on that date), and did not file actual CV profit and selling expense ratio calculations until March 31, 2015 (as exhibit one of its Case Brief). Thus, if the Department allows Petitioner the opportunity to place the translation on the record, Respondents argue that the Department must accord Respondents sufficient time to analyze exhibit one in light of the completely translated financial statement. In addition, if the Department allows Petitioner to supplement the record with new factual information as to the CV profit to be used in this case, the Department should also allow Respondents to resubmit previously submitted CV profit information, which had been rejected by the Department as untimely.²⁴

The Department's Position:

For the *Preliminary Determination*, in calculating CV profit and selling expenses for Quick Advance and PT under section 773(e)(2)(B)(iii) of the Act, the Department used OFCO's and Chun Yu's 2013 audited financial statements. After considering the record evidence and all of the arguments in the parties' case and rebuttal briefs, for the final determination, we continue to find that OFCO's and Chun Yu's audited financial statements constitute the best information on the record of this proceeding for calculating CV profit and selling expense.²⁵

As noted above, Quick Advance and PT did not have viable home or third-country markets during the POI. Thus, because they did not have home or third-country market sales to serve as a basis for normal value, normal value must be based on constructed value. Likewise, absent a viable home or third-country market, we are unable to calculate CV profit and selling expenses using the preferred method under section 773(e)(2)(A) of the Act, *i.e.*, based on the respondent's own home market or third country sales made in the ordinary course of trade.

²⁴ See the Respondents' rebuttal brief at page 9 footnote 6 citing to Enforcement and Compliance's Access Barcode 3243390-10, filed on 11/24/2014 at 2:35 PM; Barcode 3243818-10, filed on 11/25/2014 at 3:39 PM; and Barcode 3244034, filed on 11/16/2014 at 1:19 PM. <https://iaaccess.trade.gov>.

²⁵ *Preliminary Determination*, and accompanying Decision Memorandum at comments 13-16.

In situations where the Department cannot calculate CV profit under section 773(e)(2)(A) of the Act, section 773(e)(2)(B) of the Act sets forth three alternatives. They are: (i) the actual amounts incurred and realized by the specific exporter or producer being examined in the investigation or review . . . for profits, in connection with the production and sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise, (ii) the weighted average of the actual amounts incurred and realized by exporters or producers that are subject to the investigation or review (other than the exporter or producer described in clause (i)) . . . for profits, in connection with the production and sale of a foreign like product, in the ordinary course of trade, for consumption in the foreign country, or (iii) the amounts incurred and realized . . . for profits, based on any other reasonable method, except that the amount allowed for profit may not exceed the amount normally realized by exporters or producers (other than the exporter or producer described in clause (i)) in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise.

The statute does not establish a hierarchy for selecting among the alternatives for calculating CV profit.²⁶ Moreover, as noted in the Statement of Administrative Action (SAA), “the selection of an alternative will be made on a case- by-case basis, and will depend, to an extent, on available data.”²⁷ Thus, the Department has discretion to select from any of the three alternative methods, depending on the information available on the record. With regard to section 773(e)(2)(B)(i) of the Act, we note that Respondents sold only a very small amount of non-subject nails in the home market during the POI.²⁸ Therefore, we determined that Respondents’ own home market sales of the general category of merchandise do not constitute a proper basis for CV profit and selling expenses. Further, we find that we cannot calculate CV profit and selling expenses based on alternative (ii), *i.e.*, the profit for other exporters or producers subject to the investigation, because Quick Advance and PT are the only respondents in this proceeding, and neither had viable home markets. Therefore, we are left with the available alternatives under option (iii), *i.e.*, any other reasonable method.

The Respondents and Petitioner were made aware of the need for alternative sources for CV profit and selling expense information on several occasions. First, it was clear in the initial responses in August, 2014, that Quick Advance and PT did not have viable home markets or third country markets.²⁹ Second, the Department asked a question regarding CV profit in its first supplemental section D questionnaire.³⁰ We note that at this point, Petitioner had the right under section 351.301(c)(1)(v) of the regulations to rebut and clarify PT’s response to our profit question. Third, the Department sent out a letter to all interested parties, soliciting alternative

²⁶ See SAA, H.R. Doc. 103-316 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040 *et seq.*, at 840 (“At the outset, it should be emphasized, consistent with the Antidumping Agreement, new section 773(e)(2)(B) does not establish a hierarchy or preference among these alternative methods. Further, no one approach is necessarily appropriate for use in all cases.”)

²⁷ See SAA at 840.

²⁸ For Kos, *See* Cost Verification Exhibits at CVE A2. For PT, *See* Cost Verification Exhibits at CVE 6.

²⁹ *See* PT’s August 28, 2014, section A response at A-3 and Exhibit A-1 and Quick Advance’s August 28, 2014, section A response at A-3 and Exhibit A-1. Quick Advance’s October 7, 2014, section A supplemental response at 8-9.

³⁰ *See* the Department’s First Supplemental D Questionnaire to PT, dated September 29, 2014, question 8.

sources of CV profit information.³¹ The due date for that submission was October 31, 2014. Thus despite ample time to do so, Petitioner failed to timely submit fully translated financial statements within these deadlines. While Petitioner argues that the Department should have requested supplemental translation, as it has in other cases, in order to evaluate the un-translated sections on the record, the Department set the deadline for the submission to all parties and Petitioner did not request any additional time to work on completing their submission. It is the parties' burden to address all questions completely. Further, it would not be appropriate for the Department to actively take steps to build the record on behalf of one of the parties.

We acknowledge Petitioner's reference to the Oman CVD and Malaysia AD scenarios where the Department reconsidered the respondent's submission of data after the deadlines. We acknowledge Petitioner's argument regarding Oman CVD and Malaysia AD, however, each proceeding is independent of each other and stands alone.³² The facts in those proceedings were different than in this proceeding. In this case, we did not find grounds to reopen the record to allow Petitioner to augment the record.

On the record of this proceeding, we are faced with various alternative sources for CV profit and selling expenses under section 773(e)(2)(B)(iii): specifically, 1) the 2013 financial statements for Chun Yu, a Taiwanese producer of screws and fasteners;³³ 2) the 2013 financial statements for OFCO, a Taiwanese producer of screws and fasteners;³⁴ 3) the 2013 financial statements for Sumeeko, a Taiwanese producer of screws and fasteners;³⁵ 4) the 2012 financial statements of Hitech, a Thai producer of screws and rivets;³⁶ and 5) the FYE March 31, 2014 financial statements of Sundram, an Indian producer of auto parts and fasteners.³⁷

In evaluating each of the available alternatives under subsection (iii) we followed the analysis established in *Pure Magnesium from Israel*.³⁸ In *Pure Magnesium from Israel*, the Department set out three criteria for choosing among surrogate data under section 773(e)(2)(B)(iii) of the Act: 1) the similarity of the potential surrogate companies' business operations and products to the respondent's business operations and products; 2) the extent to which the financial data of the surrogate company reflects sales in the home market and does not reflect sales to the United States; and, 3) the contemporaneity of the data to the POI. In *CTVs from Malaysia*, the

³¹ See the Department's letter to all interested parties RE: Antidumping Duty Investigation of Certain Steel Nails from Taiwan: Request for Constructed Value Profit and Selling Expense Comments and Information, dated October 17, 2014.

³² See *Certain Orange Juice from Brazil: Final Results of Antidumping Duty Administrative Review and Final No Shipment Determination*, 77 FR 63291 (October 16, 2012) and accompanying Issues and Decision Memorandum at Comment 10; see also 19 C.F.R. § 351.104(a) ("The Secretary will maintain an official record of *each* antidumping and countervailing duty proceeding.") (emphasis added).

³³ See PT Enterprise and Quick Advance Submission of Factual Information for CV Profit and Selling Expenses: Antidumping Duty Investigation of Certain Steel Nails from Taiwan, dated October 31, 2014, exhibit 1.

³⁴ *Id.* at exhibit 2.

³⁵ See *Certain Steel Nails from Taiwan: Petitioner Submission of New Factual Information on Constructed Value Profit and Selling Expenses*, dated October 31, 2014, exhibit 11A through 11C.

³⁶ *Id.* at exhibits 7A through 7C.

³⁷ *Id.* at exhibits 10A and 10B.

³⁸ See *Notice of Final Determination of Sales at Less Than Fair Value: Pure Magnesium from Israel*, 66 FR 49349 (Sept. 27, 2001) (*Pure Magnesium from Israel*), and accompanying Issues and Decision Memorandum at Comment 8.

Department added a fourth criterion, which is the extent to which the customer base of the surrogate and the respondent were similar (*e.g.*, original equipment manufacturers versus retailers).³⁹ These four criteria have been followed in subsequent cases to assess the appropriateness of using various financial statements on the record of a given case under subsection (iii).⁴⁰

In weighing the available information and determining which source to use under alternative (iii), we first considered which of the proposed companies produce products that are either identical or comparable to the subject merchandise. We noted that all three of the Taiwanese companies produced comparable merchandise. In addition to the aforementioned Taiwanese sources, we have on the record third country financial statements for Hitech, which produces screws and fasteners in Thailand, products which the Department has repeatedly found in other proceedings to be comparable merchandise to steel nails.⁴¹ We also have on the record third country financial statements for Sundram. Sundram, a company located in India, produces some fasteners that could be considered to be comparable merchandise. However, its production also consists of various automotive products which are not comparable to steel nails (*i.e.*, a mix of products versus all comparable products). While Petitioner argues that we incorrectly characterized Sundram's data in the *Preliminary Determination*, here, we note that Sundram also produced car parts which are not as comparable to steel nails. In addition, the statutory preference is that CV profit reflects the production and sales of the merchandise in the market under consideration and that the profit reasonably reflects the merchandise under investigation.⁴² As such we prefer to use the financial statements of a company that primarily produces and sells either identical or comparable products in Taiwan, and we note that such information is readily available on the record of this proceeding. Since such information is readily available and because Hitech and Sundram are producers located outside of Taiwan, we have excluded them from consideration as a data source for the calculation of CV profit and selling expenses.

We have excluded the financial statements of Sumeeko from consideration due to the fact that they are only partially translated. Contrary to Petitioner's assertion, the Department does have an established practice of not accepting financial statements for consideration unless they are completely translated.⁴³ The absence of complete translations precludes the Department and interested parties from fully evaluating the appropriateness of the information set forth in these financial statements. We note that in *Xanthan Gum*, the Department rejected a proposed financial statement where only two paragraphs were left untranslated. In the case of Sumeeko,

³⁹ See *Notice of Final Determination of Sales at Not Less Than Fair Value: Certain Color Television Receivers from Malaysia*, 69 FR 20592 (April 16, 2004), and accompanying Issues and Decision Memorandum at Comment 26 (*CTVs from Malaysia*).

⁴⁰ See, *e.g.*, *Certain Oil Country Tubular Goods From the Republic of Korea: Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances*, 79 FR 41983 (July 18, 2014) and accompanying Issues and Decision Memorandum at Comment 1 (*OCTG from Korea*).

⁴¹ See, *e.g.*, *Certain Steel Nails from the United Arab Emirates: Final Determination of Sales at Less Than Fair Value*, 77 FR 17029 (March 23, 2012) and accompanying Issues and Decision Memorandum at Comment 6 (*Nails from the UAE 2012*); see also *China Nails*, and accompanying Issues and Decision Memorandum at Comment 2.

⁴² See section 773(e)(2)(B)(i) of the Act.

⁴³ See, *e.g.*, *Ironing Tables*, and accompanying Issues and Decision Memorandum at Comment 2; *Xanthan Gum from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 78 FR 33351 (June 4, 2013) and accompanying Issues and Decision Memorandum at Comment 2 (*Xanthan Gum*).

only selected sections of the financial statements were translated, with significant portions of the financial statements left completely untranslated.⁴⁴

Because of the limited time and deadlines, the Department cannot allow parties to a proceeding to selectively decide which portions of a financial statement to translate, and which to not translate, based on whether or not it benefits their position. Typically, the footnotes and disclosures included in a company's financial statements are required by the company's home country GAAP and are all deemed vital to the users of those financial statements. If any part of that information is left untranslated, it effectively withholds vital information from the Department and other interested parties. We equate the leaving of any footnotes or disclosures untranslated to be the same as omitting them completely, leaving them unavailable for the parties to a proceeding to review or comment on. Further, we agree with Respondents that the untranslated sections of the Sumeeko financial statements appear to relate to sections of significant importance.⁴⁵ Thus, consistent with our practice of rejecting financial statements that are not completely translated, we have excluded the Sumeeko financial statements from consideration for calculating CV profit and selling expenses.⁴⁶

We acknowledge Petitioner's argument that the Department accepted incompletely translated financial statements in the fourth administrative review of *China Nails*. We note, however, that the issue of translation was never raised by any party to that proceeding.⁴⁷ As such, the Department never expressed its position on the issue. Such a situation is in contrast to the instant proceeding, where the parties have extensively raised the issue of the translation. Additionally, we note that each proceeding is independent of other proceedings and each proceeding must be decided based on the record developed in that proceeding.⁴⁸ Further, the Department is not obligated to "accept an incorrect methodology and perpetuate a mistake because it was accepted" in a previous proceeding.⁴⁹

In addition, we acknowledge Petitioner's argument regarding the fifth administrative review of *China Nails*, however, each proceeding is independent of each other and stands alone.⁵⁰ On the record of this proceeding, as discussed below, we have found Chun Yu and OFCO to be the best available statements to use.

It remains the Department's practice to keep to the deadlines for submitting CV profit information for the reasons expressed above. As for Petitioner's reference to *Helical Spring Washers*, in that case accepting one untranslated page was a much different scenario than the 37

⁴⁴ See Petitioner's submission dated October 31, 2014 at exhibit 11C.

⁴⁵ *Id.*

⁴⁶ See, e.g., *Ironing Tables*, and accompanying Issues and Decision Memorandum at Comment 2; *Xanthan Gum*, and accompanying Issues and Decision Memorandum at Comment 2.

⁴⁷ See *China Nails*, and accompanying Issues and Decision Memorandum at Comment 2.

⁴⁸ See *Certain Orange Juice from Brazil: Final Results of Antidumping Duty Administrative Review and Final No Shipment Determination*, 77 FR 63291 (October 16, 2012)(*Orange Juice from Brazil*) and accompanying Issues and Decision Memorandum at Comment 10.

⁴⁹ See, e.g., *Certain Welded Carbon Steel Pipe and Tube From Turkey: Notice of Final Antidumping Duty Administrative Review*, 75 FR 64250 (October 19, 2010) and accompanying Issues and Decision Memorandum at Comment 3.

⁵⁰ See *Orange Juice from Brazil* and accompanying Issues and Decision Memorandum at Comment 10.

untranslated pages here for Sumeeko. Moreover, we find Petitioner's reference to *American School Paper Suppliers* to be distinguishable. In that proceeding, the Department had found the data at issue to be "sufficiently complete . . . for the purpose of calculating surrogate financial ratios."⁵¹ Specifically, Commerce found that the statements on the record contained a director's report, auditor's reports, balance sheet, profit and loss statement, notes, and accounting policies.⁵² Here, on the other hand, the Sumeeko financial statement was not sufficiently complete. Furthermore, *American School Paper Supplies* does not address the issue of translation of financial statements.⁵³

In contrast to the financial statements of Sumeeko, whose financial statements are inadequately translated and thus not useable, Chun Yu's and OFCO's financial statements are fully translated.⁵⁴ Both parties agree that Chun Yu and OFCO produce comparable merchandise, *i.e.*, screws and other fasteners.⁵⁵ Accordingly, Chun Yu's and OFCO's financial statements reflect producers of comparable merchandise in Taiwan, and as such are the only useable financial statements of a Taiwanese producer of identical or comparable merchandise available on the record for the calculation of CV profit and selling expenses.

We have analyzed all of the possible sources for CV profit and selling expenses, as discussed above, and the record shows that those sources not selected do not provide a reasonable basis for our calculations. Thus, for the final determination, we have continued to calculate CV profit and selling expenses using the 2013 audited financial statements of OFCO and Chun Yu.

Comment 2: The Department Should Rely on the Average-to-Average Method, without Zeroing, in the Final Determination

Respondents

Quick Advance claims that during the *Preliminary Determination*, the Department based the outcome of Quick Advance's differential pricing analysis on export sales that passed the Cohen's *d* test. Therefore, the Department decided that there was a pattern of prices for comparable merchandise that differ significantly among purchasers, regions or time periods. Quick Advance states that the Department then decided that the average-to-average (A-to-A) method appropriately accounted for such differences because there is not a meaningful difference in the weighted-average dumping margins calculated for Quick Advance when calculated using the A-to-A method and the average-to-transaction (A-to-T) method applied to all U.S. sales.

PT point out that in its *Preliminary Determination*, the Department concluded that there was no meaningful difference between calculating PT/Pro-Team margins based on the A-to-A method or the A-to-T methodology, and, accordingly, decided not to calculate margins based on the alternative A-to-T method. PT then argues that In the event that in the final determination, the Department's calculation of PT/Pro-Team margins requires the Department to revisit its

⁵¹ *American School Paper Suppliers*, 791 F. Supp. 2d at 1299.

⁵² *Id.*

⁵³ See generally *id.*

⁵⁴ See the Respondents' October 31, 2014, submission of Chun Yu's and OFCO's financial statements.

⁵⁵ See Respondent's submission dated October 31, 2014 at page 2. See Petitioner's Case Brief at pages 4 and 5.

targeting methodology, the Department should administer Section 777A(d), Tariff Act of 1930, as amended, in the manner discussed below.

For the final determination, both Quick Advance and PT assert that the Department should modify its differential pricing analysis to conform to law, for the reasons discussed in detail in PT/Pro-team's case brief: 1) The Department should conclude that U.S. sales which are not dumped cannot be "target dumped." 2) The Department should conclude that any pattern of differences in price among purchasers, regions or customers can be accounted for under the A-to-A methodology. 3) The Department should not rely on a precise mathematical formula to determine whether sales have been "target dumped." 4) The Department should conclude that application of the A-to-T method with zeroing cannot be applied to sales which have not been "targeted." 5) The Department should modify the Cohen's *d* test by offsetting the overall result of sales which did not pass the Cohen's *d* test with the overall result of sales that did pass the Cohen's *d* test. 6) The Cohen's *d* test as applied by the Department should be modified to account for directionality. 7) A pooled standard deviation should be determined based on a weighted average instead of a simple average of variances. 8) The Department should apply the Cohen's *d* test by controlling more independent variables in each run. Lastly, the Department should apply additional filters before determining the "targeted" sales.

Petitioner

Petitioner disagrees with the respondents' argument about amending its differential pricing analysis. Petitioner asserts that the Department has already rejected these challenges in other proceedings.⁵⁶ Petitioner further asserts that CIT precedent set in *Apex* affirmed the manner the Department assessed targeted dumping and that the Department does not need to "consider 'why' certain sales were lower than others".⁵⁷ Finally, Petitioner argues that the Department's differential pricing analysis, including its use of the Cohen's *d* test, is lawful and has been reaffirmed in other cases and therefore should continue to be used in the final determination.⁵⁸

Department's Position

As an general observation, the Department for this investigation has employed a differential pricing analysis to determine whether there exists a pattern of prices which differ significantly among purchasers, regions or time periods, and to explain whether the standard A-to-A method cannot account for such differences. Nothing in the statute requires the Department to identify "targeted dumping." ⁵⁹ The SAA generally refers to "targeted dumping" as a situation which section 777A(d)(1)(B) of the Act is meant to address, but the statute itself does not refer to "targeted dumping." When examining whether there exists a pattern of prices which differ significantly,⁶⁰ such a pattern involves only export sales to the United States. Normal values, and thus dumping, are not a consideration in whether such a pattern exists. Therefore, the

⁵⁶ Petitioner cites to *Differential Pricing Analysis; Request for Comments*, 79 FR 26720 (May 9, 2014); *Certain Steel Nails from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*; 2012-2013, 80 FR 18816 (April 8, 2015)

⁵⁷ Petitioners cite to *Apex*

⁵⁸ See Petitioner's Rebuttal Brief at 7-9.

⁵⁹ See SAA at 843.

⁶⁰ See section 777A(d)(1)(B)(i) of the Act.

determination of whether there exists a pattern of prices which differ significantly is to find whether conditions exist in the exporter's pricing behavior in the U.S. market which could lead to masked dumping, such that an alternative comparison method should be considered.

Comparisons between export prices and normal values and whether dumping is occurring, however, is the focus of the second statutory provision⁶¹ requiring that the Department explain why the A-to-A method cannot account for such differences. To examine this provision, the Department compares the weighted-average dumping margins calculated using the standard A-to-A method and the appropriate alternative comparison method. When there is a meaningful difference in these results, then the Department considers that the A-to-A method cannot account for such differences, namely that conditions exist where dumping may be masked, as confirmed by the existence of a pattern of prices which differ significantly, and it may employ an alternative comparison method. Thus, "targeting" and "dumping" are both considered as components of the Department's analysis into whether it may apply an alternative comparison method pursuant to section 777A(d)(1)(B) of the Act.

We now address the specific arguments asserted by Quick Advance and PT and discussed in detail in PT's case brief.

1) The Department should conclude that sales which are not dumped cannot be "target dumped."

The Department disagrees with Respondent's argument and logic that "{f}or the exception to apply, the 'pattern' of sales identified by the Department must be a pattern of sales at less than fair value (*i.e.*, dumped sales)."⁶² As described above, the pattern of prices which differ significantly is a pattern of export prices or constructed export prices – *i.e.*, U.S. prices. Respondents base its argument on the text of the SAA, where it says:

Although current U.S. law permits the use of averages on both sides of the antidumping equation, Commerce's preferred practice has been to compare an average normal value to individual export prices in investigations and reviews. In part, the reluctance to use an average-to-average methodology has been based on a concern that such a methodology could conceal "targeted dumping." In such situations, *an exporter may sell at a dumped price to particular customers or regions*, while selling at higher prices to other customers or regions.⁶³

In addition,

New section 777A(d)(1)(B) provides for a comparison of average normal values to individual export prices or constructed export prices in situations where an average-to-average or transaction-to-transaction methodology cannot account for a pattern of prices that differ significantly among purchasers, regions, or time periods, *i.e.*, *where targeted dumping may be occurring*.⁶⁴

⁶¹ See section 777A(d)(1)(B)(ii) of the Act.

⁶² See PT's Case Brief at 9.

⁶³ See PT's Case Brief at 8-9, quoting the SAA at 842 (emphasis provided in the case brief).

⁶⁴ See PT's Case Brief at 9, quoting the SAA at 843 (emphasis provided in the case brief).

From these two statements in the SAA, Respondents concludes that for sales to be considered part of a pattern of sales which differ significantly, such sales must also be below normal value – *i.e.*, dumped.

Indeed, the Department agrees that the purpose behind section 777A(d)(1)(B) of the Act is to address concerns that use of the A-to-A method is inadequate for identifying dumping by the exporter, where dumping can be masked when compared with the dumping found when using the A-to-T method. The SAA labels this as “targeted dumping,” which is then described as where “an exporter *may* sell at dumped prices ... while selling at higher prices” for other sales.⁶⁵ In other words, the SAA is identifying a condition in the U.S. market where dumping may be masked and which may warrant further scrutiny under the auspices of new section 777A(d)(1)(B) of the Act.

The SAA continues in stating that where the standard A-to-A method or the transaction-to-transaction (T-to-T) method cannot account for such differences, that this is a situation “where targeted dumping *may* be occurring.”⁶⁶ Thus, the SAA’s term “targeted dumping” is associated with both requirements provided for in section 777A(d)(1)(B) of the Act. Furthermore, with the use of the word “may” the SAA indicates that there may be other situations where the resort to an alternative comparison method may be warranted. The SAA does not limit the application of an alternative comparison method to only the situation which has been labelled as “target dumping.”

Respondents' reference to *Mid Continent* and *U.S. Steel* does not support its argument. In *Mid Continent*, the Court only discusses “lower prices” and does not even consider that dumping be a part of a pattern.⁶⁷ Likewise, *U.S. Steel* merely states that Congress provided the Department with a tool (*i.e.*, section 777A(d)(1)(B) of the Act) to allow it to “combat” targeted or masked dumping.⁶⁸

Lastly, the Department agrees with Respondents statement that “{i}f the pattern of price differences identified by the Department is composed of sales that are not being dumped, then such a pattern undeniably can be taken into account using AA.”⁶⁹ If each U.S. sale is priced above normal value, then no sales are dumped and the weighted-average dumping margins calculated using the A-to-A method and an alternative comparison method will both be zero. Thus, there would be no meaningful difference to support a finding that the A-to-A method could not account for such differences and the A-to-A method would be used to calculate the respondent’s weighted-average dumping margin, as argued by Respondents.

2) The Department should conclude that any pattern of differences in price among purchasers, regions or time periods can be accounted for under the A-to-A method.

⁶⁵ See SAA at 842.

⁶⁶ See SAA at 843.

⁶⁷ See *Mid Continent Nail Corp. v. United States*, No. 08-00224, 2010 WL 1783771, at *1 (CIT May 4, 2010).

⁶⁸ See *U.S. Steel Corp. v. United States*, 621 F.3d 1351, 1363 (Fed. Cir. 2010).

⁶⁹ See PT’s Case Brief at 10.

The Department agrees with Respondents that the phrase “such differences” in section 777A(d)(1)(B)(ii) of the Act does not refer to differences in the weighted-average dumping margins calculated using the A-to-A method and an alternative comparison method.⁷⁰ As described in the *Preliminary Determination*,⁷¹ when there is a 25 percent relative change in the weighted-average dumping margin or the weighted-average dumping margin crosses the *de minimus* threshold, the Department reasonably finds that this difference (*i.e.*, change) in the results of the two comparison methods is meaningful such that the A-to-A method cannot account for the conditions identified under section 777A(d)(1)(B)(i) of the Act.

The Department disagrees with Respondents’ contention that comparing the results of the two comparison methods merely measures the impact of zeroing rather than the impact of differing prices. The purpose of the application of an alternative comparison method is to unmask dumping. This masked dumping can be concealed by averaging lower and higher U.S. prices within an averaging group as well as lower and higher U.S. prices between averaging groups. Thus, transaction-specific export prices are used as the basis for the A-to-T method, and zeroing must be used when aggregating the results of the A-to-T comparisons because otherwise granting offsets for non-dumped transactions will continue to mask the dumping between the A-to-A method and an alternative comparison method, such that the weighted-average dumping margins calculated using the two comparison methods will always be identical.

These identical results can be seen in the calculation results for PT and Quick Advance in the Final Calculation Memo.⁷² For the use of the A-to-A method for all U.S. sales, the “mixed” application of the A-to-A method and the A-to-T method, and the A-to-T method for all U.S. sales, the sum of the positive comparison results and the negative comparison results for each comparison method are identical. Therefore, unless zeroing is used for non-dumped sales when using the A-to-T method, the remedy for “targeted dumping” would cease to exist and this provision of the statute would have no meaning.

In this final determination, the Department has found that 42.27 percent of PT’s U.S. sales and 25.98 percent of Quick Advance’s U.S. sales,⁷³ by value, pass the Cohen’s *d* test, which confirms the existence of a pattern of prices which differ significantly. In accordance with the description of the differential pricing analysis in the *Preliminary Determination*,⁷⁴ the Department has applied that A-to-T method to those U.S. sales which pass the Cohen’s *d* test and the A-to-A method to those U.S. sales which do not pass the Cohen’s *d* test.

As in *Apex*, the Court ruled that the Department’s comparison of the A-to-A and the A-to-T methods sufficed to carry Commerce’s burden under section 1677f-1(d)(1)(B)(ii).⁷⁵ Thus, the

⁷⁰ See PT’s Case Brief at 10.

⁷¹ See Preliminary Decision Memorandum at 10-12.

⁷² *Id.*

⁷³ See Memorandum from Scott Hoefke through Robert James to the File, RE: Final Determination Sales Calculation Analysis Memorandum for PT Enterprise Inc. dated May 13, 2015 (PT’s Analysis Memorandum) at 2; see also Memorandum from Victoria Cho through Robert James to the File, RE: Final Determination Sales Calculation Analysis Memorandum for Quick Advance, Inc. dated May 13, 2015 (Quick Advance’s Analysis Memorandum).

⁷⁴ See *Preliminary Determination*, and accompanying Decision Memorandum at 10-12.

⁷⁵ See *Apex Frozen Foods Private Ltd. v. United States*, 37 F. Supp. 3d 1286 (Ct. Int’l Trade 2014).

Department has provided sufficient explanation in this investigation as to why the A-to-A method cannot account for such pricing differences.

3) The Department should not rely on a precise mathematical formula to determine whether sales have been “target dumped.”

The Department disagrees with Respondents that it has failed to take into account all of the evidence on the record of this investigation or that it has failed to reasonably evaluate this information to make its final determination. The Department’s dumping calculations are based on all of the information placed on the record by interested parties, which also takes into account respondent-specific circumstances. The most obvious of this is that it is the respondent’s own U.S. prices, home market prices, and production costs which are used to determine whether the respondent has engaged in dumping. Respondents’ insistence that the Department’s failure to consider “market conditions” or reasons “why” U.S. prices differ significantly demonstrates that the Department has not considered all of the information on the record is inapposite since this information is not relevant to this determination.

The Department also disagrees with Respondents’ characterization that any pattern of prices which differ significantly must also be found to be somehow “unfair.”⁷⁶ Nothing in the statute or the SAA makes an inference that such a pattern must be judged to be unfair, fair, equitable, or possess some other quality. Whether there exists a pattern of prices which differ significantly among purchasers, regions or time periods is a factual determination based on the approach used by the Department. For this investigation, that approach is based on the Cohen’s *d* and ratio tests, as described by the Department in the *Preliminary Determination*,⁷⁷ using all of the information on the record of this investigation as submitted to the Department by Respondents.

The Department also disagrees that it must consider “why” certain sales prices were lower than others, including whether there may be legitimate commercial reasons for lower prices to certain customers, regions or time period.⁷⁸ Neither the statute nor the regulations provide that the Department must divine the cause link or the intent of the exporter when it observes a pattern of prices which differ significantly.⁷⁹ The purpose of identifying a pattern of prices which differ significantly is to establish that the exporter’s pricing behavior has created conditions under which dumping may be masked. If such conditions exist, then the Department questions whether the standard A-to-A method is the appropriate tool for determining the extent, if any, of a respondent’s dumping. This is a determination made on the facts on the record, *i.e.*, the U.S. prices which exhibit the exporter’s pricing behavior, just as these and other facts on the record are used to calculate a respondent’s weighted-average dumping margin. Without such a fact-based approach – in the terms of the respondent’s “rigid” and “mechanical” approach – the Department’s dumping calculations would be fraught with subjectivity with no regard to transparency and predictability.

⁷⁶ See PT’s Case Brief at 13.

⁷⁷ See Preliminary Decision Memorandum at 10-12.

⁷⁸ See PT’s Case Brief at 14.

⁷⁹ See *Borusan Mannesmann Boru Sanayi ve Ticaret A.S. v. United States*, 990 F. Supp. 2d 1384, 1389 (CIT 2014).

4) The Department should conclude that application of the A-to-T method with zeroing cannot be applied to sales which have not been “targeted.”

Respondents claims that application of the A-to-T method to only those U.S. sales which are found to be “targeted” is the only approach which makes sense and conforms to commercial reality.⁸⁰ The Department disagrees in general, and finds that Respondents has provided no specific support for such argument. As discussed above, the purpose of section 777A(d)(1)(B)(i) of the Act as well as the Department’s use of the Cohen’s *d* and ratio tests is not to find “targeted” sales but to identify a pattern of prices which differ significantly which indicate that a condition may exist in which dumping may be masked. Once such a condition is found to exist, the Department considers whether the application of the A-to-A method is appropriate pursuant to 19 CFR 351.414(c), or whether it should apply the A-to-T method as an alternative to the standard A-to-A method. Furthermore, the statute imposes no restrictions on the application of the A-to-T method as an alternative to the standard A-to-A method beyond meeting the two requirements set forth in the statute.

The Department disagrees with Respondents’ argument that the Department must restrict its application of the A-to-T method to “targeted” sales under the “limiting rule” as provided for under the withdrawn regulation 19 CFR 351.414(f)(2) (2007). As an initial matter, the Department published a final rule⁸¹ which addressed the deficiencies identified by the Court of International Trade⁸² in the Department’s original 2008 *Withdrawal*⁸³ of the “targeted dumping” regulations for antidumping duty investigations.

While the CIT held that the issuance of the Department’s interim final rule withdrawing the targeted dumping regulations was defective in *Gold East Paper*,⁸⁴ the CIT’s ruling is not final and conclusive as that matter is still in litigation. As discussed in greater detail below, we disagree with *Gold East Paper*. Also, *Baroque Timber* is inapposite because the CIT never had the occasion to consider the merits of those plaintiffs’ regulatory withdrawal challenge. Although *Baroque Timber* noted in a footnote that the challenge was “similar” to that made in *Gold East Paper* and that “the Government’s defense of the withdrawal does not appear strong,”⁸⁵ on remand the Department made several changes to surrogate values, after which the Department “determined that the average-to-average comparison method accounts for any pattern of prices that differ significantly for each company” and applied that method to both

⁸⁰ See PT’s Case Brief at 14-15.

⁸¹ *Non-Application of Previously Withdrawn Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations: Final Rule*, 77 FR 22371 (April 22, 2014) (effective for all less-than-fair-value investigations initiated on or after May, 22, 2014).

⁸² See, e.g., *Gold E. Paper (Jiangsu) Co. v. United States*, 918 F. Supp. 2d 1317, 1319-1334 (CIT 2013) (*Gold East Paper*); *Baroque Timber Indus. (Zhongshan) Co. v. United States*, 925 F. Supp. 2d 1332, 1340-1343 (CIT 2013) (*Baroque Timber*).

⁸³ *Withdrawal of the Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations: Interim Final Rule*, 73 FR 74930 (December 10, 2008).

⁸⁴ See *Gold East Paper*, 918 F. Supp. 2d at 1327-28.

⁸⁵ *Baroque Timber*, 925 F. Supp. 2d at 1340 n.10.

respondents in calculating their revised weighted-average dumping margins.⁸⁶ The CIT subsequently sustained the Department's findings on this point, noting that no party contested "Commerce's targeted dumping determinations."⁸⁷ Because *Baroque Timber* never decided whether the Department properly withdrew its regulation in the first place, this case is inapposite to the question of whether regulations governing targeted dumping were in effect for that review.

As for *Gold East Paper*, contrary to the Court's findings, the Department maintains that the targeted dumping regulations were properly withdrawn pursuant to the APA. During the withdrawal process, the Department engaged the public to participate in its rulemaking process. In fact, the Department's withdrawal of its regulations in December 2008 came after two rounds of soliciting public comments on the appropriate targeted dumping analysis. The Department solicited the first round of comments in October 2007, more than one year before it withdrew the regulations by posting a notice in the *Federal Register* seeking public comments on what guidelines, thresholds, and tests it should use in conducting an analysis under section 777A(d)(1)(B) of the Act.⁸⁸ As the notice explained, because the Department had received very few targeted dumping allegations under the regulations then in effect, it solicited comments from the public to determine how best to implement the remedy provided under the statute to address masked dumping. The notice posed specific questions, and allowed the public 30 days to submit comments.⁸⁹ Various parties submitted comments in response to the Department's request.⁹⁰ Notably, none of the respondents in this review commented.

After considering those comments, the Department published a proposed new methodology in May 2008 and again requested public comment.⁹¹ Among other things, the Department specifically sought comments "on what standards, if any, {it} should adopt for accepting an allegation of targeted dumping."⁹² Several of the submissions⁹³ received from parties explained that the Department's proposed methodology was inconsistent with the statute and should not be adopted.⁹⁴ Moreover, several entities explicitly stated that the Department should not establish minimum thresholds for accepting allegations of targeted dumping because the statute contains no such requirements.⁹⁵ Again, none of the respondents in this review commented.

⁸⁶ See *Baroque Timber Industries (Zhongshan) Company, Limited, et al. v. United States*, Consol. Court No. 12-00007, Slip Op. 13-96, Final Results of Redetermination Pursuant to Court Order, at 26-27 (November 14, 2013), available at <http://enforcement.trade.gov/remands/13-96.pdf>.

⁸⁷ See *Baroque Timber Indus. (Zhongshan) Co. v. United States*, 971 F. Supp. 2d 1333, 1338 n.15 (CIT 2014).

⁸⁸ See *Targeted Dumping in Antidumping Investigations; Request for Comment*, 72 FR 60651 (October 25, 2007).

⁸⁹ See *id.*

⁹⁰ See *Public Comments Received December 10, 2007*, Department of Commerce, <http://ia.ita.doc.gov/download/targeted-dumping/comments-20071210/td-cmt-20071210-index.html> (December 10, 2007) (listing the entities that commented).

⁹¹ See *Proposed Methodology for Identifying and Analyzing Targeted Dumping in Antidumping Investigations*, 73 FR 26371, 26372 (May 9, 2008).

⁹² See *id.*

⁹³ The public comments received June 23, 2008 and submitted on behalf of several domestic parties can be accessed at: <http://enforcement.trade.gov/download/targeted-dumping/comments-20080623/td-cmt-20080623-index.html>.

⁹⁴ See, e.g., Letter from Various Domestic Producers to the Department, titled "Comments on Targeted Dumping Methodology, Comments," dated June 23, 2008, ("Letter from Various Domestic Producers") at 2 (<http://enforcement.trade.gov/download/targeted-dumping/comments-20080623/kdw-td-cmt-20080623.pdf>).

⁹⁵ See, e.g., letter from Committee to Support U.S. Trade Laws, to the Department: "Comments on Targeted Dumping Methodology" at 25; see also Letter from Various Domestic Producers at 29.

These comments suggested that the regulations were impeding the development of an effective remedy for masked dumping. Indeed, after considering the parties' comments the Department explained that because "the provisions were promulgated without the benefit of any experience on the issue of targeted dumping, the Department may have established thresholds or other criteria that have prevented the use of this comparison methodology to unmask dumping."⁹⁶ For this reason, the Department determined that the regulations had to be withdrawn.⁹⁷ Although this withdrawal was effective immediately, and the Department did not replace the regulatory provisions with new provisions, the Department again invited parties to submit comments, and gave them an additional 30 days to do so.⁹⁸ The comment period ended on January 9, 2009, with several parties submitting comments.⁹⁹ Just like the first and second comment periods prior to the withdrawal, none of the respondents in this review submitted comments.

The course of the Department's decision-making demonstrates that it sought to actively engage the public. This type of public participation is fully consistent with the APA's notice-and-comment requirement.¹⁰⁰ Moreover, various courts have rejected the idea that an agency must give the parties an opportunity to comment before every step of regulatory development.¹⁰¹ Rather, where the public is given the opportunity to comment meaningfully consistent with the statute, the APA's requirements are satisfied. The touchstone of any APA analysis is whether the agency has, as a whole, acted in a way that is consistent with the statute's purpose.¹⁰² Here, similar to the agency in *Mineta*, the Department provided the parties more than one opportunity to submit comments before issuing the final rule. As in *Mineta*, the Department also considered the comments submitted and based its final decision, at least in part, upon those comments. Just as the court in *Mineta* found all of those facts to indicate that the agency's actions were consistent with the APA, so too do the Department's actions here demonstrate that it fulfilled the notice and comment requirements of the APA.

The APA does not require that a final rule that the agency promulgates must be identical to the rule that it proposed and upon which it solicited comments.¹⁰³ Here, the Department actively engaged the public in its rulemaking process; it solicited comments and considered the submissions it received. In fact, that the numerous comments prompted the Department to withdraw the regulations demonstrates that the Department provided the public with an adequate opportunity to participate. In doing so, the Department fully complied with the APA.

⁹⁶ See *Withdrawal Notice* at 74930-31.

⁹⁷ See *id.* at 74931.

⁹⁸ See *id.*

⁹⁹ See *Public Comments Received January 23, 2009*, Department of Commerce (Jan. 23, 2009), available at <http://enforcement.trade.gov/download/targeted-dumping/comments-20090123/td-cmt-20090123-index.html>.

¹⁰⁰ See, e.g., *Arizona Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1299–1300 (D.C. Cir. 2000) (holding that the EPA's decision to not implement a rule upon which it had sought comments did not violate the APA's notice and comment requirements because the parties should have understood that the agency was in the process of deciding what rule would be proper).

¹⁰¹ See *Fed. Express Corp. v. Mineta*, 373 F.3d 112, 120 (D.C. Cir. 2004) ("*Mineta*") (holding that the Department of Transportation's promulgation of four rules, each with immediate effect, only after the issuance of which the public was given the opportunity to comment, afforded proper notice and comment).

¹⁰² See *id.*

¹⁰³ See, e.g., *First Am. Discount Corp. v. CFTC*, 222 F.3d 1008, 1015 (D.C. Cir. 2000).

Further, even if the two rounds of comments that the Department solicited before the withdrawal of the regulations were insufficient to satisfy the APA's requirements, the Department properly declined to solicit further comments pursuant to the APA's "good cause" exception. This exception provides that an agency is not required to engage in notice and comment if it determines that doing so would be "impracticable, unnecessary, or contrary to the public interest."¹⁰⁴ The Federal Circuit has recognized that this exception can relieve an agency from issuing notice and soliciting comment where doing so would delay the relief that Congress intended to provide; in *National Customs Brokers*, the Federal Circuit rejected a plaintiff's argument that the U.S. Customs Service failed to follow properly the APA in promulgating certain interim regulations when it had published these regulations without giving the parties a prior opportunity to comment.¹⁰⁵ Moreover, although the U.S. Customs Service solicited comments on the published regulations, it stated that it "would not consider substantive comments until after it implemented the regulations and reviewed the comments in light of experience" administering those regulations.¹⁰⁶ The U.S. Customs Service explained that "good cause" existed to comply with the APA's usual notice and comment requirements because the new requirements did not impose new obligations on parties, and emphasized its belief that the regulations should "become effective as soon as possible" so that the public could benefit from "the relief that Congress intended."¹⁰⁷ The Court recognized that this explanation was a proper invocation of the "good cause" exception and explained that soliciting and considering comments was *both* unnecessary (because Congress had passed a statute that superseded the regulation) "*and* contrary to the public interest because the public would benefit from the amended regulations."¹⁰⁸ For this reason, the Court affirmed the regulation against the plaintiff's challenge.¹⁰⁹

In short, the regulation at issue may have had the unintentional effect of preventing the Department from employing an appropriate remedy to consider whether the A-A method is the appropriate tool with which to measure each respondent's amount of dumping. Such effect would have been contrary to congressional intent. Notwithstanding that we satisfied the APA's requirements as discussed above, the Department's revocation of such a regulation without additional notice and comment was based upon a recognized invocation of the "public interest" exception because good cause existed to waive the notice and comment period.

Finally, the court has held that the Department's 2008 *Withdrawal* amounted to harmless error for the respondent who had not previously participated in the Department's rulemaking process or responded to its request for comments.¹¹⁰

5) The Department should abandon or modify the Cohen's *d* Test

¹⁰⁴ See 5 USC 553(b)(B).

¹⁰⁵ See, e.g., *National Customs Brokers and Forwarders Ass'n of Am., Inc. v. United States*, 59 F.3d 1219, 1223 (Fed. Cir. 1995).

¹⁰⁶ See *id.* at 1220–21.

¹⁰⁷ See *id.* at 1223.

¹⁰⁸ See *id.* at 1224 (emphasis added).

¹⁰⁹ See *id.*

¹¹⁰ See *Beijing Tianhai Indus. Co., Ltd., v. United States*, 7 F. Supp. 1318, 1334–37 (CIT 2014).

The Department disagrees with Respondents' assertion that it should abandon its application of the Cohen's d test as a part of its differential pricing analysis in this investigation. The Department agrees that the Cohen's d coefficient gauges the difference in the means of two groups (here the weighted-average export prices between a given purchaser, region or time period and all other purchasers, regions or time periods of comparable merchandise) relative to the variance of the export prices (*i.e.*, the pooled standard deviation) within these two groups. This type of measurement is recognized as an "effect size," of which there are several which have been developed within the social sciences, of which Cohen's d "statistic" or "coefficient" is one of the most prominent. The Department finds that this is a reasonable approach to evaluate whether the differences in the export prices between two groups differ significantly. When there is little variation in the export prices within the two groups, then a small difference in the weighted-average export prices of the two groups will be significant. However, if there exists a large variation in the export prices within the two groups, then a much larger difference in the weighted-average export prices between the two groups must exist to find they differ significantly.

In the final determination of *Xanthan Gum from the PRC*, the Department described "effect size" in response to a comment from Deosen, an examined respondent in that investigation:

Nothing in Deosen's submitted articles undermines the Department's reliance on the Cohen's d test. Deosen's reliance on the article "It's the Effect Size, Stupid" does not undermine the validity of the Cohen's d test or the Department's reliance on it to satisfy the statutory language. Interestingly, the first sentence in the abstract of the article states: "Effect size is a simple way of quantifying the difference between two groups *and has many advantages over the use of tests of statistical significance alone.*" Effect size is the measurement that is derived from the Cohen's d test. Although Deosen argues that effect size is a statistic that is "widely used in meta-analysis," we note that the article also states that "{e}ffect size quantifies the size of the difference between two groups, and may therefore be said to be a *true measure of the significance of the difference.*" The article points out the precise purpose for which the Department relies on Cohen's d test to satisfy the statutory language, to measure whether a difference is significant.¹¹¹

The Department disagrees with Respondents' argument that the Cohen's d test's thresholds of "small," "medium," and "large" are arbitrary.¹¹² Although these thresholds have qualitative labels, as described in the Preliminary Determination for Oman Nails and Malaysia Nails, the Department stated that of these three thresholds, "the large threshold provides the strongest indication that there is a significant difference between the means of the test and comparison groups, while the small threshold provides the weakest indication that such a difference exists."¹¹³ In other words, the significance required by the Department in its Cohen's d test

¹¹¹ See *Xanthan Gum From the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 78 FR 33351 (June 4, 2013) (*Xanthan Gum from the PRC*) and the accompanying IDM at Comment 3 (emphasis in the original, internal citations omitted); quoting from Coe, "It's the Effects Size, Stupid: What effect size is and why it is important," Paper presented at the Annual Conference of British Educational Research Association (Sept. 2002), <http://www.leeds.ac.uk/educol/documents/00002182.htm>.

¹¹² See PT's Case Brief at 15.

¹¹³ See *Certain Steel Nails From Malaysia: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination and Extension of Provisional Measures*, 79 FR 78055 (December 29, 2014) and accompanying decision memorandum at 16; see also *Certain Steel Nails From the Sultanate of Oman*:

affords the greatest meaning to the difference of the means of the prices among purchasers, regions and time periods. Furthermore, as originally stated in *Xanthan Gum from the PRC*:

In “Difference Between Two Means,” the author states that “there is no objective answer” to the question of what constitutes a large effect. Although Deosen focuses on this excerpt for the proposition that the “guidelines are somewhat arbitrary,” the author also notes that the guidelines suggested by Cohen as to what constitutes a small effect size, medium effect size, and large effect size “have been widely adopted.” The author further explains that Cohen’s *d* is a “commonly used measure{ }” to “consider the difference between means in standardized units.”¹¹⁴

Therefore, despite Respondents’ contention, the Department finds the Cohen’s *d* test is a reasonable tool for use as part of an analysis to determine whether a pattern of prices differ significantly.¹¹⁵

5a) The Department must grant offsets for non-dumped sales when combining the results of the A-to-A comparisons and the A-to-T comparisons if the “mixed” method is used.

The Department disagrees with Respondents’ that it must apply offset for non-dumped sales to amounts of dumping (*i.e.*, positive comparison results) between different comparison methods. The A-to-A method and the A-to-T method are different comparison methods which are provided for in the statute and regulations with which the Department may determine whether a producer or exporter has dumped subject merchandise in the U.S. market. Each of these comparison methods (along with the T-to-T method) are distinct and independent from each other, and are appropriate under specified circumstances.¹¹⁶ Furthermore, the Department finds that the results from the calculations under each of these distinct comparison methods, along with results based on facts available,¹¹⁷ are also distinct and independent. To calculate the weighted-average dumping margin for a respondent whose sales have been evaluated using more than one comparison method, the Department reasonably aggregates the results of each of these distinct comparison methods, specifically summing the amount of dumping and the U.S. sales value for each of these methods.

To allow for offsets when combining the results under the Department’s “mixed” approach to applying the A-to-T method as an alternative to the standard A-to-A method would defeat the purpose of the A-to-T method where a pattern of prices for comparable merchandise was found that differed significantly among purchasers, regions, or periods of time. Such an approach would allow the results of the A-to-A method to reduce or completely negate the results of the A-to-T method prescribed by section 777A(d)(1)(B) of the Act and would continue to mask

Affirmative Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination, 79 FR 78034 (December 29, 2014) and accompanying decision memorandum at 6.

¹¹⁴ See *Xanthan Gum from the PRC* and the accompanying IDM at Comment 3 (internal citations omitted); quoting from David Lane et al., Chapter 19 “Effect Size,” Section 2 “Difference Between Two Means.”

¹¹⁵ See *id.*; see also *Certain Steel Nails From the People's Republic of China Final Results of the Fourth Antidumping Duty Administrative Review*, 79 FR 19316 (April 8, 2014) and accompanying IDM at Comment 7.

¹¹⁶ See, generally, section 777A(d) of the Act, and 19 CFR 351.414.

¹¹⁷ See, generally, section 776 of the Act.

dumping.¹¹⁸ Instead, by preserving the results of the A-to-T method, the Department ensures that the purpose of the A-to-T method of uncovering masked dumping is fulfilled, just as it is when the Department applies the A-to-T method as a singular comparison method.

6) The Cohen's *d* test as applied by the Department should be modified to account for directionality.

The Department disagrees with Respondents that the Department should not consider that higher-priced sales can contribute to a pattern of prices that differ significantly. As an initial matter, we note that Respondents' argument has no grounding in the language of the statute. There is nothing in the statute that mandates how the Department determines whether there is a pattern of export prices that differs significantly. As explained in the *Preliminary Determination*¹¹⁹ and below, the differential pricing analysis used in this administrative review is reasonable, and the use of Cohen's *d* test as a component in this analysis is consistent with the purpose of the statutory provision concerning the application of an alternative comparison method.

Section 777A(d)(1)(B)(i) of the Act requires that the Department identify whether there exists a pattern of prices that differ significantly among purchasers, regions or time periods. The SAA states:

In part the reluctance to use an average-to-average methodology had been based on a concern that such a methodology could conceal "targeted dumping." In such situations, an exporter may sell at a dumped price to particular customers or regions, while selling at higher prices to other customers or regions.¹²⁰

Respondents' argument that "targeted" U.S. sales must be at prices "below a certain base level" is completely unsupported by the statute or the SAA. The SAA recognizes the concerns accompanying the Department's change in practice to using the A-to-A method and that the potential for masked dumping, or "targeted dumping," involves not only lower-priced (*i.e.*, potentially dumped) sales but also the higher priced sales which may be concealing the dumping of these lower priced sales. It is precisely this situation which is the basis for the Department's approach in using the Cohen's *d* and ratio tests to examine whether there exists a pattern of prices that differ significantly.

Contrary to Respondents' claim, the statute does not require that the Department consider only lower-priced sales when considering whether there exists a pattern or prices that differ significantly. It is reasonable for the Department to consider sales information on the record in its analysis and to draw reasonable inferences as to what the data show. Contrary to Respondents' claim, it is reasonable for the Department to consider both lower-priced and

¹¹⁸ Similarly, if the amount of dumping for some U.S. sales is calculated using the A-to-A method, and the amount of dumping for other U.S. sales using facts available with an adverse inference because of the respondent's failure to cooperate, then if non-dumped U.S. sales evaluated using the A-to-A method were allowed to offset the amount of dumping calculated using adverse facts available, this would enable a respondent to eliminate the consequences of not cooperating to the best of its ability.

¹¹⁹ See *Preliminary Determination* and accompanying Decision Memorandum at 10-12.

¹²⁰ See SAA at 842.

higher-priced sales in the Cohen's *d* analysis because higher-priced sales are equally capable as lower-priced sales to create a pattern of prices that differ significantly. Further, when greater than their normal value, higher-priced sales will offset lower-priced sales when using the A-to-A method, either implicitly through the calculation of a weighted-average price or explicitly through the granting of offsets, which can mask dumping. The statute states that the Department may apply the A-to-T method if "there is a *pattern of export prices* . . . for comparable merchandise that *differ* significantly among purchasers, regions, or periods of time," and the Department "explains why *such differences* cannot be taken into account" using the A-to-A comparison method.¹²¹ The statute directs the Department to consider whether there exists a pattern of prices that differ significantly. The statutory language references prices that "differ" and does not specify whether the prices differ by being lower or higher than the remaining prices. The statute does not provide that the Department consider only higher-priced sales or only lower-priced sales when conducting its analysis, nor does the statute specify whether the difference must be the result of certain sales being priced higher or lower than other sales. The Department has explained that higher-priced sales and lower-priced sales do not operate independently; all sales are relevant to the analysis.¹²² Higher- or lower-priced sales could be dumped or could be masking other dumped sales. However, the relationship between higher or lower U.S. prices and their comparable normal values is not relevant in the Cohen's *d* test and in answering the question of whether there is a pattern of prices that differ significantly, this analysis includes no comparisons with normal values and section 777A(d)(1)(B)(i) of the Act contemplates no such comparisons. By considering all sales, higher-priced sales and lower-priced sales, the Department is able to analyze an exporter's pricing to identify whether there is a pattern of prices that differ significantly.

7) A pooled standard deviation should be determined based on a weighted average instead of a simple average of the variances of the test and comparison groups.

Respondents' argues that the Department should use a weighted-average rather than a simple average of the variances for the test and comparison groups when calculating the pooled standard deviation of the Cohen's *d* coefficient.¹²³ Respondents claims that the correct approach is a weighted-average, based on the frequency of observations, to adjust for differences in sizes between the test and comparison groups, and that a simple average gives too much weight to the variance from the test groups.¹²⁴ As explained above with respect to other issues, there is no statutory directive with respect to how the Department should determine whether a pattern of prices that differ significantly exists, let alone how to calculate the pooled standard deviation of the Cohen's *d* coefficient. The Department's intent is to rely on a reasonable approach that affords predictability. The Department finds here that the best way to accomplish this goal is to use a simple average (*i.e.*, giving equal weight to the test and comparison groups) when determining the pooled standard deviation. By using a simple average, the respondent's pricing practices to each group will be weighted equally, and the magnitude of the sales to one group

¹²¹ See section 777A(d)(1)(B) of the Act (emphasis added).

¹²² See *Hardwood and Decorative Plywood From the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 78 FR 58273 (September 23, 2013) and accompanying Issues and Decision Memorandum at Comment 5.

¹²³ See PT's Case Brief, at 20-22.

¹²⁴ *Id.*

does not skew the outcome (although the Department notes that within both the test group and comparison group, it uses weight averaging when calculating the variance for each group).

The Department disagrees with Respondents' argument that using a simple average rather than a weighted average, by number of observations, undervalues the pooled standard deviation, which thereby distorts the results of the Cohen's *d* test. Respondents' conclusion is based on its assumptions that the number of observations and the variance of the U.S. prices to the test groups will both be smaller than the number of observations and the variance of the U.S. prices to the comparison groups. Respondents provides no support for such assumptions, either for its reported U.S. sales in the investigation or in general, and whether any alleged distortion would outweigh the Department's approach that the pricing behavior of the export between the test and comparison groups be considered equally. Further, by weighting the variances of the test and comparison groups by the number of observations, this in itself would open up the analysis to distortion since how the U.S. sales data is reported, *i.e.*, how each observation is determined, is completely under the control of the respondent. Therefore, we disagree with Respondents' claim that the proper approach is to account for differences in the size of each group. Rather, as stated above, the Department finds it reasonable to use a simple average of the variances, in which the respondent's pricing behavior to each group will be weighted equally, and the magnitude of the sales to one group does not skew the outcome. Respondents' arguments fall short of demonstrating that the Department's current approach and use of the Cohen's *d* test does not comply with the statute, fails to address the requirements of section 777A(d)(1)(B)(i) of the Act, or is unreasonable.

8) The Department should apply the Cohen's *d* test controlling for time when examining price differences among purchasers and regions.

The Department disagrees with Respondents' argument that it should consider both time period and purchaser, and time period and region, when examining price differences among different purchasers or regions. Respondents' concern is based on the potential that when there is a correlation between time period and purchaser or time period and region, that U.S. sales will be found to pass the Cohen's *d* test by both time period and also purchaser and region. As explained above with respect to other issues, there is no statutory directive with respect to how the Department should determine whether a pattern of prices that differ significantly exists, except that the price differences occur among purchasers, regions or time periods. Therefore, the statute does not require, or preclude, the Department from taking an approach as recommended by Respondents.

Nonetheless, Respondents' concerns appear to stem from finding that certain U.S. sales are at significantly different prices by time period, and also by purchaser or region when there is a correlation between time period and either purchaser or region. Such a situation (*i.e.*, a correlation of U.S. sales between purchasers, regions and/or time periods) may indeed exist for a respondent, however, such concerns are unfounded since the Department, when aggregating the results of the Cohen's *d* test with the ratio test, eliminates all instances where a U.S. sales is found to be at a significantly different price by two, or even all three, of the categories provided for in the statute (*i.e.*, purchaser, region or time period). Accordingly, if a U.S. sale passes the

Cohen's *d* test by time period and, for example, by purchaser, it is only included once in the numerator of the ratio test.

9) The Department must exclude individual U.S. prices to determine if they are not “targeted dumped” (*i.e.*, they are above normal value) rather than relying on the overall weighted-average price of the test group.

Respondents argues that the Department should exclude high value sales to determine if they are “targeted dumped.”¹²⁵ As discussed above, dumping, or comparisons with normal values, plays no part in the statutory requirement to identify a pattern of export price (or constructed export prices) which differ significantly among purchasers, regions or time periods. This provision requires comparisons of U.S. prices with other U.S. prices and not normal values, which are necessary in order to determine whether subject merchandise has been dumped in the U.S. market. Therefore, on its face, Respondents' argument is inapposite.

9a) The Department's use of the Cohen's *d* test “says nothing about the relative magnitude of the difference between the two mean values.”¹²⁶

The Department disagrees with Respondents that the differential pricing analysis does not take into account the relative magnitude of the observed price differences.¹²⁷ The Cohen's *d* coefficient measures the difference in the weighted-average prices between the test group and the comparison group relative to the distribution of prices within each group (*i.e.*, the variance or standard deviation). As a result, if prices within the test and comparison groups differ by only small amounts, then the variance within each group is small and there only needs to be a proportionally small difference in the weighted-average prices between the test group and the comparison group to identify a significant difference. Likewise, if there would be a wide dispersion of prices within either the test group or the comparison group, then a difference between the weighted-average prices between the test group and the comparison group would have to be correspondingly larger for the Cohen's *d* test to identify this difference to be significant. The Department finds that this is a reasonable approach to examine whether U.S. prices between different purchasers, regions or time periods differ significantly – *i.e.*, whether conditions exist where dumping may be masked.

Whether the differences in the U.S. prices are meaningful, or whether the conditions identified as a pattern of prices that differ significantly are concealing dumping to a meaningful extent, is examined when the Department considers whether the A-to-A method can account for the varying pricing behavior exhibited by the respondent. When the weighted-average dumping margins are calculated using the A-to-A method and an alternative comparison method, the magnitude of the differences in U.S. prices, as measured relative to the normal value, are examined relative to the absolute pricing level in the U.S. market (*i.e.*, the denominator of the weighted-average dumping margin is the total export value). Once the conditions exist which

¹²⁵ See PT's Case Brief at 24.

¹²⁶ See PT's Case Brief at 24.

¹²⁷ See *id.*

may mask dumping (*i.e.*, when there is a pattern of prices that differ significantly between different purchasers, regions and time periods), the following situations may arise:

- 1) the normal value is less than all of the U.S. prices and there is no dumping;
- 2) the normal value is greater than all of the U.S. prices and all sales are dumped;
- 3) the normal value is nominally greater than the U.S. prices such that there is a minimal amount of dumping and a significant amount of offsets from non-dumped sales;
- 4) the normal value is nominally less than the U.S. prices such that there is a significant amount of dumping and a minimal amount of offsets generated from non-dumped sales;
- 5) the normal value is in the middle of the range of individual U.S. prices such that there is both a significant amount dumping of a significant amount of offsets generated from non-dumped sales.

Under situations (1) and (2), there is either no dumping or all U.S. sales are dumped such that there is no difference between the A-to-A method and an alternative comparison method – *i.e.*, there is no meaningful difference as described above and in the *Preliminary Determination*.¹²⁸ Under situation (3), there is a minimal (*i.e.*, *de minimis*) amount of dumping, such that the A-to-A method and the alternative comparison method result in either zero or *de minimis* weighted-average dumping margins, the difference in which does not constitute a meaningful difference. Under situation (4), there is a significant (*i.e.*, non-*de minimis*) amount of dumping with only a minimal amount of non-dumped sales to offset the amount of dumping, such that there is not a meaningful difference in the weighted-average dumping margins (*i.e.*, less than a 25% relative change). Lastly, under situation (5), there is a significant, non-*de minimis* amount of dumping and a significant amount of offsets generated from non-dumped sales such that there is a meaningful difference between the weighted-average dumping margins calculated using the standard A-to-A method and an alternative comparison method either because there is more than a 25% relative change in the results of the results cross the *de minimis* threshold.

Only under situations (3), (4) and (5) are the granting or denial of offsets relevant to whether dumping is being masked to an extent that the A-to-A method is not an appropriate comparison method. The extent of the amount of dumping and potential offsets for non-dumped sales is measured relative to the total export value (*i.e.*, the denominator of the weighted-average dumping margin) of the subject merchandise. Thus, the differential pricing analysis does account for the difference in the U.S. prices relative to the absolute price level of the subject merchandise. Only under situation (5) will the Department find that the A-to-A method is not appropriate – where there is an above *de minimis* amount of dumping along with an amount of potential offsets generated from non-dumped sales such that the amount of dumping is changed by a meaningful amount. Both of these amounts are measured relative to the total export value (*i.e.*, absolute price level) of the subject merchandise sold by the exporter in the U.S. market.

Comment 3: The Department Should Determine that Quick Advance and PT are Affiliated with Their Respective Largest U.S. Customers

Petitioner asserts that the Department should determine that Quick Advance and PT are affiliated with their respective largest U.S. customers. Petitioner states that record evidence clearly

¹²⁸ See *Preliminary Determination*, and accompanying Decision Memorandum at 10-12.

demonstrates that the statutory standard is satisfied. As an example, it points to PT's decision on a prospective business opportunity. Petitioner points out that the Department preliminarily found against affiliation, but employed the incorrect standard by requiring a demonstration of one party actually controlling another. Petitioner argues that the correct legal standard, as set forth in the statute and confirmed by Department regulation and judicial precedent, requires only that one party be in a position to exercise restraint over the other party.¹²⁹ Petitioner then claims that the respondents' various arguments against affiliation are without merit (*e.g.*, Quick Advance's history with its largest U.S. Customer, PT's other channels of sales).¹³⁰

Respondents disagree with Petitioner's argument that they are affiliated with their respective largest U.S. customer. Respondents argue that based on longstanding Department practice, affirmed by the courts, the fact that the Respondents' largest U.S. customer purchases subject nails sold by Respondents does not constitute sufficient reason to find that these parties have entered into a "close supplier relationship."¹³¹ Respondents argue that affiliation does not exist because Respondents and their largest U.S. customer have had a longstanding and mutually beneficial business relationship. Respondents state that evidence on the record confirms that the parties are not affiliated, since: 1) Respondents' respective largest U.S. customer transacts business with Respondents in the same manner as it transacts business with it numerous vendors around the world; 2) Respondents' respective largest U.S. customer does not share any information on customers, resale prices, or profits with Respondents; 3) Respondents do not share any information regarding material procurement policies, employment policies, or other aspects of their business operations with their respective largest U.S. customer; and 4) Respondents are free to sell subject merchandise to other customers if they so desire.¹³²

The Department's Position:

Section 771(33) of the Act requires the Department to consider certain persons affiliated. Specifically, it provides that:

The following persons shall be considered to be "affiliated" or "affiliated persons":

- (A) Members of a family, including brothers and sisters (whether by the whole or half-blood), spouse, ancestors, and lineal descendants.
- (B) Any officer or director of an organization and such organization.
- (C) Partners.
- (D) Employer and employee.
- (E) Any person directly or indirectly owning, controlling, or holding with power to vote, 5 percent or more of the outstanding voting stock or shares of any organization and such organization.
- (F) Two or more persons directly or indirectly controlling, controlled by, or under common control with, any person.

¹²⁹ Petitioner cites to *TIJID, Inc. v. United States*, 366 F. Supp. 2d 1286 (CIT 2005) (*TIJID*).

¹³⁰ See Petitioner's case brief at 50-57.

¹³¹ See *TIJID*, 366 F. Supp. 2d 1286; *Certain Oil Country Tubular Goods from Taiwan: Final Determination of Sales at Less Than Fair Value*, 79 FR 41979 (July 18, 2014) (*Taiwan OCTG*); *Grain-Oriented Electrical Steel from the Czech Republic: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances*, 79 FR 58324 (Sept. 29, 2014) (*Czech GOES*).

¹³² See Respondents' rebuttal brief at 32-45.

(G) Any person who controls any other person and such other person.

Regarding control, section 771(33) of the Act states that a person shall be considered to control another person if the person is legally or operationally in a position to exercise restraint or direction over the other person. The SAA further explains that control may be found to exist within corporate groupings.¹³³ The Department's regulations at 19 CFR 351.102(b)(3) state that, in determining whether control over another person exists within the meaning of section 771(33) of the Act, the Department will not find that control exists unless the relationship has the potential to impact decisions concerning the production, pricing, or cost of the subject merchandise or foreign like product.

In the Preliminary Decision Memorandum, we did not find PT or Quick Advance affiliated with their U.S. customer. We stated in the Preliminary Decision Memorandum:

Consistent with the Department's past decisions, we find that a respondent making the vast majority of sales to one customer does not, by itself, constitute sufficient evidence to determine affiliation by virtue of a close supplier relationship.¹³⁴ The record does not show any contracts, exclusivity agreements, or affiliated individuals between PT and Quick Advance and its U.S. customer. Instead, the record establishes that the U.S. customer in question has vendors located in many countries around the world and is not solely reliant on PT and Quick Advance for its subject merchandise needs.¹³⁵ Therefore, the Department finds that the U.S. customer's relationship to PT and Quick Advance is not so significant that it could not be replaced.¹³⁶ Conversely, there is no evidence on the record that establishes that PT and Quick Advance are debarred from selling to other U.S. importers.¹³⁷ Therefore, the record does not establish that the U.S. customer exercises restraint or direction as defined under section 771(33) of the Act. On this basis, we preliminarily determine that PT and Quick Advance are not affiliated to any U.S. customer.¹³⁸

We continue to disagree with Petitioner. First, we note that there has been no new evidence found since the *Preliminary Determination* that contradicts our original decision. Additionally,

¹³³ See SAA at 838 (stating that control may exist within the meaning of section 771(33) of the Act in the following types of relationships: (1) corporate or family groupings, (2) franchises or joint ventures, (3) debt financing, and (4) close supplier relationships in which either party becomes reliant upon the other).

¹³⁴ See, e.g., *TIJID*, 366 F. Supp. 2d 1286; *CZECH GOES*, and accompanying Issues and Decision Memorandum at comment 1.

¹³⁵ See Quick Advance and PT's October 31, 2014 submission at 9.

¹³⁶ See, e.g., *Notice of Final Determination of Sales at Less Than Fair Value: Polyethylene Retail Carrier Bags From Thailand*, 69 FR 34122 (June 18, 2004) and accompanying Issues and Decision Memorandum at 8; *Solid Urea From the Russian Federation: Final Results of Antidumping Duty Administrative Review*, 76 FR 66690 (October 27, 2011) and accompanying Issues and Decision Memorandum at 1.

¹³⁷ See, e.g., *Notice of Final Determination of Sales at Less Than Fair Value: Certain Folding Gift Boxes From the People's Republic of China*, 66 FR 58115 (November 20, 2001) and accompanying Issues and Decision Memorandum at comment 4.

¹³⁸ See Preliminary Decision Memorandum at 7-8.

the Department did not find any new evidence at verification.¹³⁹ Second, the Department appropriately concluded that the PT and Quick Advance are not affiliated with their respective largest U.S. customer based on the requirements stated by the Department in the *Preliminary Determination* Memorandum, which are in turn based on other Department rulings. Petitioner argues that the vast majority of PT's and Quick Advance's U.S. sales are to their respective largest U.S. customer. However, in *TIJID*, the CIT affirmed the Department's finding that even in instances where companies sell 100 percent of its products to one customer, with no evidence that there is a requirement to do so, that alone is not enough to find that the two companies are affiliated.¹⁴⁰ This has been consistently applied across recent Department decisions.¹⁴¹

With regards to Petitioner's argument towards PT, Petitioner stated that because PT declined to entertain an offer for new business that is proof of some type of control by PT's largest U.S. customer, especially given the financial situation of the prior year. However, PT's refusal to entertain an offer did not state that it was contractually unable to do so or even that PT would not accept an offer in the future. We agree with Respondent's argument that there are many valid business reasons to not entertain a business offer than the sole reason offered by Petitioner. In addition, the record remains devoid of any contracts, exclusivity agreements, or affiliated individuals between PT and its U.S. customer. Furthermore, PT's other channels of sales to other U.S. customers do not support a finding of reliance on its largest U.S. customer as Petitioner argues. This shows that PT has other avenues of trade and is not solely reliant on its largest U.S. customer, but rather, it chooses to maintain its long-term business relationship.

With regards to Petitioner's argument concerning Quick Advance, we disagree with Petitioner's logic. There is no record evidence that Quick Advance is contractually obligated to sell to its largest U.S. customer, and thus at any given point Quick Advance can refuse to honor any of the customer's requests, with Quick Advance free to accept the consequence of a lost sale. Quick Advance is also free to find other customers for its nails in the United States and around the world as there is no evidence on the record showing any such restrictions on its operations. Therefore, we do not find Petitioner's argument that the largest U.S. customer's dominance of Quick Advance's business, as Petitioner claims, even if they have had a relationship "for many years" as a basis for affiliation.

We find that the overall theme of Petitioner's arguments is based on the assumption that PT and Quick Advance are motivated purely by maximizing profit. While maximizing profit is a major factor with any business, however, the Department's findings at verification show that it is just one of several factors determining how both Respondents conduct business.¹⁴² We find that there is nothing new on the record that establishes affiliation under the statute. We also do not find any evidence on the record that establishes that Respondents' respective largest U.S.

¹³⁹ See Quick Advance's February 26, 2015, Memorandum to the File entitled, "Verification of the Sales Response of Quick Advance, Inc. and Ko's Nail, Inc. in the Investigation of Nails from Taiwan" (Quick Advance's Sales Verification Report); and PT's February 26, 2015, Memorandum to the File entitled, "Verification of the Sales Response of PT Enterprises, Inc. and Proteam Coil Nail Enterprises, Inc. in the Investigation of Nails from Taiwan" (PT's Sales Verification Report).

¹⁴⁰ See *TIJID*, 366 F. Supp. 2d at 1299.

¹⁴¹ See *Taiwan OCTG*, and accompanying Issues and Decision Memorandum at comment 1; see also *Czech GOES*, and accompanying Issues and Decision Memorandum at comment 1.

¹⁴² See PT's Sales Verification Report; see also Quick Advance's Sales Verification Report.

customer has direct control of the day-to-day operations of PT and Quick Advance. Therefore, we continue to find that PT and Quick Advance are not affiliated by virtue of a close supplier relationship, and that the Department properly applied the correct standard in examining “control” as defined by the Act and the Department’s regulations.

Comment 4: Whether a Middleman Dumping Investigation is Warranted

Petitioner argues the Department should have initiated an investigation of middleman dumping by both Respondents’ trading companies. Petitioner claims it timely filed middlemen dumping allegations that were supported by extensive record evidence. Petitioner also argues that the Department’s refusal to initiate a middleman dumping investigation is contrary to established agency practice and the clear facts of this proceeding.¹⁴³ Petitioner then argues that the *Preliminary Determination* inappropriately and inexplicably relied on a product specific basis analysis instead of a CONNUM specific analysis and on selective pieces of the record provided by Respondents, while ignoring the overwhelming evidence of sizeable dumping through trading companies.¹⁴⁴

Respondents disagree with Petitioner and insist that there was sufficient evidence on the record supporting the Department’s decision not to initiate an inquiry. Respondents suggest there was no reason to expend scarce resources to conduct a costly and time-consuming middleman dumping investigation. Respondents further argue that the information and documentation reviewed by the Department at verification confirmed that this was the correct decision. Respondents state that the record reveals the Respondents sold subject merchandise to Taiwan middleman (or acted as a middleman for nails produced by other mills), and the middleman in these transactions purchased the nails from the producing mill at a price which: 1) was less than the resale price at the which the middleman resold the nails to the U.S. customer; and 2) was expressly intended to compensate the middleman for its costs in shipping the nails to the United States. Respondents maintain that the transactions were structured to allow the middleman to avoid the possibility of middleman dumping. Respondents maintain that the Department exercised its discretion in a reasonable manner by deciding that it was not necessary to initiate a middleman dumping investigation, and the information provided by Respondents at verification confirmed that this decision was correct.¹⁴⁵

The Department’s Position:

We disagree with Petitioner and continue to find that a middleman dumping investigation was not warranted in this proceeding. When an exporter sells its merchandise to an unaffiliated exporter who, in turn, resells the merchandise to the United States at prices below the reseller’s acquisition and selling costs, it is possible that “middleman dumping” may exist. In such cases, the Department will calculate an antidumping duty margin based on a combination of the price

¹⁴³ Petitioner cites to *Certain Forged Steel Crankshafts from Japan*, 52 FR 36984 (October 2, 1987) (*Crankshafts from Japan*); *Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products From Korea*, 67 FR 62124 (October 3, 2002) (*Cold-Rolled Steel From Korea*); *Final Determination of Sales at Less Than Fair Value: Certain Stainless Steel Cooking Ware from Korea*, 51 FR 42873, 42874 (November 26, 1986) (*Cook Ware from Korea*); *Fuel Ethanol from Brazil*, 51 FR 5572 (February 14, 1986).

¹⁴⁴ See Petitioner’s case brief at 90.

¹⁴⁵ See Respondents’ rebuttal brief at 61-66.

paid by the middleman to the exporter, and the price paid to the middleman from the unaffiliated U.S. customer. Congress indicated in its legislative history that it intended for the Department to prevent middleman dumping from occurring, and the Courts have affirmed this application of the law as necessary to prevent the circumvention of the antidumping duty law.¹⁴⁶ Chapter 7 of the Department's current antidumping manual indicates allegations of middleman dumping are rare.¹⁴⁷ Through its administrative practice, the Department has developed an appropriate standard for analyzing allegations of middleman dumping.

To initiate an investigation of middleman dumping, we require that the petitioner(s) submit reasonably available information that provides us with evidence of middleman dumping.¹⁴⁸ This includes information, either direct or circumstantial, on the price actually paid to the middleman by the U.S. end user. Further, "{s}ince trading companies typically operate at small mark-ups, and presumably do not take losses, we require specific evidence that the trading company is in fact dumping before initiating an investigation with respect to the trading company."¹⁴⁹

Furthermore, the Department has stated in the past "in analyzing whether to initiate, we will evaluate information, either direct or circumstantial, and will require that petitioners provide supporting data on prices and costs which are reasonably available to them and that this information is *convincing* {emphasis added}."¹⁵⁰ If initiated, the purpose of the investigation will be to analyze whether "substantial portions of sales are substantially below acquisition cost," thus indicating the "middleman" is engaged in middleman dumping."¹⁵¹

In this investigation, we received timely filed price and cost information from Petitioner, but at the same time we also received rebuttal comments from Respondents with information on the record that called into question the validity of Petitioner's allegation.¹⁵² From these rebuttal comments the Department sent supplemental questionnaires to Respondents to gather additional information.¹⁵³ While the price and cost analysis provided by Petitioner could indicate

¹⁴⁶ See *Tung Mung Dev. Co., Ltd., et al. v. United States*, 219 F. Supp. 2d 1333, 1343 (CIT 2002), *aff'd* 354 F.3d 1371 (Fed. Cir. 2004); S. Rep. No. 96-249 at 94 (1979), reprinted in 1979 U.S.C.C.A.N. 381, 480; and H.R. Rep. No. 96-317 at 75 (1979) (both discussing the need to prevent middleman dumping).

¹⁴⁷ See Department's Antidumping Manual Chapter 7: Export Price and Constructed Export Price, at 5, *see also Cold-Rolled Steel From Korea* and accompanying Issues and Decision Memorandum at Comment 2.

¹⁴⁸ See, e.g., *Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Plate in Coils from Taiwan*, 64 FR 15493, 15502 (March 31, 1999) (*Stainless Steel Plate in Coils from Taiwan*); *Electrolytic Manganese Dioxide From Japan Final Results of Antidumping Duty Administrative Review*, 58 FR 28551, 28554-28555 (May 14, 1993) (*EMD From Japan*).

¹⁴⁹ See *Cook Ware from Korea*, 51 FR at 42874; *see also Consolidated Int'l Automotive, Inc. v. United States*, 809 F. Supp. 125, 130 (CIT 1992); *see also EMD From Japan*, 58 FR at 28555; *see also Crankshafts from Japan*, 52 FR at 36985; *see also Cold-Rolled Steel From Korea*, and accompanying Issues and Decision Memorandum at Comment 2.

¹⁵⁰ See *Stainless Steel Plate in Coils from Taiwan* at 15501.

¹⁵¹ See *Steel Wire Strand for Prestressed Concrete From Japan; Notice of Final Court Decision and Amended Final Results of Antidumping Duty Administrative Reviews*, 62 FR 60688, 60689 (November 12, 1997).

¹⁵² See Respondents' jointly filed submission dated October 31, 2014.

¹⁵³ See Letter from the Department to PT regarding: Antidumping Investigation of Certain Steel Nails from Taiwan: PT Enterprise, Inc. Supplemental Questions for Channel 3 sales, dated November 25, 2014; *see also* Letter from the Department to PT regarding: Antidumping Investigation of Certain Steel Nails from Taiwan: PT Enterprise, Inc. Supplemental Questions for Channel 3 sales, dated December 4, 2014; *see also* Letter from the Department to Quick

middleman dumping, after reviewing information submitted in response to these allegations in supplemental questionnaires and other evidence on the record, we obtained reasonable assurance that middleman dumping had not occurred as the evidence indicated all parties were recouping their acquisition costs and selling costs.¹⁵⁴ In addition, in the *Preliminary Determination*, we noted that we would examine this issue closely at verification, which as discussed below, we did.¹⁵⁵

Furthermore, we disagree with Petitioner that the Department's decision to not initiate was contrary to past practice. As stated above, there is no statutory language that dictates the methodology for the handling of middleman dumping allegations, only the practice that the Department developed over time. As noted, we sent additional questions to Respondents to address the original allegations.¹⁵⁶ The sending out of supplemental questionnaires to get further information is not contrary to established agency practice but has been previously done by the Department before initiating middleman dumping in other cases and therefore is consistent with the Department's practice.¹⁵⁷

Finally, in light of information on the record, and the presumably small markups with which trading companies generally operate, the Department found in this instance that analysis by product control number (CONNUM) was not the most appropriate analysis, as the CONNUM contains multiple products at different price points. These differences in prices could skew the results into false positives when the Department finds "trading companies typically operate at small-markups."¹⁵⁸ We found this to be especially true when we evaluated the transaction-related documents on the record from Respondents that relate to these alleged "middleman dumped" sales.¹⁵⁹ These documents show, as we confirmed at verification,¹⁶⁰ that acquisition costs are being accounted for in the transaction and no further follow-up with the trading companies was reasonably warranted by the Department to make a decision. Therefore, after reviewing evidence on the record, and checking the transaction documents at verification, we continue to find Petitioner's allegation unconvincing.

Comment 5: The Department's Calculation of Constructed Value for PT and Quick Advance

Advance regarding Antidumping Investigation of Certain Steel Nails from Taiwan: Quick Advance, Inc.'s Second Section C Supplemental Questions, dated November 11, 2014.

¹⁵⁴ See PT's December 2, 2014 submission; see also PT's December 8, 2014 submission; see also Quick Advance's November 4, 2014 submission at 5-6; see also Quick Advance's November 21, 2014 submission at 1-2.

¹⁵⁵ See *Preliminary Decision Memorandum* at 10.

¹⁵⁶ See Letter from the Department to PT regarding: Antidumping Investigation of Certain Steel Nails from Taiwan: PT Enterprise, Inc. Supplemental Questions for Channel 3 sales, dated November 25, 2014; see also Letter from the Department to PT regarding: Antidumping Investigation of Certain Steel Nails from Taiwan: PT Enterprise, Inc. Supplemental Questions for Channel 3 sales, dated December 4, 2014; see also Letter from the Department to Quick Advance regarding Antidumping Investigation of Certain Steel Nails from Taiwan: Quick Advance, Inc.'s Second Section C Supplemental Questions, dated November 11, 2014.

¹⁵⁷ See, e.g., *Cold-Rolled Steel From Korea*, and accompanying Issues and Decision Memorandum at Comment 2.

¹⁵⁸ See *Cook Ware from Korea*, 51 FR at 42874; see also *Consolidated Int'l Automotive, Inc. v. United States*, 809 F. Supp. 125, 130 (CIT 1992); see also *EMD From Japan*, 58 FR at 28555; see also *Crankshafts from Japan*, 52 FR at 36985; see also *Cold-Rolled Steel From Korea*, and accompanying Issues and Decision Memorandum at Comment 2.

¹⁵⁹ See, e.g., PT's December 2, 2014 submission; see also PT's December 8, 2014 submission.

¹⁶⁰ See PT's Sales Verification Report, see also Quick Advance's Sales Verification Report.

Petitioner reasserts its ministerial error allegation from the *Preliminary Results* that the Department should correct errors in its preliminary CV calculations for both respondents. Specifically, Petitioner states that the Department miscalculated the constructed value through a programming error regarding the appropriate components for the total cost of manufacturing for both the Respondents. Petitioner also alleges that the Department failed to include the line items “direct selling,” “indirect selling,” and “commission” in the calculation of total constructed value in the margin program.

Moreover, Petitioner contends while the Department subsequently acknowledged committing such a ministerial error in its calculations for PT,¹⁶¹ the Department should likewise revise its programming to reinstate its standard cost of total constructed value macro programming for Quick Advance.¹⁶²

Respondents did not comment on the line items “direct selling,” “indirect selling,” and “commission” in the calculation of total constructed value in the margin program.

The Department’s Position:

We agree with Petitioner. As discussed in the ministerial error memorandum at page 3, the Department erred in the calculation of constructed value by not including “direct selling,” “indirect selling,” and “commission” in the calculation of total constructed value. For these final determinations, we will make the appropriate corrections to the dumping calculation for PT and Quick Advance.

Comment 6: The Department’s Calculation of Surrogate Credit Expense Ratio

Petitioner asserts that the Department in the *Preliminary Determination* incorrectly calculated the surrogate credit expense ratio by including bank borrowing and interest expenses identified in OFCO’s and Chun Yu’s financial statements¹⁶³ to both respondents. Petitioner alleges that the Department used the wrong value when calculating PT’s CV credit expense ratio.

Petitioner also contends that while the Department has partially addressed this deficiency by acknowledging a ministerial error with respect to OFCO’s calculation,¹⁶⁴ the broader concern remains as to interest expenses. Petitioner claims that supposition that interest expenses constitute the type of expenses captured by the Department’s imputed credit expense calculation is wholly unsupported by the record evidence in this case. Petitioner states that treating these expenses as credit expenses would run directly contrary to the record evidence, agency practice, and sound accounting principles.¹⁶⁵

¹⁶¹ See the Department’s ministerial error memorandum.

¹⁶² See Petitioner’s case brief at 21.

¹⁶³ We used OFCO’s and Chun Yu’s financial statements to calculate CV selling expenses for the Respondents. See PT’s and Quick Advance’s October 31, 2014, submission at Exhibits 1A, 2A, and 2C: OFCO Ltd.’s 2013 (OFCO’s financial statements) and Chun Yu Works & Co. Ltd.’s 2013 (Chun Yu’s financial statements) Financial Statements.

¹⁶⁴ See the ministerial error memorandum.

¹⁶⁵ See Petitioner’s case brief at 22.

Moreover, Petitioner asserts that the Department can calculate a surrogate credit expense in the same manner as in *TV Receivers from Malaysia*¹⁶⁶ by using OFCO's financial statement to derive the average payment period and the components necessary to calculate a standard imputed credit expense for both respondents.

Respondents rebut that the Department should continue to use OFCO's and Chun Yu's interest expenses as credit expenses in the final determination. Respondents assert that the Department reasonably concluded that these interest expenses relate to receivables to adjust CV to account for the fact that credit expense are deducted from U.S. price. Moreover, Respondents rebut Petitioner's comments that the Department should use OFCO's financial statement¹⁶⁷ because it reports the accounts receivable average turnover ratio for the financial year, from which the Department could derive the average collection period.

Consistent with the Department's policy¹⁶⁸ and in *Certain Reinforcing Bars from Turkey*,¹⁶⁹ Respondents contend that the record contains necessary information for the Department to compute the home market credit expense ratio based on a company's actual interest cost incurred on loans tied to the home market sales of merchandise under consideration. Respondents assert that if the Department ultimately decides to calculate financial/credit expenses in the manner Petitioner is suggesting that the Department should rely on data in Chun Yu's statement, either in place of or in conjunction with the data on OFCO submitted by Petitioner.¹⁷⁰

The Department's Position:

With no viable home market or third-country market, the Department relied on Chun Yu's and OFCO's financial statements to calculate CV credit expense for the Respondents. During the *Preliminary Determination*, we inadvertently copied the wrong value to calculate the credit expense ratio from OFCO's financial statement and applied it PT's and Quick Advance's CV credit expense. We used the value of "Bank Borrowings" (60,291,000 NTD) when we should have used the value from "Interest Expenses" (3,184,000 NTD) from page 92 of OFCO's financial statements.¹⁷¹ We addressed these changes in the Department's ministerial error memorandum¹⁷² after the *Preliminary Determination*.

For the final determination, Petitioner urges the Department to use OFCO's financial statements to derive an average payment period and to calculate a standard imputed credit expense for both Respondents. The Respondents otherwise argue that if the Department applies Petitioner's

¹⁶⁶ See Notice of Negative Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Negative Preliminary Determination of Critical Circumstances: *Certain Color Televisions from Malaysia*, 68 FR 66810 (November 28, 2003) (*TV Receivers from Malaysia*).

¹⁶⁷ See OFCO's financial statements at Exhibit 1A and 1C.

¹⁶⁸ See Respondents' April 9, 2015, rebuttal brief at 24 citing to the Department's Policy Bulletin – "Import Administration Policy Bulletin 98.2; Imputed Credit Expenses and Interest Rate," <http://enforcement.trade.gov/policy/bull98-2.htm> (February 23, 1998).

¹⁶⁹ See *Certain Steel Concrete Reinforcing Bars From Turkey; Final Results of Antidumping Duty Administrative Review*, 66 FR 56274, 56276 (November 7, 2001).

¹⁷⁰ See Respondents' rebuttal brief at 23.

¹⁷¹ See Respondents' October 31, 2014, submission at exhibit 1-A, OFCO's financial statements.

¹⁷² See ministerial error memorandum.

aforementioned calculation, it should use Chun Yu's financial statements instead. The Department agrees with both Petitioner and the Respondents that the Department can use both OFCO's and Chun Yu's financial statements to calculate a standard imputed credit expense for the Respondents. This investigation is based on dumping margin calculations based on an all-CV analysis whereby the Department relied on surrogate financial statements to calculate Quick Advance's and PT's CV credit expenses.¹⁷³

To accurately calculate the Respondents' credit expense based on the record and to be consistent with the CV methodology used for all selling expenses, the Department will take the combined credit expenses incurred by both Chun Yu and OFCO, and divide it by the combined total COP and profit for both companies. For the detailed explanation of the CV calculations, *see* the Department's May 13, 2015, final determination sales calculation memoranda for PT and Quick Advance. For the final determination, the Department will make the appropriate changes mentioned above to the antidumping margin calculations for Quick Advance and PT.

Comment 7: The Department's Calculation of Indirect and Direct Selling Expense Ratio to Categorize Chun Yu's Selling Expenses

In the *Preliminary Determination*, Petitioner claims that the Department improperly misclassified certain of Chun Yu's expenses in calculating CV selling expenses for both Respondents.¹⁷⁴ Petitioner alleges that the Department erred in calculating various items of Chun Yu's selling expense by including several items that are indirect in nature in its direct selling expense ratio calculation.¹⁷⁵ For example, Petitioner argues that office supplies, rent, travel fees, wages and salaries, PR fees, pension, employee welfare, overtime, advertising and bad debt were included in Chun Yu's direct selling expenses, but should have been included in Chun Yu's indirect selling expense instead.¹⁷⁶ While this issue was addressed in the ministerial error memorandum, Petitioner continues to contend that the Department should not have included any of these items in its direct selling expense ratio calculation.

¹⁷³ *See Certain Oil Country Tubular Goods From the Republic of Korea: Negative Preliminary Determination of Sales at Less Than Fair Value, Negative Preliminary Determination of Critical Circumstances and Postponement of Final Determination*, 79 FR 10480 (February 25, 2014) and unchanged in *Certain Oil Country Tubular Goods From the Republic of Korea: Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances*, 79 FR 41983 (July 18, 2014).

¹⁷⁴ *See* Quick Advance's December 17, 2014, Memorandum to the File, entitled "Analysis of Data Submitted by Quick Advance, Inc. in Certain Steel Nails from Taiwan," (Quick Advance's Prelim Sales Memo) and PT's December 17, 2014, Memorandum to the File, entitled "Analysis of Data Submitted by PT Enterprise Inc. in Certain Steel Nails from Taiwan," (PT's Prelim Sales Memo) (Respondents' prelim sales memoranda, collectively).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

Petitioner contends that the Department's Questionnaire and AD manual specifically identifies salaries and benefits paid to salesman, and travel expenses as example of indirect selling expenses. For example, Petitioner states that there is no evidence on the record that Chun Yu's advertising line reflect advertising expenses incurred for Chun Yu's customer's customers,¹⁷⁷ thus, its advertising expense should be allocated as an indirect expense. Moreover, Petitioner claims that the Department normally classifies bad debt expense as indirect selling expenses because these expenses relate to the sales of a company as a whole,¹⁷⁸ however, nothing in Chun Yu's financial statement or elsewhere on the record links Chun Yu's bad debt to specific sales. For the final determination, Petitioner asserts that the Department should revise its surrogate indirect and direct selling ratios for Chun Yu to include only export fees and transportation expenses to direct expenses and the rest to indirect selling expenses.¹⁷⁹

Respondents maintain that they recognize that the Department during the *Preliminary Determination* categorized most of Chun Yu's expenses as indirect, but that the Department relied on a reasonable methodology for categorizing Chun Yu's expenses in the *Preliminary Determination*. For the final determination, the Respondents urge the Department to continue to rely on the same methodology.¹⁸⁰

The Department's Position:

With no viable home market or third-country market, the Department relied on Chun Yu's and OFCO's financial statements to calculate CV selling expenses for the Respondents in accordance with section 773(e)(2)(B)(iii) of the Act. Accordingly, during the *Preliminary Results*, we also used Chun Yu's selling expenses in conjunction with OFCO's selling expenses in our calculation of CV indirect and direct selling expenses in order to reflect as closely as possible the experience of the Respondents.

During the *Preliminary Results* and then again in our ministerial error memorandum at page 5, the Department at that time asserted that Chun Yu's indirect and direct selling expenses were allocated within the context of fixed and variable expenses. However, after a careful reconsideration for final determination to which expenses are indirect and direct in nature, the Department agrees with Petitioner that the Department should adjust Chun Yu's selling expenses for our final determination. We agree with Petitioner that office supplies, rent, travel fees, wages and salaries, PR fees, pension, employee welfare, overtime, advertising and bad debt, which were included in Chun Yu's direct selling expenses, are indirect, in nature.¹⁸¹ For example, we agree with Petitioner that such expenses as advertising and bad debt are indirect in nature. We agree with Petitioner that there is no evidence on the record that Chun Yu's advertising line

¹⁷⁷ See the Department's section C questionnaire - <http://enforcement.trade.gov/questionnaires/questionnaires-ad.html>. (Section C Questionnaire).

¹⁷⁸ See Petitioner's case brief at 34 citing to *Notice of Final Determination of Sales at Less Than Fair Value: Glycine from India*, 73 FR 16640 (March 28, 2008) (*Glycine from India*) and accompanying Issues and Decision Memorandum at comment 2; and also see *Notice of Final Determination of Sales at Less Than Fair Value: Coated Free Sheet Paper from the Republic of Korea*, 72 FR 60630 (October 25, 2007) (*Coated Free Sheet Paper from Korea*) and accompanying Issues and Decision Memorandum at comment 14.

¹⁷⁹ See Petitioner's case brief at 35.

¹⁸⁰ See Respondents' rebuttal brief at 26.

¹⁸¹ See section 772(d)(1)(D) of the Act.

reflects advertising expenses incurred for Chun Yu's customer's customers,¹⁸² as directed by the Department's questionnaire. Moreover, the Department normally classifies bad debt expense as indirect selling expenses because these expenses relate to the sales of a company as a whole,¹⁸³ however, nothing in Chun Yu's financial statement or elsewhere on the record links Chun Yu's bad debt to specific sale as directed by the Department's questionnaire. We also agree with Petitioner that transportation and export fees should remain as direct selling expenses.¹⁸⁴ For the final determination, the Department will allocate the aforementioned expenses to Chun Yu's indirect selling expenses.

Comment 8: The Department's Calculation of Indirect and Direct Selling Expense Ratio to Properly Account for OFCO's Selling Expenses

Petitioner states that the Department should revise its surrogate indirect and direct selling expense ratio to properly account for OFCO's selling expenses. During the *Preliminary Determination*, Petitioner alleges that the Department failed to allocate \$28 million NTD of OFCO's¹⁸⁵ reported selling expenses to the numerator, in calculating CV selling expenses for the respondents. While the Department identified OFCO's total selling expenses as \$31,855,000 NTD, the Department included only \$1,119,559 NTD for direct selling expenses and \$2,687,042 NTD as indirect selling expenses.

Petitioner claims that the Department then took these two values and added them to Chun Yu's¹⁸⁶ total selling expenses to calculate the weighted-average direct and indirect selling expense ratio. Moreover, Petitioner contends that the Department should revise its identification of indirect and direct selling expenses. Since the record does not provide any basis for the Department to separately identify direct and indirect expenses, Petitioner asserts that the Department should calculate a single OFCO selling expense ratio based on the overall total amount of \$31,855,000 NTD.¹⁸⁷

Moreover, Petitioner claims that direct expenses are variable in nature and traceable in a company's records to sales of the merchandise under investigation. Here, Petitioner contends that nothing on the record indicates that OFCO's selling expenses can be traced to any particular sales, thus, all of OFCO's selling expenses should be treated as indirect selling expenses. In the final determination, Petitioner asserts that the Department should treat all of OFCO's selling expenses as indirect; or, alternatively, correct a critical error in the identification of OFCO's total selling expenses as indirect or direct.¹⁸⁸

¹⁸² See the Department's Section C Questionnaire.

¹⁸³ See Petitioner's case brief at 34 citing to *Glycine from India* and accompanying Issues and Decision Memorandum at comment 2; *Coated Free Sheet Paper from Korea* and accompanying Issues and Decision Memorandum at comment 14; and also see the Department's Section C Questionnaire.

¹⁸⁴ See the Department's Section C Questionnaire.

¹⁸⁵ We used OFCO's and Chun Yu Works & Co.'s financial statements to calculate CV selling expenses for the Respondents. See PT's and Quick Advance's October 31, 2014, submission at Exhibits 1A, 2A, and 2C: OFCO Ltd.'s 2013 and Chun Yu Works & Co. Ltd.'s 2013 Financial Statements.

¹⁸⁶ *Id.*

¹⁸⁷ See Petitioner Allegations Letter at 4-10.

¹⁸⁸ See Petitioner's case brief at 36.

Respondents contend that the Department should reject Petitioner's assertion that all of OFCO's selling expenses are indirect expenses in nature. Respondents rebut that by treating all of OFCO's expenses as indirect selling expenses is prejudicial to Quick Advance and PT. Respondents assert that it automatically makes the assumption that none of OFCO's expenses are direct selling expenses.

Respondents maintains that during the *Preliminary Determination* the Department acted in a reasonable manner in accordance with law, by allocating OFCO expenses as direct or indirect based on Chun Yu's experience. For the final determination, Respondents urge the Department to maintain the same methodology it used during the *Preliminary Determination*.¹⁸⁹

The Department's Position:

During the *Preliminary Determination* of this investigation, the Department took a ratio of Chun Yu's reported direct and indirect selling expenses and applied those ratios to OFCO's reported total selling expenses to derive direct selling and indirect selling expenses for OFCO in calculating CV selling expenses for the Respondents. However, upon reviewing our calculations of CV selling expenses for the Respondents, we determined that we used the wrong denominator in calculating Chun Yu's indirect selling ratio. We addressed this issue in our ministerial error memorandum at 4.

For the final determination, we agree with Petitioner, in part. It is true that, based on OFCO's financial statements, we do not know with certainty the nature and the proportion of direct to indirect selling expenses, which are included in OFCO's reported total selling expenses. We have concluded, however, that it is reasonable to assume that based on normal commercial practices, OFCO's total selling expenses include both direct and indirect selling expenses. We also believe it is reasonable to conclude that the nature and proportion of direct and indirect selling expenses are similar to those of Chun Yu because OFCO is a Taiwanese producer of similar merchandise, has a similar customer base, and operated with a profit. Therefore, we reject Petitioner's proposal to treat all of OFCO's selling expenses as indirect selling expenses.

The Department erred in calculating the correct ratios from Chun Yu's selling expenses and applying those correct ratios to OFCO during the *Preliminary Results*, which was also mentioned in its ministerial error memorandum at page 4. Because of the error in calculation, OFCO's \$28 million NTD was not properly allocated. Upon reconsideration, we agree with Petitioner that the Department failed to properly allocate \$28 million NTD of OFCO's¹⁹⁰ reported selling expenses to the numerator, in calculating CV selling expenses for the Respondents. For the final determination, the Department will allocate all of OFCO's selling expenses with Chun Yu's new direct and indirect selling expense ratios aforementioned to the combined numerator in calculating CV selling expenses for the Respondents. For the detailed explanation of the CV calculations, *see* the Department's May 13, 2015, final determination sales calculation memoranda for PT and Quick Advance. For the final determination, the Department will make

¹⁸⁹ *See* Respondents' rebuttal brief at 26.

¹⁹⁰ We used OFCO's and Chun Yu's financial statements to calculate CV selling expenses for the Respondents. *See* PT's and Quick Advance's October 31, 2014, submission at Exhibits 1A, 2A, and 2C: OFCO Ltd.'s 2013 and Chun Yu Works & Co. Ltd.'s 2013 Financial Statements.

the appropriate changes mentioned above to the antidumping margin calculations for Quick Advance and PT.

Comment 9: The Department's Treatment of PT's and Quick Advance's U.S. Prices for Commission/Compensation Paid to its Unaffiliated Taiwanese Selling Agent and Unaffiliated Taiwanese Trading Company

Petitioner asserts that the Department should adjust PT's and Quick Advance's U.S. prices for the unreported commissions/compensation paid to its unaffiliated Taiwanese trading company. Petitioner claims that neither Respondent has accounted for these expenses. Petitioner states that throughout this investigation, it has urged an inquiry into the ambiguous relationship between the Respondents, its unaffiliated Taiwanese trading company, its unaffiliated selling agent, and the Respondents' U.S. customers.

Petitioner asserts that at verification, the Department documented contradictions during its interview with Respondents' unaffiliated Taiwanese trading company's president. Petitioner claims that the president was guarded, uninformative, and provided answers inconsistent to the Respondents' questionnaire responses.¹⁹¹ Petitioner contends that this finding confirms that Respondents have failed to report an entire layer of selling expenses.

For PT's third channel of distribution and Quick Advance's four channels of distribution, Petitioner states that the unaffiliated Taiwanese trading company assisted Respondents' unaffiliated selling agent with developing new products and packaging, ensuring that products and packaging comply with customer requirements via on site quality control at the mill and arranging shipment to the United States.¹⁹² Petitioner contends that it urged the Department to determine specifically how Respondents' unaffiliated Taiwanese trading company and unaffiliated selling agent were compensated where it acted as a buyer and reseller for PT and Quick Advance.¹⁹³

For the final determination, Petitioner insists that the Department should counteract such manipulation by applying partial adverse facts available to deduct from U.S. price for both Respondents an amount for its unaffiliated Taiwanese trading company's indirect commissions at a percentage double that paid to the unaffiliated selling agent as direct commissions.¹⁹⁴

Respondents rebut Petitioner's assertion that the Department should adjust the Respondents' sales price to account for the unreported commissions/compensation paid by the Respondents to its unaffiliated Taiwanese trading company. Respondents also assert that the Department conducted an extensive four week verification of Quick Advance/Ko and PT/Proteam where the verifying teams verified commission payments. Moreover, Respondents contend that the team interviewed the Respondents' unaffiliated Taiwanese trading company's officials.

¹⁹¹ See Petitioner's case brief at 43.

¹⁹² See Petitioner's case brief at 44 citing to PT's November 25, 2014, Second Supplemental Section A and C Response at 9 and also Quick Advance's November 12, 2014, Second Supplemental Section A Response at 5.

¹⁹³ See Petitioner's December 3, 2014, Pre-Preliminary Determination Comments at 10-13 and Petitioner's January 21, 2015, Sales Pre-Verification Comments at 6-10.

¹⁹⁴ See Petitioner's case brief at 49.

Respondents argue that the Department verified the completeness and accuracy of sales, costs,¹⁹⁵ and expenses reported by PT, Proteam, Quick Advance, and Ko. In addition, the Respondents contend that their unaffiliated Taiwanese trading company voluntarily submitted its tax return and documentation regarding representative transactions with other companies.¹⁹⁶ Respondents claim that the Department's verifiers confirmed that neither Quick Advance/Ko nor PT/Proteam paid a commission to the trading company and since commissions were not paid, commission expenses cannot be deducted from either Respondent's prices.¹⁹⁷

Respondents rebut Petitioner's characterization of the Department's discussion with its unaffiliated Taiwanese trading company's president as guarded, uninformative, and inconsistent. Respondent asserts that the Taiwanese trading company representatives answered all questions posed by Department officials at verification, in an open, honest and comprehensive manner.¹⁹⁸ Respondents assert while at verification, their unaffiliated Taiwanese trading company confirmed that its unaffiliated Taiwanese selling agent also received a commission for sales by PT/Proteam. Respondents contend the services provided by their unaffiliated Taiwanese selling agent/unaffiliated Taiwanese trading company to Quick Advance/Ko were more extensive, since they included provision of packing material,¹⁹⁹ for which the unaffiliated Taiwanese selling agent received additional commission payments. In addition, Respondents contend that to conduct its own business as buyer/reseller, the unaffiliated Taiwanese trading company assists the unaffiliated Taiwanese selling agent with respect to orders for merchandise to be produced/exported from Taiwan, which are placed with the unaffiliated Taiwanese selling agent and for which the unaffiliated Taiwanese selling agent receives a commission.²⁰⁰

Furthermore, Respondents also assert that the manner in which their unaffiliated Taiwanese selling agent and unaffiliated Taiwanese trading company conduct business between themselves is not at issue in this investigation. Respondents contend whether their unaffiliated trading company actually performs the services for which the unaffiliated Taiwanese selling agent is being paid a commission, or whether the Taiwanese selling agent compensates the Taiwanese trading company for these services, either directly or indirectly, is not relevant to the Department's ultimate determination. Accordingly, for the final determination, Respondents argues that the Department should not reduce the U.S. sales price for either Respondent.²⁰¹

¹⁹⁵ See Quick Advance's March 19, 2015, Memorandum entitled, "Verification of the Cost Response of Quick Advance Inc. and Ko Nail Inc. in the Antidumping Duty Investigation of Certain Steel Nails from Taiwan," (Quick Advance's cost verification memo) and PT's March 19, 2015, Memorandum entitled, "Verification of the Cost Response of PT Enterprise Inc. in the Antidumping Duty Investigation of Certain Steel Nails from Taiwan," (PT's cost verification memo) (Respondents' costs verification memoranda, collectively).

¹⁹⁶ See Quick Advance's February 26, 2015, Memorandum to the File entitled, "Verification of the Sales Response of Quick Advance, Inc. and Ko's Nail, Inc. in the Investigation of Nails from Taiwan" (Quick Advance's sales verification memo); and PT's February 26, 2015, Memorandum to the File entitled, "Verification of the Sales Response of PT Enterprises, Inc. and Proteam Coil Nail Enterprises. Inc. in the Investigation of Nails from Taiwan" (PT's sales verification memo) (Respondents' sales verification memoranda, collectively).

¹⁹⁷ See Respondents' sales verification memoranda.

¹⁹⁸ See Respondents' April 9, 2015, Rebuttal Brief (Respondents' rebuttal brief) at 29, citing to the Quick Advance's sales verification memo at 19 and SVE 20.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ See Respondent's rebuttal brief at 32.

The Department's Position:

We disagree with Petitioner that the Department should adjust PT's and Quick Advance's U.S. prices or apply adverse facts available for allegedly unreported commissions/compensation paid to its unaffiliated Taiwanese selling agent and unaffiliated Taiwanese trading company.

Sections 776(a)(1) and (2) of the Act provide that the Department shall, subject to section 782(d) of the Act, apply "facts otherwise available" if necessary information is not on the record or if an interested party or any other person: (A) withholds information that has been requested; (B) fails to provide information within the deadlines established, or in the form and manner requested by the Department, subject to subsections (c)(1) and (e) of section 782 of the Act; (C) significantly impedes a proceeding; or (D) provides information that cannot be verified as provided by section 782(i) of the Act. Section 776(b) of the Act further provides that the Department may use an adverse inference in applying the facts otherwise available when a party has failed to cooperate by not acting to the best of its ability to comply with a request for information.

Where U.S. price is based on EP sales,²⁰² we find that the Respondents' commissions paid to the unaffiliated companies were adequately accounted for under the circumstance of sale provision set forth in section 773(a)(6) of the Act.²⁰³ The Respondents during verification and throughout this investigation justified how "commissions" are paid to the unaffiliated Taiwanese trading company and unaffiliated Taiwanese selling agent.²⁰⁴

PT and Quick Advance in this investigation have provided on the record the commission payments for its unaffiliated Taiwanese selling agent, and at verification the Department interviewed officials and received documentation on how the unaffiliated Taiwanese trading company is compensated for its services.²⁰⁵ Also, we agree with the Respondents that its unaffiliated Taiwanese trading company and unaffiliated Taiwanese selling agent are not under investigation in this review and how they conduct business between themselves is not at issue in this investigation.²⁰⁶ The record in this investigation supports the Respondents' assertion that their unaffiliated Taiwanese trading company and unaffiliated Taiwanese selling agents were adequately compensated during the POI. Accordingly, for the final determination, we find no adjustments are needed for PT's and Quick Advance's U.S. price nor is application of adverse facts available warranted.

PT/Proteam

Comment 10: The Department Should Assign Partial AFA to PT's Unreported Sales of Subject Merchandise

²⁰² See *Notice of Preliminary Determinations of Sales at Less Than Fair Value: Certain Durum Wheat and Hard Red Spring Wheat From Canada*, 68 FR 24707 (May 8, 2003) and also see *Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Wire Rod From Italy*, 63 FR 40422 (July 29, 1998), and accompanying Issues and Decision Memorandum at comment 6.

²⁰³ See also 19 CFR 351.410(e).

²⁰⁴ See Respondents' rebuttal brief at 29, citing to the Quick Advance's sales verification memo at 19 and SVE 20.

²⁰⁵ See PT's sales verification report at 4 and Quick Advance's sales verification report at 19.

²⁰⁶ See Respondents' rebuttal brief at 31.

Petitioner states that the Department found at verification PT failed to report products that are considered subject merchandise in its sales database.²⁰⁷ Petitioner argues that the Department should take this reporting failure into account in the final determination by using the highest corroborated margin from the Petition and add it into the Department's margin calculation.²⁰⁸

Respondents disagree with Petitioner's claim about unreported sales. Respondents point out that there were no discrepancies noted in either quantity and value reconciliation or completeness tests in PT's Sales Verification Report. Respondents argue that Petitioner is mistakenly referring to issue number 1 in the Department's Cost Verification Report. Respondents state that there is no basis in law or fact to the Department to conclude that PT had unreported U.S. Sales.²⁰⁹

The Department's Position:

We disagree with Petitioner. We find that there is no evidence on the record to suggest that there are unreported sales of the product in question. The Department found no discrepancies while conducting the verification.²¹⁰ Furthermore, the section at issue from PT's verification report is consistent with what PT had reported previously.²¹¹ Therefore, we will not be applying partial adverse facts available.

Comment 11: Transactions disregarded – Tolling Activities

Petitioner argues that the Department should find PT's affiliated producer Pro-Team affiliated with its tollers and apply the transactions disregarded analysis for the tolling services in accordance with section 773(f)(2) of the Act. According to Petitioner, Pro-Team has the potential to exercise control over the operations of its tollers and therefore argues that the Department should treat Pro-Team's tollers as affiliated parties.

Petitioner claims that the Department's practice confirms that it may consider control to exist, and thus find that the producer is affiliated with the tollers or processors, when the producer has the potential to manipulate price and production of the tollers or processors.²¹²

In addition, Petitioner cites to *Circular Welded Carbon Standard Steel Pipe and Tubes from India*, where the Department found RPL and RSL to be affiliated because they were "manufacturing units" within the "Rajinder Group" and their relationship had the potential to impact decisions concerning the production, pricing, or cost of the subject merchandise or foreign like product.²¹³ Petitioner also cites to *Shrimp from Brazil*, where the Department found CIDA to have the ability to control its processing company, Produmar, and that the two entities were affiliated given the

²⁰⁷ Petitioner cites to PT's Sales Verification Report at 9.

²⁰⁸ See Petitioner's case brief at 77-78.

²⁰⁹ See Respondents' rebuttal brief at 60.

²¹⁰ See PT's Sales Verification Report.

²¹¹ See PT's October 27, 2014 submission at 2; see also PT's November 26, 2014 submission at 4.

²¹² See *Notice of final determination of sales at less than fair value: Certain Frozen and Canned Warmwater Shrimp from Brazil*, 69 FR 76910 (Dec. 23, 2004) and the accompanying Issue and Decision Memorandum at comment 5 (citing the final results of new shippers antidumping duty administrative review *Certain Welded Carbon Standard Steel Pipe and Tubes from India*, 62 FR 47632, 47638 (Sept. 10, 1997)) (*Steel Pipe from India*).

²¹³ See *Steel Pipe from India*, 62 FR 47638.

great extent to which the two companies operated as a single entity.²¹⁴ According to Petitioner, the Department noted that Produmar shared the same building and administrative space with CIDA, had no administrative staff, used the administrative staff of CIDA, and had an exclusive processing relationship with CIDA.²¹⁵

Petitioner claims that the Department has described Pro-Team as a “coordinator/producer of nails.”²¹⁶ Petitioner claims that many of the tollers share production facilities and equipment or use Pro-Team’s production equipment. Petitioner claims that in some cases Pro-Team pays the rent on the building, as well as the utilities.²¹⁷ Petitioner argues that all these facts show that Pro-Team and its tollers have a close supplier relationship and the tollers are dependent on Pro-Team.²¹⁸ Petitioner questions the reliability of the tollers’ reported data, arguing that the tollers’ financial statements and tax returns are essentially false and are manipulated to report a profit rate specifically expected and required by the government, in order to reduce the risk of an audit.²¹⁹ Petitioner argues that the tollers’ manipulated financial statements and tax returns clearly have no standing as a reliable basis for any conclusion in this investigation and the Department cannot rely on those same tax returns as proof that the tollers owned their own machinery or equipment, or otherwise acted independently of Pro-Team.

Petitioner argues that the record evidence – coupled with established Department practice that considers a producer to be affiliated with its tollers where the relationship has the potential to impact decisions concerning the production, pricing, or cost of the subject merchandise – compels a determination that at least a few of the tollers are affiliated.²²⁰ The Department should accordingly disregard the transactions between PT/Pro-Team and the tollers that Petitioner has identified as affiliated tollers, pursuant to section 773(f)(2) of the Act.

According to Petitioner, the Department compared the average prices of tolling services provided by affiliated (*i.e.*, “transfer price”) and unaffiliated (*i.e.*, “market price”) suppliers and concluded that the market price was greater than the transfer price for wire drawing and nail making.”²²¹ Petitioner claims that the comparison table was based on the PT’s definition of the affiliated parties. However, Petitioner argues that additional tollers should be considered affiliated with Pro-Team and a revised comparison should be made.²²² Petitioner notes that, in deriving the necessary transactions disregarded adjustments for collating and packing services, a proper comparison between market price and transfer price can only be executed for paper collating. This is the only collating and packing service where an unaffiliated toller provides services for Pro-Team and a market price can be calculated. Petitioner argues that the Department should apply facts available to the other packing and collating services by assuming that the transfer

²¹⁴ See *Shrimp from Brazil*, 69 FR 76910.

²¹⁵ *Id.*

²¹⁶ See PT Cost Verification Report at 18.

²¹⁷ See Petitioner’s case brief at page 64.

²¹⁸ *Id.* at page 61 (citing PT Cost Verification Report at 18).

²¹⁹ *Id.* at page 70.

²²⁰ *Id.*

²²¹ See PT Cost Verification Report at 19.

²²² See Exhibit 3 of the Petitioner’s Case Brief, where Petitioner identified the additional tollers that it believes should be considered affiliated with Pro-Team and the adjustment for transactions disregarded.

prices for other packing and collating services are below market price, and apply the transactions disregarded adjustment calculated for paper collating to all collating and packing services.

Respondents argue that there is no material difference between the prices paid to affiliated and unaffiliated tollers for services (*e.g.*, wire drawing and nail making). Respondents claim that the affiliated party prices “fairly reflect the amount usually reflected in sales of merchandise under consideration in the market under consideration.”²²³ Therefore, Respondents argue that the Department should rely on the payments made to affiliated tollers in determining weighted average tolling fees for the final determination.

Respondents argue that the Department should not entertain Petitioner’s arguments that unaffiliated tollers are in fact affiliated with Pro-Team through close supplier relationships. According to Respondents, the Department’s regulation, 19 CFR 351.102(b)(3), provides that the Department will not make a finding of control under this statute in the absence of a determination that the relationship has the potential to impact decisions concerning pricing, production or cost of the subject merchandise. Respondents claim that the Department has consistently held that the fact that one party sells 100 percent of its products, or provides 100 percent of its services to another party, is not sufficient to establish affiliation.²²⁴ Respondents also claim that the Department has consistently recognized that the relative size of the parties (*i.e.*, one larger than the other) does not constitute control, nor does control arise merely because two parties co-operate in their business dealings.²²⁵

Respondents note that Petitioner cited to only two Department determinations in their briefs to support their analysis.²²⁶ Respondents argue that the facts in those cases are completely different than those present here. According to Respondents, in *Shrimp from Brazil*, both companies were operated by the same family, shared employees, and the same individuals that managed production at one company also managed the other’s operations.²²⁷ In other words, the business operations of these companies were completely intertwined. Respondents claim, that in *Welded Carbon Steel Pipe from India*, the Department based its determination on the fact that the two companies were “manufacturing units” within one Group, and that the companies had overlapping members of the board of directors and overlapping management.²²⁸ Respondents note that in contrast, in the instant case there are no family connections, no shared employees, no common directors, no common management, no common production activities, no common sales responsibilities, and no common record- keeping, between PT and its unaffiliated tollers.

Respondents note that in its *Preliminary Determination*, the Department disagreed with Petitioner’s allegations and did not find a close supplier relationship existed with any of the

²²³ See Respondents’ rebuttal brief at page 3.

²²⁴ See Respondents’ rebuttal brief at page 45.

²²⁵ See Respondents’ rebuttal brief at pages 45 and 46.

²²⁶ See *Certain Frozen and Canned Warmwater Shrimp from Brazil*, 69 FR 76910 (Dec. 23, 2004) (*Shrimp from Brazil*), and *Certain Welded Carbon Standard Steel Pipe and Tubes from India*, 62 FR 47632 (Sept. 10, 1997) (*Welded Carbon Steel Pipe from India*).

²²⁷ *Shrimp from Brazil*, 69 FR 76910.

²²⁸ See *Welded Carbon Steel Pipe from India*, 62 FR 47632.

unaffiliated tollers.²²⁹ Respondents note that most of the unaffiliated tollers were in business before they began doing business with PT, and in many cases a considerable period of time before they began doing business with PT.²³⁰ According to Respondents, each toller has its own production report, material transfer slip and issues its own invoice.²³¹ Respondents claim that the absence of any control or ability by PT to control the prices it pays to the unaffiliated tollers is confirmed by the per/kg prices paid to unaffiliated tollers for the same services. Respondents claim that the fact that the tollers are in close proximity is important, and rational, since they function in effect as a kind of assembly line moving product from one production stage to another and does not support that they are affiliated as argued by Petitioner.

The Department's Position:

Prior to the *Preliminary Determination*, we solicited information from Pro-Team regarding its unaffiliated tollers in order to analyze Pro-Team's relationship with these companies (i.e., to assess any close supplier relationships that may allow Pro-Team to exert restraint or direction over these companies).²³² For the *Preliminary Determination*, we found that record evidence did not support a finding that Pro-Team controlled its unaffiliated tollers by means of a close supplier relationship.²³³ We made further inquiries concerning Pro-Team's unaffiliated tollers during the cost verification.²³⁴

We examined several factors in analyzing whether Pro-Team was able to exert restraint or direction over its unaffiliated tollers. Among the factors considered were: (i) the terms and provisions of supply agreements; (ii) the relative percentage that tolling services to Pro-Team represented of each of the suppliers' total sales; (iii) the terms of any financing agreements with the suppliers; and (iv) the overall profitability of the tollers.²³⁵ We described the tollers and their operations in the cost verification report,²³⁶ which includes an analysis of the tolling operations and whether the tollers owned the land/building and machinery, the years they provided tolling services to Pro-Team, and whether they share the same shareholders with Pro-Team or other tollers.²³⁷ Pro-Team and its unaffiliated tollers have no stock ownership in each other, they do not share officers or managers, there are no employees or partnership type relationships, and

²²⁹ See Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Determination – PT Enterprise Inc. dated December 17, 2014, at pp. 1-2, where the Department stated “In its October 21, 2012 {sic, meaning 2014} submission, PT submitted detailed, supplier-specific information for its unaffiliated tollers. As part of our analysis, we examined the nature of the relationship between PT and its tollers, as well as the tollers' profits, supply agreements in effect during the period of investigation, loans provided by PT (if any), and the relative percentage sales to PT represented of each toller's total sales. Based on our review of the tollers' data, which we summarized in attachment 1, we have preliminarily determined that the record does not support a finding that PT is in a position to control its unaffiliated tollers, within the meaning of Section 771(33)(G) of the Act.”

²³⁰ See PT's rebuttal brief at page 50.

²³¹ *Id.* at page 55.

²³² See the Department's September 29, 2014, supplemental Section D questionnaire.

²³³ See *Preliminary Determination*, 79 FR 78053; see also Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Determination – PT Enterprise Inc., dated December 17, 2014, at pp. 1-2.

²³⁴ See PT's Cost Verification Report at pages 4 through 8, page 15, and pages 17 through 18.

²³⁵ See page 4 and exhibits SD-11 and SD-12 of Pro-Team's supplemental Section D response.

²³⁶ See page Cost Verification Report at 4.

²³⁷ See Attachment 1 to the Prelim Cost Calculation Memorandum.

there is no common familial ownership.²³⁸ In contrast, in *Shrimp from Brazil*, both companies were operated by the same family, shared employees, and the same individuals that managed production at one company also managed the other's operations.²³⁹ In *Welded Carbon Steel Pipe from India*, the two companies were "manufacturing units" within one Group, and the companies had overlapping members of the board of directors and overlapping management.²⁴⁰ These facts are not present in this case. Therefore, we continue to find that affiliation between Pro-Team and its tollers cannot be established based on section 771(33)(A) through (E) of the Act.

Sections 771(33)(F) and (G) allow the Department to find affiliation where some form of control exists. Sections 771(33)(F) and (G) of the Act, provide that affiliation may be found when a person controls another person. Section 771(33) of the Act further provides that for purposes of this paragraph, a person shall be considered to control another person if the person is "legally or operationally in a position to exercise restraint or direction over the other person." The Department's regulations at 19 CFR 351.102(b)(3) state that, in finding affiliation based on control, the Department will consider, among other factors the existence of a close supplier relationship. Control between persons may exist in close supplier relationships in which either party "becomes reliant upon the other on another."²⁴¹ Only if such reliance exists does the Department then determine whether one of the parties is in a position to exercise restraint or direction over the other. The Department will not, however, find affiliation on the basis of this factor unless the relationship has the potential to affect decisions concerning the production, pricing, or cost of the subject merchandise or foreign like product.²⁴²

While many of the tollers provided services exclusively to Pro-Team, many of the tollers had been operating long before doing business with Pro-Team.²⁴³ This fact indicates that these companies could provide their services to other clients and in many cases have provided services to others.²⁴⁴ There were no contracts or agreements on the record between Pro-Team and its unaffiliated tollers locking the toller into providing services for a specific period of time.²⁴⁵ We found nothing that prohibits the tollers from providing services to other companies. Another factor we considered in our analysis was the relative percentage that services to Pro-Team represented of each of the supplier's total sales.²⁴⁶ Based on our review of the sales and purchase data provided by PT in its October 21, 2014, submission, while some of the tollers

²³⁸ *Id.*

²³⁹ See *Shrimp from Brazil*, 69 FR 76910.

²⁴⁰ See *Welded Carbon Steel Pipe from India*, 62 FR 47632.

²⁴¹ See SAA at 838.

²⁴² See 19 CFR 351.102(b)(3).

²⁴³ See Exhibit SD-13 of Pro-Team's supplemental Section D response.

²⁴⁴ See, e.g., *Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products From Korea: Final Results of Antidumping Duty Administrative Reviews*, 62 FR 18404, 18417 (April 15, 1997) (*Korean Steel*), where the Department stated that we "must find that a situation exists where the buyer has, in fact, become reliant on the seller, or vice versa. Only if we make such a finding can we address the issue of whether one of the parties is in a position to exercise restraint or direction over the other. When the preamble to our *Proposed Regulations*, in its definition of "affiliated parties," states that "business and economic reality suggest that these relationships must be significant and not easily replaced," it suggests that we must find significant indicia of control. See *Proposed Regulations* at 7310."

²⁴⁵ See page 4 and exhibits SD-11 and SD-12 of Pro-Team's supplemental Section D response.

²⁴⁶ See Exhibit SD-12 of Pro-Team's supplemental Section D response.

provided services exclusively to Pro-Team, in other instances the tollers provided services to other parties. Also we noted that multiple tollers provided Pro-Team with the same services, indicating that the tollers had no expectation of exclusively providing a particular service to Pro-Team.²⁴⁷ Moreover, all of the tollers that had most if not all of their business with Pro-Team had an operating profit during 2013.²⁴⁸ The fact that these suppliers were profitable suggests that Pro-Team lacks the ability to control completely the prices at which it purchases services from its tollers. As part of our analysis, we also examined whether there were any debt financing agreements with Pro-Team's unaffiliated tollers. A review of the record reveals no debt financing agreements between Pro-Team and any of its tollers.

While Pro-Team and its unaffiliated tollers cooperate closely, we do not consider this cooperation to demonstrate "reliance" for purposes of finding affiliation through control under sections 771(33)(F) and (G) of the Act. There is no evidence on the record that Pro-Team's tollers could not look to other buyers of their services. In fact, the record contains evidence that there is a significant number of nail producers in Taiwan. Exhibit General-5 of the Petition dated May 29, 2014, indicates that there are at least 136 producers/exporters of nails in Taiwan from which the U.S. and comparison-market customers can purchase nails, thereby eliminating any notion of dependence on Pro-Team by its unaffiliated tollers. Thus, we do not find a sufficient basis for finding that reliance exists. Any appearance of closeness arising from the relationship between Pro-Team and its unaffiliated tollers does not appear to be the result of exclusive dependence on Pro-Team by its unaffiliated tollers. Rather, it appears to be the result of the typical economic cooperation required under Pro-Team's decentralized business model. Moreover, affiliation through a close supplier relationship under 19 CFR 351.102(b)(3) must be evidenced by the relationship's effect on decisions concerning the merchandise under consideration. We find no evidence that the tollers have the ability to affect the production, pricing or cost of the subject merchandise or foreign like product.²⁴⁹

The Preamble to our Proposed Regulations, in its definition of affiliated parties, states that "business and economic reality suggest that these relationships must be significant and not easily replaced, it suggests that we must find significant indicia of control."²⁵⁰ In this case we did not find significant indicia of control. After analyzing the evidence on the record, we continue to find that Pro-Team's unaffiliated tollers are not affiliated with Pro-Team through close supplier relationships as suggested by Petitioner. As noted above, a close supplier relationship is defined as one in which the buyer or the seller becomes "reliant" on the other with the potential to affect decisions on production, price or cost of the end product (*i.e.*, nails).

We disagree with Petitioner's assertion that the tollers' financial statements and tax returns are essentially false and are manipulated. The Department reviewed the invoices and tax returns of

²⁴⁷ See Exhibit SD-7.3 of Pro-Team's supplemental Section D response.

²⁴⁸ See Exhibit SD-11 of Pro-Teams supplemental Section D response.

²⁴⁹ See *TIJID*, 366 F. Supp. 2d at 1299. The CIT acknowledged in *TIJID* that, even where there was a high level of cooperation between parties, one did not have the ability to exercise restraint or direction over the other.

²⁵⁰ See *Antidumping Duties; Countervailing Duties*, 61 FR 7308, 7310 (Feb. 27, 1996) (*Proposed Regulations*); *Korean Steel*, 62 FR 18404, discussing the concern that relationships are not "easily replaced."

the tollers and did not find anything to indicate that the tollers were falsifying or manipulating their records.²⁵¹

We disagree with PT that the Department should not apply its transaction disregarded analysis in the manner it did in the *Preliminary Determination* because there was not any material difference between the prices paid to affiliated and unaffiliated tollers for tolling services. While the Department has discretion in applying the major input and transactions disregarded rule,²⁵² we made an adjustment for the *Preliminary Determination*, because we found that there was a difference between the market price and transfer prices for drawing and nail making services. Thus, for the final determination, we have continued to make the transactions disregarded adjustment pursuant to section 773(f)(2).

Since the *Preliminary Determination*, there has been no information or argument submitted that persuades us to change our finding that Pro-Team and its unaffiliated tollers are not affiliated within the meaning of section 771(33)(F) and (G) of the Act. For the final determination we will conduct our transaction disregarded analysis by comparing the cost of toller services of the affiliated and unaffiliated tollers, without considering additional tollers to be affiliated as suggested by Petitioner.

Comment 12: Threading Costs

Petitioner argues that for PT, the Department should use the unaffiliated tollers average price of threading carbon steel nails to adjust the costs of services provided by the acknowledged affiliate, Xin-Cheng Industry Inc. Petitioner believes that the Department overlooked the fact that the unaffiliated toller did some threading for carbon steel nails. Petitioner notes that exhibit SD-7.3 of PT's supplemental section D response clearly shows the POI quantity and value of threading done for stainless steel and carbon steel nails separately by the unaffiliated toller.²⁵³

Respondents argue that the unaffiliated toller's threading of carbon steel nails is not comparable to Xin-Cheng's threading of carbon steel nails. According to Respondents, the Department's Cost Verification Report, at page 17, states that the unaffiliated toller "does full threading of nails whereas Xin-Cheng Industry does not thread the whole nail." Respondents argue that because Xin-Cheng only partially threads carbon steel nails, those products cannot be compared. Therefore, Respondents argue that no adjustment to the respective average prices should be made.²⁵⁴

The Department's Position:

²⁵¹ See page 18 of the Cost Verification Report, where the Department stated that "We traced the amounts paid to Pro-Team's tollers to Pro-Team's income statement. As an additional step, for the tollers doing 100 percent of their business with Pro-Team we reconciled the amount they were paid to Pro-Team's income statement and to the toller's tax return (see CVE 6). We traced selected tolling changes to invoices."

²⁵² See *SKF USA, Inc. v. United States*, 116 F. Supp. 2d 1257, 1267 (CIT 2000) (*SKF*) (holding that the statutory construction of sections 773(f)(2) and (3) of the Act gives the Department discretion as to how it applies the major input rule, including whether some or all of the elements of the major input rule are considered).

²⁵³ See Petitioner's case brief at 73 through 75.

²⁵⁴ See Respondent's rebuttal brief at 58 and 59.

For the *Preliminary Determination*, the Department did not adjust Xin-Cheng's threading costs because there were no comparable market prices for the services and we found that the transfer price was at or above the cost of the service. We agree with Respondents that the unaffiliated toller does full threading of nails, whereas Xin-Cheng, (the affiliated toller), does not thread the whole nail.²⁵⁵ Therefore, the toller services are not comparable and the unaffiliated tollers per-unit toller charge should not be used in performing the Department's transactions disregarded analysis.

Comment 13: General and Administrative Expense

PT argues that all costs and expenses (including general and administrative (G&A)) expenses related to its other line of business should be excluded altogether. PT claims that its accounting records allow it to report costs/expenses, including G&A, separately for the other line of business, which is not used in anyway in the production of nails. Alternatively, PT argues that if the Department adds the G&A expenses related to its other line of business, then the Department should offset the G&A expenses (*i.e.*, the expenses associated with the general operations of the company) with the subsidy received by Pro-Team from the Government of Taiwan, which compensates Pro-Team for incurring those expenses related to that line of business. PT cites to a few cases where the Department includes grants received from the government in the reported costs.²⁵⁶

Petitioner argues that the "other" activity is a minor activity of the company and not a separate line of business. As such, Petitioner argues that the Department should include the net costs and revenues of those activities in the numerator of the G&A expense ratio calculation and exclude the costs of those activities from the denominator used to calculate the G&A ratio for the final determination. According to Petitioner, Pro-Team could not provide the quantity of the activity produced/generated each month or the quantity and value sold each month. Petitioner claims that there is no way to know whether the activity was used in the production of the merchandise under consideration or for administrative purposes. Therefore, Petitioner argues that the activity should be considered as part of the general operations of the company as a whole, and its net results should be included in G&A for the final determination.

While Petitioner agrees that it is the Department's practice to include government subsidies or grants that relate to the company's main operations in G&A, Petitioner argues that the grant in

²⁵⁵ See PT's Cost Verification Report at 17.

²⁵⁶ See *Notice of Final Determination of Sales at Less Than Fair Value: Live Swine From Canada*, 70 FR 12181 (March 11, 2005) Comment 2, where it states that "the Department normally includes the grants received from the government in the reported costs. . . . Consistent with the Department's past practice, and the fact that the NISA program relates to the total farming operations, we have continued to include the government contributions received by the respondents for the fiscal year from the NISA program as an offset to respondents' reported G&A costs. See *Notice of Final Results and Partial Rescission of Antidumping Duty Administrative Review: Certain Pasta From Italy*, 64 FR 6615 (February 10, 1999) Comment 13: where the Department stated that "we agree with Puglisi that the grants for equipment purchases and loan-restitution payments for leased production equipment should be treated as offsets to total G&A expenses. The grants relate specifically to the company's general operations. Consistent with our findings in *Pasta from Italy*, 61 FR 30326, 30355, and *Furfuryl Alcohol from South Africa*, 60 FR 22550, 22556, we have included the grants received for equipment purchases and loan-restitution payments for leased production equipment by the Italian government as offsets to total G&A expense for the final margin calculation."

question does not apply to Pro-Team's main production operations – nail making – given that the activity is a minor activity of the company. Petitioner claims that the activity does not appear to be “production” at all, but a minor activity more akin to rental activity. Petitioner argues that the Department should treat the subsidy consistent with how it treats the underlying activity.

According to Petitioner, given that the activity is a minor activity of the company and does not appear to be a production activity, the Department's practice requires that the net of the activities costs and revenues should be included in the numerator of Pro-Team's G&A expense ratio, and to ensure an apples-to-apples ratio calculation, all activity costs should be excluded from the denominator of the G&A ratio calculation. Petitioner argues that because Pro-Team's “activity” appears to be primarily rental activities, it is the Department's established practice to include both costs and revenues of rental activities, as a minor activity of a company, in the numerator of the G&A expense calculation.²⁵⁷ For the final determination, the Department accordingly should treat this subsidy in the same manner as all activity costs and revenues by simply including it in the numerator of the G&A ratio.²⁵⁸

The Department's Position:

The activity being discussed appears to be a separate line of business of Pro-Team. We discussed the activity in PT's cost verification report.²⁵⁹ The costs of the separate line of business were recorded separately in Pro-Team's financial accounting records and the activities of the separate line of business were not related in any way to the production of nails or used for the general operations of the company as suggested by Petitioner. The costs associated with the other line of business were properly included in the denominator of the G&A expense ratio calculation (*i.e.*, cost of goods sold).

We disagree with PT that G&A expenses should be calculated on a product-specific basis or for each line of business. Section 773(f)(1)(A) of the Act states that the COP “shall normally be based upon the records of the exporter or producer of the merchandise, if such records are kept in accordance with the generally accepted accounting principles of the exporting country . . . and reasonably reflect the costs associated with the production and sale of merchandise.” Because there is no definition in the Act or regulations of what a G&A expense is or how the G&A expense ratio should be calculated, the Department has, over time, developed a consistent and predictable practice for calculating and allocating G&A expenses. This reasonable, consistent,

²⁵⁷ Petitioner cites *Circular Welded Carbon Steel Pipes and Tubes from Thailand: Final Results of Antidumping Duty Administrative Review; 2011-2012*, 78 FR 65272 (Oct. 23, 2013), and accompanying Issues and Decision Memorandum at Comment 2, where the Department stated that “we have included, for the final results, both the warehouse rental income and associated expenses in the G&A expenses because these amounts are associated with general operations of the company as a whole. When determining if an activity is related to the general operations of the company, the Department considers the nature, the significance, and the relationship of that activity to the general operations of the company. In the instant case, the warehouse rental income and expenses are a minor activity that relates to the general operations of the company as a whole. Saha Thai's rental activity in question does not relate to a separate line of business. Instead, it represents a minor activity associated with the company's general operations, resulting in a very small amount of net gain. Accordingly, we consider it appropriate to include both the income and related expenses in the calculation of Saha Thai's G&A expense ratio.”

²⁵⁸ See Petitioner's rebuttal brief at 6.

²⁵⁹ See Memorandum from Laurens Van Houten to Neal M. Halper entitled, “Verification of the Cost Response of PT Enterprise Inc. in the Antidumping Duty Investigation of Certain Steel Nails from Taiwan,” dated March 19, 2015 (PT's Cost Verification Report) at 11.

and predictable method is to calculate the rate based on the company-wide G&A costs incurred by the producing company allocated over the producing company's company-wide COGS, and not on a consolidated, divisional, or product-specific basis.²⁶⁰ Moreover, the nature of G&A expenses is that they relate to the administration of the company as a whole.

We disagree with PT that the subsidy in question received from the government should be used as an offset to G&A expense. When determining if an activity is related to the general operations of the company, the Department considers the nature, the significance, and the relationship of that activity to the general operations of the company.²⁶¹ As noted in the Cost Verification Report, the subsidy in question was provided to the company to promote energy production.²⁶² While it is the Department's normal practice to include non-specific subsidies in G&A when they are related to the general operation of a company,²⁶³ this subsidy is not related to the general operations of the company as a whole, but instead appears directly related to and intended for the company's other line of business.²⁶⁴ Because the subsidy is related directly to Pro-Team's other line of business, we consider it appropriate to include the subsidy in the cost of goods sold for its other line of business. As such, it should be applied as an offset to the cost of goods sold denominator used in the G&A expense ratio calculation, not the G&A expense numerator.

Quick Advance/Ko

Comment 14: The Department Should Rely on Quick Advance/Ko's Section C Database Submitted After Verification

Quick Advance states that the Department should calculate its final determination with the revised section C database submitted by Quick Advance after verification. Quick Advance claims that this database reflects the minor corrections provided to the Department at verification and included all sales with invoice dates within the POI. Conversely, this database did not include sales with purchase order dates within the POI, but invoice dates outside of the POI. Quick Advance asserts that the data submitted by Quick Advance, as verified by the Department, demonstrates that the proper date of sale cannot be date of the purchase order (PO), since the PO

²⁶⁰ See *Narrow Woven Ribbons With Woven Selvedge From Taiwan; Final Results of Antidumping Duty Administrative Review*; 2012-2013, 80 FR 19635 (April 13, 2015), and the accompanying Issues and Decision Memorandum at 8.

²⁶¹ See *Circular Welded Carbon Steel Pipes and Tubes from Thailand: Final Results of Antidumping Duty Administrative Review*; 2011-2012, 78 FR 65272 (Oct. 23, 2013), and accompanying Issues and Decision Memorandum at Comment 2, where the Department stated that "we have included, for the final results, both the warehouse rental income and associated expenses in the G&A expenses because these amounts are associated with general operations of the company as a whole. When determining if an activity is related to the general operations of the company, the Department considers the nature, the significance, and the relationship of that activity to the general operations of the company."

²⁶² See PT's Cost Verification Report at 22

²⁶³ See *Notice of Final Results and Partial Rescission of Antidumping Duty Administrative Review: Certain Pasta From Italy*, 64 FR 6615 (February 10, 1999), where the Department stated "We agree with Puglisi that the grants for equipment purchases and loan-restitution payments for leased production equipment should be treated as offsets to total G&A expenses. The grants relate specifically to the company's general operations." See also *Notice of Final Determination of Sales at Less Than Fair Value: Certain Pasta From Italy*, 61 FR 30326 (June 14, 1996) at comment 11.

²⁶⁴ See PT's Cost Verification Report at page 22.

date is not a date recorded in Quick Advance's books and since there were changes in material terms of the transactions (price, quantity, merchandise ordered) in numerous POs issued by Quick Advance's customer during the POI.²⁶⁵

Petitioner did not comment on this issue.

The Department's Position:

We agree with the Quick Advance. The Department will rely on Quick Advance's March 3, 2015, section C database received after verification for these final determinations. This database reflects the minor corrections provided at verification and all sales within invoices dates within the POI.²⁶⁶

Comment 15: Ko's Raw Materials

The Department presented two issues in its cost verification report related to raw materials costs to be considered for the final determination.²⁶⁷ Petitioner argues that these items were errors that the Department should correct for the final determination. The first issue is a reconciliation difference that resulted from a raw material overage at the end of the fiscal year. Petitioner contends that although the Department conducted several tests to identify the nature of the overage, Quick Advance/Ko's records did not contain the detail necessary to determine the source of the overage and therefore the variance should not be excluded from reported costs. The second issue consisted of two errors related to Quick Advance/Ko's scrap revenue offset. Petitioner explains that during the course of the cost verification, the Department found that the scrap offset was double-counted and that it was also overstated. Petitioner argues that the Department should increase Quick Advance/Ko's reported raw material costs for the raw material overage and the scrap offset errors.²⁶⁸

Respondents concur with the Department's proposed adjustment to correct for the clerical errors related to the reported scrap revenue offset. However, Respondents disagree that the reconciliation difference that resulted from a raw material overage should be added to reported costs. Respondents assert that it presented all of the relevant facts to the Department. Moreover, that the Department verified the raw material overage that was booked as a year-end surplus. Nevertheless, Respondents assert that if the Department decides to add the variance back to reported costs, then the Department should not add back the portion related to the first quarter of 2013, which is outside the POI.²⁶⁹

The Department's Position:

²⁶⁵ See Quick Advance's case brief at 5.

²⁶⁶ See Quick Advance's sales verification report at pages 2-3 and VE 1.

²⁶⁷ See Memorandum from Gina K. Lee to Neal M. Halper, RE: Verification of the Cost Response of Quick Advance Inc. and Ko Nail Inc. in the Antidumping Duty Investigation of Certain Steel Nails from Taiwan, page 2, dated March 18, 2015 (Ko's Cost Verification Report).

²⁶⁸ See pages 78-79 of the Petitioner's case brief and page 1-3 of Petitioner's rebuttal brief.

²⁶⁹ See pages 2-5 of Respondents' case brief and pages 60-61 of Respondents' rebuttal brief.

At the cost verification, the Department reviewed support for a variance which Ko explained resulted from a raw material overage.²⁷⁰ Although we noted that the overage was booked by Ko after its physical count of the year-end inventory, it is not apparent from the record whether this overage related to the beginning inventory, purchases, consumption of the raw materials, or some other error. During the course of our cost verification, we tested all three of these elements. Furthermore, the raw material movement schedule for October to December, 2013, shows the overage being added along with purchases, but this only shows an increase to raw material inventory and does not demonstrate the actual source of the original error.²⁷¹ Therefore, as the raw material overage could have related to either beginning inventory, purchases, consumption of the raw materials, or some other error, and as the burden of demonstrating which item it relates to rests on the responding party, it is not certain that this overage should be a reduction to costs. Therefore, we have added the raw material overage back to the reported costs for the final determination. Furthermore, as the nature of the error is unclear, we do not find it appropriate to exclude any portion (*i.e.*, first quarter of 2013) or percentage of the difference from total direct material costs. In addition, we have revised the reported scrap revenue offset amounts for the overstatement and double-counting errors.²⁷²

Comment 16: Ko's Phosphate Coating Costs

Petitioner asserts that the Department obtained documentation at the cost verification which confirms that Ko obtained phosphate coating services from its affiliate at a weighted-average POI transfer price which was lower than the market value (*i.e.*, coating services that Ko's affiliate charged to unaffiliated customers during the POI)²⁷³. As such, the Department should continue to make transactions disregarded adjustment to Quick Advance/Ko's reported phosphate coating costs for the final determination, using the most updated information that was collected at the cost verification.²⁷⁴

Respondents did not comment on this issue.

The Department's Position:

As was done in the *Preliminary Determination*, we have adjusted the phosphate coating costs to reflect the market value. We have updated our adjustment to reflect the revised figures from the cost verification.²⁷⁵

²⁷⁰ See Ko's Cost Verification Report, page 2.

²⁷¹ *Id.*

²⁷² See Cost of Production and Constructed Value Calculation Adjustments for the *Final Determination* – Quick Advance Inc., dated May 14, 2015 (Quick Advance Final Cost Calc Memorandum).

²⁷³ See pages 79-80 of Petitioner's case brief.

²⁷⁴ See the cost verification exhibit C1.

²⁷⁵ See Quick Advance Final Cost Calc Memorandum.

Conclusion

We recommend following the above methodology for this Final Determination.

Agree ✓ Disagree

Christian Marsh
Christian Marsh
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

5/13/15
Date