Final Results of Redetermination Pursuant to
Mid Continent Nail Corporation v. United States
Slip Op. 13-115 (Ct. Int'l Trade 2013)
(August 30, 2013)

I. SUMMARY

The U.S. Department of Commerce ("Department") prepared these final results of redetermination pursuant to the remand orders of the U.S. Court of International Trade ("CIT" or "Court") in *Mid Continent Nail Corporation v. United States,* Slip Op. 13-115 (CIT 2013) ("Mid Continent Remand Order").

On December 23, 2013, the Department issued the draft results of redetermination to interested parties for comment. On January 6, 2014, Petitioner[1] and CPI *et al.*[2] submitted comments on the draft results of redetermination.

In accordance with the Court's instructions in the Mid Continent Remand Order, the Department determines that U.S. Customs Border and Protection ("CBP") entries misattributed to 10 combination rates[3] pertaining to CPI should be treated in a manner consistent with the rationale underlying the Department's non-market economy ("NME") reseller policy statement.[4] Additionally, as we discuss further below, the Department will amend its previous partial

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[1] Mid Continent Nail Corporation ("Petitioner").
[2] Itochu Building Products Inc., Certified Products International ("CPI"), and certain Chinese producers (collectively known as "CPI *et al.*").
[3] The Separate Rates and Combination Rates Bulletin states: "while continuing the practice of assigning separate rates only to exporters, all separate rates that the Department will now assign in its NME investigations will be specific to those producers that supplied the exporter during the period of investigation. Note, however, that one rate is calculated for the exporter and all of the producers which supplied subject merchandise to it during the period of investigation. This practice applies both to mandatory respondents receiving an individually calculated separate rate as well as the pool of non-investigated firms receiving the weighted-average of the individually calculated rates. This practice is referred to as the application of "combination rates" because such rates apply to specific combinations of exporters and one or more producers. The cash-deposit rate assigned to an exporter will apply only to merchandise both exported by the firm in question *and* produced by a firm that supplied the exporter during the period of investigation." *See* Policy Bulletin 05.1: Separate--Rates Practice and Application of Combination Rates in Antidumping Investigation involving Non-Market Economy Countries (April 5, 2005) (Separate Rates and Combination Rates Bulletin), available on the Department's Web site at http://enforcement.trade.gov/policy/).
[4] *See Non-Market Economy Antidumping Proceedings: Assessment of Antidumping Duties*, 76 FR 65694 (October 24, 2011) ("*NME Final Assessment of Antidumping Duties*").

rescission of the administrative review and no longer rescind the review with respect to CPI, and will instead issue final results of review with respect to CPI. In this regard, the Department will issue instructions to CBP to liquidate the entries with CPI's 23 combination rates, which consist of 10 combination rates that CPI did not acknowledge using ("10 combination rates") and 13 combination rates that CPI did acknowledge using ("13 combination rates"). For the 10 combination rates, the Department finds that it is appropriate to instruct CBP to liquidate entries with these 10 combination rates at the NME-wide rate because the record evidence demonstrates that none of the companies associated with these 10 combination rates made the relevant export sale. For the 13 combination rates and for which each producer had knowledge the merchandise was destined for the United States, the Department finds that it is appropriate to instruct CBP to liquidate entries with these 13 combination rates at the separate rate applicable to the companies identified as the producers in each combination.

II. ANALYSIS

Certain Entries Attributed to Certified Products International ("CPI")

Background

In the first administrative review of certain steel nails from the People's Republic of China ("PRC"), CPI, a Taiwanese reseller, submitted a no-shipment response to the Department and requested that the Department rescind the administrative review with respect to it, pursuant to 19 CFR 351.213(d)(3). In *Preliminary Results AR1*, the Department considered whether CPI or its unaffiliated PRC producers were the respondent(s), based on which party had knowledge that the merchandise was destined for the U.S. market.[5]

[5] *See Certain Steel Nails from the People's Republic of China: Notice of Preliminary Results and Preliminary Rescission, in Part, of Antidumping Duty Administrative Review,* 75 FR 56070 (September 15, 2010) *("Preliminary Results AR1")*; *see also* Statement of Administrative Action Accompanying The Trade Agreements Act of 1979, H.R. Rep. No. 4537, 388, 411, reprinted in 1979 U.S.C.A.N. 665, 682.

In its responses to the Department prior to *Preliminary Results AR1*, CPI maintained that its PRC producers, and not CPI itself, should be considered the actual respondents, as they had knowledge the product was destined for the U.S. market.[6] The Department found in *Preliminary Results AR1* that evidence demonstrated that CPI's producers helped arrange shipping from the PRC port of export to the United States, and were in many instances aware of the ultimate U.S. customer name, and thus had actual knowledge of the final destination.[7]

During this administrative review, the Department obtained CBP data that showed there were entries (based on the nine-digit case numbers) for 23 out of 29 of CPI's combinations. For the 23 combinations identified in the CBP data, CPI acknowledged that it sourced subject merchandise from 13 of the producers and that the other 10 producer combinations were misattributed to it, either due to coding errors or differences in timing.[8] In *Preliminary Results AR1*, after obtaining sample CBP entry packages for every combination rate appearing in the CBP data pertaining to CPI, the Department found that for the 13 producers which CPI acknowledged using during the period of review ("POR"), the entry documents were consistent with the information provided by CPI.[9] However, for the other 10 combinations, the Department found that the entry documents demonstrated that they did not pertain to the combination under which they entered.[10] Accordingly, the Department preliminarily rescinded the review for CPI because it had no shipments of the subject merchandise during the POR.[11]

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[6] *See* Memorandum to James C. Doyle, Director, Office 9, through Alex Villanueva, Program Manager, Office 9, from Matthew Renkey, Senior Analyst, Office 9, Subject: Certain Steel Nails from the People's Republic of China: Partial Rescission of the First Antidumping Duty Administrative Review, (September 7, 2010) at 3 ("Partial Rescission Memo").
[7] *See Preliminary Results AR1;* Partial Rescission Memo at 4.
[8] *See* Partial Rescission Memorandum., at 4.
[9] *Id.*
[10] *Id.*, at 3-4.
[11] *See Preliminary Results AR1.*

In *Nails PRC Final Results AR1*, the Department continued to find that CPI had no shipments of subject merchandise during the POR and rescinded the review with respect to CPI.[12] In response to Mid Continent Nail Corporation's ("Petitioner's") argument that the entries with CPI's 23 combinations should be liquidated at the NME-wide rate, the Department found that 13 of the producers had knowledge that their sales made to CPI, a Taiwanese reseller, were destined for the United States, and that their entries should not be liquidated at the NME-wide rate. Instead, the Department found that these entries should be liquidated at the separate rate the producers earned in the investigation or in this review.[13] Additionally, for the other 10 producer combinations, the Department found that these entries should be liquidated at the rate in effect at the time of entry.[14]

Non-Market Economy Reseller Policy

In AD proceedings, the Department establishes a cash-deposit rate for each company subject to the investigation or review.[15] In market economy ("ME") proceedings, the Department establishes an "all-others" rate that applies to exporters that have not been assigned a company-specific rate.[16] In NME proceedings, the Department establishes an "NME-wide" rate that applies to exporters that do not qualify for, and do not receive, a separate rate.[17]

In the past, in both ME and NME cases, the Department generally instructed CBP to assess antidumping duties("ADs") on entries not examined and/or not otherwise covered by the

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[12] *See Certain Steel Nails from the People's Republic of China: Final Results of First Antidumping Duty Administrative Review*, 76 FR 16379, 16380 (March 23, 2011) ("*Nails PRC Final Results AR1*").
[13] *Id.*, and accompanying Issues and Decision Memorandum at Comment 9.
[14] *Id.*
[15] *See* section 735(c)(1)(B)(i)(II) of the Tariff Act of 1930, as amended ("the Act").
[16] *Id.*
[17] In proceedings involving NME countries, it is the Department's policy to assign all exporters of subject in an NME country a single antidumping duty rate, the NME-wide rate, unless an exporter can demonstrate that it is sufficiently independent of government control so as to be entitled to a "separate rate." *See Prestressed Concrete Steel Rail Tie Wire from the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value*, 78 FR 75545 (December 12, 2013) and accompanying Decision Memorandum at Separate Rates section.

final results of review for a firm that was subject to the review at the rate at which the merchandise entered the United States, *i.e.,* at the cash-deposit rate in effect at the time of entry.[18] However, in May 2003, the Department announced a change to its practice regarding ME cases. In ME cases, the Department began instructing CBP to assess duties at the rate applicable to a party that did not have its own AD rate, *i.e.,* the all-others rate, on entries that were suspended at the deposit rate of the producer subject to review but that were not covered by the final results of review for that firm subject to review.[19] In other words, to the extent that a firm did not report sales to a particular importer or customer during a given review period, the customer or importer was not entitled to a rate that the Department previously established for that firm.[20] Because discussions had not fully explored the Department's revised practice in the NME context, the Department expressly did not apply the *2003 Antidumping Duties Notice* in NME cases.

However, in both NME and ME proceedings, the Department maintains an interest in having entries liquidated in a manner that is consistent with the final results of its administrative reviews. In certain past NME cases, the Department noted instances where certain importers from NME countries had benefitted from an exporter's previously-established cash-deposit rate but had not been reported to the Department during the relevant administrative review of the exporter, and, therefore, should have been liquidated at the NME-wide rate.[21] As described in

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[18] *See Nails PRC Final Results AR1*, and accompanying Issues and Decision Memorandum at Comment 9; 2003 *See Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties*, 68 FR 23954 (May 6, 2003) ("*2003 Antidumping Duties Notice*").

[19] *See 2003 Antidumping Duties Notice.*

[20] *See Chlorinated Isocyanurates from Spain: Final Results of Antidumping Duty Administrative Review*, 78 FR 72633 (December 3, 2013).

[21] *See Glycine from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 74 FR 41121 (August 14, 2009) and accompanying Issues and Decision Memorandum at Comment 7; *First Administrative Review of Certain Polyester Staple Fiber from the People's Republic of China: Final Results of Antidumping Duty Administrative Review,* 75 FR 1336 (January 11, 2010) and accompanying Issues and Decision Memorandum at Comment 3.

the *2003 Antidumping Duties Notice*, the practice of liquidating entries at an exporter's cash-deposit rate claimed at the time of entry where the entries had been suspended pursuant to a request for review of the exporter but were not covered by the final results of review for the exporter subject to review allowed intermediaries to benefit from another firm's rate.[22] For as the CIT stated in *Parkdale,* "there is no reason that a reseller or importer should be entitled to choose among the rates it prefers when none is specific to it, and when it may request its own rate."[23]

Following the CIT's logic in *Parkdale*, in the *June 2011 Assessment of Antidumping Duties*, the Department proposed clarifying its liquidation instructions in NME cases to instruct CBP to liquidate entries of merchandise from a non-reviewed exporter at the NME-wide rate.[24] By clarifying the NME liquidation instructions in a manner similar to that described in the *2003 Antidumping Duties Notice*, the Department intended to ensure that entries were liquidated at the appropriate rate, *i.e.,* the NME-wide rate for entries from firms without a separate rate assigned to them.

After receipt of comments, in the *NME Final Assessment of Antidumping Duties*, the Department refined its policy regarding the rate at which it would instruct CBP to liquidate non-reviewed entries in NME proceedings.[25] The Department determined that it would instruct CBP to apply the NME-wide rate to entries suspended at a reviewed exporter's rate, but which were not reported to or reviewed by the Department during the administrative review process.[26] Additionally, the Department stated that if the Department found that an exporter under review

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[22] *See 2003 Antidumping Duties Notice*, 68 FR at 23961.
[23] *See Parkdale Int'l, Ltd. v. United States*, 491 F. Supp. 2d 1262, 1272 (CIT 2007) ("*Parkdale I*").
[24] *See Non-Market Economy Antidumping Proceedings: Assessment of Antidumping Duties*, 76 F 34046, 34047 (June 10, 2011) ("*June 2011 Assessment of Antidumping Duties*").
[25] *See NME Final Assessment of Antidumping Duties*, 76 FR 65694.
[26] *Id.*

had no shipments of the subject merchandise, any suspended merchandise that entered under that exporter's case number (*i.e.*, at that exporter's rate) would be liquidated at the NME-wide rate.[27]

Mid-Continent Remand Order

In the Mid-Continent Remand Order, the Court found the liquidation determinations regarding CPI's 23 combination rates in this case raise concerns about the reasonableness of the Department's assessment practice in NME cases.[28] The Court noted that, until recently, the Department's duty assessment practice in ME cases and NME cases have been inconsistent.[29] The Court found that after the final results were issued for this case, the Department published a proposal designed to conform the Department's approach to the assessment of ADs in NME proceedings in the circumstances outlined in the Department's practice in ME proceedings.[30]

The Court found that, in this case, the Department did not address the inconsistency regarding the Department's duty assessment practice in ME cases versus NME proceedings.[31] The Court found that the Department's indication to liquidate at the rate entered at the time entry in the final results of this case, involving an NME country, were not consistent with the Department's practice in ME proceedings, and that this inconsistency renders the liquidation instructions unreasonable absent an explanation for why differential treatment between ME and NME proceedings is necessary.[32]

The Court noted that the *NME Final Assessment of Antidumping Duties* found that the goal of liquidating non-reviewed entries at the country-wide rate in ME proceedings is the "accurate assignment of duties based on information obtained in a review," which "is not unique

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[27] *Id; Magnesium Metal from the Russian Federation: Final Results of Antidumping Duty Administrative Review*, 75 FR 56989 (September 17, 2010).
[28] *See* Mid-Continent Remand Order at 63.
[29] *Id.*, at 64.
[30] *Id.*, at 64-65; *June 2011 Assessment of Antidumping Duties*, 76 FR at 34047-7.
[31] *See* Mid-Continent Remand Order at 66.
[32] *Id.*

to {ME} proceedings but is necessary in all antidumping proceedings."[33] The Court found that there may be a reasonable basis for the Department to adopt a liquidation methodology in this review that conflicts with its approach in ME proceedings but there is no such rationale that appears on the record of this case.[34]

Accordingly, the Court ordered the Department on remand to determine whether the entries misattributed to CPI fall within the scope of the *NME Final Assessment of Antidumping Duties*.[35] Additionally, the Court remanded the Department to explain its rationale for not applying the NME-wide rate to those entries given the Department's longstanding practice in ME proceedings.[36]

Analysis of CPI's Combination Rates

In reconsidering its determination, the Department carefully evaluated the facts presented in this case, in light of its regulations and several important policies, in particular the Department's practice of accurate assignment of duties based on the information obtained in the ongoing proceeding. In the course of this administrative review, the Department determined that importers entered subject merchandise using 23 of the combination rates assigned to CPI.[37] For the 13 combination rates, the Department found that the producers under each combination had knowledge that the sales were destined for the United States, and that these entries should therefore be liquidated at the separate rate the producer earned in the investigation or review, as applicable.[38] For the 10 other combination rates, the Department noted that there were entries, but the Department's review of sample CBP entry packages for each of the 10 combination rates

[33] *Id.*, at 67; *NME Final Assessment of Antidumping Duties*, 76 FR at 65695.
[34] *See* Mid-Continent Remand Order at 67.
[35] *Id.*
[36] *Id.*
[37] *See* Partial Rescission Memorandum at 3-4.
[38] *See Nails PRC Final Results AR1,* and accompanying Issues and Decision Memorandum at Comment 9.

show that the entry documents did not pertain to the specific combination rate under which they entered.[39] Nevertheless, in keeping with the Department's practice at the time of this administrative review, the Department indicated that it would liquidate the entries with these 10 combination rates at the rate in effect at the time of entry even though the sample entry documentation for these 10 combination rates showed that these entries did not pertain to these 10 combination rates.[40] However, in this remand, the Department reconsidered the appropriate assessment and liquidation rate for the merchandise that entered under CPI's 23 combination rates and whether rescission of review for CPI is appropriate.

The facts of this case are unusual, but raise the same concerns as that underlying the *NME Final Assessment of Antidumping Duties*.[41] Our evaluation, on remand, leads us to the conclusion that the core principles underlying both liquidation in ME cases and outlined in the *NME Final Assessment of Antidumping Duties*, which ensure that entries are liquidated at correct assessment rates, apply to the entries at issue.[42] Although the Department articulated that the *NME Final Assessment of Antidumping Duties* was prospective and only applied to entries for which the administrative review had not yet been initiated,[43] the Department noted therein that the goal of the liquidation practice in both NME and ME cases was the accurate assignment of duties based on the information obtained in the ongoing review.[44]

While the Department is not retroactively applying the policy outlined in the *NME Final Assessment of Antidumping Duties* in this remand, the Department finds that the rationale underlying both the ME liquidation practice and the refined NME liquidation practice provide

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[39] *See* Partial Rescission Memorandum at 4.
[40] *See Nails PRC Final Results AR1*, and accompanying Issues and Decision Memorandum at Comment 9.
[41] *See NME Final Assessment of Antidumping Duties*, 76 FR at 65695.
[42] *Id.*
[43] *Id.*
[44] *Id.*, 76 FR at 65694.

guidance for the circumstances encountered in this case. When the Department explained why it was changing its ME liquidation practice in the *2003 Antidumping Duties Notice*, the Department noted "the practice of liquidating entries at an exporter's cash-deposit rate claimed at the time of entry where the entries had been suspended pursuant to a request for review of the exporter but are not covered by the final results of review for the exporter subject to review allows intermediaries to benefit from another firm's rate."[45] Yet, as the CIT stated in connection with the *2003 Antidumping Duties Notice*, "there is no reason that a reseller or importer should be entitled to choose among the rates it prefers when none is specific to it, and when it may request its own rate."[46] The Department noted when it was proposing to refine to the NME liquidation practice, in the *June 2011 Assessment of Antidumping Duties*, that the same logic was applicable to exporters in NME proceedings and that the refinement in the Department's liquidation practice was to prevent non-reviewable exporters in NME cases from benefitting from the rates of other exporters.[47] This was in keeping with the Department's practice in certain cases, where the Department found that the entries did not correspond to the exporter's reported U.S. sales, and therefore the claimed cash-deposit rate based on the exporter's rate was not appropriate. For instance, in *Honey from the PRC*, the Department found that certain merchandise that entered under the rate for a respondent, Wuhan Bee, did not belong to Wuhan Bee, and thus instructed CBP to liquidate these entries at the NME-wide rate.[48] As explained in the *June 2011 Assessment of Antidumping Duties*, when the declaration of the exporter's cash-deposit rate at the

[45] *See 2003 Antidumping Duties Notice*, 68 FR at 23961.
[46] *See Parkdale I* at 1272.
[47] *See June 2011 Assessment of Antidumping Duties*, 76 FR at 34047.
[48] *See Honey from the People's Republic of China: Final Results and Final Rescission, in Part, of Antidumping Duty Administrative Review*, 70 FR 38873, 38875 (July 6, 2005) ("*Honey from the PRC*").

time of entry is inconsistent with the information reported to the Department, the liquidation rate applicable to such entries from firms without their own separate rate is the NME-wide rate.[49]

Accordingly, the Department finds that there is no basis to liquidate entries in ME and NME cases differently when the goal of liquidation practice in both ME and NME cases is the accurate assignment of ADs. As explained in *Parkdale II*, "to require {the Department} to adhere to a producer's cash deposit rate in liquidating entries even after it discovers that the assumption upon which the use of that rate was based is false, would not result in the rate the reseller {or exporter} should have received, *i.e.*, the 'proper rate.'"[50]

The Department finds that the facts of this case regarding CPI's 23 combination rates, specifically the 10 combination rates, as similar to the situation addressed by the *2003 Antidumping Duties Notice* and the *NME Final Assessment of Antidumping Duties*.[51] The entries with the 10 combination rates entered the United States using the CPI combination rate at issue, even though CPI reported that these entries were not its sales and the producer for that combination rate claimed no shipments or the producer for which was not under review, a fact that was supported by record evidence.[52] Thus, there is no reason to conclude that the rate for these combination rates is appropriate for liquidation. For all of these 10 combination rates, an examination of the sample entry package documents for each of these combination rates demonstrates that the entries do not pertain to the combination rate under which they entered.[53] Accordingly, the Department finds that the correct cash deposit rate was not used at the time of entry. The sample entry documents for the 10 combination rates show that neither CPI, nor the

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[49] *See June 2011 Assessment of Antidumping Duties*, 76 FR at 34047.
[50] *See Parkdale Int'l Ltd. v. United States*, 508 F. Supp. 2d 1338, 1353 (CIT 2007) ("*Parkdale II*").
[51] *See 2003 Antidumping Duties Notice*, 68 FR at 23961; *NME Final Assessment of Antidumping Duties*, 76 FR at 65695.
[52] *See Nails PRC Final Results AR1*, 76 FR at 16380, and accompanying Issues and Decision Memorandum at Comment 9; Partial Rescission Memorandum.
[53] *See* Partial Rescission Memorandum at 4.

purported producer from the combination rate, were involved in these transactions.[54] Liquidating these entries at the reported CPI combination rates at the time of entry into the United States would allow these entries to be assessed at rates which the record evidence does not support. As such, it is unreasonable to liquidate these entries at the rate entered because it would prevent the accurate assignment of ADs which was the stated goal for refining the liquidation practice in ME and NME cases.[55] Accordingly, the Department finds that the entries with these 10 combination rates misattributed to CPI should not be liquidated at the cash deposit rate applicable to CPI at the time of entry because the information reported to the Department shows that these are not CPI's entries.[56]

Based on this, two further questions arise which we address in this remand: (1) whether the Department must continue to rescind this administrative review because CPI claims it had no shipments of subject merchandise during the POR for which it was the first party in the transaction chain with knowledge of U.S. destination; and (2) at what rate each entry subject to CPI's review request should be liquidated.

1) Whether the Department Must Rescind the Review

Pursuant to the Department's regulations, "the Secretary may rescind an administrative review, in whole or only with respect to a particular exporter or producer if the Secretary concludes that, during the period covered by the review, there were no entries, exports, or sales of the subject merchandise, as the case may be."[57] As is clear from the use of the term "may" in the Department's regulation, the Department has discretion in determining whether to rescind a review in a situation where "there were no entries, exports, or sales of the subject merchandise,

[54] *Id.*, at 4 and Attachment 4.
[55] *See 2003 Antidumping Duties Notice*, 68 FR at 23961; *NME Final Assessment of Antidumping Duties*, 76 FR at 65695.
[56] *See* Partial Rescission Memorandum at 4 and Attachment 4.
[57] *See* 19 CFR 351.213(d)(3).

as the case may be." In exercising this discretion, the Department normally rescinds reviews when the exporter or producer covered by the review had no entries of subject merchandise during the POR.[58]

The factual record in this review, however, indicates that entries in the 23 combination rates for CPI fall within two categories: 1) for the 10 combination rates, the record shows that CPI did not have any shipments and that these shipments inappropriately entered the U.S. market using a CPI combination rate that did not pertain to them; and 2) for the 13 combination rates, the record evidence shows that the producers of the merchandise had knowledge that the goods were destined for the United States.[59] The Department's finding that other parties, in this case the producers for these 13 combination rates, had knowledge that the subject merchandise was destined for the United States is critical because it also affects the rate required at the time of entry. In this case, the Department found during the course of the review that the rate for the entries with these 13 combination rates should have been the separate rate obtained by the producer.[60]

The entries with the 10 combination rates and the entries with the 13 combination rates, which the producers had knowledge of the ultimate destination to the United States, came in under CPI's rate. It is the Department's normal practice, absent an administrative review, of using automatic liquidation instructions and instructing CBP to liquidate at the rate required at the time of entry. However, based on record of this case regarding the 10 combination rates, the Department finds that this could potentially lead to unintended consequences. Because it is

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[58] *See, e.g., Certain Stainless Steel Butt-Weld Pipe Fittings from Taiwan: Final Results and Final Rescission of Antidumping Duty Administrative Review*, 74 FR 66620 (December 16, 2009); *Final Results and Final Partial Rescission of Antidumping Duty Administrative Review: Silicon Metal from the People's Republic of China*, 73 FR 46578 (August 11, 2008).

[59] *See* Partial Rescission Memorandum at 4 and Attachment 4.

[60] *See Nails PRC Final Results AR1*, and accompanying Issues and Decision Memorandum at Comment 9

possible that CBP may not have all relevant information regarding the identity (or role) of the producers readily available on the entry forms, the relevant entries of subject merchandise could potentially be liquidated at the incorrect rate, *i.e.*, in this case at CPI's respective combination rate rather than at the rates applicable to the producer of the subject merchandise or at the NME-wide rate. In light of the evidence found during the administrative review, the Department reconsidered its decision to rescind the review in part. Because of the unique circumstances of this case, the Department finds that it is more appropriate to amend its original rescission to no longer apply to CPI, to issue final results of review with respect to CPI, and to issue liquidation instructions that would accurately reflect the appropriate rate for the two distinct categories of entries involving the combination rates pertaining to CPI.

2) The Appropriate Assessment Rate

In the final results of this case, the Department indicated that given the circumstances of this case, the entries with CPI's 23 combination rates should be liquidated as follows: (1) the 13 combination rates that CPI acknowledged using, the entries should be liquidated at the separate rate obtained by the producer; and (2) the 10 combination rates that CPI did not acknowledge using, the entries should be liquidated at the rate entered at the time of entry.[61]

On remand, the Department finds that the entries with the 13 combination rates that CPI acknowledged using should be liquidated at the separate rate for the respective producer of these 13 combination rates. The Department notes that the rationale outlined in the *June 2011 Assessment of Antidumping Duties* and the *NME Final Assessment of Antidumping Duties* for liquidating at the NME-wide rate when the declared cash-deposit rate at the time of entry is

[61] *See Nails PRC Final Results AR1*, 76 FR at 16382-3, and accompanying Issues and Decision Memorandum at Comment 9.

inconsistent does not apply for the entries with these 13 combination rates.[62] The producers for the entries of the 13 combination rates received their own separate rate during this review.[63] The 13 combination rate entries are attributable to 13 producers that were subject to the review and received a separate rate. Therefore, the Department finds that the entries with these 13 combination rates are entitled to liquidation at the separate rate these producers received in the final results of this review. Moreover, the Department notes that in the *Mid-Continent Order*, the Court found that the producers of these entries with these 13 combination rates had their own cash deposit rates, which were at precisely the same rate as the relevant CPI combinations.[64]

However, for the entries with the 10 combination rates that CPI did not acknowledge using, the Department finds that the entries should be liquidated at the NME-wide rate. As explained above and in the *June 2011 Assessment of Antidumping Duties*, when the declaration of the exporter's cash deposit rate at the time of entry is inconsistent with the information reported to the Department, the liquidation rate applicable to such entries from firms is the NME-wide rate.[65] By liquidating entries at an exporter's cash deposit rate claimed at the time of entry where the entries were not covered by the final results of review for that exporter, the Department would not accurately assess ADs and allow intermediaries to benefit from another firm's rate.[66] If the Department were to liquidate the entries with the 10 combination rates as entered, even though the record entry documentation shows that these entries were not entitled to these 10 combination rates for CPI, the Department would not be accurately assessing ADs. The record evidence demonstrates that none of the companies associated with these 10 combination rates

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[62] *See June 2011 Assessment of Antidumping Duties*, 76 FR at 34047; and *NME Final Assessment of Antidumping Duties*, 76 FR at 65695.
[63] *See Nails PRC Final Results AR1*, 76 FR at 16382-3.
[64] *See* Mid Continent Remand Order at 58.
[65] *See June 2011 Assessment of Antidumping Duties*, 76 FR at 34047.
[66] *See 2003 Antidumping Duties Notice*, 68 FR at 23961.

made the relevant export sale and, therefore, the rates applicable to the companies associated with the 10 CPI combination rates should not be applied. Accordingly, the Department finds that it is appropriate to liquidate the entries with the 10 combination rates that CPI did not acknowledge using at the NME-wide rate because this will allow the Department to accurately assess ADs.

III. COMMENTS FROM INTERESTED PARTIES

A. Application of the NME Reseller Policy to the 10 Combination Rates

CPI et al.'s Comments

- The Department should not apply the NME reseller policy to the merchandise that entered under the 10 combination rates because certain of these entries may have entered improperly due to inadvertent clerical errors.
- The Department should instruct CBP not to liquidate merchandise that entered under the 10 combination rates if importers establish that: (1) the initial designated CBP case number was a clerical error; and (2) the shipment qualifies for a separate rate.
- In the final results of this review, the Department determined that the merchandise that entered under the 10 combination rates were entered improperly as a result of a clerical error and recognized that CBP had the responsibility to liquidate these entries at the correct rate upon liquidation.
- In the Mid Continent Remand Order, the CIT recognized that "entering goods at an improper rate may involve negligence, or even fraud . . . mis-attribution also may be the result of clerical errors or mistakes of fact."[67] The CIT further concludes that "neither the

[67] *See* Mid Continent Remand Order, at 58.

statute nor the regulations cited by Mid Continent mandates that {the Department} apply the NME-wide rate to entries that were entered at an incorrect rate."[68]

- The *2003 Antidumping Duties Notice* did not address whether ADs should be assessed at the correct rate of duty upon liquidation to correct clerical errors and thus is not applicable to the entries with the 10 combination rates.
- The Department's *NME Final Assessment of Antidumping Duties* was not intended to punish an importer for listing the incorrect CBP case number without allowing the importer the opportunity to correct the error and establish this was a clerical error upon liquidation.
- The *NME Final Assessment of Antidumping Duties* was not intended to trump CBP's obligation to liquidate an importer's entries at the correct AD rate.
- The examination of the sample CBP entry documents for the 10 combination rates shows that errors could have been made due to the similarity in the producers' names, which are errors that can be readily corrected.
- CPI *et al.* actively participated in this review to ensure that their entries are accurately liquidated. Accordingly, the Department should coordinate with CBP to provide guidance to importers confirming that entries will not be liquidated at an improper rate because clerical errors cannot be corrected prior to liquidation.
- The treatment of assessment of ADs in the *2003 Antidumping Duties Notice* does not address situations where a respondent made a no shipment claim and thus does not apply to the assessment of the entries with these 10 combination rates.

Petitioner's Comments

[68] *Id.*, at 58-9.

- The Department properly assigned the NME-wide rate to the entries improperly imported using the 10 combination rates assigned to CPI.
- The Department's action appropriately treats the merchandise that entered under the 10 combination rates into conformance with the liquidation practice in ME cases and the *NME Final Assessment of Antidumping Duties.*
- By assigning the NME-wide rate to these entries, the Department is not allowing importers to misidentify entries in order to avail themselves of a more favorable cash deposit rate.

Department's Position: The Department disagrees with CPI *et al.* that the merchandise that entered under these 10 combination rates should not be liquidated at the NME-wide rate, following the rationale outlined in the *NME Final Assessment of Antidumping Duties* because these entries may have been entered incorrectly due to a custom brokers' error in entering the incorrect CBP case number. The Department finds that in *Nails PRC Final Results AR1* and in our draft results of redetermination that the Department properly found that CPI had no shipments during this review because the merchandise that entered under the 10 combination rates was found not to be attributable to the 10 combination rates.[69] The Department notes that no party, including CPI, challenged the Department's finding that CPI had no shipments, nor that the entries with the 10 combination rates were properly entered under the relevant CPI combination rate. Accordingly, the Department continues to find that CPI had no shipments during this review.

The Department also continues to find that the entries using the 10 combination rates at issue were not properly entered under those CPI combination rates. In *Preliminary Results AR1*,

[69] *See* Partial Rescission Memorandum, at 4.

as noted above, the Department found that the sample entry package documents for each of the 10 combination rates showed that the entries were not entitled to the 10 combination rates for CPI.[70] While CPI *et al.* now argue that the sample entry package documents show that the entries may have been improperly entered due to a simple error in the similarity in the producer's name or other reasons, the Department notes that CPI *et al.* did not submit any evidence since *Preliminary Results AR1* that these errors had been corrected through CBP's Post-Entry Amendment process.[71] Thus, the Department finds that the only record evidence shows that these entries were not entitled to the 10 combination rates for CPI because none of the companies associated with these 10 combination rates made the relevant export sale, pursuant to the sample entry documentation for each of these 10 combination rates.[72]

Because the Department finds that the record evidence shows that the merchandise that entered under the 10 combination rates for CPI were not entitled to those rates, the Department finds that it is appropriate to liquidate these entries at the NME-wide rate, following the rationale outlined in the *NME Final Assessment of Antidumping Duties*. While CPI *et al.* argue that the *NME Final Assessment of Antidumping Duties* was not intended to trump CBP's obligation to assess ADs at the correct rate, the Department disagrees with CPI *et al.*'s logic. Liquidating these entries at the reported CPI combination rates at the time of entry into the United States would allow these entries to be assessed at rates which the record evidence does not support. That is, there is no evidence on the record that CPI's rate is the correct rate at which to assess duties on these 10 combination rate entries. As such, it is unreasonable to liquidate these entries

[70] *Id.*
[71] *See* Mid Continent Nail Corporation's Comments on the Draft Results of Redetermination, (January 6, 2014) at 11 and footnote 47.
[72] *See Nails PRC Final Results AR1*, 76 FR at 16382-3, and accompanying Issues and Decision Memorandum at Comment 9.

at the rate entered because it would prevent the accurate assignment of ADs which was the stated goal for revising the liquidation practice in ME and NME cases.[73]

The Department finds that it is appropriate to liquidate the merchandise that entered under the 10 combination rates at the NME-wide rate because both CPI and the producers for the 10 combination rates were found to have no shipments or were part of the NME-wide entity[74] in the final results of this review.[75] As explained in the *NME Final Assessment of Antidumping Duties*, the Department established that when an exporter claimed no shipments, "any suspended merchandise that entered under that exporter's case number (*i.e.,* at that exporter's rate) will be liquidated at the NME-wide rate."[76] Based on this, the Department finds that the rationale for the *NME Final Assessment of Antidumping Duties* applies to the entries with the 10 combination rates attributed to CPI because there is no reason to conclude that the combination rates associated with the CPI numbers are the appropriates rates for liquidation.

Although CPI *et al.* argue that the Department should not apply the *NME Final Assessment of Antidumping Duties* in this review because the *2003 Antidumping Duties Notice* did not discuss situations involving no shipment allegations; the Department disagrees that the Department cannot apply the logic of the NME Final Assessment of Antidumping Duties to these entries. As noted above, both *NME Final Assessment of Antidumping Duties* and the preceding ME policy, *2003 Antidumping Duties Notice* were established to assist the Department in liquidating entries

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[73] *See 2003 Antidumping Duties Notice*, 68 FR at 23961; *NME Final Assessment of Antidumping Duties*, 76 FR at 65695.

[74] The Department notes that one of the producers in the 10 combination rates, Tianjin Zhitong Metal Products Co., Ltd., has never requested a separate rate as an exporter during the investigation or this underlying review and is thus part of the NME-wide entity.

[75] *See Nails PRC Final Results AR1*, 76 FR at 16382-3, and accompanying Issues and Decision Memorandum at Comment 9.

[76] *See NME Final Assessment of Antidumping Duties*, 76 FR at 65695; *Magnesium Metal from the Russian Federation: Final Results of Antidumping Duty Administrative review,* 75 FR 56989 (September 17, 2010).

at the accurate AD rate.[77] Additionally, as explained in the *2003 Antidumping Duties Notice*, the practice of liquidating entries at an exporter's cash-deposit rate claimed at the time of entry where the entries have been suspended pursuant to a request for review of the exporter but are not covered by the final results of review for the exporter subject to review allows intermediaries to benefit from another firm's rate.[78] Accordingly, the Department finds that the *2003 Antidumping Duties Notice* addresses situations, such as a no shipment claim, to prevent intermediaries from benefitting the firm's rate when entries are not reviewed due to that firm's no shipment claim. Thus, the Department finds that liquidating the merchandise that entered under the 10 combination rates attributed to CPI at the NME-wide rate, pursuant to the *NME Final Assessment of Antidumping Duties* and the *2003 Antidumping Duties Notice*, is appropriate. By doing this, the Department is ensuring the accurate assessment of ADs and preventing importers from "being entitled to choose among the rates it prefers."[79]

Although CPI *et al.* argue that the Department should not follow the rationale of the *NME Final Assessment of Antidumping Duties* and instruct CBP to allow importers to correct alleged clerical errors, the Department disagrees. The Department finds that it is not the Department's responsibility to instruct importers on how to correct alleged clerical errors regarding CBP entries. Such concern is the purview of CBP and should be properly addressed by CBP, which has the authority to address such issues.[80] The Department will refer this matter to CBP when the Department instructs CBP to liquidate the entries at issue at the NME-wide rate. The Department will provide CBP any relevant information, as appropriate, to assist that agency in

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[77] *See 2003 Antidumping Duties Notice*, 68 FR at 23961; *NME Final Assessment of Antidumping Duties*, 76 FR at 65695.
[78] *See 2003 Antidumping Duties Notice*, 68 FR at 23961.
[79] *See Parkdale Int'l Ltd. v. United States*, 508 F. Supp. 2d 1338, 1353 (CIT 2007) ("*Parkdale II*").
[80] The Department notes that such concerns can be addressed through CBP's Post-Entry Amendment process.

fulfilling its statutory mission relating to AD and countervailing duty collection and enforcement.

B. Non-Application of the NME Reseller Policy to the 13 Combination Rates

CPI et al.'s Comments

- In the Mid Continent Remand Order, the CIT found that the producers of the 13 combination rates "were entitled to enter steel nails during the review period at the same rate as entered without using the combination rate they shared with CPI," nor had these companies or CPI "had any incentive whatsoever to take advantage of CPI's rate."[81]
- The focus of the *2003 Antidumping Duties Notice* and *NME Final Assessment of Antidumping Duties* is how ADs should be assessed on shipments from companies selected for individual examination which were reported to the Department. Because CPI was not a mandatory respondent in this review, the CIT's concern regarding the Department's inconsistent application of assessment duties in ME cases and NME cases is not relevant to CPI's entries.
- Based on the facts in this case, the merchandise that entered under CPI's 13 combination rates should be liquidated at the separate rate and not the NME-wide rate.
- Petitioner is incorrect that the NME reseller policy statement applies to the entries with the 13 combination rates based on the Department's finding that "if the Department determines that an exporter under review had no shipments of the subject merchandise, any suspended entries that entered under that exporter's case number (*i.e.*, at that exporter's rate) will be liquidated at the NME-wide rate."[82]

[81] *See* Mid Continent Remand Order, at 54.
[82] *See NME Final Assessment of Antidumping Duties*, 76 FR at 65695.

- The issue that is directly relevant to the merchandise that entered under CPI's 13 combination rates is the Department's relationship of the NME reseller policy to its selection of the legal "exporter." This was outlined in "the importer's responsibility to ensure that the documentation of the sales transaction supports the cash deposit rate the importer claims for its entries."[83]
- The question of whether the producers for the 13 combination rates or CPI should be deemed the exporters of the entries at issue governs the Department's decision as to the proper rate to apply these entries.
- The merchandise that entered under the 13 combination rates should be liquidated at the separate rate because the producers of these 13 combination rates qualify for a separate rate and are the legal exporter under AD law.
- The CIT erred in the Mid Continent Remand Order by concluding that the NME-wide rate is equivalent to the "all others rate" applied in ME cases. The "all others rate" issued in ME cases is equivalent to the calculated separate rate in NME cases because both of these rates reflect rates calculated from the rates assigned to the mandatory respondents.

Petitioner's Comments

- The Department improperly intended to liquidate the entries with the 13 combination rates at the separate rate assigned to the company that the Department concluded was the exporter of the subject merchandise.
- The Department's treatment of these entries usurps CBP's role of ensuring accuracy of entry documents and treats this NME proceeding differently than ME proceedings, which contradicts the *NME Final Assessment of Antidumping Duties*.

[83] *Id.*

- The *NME Final Assessment of Antidumping Duties* established that where entries are mis-attributed to an exporter claiming "no shipments, the Department will instruct CBP to liquidate such entries at the NME-wide rate."[84]
- The *NME Final Assessment of Antidumping Duties* did not create exceptions to the policy where certain mis-attributed entries would be liquidated at the NME-wide rate while other mis-attributed entries would be liquidated at a different rate, such as the separate rate.
- The Department is determining, without support on the record, that all of the merchandise that entered using the 13 combination rates were manufactured by the producer identified in the combination rate assigned to the exporter.
- Although there is sample documentation on the record for each of the 13 combination rates from CPI, this documentation does not demonstrate that all entries imported using the 13 combination rates were for merchandise manufactured by the producer assigned to that combination rate.
- The Department's decision to liquidate the merchandise that entered under the 13 combination rates at the separate rate assigned to the company determined to be the exporter improperly circumvents the Post-Entry Amendment process. Despite record evidence that importers improperly used the 13 combination rates, the Department intends to instruct CBP to act as if the entries were properly designated at the time of entry.

Department's Position: The Department disagrees with Petitioner that the merchandise that entered under the 13 combination rates attributed to CPI should be liquidated at the NME-wide

[84] *Id.*, 76 FR at 65694.

rate, pursuant to the *NME Final Assessment of Antidumping Duties*.[85] As described above, for the merchandise that entered under the 13 combination rates, CPI acknowledged that it sourced subject merchandise from the 13 producers for these combination rates and that the producers had knowledge that the merchandise were ultimately destined for the United States.[86] In the preliminary results of the underlying review, after obtaining sample CBP entry packages for these 13 combination rates pertaining to CPI, the Department found that for the 13 producers which CPI acknowledged using during the POR, the entry documents were consistent with the information provided by CPI.[87] Accordingly, the Department preliminarily rescinded the review for CPI because it had no shipments of the subject merchandise during the POR since the producers of the 13 combination rates were designated the exporter of these entries.[88] Additionally, in the final results of this administrative review, the Department continued to find that CPI had no shipments of subject merchandise during the POR and rescinded the review with respect to CPI.[89] Furthermore, the Department found that for the merchandise that entered under the 13 combination rates, the 13 producers had knowledge that their sales made to CPI, a Taiwanese reseller, were destined for the United States, and thus their entries should be liquidated at the separate rate for the respective producer.[90]

The Department agrees with Petitioner that the *NME Final Assessment of Antidumping Duties* states that for an exporter claiming "no shipments, the Department will instruct CBP to liquidate such entries at the NME-wide rate."[91] However, this policy only applies to entries for which the respondent is found to be the exporter of the subject entries. In calculating the AD

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[85] *Id.*
[86] *See* Partial Rescission Memorandum, at 4.
[87] *Id.*
[88] *See Preliminary Results AR1.*
[89] *See Nails PRC Final Results AR1*, 76 FR at 16380.
[90] *Id.*, 76 FR at 16382-3, and accompanying Issues and Decision Memorandum at Comment 9.
[91] *See NME Final Assessment of Antidumping Duties*, 76 FR at 65694.

margin in ME and NME cases, the Department's analysis focuses on what U.S. price should be used in the Department's margin calculation.[92] The relevant sale or U.S. price that is examined in the Department's margin calculation is the first sale in the distribution chain by the company that is in the position to set the price of the product, and by doing so, to sell at less than fair value in or to the U.S. market.[93] The Department notes that the regulations and statute do not define the term "exporter." Absent a definition of "exporter" in the statute, the Department determines who is an "exporter" in a reasonable manner in order to effectuate the purposes of the AD law.[94] In certain cases, the Department determined that the basis for export price, and thus the party to be designated as the "exporter," is the price at which the first party in the chain of distribution who has knowledge of the U.S. destination of the merchandise sells the subject merchandise, either directly to a U.S. purchases or to an intermediary, such as a trading company.[95] The party making such a sale, with knowledge of the destination, has been the appropriate party to be reviewed and determined to be the exporter of the merchandise by the Department in previous cases.[96]

As explained above, in the preliminary results of the underlying review, which was unchanged in the final results and the draft results of this redetermination, the Department found

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[92] *See* section 772 of the Act; *Taiwan Semiconductor Mfg. Co., Ltd. v. United States*, 143 F. Supp. 2d 958, 966 (CIT 2001).

[93] *Id.*, 143 F. Supp. 2d at 966.

[94] *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984) ("If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.").

[95] *See* section 772(a) of the Act.

[96] *See, e.g., Final Results of Antidumping Duty Administrative Review: Certain In-Shell Raw Pistachios From Iran*, 70 FR 7470 (February 14, 2005) and the accompanying Issues and Decision Memorandum at Comment 1; *Final Results of Antidumping Duty Administrative Review and Determination Not to Revoke the Order in Part: Dynamic Random Access Memory Semiconductors of One Megabit or Above from the Republic of Korea*, 64 FR 69694 (December 14, 1999); *Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Synthetic Indigo from the People's Republic of China*, 64 FR 69723, 69727 (December 14, 1999) (unchanged in *Notice of Final Determination of Sales at Less Than Fair Value: Synthetic Indigo from the People's Republic of China*, 65 FR 25706 (May 3, 2006)); and *Certain Pasta from Italy: Termination of New Shipper Review*, 62 FR 66602 (December 19, 1997).

that the producers for the entries of the 13 combination rates had knowledge that the subject merchandise was destined for the United States.[97] The evidence on the record supports that these producers had knowledge that the entries with the 13 combination rates were destined for the United States. Accordingly, the Department continues to find that the producers for the entries of the 13 combination rates knew or should have known that their merchandise was destined for the United States. Thus, the Department finds that the respective producer for the entries of the 13 combination rates and not CPI is the appropriate party to review for these entries.[98]

The Department disagrees with Petitioner that the record evidence does not support the determination that all of the merchandise that entered using the 13 combination rates were manufactured by the producer identified in the combination rate assigned to the exporter. The Department obtained entry sales documentation for each of the 13 combination rates and the sales documentation for each of the 13 combination rates was consistent with the information provided by CPI.[99] Although Petitioner argues that the record does not contain entry sales documentation for every CBP entry that entered under 13 combination rates, the Department disagrees that there is insufficient evidence to conclude that these entries entered under the appropriate combination rate. The Department has a practice of basing its determination on the record evidence, such as sample documentation, and has not found the record here to be insufficient absent information on every transaction subject to the determination.[100] Because the sales documentation for each of the 13 combination rates is consistent with the information

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[97] *See Partial Rescission Memorandum* at 4; *Nails PRC Final Results AR1*, 76 FR at 16382-3, and accompanying Issues and Decision Memorandum at Comment 9.

[98] *See* Statement of Administrative Action Accompanying the Trade Agreements Act of 1979, H.R. Rep. No. 4537, 388, 411, reprinted in 1979 U.S.C.A.N. 665, 682 (SAA for 1979 Act).

[99] *See* Partial Rescission Memorandum at 4; *Nails PRC Final Results AR1*, 76 FR at 16382-3 and accompanying Issues and Decision Memorandum at Comment 9.

[100] *See Xanthum Gum from Austria: Final Determination of Sales at Less Than Fair Value*, 78 FR 33354 (June 4, 2013) and accompanying Issues and Decision Memorandum at Comment 1; *Certain Steel Grating from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 75 FR 32366 (June 8, 2010) and accompanying Issues and Decision Memorandum at Comment 3.

provided by CPI, the Department finds that the record supports the determination that all of the entries entered using the 13 combination rates were entered appropriately (*i.e.,* using the combination rate assigned to the producer of the merchandise).

Based on the above, the Department finds that the discussion in the *NME Final Assessment of Antidumping Duties* regarding a no shipment claim does not apply because the entries with the 13 combination rates are not CPI's entries but the producer for that respective combination rate's entries. Accordingly, the Department finds that the entries for the respective producer of the 13 combination rates should be liquidated at the rate for the respective producer, not the NME-wide rate.

The Department notes that the respective producer for each of the 13 combination rates participated in the underlying review and received a separate rate in the final results of this review.[101] The Department finds that the separate rate for the respective producer of the 13 combination rates is the same AD rate that this merchandise entered under for the 13 combination rates.[102]

The Department disagrees with Petitioner that the Department's decision to liquidate the entries at the respective producer's rate for these 13 combination rates contradicts the rationale of the *NME Final Assessment of Antidumping Duties* and the preceding ME policy, *2003*

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[101] *See Partial Rescission Memorandum* at 4; *Nails PRC Final Results AR1*, 76 FR at 16382-3, and accompanying Issues and Decision Memorandum at Comment 9.

[102] In the Mid Continent Remand Order, the CIT noted that there was no evidence of circumvention of the imposition of antidumping duties for the merchandise that entered under these 13 combination rates because: "12 of the companies in question—representing virtually all of the import volume at issue—could have entered steel nails during the review period at the same rate as entered without using the combination rate they shared with CPI, because each of those 12 companies also had combination rates in which they were listed as exporter, and those rates were the same as the combination rates that each shared with CPI." *See* Mid Continent Remand Order, at 58. The Department notes also for the 13th company that the CIT also found: "there is not a scintilla of record evidence to substantiate Mid Continent's claim that the company was deliberately using CPI's combination to take advantage of CPI's cash deposit rate," *see* Mid Continent Remand Order at 54.

Antidumping Duties Notice.[103] As explained above, the *NME Final Assessment of Antidumping Duties* and the preceding ME policy, *2003 Antidumping Duties Notice,* were established to assist the Department in liquidating entries at the accurate AD rate.[104] While Petitioner argues that the *NME Final Assessment of Antidumping Duties* did not create exceptions to the policy where certain mis-attributed entries would be liquidated at the NME-wide rate, the Department finds that this rationale only applies in situations when there is no record evidence that the entries should be attributed to another party that is under review. Yet, here, there is record evidence that the entries should be attributed to another party under review.[105] Thus, the Department finds that the respective producer is the appropriate party to review for these entries, which is why these entries will be liquidated at the respective producer's separate rate. Accordingly, the Department finds that liquidating these entries at the producer's separate rate ensures accurate assessment of AD rates, which is supported by the record entry documentation for each of the 13 combination rates.

Although Petitioner argues that liquidating these entries at the producer's separate rate[106] circumvents CBP's role of ensuring accuracy of entry documents, the Department disagrees. As explained above, the Department obtained entry sales documentation for each of the 13 combination rates and the sales documentation for each of the 13 combination rates were consistent with the information provided by CPI.[107] Additionally, the Department finds that the respective producer is the appropriate party to review for these entries, which is why these

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[103] *See NME Final Assessment of Antidumping Duties*, 76 FR at 65694; *2003 Antidumping Duties Notice*, 68 FR at 23961.
[104] *See 2003 Antidumping Duties Notice*, 68 FR at 23961; *NME Final Assessment of Antidumping Duties*, 76 FR at 65695.
[105] *See* Partial Rescission Memorandum at 4.
[106] The Department notes that each producer listed within the 13 combination rates attributed to CPI were also exporters in their own right and received a separate rate in the final results of this review. *See Nails PRC Final Results AR1*, 76 FR at 16382-3, and accompanying Issues and Decision Memorandum at Comment 9.
[107] *See* Partial Rescission Memorandum at 4; *Nails PRC Final Results AR1*, 76 FR at 16382-3, and accompanying Issues and Decision Memorandum at Comment 9.

entries will be liquidated at the respective producer's separate rate. In contrast to the merchandise that entered under the 13 combination rates, the Department finds that the record evidence for the merchandise that entered under the 10 combination rates, as discussed in Comment 1 of Section III, were not entitled to the 10 combination rates for CPI because none of the companies associated with these 10 combination rates made the relevant export sale.[108] Thus, unlike for the merchandise that entered under the 13 combination rates, the Department finds that liquidating the merchandise that entered under the 10 combination rates at the rate entered would not ensure an accurate assessment of ADs. Because the record evidence shows that the merchandise entered under the 13 combination rates should be accurately assessed at the producer's separate rate, the Department will instruct CBP to liquidate the merchandise that entered under the 13 combination rates at the producer's separate rate. By doing this, the Department is implementing the rationale of the *NME Final Assessment of Antidumping Duties* by accurately assessing ADs based on the record evidence.

The Department disagrees with Petitioner that instructing CBP to liquidate the entries that entered using the 13 combination rates at the separate rate for the producer circumvents CBP's Post-Entry Amendment ("PEA") process. The Department finds that CBP's PEA process is a process that allows importers to inform CBP of corrections to the entry documentation that the importer submitted to CBP. Although Petitioner is correct that there is no record evidence that importers filed a PEA for any entries that entered under the 13 combination rates, the Department disagrees that liquidating these entries at the producer's separate rate does not ensure the accurate assessment of ADs. As explained above, the Department obtained entry sales documentation for each of the 13 combination rates and the sales documentation for each of the

[108] *See Nails PRC Final Results AR1*, 76 FR at 16382-3, and accompanying Issues and Decision Memorandum at Comment 9.

13 combination rates were consistent with the information provided by CPI.[109] Additionally, the Department finds that the respective producer is the appropriate party to review for these entries, which is why these entries will be liquidated at the respective producer's separate rate. Accordingly, the Department finds that Petitioner is incorrect that importers improperly entered these entries using the 13 combination rates and liquidating these entries at the producer's rate does not ensure accurate assessment of ADs.

Regarding CPI *et al.*'s argument that the NME-wide rate applied in NME cases is not equivalent to the "all others" rate, the Department agrees that the two are not equivalent. The "all others rate" is the rate calculated in ME cases when the Department limits respondent selection and is not able to individually review all respondents under review, pursuant to section 735(c)(5) of the Act. In ME cases, the Department calculates the "all others rate" from the rates calculated for the mandatory respondents that are not based on zero, *de minimis*, or based entirely on facts available, which is then applied as the rate to respondents that are not individually examined or have never been examined.[110] The Department notes that it employs the same methodology used to calculate the separate rate for non-examined respondents in NME cases.

In contrast to the "all others rate" which is a calculated rate issued in ME cases, the Department finds that the NME-wide rate is the rate applied to the NME-wide entity which is based on adverse facts available ("AFA"). It has been the Department's practice to assign all exporters of merchandise subject to an AD investigation or review from an NME country a single AFA rate unless an exporter can demonstrate that it is sufficiently independent of the government in its export activities, on both a *de jure* and *de facto* basis, so as to be entitled to a

[109] *See* Partial Rescission Memorandum at 4; *Nails PRC Final Results AR1*, 76 FR at 16382-3, and accompanying Issues and Decision Memorandum at Comment 9.
[110] *See* section 735(c)(A) of the Act.

separate rate. Based on the above, the Department finds that the rate for the NME-wide entity is not equivalent to either the "all others rate" applied in ME cases or the separate rate applied in NME cases because both of these rates are calculated.

C. Separate Rate for the Entries of the 13 Combination Rates

CPI et al.'s Comments

- The assessment rate for the entries of the 13 combination rates should be the separate rate calculated in the final results, 10.63 percent, and not the rate, 17.68 percent, calculated for Stanley[111] in the draft results of Stanley Works Remand Order (or whatever rate is calculated in the final results of redetermination).[112]
- The final results of the first administrative review are subject to two separate and distinct civil actions at the CIT: (1) the Mid Continent Remand Order addresses the liquidation of the merchandise that entered under the 13 combination rates and the merchandise that entered under the 10 combination rates; and (2) the Stanley Works Remand Order addresses parties' arguments that the Department made errors in the calculation of Stanley's AD margin.
- The injunction for the litigation of the Mid Continent Remand Order only covers merchandise that entered under the 13 combination rates, the merchandise that entered under the 10 combination rates, and entries for certain separate rate companies. Entries for Stanley are not covered by this injunction but are covered by a separate injunction for the litigation of the Stanley Works Remand Order.
- There is no overlap of issues in the litigation of the Mid Continent Remand Order and the litigation of the Stanley Works Remand Order. Thus, the results of the litigation of the

[111] Stanley Works (Langfang) Fastening Systems Co., Ltd. ("Stanley").
[112] *See The Stanley Works (Langfang) Fastening Systems Co. Ltd., et al. v. United States*, Court No. 11-00102 (*Stanley Works* litigation). .

Stanley Works Remand Order should only apply to the respondent subject to the litigation, Stanley.

- CPI *et al.* notified the Court regarding the litigation of the Stanley Works Remand Order that they would not participate because the results of this litigation did not apply to the separate rate margin of separate rate respondents. If Petitioner or the Department disagreed with this position, either Petitioner or the Department should have advised the Court of this fact.
- Petitioner's decision to raise this issue in the litigation of the Stanley Works Remand Order shows that Petitioner agreed that the entries with the 13 combination rates should be liquidated at the 10.63 percent separate rate from the final results of AR1.
- Legal case precedent supports the decision that the entries with the 13 combination rates cannot be liquidated at the final rate calculated for Stanley in the litigation of the Stanley Works Remand Order because there is no injunction on these entries.[113]
- The Stanley Works Remand Order does not authorize or imply that the Department has the authority to instruct CBP to liquidate the entries with the 13 combination rates or the entries for the separate rate respondents at the rate applicable to Stanley's calculated rate.

Petitioner

- Petitioner did not comment on this issue.

Department's Position: Neither the Act nor the Department's regulations address the determination of the rate applied to individual companies that qualify for a separate rate, but, are not selected for individual examination in an administrative review pursuant to the Department's

[113] *See Lone Star Steel Co. v. United States*, 649 F. Supp. 75 (CIT 1986); *Mukand Int'l, Ltd. v. United States*, 452 F. Supp 2d 1329 (CIT 2006); *Union Steel V. United States*, 617 F. Supp 2d 1373, 1381 (CIT 2009); *Snap-On, Inc. v. United States*, Slip Op. 2013-150 (CIT 2013); and *Home Meridian Int'l Inc. v. United States*, 865 F. Supp. 2d 1311, 1331-2 (CIT 2012).

discretion under section 777A(c)(2) of the Act. The Department's practice in assigning non-investigated separate rate companies a rate is to look to section 735(c)(5) of the Act for guidance, which provides instructions for calculating the all-others rate in an investigation. Section 735(c)(5)(A) of the Act instructs the Department to avoid calculating an all-others rate using any rates that are zero, *de minimis*, or based entirely on facts available in investigations. Section 735(c)(5)(B) of the Act provides that, where all rates are zero, *de minimis*, or based entirely on facts available, the Department may use "any reasonable method" for assigning a rate to non-examined respondents.

The Department's practice is to assign non-investigated separate rate respondents a rate based on the average of the margins calculated for those companies selected for individual review, weighted by each company's publicly-ranged quantity of reported U.S. transactions.[114] In instances where there is only one company selected for individual review, the rate for the non-investigated separate rate respondents is the weighted-average dumping margin calculated for the sole mandatory respondent.[115]

In the draft results, the Department followed its practice. The Department assigned the separate rate respondents in this proceeding the rate calculated for the mandatory respondent, Stanley,[116] a rate that was not zero, *de minimis*, or based entirely on facts available, in the Draft Remand Results pursuant to *Stanley Works* litigation. The Department rejects CPI *et al.*'s assertion that a change in Stanley's rate should not change the rate applied to non-investigated

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[114] *See Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam*, 76 FR 56158, 56160 (September 12, 2011) (final results antidumping administrative review).

[115] *See Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China*, 78 FR 3396, 3397 (January 16, 2013) (final results of administrative review); *see also Certain Steel Threaded Rod From the People's Republic of China*, 78 FR 66330, 66332 (November 5, 2013).

[116] In the *Nails PRC Final Results AR1*, the Department applied total facts available to another mandatory respondent, Shandong Minmetal Co., Ltd. ("Shandong Minmental"), and therefore considered Shandong Minmetal part of the PRC-wide entity. *See Nails PRC Final Results AR1*, and accompanying Issues and Decision Memorandum at Comment 13.

separate rate respondents as it seeks to arbitrarily divorce the rate determined for the non-investigated separate rate respondents from the calculated rate for a mandatory respondent contrary to the Department's practice.

Here, both the *Stanley Works* litigation and *Mid-Continent* litigation arise out of the same administrative proceeding, the first administrative review of the AD order covering steel nails from the People's Republic of China.[117] The rate applied to the separate rate respondents is connected to the rate determined for Stanley, the only mandatory respondent with a calculated rate that is not zero, *de minimis*, or based entirely on facts available, by virtue of the Department's practice. In this review, the rate assigned to the separate rate respondents is exactly the same as the rate calculated for Stanley. The Department's separate rate assessment was proper.

The crux of CPI *et al.*'s argument is that the assessment rate on entries of subject merchandise they exported should be based solely on the issues raised in Court No. 11-00119 (*Mid-Continent* litigation) and that the outcome of the *Stanley Works* litigation should not affect their liquidation rates because CPI *et al.*'s entries were not enjoined in the *Stanley Works* litigation. The underlying basis of this argument is that a preliminary injunction defines the parameters of litigation; if a party is not enjoined, it cannot be affected by the connected litigation. As an initial matter, the Department disagrees that a preliminary injunction defines the parameters of litigation rather than the complaint on which the litigation was initiated. Mid-Continent's complaint challenged numerous calculation issues related to both the mandatory and separate rate companies.

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[117] *See Nails PRC Final Results AR1*; *Certain Steel Nails From the People's Republic of China: Amended Final Results of the First Antidumping Duty Administrative Review*, 76 FR 23279 (April 26, 2011) ("Amended Final Results").

In any event, Mid-Continent had a preliminary injunction covering all of the separate rate companies that transferred to the *Stanley Works* litigation when the Court consolidated Mid-Continent's seven calculation claims into that litigation. Upon the Court's consolidation, Mid-Continent's preliminary injunction continued to cover the separate rate companies' entries from its consolidated position in the *Stanley Works* litigation. Moreover, Stanley was removed from the *Mid-Continent* injunction because the Court agreed with Stanley's assertion that, because of severance of issues in the *Mid-Continent* litigation, the *Mid-Continent* litigation no longer contained issues that could affect the calculation of Stanley's entries.[118] The remaining three claims in the Mid-Continent litigation do not relate to calculation issues because all of those claims were consolidated into the Stanley Works litigation.[119] The fact remains that the rate assigned to separate rate respondents is determined from the rate of the mandatory respondent; CPI *et al.* has not provided a reason for why the mandatory respondent's rate would cease having an effect on the separate rate respondents' rate, especially in a situation where the Court consolidated all calculation claims into a single case and the entries from both the mandatory and separate rate respondents are enjoined.

CPI *et al.* assert that Mid-Continent, Stanley, and the Department, all agreed with its position in its February 17, 2012, letter to the Court that the "issues currently before the Court in the {*Stanley Works* litigation} are Stanley-specific and do not affect the GDLSK Defendant-Intervenors" because they did not respond to this statement. However, CPI *et al.*'s belief is wrong. Neither Mid-Continent nor the Department was requested by the Court to respond to the

[118] Stanley's Proposed Preliminary Injunction Order and Motion to Amend the Preliminary Injunction, *Mid Continent Nail Corporation v. United States*, No. 11-00119, Dkt. No. 49 (CIT Oct. 14, 2011); *see also* Amended Preliminary Injunction Order, *Mid Continent Nail Corporation v. United States*, No. 11-00119, Dkt. No. 52 (CIT October 20, 2011).

[119] Those three claims were: 1) Count I – unlawfully limited number of mandatory respondents; 2) Count V – companies' misuse of exporter-producer of combination rates; and 3) Count VI – three respondents should not have been reviewed.

letter to CPI *et al.*; this letter was addressed to CPI *et al.* Significantly, the parties' silence does not imply that they agreed with the mistaken belief that the margin resulting from the adjudication of the issues in the *Stanley Works* litigation would not affect the separate rate companies. The Department's separate rate methodology refutes their assertion.

Moreover, assigning CPI *et al.*, a 10.63 percent rate, while simultaneously assigning Stanley the revised rate would result in an incongruous result, where, as here, issues affecting calculation of both rates were challenged by Mid-Continent and Mid-Continent properly requested and received a preliminary injunction. Finally, unlike *Snap-On*, the separate rate respondents are parties to the litigation,[120] involving the mandatory respondent and entries of all parties are enjoined.[121]

IV. FINAL RESULTS OF REDETERMINATION

Pursuant to the Court's order and based on the analysis of the data available on the record, the Department determined that the rationale underlying the NME reseller policy statement[122] provides the appropriate framework for considering certain CBP entries misattributed to 10 combination rates for CPI. Additionally, the Department is amending its previous rescission of the administrative review and is no longer rescinding the review with respect to CPI but, instead, is issuing final results of review with respect to CPI. Moreover, the Department will issue instructions to CBP to liquidate the merchandise entered under CPI's 23 combination rates, which consist of 10 combination rates that CPI does not acknowledge using and 13 combination rates that CPI does

[120] *See* Consolidation Order, *Mid Continent Nail Corporation v. United States*, No. 11-00119, Dkt. No. 37 (Ct. Int'l Trade Sept. 16, 2011) (ordering that briefing for *Mid-Continental* litigation proceed on the same schedule as *Stanley Works* litigation).
[121] *See Snap-On, Inc. v. United States*, 2013 Ct. Intl. Trade LEXIS 157, *23-*30 (Ct. Int'l Trade 2013) (party that did not participate in the investigation or the subsequent litigation on investigation rate and did not suspend liquidation should not receive retrospective benefit of a rate revised as a result of litigation).
[122] *See NME Final Assessment of Antidumping Duties.*

acknowledge using. For the 10 combination rates that CPI does not acknowledge using, the Department finds that it is appropriate to instruct CBP to liquidate entries under these 10 combination rates at the NME-wide rate, 118.04 percent, because the record evidence demonstrates that none of the companies associated with these 10 combination rates made the relevant export sale. For the 13 combination rates that CPI does acknowledge using and for which each producer had knowledge the merchandise was destined for the United States, the Department finds that it is appropriate to instruct CBP to liquidate entries with these 13 combination rates at the separate rate, 15.43 percent[123], determined for each producer during this administrative review.

Paul Piquado
Assistant Secretary
for Enforcement and Compliance

5 MARCH 2014
Date

[123] The rate calculated for Stanley in the Final Results of Redetermination (March 5, 2014) Pursuant to *Stanley Works (Langfang) Fastening Systems Co., Ltd. and the Stanley Words/Stanley Fastening Systems, LP v. United States,* Slip Op. 13-118 (CIT 2013) (September 3, 2013).