

**Final Results of Redetermination Pursuant to  
*Itochu Building Products Co., Inc., et al v. United States*  
Slip Op. 17-73 (CIT 2017)  
(June 22, 2017)**

**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 *Itochu Building Products Co., et al v. United States*, Slip Op. 17-73 (CIT 2017) (*Itochu*). This remand involves the second administrative review of the antidumping duty order certain steel nails (steel nails) of the antidumping duty order from the People's Republic of China (PRC).<sup>1</sup>

In accordance with the Court's instructions in *Itochu*, the Department reconsidered its evaluation of certain surrogate values (SV), *i.e.*, steel plate, and surrogate financial statements, as they relate to the selection of the surrogate country.<sup>2</sup> Additionally, and in accordance with the Court's instruction, the Department revisited its application of adverse facts available to Tianjin Jinchi Metal Products Co., Ltd. (Jinchi)'s missing factors of production (FOP) provided by an unaffiliated supplier for Jinchi's masonry nails.<sup>3</sup> Also, at the Court's instruction, the Department

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<sup>1</sup> 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 (IDM) (*Final Results*); amended in *Certain Steel Nails from the People's Republic of China: Amended Final Results of the Second Antidumping Duty Administrative Review*, 77 FR 24462 (April 24, 2012) (*Amended Final Results*).

<sup>2</sup> See *Itochu* at 15-21 and 41.

<sup>3</sup> *Id.*, at 34-40.

addressed the Court's questions and Mid-Continent Nail Corporation (the petitioner)'s responses regarding the withdrawal of review requests in this administrative review.<sup>4</sup>

For these Final Remand Results, under respectful protest, the Department valued the steel plate SV using Joint Plant Committee (JPC) data from the primary surrogate country, India.<sup>5</sup> Second, the Department reconsidered whether it has reason to believe that Sundram Fasteners Ltd. (Sundram) received countervailable subsidies and determined that Sundram's financial statement is appropriate to use for calculating the surrogate financial ratios. In so doing, the Department also addressed issues considering whether Sundram produced merchandise comparable to nails. Third, under respectful protest, the Department applied neutral facts available to Tianjin Jinchi Metal Products Co., Ltd. (Jinchi)'s missing factors of production (FOP) provided by an unaffiliated supplier for Jinchi's masonry nails.<sup>6</sup> The Department accounted for all of the changes in Jinchi's margin calculation and Tianjin Jinghai County Hongli Industry & Business Co. (Hongli)'s margin calculation, pursuant to this remand redetermination.<sup>7</sup> We note that no changes in this remand determination affect the margins for the other mandatory respondent in this administrative review, the Stanley Works (Langfang) Fastening Systems Co., Ltd. and Stanley Black & Decker, Inc. (collectively Stanley). For these Final Remand Results, the Department continues to find that sales by Jinchi and Hongli were made for less than normal value (NV) during the period of review (POR). Because there were

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<sup>4</sup> *Id.*, at 13-15 and 41.

<sup>5</sup> *See Viraj Group Ltd. v. United States*, 343 F.3d 1371 (Fed. Cir. 2003). While the Department respectfully disagrees with the Court, it complies with the Court's order under respectful protest.

<sup>6</sup> *Id.*

<sup>7</sup> *See* Memo to the File, from Julia Hancock, Case Analyst, "Second Administrative Review of Certain Steel Nails from the People's Republic of China: Draft Remand Results Analysis Memorandum for Jinchi," dated concurrently with this notice (Jinchi Draft Analysis Memo); Memo to the File, from Julia Hancock, Case Analyst, "Second Administrative Review of Certain Steel Nails from the People's Republic of China: Draft Remand Results Analysis Memorandum for Hongli," dated concurrently with these draft results of redetermination (Hongli Draft Analysis Memo).

changes to Jinchi's and Hongli's margin calculations, the Department also recalculated the separate rate margin for all separate rate respondents.<sup>8</sup>

Per the Court's request, the Department evaluated the petitioner's response to the Court. As discussed below, we find that the petitioner operated within the Department's regulations in both its request for review and subsequent withdrawal of review on certain Chinese producers of subject merchandise. Moreover, the Department reviewed the record evidence in this proceeding and did not find any evidence that suggested [ ].

## II. ANALYSIS

### A. Surrogate Value for Plate

In the underlying review, the Department selected GTA India import data to value steel cut plate and rejected the Indian domestic sources, JPC and Steelworld data, on the record, because these sources did not match the thickness of the plate consumed by respondents.<sup>9</sup> Moreover, we rejected the benchmark information submitted by respondents, finding those sources had no probative value.<sup>10</sup> The Court remanded this issue to the Department, holding that “record evidence calls into question Commerce’s conclusion that on this record steel plate thickness is an appropriate method for differentiating between surrogate sources.”<sup>11</sup> The Court directed the Department to “consider whether the other data sources render the GTA India import data unreliable and to explain what record evidence supports its decision to disregard surrogate

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<sup>8</sup> See *Itochu Br.* at 39-40 (arguing that “{t}he Department’s calculation of the ADD margin for the Separate Rate Companies was not supported by substantial evidence in the record and was contrary to law.”).

<sup>9</sup> See IDM at 25.

<sup>10</sup> See *Itochu* at 17-18; IDM at Comment 9.

<sup>11</sup> See *Itochu* at 18.

data for varying thickness of steel plate.”<sup>12</sup> Specifically, the Court stated that the Department did not explain why it does not consider export values in evaluating the best available information, why it did not consider data from non-economically comparable countries, and whether record evidence demonstrates that price correlates to steel plate thickness.<sup>13</sup> The Court explained its reasoning, finding that the record evidence showed that “these data do appear to be relevant” because they “call into question the GTA India import value.”<sup>14</sup> Therefore, the Department reconsiders its selection of GTA India import data.

The respondents submitted benchmark data which purport to show that Indian GTA data for the harmonized tariff schedule (HTS) category are aberrational.<sup>15</sup> When determining whether prices are aberrational, the Department has found that the existence of higher prices alone does not necessarily indicate that the prices are distorted or misrepresentative, and thus, it is not a sufficient basis upon which to exclude a particular SV.<sup>16</sup> Rather, interested parties must provide specific evidence showing whether the value is aberrational.<sup>17</sup> In evaluating the reliability of SVs which were valued using import statistics alleged to be aberrational, the Department’s longstanding practice is to examine benchmark GTA import data from the same HTS number for: (a) the surrogate country over multiple years to determine if the current data appear aberrational compared to historical values, and/or (b) POR-specific data for potential surrogate

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<sup>12</sup> See *Itochu* at 21.

<sup>13</sup> *Id.* at 18-20.

<sup>14</sup> *Id.* at 19.

<sup>15</sup> See *Itochu, et al.*’s June 24, 2011 submission at Exhibit 2; IDM at Comment 9.

<sup>16</sup> See, e.g., *Steel Wire Garment Hangers from the People’s Republic of China: Final Results of Antidumping Duty Administrative Review, 2012-2013*, 80 FR 13332 (March 13, 2015) (*Hangers*) and accompanying Issues and Decision Memorandum at Comment 5.

<sup>17</sup> *Id.*; *Carbazole Violet Pigment 23 from the People’s Republic of China: Final Results of Antidumping Duty Administrative Review*, 75 FR 36630 (June 28, 2010) (*Violet Pigment*) and accompanying Issues and Decision Memorandum at Comment 6.

countries for a given case.<sup>18</sup>

The Department has found that evidence of a high or low AUV does not necessarily establish that GTA data are unreliable, distorted, or misrepresentative.<sup>19</sup> To determine whether a SV is aberrational, the SV must be substantially higher than the benchmark data on the record. The Department reviews any disparities on a case-by-case basis. For example, in *Pencils*, the Department did not exclude certain surrogate values which were over four times the overall average surrogate value for a particular input.<sup>20</sup> In another example, *Wire Rope*, the Department stated that it would determine whether unit values are aberrational if they are substantially higher than the import values from other countries.<sup>21</sup> However in *Isos*, we found that import statistics that were 10 times higher than the benchmark data were aberrational.<sup>22</sup>

In this administrative review, interested parties had ample opportunity to place benchmark GTA data from the surrogate country over multiple years and/or POR-specific GTA data for the countries on the surrogate country list, *i.e.*, from February 1, 2011 to October 3, 2011,<sup>23</sup> but failed to do so.<sup>24</sup> As such, the Department does not have the benchmark data it normally considers in order to determine whether the steel plate SV is aberrational. Below we

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<sup>18</sup> *Id.*; *Carbazole Violet* at Comment 6.

<sup>19</sup> *See, e.g., Hangers* at Comment 5; *Certain Frozen Warmwater Shrimp from the People's Republic of China: Preliminary Results of Administrative Review; 2011-2012*, 78 FR 15696 (March 12, 2013), unchanged in *Certain Frozen Warmwater Shrimp from the People's Republic of China: Final Results of Administrative Review; 2011-2012*, 78 FR 56209 (September 12, 2013).

<sup>20</sup> *See Certain Cased Pencils from the People's Republic of China: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 74 FR 33,406 (July 13, 2009) (*Pencils*) and accompanying Issues and Decision Memorandum at Comment 6.

<sup>21</sup> *See Notice of Final Determination of Sales at Less Than Fair Value: Steel Wire Rope from India and the People's Republic of China; Notice of Final Determinations of Sales at Not Less Than Fair Value: Steel Wire Rope from Malaysia*, 66 FR 12759 (February 28, 2001) (*Wire Rope*) and accompanying Issues and Decision Memorandum at Comments 1 and 6.

<sup>22</sup> *See Notice of Final Determination of Sales at Less Than Fair Value: Chlorinated Isocyanurates from the People's Republic of China*, 70 FR 24502 (May 10, 2005) (*Isos*) and accompanying Issues and Decision Memorandum at Comment 16.

<sup>23</sup> *See* the Department's February 1, 2011 letter to all interested parties.

<sup>24</sup> SVs were due 20 days after the publication of the preliminary results.

analyze each of the benchmark or SV sources submitted by parties. At the outset, we find that most of the data placed on the record of this review to value plate are inappropriate for benchmarking purposes, and therefore, SV purposes. However, based on the Court's findings, under respectful protest, we have included these sources in our benchmark and SV analysis.<sup>25</sup>

#### GTA Export Data

The record contains GTA export data for Germany. The Department has a longstanding practice of not considering country-specific export data as appropriate data for SVs or benchmarking to test the validity of selected SVs.<sup>26</sup> As such, in the administrative review we declined to use this data as a benchmark or consider its use as a SV.

Itochu *et al.* submitted German export data,<sup>27</sup> and stated that record information, including German export statistics, corroborate JPC and Steelworld prices.<sup>28</sup> However, the reason the Department does not rely on export data to test the validity of SV data, as explained in other cases, is that, given different reporting and inspection requirements and timing considerations, it would be unrealistic to expect export statistics to correspond with import

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<sup>25</sup> See *Itochu* at 19 (“Indeed the probative value of these figures may be better understood when considering the comparative reliability of the underlying data.”)

<sup>26</sup> See, e.g., *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China: Final Results of the 2007-2008 Administrative Review of the Antidumping Duty Order*, 75 FR 844 (January 6, 2010) (*TRBs*) and accompanying Issues and Decision Memorandum at Comment 2 (we do not consider country-specific export data suitable comparative price benchmarks to test the validity of selected SVs); *Polyethylene Terephthalate Film, Sheet, and Strip from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2010-2011*, 78 FR 35245 (June 12, 2013) (*PET Film*) and accompanying Issues and Decision Memorandum at Comment 2.A. (country-specific export data are not suitable benchmarks to test the validity of selected SV data); *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2014-2015*, 82 FR 29033 (June 27, 2017) (*Solar Cells*) and accompanying Issues and Decision Memorandum at Comment 13; *Certain Activated Carbon from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2014-2015*, 81 FR 62088 (September 8, 2016) (*Carbon*) and accompanying Issues and Decision Memorandum at Comment 6 (reliance on POR export data is contrary to Department's practice, which has long since rejected the use of export values as surrogate values or as benchmarks for surrogate valuation).

<sup>27</sup> See *Itochu, et al.*'s June 24, 2011 submission at Exhibit 2D and 2.E.

<sup>28</sup> See *IDM* at Comment 9.

statistics for any given shipment of merchandise.<sup>29</sup> The Department does not expect one country's export quantities to be a one-to-one ratio to another country's import data.<sup>30</sup> As such, we find that the German export data are not reliable for purposes of evaluating the legitimacy of the corresponding import volumes into India.<sup>31</sup> Nevertheless, based on the Court's opinion that export data may be used to call into question, or corroborate, the validity of SVs, under respectful protest, we have included this data in our benchmark analysis under these circumstances.<sup>32</sup>

#### Data for Non-Economically Comparable Countries

The countries included in the surrogate country memo as economically comparable to China are: India, Indonesia, the Philippines, Thailand, Ukraine, and Peru.<sup>33</sup> As we noted in the *Preliminary Results*, all of the surrogate values placed on the record were obtained from sources in India, excluding certain benchmarking data.<sup>34</sup> Thus, interested parties only submitted data from two economically comparable countries: India (MEPs plate data, GTA import data, JPC domestic plate data, Indian Steelworld price data) and the Philippines (GTA import data). Otherwise, parties submitted data from countries that the Department has not found to be economically comparable (Germany (GTA export data), United States (GTA export data), Europe (MEPS data for hot-rolled plate)), and global data (World hot-rolled steel plate).

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<sup>29</sup> See, e.g., *PET Film* at Comment 2.A.; *Solar Cells* at Comment 13.

<sup>30</sup> *Id.*

<sup>31</sup> See *Lightweight Thermal Paper from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 73 FR 57329 (October 2, 2008) and accompanying Issues and Decision Memorandum at Comment 9 (where the Department explained that it does not consider export statistics from the relevant exporting country reliable for purposes of evaluating the legitimacy of the corresponding import values into the importing country).

<sup>32</sup> See *Itochu* at 18 – 19.

<sup>33</sup> See the Department's January 3, 2011 letter, containing the Memorandum to Alex Villanueva, Program Manager, Office 9, from Carole Showers, Director, Office for Policy, "Request for List of Surrogate Countries for an Antidumping Duty Review of the Antidumping Duty Order on Certain Steel Nails from the People's Republic of China."

<sup>34</sup> See *Preliminary Results*.

Section 773(c)(4)(A) of the Tariff Act of 1930, as amended (the Act) states that the Department should “to the extent possible” utilize the prices, or costs, of FOPs in one or more market economy countries that are, *inter alia*, “at a level of economic development comparable to that of the nonmarket economy country.” The statute is silent with respect to how, or on what basis, the Department may make this determination, but it is the Department’s long-standing practice to use per capita GNI data reported in the World Bank’s *World Development Report* as the indicator of the level of economic development.<sup>35</sup> The statute does not require that the Department use a surrogate country that is (a) at a level of economic development identical or most comparable to that of the nonmarket economy (NME) country, nor (b) the most significant producer of comparable merchandise.<sup>36</sup> Section 773(c)(4) of the Act requires only that the Department, (A) use a surrogate market economy (ME) country that is at a level of economic development comparable to that of the NME country, and (B) is a significant producer of comparable merchandise.<sup>37</sup> Nevertheless, wherever possible, the Department selects a surrogate country at the *same* level of economic development as the NME country, which certainly satisfies the statutory requirement. Unless it is determined that none of the potential surrogate countries considered at the same level of economic development are usable because (a) they either are not significant producers of comparable merchandise, (b) do not provide sufficient

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<sup>35</sup> See, e.g., *Preliminary Determination of Sales at Less Than Fair Value: Steel Wire Garment Hangers from the People’s Republic of China*, 73 FR 15726, 15728 (March 25, 2008), unchanged in *Steel Wire Garment Hangers from the People’s Republic of China: Final Determination of Sales at Less Than Fair Value*, 73 FR 47587 (August 14, 2008); *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review*, 76 FR 56158 (September 12, 2011) and accompanying Issues and Decision Memorandum, at Comment 1; *Fresh Garlic from the People’s Republic of China, Final Results and Partial Rescission of the 18<sup>th</sup> Antidumping Duty Administrative Review; 2011-2012*, 79 FR 36721 (June 30, 2014) and accompanying Issues and Decision Memorandum at Comment 1.

<sup>36</sup> See *Policy Bulletin No. 04.1*, “Non-Market Economy Surrogate Country Selection Process,” (March 1, 2004) (*Policy Bulletin*), available on the Department’s Web site at <http://enforcement.trade.gov/policy/bull04-1.html>.

<sup>37</sup> *Id.*



reliable sources of publicly available SV data, or (c) are not suitable for use based on other reasons, we will rely on data from one of these countries.<sup>38</sup>

As India fulfills the Department's surrogate country selection criteria, there is no need to resort to countries that are at a level less economically comparable, such as Europe, Germany, the United States, or the world to value factors of production.<sup>39</sup> Moreover, none of the exclusionary requirements listed above apply to India. India is economically comparable to China and is a significant producer of comparable merchandise, in accordance with section 773(c)(4)(A) and (B) of the Act.<sup>40</sup> In addition, it is not the Department's practice to use non-economically comparable countries' data as benchmarks.<sup>41</sup> However, because the Court has found that the data from non-economically comparable countries "do appear to be relevant," we have included this data in our benchmark analysis.<sup>42</sup>

#### Indian Domestic Price Data

Itochu *et al.* submitted JPC and Steelworld prices,<sup>43</sup> and argued that either of these sources could be used to value steel plate for the *Final Results*.<sup>44</sup> Itochu *et al.* also submitted

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<sup>38</sup> See, e.g., *Steel Wire Garment Hangers from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and New Shipper Review, 2011-2012*, 79 FR 31298 (June 2, 2014) and accompanying Issues and Decision Memorandum at Comment 1.

<sup>39</sup> See Itochu, *et al.*'s June 24, 2011 submission at Exhibit 2.

<sup>40</sup> See *Preliminary Results* at "Surrogate Country."

<sup>41</sup> See, e.g., *PET Film* at Comment I.A (use of the Singapore import data to support the use of Thai import data for PET chips is not appropriate because import values from countries at levels of economic development different from that of the PRC are not suitable benchmarks to test the validity of selected SVs); *Multilayered Wood Flooring from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 2011-2012*, 79 FR 26712 (May 9, 2014) at Comment 6 (Australia is not economically comparable to the PRC or to the countries considered as potential surrogates and, as a result, its use as a price or as a pricing benchmark is inappropriate); *TRBs* at Comment 2 (import values from countries at different levels of economic development from the PRC are not suitable comparative price benchmarks to test the validity of selected SVs).

<sup>42</sup> See Itochu at 19.

<sup>43</sup> See Itochu, *et al.*'s June 24, 2011 submission at Exhibit 2.L and 2.N.

<sup>44</sup> See IDM at Comment 9.

MEPS India data,<sup>45</sup> and argued that this data corroborates JPC and Steelworld prices.<sup>46</sup> Upon further review of these data sources, JPC, Steelworld, and MEPS, we find that each has deficiencies. First, none of these sources cover the entire POR. The MEPS India data covers only six months of the POR, February to July 2010.<sup>47</sup> The JPC prices cover eight months of the POR, December 2009 to July 2010.<sup>48</sup> In addition, Steelworld prices were submitted for only certain months of the POR, specifically, August to December 2009, and March 2010.<sup>49</sup> No record evidence indicates why only partial data sets or self-selected months by interested parties were submitted for these sources. When choosing between two equal data sources to value FOPs, it is the Department's practice to select the data source covers the entire POR, like GTA data does in this case, as opposed to an incomplete data source that only covers a part of the POR.<sup>50</sup> Consistent with our practice, the Department should have stated in the *Final Results* that because these datasets only cover a part of the POR, and GTA data cover the entire POR, we had not considered these for SV or benchmarking purposes.

Although we have concerns with the reliability of these data sources, considering the

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<sup>45</sup> See Itochu, *et al.*'s June 24, 2011 submission at Exhibit 2.K.

<sup>46</sup> See IDM at Comment 9.

<sup>47</sup> See Itochu, *et al.*'s June 24, 2011 submission at Exhibit 2.K.

<sup>48</sup> *Id.* at Exhibit 2.L.

<sup>49</sup> *Id.* at Exhibit 2.N.

<sup>50</sup> See, e.g., *Helical Spring Lock Washers from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 73 FR 4175 (January 24, 2008) (*Lock Washers*) and accompanying Issues and Decision Memorandum at Comment 2 (where the Department valued a steel input using GTA data because it covered the entire POR, and the domestic price, JPC, did not cover the entire POR); *Certain Steel Threaded Rod from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2013-2014*, 80 FR 69938 (November 12, 2015) (*STR*) and accompanying Issues and Decision Memorandum at Comment 6.C.1 (where the Department found that the domestic price data from Ukrainian Metal Expert did not cover the entire POR, and therefor was not as contemporaneous as the GTA import data covering the entire POR); *Diamond Sawblades and Parts Thereof from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2010-2011*, 78 FR 36166 (June 17, 2013) (*Sawblades*) and accompanying Issues and Decision Memorandum at Comment 15 (where the Department did not use ISIT domestic prices because they covered only part of the POR, whereas GTA data covered the entire POR).

Court’s holding, we have included these datasets in our benchmark analysis.<sup>51</sup>

### GTA Import Data

Philippines import GTA data for HTS 7208.53.00.00 was placed on the record by Itochu, *et al.* The Philippines is listed on the surrogate country list. Aside from the Philippines GTA data, the record does not contain GTA data for the remaining countries on the surrogate country list – which, as discussed above, the Department normally prefers in evaluating whether GTA data for a specific country is aberrational. Therefore, in light of the Court’s holding that the selection of Indian data to value steel plate was unsupported by substantial evidence,<sup>52</sup> we have excluded this data from our benchmarking and SV analysis.

### Analysis of Benchmark Data

The following chart summarizes the benchmark sources and values that we have considered in our analysis:

<b>Chart 1</b>	
Indian GTA Import Statistics	
<b>Period</b>	<b>AUV (USD/kg)</b>
U.S. GTA Import Data	0.78
German GTA Export Data	0.78
JPC India	0.78
Europe MEPS	0.75
World Steel Prices	0.72
India MEPS	0.71
Steelworld India	0.68
Philippines Import GTA Data	0.49

<sup>51</sup> See *Itochu* at 19 (“Excluding the GTA India import data and the GTA Philippines import data, all of the nine other data points fall within the narrow range of \$0.68 to \$0.78 per kilogram. These data, therefore, corroborate the Steelworld India value of \$0.68 per kilogram and the JPC India value of \$0.78 per kilogram.”).

<sup>52</sup> See *Itochu* at 16 (“Commerce’s selection of the GTA India import data to value steel plate is unsupported by substantial evidence.”).

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Upon examining the benchmark data identified above, we find that, excluding the GTA Philippines import data, all of the other data points fall within the narrow range of \$0.68 to \$0.78 per kilogram, as noted by the Court. Additionally, in light of the Court’s holding and our discussion above, we have no evidence to suggest that any of these data points are aberrational.<sup>53</sup>

Selection of the Plate SV

The only remaining candidates for surrogate value selection are the two domestic sources, JPC and Steelworld. As noted above, both contain partial data sets, however the JPC data contains more months of the POR than the Steelworld data. Additionally, although the court states that the Department’s preference is to rely on domestic data sources,<sup>54</sup> we note that our preference exists when all else is equal.<sup>55</sup> On remand, the Department reconsiders the record evidence to determine which data bears a “rational and reasonable relationship to the factor of production it represents,” including the thickness of the steel plate and the contemporaneity of the data.<sup>56</sup>

Moreover, section 773(c)(1) of the Act directs the Department to use the best available information from the appropriate market economy (ME) country to value FOPs. When considering what constitutes the best available information, the Department considers several

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<sup>53</sup> See *Itochu* at 19.

<sup>54</sup> See *Itochu* at 15 (citing *Hebei Metals & Minerals Imp. & Exp. Corp. v. United States*, 28 CIT 1185, 1191 (2004)); see also *Hebei Metals & Minerals Imp. & Exp. Corp. v. United States*, 366 F. Supp. 2d 1264, 1273-74 (citing prior administrative cases) (*Hebei Metals*).

<sup>55</sup> See *Hebei Metals*, 366 F. Supp. 2d at 1273-74 (“domestic data is clearly preferable over import data, but, as all things are rarely equal, this preference is subject to conditions. . . . {T}he preference for domestic data is most appropriate where the circumstances indicate that a producer in a hypothetical market would be unlikely to use an imported factor in its production process.”).

<sup>56</sup> See *Itochu* at 15 and 20.

criteria, including whether the SV data are contemporaneous, publicly available, tax and duty exclusive, representative of a broad market average, and specific to the inputs in question.<sup>57</sup> The Department's preference is to satisfy the breadth of the aforementioned selection criteria.<sup>58</sup> Moreover, it is the Department's practice to carefully consider the available evidence in light of the particular facts of each industry when undertaking its analysis of valuing FOPs.<sup>59</sup> As there is no hierarchy for applying the above-mentioned criteria, the Department must weigh available information with respect to each input value and make a product-specific and case-specific decision as to what the "best" available SV is for each input, regardless of whether the source data for that SV are import statistics or domestic prices.<sup>60</sup>

As noted above, *Itochu et al.* argued that steel plate should be valued using either JPC or Steelworld.<sup>61</sup> Because we are no longer relying on Indian GTA data, we find, respectfully under respectful protest, that the best available information to value steel plate is Indian JPC data. The JPC data covers eight months of the POR, while Steelworld data only covers six months of the POR and contains a gap not explained by the record. As such, we have valued steel plate using JPC data for this remand. Use of the JPC data is consistent with the Department's strong preference to use SVs from the primary surrogate country, which in this case is India.<sup>62</sup>

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<sup>57</sup> See, e.g., *Notice of Final Determination of Sales at Less Than Fair Value and Affirmative Critical Circumstances, In Part: Certain Lined Paper Products from the People's Republic of China*, 71 FR 53079 (September 8, 2006) and accompanying Issues and Decision Memorandum at Comment 3.

<sup>58</sup> See, e.g., *Administrative Review of Certain Frozen Warmwater Shrimp from the People's Republic of China: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 76 FR 51940, 51943 (August 19, 2011) and accompanying Issues and Decision Memorandum at Comment 2.

<sup>59</sup> See *Certain Preserved Mushrooms from the People's Republic of China: Final Results and Final Partial Rescission of the Sixth Administrative Review*, 71 FR 40477 (July 17, 2006) (*Mushrooms*) and accompanying Issues and Decision Memorandum at Comment 1; *Freshwater Crawfish Tail Meat from the People's Republic of China: Notice of Final Results of Antidumping Duty Administrative Review, and Final Partial Rescission of Antidumping Duty Administrative Review*, 67 FR 19546 (April 22, 2002) and accompanying Issues and Decision Memorandum at Comment 2.

<sup>60</sup> See, e.g., *Mushrooms* at Comment 1.

<sup>61</sup> See IDM at Comment 9.

<sup>62</sup> See 19 CFR 351.408(c)(2); *Clearon Corp. v. United States*, No. 08-00364, 2013 WL 646390 (CIT 2013) at 6 (“{T}he court must treat seriously {the Department’s} preference for the use of a single surrogate country.”).

## B. Selection of Financial Statements

The CIT granted the Department's request for voluntary remand to reconsider whether there is reason to believe or suspect that Sundram received countervailable subsidies. The Department requested this partial voluntary remand because it incorrectly concluded that the EU never reviewed Section 35(2AB) of the Indian Income Tax Act, which the respondents argued to be countervailable. The Department also sought to revisit the issue of whether Sundram received countervailable subsidies due to its location in a Special Economic Zone (SEZ). In reexamining Sundram's financial statements, as detailed below, the Department does not have reason to believe or suspect that Sundram benefited from a countervailable subsidies. Thus, in accordance with the Court's opinion, the Department addresses Stanley's and Itochu's additional arguments regarding Sundram's inclusion as a source of surrogate financial information.<sup>63</sup>

In selecting surrogate values, section 773(c)(1) of the Act, instructs the Department to use "the best available information" from the appropriate market-economy (ME) country, and section 773(c)(3)(D) of the Act states the factors of production should include "representative capital costs." In choosing surrogate financial ratios, it is the Department's policy to use data from ME surrogate companies based on the "specificity, contemporaneity, and quality of the data."<sup>64</sup> Further, Congress instructed the Department to "avoid using any prices which it has reason to believe or suspect may be dumped or subsidized prices."<sup>65</sup> Congress additionally

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<sup>63</sup> See *Itochu* 23 footnote 19.

<sup>64</sup> See *Notice of Final Determination of Sales at Less Than Fair Value and Affirmative Critical Circumstances, In Part: Certain Lined Paper Products from the People's Republic of China*, 71 FR 53079 (September 8, 2006) and accompanying Issues and Decision Memorandum at Comment 1.

<sup>65</sup> See Omnibus Trade and Competitiveness Act of 1988, H.R. Rep. No. 576, 100<sup>th</sup> Cong., 2<sup>nd</sup> Sess. At 590-91 (1988).

explained that Commerce need not “conduct a formal investigation to ensure that such prices are not subsidized, but rather ... {need only} base its decision on information generally available to it at that time.”<sup>66</sup> Consequently, the Department avoids using information that the Department has reason to believe or suspect may be distorted by subsidies, when calculating the normal value in nonmarket economy antidumping proceedings, as ordered by Congress.<sup>67</sup>

Upon reexamination, the Department determines that there is no reason to believe or suspect that Sundram benefited from its location in a SEZ or Section 35(2AB) of the Income Tax Act. In an antidumping duty proceeding, when calculating normal value in the Department applies the “reason to believe or suspect” standard in two instances: (1) when determining whether to use a set of financial statements to calculate selling, general, and administrative expenses (SG&A); and (2) when determining whether to use import statistics to value certain factors of production.<sup>68</sup> In the first instance, if Commerce has reason to believe or suspect that a set of financial statements with evidence of subsidies may result in distorted financial ratios, Commerce generally will not use this information when calculating normal value.<sup>69</sup> In the past, Commerce has found a reason to “believe or suspect” that financial ratios may be distorted by

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<sup>66</sup> See House Rep. at 591; *Peer Bearing Co.- Changshan v. United States*, 298 F. Supp. 2d 1328, 1334 (Ct. Int’l Trade 2003) (*Peer Bearing*) (“Congress did not intend for Commerce to undertake an investigation to determine whether prices were in fact subsidized.”).

<sup>67</sup> *Id.*, see also *Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1378 (Fed. Cir. 1999); *Clearon Corp. v. United States*, 800 F. Supp. 2d 1355, 1358-59 (Ct. Int’l Trade 2011); *Catfish Farmers of Am. v. United States*, 641 F. Supp. 2d 1362, 1379-80 (Ct. Int’l Trade 2009); *Peer Bearing Co.*, 298 F. Supp. 2d 1328, 1334 (Ct. Int’l Trade 2003).

<sup>68</sup> See, e.g., *Wooden Bedroom Furniture from the People’s Republic of China*, 73 FR 49162 (August 20, 2008) at “Financial Statements”.

<sup>69</sup> See *Certain New Pneumatic Off-The-Road Tires from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances*, 73 FR 40485 (July 15, 2008); *Certain Helical Spring Lock Washers from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review*, 74 FR 57653 (November 9, 2009); but see *DuPont Teijin Films v. United States*, 896 F. Supp. 2d 1302, 1312-13 (CIT 2013) (noting Commerce’s ability to use the least distorted financial statement when there is reason to believe or suspect that all potential surrogate companies on record benefitted from countervailable subsidies).

countervailable subsidies if there is evidence that the financial statements demonstrate receipt of benefit and there is other sufficient, reliable, and representative data on the record.<sup>70</sup>

To make the determination in this case, we first reviewed Sundram's 2009-2010 financial statements. When reviewing a set of financial statements for evidence of countervailable subsidies, the Department has adopted general guideposts:

(1) If a financial statement contains a reference to a *specific* subsidy program found to be countervailable in a formal CVD determination, Commerce will *exclude* that financial statement from consideration. (2) If a financial statement contains *only a mere mention that a subsidy was received*, and for which there is no additional information as to the specific nature of the subsidy, Commerce will *not exclude* the financial statement from consideration.<sup>71</sup>

Thus, if a specific subsidy program is mentioned or identified within a company's financial statements, with evidence of a benefit received, and that subsidy program has been determined to be countervailable, the Department will exclude the financial statements from consideration.<sup>72</sup>

However, mere mention of a subsidy, without information that the company actually received the subsidy, or further information as to the specific nature of the subsidy, is not enough for the Department to exclude the statements.<sup>73</sup> With respect to this review, the financial statements are the best available information on the record with which to identify whether the company

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<sup>70</sup> See, e.g., *Carbazole Violet Pigment 23 from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 75 FR 36630 (June 28, 2010) and accompanying Issues and Decision Memorandum at Comment 1.

<sup>71</sup> See *Clearon Corp.*, 800 F.Supp.2d at 1358-59; *Catfish Farmers*, 641 F. Supp. 2d at 1379-80; *Certain Helical Spring Lock Washers from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review*, 74 FR 57657 (November 9, 2009).

<sup>72</sup> *Id.*; see 19 USC 1671(a) (allowing duties to be imposed only upon a finding that a *countervailable* subsidy is being provided); see also 19 USC 1677(5) & (5B) (differentiating countervailable and non-countervailable subsidies, respectively).

<sup>73</sup> *Id.*; see also *DuPont Teijin Films*, 896 F. Supp. 2d at 1312-13 (upholding Commerce's determination that the "reason to believe or suspect" standard was not satisfied when the surrogate company's financial statements included line items to account for specific subsidies, but showed no actual dollar amount of the subsidies received); *Catfish Farmers*, 641 F. Supp. 2d at 1380 (affirming Commerce's determination that the "reason to believe or suspect" standard was not satisfied when petitioners identified a subsidy without additional substantiating evidence of countervailability).



benefitted from a countervailable subsidy. Because this is the best available evidence on the record, and to avoid conducting a full countervailing duty investigation, which, as noted above, Congress has stated is not warranted, it is reasonable for Commerce to rely on the financial statements to determine whether a company has received a subsidy.

As discussed in the *Final Results*, although Sundram operates a manufacturing plant located in a SEZ, this does not detract from the Department's conclusion that it has no reason to believe or suspect Sundram benefitted from subsidies related to this SEZ.<sup>74</sup> As previously explained, "Sundram's financial statement does not identify any specific line item showing that it received benefits" related to the specific program.<sup>75</sup> In light of this evidence, we find that the mere fact that Sundram is located in an SEZ alone does not suggest receipt of a specific subsidy.<sup>76</sup> Moreover, the Department finds that, based on a prior CVD finding, benefits from India's SEZ programs are not provided automatically to companies located within the SEZ because in certain instances, a company must also apply and qualify for the benefits of the subsidy programs to receive them.<sup>77</sup> So although Sundram operates a manufacturing plant in an

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<sup>74</sup> See IDM at 2.

<sup>75</sup> *Id.*

<sup>76</sup> In contrast, when determining whether to use import statistics to calculate normal value, Commerce generally disregards import statistics from countries that maintain broadly available, non-industry specific export subsidies. See *Seamless Refined Copper Pipe and Tube from the People's Republic of China: Preliminary Results of the First Antidumping Duty Administrative Review, and Intent to Rescind in Part*, 77 FR 47030 (August 7, 2012) (*Seamless Pipe*). In such instances, the source of the imports, *i.e.*, the country, alone, is sufficient to provide Commerce with a reason to believe or suspect the receipt of subsidies. See *Seamless Pipe; Tapered Roller Bearings and Parts Thereof, Finished or Unfinished, from the People's Republic of China: Preliminary Results of the 2010-2011 Antidumping Duty Administrative Review, Rescission in Part, and Intent to Rescind in Part*, 77 FR 40579 (July 10, 2012); *Sodium Hexametaphosphate from the People's Republic of China: Preliminary Results of Second Antidumping Duty Administrative Review*, 77 FR 17013. The country is sufficient because import statistics generally are in the aggregate; Commerce presumes that at least one of the companies included in this aggregate number has benefitted from such subsidy programs. Consequently, the fact that a country maintains broadly available, non-industry specific export subsidies is sufficient evidence to indicate that there is reason to believe or suspect the *import statistics* from that country are distorted by countervailable subsidies. This geographical categorization does not, however, apply to financial statements.

<sup>77</sup> See, *e.g.*, *Polyethylene Terephthalate Film, Sheet, and Strip from India: Final Results of Countervailing Duty New Shipper Review*, 76 FR 30910 (May 27, 2011) (*PET Film NSR*) and accompanying Issues and Decision Memorandum at 13-19.

SEZ and Commerce has previously found programs under Indian Government's Special Economic Zone (SEZ Act) countervailable,<sup>78</sup> there is no evidence on the record leading to the conclusion that Sundram receives countervailable subsidies under an SEZ program. Given the above, the Department continues to find that there is insufficient evidence on the record that would cause us to believe or suspect Sundram enjoyed the benefits of any countervailable subsidies with respect to its location within an SEZ.

Further, Itochu and Stanley contend that Sundram's financial statements indicate that it receives special tax incentives under Section 35(2AB) of India's Income Tax Act to support its R&D program, and, further, that the European (EU) has found this program to be countervailable. In reviewing Sundram's financial statements for evidence of countervailable subsidies, the Department previously observed that Sundram was "eligible for weighted deduction under Section 35(2AB) of the Income Tax Act."<sup>79</sup> The Department also misstated the EU's finding. For purposes of this remand, following careful analysis of the financial statements, we did not find affirmative evidence indicating that Sundram was approved or specifically received benefits from any programs related to Section 35(2AB) of the Income Tax Act. While the financial statements discuss Sundram's eligibility for Section 35(2AB) of the Income Tax Act, there is no corresponding line item demonstrating that Sundram received any subsidies. Accordingly, we find that there is no reason to believe or suspect that Sundram benefited from a countervailable subsidy with respect to Section 35(2AB) of the Income Tax Act and, as such, the Department continues to find it appropriate to rely on Sundram's financial statements.

Because the Department continues to rely on Sundram's financial statements for the

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<sup>78</sup> See Itochu Br. at 29 citing *Pet Film NSR* at Comment 4.

<sup>79</sup> See Sundram Financial Statement at 11.

valuations of SG&A ratios, we hereby address Itochu and Stanley’s concerns related to whether Sundram is a producer of comparable merchandise, pursuant to the Court’s opinion.<sup>80</sup> When selecting financial statements for purposes of calculating financial ratios, the Department’s policy is to use data from ME surrogate companies based on the “specificity, contemporaneity, and quality of the data.”<sup>81</sup> In accordance with 19 CFR 351.408(c)(4), the Department normally will use non-proprietary information gathered from producers of identical or comparable merchandise in the surrogate country to value manufacturing overhead, general expenses, and profit.<sup>82</sup> Although the regulation does not define what constitutes “comparable merchandise,” it is the Department’s practice to, where appropriate, apply a three-prong test that considers: (1) physical characteristics; (2) end uses; and (3) production process.<sup>83</sup> Additionally, for purposes of selecting surrogate producers, the Department examines how similar a proposed surrogate producer’s production experience is to the NME producer’s production experience.<sup>84</sup> However, the Department is not required to “duplicate the exact production experience of” an NME producer, nor must it undertake “an item-by-item analysis in calculating factory overhead.”<sup>85</sup>

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<sup>80</sup> See *Itochu* at 23, footnote 19 (“If Commerce, however, continues to rely on Sundram’s financial statements after conducting its redetermination, Commerce shall address with some detail Itochu’s and Stanley’s other concerns, particularly those related to the comparable producer inquiry.”).

<sup>81</sup> See *Notice of Final Determination of Sales at Less Than Fair Value, and Affirmative Critical Circumstances, In Part: Certain Lined Paper Products from the People’s Republic of China*, 71 FR 53079 (September 8, 2006) and accompanying Issues and Decision Memorandum at Comment 1.

<sup>82</sup> See *Certain Frozen Warmwater Shrimp from the People’s Republic of China: Notice of Final Results and Rescission, in Part, of 2004/2006 Antidumping Duty Administrative and New Shipper Reviews*, 72 FR 52049 (September 12, 2007) and accompanying Issues and Decision Memorandum at Comment 2.

<sup>83</sup> See, e.g., *Certain Woven Electric Blankets from the People’s Republic of China: Final Determination of Sales at Less Than Fair Value*, 75 FR 38459 (July 2, 2010) and accompanying Issues and Decision Memorandum at Comment 2.

<sup>84</sup> See *Certain Oil Country Tubular Goods from the People’s Republic of China: Final Determination of Sales at Less Than Fair Value, Affirmative Final Determination of Critical Circumstances and Final Determination of Targeted Dumping*, 75 FR 20335 (April 19, 2010) and accompanying Issues and Decision Memorandum at Comment 13.

<sup>85</sup> See *Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1377 (Fed. Cir. 1999); see also *Magnesium Corp. of Am. v. United States*, 166 F.3d 1364, 1372 (Fed. Cir. 1999).

When considering the physical characteristics between fasteners and nails, we disagree with Itochu that these products are sufficiently different to consider them incomparable.<sup>86</sup> Prior to this review, the Department determined that fasteners, which includes screws and bolts, are comparable to steel nails.<sup>87</sup> Nails are described as having shaft lengths up to 12 inches and may be produced from any type of steel, and have a variety of finishes, heads, shanks, point types, shaft length and diameters.<sup>88</sup> In comparison, screws are made of steel, other than stainless steel, and have a shank or thread with a circular or hexagonal head.<sup>89</sup> As such, because nails and screws are both made from steel, have a shank and head, we find that these physical descriptions are comparable.

Regarding Itochu's argument that nails and automotive screws have different end uses,<sup>90</sup> we disagree. Nails are used for holding separate pieces together<sup>91</sup> while screws are used to hold, join, couple, assemble or maintain the equilibrium of single or multiple components.<sup>92</sup> Because both nails and screws are used to hold different pieces together, we additionally find that their end uses are similar.

With respect to Stanley's and Itochu's argument that Sundram's fasteners are manufactured utilizing a different production process than those of nails,<sup>93</sup> we disagree. Steel nails are typically produced from steel wire rod (low-carbon steel, stainless steel, and hardenable

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<sup>86</sup> See Itochu Br. at 35-36.

<sup>87</sup> See *Certain Steel Nails from the People's Republic of China: Final Results of the First New Shipper Review*, 75 FR 34425 (June 17, 2010) and accompanying Issues and Decision Memorandum at Comment 4.

<sup>88</sup> See at *Certain Steel Nails from the United Arab Emirates*, Inv. No. 731-TA-1185 (May 2011) (*Certain Steel Nails from the UAE*) at 5, attached to Petitioner's Final SV Submission at Exhibit 10.

<sup>89</sup> See *Certain Standard Steel Fasteners from China and Taiwan*, Inv. Nos. 701-TA-472 and 731-TA-1171-1172 (November 2009) (*Certain Fasteners from China and Taiwan*) at 8, attached to Petitioner's Final SV Submission at Exhibit 10.

<sup>90</sup> See Itochu Br. at 36.

<sup>91</sup> See *Certain Steel Nails from the UAE* at I-6.

<sup>92</sup> See *Certain Fasteners from China and Taiwan* at 9.

<sup>93</sup> See Stanley Br. at 35-39; see also Itochu Br. at 32-34.

medium to high-carbon steel).<sup>94</sup> During the production process, wire is fed from a large coil into a nail machine that straightens the wire.<sup>95</sup> Next, the machine forms the head of the nail, cuts the nail from the wire, and finally ejects the finished nail.<sup>96</sup> There are two general types of nail machines: cold heading machines and rotary heading machines.<sup>97</sup> The cold heading machine holds the wire near its end in gripper dies and forms the head by striking the end of the wire.<sup>98</sup> The rotary heading machine, on the other hand, is fed continuously while cutting rollers cut individual nails blanks, which then form the point.<sup>99</sup> Next, the blanks are inserted into a die ring and the heads are formed by compression of the end of the nail between the rotating ring and heading roller.<sup>100</sup> After forming, nails are tumbled and cleaned, which can be followed by further processing, such as painting, resin coating, or galvanizing.<sup>101</sup>

To manufacture screws and other fasteners, producers begin with hot-rolled carbon alloy steel rod or bar.<sup>102</sup> During the production process, producers utilize a cold forming-process. Specifically, manufactures pass the steel through dies in cold-forming equipment to form the fastener.<sup>103</sup> Following this stage, the steel is then transferred to threading machinery to cold roll or tap the threads.<sup>104</sup> Additional processing could also include heat treatment or coating.<sup>105</sup>

Here, the Department finds that nails and screws/fasteners' production processes are similar because they are both produced from steel wire and rod. While Stanley argues that

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<sup>94</sup> See *Certain Steel Nails from the UAE* at I-9.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*, at I-10.

<sup>102</sup> See *Certain Fasteners from China and Taiwan* at 10.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

Sundram uses high tensile steel to produce its fasteners, which is different from the low-carbon and medium-carbon steel wire rod,<sup>106</sup> we find that no party provided conclusory evidence on the record that high tensile fasteners cannot be made from the steel wire rod consumed by mandatory respondents. Additionally, parties have not provided any additional information with respect to the chemical, physical, or mechanical makeup of high tensile steel which would differentiate it from low-carbon and medium-carbon steel wire rod. Thus, we do not find the argument that Sundram and the mandatory respondents use different steel wire rod to be persuasive.

Additionally, we disagree with Stanley and Itochu's assertion that Sundram's production process is so different from nails that they are incomparable.<sup>107</sup> For purposes of selecting surrogate producers, the Department examines how similar a proposed surrogate producer's production experience is to the NME producer's production experience.<sup>108</sup> As noted above, the Department is not required to "duplicate the exact production experience of" an NME producer, nor must it undertake "an item-by-item analysis in calculating factory overhead."<sup>109</sup> While Stanley points to certain stages in the production process for fasteners, including, annealing, pickling, and heat treatment,<sup>110</sup> as significant in terms of analyzing the production process the Department does not find such differences in production to be so vast as to consider the production processes dissimilar. Because nails and automotive screws are produced using cold forming machines, which create a head and the shank or body, and are both subject to further

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<sup>106</sup> See Stanley's Br. at 33-34.

<sup>107</sup> *Id.* at 35-37; Itochu's Br. at 32-34.

<sup>108</sup> See, e.g., *Certain Woven Electric Blankets from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 75 FR 38459 (July 2, 2010) and accompanying Issues and Decision Memorandum at Comment 2.

<sup>109</sup> See *Certain Oil Country Tubular Goods from the People's Republic of China: Final Determination of Sales at Less Than Fair Value, Affirmative Final Determination of Critical Circumstances and Final Determination of Targeted Dumping*, 75 FR 20335 (April 19, 2010) and accompanying Issues and Decision Memorandum at Comment 13.

<sup>110</sup> See Stanley Brief at 35-36.

processing, including head treatment and coating, we find that the production process of automotive screw to be sufficiently similar to nails.

In sum, the Department finds that the physical characteristics, end uses, and manufacturing process for nails and screws are similar. Accordingly, we find that nails and screws/fasteners are comparable merchandise.

With respect to Stanley's and Itochu's arguments that Sundram's financial statements should not be used to value financial ratios because automotive fasteners are different from ordinary bolts/nuts, we disagree. Stanley cites characteristics such as automotive fasteners' and bolts/nuts' interchangeability, channels of distribution, customer perception, and manufacturing facilities in order to demonstrate that nails are not comparable to Sundram's automotive fasteners.<sup>111</sup> Additionally, Itochu asserts that Sundram's fasteners are specific to automotive manufacturers, which is in contrast to nails that are specific to the housing market.<sup>112</sup> Despite Stanley's and Itochu's claims, these characteristics are inapposite when determining whether merchandise is comparable because, as noted above, the Department applies a three-prong test that considers: (1) physical characteristics; (2) end uses; and (3) production process.<sup>113</sup> Therefore, the Department has not relied upon interchangeability, channels of distribution, customer perception, and manufacturing facilities for the purpose of determining whether Sundram produces comparable merchandise.

We also disagree with Itochu's argument that the Department should not use Sundram's financial statements because it is the Department's practice to rely on "the statement of a

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<sup>111</sup> See Stanley Brief at 37-39.

<sup>112</sup> See Itochu Brief at 24.

<sup>113</sup> See, e.g., *Certain Woven Electric Blankets from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 75 FR 38459 (July 2, 2010) and accompanying Issues and Decision Memorandum at Comment 2.

company which produces identical merchandise (*i.e.*, nails) over the statement of a company which does not produce identical merchandise, but only produces comparable merchandise.”<sup>114</sup> As discussed in the *Final Results*, the Department found that Bansidhar Granites’ (Bansidhar) financial statements, the other financial statements used to calculate surrogate financial ratios, demonstrate that it is a producer of comparable, rather than identical, merchandise.<sup>115</sup> Although Bansidhar produces some identical merchandise, its financial statements reflect a company that produces comparable merchandise, *i.e.*, bolts and wire, with only limited amounts of identical merchandise, *i.e.*, nails. Accordingly, record evidence demonstrates that all useable financial statements are from companies that produce comparable merchandise, rather than identical merchandise; thus, rendering moot Itochu’s argument that the Department should only use the financial statements of companies which produce identical merchandise, since only relying on manufacturers of identical merchandise would leave the Department without any useable financial statements to value surrogate financial ratios.

Last, following the Court’s request, we find that the subsequent investigations of steel nails in which the Department addressed whether Sundram is a producer of comparable merchandise<sup>116</sup> are not applicable to this administrative review. As an initial matter, we note that each administrative review stands alone; the Department bases each determination on the corresponding record and the facts of that case.<sup>117</sup> Importantly, because each of the segments

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<sup>114</sup> See *Itochu Br.* at 32-33.

<sup>115</sup> See *Final Results* at Comment 2.

<sup>116</sup> See *Itochu* at 23 and footnote 41.

<sup>117</sup> See, *e.g.*, *Fresh Garlic from the People’s Republic of China: Final Results of Antidumping Administrative Review and Rescission of New Shipper Review*, 67 FR 11283 (March 13, 2002) and accompanying Issues and Decision Memorandum at Comment 3 (“What transpired in previous reviews is not binding precedent in later reviews”). The Department’s interpretation of the statute was affirmed by the CIT in *Shandong Huarong Machinery Co. v. United States*, 2005 CIT Lexis 57, Slip Op. 2005-54 (May 2, 2005) (“As Commerce points out each administrative review is a separate segment of proceedings with its own unique facts”).



referenced<sup>118</sup> represents a period of review subsequent to the administrative review at issue, we note that the financial statements are not contemporaneous with the administrative review at issue, and, as such, different financial statements than the 2009-2010 Sundram financial statement were used to value surrogate financial ratios. When selecting financial statements for purposes of calculating financial ratios, the Department's policy is to use data from market economy surrogate companies based on the "specificity, contemporaneity, and quality of the data."<sup>119</sup> Specifically, one of the three proceedings<sup>120</sup> cited does not indicate the fiscal year analyzed in the financial statements,<sup>121</sup> while the two proceedings that do note a fiscal year are for the year ending on March 31, 2014.<sup>122</sup> As such, there is a five-year difference between the financial statements referenced by Itochu and the financial statements used in the administrative review at issue, making these financial statements unusable to determine whether the merchandise produced by Sundram for the 2014 fiscal year were comparable to the merchandise produced by respondents in the 2009-2010 administrative review. Even though the Department may have found that Sundram was not a producer of comparable merchandise in the aforementioned reviews, there is no indication that the facts are the same in this administrative

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<sup>118</sup> See *Itochu* at 23 and footnote 19.

<sup>119</sup> See *Notice of Final Determination of Sales at Less Than Fair Value, and Affirmative Critical Circumstances, In Part: Certain Lined Paper Products from the People's Republic of China*, 71 FR 53079 (September 8, 2006), and accompanying Issues and Decision Memorandum at Comment 1.

<sup>120</sup> While four *Federal Register* notices are cited, we note that two of the notices are from the same segment. See *Certain Steel Nails from the Sultanate of Oman: Affirmative Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 79 FR 78034 (December 29, 2014) and accompanying Issues and Decision Memorandum at "Normal Value" unchanged at *Certain Steel Nails from the Sultanate of Oman: Final Determination of Sales at Less Than Fair Value*, 80 FR 28972 (May 20, 2015) (collectively, *Nails from Oman*)

<sup>121</sup> See *Certain Steel Nails from the Republic of Korea: Affirmative Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 79 FR 78051 (December 28, 2014) and Preliminary Decision Memorandum at "Normal Value" and unchanged at *Certain Steel Nails from the Republic of Korea: Final Determination of Sales at Less Than Fair Value*, 80 FR 28955 (May 20, 2015).

<sup>122</sup> See *Nails from Oman*; see also *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). The Department observes at the final determination, we declined to use Sundram because it did not sell identical or comparable products in the market under consideration, Taiwan. See *Certain Steel Nails from Taiwan: Final Determination of Sales at Less Than Fair Value*, 80 FR 28959 (May 20, 2015) and accompanying Issues and Decision Memorandum at Comment 1.

review to make the same determination, and are unsuitable to reference when determining whether Sundram produced comparable merchandise for the purposes of this administrative review.

Therefore, upon remand, and following the above analysis, we continue to find that there is no reason to believe or suspect that Sundram received any countervailable subsidies. We also continue to find that Sundram is a producer of comparable merchandise and thus we will continue to average Bansidhar's and Sundram's financial statements for the remand results.

### **C. Application of AFA to Jinchi**

The Court found that the Department's decision to apply facts otherwise available regarding the missing information of Jinchi's unaffiliated supplier and tollers is supported by substantial evidence because the Department never received the necessary data it required to calculate normal value.<sup>123</sup> Additionally, the Court found that the Department properly found that the application of AFA was not warranted for the unreported FOPs of Jinchi's unaffiliated tollers.<sup>124</sup> However, the Court also determined that the Department improperly applied AFA to Jinchi for the failure to cooperate of a separate, unaffiliated supplier.<sup>125</sup> Specifically, the Court found that the Department failed to conduct the necessary case-specific analysis to determine whether it was appropriate to apply an adverse inference to Jinchi for its supplier's failure to cooperate.<sup>126</sup> The Court determined that the Department "never made a finding that Jinchi failed to cooperate," and instead that "the record evidence shows that Jinchi continued to work with the Department to provide the requested data" from its unaffiliated supplier.<sup>127</sup> Despite its efforts,

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<sup>123</sup> See *Itochu* at 35.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*, at 36.

<sup>127</sup> *Id.*, at 37.

Jinchi was unable to obtain the missing FOPs from the unaffiliated supplier and the Court found that the Department did not make a finding that Jinchi had sufficient control over its supplier such that it could induce cooperation, or that application of an AFA margin to Jinchi would directly and adversely affect Jinchi's supplier's interests.<sup>128</sup> As such, the Court found that the Department punished Jinchi without justifying how applying an AFA margin of 471.21 percent to the limited missing FOP data, a rate nearly four times higher than the PRC-wide rate, to Jinchi furthers the statute's goal of cooperation.<sup>129</sup> Accordingly, the Court directed the Department to reconsider its decision to apply AFA to the unreported FOPs of Jinchi's unaffiliated supplier and "either make the necessary factual determinations to explain why application of AFA to Jinchi, a fully cooperating party, is appropriate or apply a neutral facts available margin to Jinchi."<sup>130</sup>

It is the Department's practice in non-market economy cases to calculate normal value using the factors of production (FOP) consumed in the production of the subject merchandise by the respondent during the POR, pursuant to section 773(c) of the Act.<sup>131</sup> When calculating a respondent's dumping margin, the Department has a practice of obtaining the FOPs for the entirety of the production process of the subject merchandise, including situations where these FOPs need to be obtained from tollers or unaffiliated suppliers.<sup>132</sup> Accordingly, in cases where a

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<sup>128</sup> *Id.*, at 38.

<sup>129</sup> *Id.*, at 39; and *Changzhou Wujin Chem. Factor Co. v. United States*, 701 F. 3d 1367, 1378 (CAFC 2012).

<sup>130</sup> See *Itochu* at 39.

<sup>131</sup> See *Certain Steel Nails from the People's Republic of China: Preliminary Results and Preliminary Rescission, in Part, of the Antidumping Duty Administrative Review and Preliminary Intent to Rescind New Shipper Review*, 76 FR 56147, 56150, and 56152 (September 12, 2011) (*Preliminary Results*) (unchanged in *Final Results*).

<sup>132</sup> See *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China: Final Determination of Sales at Less Than Fair Value, and Affirmative Final Determination of Critical Circumstances, in Part*, 77 FR 63791 (October 17, 2012) and accompanying Issues and Decision Memorandum at Comment 12 (*Solar Cells Final 2012*); *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2014-2015*, 82 FR 29033 (June 27, 2017) and accompanying Issues and Decision Memorandum at Comment 1 (*Solar Cells Final 2017*); and *Mueller Comercial De Mexico, S. De R.L. De C. V. v. United States*, 753 F.3d 1227, 1233 (CAFC 2014).

respondent identifies that it used tollers or unaffiliated suppliers to produce the subject merchandise, the Department requests that the respondent obtain the FOPs from these tollers or unaffiliated suppliers so that the Department has complete FOP data to calculate an accurate margin.<sup>133</sup>

However, if a respondent is having difficulty obtaining the information from a certain toller or unaffiliated supplier, the Department may excuse the respondent, if that respondent makes such a request, from reporting this information if there are a large number of suppliers or tollers, the missing FOPs from this supplier or toller represent an insignificant quantity, and there is information on the record from other suppliers or tollers to be applied as facts available.<sup>134</sup> In other situations, where the respondent did not make a request to be excused from reporting a supplier or toller's FOPs, the missing FOPs from this supplier or toller represent a significant quantity, and there is no information on the record from other suppliers or tollers to be applied as facts available, the Department has a practice of requiring the respondent to obtain the FOPs from the toller or unaffiliated supplier.<sup>135</sup> If the respondent is experiencing difficulties in obtaining the FOPs from the toller or unaffiliated supplier, the Department requires the respondent to inform the Department early on, with documentation of its difficulties in obtaining the FOPs from the toller or unaffiliated supplier and to identify these non-reporting parties to the Department.<sup>136</sup> In such cases, for tollers or unaffiliated suppliers where there is other FOP information available on the record from either a respondent or another toller/supplier, the Department may apply facts available to these missing FOPs, not require the respondent to again

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<sup>133</sup> *Id.*

<sup>134</sup> *See Solar Cells Final 2012* at Comment 12.

<sup>135</sup> *Id.*, *see also Solar Cells Final 2017* at Comment 1.

<sup>136</sup> *Id.*

attempt to obtain the missing FOPs; in addition, the Department will not attempt to obtain the missing FOPs directly from the unaffiliated tollor or supplier.<sup>137</sup>

However, for unaffiliated suppliers where there is no other FOP information on the record to apply as facts available and these unaffiliated suppliers refused to provide the requested FOP information, the Department has a practice of applying AFA to the missing FOPs of these unaffiliated suppliers.<sup>138</sup> Unlike tollers that perform only a certain portion of the production process, unaffiliated suppliers are producers of the subject merchandise and the antidumping statute defines an interested party as, among other things, a “foreign manufacturer . . . of such merchandise.”<sup>139</sup> Thus, when an unaffiliated supplier refuses to provide missing FOP information that is necessary to the Department’s accurate margin calculation, the Department has a practice of finding that the unaffiliated supplier withheld requested information and failed to cooperate by not acting to the best of their ability to comply with a request for necessary information, pursuant to sections 776(a)(2)(A) and 776(b) of the Act. In such situations, the statute allows the Department to use AFA in place of the missing information where the missing FOPs represent a significant quantity or there is no information on the record to apply as facts.<sup>140</sup> Accordingly, the Department finds that it was following its practice in applying AFA to Jinchi for the missing FOPs of its unaffiliated supplier since this unaffiliated supplier is an interested party, pursuant to section 771(9)(A) of the Act, the unaffiliated supplier withheld necessary information and thus did not cooperate to the best of its ability by refusing to supply the requested FOP data, and there

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<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> See section 771(9)(A) of the Act.

<sup>140</sup> See *Solar Cells Final 2017* at Comment 1; *Solar Cells Final 2012* at Comment 12; and *Narrow Woven Ribbons with Woven Selvedge from Taiwan; Final Results of Antidumping Duty Administrative Review; 2012-2013*, 80 FR 19635 (April 13, 2015) and accompanying Issues and Decision Memorandum at Comment 7.

was no other FOP information on the record from Jinchi's other suppliers regarding the masonry nails provided by this supplier.<sup>141</sup> However, following the Court's directive, the Department re-examined its finding in the *Final Results* to apply AFA to Jinchi's missing FOPs from its unaffiliated supplier for these draft results of redetermination.<sup>142</sup>

In re-examining the record evidence, the Department finds that Jinchi in its initial questionnaire response advised the Department that it purchased hard-cut masonry nails from an unaffiliated supplier that constituted the supermajority of Jinchi's sales of these hard-cut masonry nails to the United States during the POR.<sup>143</sup> In further questionnaire responses prior to the *Preliminary Results*, Jinchi notified the Department that this unaffiliated supplier was the manufacturer of these hard-cut masonry nails and that this unaffiliated supplier refused to provide the FOP data for these hard-cut masonry nails to Jinchi because of concerns about the confidentiality of its accounting information.<sup>144</sup> Additionally, Jinchi provided documentary evidence of its multiple efforts to obtain the missing FOP data from its unaffiliated supplier, which the unaffiliated supplier continued to refuse to provide to Jinchi.<sup>145</sup> Based on information that was on the record at the *Preliminary Results*, the Department applied neutral facts available to Jinchi for the missing FOPs of this unaffiliated supplier because Jinchi documented its attempts to obtain the FOPs from this unaffiliated supplier.<sup>146</sup> However, in the *Preliminary Results*, the Department notified Jinchi and its unaffiliated supplier, as an interested party under

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<sup>141</sup> See *Final Results* at Comment 12.

<sup>142</sup> *Id.*; see also *Itochu* at 39.

<sup>143</sup> See Jinchi's Section A Response, (February 28, 2011) at 14 and Exhibit A-11.

<sup>144</sup> See Jinchi's Sections C and D Response, dated March 15, 2011, at C-28 and D-2; and Jinchi's Supplemental Sections C and D Response, dated May 16, 2011, at 27-30.

<sup>145</sup> See Jinchi's Supplemental Sections C and D Response at Exhibit 19; Jinchi's Letter to the Department, dated April 3, 2011, at Exhibit 17; and Jinchi's Letter to the Department, dated May 5, 2011, at Exhibit 18.

<sup>146</sup> See *Preliminary Results*, 76 FR at 56148-9.

section 771(9)(A) of the Act, that the Department intended to request the missing FOPs directly from the unaffiliated supplier later in this review.<sup>147</sup>

Subsequently, after the *Preliminary Results*, the Department directly requested from the unaffiliated supplier that it provide the Department with the missing FOP data for the hard-cut masonry nails that the unaffiliated supplier sold to Jinchi during the POR.<sup>148</sup> In its request to the unaffiliated supplier, the Department specifically addressed the unaffiliated supplier's concerns with respect to disclosing confidential information, as explained to the Department by Jinchi in its questionnaire responses, in providing the missing FOP information to Jinchi and explained that section 782(c) of the Act requires the Department to provide assistance to interested parties, including small companies, experiencing difficulties in supplying information to the Department.<sup>149</sup> The Department explained to the unaffiliated supplier in its request that the Department understood the unaffiliated supplier's concerns about information security and confidentiality, which are protected under section 777 of the Act.<sup>150</sup> The procedures for protecting the unaffiliated supplier's concerns about confidentiality were explained in detail by the Department.<sup>151</sup> However, the Department informed the unaffiliated supplier that because it was the unaffiliated supplier of the subject merchandise to Jinchi, the Department was requesting the missing FOP data for these hard-cut masonry nails sold to Jinchi.<sup>152</sup> Additionally, the unaffiliated supplier received notification that because it was a manufacturer of subject merchandise it was required to respond to the FOP section of the Department's questionnaire and

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<sup>147</sup> *Id.*, at 56149.

<sup>148</sup> See Letter from the Department to Jinchi's Unaffiliated Supplier, dated September 14, 2011.

<sup>149</sup> *Id.*, at 1; Jinchi's Supplemental Sections C and Questionnaire Response, at Exhibit 19.

<sup>150</sup> *Id.*, at 1-2.

<sup>151</sup> *Id.*, at 2.

<sup>152</sup> *Id.*

that failure to provide the requested information could result in the application of partial or total facts available, pursuant to section 776(a) of the Act, that may include adverse inferences, pursuant to section 776(b) of the Act.<sup>153</sup>

In response to the Department's direct request, Jinchi's unaffiliated supplier continued to refuse to provide the missing FOPs for these hard-cut masonry nails to the Department.<sup>154</sup> Specifically, Jinchi's unaffiliated supplier informed the Department that it could not provide the missing FOPs for these hard-cut masonry nails because the unaffiliated supplier was a small company that does not maintain product-specific production records required to answer the Department's questions.<sup>155</sup> The Department observes that the direct request issued to Jinchi's unaffiliated supplier for the missing FOP data informed the unaffiliated supplier that if it was experiencing difficulties meeting the Department's reporting requirement that the unaffiliated supplier should contact the Department directly to address these difficulties prior to submitting a response.<sup>156</sup> However, instead of contacting the Department about these reporting difficulties which the Department could have addressed with the unaffiliated supplier, the unaffiliated supplier instead refused to provide the missing FOP data and stated that it could not respond to the Department's request.<sup>157</sup>

Accordingly, the Department finds that Jinchi's unaffiliated supplier withheld information by refusing to provide the missing FOP data and precluded the Department from providing practicable assistance.<sup>158</sup> Thus, the unaffiliated supplier failed to cooperate to the best

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<sup>153</sup> *Id.*, at 3 and 4.

<sup>154</sup> See Jinchi's Unaffiliated Supplier Response, dated September 28, 2011.

<sup>155</sup> *Id.*, at 2 and Attachment 1.

<sup>156</sup> See Letter from the Department to Jinchi's Unaffiliated Supplier, at D-1 (Reporting of Factors of Production section).

<sup>157</sup> See Jinchi's Unaffiliated Supplier Response, at 2 and Attachment 1.

<sup>158</sup> See section 782(c)(2) of the Act.



of its ability as an interested party (*i.e.*, foreign manufacturer of the subject merchandise), pursuant to section 771(9)(A) of the Act.<sup>159</sup> Following the Department's practice, as outlined above, the Department finds that it could have chosen to excuse Jinchi from reporting the sales and missing FOPs of the hard-cut masonry nails from this unaffiliated supplier as an insignificant quantity, if Jinchi made such a request. However, Jinchi never made such a request and, thus, the Department needed to address whether facts available or AFA should be applied to the missing FOPs due to the unaffiliated supplier's refusal to provide this necessary information.<sup>160</sup> Further, there was no other FOP data for these masonry-cut nails on the record from Jinchi or Jinchi's other supplier, which would allow the Department to apply neutral, rather than adverse, facts available.<sup>161</sup> Thus, because the necessary FOP information for these hard-cut masonry nails was not on the record to calculate an accurate margin, Jinchi's supplier withheld the requested information as an interested party, and Jinchi's supplier thus failed to cooperate to the best of its ability, the Department followed its practice of applying AFA to Jinchi's hard-cut masonry nails by using the highest-calculated NV on the record in the *Final Results*.<sup>162</sup>

However, in the Department's re-examination of the application of AFA to Jinchi's hard-cut masonry nails, the Department finds that these hard-cut masonry nails represent an insignificant quantity of Jinchi's total quantity of subject merchandise sales to the United States during the POR.<sup>163</sup> In reviewing all of the normal values calculated for Jinchi in comparison to the highest-calculated normal value applied as AFA to these hard-cut masonry nails, the

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<sup>159</sup> See *Solar Cells Final 2012* at Comment 12; and *Solar Cells Final 2017* at Comment 1.

<sup>160</sup> See *Solar Cells Final 2012* at Comment 12.

<sup>161</sup> *Id.*; see also *Solar Cells Final 2017* at Comment 1.

<sup>162</sup> See *Final Results* at Comment 12; *Solar Cells Final 2012* at Comment 12; and *Solar Cells Final 2017* at Comment 1.

<sup>163</sup> See *Jinchi Draft Remand Analysis Memo* at Attachment 2 (Output).

Department finds that there are only a few other calculated normal values close to the highest-calculated normal value applied to these hard-cut masonry nails.<sup>164</sup> For the rest of the normal values calculated for Jinchi's sales, the Department finds that these normal values are significantly lower than the highest-calculated normal value that was applied as AFA to Jinchi's hard-cut masonry nails.<sup>165</sup> Accordingly, because the Court identified that the highest-calculated normal value applied as AFA to Jinchi's hard-cut masonry nails is significantly high and the total quantity of these hard-cut masonry nails represent an insignificant quantity of Jinchi's total sales, under respectful protest, the Department is applying neutral facts available to the missing FOPs for these hard-cut masonry nails for these final results of redetermination.<sup>166</sup> Although, as described above, the Department finds that it was following its practice to apply AFA to Jinchi's hard-cut masonry nails, the Department will not apply AFA to the missing FOPs for these hard-cut masonry nails for these final results of redetermination.<sup>167</sup>

Additionally, since Jinchi's antidumping margin is now being calculated based on neutral facts available without any adverse inference, we find that the Court's statements regarding the calculation of the separate rate margin using a dumping margin that includes adverse inference is moot and does not need to be addressed in these draft results of redetermination.<sup>168</sup>

#### **D. Withdrawal of Review Requests**

Although the Court sustained that the Department's selection of three respondents was not contrary to the law because those exporters comprise a meaningful share of total volume of

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<sup>164</sup> See Jinchi Draft Remand Analysis Memo at Attachment 3 (Normal Value Analysis).

<sup>165</sup> *Id.*

<sup>166</sup> See *Viraj Group Ltd.*, 343 F.3d 1371.

<sup>167</sup> See Jinchi Draft Remand Analysis Memo at 2-3.

<sup>168</sup> See *Itochu* at 40-41.

exports of subject merchandise,<sup>169</sup> the Court questioned the circumstances surrounding the particular selection of mandatory respondents.<sup>170</sup> Specifically, the Court, referring to the interests of preventing fraud on the proceeding and promoting transparency, required that the petitioner respond to questions surrounding its withdrawal on Jisco and the other 159 other companies. Specifically, the court asked the petitioner to respond to three questions:

- 1) Why was a broad review initially requested?
- 2) How did it come about that Mid Continent withdrew the majority of the request for review?
- 3) Were payments made in exchange for the withdrawal of request? If so, what is the legal basis for the collection of such payments by a party other than the government?<sup>171</sup>

On July 14, 2017, the petitioner, Mid Continent Nail Corporation, provided responses to the questions posed by the Court.<sup>172</sup>

In response to the Court’s questions, the petitioner stated: 1) A broad request was a “function of legitimate and prudent consideration to ensure that the review included the largest number of respondents” in order to increase the chances the segment included the largest number of companies engaged in dumping during the POR and provide the “greatest support for a determination to select respondents” to be individually examined by sampling;<sup>173</sup> 2) “Their determination to withdraw the majority of the requests for review was a function of existing cash deposit rates and [

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<sup>169</sup> *Id.*, at 12-13.

<sup>170</sup> *Id.*, at 13.

<sup>171</sup> *Id.*, at 41.

<sup>172</sup> See Letter from Mid Continent, “Certain Steel Nails from the People’s Republic of China: Response to Questions Posed in Court Order in *Itochu Building Prods., et al. v. United States* Consol. Ct. No. 12-00065, Slip Op. 17-73 (June 22, 2017)” (July 14, 2017) (Petitioner Response to the Court).

<sup>173</sup> See Petitioner Response to the Court at 7.

<sup>174</sup> *Id.*, at 10.

].<sup>175</sup>

At the outset, the Department recognizes and takes seriously its inherent authority to prevent fraud and abuse upon its proceedings,<sup>176</sup> and, further, strives to conduct its proceedings in an open and transparent manner.<sup>177</sup> We further note that, in discussing the 90-day deadline to allow for withdrawal of review requests under 19 CFR 351.213(d)(1) in the 1997 preamble to its regulations, the Department recognized its role in preventing abuse of the procedures for requesting and withdrawing a review.<sup>178</sup>

After assessing the credibility of its response, the Department finds that the petitioner acted according to Department procedure and within the Department's regulations<sup>179</sup> in its request to review and subsequent withdrawal of those requests for review on certain Chinese producers of subject merchandise. According to 19 CFR 351.213(b), a domestic interested party may request in writing that the Secretary conduct an administrative review under section 751(a)(1) of the Act of specified individual exporters or producers covered by an order, if the requesting person states why the person desires the Secretary to review those particular exporters or producers. Consistent with the Department's regulations, in the underlying review the petitioner specifically named Chinese producers and/or exporters of subject merchandise in the request for review.<sup>180</sup> The petitioner also stated that they requested a "review of these entities

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<sup>175</sup> *Id.*, at 11.

<sup>176</sup> See *Alberta Gas Chems., Ltd. v. Celanese Corp.*, 650 F.2d 9, 12 (2d. Cir. 1981) (discussing "the inherent power of any administrative agency to protect the integrity of its own proceedings").

<sup>177</sup> See *MacLean-Fogg Co. v. United States*, 100 F. Supp. 3d 1349, 1362 (Ct. Int'l Trade 2015) (discussing "a fundamental public interest in transparency in government.")

<sup>178</sup> See *Antidumping Duties; Countervailing Duties*, 62 FR 27296, 27317 (May 19, 1997) ("We agree that the 90-day limitation may be too rigid. However, we believe that the Department must have the final say concerning rescissions of reviews requested after 90 days in order to prevent abuse of the procedures for requesting and withdrawing a review.")

<sup>179</sup> See 19 CFR 351.213(d)(1).

<sup>180</sup> See Letter from the Petitioner, "Certain Steel Nails from the People's Republic of China: Request for Administrative Review" (August 10, 2010) at Attachment A.

because it believes that these producers and/or exporters sold subject merchandise at less than normal value in the United States during the period of review, and that any estimated cash deposits being collected on imports of subject merchandise from these manufacturers or exporters understate the degree of dumping that occurred during the period.”<sup>181</sup> As a result, the petitioner fulfilled the only requirements set forth by the regulation to request a review: 1) specify individual exporters or producers and 2) explain why the Secretary to review those particular exporters or producers.<sup>182</sup>

In making its request for review, the petitioner relied on publicly available shipment data to assess dumping activity.<sup>183</sup> The petitioner stated that the publicly available shipment data used to assess whether dumping is taking place is often unreliable and the petitioner was limited in its ability to accurately identify shippers’ volumes during the POR.<sup>184</sup> The petitioner expanded upon this reasoning and explained that the “domestic industry’s ability to accurately identify Chinese producers and shippers sending subject merchandise to the United States, and their associated volumes of entries, is limited by the quality of the inbound ship manifest data that are publicly available for analysis.”<sup>185</sup> Thus, the petitioner based its initial request for review on multiple producers and/or exporters of subject merchandise on the shipment volume data because it was the only data available, at the time, that allowed the petitioners to assess dumping activity.<sup>186</sup>

The petitioner further explained why, then, it would rescind its review request for such a

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<sup>181</sup> *Id.* at 2.

<sup>182</sup> *See* 19 CFR 351.213(b)(1).

<sup>183</sup> *See* Petitioner Response to the Court at 6.

<sup>184</sup> *Id.* at 5.

<sup>185</sup> *See* Petitioner Response to the Court at 3-4.

<sup>186</sup> *Id.* at 5.

large number of producers and/or exporters of the subject merchandise. Reasoning that the Department only releases import data from Customs and Border Patrol (CBP), on companies on which a review is requested, the petitioner explained that it now had a better understanding of the imports of certain steel nails into the United States.<sup>187</sup> With the ability to review the more accurate CBP import data released by the Department under administrative protective order (APO), the petitioner was better able to assess the identities of Chinese companies that actually shipped subject merchandise during the POR, and in what amounts.<sup>188</sup>

Further, with respect to the petitioner's withdrawal request, the petitioner acted within the Department's regulations to withdraw its request for review on certain Chinese producers and/or exporters of subject merchandise.<sup>189</sup> According to 19 CFR 351.213(d)(1), "{t}he Secretary will rescind an administrative review . . . , in whole or in part, if a party that requested a review withdraws the request within 90 days of the date of publication of notice of initiation of the requested review." The only stipulation set forth by this part of the regulation is that a request for withdrawal must be made within 90 days of the date of the publication of the notice of initiation,<sup>190</sup> which was met by the petitioner in its withdrawal of request for review.<sup>191</sup> There is

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<sup>187</sup> *Id.* at 5.

<sup>188</sup> *Id.* at 8.

<sup>189</sup> *See* 19 CFR 213(d)(1).

<sup>190</sup> The regulation further provides that "{t}he Secretary may extend this time limit if the Secretary decides that it is reasonable to do so." Beginning in August 2011, the Department adopted a new interpretation of this provision:

In order to provide parties additional certainty with respect to when the Department will exercise its discretion to extend this 90-day deadline, interested parties are advised that, with regard to reviews requested on the basis of anniversary months after August 2011, the Department will not consider extending the 90-day deadline unless the requestor demonstrates that an extraordinary circumstance has prevented it from submitting a timely withdrawal request. Determinations by the Department to extend the 90-day deadline will be made on a case-by-case basis.

*Antidumping or Countervailing Duty Order, Finding or Suspended Investigation, Opportunity to Request Administrative Review*, 76 FR 45773 (August 1, 2011).

<sup>191</sup> *See* Letter from the petitioner, "Certain Steel Nails from the People's Republic of China: Withdrawal for Requests for Administrative Review" (December 28, 2010); *see also* *Initiation of Antidumping and Countervailing*

no limitation or restriction on the number of requests for review that can be withdrawn.

In its request for withdrawal of review on certain Chinese companies, the petitioner based its request for withdrawal on its review of the CBP import data, to assess existing cash deposit rates in effect for the companies named in its initial request for review.<sup>192</sup> Additionally, the petitioner states that most of the “companies named in the initial request for review were already assigned the NME-wide 118.04% margin or had margins sufficiently high that it appeared possible they would receive a lower margin through review.”<sup>193</sup> As a result, the petitioner determined that it would withdraw its request for an administrative review of Jisco, as well as the other 159 companies. Further, though Jisco was chosen as a mandatory respondent in this proceeding, the petitioners believed that [

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The petitioner further indicates that its decision to withdraw its request for review of certain companies in this proceeding, therefore, was based on an evaluation of cash deposit rates and subsequent assessments on companies shown in the CBP data, as well as Mid Continent’s experience in the nails industry. As a result, [

] <sup>195</sup> The Department has no evidence to contradict these explanations.

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*Duty Administrative Review and Request for Revocation in Part*, 75 FR 60076 (September 29, 2010).

<sup>192</sup> *Id.* at 8-10.

<sup>193</sup> *See* Petitioner Response to the Court at 8.

<sup>194</sup> *Id.* at 9.

<sup>195</sup> *Id.* at 10-11.

In light of the above, the Department determines that no further action is warranted on this matter.

### III. COMMENTS FROM INTERESTED PARTIES

The Department released the draft remand results on October 6, 2017. Interested parties submitted comments on October 11, and 12, 2017.<sup>196</sup>

#### Issue 1: Surrogate Financial Ratios

##### Itochu's Comments

- Commerce's requirement that receipt of subsidies should be evidenced within a financial statement line item is not in accordance with law and established precedent.<sup>197</sup>
- Commerce conflates its requirement of conclusive evidence of receipt in its CVD proceedings with an evidentiary standard in its antidumping duty proceedings.<sup>198</sup>
- Commerce erred by confining its analysis to the four corners of Sundram's financial statement.<sup>199</sup>
- Commerce's practice is to reject a financial statement when it has reason to believe or suspect that it is distorted by subsidies, unless the alternative choices are distinctly inferior or non-existent.<sup>200</sup>
- Because Commerce acknowledged that Sundram operates within an SEZ, and Commerce recognizes the SEZ Act as being countervailable, the Department should not insist on evidence of receipt within the financial statement.<sup>201</sup>

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<sup>196</sup> See Itochu's October 11, 2017, submission, and the petitioner's and Stanley's October, 12, 2017, submissions.

<sup>197</sup> See Itochu's Draft comments at 2-11.

<sup>198</sup> *Id.* at 3-4.

<sup>199</sup> *Id.* at 4.

<sup>200</sup> *Id.* at 5.

<sup>201</sup> *Id.* at 8.



- In its administrative reviews, the Department has not held that evidence of line itemization is necessary to meet the “reason to believe or suspect” test.<sup>202</sup>
- Because India’s SEZ scheme has certain features which distinguish it from other Indian subsidy programs, Sundram’s location in an SEZ constitutes substantial evidence that a subsidy has been received.<sup>203</sup>
- The Department’s requirement of a line item proof of subsidization is a more stringent standard than what the Department is required to follow.<sup>204</sup>
- Because the Department has rejected Thai financial statements that receive benefits under the Investment Protection Act (IPA) program, which is similar to Indian SEZ scheme, the Department should also reject Sundram’s financial statement.<sup>205</sup>
- When determining the countervailability of subsidy programs, Commerce does not rely solely on its own CVD determinations, but evidence from other jurisdictions.<sup>206</sup>
- Because automotive fasteners are not comparable to nails, Commerce should not use Sundram’s financial statements. Instead, Commerce should calculate surrogate value using Bansidhar’s financial statements because it produces nails.<sup>207</sup>
- Commerce’s decision to consider Sundram’s production experience as comparable to nails is not supported by judicial and agency precedent.<sup>208</sup>
- Commerce’s decision to use the financial statements from a company that does not produce

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<sup>202</sup> *Id.* at 11-12.

<sup>203</sup> *Id.* at 14.

<sup>204</sup> *Id.* at 18-19.

<sup>205</sup> *Id.* at 19-20.

<sup>206</sup> *Id.* at 21-22.

<sup>207</sup> *Id.* at 23-27.

<sup>208</sup> *Id.* at 29-30.

identical merchandise is inconsistent with other segments of this proceeding.<sup>209</sup>

Stanley's Comments

- By requiring that there must be evidence that a company actually received a subsidy, the Department is not correctly applying the “reason to believe or suspect” standard.<sup>210</sup>
- The Court has stated that the “reason to believe or suspect” standard established a lower threshold than what is required to support a firm conclusion.<sup>211</sup>
- The Department’s interpretation of the “reason to believe or suspect” standard in previous administrative determination has not required specific evidence that a subsidy was received.<sup>212</sup>
- Record evidence establishes a reason to believe or suspect that Sundram may have received subsidies.<sup>213</sup>
- The Court set forth a three-prong test for proper application of “Commerce’s ... suspicion policy;”<sup>214</sup> all of which Sundram’s financial statements meet.<sup>215</sup>
- Because all of the programs from which Sundram may be receiving benefits are reductions in cost, they would not be identified in Sundram’s financial statements.<sup>216</sup>
- Sundram’s automotive fasteners are fundamentally different from nails because they use different types of inputs and have a different production process. Moreover, Sundram produces automotive components beyond fasteners, which are not comparable to nails.<sup>217</sup>

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<sup>209</sup> *Id.* at 31-32.

<sup>210</sup> *See* Stanley’s Draft Remand Comments at 4-5.

<sup>211</sup> *Id.* at 5-6.

<sup>212</sup> *Id.* at 6-8.

<sup>213</sup> *Id.* at 9.

<sup>214</sup> *Id.* at 8-9.

<sup>215</sup> *Id.* at 9-14.

<sup>216</sup> *Id.* at 15-16.

<sup>217</sup> *Id.* at 16-21.

- There is nothing on the record suggesting that Sundram’s production changed materially in subsequent reviews such that any following proceedings would be irrelevant in the Department’s analysis of whether Sundram produced comparable merchandise.<sup>218</sup>

**Department’s Position:** As discussed above, when calculating normal value, the Department applies the “reason to believe or suspect” standard when determining whether to use a set of financial statements to calculate financial ratios. If a specific subsidy program is mentioned or identified within a company’s financial statements, with evidence of a benefit received, and that subsidy program has been determined to be countervailable, the Department will exclude the financial statements from consideration.<sup>219</sup> However, mere mention of a subsidy, without information that the company actually received the subsidy, or further information as to the specific nature of the subsidy, is not enough for the Department to exclude the statements.<sup>220</sup> Although the “reason to believe or suspect” standard is a relatively low threshold, ultimately Commerce must make a determination with respect to the evidence “generally available to it at that time.”<sup>221</sup> With respect to this review, the financial statements are the best available information on the record with which to identify whether the company benefitted from a countervailable subsidy. Because this is the best available evidence on the record, and to avoid conducting a full countervailing duty investigation, which, as noted above, Congress has stated is

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<sup>218</sup> *Id.* at 21-22.

<sup>219</sup> *Id.*; see 19 USC 1671(a) (allowing duties to be imposed only upon a finding that a *countervailable* subsidy is being provided); see also 19 USC 1677(5) & (5B) (differentiating countervailable and non-countervailable subsidies, respectively).

<sup>220</sup> *Id.*; see also *DuPont Teijin Films*, 896 F. Supp. 2d at 1312-13 (upholding Commerce’s determination that the “reason to believe or suspect” standard was not satisfied when the surrogate company’s financial statements included line items to account for specific subsidies, but showed no actual dollar amount of the subsidies received); *Catfish Farmers*, 641 F. Supp. 2d at 1380 (affirming Commerce’s determination that the “reason to believe or suspect” standard was not satisfied when petitioners identified a subsidy without additional substantiating evidence of countervailability).

<sup>221</sup> See *Zhejiang Mach. Imp. & Exp. Corp. v. United States*, 31 C.I.T, 159, 169 (CIT 2007).

not warranted, it is reasonable for Commerce to rely on the financial statements to determine whether a company has received a subsidy.

We disagree with Stanley's suggestion that the Department should go beyond the four corners of the financial statements in its analysis; rather, the Department bases its analysis on the record before it, which in this case are Sundram's financial statements. The Department also disagrees with Stanley that Sundram's financial statements should not be used because, as all of the programs from which Sundram may be receiving benefits are reductions in cost, they would not be identified in Sundram's financial statements. Not only does such an analysis go beyond the four corners of Sundram's financial statements, it is speculative as to what Sundram would or would not include in its financial statements, and is therefore not supported by record evidence. Finally, while parties argue that Department's requirement of a line item proof of subsidization is a more stringent standard than what the Department is required to follow and that line itemization is not necessary, we also disagree. Specifically, we are confining our analysis to the best available information on the record, which in this case is the entirety of Sundram's financial statement, which does not show receipt of the subsidy at issue.

Based on the above, because Sundram's financial statement in this regard stated only that it "was eligible for weighted deduction under Section 35(2AB) of the Income Tax Act," but did not have a corresponding line item demonstrating receipt of these subsidies, we find that there is no reason to believe or suspect that Sundram benefited from a countervailable subsidy.

Although Itochu argues that when determining the countervailability of subsidy programs, Commerce will rely on both its own CVD determinations and evidence from other jurisdictions, we continue to find that our determination to rely on Sundram's financial statements is consistent with Department practice. As mentioned above, one of the guideposts employed by the

Department when reviewing a financial statement for evidence of countervailable subsidies is “{i}f a financial statement contains a reference to a specific subsidy program found to be countervailable in a formal CVD determination.”<sup>222</sup> On the other hand, Itochu references an administrative review in which material inputs, and not financial statements were at issue,<sup>223</sup> which as discussed below, is inappropriate for this analysis.

Moreover, since Sundram operates a manufacturing plant in an SEZ and Commerce has previously found that, in certain instances, a company, while eligible, still must apply for benefits within a SEZ,<sup>224</sup> there is not sufficient evidence on the record causing us to believe or suspect that Sundram benefited from any countervailable subsidies with respect to its location within an SEZ. While Itochu argues that India’s SEZ program has features which distinguish it from other Indian subsidy programs, we find that determining whether such a claim is true would require the Department to compare the SEZ scheme at issue to other types of subsidy programs. Not only did Itochu not place the necessary information on the record for such analysis, more importantly, doing so would be akin to conducting a CVD investigation which as discussed above is not warranted. We also disagree with Itochu’s assertion that the Department’s previous dismissal of a Thai financial statement pursuant to evidence of the IPA program is applicable in this instance. Specifically, the financial statements at issue contained evidence that the companies received IPA companies,<sup>225</sup> which is distinct from Sundram’s financial statements. Even more telling, Sundram is an Indian company operating in India; Thai financial statements

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<sup>222</sup> *Supra* note 67.

<sup>223</sup> See Itochu’s Draft Comments at 21 citing *Notice of Final Determination of Sales at Less Than Fair Value: Folding Metal Tables and Chairs from the People’s Republic of China*, 67 FR 20090 (April 24, 2002).

<sup>224</sup> See, e.g., *Polyethylene Terephthalate Film, Sheet, and Strip from India: Final Results of Countervailing Duty New Shipper Review*, and accompanying Issues and Decision Memorandum at 13-19.

<sup>225</sup> See *Certain Crystalline Silicon Photovoltaic Products from the People’s Republic of China: Final Determination of Sales at Less Than Fair Value*, 79 FR 76970 (December 23, 2014) and accompanying Issues and Decision Memorandum at Comment 2.

and subsidy analyses would shed little light on the instant issue.

While Stanley argues that the legislative history and the Court's decisions do not require specific evidence that a countervailable subsidy was received, we note that Stanley only cites to proceedings in which the issue at hand was related to the surrogate valuation of raw materials and not to the appropriateness of using particular sets of financial statements.<sup>226</sup> Specifically, when calculating the surrogate values for raw materials it is the Department's practice to disregard statistics from non-market economies, countries that maintain broadly available, non-industry specific export subsidies.<sup>227</sup> For these reasons, we also disagree with parties' claims that we should apply the three-prong test discussed in *Fuyao*<sup>228</sup> because that analysis was specific to the surrogate valuation of raw materials and not the selection of appropriate financial statements. As a result, we do not find that the arguments are applicable to determining whether Sundram's financial statements are appropriate for calculating surrogate financial ratios.

With respect to comparability, we continue to find that Sundram produces comparable merchandise using the Department's three-prong test that considers: (1) physical characteristics; (2) end uses; and (3) production process. Regarding parties' arguments that the production process for automotive fasteners are not the same as the production process for nails, we reiterate that the Department is not required to "duplicate the exact experience of an NME producer, nor must it undertake "an item-by-item analysis in calculating factory overhead."<sup>229</sup> While Itochu argues that Sundram produces a variety of automotive components, as discussed in the *Final*

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<sup>226</sup> See, e.g., *Final Results of Antidumping Investigation of Automotive Replacement Glass Windshields from the People's Republic of China*, 67 FR 6482, and accompanying Issues and Decision Memorandum at Comment 1; *Fuyao Glass Industry Group v. United States*, 29 CIT 109 (2005).

<sup>227</sup> See Omnibus Trade and Competitiveness Act of 1988, Conf. Report to Accompany H.R. 3, H.R. Rep. No. 576, 100th Cong., 2nd Sess. (1988) at 590.

<sup>228</sup> See *Fuyao Glass Industry Group v. United States*, 29 CIT 109 (2005).

<sup>229</sup> See *Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1377 (Fed. Cir. 1999); see also *Magnesium Corp. of Am. v. United States*, 166 F.3d 1364, 1372 (Fed. Cir. 1999).

*Results*, Sundram's production of fasteners constitutes its single largest product line, which we found to be sufficient in determining that Sundram is a producer of comparable merchandise.<sup>230</sup>

Last, we continue to find it inappropriate to determine whether Sundram's financial statements are suitable to calculate surrogate financial ratios based on proceedings that discuss financial statements that are not contemporaneous to the POR. In the *Final Results*, we noted that the Department has a practice of using only contemporaneous data when there are viable financial statements from comparable producers rather than non-contemporaneous data from identical or other comparable producers.<sup>231</sup> As such, relying on any decisions regarding the comparability of merchandise produced by Sundram outside of the POR is inconsistent with Department practice.<sup>232</sup> Therefore, the Department finds it unnecessary to consider the proceedings and judicial precedent referenced by parties.

We note that the petitioner did not respond to this issue in its comments regarding this draft remand.

## **Issue 2: Surrogate Value for Steel Plate**

### *The petitioner's Comments*

- Because the Department has carefully analyzed each set of potential benchmark data, and found all of them to be lacking in one respect or another, it should determine to reject using them as benchmark data. The Department should continue to rely on the GTA India data to value the steel plate input, rather than selecting the JPC data among them to value steel plate under protest.

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<sup>230</sup> See *Final Results* and accompanying Issues and Decision Memorandum at Comment 2.

<sup>231</sup> *Id.*

<sup>232</sup> See, e.g., *Certain Circular Welded Carbon Quality Steel Line Pipe from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 74 FR 14514 (March 31, 2009) and accompanying Issues and Decision Memorandum at Comment 13.

- As demonstrated by Hongli’s unaffiliated supplier’s questionnaire response, the thickness of the steel plate remains unchanged from the beginning of the cut nail production process to the end: the supplier purchases steel plate in a certain thickness, and puts it into inventory, unchanged. When needed for production, the steel plate is placed into a cutting machine and cut into small pieces, which are then fed into nail-making machines and are punched into nails.<sup>233</sup> In contrast, for nails made from steel wire rod, the wire rod’s diameter can change from the beginning of the production process to the end, because the wire drawing machine can draw wire rod down to whatever diameter the ultimate nail needs to be. Therefore, the thickness of the steel plate is a crucial criterion in identifying which potential SV source best matches the steel plate used by the respondents, hence represents the most accurate SV.
- As the Court recognized, Hongli’s supplier uses steel plates that are a certain thickness, which is nearly matched by the India GTA data.<sup>234</sup> In contrast, the JPC data include prices for steel plates of 6 to 25 mm thick, and the Steelworld data include prices for steel plates of 5 to 20 mm thick, *i.e.*, plate that is much thicker, and would unquestionably lead to inaccurate results and constitute an unsupported and unreasonable approach.
- At the very least, the Department could seek to reopen the record so that parties may submit appropriate benchmarks, although the petitioner does not believe this is necessary, given the strength of the record evidence. In sum, the GTA India import data provide the most accurate surrogate value for steel plate that is used by the respondents in this review.

**Department’s Position:** As noted in the draft remand, we agree with the petitioner that we have identified a number of concerns with the benchmarks at issue on this record (*i.e.*, they are not

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<sup>233</sup> See Hongli’s September 28, 2011 submission at Exhibit 5; the petitioner’s October 11, 2017 submission at Exhibit 1.

<sup>234</sup> See Slip Op. 17-73 at 17 and 20.



from economically comparable countries, are export data, and partial datasets). We also noted that the information normally relied upon by the Department in past cases for benchmarking purposes – historic Indian GTA data and GTA data from economically comparable countries – are not on the record of the review. As discussed, interested parties had ample opportunity during the course of the administrative review to place such data on the record, but failed to do so. As such, the Department does not have the benchmark data it normally considers in order to determine whether the steel plate SV is aberrational. It is the Department’s preference to use this type of data for benchmarking purposes, as explained above.

Thus, although the benchmarking data on the record does not satisfy the Department’s preference, as stated above, the Court explained that “these data do appear to be relevant” and that “the probative value of these figures may be better understood when considering the comparative reliability of the underlying data.”<sup>235</sup> As such, under respectful protest, we continue to find that the JPC data represent the best available data to value steel plate, outside of the Indian GTA data.

We note that neither Itochu nor Stanley commented on this issue in their draft remand comments.

### **Issue 3: Application of Neutral Facts Available to Jinchi**

#### *The petitioner’s Comments*

- The Court gave no definite directive that the Department must apply neutral facts available to Jinchi. Instead, the Court gave specific remand instructions to the Department, stating that it may either make the necessary factual determinations to explain why application of AFA to Jinchi is appropriate, or apply a neutral facts available margin to Jinchi. Because the Court

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<sup>235</sup> See *Itochu* at 19.

did not direct a remand result, the Department has the latitude to provide the necessary factual determination to support its application of AFA to Jinchi and should do so here.

- The application of AFA adversely affects Jinchi’s supplier’s interests, because exporters will cease using it as a supplier if they know that the company will not report necessary FOP information and that portion of sales will be subject to adverse AFA.
- In addition, the application of AFA also furthers the statutory goal of inducing cooperation, because suppliers, as rational business entities, will choose to cooperate with the Department and provide the necessary FOP information, rather than losing business from respondents to whom the suppliers sell their products.
- The Department’s draft remand determination should be revised to respond directly to the Court’s instructions, without abdicating the agency’s responsibility to defend its well-supported determinations. For the reasons discussed above, the petitioner respectfully requests that the Department apply AFA to Jinchi’s missing FOP information from its unaffiliated supplier in the final remand results.

**Department’s Position:** Although the Court stated that the Department may “either make the necessary factual determinations to explain why application of AFA to Jinchi, a fully cooperating party, is appropriate or apply a neutral facts available margin to Jinchi,” we also considered the Court’s holding that “Commerce improperly applied an adverse inference to Jinchi.”<sup>236</sup> Indeed, the Court further explained that the Department made no “finding that Jinchi had sufficient control over its supplier such that it could induce cooperation, that Jinchi’s supplier attempted to evade a higher AD rate by using Jinchi as an exporter, or that application of an AFA margin to Jinchi would directly and adversely affect Jinchi’s supplier’s interests.”<sup>237</sup> Therefore, under

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<sup>236</sup> See *Itochu* at 39-40.

<sup>237</sup> See *Itochu* at 40.

respectful protest, the Department further explained its practice with respect to unaffiliated suppliers and tollers, and ultimately applied neutral facts available to Jinchi, rather than an adverse inference on behalf of its supplier.

Although the Department has declined to apply AFA in this instance, we note that the facts of this review are similar to those in *Mexico Pipe*, where one of the mandatory respondents, Ternium Mexico, S.A. de C.V. (Ternium) also produced subject merchandise exported by another mandatory respondent, Mueller Comercial de Mexico, S. de R.L. de C.V. and Southland Pipe Nipples Company, Inc., (collectively, Mueller).<sup>238</sup> The Department requested cost information from Ternium as an unaffiliated supplier to Mueller, in addition to the information requested of it as a mandatory respondent.<sup>239</sup> Because Ternium did not respond to the Department's requests for information, for either questionnaire, the Department applied AFA to Ternium as a mandatory respondent, and applied AFA to Ternium for its refusal to provide necessary cost information as Mueller's supplier.<sup>240</sup> Had the Department not applied AFA to Ternium as Mueller's supplier, Ternium could have avoided its own high cash deposit rate by simply selling through Mueller. The Department noted that it has a duty to both ensure that uncooperative parties do not benefit from their lack of cooperation and to encourage their future compliance.<sup>241</sup> Subsequently, the CIT upheld the Department's final results in *Mexico Pipe*.<sup>242</sup>

On appeal, the Court of Appeals for the Federal Circuit (CAFC) stated that the Department may rely on adverse inferences for an unaffiliated party's failure to cooperate and

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<sup>238</sup> See *Certain Circular Welded Non-Alloy Steel Pipe from Mexico: Final Results of Antidumping Duty Administrative Review*, 76 FR 36086, (June 21, 2011) (*Mexico Pipe*) and accompanying Issues and Decision Memorandum at Comment 4.

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> See *Mueller Comercial De Mex. V. United States*, 887 F. Supp.2d 1360 (CIT 2012).

include that inference in the margin determination for a cooperating respondent, as long as the application of the inference is reasonable given the particular facts of the proceeding and the predominate interest in accuracy is properly taken into account.<sup>243</sup> To the extent that the adverse inference impacted Mueller’s margin calculation, the Court noted that this was permissible because the supplier “would not be sufficiently deterred if Mueller were unaffected by the supplier’s non-cooperation.”<sup>244</sup> In the *Final Results*, as noted above, the number of sales affected by the application of AFA to one of Jinchi’s suppliers was small, and thus, the effect on Jinchi’s margin was small. We find a small increase in Jinchi’s margin as an incentive to induce cooperation to be reasonable, consistent with *Mueller*.

The CAFC also considered the key question of whether the respondent, Mueller, acted to the best of its ability to compel its unaffiliated supplier to cooperate. The Court concluded that “Mueller had an existing relationship with its supplier” and, therefore, “could potentially have refused to do business with {its supplier} in the future as a tactic to force {its supplier} to cooperate.”<sup>245</sup> It added that, if Mueller was willing to terminate its relationship with its supplier “this would potentially induce {the supplier} to cooperate.”<sup>246</sup> Here, Jinchi made no such attempt to influence its supplier, with which it had an ongoing business relationship, indicating that it may have had control over its supplier.<sup>247</sup> Nevertheless, as noted above, we have complied with the Court’s request to apply neutral facts available in this case, under respectful

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<sup>243</sup> See *Mueller Comercial De Mexico v. United States*, 753 F.3d 1227, 1236 (Fed. Cir. 2014) (“Finally, we wish to be clear that under subsection (b) we do not bar Commerce from drawing adverse inferences against a non-cooperating party that have collateral consequences for a cooperating party. Where an adverse inference is used to calculate the rate of a non-cooperating party that rate may sometimes be used in calculating the rate of a cooperating party and thus have collateral consequences for the cooperating party.”) (*Mueller*).

<sup>244</sup> *Id.* at 1233.

<sup>245</sup> *Id.* at 1235.

<sup>246</sup> *Id.*

<sup>247</sup> *Cf id.* at 1235 (“{I}f the cooperating entity has no control over the non-cooperating suppliers, a resulting adverse inference is potentially unfair to the cooperating party.”).

protest.<sup>248</sup>

#### 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 continues to find that Sundram's financial statements constitute the best information on the record for surrogate ratio valuation purposes; we have valued, under respectful protest, steel plate using JPC domestic data from India; recalculated Jinchi's dumping margin by applying neutral facts available to the missing FOPs for hard-cut masonry nails produced by an unaffiliated supplier; and examined the petitioner's responses to the Court's questions. Additionally, due to the changes in Jinchi's and Hongli's dumping margins, the Department also recalculated the separate rate margin for the separate rate respondents. For these final remand results, Jinchi's margin is now 53.47 percent, Hongli's dumping margin is now 36.23 percent, and the separate rate margin is now 14.48 percent.<sup>249</sup>

*/S/ Carole Showers*

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Carole Showers  
Executive Director, Office of Policy  
performing the duties of the Deputy Assistant Secretary  
for Enforcement and Compliance

October 20, 2017

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Date

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<sup>248</sup> This determination has been made pursuant to the law in effect at the time Commerce made its underlying determinations. *See Itochu* at 39, n. 33.

<sup>249</sup> *See Jinchi Draft Remand Analysis Memo* at 1 and 2; and *Hongli Draft Remand Analysis Memo* at 1.