UNITED STATES DEPARTMENT OF COMMERCE
International Trade Administration
Washington, D.C. 20230

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Investigation
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DATE: March 29, 2017

MEMORANDUM TO: Ronald K. Lorentzen
Acting Assistant Secretary
for Enforcement and Compliance

FROM: Gary Taverman
Associate Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Final Affirmative Determination in the Less-Than-Fair-Value Investigation of Certain Carbon and Alloy Steel Cut-To-Length Plate from Belgium

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I. Summary

We analyzed the comments of the interested parties in the less-than-fair-value (LTFV) investigation of certain carbon and alloy steel cut-to-length plate (CTL plate) from Belgium. As a result of our analysis, and based on our findings at verification, we made changes to the margin calculations for Industeel Belgium S.A. (Industeel), one of the mandatory respondents in this investigation. Moreover, after considering the facts on the record, as well as comments received, we are basing the final margin for NMLK Belgium[1] on adverse facts available (AFA). We recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum. Below is the complete list of the issues in this LTFV investigation for which we received comments from interested parties:

Industeel

Comment 1: Differential Pricing Methodology

Comment 2: Industeel's Misreported International Freight Expenses

Comment 3: Whether Certain of Industeel's U.S. Sales were Made Outside the Course of Ordinary Trade

[1] In the preliminary determination, the Department determined to collapse, and treat as a single entity, NLMK Clabecq S.A. (NLMK Clabecq), NLMK Plate Sales S.A. (NLMK Plate Sales), NLMK Sales Europe S.A.(NLMK Sales Europe), NLMK Manage Steel Center S.A. (Manage), and NLMK La Louviere S.A. (NLMK LL) (collectively, NLMK Belgium). No party has challenged this determination. Thus, we continue to find, for the final determination, that the five NLMK companies should be collapsed and treated as a single entity, NLMK Belgium.

Comment 4: Date of Sale for Industeel's U.S. Sales and Application of Partial AFA

Comment 5: Industeel's Correction Presented During the Cost Verification

Comment 6: Affiliated Party Transactions

Comment 7: Including Interest Expense in the Minor Input Calculation

NLMK Belgium

Comment 8: Date of Sale for NLMK Belgium's U.S. Direct Shipments

Comment 9: Product Characteristics and Control Numbers for NLMK Belgium

Comment 10: Sales by Manage

Comment 11: Total AFA for NLMK Belgium

Comment 12: Other NLMK Belgium Adjustments

II. Background

On November 14, 2016, the Department of Commerce (the Department) published the *Preliminary Determination* of sales of CTL plate from Belgium at LTFV.[2] The period of investigation (POI) is April 1, 2015, through March 31, 2016.

In October 2016 and November 2016, we received scope case briefs and scope rebuttal briefs. On November 29, 2016, we issued a final memorandum in response to these scope comments in which we did not change the scope of this investigation.[3]

From November 2016 through January 2017, we conducted verification of the sales and cost of production (COP) data reported by Industeel and NLMK Belgium, in accordance with section 782(i) the Tariff Act of 1930, as amended (the Act). In January 2017, we requested that Industeel submit revised home market and U.S. sales databases; we received these databases in the same month.

We invited parties to comment on the *Preliminary Determination*. In December 2016, we received comments on the *Preliminary Determination* from the European Commission. In

[2] *See Certain Carbon and Alloy Steel Cut-To-Length Plate from Belgium: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 81 FR 79431 (November 14, 2016) (*Preliminary Determination*), and accompanying Preliminary Decision Memorandum, "Decision Memorandum for the Preliminary Determination in the Antidumping Duty Investigation of Certain Carbon and Alloy Steel Cut-To-Length Plate from Belgium" (Preliminary Decision Memorandum).

[3] *See* Memorandum, "Certain Carbon and Alloy Steel Cut-to-Length Plate from Austria, Belgium, Brazil, the People's Republic of China, France, the Federal Republic of Germany, Italy, Japan, the Republic of Korea, the Republic of South Africa, Taiwan, and Turkey: Final Scope Comments Decision Memorandum," dated November 29, 2016 (Final Scope Memorandum).

February 2017, the petitioners,[4] Industeel, and NLMK Belgium submitted case and rebuttal briefs.

Based on our analysis of the comments received, as well as our verification findings, we revised the weighted-average dumping margins for Industeel and NLMK Belgium from those calculated in the *Preliminary Determination*.

III. Use of Adverse Facts Available

Section 776(a)(1) and 776(a)(2)(A)-(D) of the Act provide that if necessary information is not available on the record or if an interested party: (A) withholds information that has been requested by the Department; (B) fails to provide such information in a timely manner or in the form or manner requested subject to section 782(c)(1) and (e) of the Act; (C) significantly impedes a proceeding under the antidumping statute; or (D) provides such information but the information cannot be verified as provided for in section 782(i) of the Act, the Department shall, subject to subsection 782(d) of the Act, use facts otherwise available in reaching the applicable determination.[5]

Section 782(c)(1) of the Act provides that if an interested party "promptly after receiving a request from {the Department} for information, notifies {the Department} that such party is unable to submit the information requested in the requested form and manner," the Department shall consider the ability of the interested party and may modify the requirements to avoid imposing an unreasonable burden on that party.

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

Section 782(e) of the Act states that the Department shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the

[4] The petitioners in this investigation are ArcelorMittal USA LLC, Nucor Corporation (Nucor), and SSAB Enterprises, LLC. Only Nucor filed comments for consideration in the final determination, and is referred to throughout as "the petitioner."

[5] Under the Trade Preferences Extension Act of 2015, numerous amendments to the antidumping duty (AD) and countervailing duty (CVD) laws were made , including amendments to sections 776(b) and 776(c) of the Act and the addition of section 776(d) of the Act. *See Trade Preferences Extension Act of 2015*, Pub. L. No. 114-27, 129 Stat. 362 (June 29, 2015) (*TPEA*). The 2015 law does not specify dates of application for those amendments. On August 6, 2015, the Department published an interpretative rule, in which it announced the applicability dates for each amendment to the Act, except for amendments to section 771(7) of the Act, which relate to determinations of material injury by the ITC. *See Dates of Application of Amendments to the Antidumping and Countervailing Duty Laws Made by the Trade Preferences Extension Act of 2015*, 80 FR 46793 (August 6, 2015) (*TPEA Application Dates*). The amendments to section 776 of the Act are applicable to all determinations made on or after August 6, 2015. Therefore, the amendments apply to this investigation.

applicable requirements established by the administering authority if: (1) the information is submitted by the established deadline; (2) the information can be verified; (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination; (4) the interested party has demonstrated that it acted to the best of its ability; and (5) the information can be used without undue difficulties.

Section 776(b) of the Act provides that the Department may use an adverse inference in applying the facts otherwise available when a party fails to cooperate by not acting to the best of its ability to comply with a request for information.[6] In doing so, and under the *TPEA*, the Department is not required to determine, or make any adjustments to, a weighted average dumping margin based on any assumptions about information an interested party would have provided if the interested party had complied with the request for information. Section 776(b)(2) provides that an adverse inference may include reliance on information derived from the petition, the final determination from the investigation, a previous administrative review, or other information placed on the record. In addition, the SAA explains that the Department may employ an adverse inference "to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully."[7] Further, affirmative evidence of bad faith on the part of a respondent is not required before the Department may make an adverse inference.[8]

Section 776(c) of the Act provides that, when the Department relies on secondary information rather than on information obtained in the course of an investigation, it shall, to the extent practicable, corroborate that information from independent sources that are reasonably at its disposal. Secondary information is defined as information derived from the petition that gave rise to the investigation or review, the final determination concerning the subject merchandise, or any previous review under section 751 of the Act concerning the subject merchandise.[9] Further, and under the *TPEA*, the Department is not required to corroborate any dumping margin applied in a separate segment of the same proceeding.

Finally, under the new section 776(d) of the Act, the Department may use any dumping margin from any segment of a proceeding under an antidumping order when applying an adverse inference, including the highest of such margins. The *TPEA* also makes clear that when selecting an AFA margin, the Department is not required to estimate what the dumping margin would have been if the interested party failing to cooperate had cooperated or to demonstrate that the dumping margin reflects an "alleged commercial reality" of the interested party.

As noted above, section 776(a)(2)(B) and (D) of the Act provides that if an interested party fails to provide information within the established deadlines or provides information but the

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[6] *See* section 776(b)(1)(B) of the Act; *TPEA*, section 502(1)(B).

[7] *See* Statement of Administrative Action Accompanying the Uruguay Round Agreements Act, H.R. Doc. 103-316, vol. 1 (1994) (SAA) at 870.

[8] *See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Circular Seamless Stainless Steel Hollow Products from Japan*, 65 FR 42985 (July 12, 2000); *Antidumping Duties; Countervailing Duties: Final Rule*, 62 FR 27296, 27340 (May 19, 1997) (*Preamble*); and *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382-83 (CAFC 2003) (*Nippon Steel*).

[9] *See* SAA at 870.

information cannot be verified, the Department shall use, subject to section 782(d) of the Act, facts otherwise available in reaching the applicable determination. Moreover, section 776(b) of the Act provides that, if the Department finds that an interested party failed to cooperate by not acting to the best of its ability to comply with a request for information, the Department may use an inference adverse to the interests of that party in selecting the facts otherwise available. In addition, the SAA explains that the Department may employ an adverse inference "to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully."[10]

In *Nippon Steel*, the U.S. Court of Appeals for the Federal Circuit (CAFC) noted that while the statute does not provide an express definition of the "failure to act to the best of its ability" standard, the ordinary meaning of "best" is "one's maximum effort."[11] Thus, according to the CAFC, the statutory mandate that a respondent act to the "best of its ability" requires the respondent to do the maximum it is able to do. The CAFC indicated that inadequate responses to an agency's inquiries would suffice to find that a respondent did not act to the best of its ability. While the CAFC noted that the "best of its ability" standard does not require perfection, it does not condone inattentiveness, carelessness, or inadequate record keeping.[12] The "best of its ability" standard recognizes that mistakes sometimes occur; however, it requires a respondent to, among other things, "have familiarity with all of the records it maintains," and "conduct prompt, careful, and comprehensive investigations of all relevant records that refer or relate to the imports in question to the full extent of" its ability to do so.[13]

Selection and Corroboration of the AFA Rate

In selecting a facts available margin, we sought a margin that is sufficiently adverse so as to effectuate the statutory purposes of the AFA rule, which is to induce respondents to provide the Department with complete and accurate information in a timely manner.[14]

In order to determine the probative value of the dumping margin alleged in the petition for assigning an AFA rate, we examined the information on the record. We compared the highest petition dumping margin of 51.78 percent to the transaction-specific margins calculated for Industeel, which were not calculated using total AFA. We find that the 51.78 percent petition margin falls within the range of the highest transaction-specific margins calculated for Industeel, which appear to be sales whose terms were normal, when compared with other sales in

[10] *See* SAA at 870; *see also Notice of Final Results of Antidumping Duty Administrative Review: Stainless Steel Bar from India*, 70 FR 54023, 54025-26 (September 13, 2005); *Notice of Final Determination of Sales at Less Than Fair Value and Final Negative Critical Circumstances: Carbon and Certain Alloy Steel Wire Rod from Brazil*, 67 FR 55792, 55794-96 (August 30, 2002).

[11] *See Nippon Steel*, 337 F.3d at 1382-83.

[12] *Id*. at 1382.

[13] *Id.*

[14] *See* SAA at 870. *See also, e.g.*, *Notice of Final Determination of Sales at Less Than Fair Value: Large Residential Washers from the Republic of Korea*, 77 FR 75988, 75990 (December 26, 2012).

Industeel's database.[15] Thus, in accordance with section 776(c)(1) of the Act, we have corroborated the highest dumping margin contained in the petition, 51.78 percent, as AFA, using transaction-specific margins from the mandatory respondent Industeel.

Application of Partial AFA for Industeel

As discussed in Comment 4 below, Industeel's terms of sale are set when its merchandise departs the factory. Because Industeel's terms of sale are set based on shipment date, here meaning the date the merchandise departs the factory (factory shipment date), in our supplemental Sections B and C questionnaire, we asked Industeel to report all sales shipped during the POI and to report the factory shipment date for all of its sales. In its subsequent questionnaire response, Industeel failed to report shipment date and stated that all of the relevant sales were reported based upon invoice date, because, in its view, invoice date represented the date its terms were finalized and was a close proxy for shipment date. During verification, we discovered that, in fact, there was a significant gap in time between when shipments departed Industeel's factory and when they were loaded onto a ship at the port. Additionally, as discussed below in Comment 4, we did not observe any changes in the terms of sale after a shipment had departed from Industeel's factory. Moreover, we observed that Industeel had missed reporting sales which left the factory prior to the end of the POI, although they were not invoiced until after the POI.

As discussed in Comment 2 below, the Department's questionnaire instructs parties to report sales expenses in the currency in which they were incurred. At verification, the Department discovered that Industeel had converted some of its international freight expenses from U.S. dollars, into Euros, and reported a single Euro value for its U.S. sales expenses, in contravention of the Department's instructions.

As discussed further below in Comments 2 and 4, in this case, we find that the application of facts available is appropriate under section 776(a)(2)(A), (B), and (C) of the Act because, as evidenced by its ability at verification to identify the correct information, it is clear that Industeel possessed the necessary records to provide a complete and accurate U.S. sales database, including factory shipment dates, but did not conduct a comprehensive investigation of all relevant records in a timely manner. We therefore find that Industeel withheld information that the Department had requested, failed to provide information by the deadlines for submission of the information in the form and manner requested, and significantly impeded this proceeding, in accordance with 776(a)(2)(A), (B), and (C) of the Act by refusing to provide the factory shipment dates, as requested, and thereby inhibiting the Department from accurately assessing the significant differences in factory and port shipment dates in a timely manner, and thus preventing the Department from reviewing and calculating a margin based on the most accurate universe of sales. In addition, we find that Industeel's failures to report the requested information, accurately and in the manner requested, using the records over which it maintained control at all times indicates that Industeel did not act to the best of its ability to comply with our requests for information. Further, in accordance with section 782(d) of the Act, as explained below in Comments 2 and 4, the Department provided Industeel with opportunities to remedy or

[15] *See* Memorandum, "Analysis for the Final Determination in the Less-Than-Fair Value Investigation of Certain Carbon and Alloy Steel Cut-To-Length Plate from Belgium for Industeel Belgium S.A.," dated March 29, 2017 (Industeel Final Calculation Memorandum), at Attachment III.

explain the deficiencies in its initial responses regarding the unreported dates of sale, missing sales, and misreported freight costs. Hence, we find that the application of AFA is appropriate under section 776(b) of the Act for Industeel's unreported dates of sale, missing sales, and misreported freight costs. For discussion of the specific AFA rates being assigned, and any facts available plugs used, *see* Comments 2 and 4, below.

To the extent possible, we are relying on Industeel's own information obtained during the course of this investigation; in such cases, there is no need to corroborate this information pursuant to section 776(c) of the Act. Where we relied on an AFA rate, in accordance with section 776(c)(1) of the Act, we have corroborated the petition margin of 51.78 using Industeel's transaction-specific margins (*see* above at "Selection and Corroboration of the AFA Rate").

Application of Total AFA for NLMK Belgium

As discussed further in Comments 8, 9, 10, and 11 below, at verification we discovered multiple deficiencies in NLMK Belgium's reporting and, in this case, we find that the application of total facts available is appropriate under sections 776(a)(2)(A), (B), (C), and (D) of the Act because, as evidenced by its ability at verification to identify the correct information, it is clear that NLMK Belgium possessed the necessary records to provide a complete and accurate U.S. sales database, including factory shipment dates and product characteristics, but did not conduct a comprehensive investigation of all relevant records in a timely manner. In addition, we find that NLMK Belgium's failures to report the requested information, accurately and in the manner requested, using the records over which it maintained control at all times, indicates that NLMK Belgium failed to cooperate by not acting to the best of its ability to comply with our requests for information. Hence, we find that the application of total AFA is appropriate under section 776(b) of the Act for NLMK Belgium's margin.

As total AFA, we have assigned NLMK Belgium the petition rate of 51.78 percent, which in accordance with section 776(c)(1) of the Act, we have corroborated using transaction-specific margins from the mandatory respondent Industeel (*see* above at "Selection and Corroboration of the AFA Rate").

IV. Critical Circumstances

On September 7, 2016, the Department issued its preliminary critical circumstances determination.[16] Accordingly, based on trade data submitted through June 2016, the Department preliminarily determined that critical circumstances existed for Industeel and NLMK Belgium, but not for all other Belgian producers or exporters.[17] No party raised the issue of critical circumstances for this final determination; however, because critical circumstances were alleged in this case and because we made a preliminary determination, pursuant to section 735(a)(3) of

[16] *See Certain Carbon and Alloy Steel Cut-to-Length Plate from Austria, Belgium, Brazil, the Republic of Korea, Taiwan, and Turkey; Antidumping and Countervailing Duty Investigations: Preliminary Determinations of Critical Circumstances*, 81 FR 61666 (September 7, 2016) (*Preliminary Determination of Critical Circumstances*).

[17] *Id*. at 61668.

the Act, and 19 CFR 351.210(c), we hereby make a final determination on the issue of critical circumstances.

In order to determine whether there is a history of dumping pursuant to section 735(a)(3)(A)(i) of the Act, the Department generally considers current or previous AD orders on subject merchandise from the country in question in the United States and current orders imposed by other countries with regard to imports of the same merchandise. The Department has previously had AD and CVD orders on CTL plate from Belgium,[18] covering a similar range of products, as well as current AD and CVD orders on CTL plate products from the India, Indonesia, and Korea,[19] and an AD order on CTL plate products from the People's Republic of China.[20] Certain harmonized tariff schedule (HTS) numbers subject to these orders overlap with HTS numbers listed under our current scope for corrosion-resistant steel. Therefore, we find that there is a history of dumping of CTL plate, including subject merchandise exported from Belgium. Because the criteria of a history of dumping has been satisfied pursuant to section 735(a)(3)(A)(i) of the Act, the Department is not required to examine the additional criteria enumerated under section 735(a)(3)(A)(ii) of the Act.

In determining whether there are "massive imports" over a "relatively short period," pursuant to section 735(a)(3)(B) of the Act and 19 CFR 351.206(h), the Department normally compares the import volumes of the subject merchandise for at least three months immediately preceding the filing of the petition (*i.e.*, the "base period") to a comparable period of at least three months following the filing of the petition (*i.e.*, the "comparison period"). Imports normally will be considered massive when imports during the comparison period have increased by 15 percent or more compared to imports during the base period.[21]

On July 29, 2016, the Department requested NLMK Belgium and Industeel to report their respective monthly "quantity and value data for subject merchandise shipped to the United States beginning with August 2015, through the last day of the month of the publication of the preliminary determination of this investigation" (*i.e.*, November 2016).[22] As such, respondents

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[18] *See Cut-to-Length Carbon Steel Plate from Belgium, Brazil, Finland, Germany, Mexico, Poland, Romania, Spain, Sweden, and the United Kingdom and Carbon Steel Plate from Taiwan; Second Five-year (Sunset) Reviews of Antidumping Duty Orders and Antidumping Finding; Final Results*, 71 FR 11577 (March 8, 2006) and *Cut-to-Length Carbon Steel Plate from Belgium: Final Results of Full Sunset Review*, 71 FR 58585 (October 4, 2006).

[19] *See Certain Cut-To-Length Carbon-Quality Steel Plate from India, Indonesia, and the Republic of Korea: Continuation of Antidumping and Countervailing Duty Orders*, 77 FR 264 (January 1, 2012).

[20] *See Continuation of Antidumping Duty Order on Certain Cut-to-Length Carbon Steel Plate from the People's Republic of China and Continuation of Suspended Antidumping Duty Investigations on Certain Cut-to-Length Carbon Steel Plate from the Russian Federation and Ukraine*, 80 FR 79306 (December 21, 2015).

[21] *See* 19 CFR 351.206(h)(2).

[22] *See* Department Letters re: Antidumping Duty Investigation of Certain Carbon and Alloy Steel Cut-To-Length Plate from Belgium: Request for Monthly Quantity and Value Shipment, dated July 29, 2016.

reported all relevant shipment data available at the time, and necessarily updated their reported data with more recent monthly totals, as they became available during the proceeding.[23]

Accordingly, for the *Preliminary Determination of Critical Circumstances*, the Department compared the total volume of shipments from January 2016 through March 2016 (the base period), to shipment data for April 2016 through June 2016 (the comparison period).[24] For "all others," the Department used Global Trade Atlas (GTA) data, and subtracted exports reported by Industeel and NLMK Belgium from the monthly GTA data.[25]

With respect to the specific analysis, pursuant to our request for parties to report shipment data from August 2015 through the last day of the month of the publication of the preliminary determination of this investigation (*i.e.*, November 2016), we note that the appropriate analysis now considers the eight-month comparison period of April 2016 through November 2016 to the eight-month base period of August 2015 through March 2016.[26]

In evaluating import levels for "all others," we compared GTA data for the period August 2015 through March 2016 with the proceeding eight-month period of April 2016 through November 2016, adjusted to remove shipments made by the mandatory respondent, Industeel.[27] For "all other" producers and exporters, our critical circumstances determination demonstrates massive imports (*i.e.*, an increase greater than or equal to 15 percent between the base and comparison periods).[28] As such, and as a result of the affirmative finding that CTL plate is, or is likely to be, sold in the United States at LTFV, the Department finds that critical circumstances exist for "all other" producers and exporters for this final determination.[29]

Industeel submitted updated shipment data, through November 2016, as requested.[30] Based on the information submitted by Industeel (*i.e.*, for the comparison period April 2016 through November 2016, with the base period of August 2015 through March 2016); we do not find

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[23] *See Preliminary Determination of Critical Circumstances*, 81 FR at 61666, and accompanying Memorandum, "Antidumping Duty Investigation Antidumping Duty Investigation of Certain Carbon and Alloy Steel Cut-to-Length Plate from Belgium: Critical Circumstances Analysis," dated August 30, 2016.

[24] *Id*.

[25] *Id*.

[26] The *Preliminary Determination*'s publication date of November 4, 2016, resulted in the Department's prior request for information including shipment data through November 2016.

[27] *See* Memorandum, "Antidumping Duty Investigation Antidumping Duty Investigation of Certain Carbon and Alloy Steel Cut-to-Length Plate from Belgium: Final Critical Circumstances Analysis," dated concurrently with this memorandum (Final Critical Circumstances Analysis). We did not remove the exports reported by NLMK Belgium from this data, because we have determined that all information reported by NLMK Belgium is unreliable for purposes of this final determination (*see* further discussion of NLMK Belgium's data issues, below, under "Discussion of Issues").

[28] *Id*.

[29] *See* section 735(a)(3) of the Act, which allows that findings of critical circumstances for the final determination "may be affirmative even though the preliminary determination under 733(e)(1) was negative."

[30] *See* Industeel Letter re: Certain Carbon and Alloy Steel Cut-To-Length Plate from Belgium: Industeel's December Quantity and Value Submission, dated December 15, 2016.

massive imports for Industeel (*i.e.*, an increase greater than or equal to 15 percent between the base and comparison periods), and thus we are making a negative finding of critical circumstances for Industeel, for this final determination.[31]

Concerning NLMK Belgium, as noted above, we determined to apply total AFA with regard to the company, as described under section 776(b) of the Act. Thus, for purposes of the massive imports analysis, because we lack the necessary reliable shipment data from NLMK Belgium (*see* our analysis below, applying total AFA to NLMK Belgium), we determine that, pursuant to section 776(b) of the Act, that NLMK Belgium shipped CTL plate in "massive" quantities during the comparison period, thereby fulfilling the criteria under section 773(a)(3)(B) of the Act and 19 CFR 351.206(i). Therefore, we determine that critical circumstances exist with regard to NLMK Belgium for this final determination.

V. Scope of the Investigation

The products covered by this investigation are certain carbon and alloy steel hot-rolled or forged flat plate products not in coils, whether or not painted, varnished, or coated with plastics or other non-metallic substances (cut-to-length plate). Subject merchandise includes plate that is produced by being cut-to-length from coils or from other discrete length plate and plate that is rolled or forged into a discrete length. The products covered include (1) Universal mill plates (*i.e.*, flat-rolled products rolled on four faces or in a closed box pass, of a width exceeding 150 mm but not exceeding 1250 mm, and of a thickness of not less than 4 mm, which are not in coils and without patterns in relief), and (2) hot-rolled or forged flat steel products of a thickness of 4.75 mm or more and of a width which exceeds 150 mm and measures at least twice the thickness, and which are not in coils, whether or not with patterns in relief. The covered products described above may be rectangular, square, circular or other shapes and include products of either rectangular or non-rectangular cross-section where such non-rectangular cross-section is achieved subsequent to the rolling process, *i.e.*, products which have been "worked after rolling" (*e.g.*, products which have been beveled or rounded at the edges).

For purposes of the width and thickness requirements referenced above, the following rules apply:

> (1) except where otherwise stated where the nominal and actual thickness or width measurements vary, a product from a given subject country is within the scope if application of either the nominal or actual measurement would place it within the scope based on the definitions set forth above; and
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> (2) where the width and thickness vary for a specific product (*e.g.*, the thickness of certain products with non-rectangular cross-section, the width of certain products with non-rectangular shape, *etc.*), the measurement at its greatest width or thickness applies.
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> Steel products included in the scope of this investigation are products in which: (1) iron predominates, by weight, over each of the other contained elements; and (2) the carbon content is 2 percent or less by weight.

[31] *See* Final Critical Circumstances Analysis.

Subject merchandise includes cut-to-length plate that has been further processed in the subject country or a third country, including but not limited to pickling, oiling, levelling, annealing, tempering, temper rolling, skin passing, painting, varnishing, trimming, cutting, punching, beveling, and/or slitting, or any other processing that would not otherwise remove the merchandise from the scope of the investigation if performed in the country of manufacture of the cut-to-length plate.

All products that meet the written physical description, are within the scope of this investigation unless specifically excluded or covered by the scope of an existing order. The following products are outside of, and/or specifically excluded from, the scope of this investigation:

(1) products clad, plated, or coated with metal, whether or not painted, varnished or coated with plastic or other non-metallic substances;

(2) military grade armor plate certified to one of the following specifications or to a specification that references and incorporates one of the following specifications:

- MIL-A-12560,
- MIL-DTL-12560H,
- MIL-DTL-12560J,
- MIL-DTL-12560K,
- MIL-DTL-32332,
- MIL-A-46100D,
- MIL-DTL-46100-E,
- MIL-46177C,
- MIL-S-16216K Grade HY80,
- MIL-S-16216K Grade HY100,
- MIL-S-24645A HSLA-80;
- MIL-S-24645A HSLA-100,
- T9074-BD-GIB-010/0300 Grade HY80,
- T9074-BD-GIB-010/0300 Grade HY100,
- T9074-BD-GIB-010/0300 Grade HSLA80,
- T9074-BD-GIB-010/0300 Grade HSLA100, and
- T9074-BD-GIB-010/0300 Mod. Grade HSLA115,

except that any cut-to-length plate certified to one of the above specifications, or to a military grade armor specification that references and incorporates one of the above specifications, will not be excluded from the scope if it is also dual- or multiple-certified to any other non-armor specification that otherwise would fall within the scope of this investigation;

(3) stainless steel plate, containing 10.5 percent or more of chromium by weight and not more than 1.2 percent of carbon by weight;

(4) CTL plate meeting the requirements of ASTM A-829, Grade E 4340 that are over 305 mm in actual thickness;

(5) Alloy forged and rolled CTL plate greater than or equal to 152.4 mm in actual thickness meeting each of the following requirements:

(a) Electric furnace melted, ladle refined & vacuum degassed and having a chemical composition (expressed in weight percentages):

- Carbon 0.23-0.28,
- Silicon 0.05-0.20,
- Manganese 1.20-1.60,
- Nickel not greater than 1.0,
- Sulfur not greater than 0.007,
- Phosphorus not greater than 0.020,
- Chromium 1.0-2.5,
- Molybdenum 0.35-0.80,
- Boron 0.002-0.004,
- Oxygen not greater than 20 ppm,
- Hydrogen not greater than 2 ppm, and
- Nitrogen not greater than 60 ppm;

(b) With a Brinell hardness measured in all parts of the product including mid thickness falling within one of the following ranges:

(i) 270-300 HBW,

(ii) 290-320 HBW, or

(iii) 320-350HBW;

(c) Having cleanliness in accordance with ASTM E45 method A (Thin and Heavy): A not exceeding 1.5, B not exceeding 1.0, C not exceeding 0.5, D not exceeding 1.5; and

(d) Conforming to ASTM A578-S9 ultrasonic testing requirements with acceptance criteria 2 mm flat bottom hole;

(6) Alloy forged and rolled steel CTL plate over 407 mm in actual thickness and meeting the following requirements:

(a) Made from Electric Arc Furnace melted, Ladle refined & vacuum degassed, alloy steel with the following chemical composition (expressed in weight percentages):

- Carbon 0.23-0.28,
- Silicon 0.05-0.15,
- Manganese 1.20-1.50,
- Nickel not greater than 0.4,
- Sulfur not greater than 0.010,
- Phosphorus not greater than 0.020,
- Chromium 1.20-1.50,
- Molybdenum 0.35-0.55,
- Boron 0.002-0.004,
- Oxygen not greater than 20 ppm,
- Hydrogen not greater than 2 ppm, and
- Nitrogen not greater than 60 ppm;

(b) Having cleanliness in accordance with ASTM E45 method A (Thin and Heavy): A not exceeding 1.5, B not exceeding 1.5, C not exceeding 1.0, D not exceeding 1.5;

(c) Having the following mechanical properties:

(i) With a Brinell hardness not more than 237 HBW measured in all parts of the product including mid thickness; and having a Yield Strength of 75ksi min and UTS 95ksi or more, Elongation of 18% or more and Reduction of area 35% or more; having charpy V at -75 degrees F in the longitudinal direction equal or greater than 15 ft. lbs (single value) and equal or greater than 20 ft. lbs (average of 3

specimens) and conforming to the requirements of NACE MR01-75; or

(ii) With a Brinell hardness not less than 240 HBW measured in all parts of the product including mid thickness; and having a Yield Strength of 90 ksi min and UTS 110 ksi or more, Elongation of 15% or more and Reduction of area 30% or more; having charpy V at -40 degrees F in the longitudinal direction equal or greater than 21 ft. lbs (single value) and equal or greater than 31 ft. lbs (average of 3 specimens);

(d) Conforming to ASTM A578-S9 ultrasonic testing requirements with acceptance criteria 3.2 mm flat bottom hole; and

(e) Conforming to magnetic particle inspection in accordance with AMS 2301;

(7) Alloy forged and rolled steel CTL plate over 407 mm in actual thickness and meeting the following requirements:

(a) Made from Electric Arc Furnace melted, ladle refined & vacuum degassed, alloy steel with the following chemical composition (expressed in weight percentages):

- Carbon 0.25-0.30,
- Silicon not greater than 0.25,
- Manganese not greater than 0.50,
- Nickel 3.0-3.5,
- Sulfur not greater than 0.010,
- Phosphorus not greater than 0.020,
- Chromium 1.0-1.5,
- Molybdenum 0.6-0.9,
- Vanadium 0.08 to 0.12
- Boron 0.002-0.004,
- Oxygen not greater than 20 ppm,
- Hydrogen not greater than 2 ppm, and
- Nitrogen not greater than 60 ppm.

(b) Having cleanliness in accordance with ASTM E45 method A (Thin and Heavy): A not exceeding 1.0(t) and 0.5(h), B not exceeding 1.5(t) and 1.0(h), C not exceeding 1.0(t) and 0.5(h), and D not exceeding 1.5(t) and 1.0(h);

(c) Having the following mechanical properties: A Brinell hardness not less than 350 HBW measured in all parts of the product including mid thickness; and having a Yield Strength of 145ksi or more and UTS 160ksi or more, Elongation of 15% or more and Reduction of area 35% or more; having charpy V at -40 degrees F in the transverse direction equal or greater than 20 ft. lbs (single value) and equal or greater than 25 ft. lbs (average of 3 specimens);

(d) Conforming to ASTM A578-S9 ultrasonic testing requirements with acceptance criteria 3.2 mm flat bottom hole; and

(e) Conforming to magnetic particle inspection in accordance with AMS 2301.

The products subject to the investigation are currently classified in the Harmonized Tariff Schedule of the United States (HTSUS) under item numbers: 7208.40.3030, 7208.40.3060, 7208.51.0030, 7208.51.0045, 7208.51.0060, 7208.52.0000, 7211.13.0000, 7211.14.0030, 7211.14.0045, 7225.40.1110, 7225.40.1180, 7225.40.3005, 7225.40.3050, 7226.20.0000, and 7226.91.5000.

The products subject to the investigation may also enter under the following HTSUS item numbers: 7208.40.6060, 7208.53.0000, 7208.90.0000, 7210.70.3000, 7210.90.9000, 7211.19.1500, 7211.19.2000, 7211.19.4500, 7211.19.6000, 7211.19.7590, 7211.90.0000, 7212.40.1000, 7212.40.5000, 7212.50.0000, 7214.10.0000, 7214.30.0010, 7214.30.0080, 7214.91.0015, 7214.91.0060, 7214.91.0090, 7225.11.0000, 7225.19.0000, 7225.40.5110, 7225.40.5130, 7225.40.5160, 7225.40.7000, 7225.99.0010, 7225.99.0090, 7226.11.1000, 7226.11.9060, 7226.19.1000, 7226.19.9000, 7226.91.0500, 7226.91.1530, 7226.91.1560, 7226.91.2530, 7226.91.2560, 7226.91.7000, 7226.91.8000, and 7226.99.0180.

The HTSUS subheadings above are provided for convenience and customs purposes only. The written description of the scope of the investigation is dispositive.

VI. Scope Comments

During the course of this investigation, the Department received numerous scope comments from interested parties. Prior to the *Preliminary Determination*, the Department modified the language of the scope to clarify the exclusion for stainless steel plate, correct two misidentified

HTSUS item numbers, and modify language pertaining to existing steel plate and hot-rolled flat-rolled steel orders.[32]

In October and November 2016, we received scope case and rebuttal briefs. On November 29, 2016, we issued a final scope memorandum in response to these comments in which we did not change the scope of this investigation.[33]

VII. Margin Calculations

We calculated export price (EP) and normal value (NV) for Industeel using the same methodology as stated in the *Preliminary Determination*,[34] except as follows:[35]

1. We revised Industeel's margin calculations to take into account our findings from the sales and cost verifications. *See* Comments 2, 4, 5, and 6.

2. We applied partial AFA to Industeel's misreported international freight. As partial AFA, we used the highest exchange rate during the POI to convert freight expenses reported as incurred only in Euros, but which were actually incurred in a mix of currencies.[36] *See* Comment 2.

3. We also applied partial AFA to Industeel for its failure to report factory shipment date as its U.S. date of sale. As partial AFA, we: 1) removed all sales during the first 42 days of the POI, where factory shipment date is unknown; 2) as the date of sale we used the bill of lading date minus 42 days (where the factory shipment dates are unknown); and 3) included unreported sales in our analysis using information obtained at verification. We applied the petition rate of 51.78 percent to the verified quantity of unreported sales

[32] *See* Memorandum, "Certain Carbon and Alloy Steel Cut-to-Length Plate From Austria, Belgium, Brazil, the People's Republic of China, France, the Federal Republic of Germany, Italy, Japan, the Republic of Korea, the Republic of South Africa, Taiwan, and Turkey: Scope Comments Decision Memorandum for the Preliminary Determinations," dated September 6, 2016, and Memorandum, "Certain Carbon and Alloy Steel Cut-to-Length Plate From Austria, Belgium, Brazil, the People's Republic of China, France, the Federal Republic of Germany, Italy, Japan, the Republic of Korea, the Republic of South Africa, Taiwan, and Turkey: Additional Scope Comments Preliminary Decision Memorandum and Extension of Deadlines for Scope Case Briefs and Scope Rebuttal Briefs," dated October 13, 2016.

[33] *See* Final Scope Memorandum.

[34] *See Preliminary Determination*, and accompanying Preliminary Decision Memorandum, at 10 and 11.

[35] *See* Industeel Final Calculation Memorandum, and Memorandum, "Cost of Production and Constructed Value Calculation Adjustments for the Final Determination – Industeel Belgium S.A.," dated March 29, 2017 (Industeel Cost Calculation Memorandum); *see also* Memorandum, "Less Than Fair Value Investigation of Certain Carbon and Alloy Steel Cut-To-Length Plate from Belgium: Verification of the Sales Responses of Industeel Belgium S.A.," dated January 18, 2017 (Industeel Sales Verification Report); and Memorandum, "Verification of the Cost Response of Industeel Belgium S.A. (Industeel) in the Antidumping Duty Investigation of Certain Carbon and Alloy Steel Cut-to-Length Plate from Belgium," dated January 23, 2017 (Industeel Cost Verification Report).

[36] *See* Industeel Final Calculation Memorandum.

(representing 30 days of data), plus an extrapolated quantity for the additional 12 possible days (*i.e.*, for the total of 42 days after the POI).[37] *See* Comment 4.

VIII. Discussion of Issues

Industeel

Comment 1: Differential Pricing Methodology

The European Commission's Arguments

- The European Commission argues that a WTO dispute settlement panel recently held that the Department's differential pricing methodology is inconsistent with the WTO Antidumping Agreement.[38] Specifically, the European Commission notes that the WTO dispute settlement panel found that this methodology inappropriately: 1) "identified patterns of price differences based on random and unrelated price variations;" and 2) uses zeroing as part of the differential pricing test.[39] According to the European Commission, the panel found that a "pattern can only be found in prices that differ significantly either among purchasers, or among regions, or among time periods—not across these categories 'cumulatively'—and that "prices that are too high and prices that are too low do not belong to the same pattern."[40] Thus, the European Commission contends that the Department should suspend its use of differential pricing and instead calculate Industeel's weighted-average dumping margin using the A-to-A method in the final determination.

Industeel's Arguments

- Industeel did not comment on the Department's differential pricing methodology, though Industeel did voice support for similar arguments advanced by NLMK Belgium.[41] As discussed in Comment 12, below, we have not addressed NLMK Belgium's arguments with regard to the Department's differential pricing methodology, because we have based NLMK Belgium's margin on total AFA.

The Petitioner's Arguments

- Although it did not specifically provide a response to the differential pricing argument made by the European Commission, the petitioner responded to similar arguments made by NLMK

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[37] *Id*.

[38] *See* Letter, "Antidumping Duty Investigations of Imports of Carbon and Alloy Steel Cut-To-Length Plate from Austria, Belgium, France, Germany and Italy (investigations: A-433-812, A-423-812, A-427-828, A-428-844, A-475-834)," dated December 22, 2016 (European Commission Comments), at 1-2 (citing *United States – Anti-dumping and Countervailing Measures on Large Residential Washers from Korea*, WT/DS464/R (March 11, 2016) (*U.S. – Washers*), at paras. 5.32, 5.39, 5.152, 5.153, 5.155).

[39] *Id*.

[40] *Id*. at 2 (citing *U.S. – Washers*, at 30).

[41] *See* Industeel Rebuttal Brief, "Antidumping Duty Investigation of Carbon and Alloy Steel Cut-to-Length Plate from Belgium: Rebuttal Brief of Industeel Belgium S.A.," dated February 13, 2017 (Industeel Rebuttal Brief), at 15.

Belgium, maintaining that the Department should continue to apply its differential pricing analysis for the final determination.

Department's Position:

The European Commission argues that the Department's differential pricing methodology is contrary to law because the Department applies zeroing to the sales to which it applies the A-to-T method, and the WTO has made clear that the "fair comparison" requirement in the WTO Antidumping Agreement (also included in U.S. law) does not permit the use of zeroing because individual pattern transactions priced above normal value are not properly taken into account.[42] The Department disagrees with the European Commission. The CAFC has held that WTO reports are without effect under U.S. law, "unless and until such a {report} has been adopted pursuant to the specified statutory scheme" established in the Uruguay Round Agreements Act (URAA).[43] In fact, Congress adopted an explicit statutory scheme in the URAA for addressing the implementation of WTO reports.[44] As is clear from the discretionary nature of this scheme, Congress did not intend for WTO reports to automatically supersede the exercise of the Department's discretion in applying the statute.[45] With regard to the A-to-T method, specifically, as an alternative comparison method and the use of zeroing under the second sentence of Article 2.4.2 of the WTO Antidumping Agreement, the Department has issued no new determination, and the United States has adopted no change to its practice pursuant to the statutory requirements of sections 123 or 129 of the URAA.

Comment 2: Industeel's Misreported International Freight Expenses

Industeel's Arguments

- Industeel reported that it incurred U.S. international freight expenses in Euros. However, the Department found at verification that Industeel incurred a portion of these expenses in U.S. dollars, and that Industeel had converted the U.S. dollars amounts to Euros for reporting purposes.[46] Industeel argues that its manner of reporting international freight expenses requires no adjustment because: 1) the Department found no error with the actual amount of expense incurred; and 2) in converting from U.S. dollars to Euros, Industeel inadvertently over-reported these expenses.

- Industeel illustrates its arguments using information taken at verification, and it summarized it in a chart attached to its case brief.[47] This chart shows that the amount Industeel reported

[42] *See* European Commission's Comments, at 2-3.

[43] *See Corus Staal BV v. Dep't of Commerce*, 395 F.3d 1343, 1349 (Fed. Cir. 2005)

[44] *See*, *e.g.*, 19 USC §3533, 3538 (sections 123 and 129 of the URAA).

[45] *See*, *e.g.*, 19 USC §3538(b)(4) (implementation of WTO reports is discretionary).

[46] *See* Industeel Sales Verification Report, at 2.

[47] *See* Industeel's Case Brief, "Antidumping Duty Investigation of Carbon and Alloy Steel Cut-to-Length Plate from Belgium: Case Brief of Industeel Belgium S.A.," dated February 7, 2017 (Industeel Case Brief), at Attachment A.

on its sales file was generally higher than the amount it would have reported if it had reported the expense in the currency incurred.

The Petitioner's Arguments

- According to the petitioner, the Act requires that all currency conversions be made using the exchange rates in effect on the date of the U.S. sale.[48] The petitioner contends that the Department should enforce a zero-tolerance policy for failures to report prices and adjustments in the currency incurred. The petitioner claims that, if the Department allowed respondents to make their own currency conversions, the agency's ability to enforce consistency in conversions would be severely undermined, and respondents could select any prevailing exchange rate on dates of their choosing.

- The petitioner disagrees that Industeel's chart shows that it likely over-reported its international freight costs because: 1) Industeel's analysis is based on an inadequate sample size and, thus, is not representative; and 2) the Department's official euro-to-dollar exchange rates show irregular fluctuations over the POI, and it is therefore unclear whether Industeel's currency reporting error favored or harmed the company.

- The petitioner argues that, consistent with its treatment of such failures in other cases, the Department should apply partial AFA to Industeel's international freight expenses. As AFA, the petitioner maintains that the Department should use the highest exchange rate during the POI to convert freight for sales where the Department is unable to determine the international freight currency.[49]

Department's Position:

Section 773A(a) of the Act states that, in general, in antidumping duty proceedings, the Department "shall convert foreign currencies into United States dollars using the exchange rate in effect on the date of sale of the subject merchandise . . . ."[50] This directive is echoed in 19 CFR 351.415. Consistent with these requirements, the Department's antidumping questionnaire instructs respondents to report sales and expense data in the currency in which they were incurred.[51] In its initial Section C Questionnaire Response, Industeel reported that the currency for its international freight was U.S. dollars.[52] In its Supplemental Sections B and C

[48] *See* Petitioner's Rebuttal Brief, "Certain Carbon and Alloy Steel Cut-to-Length Plate from Belgium: Rebuttal Brief," dated February 13, 2017 (Petitioner's Rebuttal Brief), at 30 (*citing* 773A(a) of the Act and 19 CFR 351.415(a)).

[49] *See* Petitioner's Rebuttal Brief, at 31 (citing *Notice of Final Determination of Sales at Less Than Fair Value: Citric Acid and Certain Citrate Salts from Canada*, 74 FR 16843 (April 13, 2009), and accompanying Issues and Decision Memorandum, at Comment 4).

[50] *See* section 773A(a) of the Act (emphasis added).

[51] *See* Department Letter re: Antidumping Questionnaire, dated May 25, 2016 (Antidumping Questionnaire), at G-4 ("All monetary amounts should be shown in the currency in which they were originally denominated, and in the currency in which they are registered in your accounts (if the two are different)."); *see also* section 773A of the Act and 19 CFR 351.415(a).

[52] *See* Industeel's July 15, 2016 Section C Questionnaire Response (Industeel July 15, 2016 CQR), at Exhibit C-1.

Questionnaire Response, Industeel reported that the currency for its international freight was in Euros.[53] Thus, the Department requested, in a second supplemental questionnaire to Industeel, that Industeel clarify whether its international freight was denominated in Euros or U.S. dollars; Industeel replied that "Industeel's international freight expenses (reported in field INTNFRU) were incurred in Euros" (emphasis added).[54] At verification, however, we found that, for a number of U.S. sales, Industeel incurred international freight in both Euros and U.S. dollars, and it converted the U.S. dollar amounts to Euros based upon an unexplained exchange rate. Specifically, our verification report states:[55]

> Industeel incurred international freight expenses on certain U.S. sales in both Euros and U.S. dollars, and it reported a single Euro-denominated value for its international freight after performing its own currency conversions. Specifically, we found that Industeel received two separate ocean freight bills and made two separate accounting entries, in both Euros and U.S. dollars.
>
> Company officials explained that, in the course of preparing its U.S. sales database, Industeel converted the U.S. dollar amount to Euros, although the bill Industeel received was issued in U.S. dollars and was booked into Industeel's accounts as a U.S. dollar cost. Moreover, although the U.S. dollar freight invoices have a dollars-to-Euro conversion factor on them, that is not the conversion factor that Industeel used in converting the freight costs. *See* VEs {verification exhibits} 17, 23, and 24. We noted that, although Industeel's calculations may have been mathematically correct, the source of the currency conversion rate applied to the freight invoiced in U.S. dollars was unclear (not specified) and, regardless, the expenses were incurred in U.S. dollars and per the Department's questionnaire instructions should have been reported as U.S. dollar expenses. Moreover, information reviewed at verification appears to contradict Industeel's statement in a supplemental questionnaire response that its "international freight expenses… were incurred in Euros." *See* Industeel's Second Supplemental Sections B and C Response, dated October 14, 2016, at 8.

We disagree with Industeel that, given the above facts, it is appropriate to accept its international freight data as reported. While the data examined at verification purports to show that Industeel overstated the amount of certain expenses, it also shows that Industeel underreported others.[56] However, the information prepared by Industeel is unusable, because Industeel based the exchange rate used in its calculations on the rate in effect on the invoice date (*i.e.*, the U.S. date of sale initially reported in its questionnaire response); as noted below, however, we find that that the shipment date from the factory is the relevant date instead (*see* Comment 4). Because the factory shipment date is substantially prior to invoice date, this difference may have a significant impact on the exchange rate used. Furthermore, the sample of sales examined at

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[53] *See* Industeel's October 14, 2016 Second Supplemental Sections B and C Questionnaire Response (Industeel October 14, 2016 SQR), at Exhibit SC-1.

[54] *See* Industeel October 14, 2016 SQR, at 8.

[55] *See* Industeel Sales Verification Report, at 16-17.

[56] *See* Industeel Case Brief, at Attachment A.

verification is small, and the exchange rate experienced fluctuations during the POI.[57] Based on these facts, we cannot conclude that our observations at verification are indicative of the results for the rest of the database.

Therefore, we accepted Industeel's international freight expenses only where we either: 1) determined at verification that Industeel incurred international freight solely in Euros; or 2) obtained currency-specific information at verification. However, for all other sales where we found mixed-currency reporting, or the potential for mixed-currency reporting, we based the amount of the expenses on AFA. Specifically, for all sales where it is either impossible to isolate the proper conversion at verification or for which we do not know whether Industeel properly reported the expenses, we accepted the reported figures; but, as AFA, we converted them into U.S. dollars using the highest exchange rate in effect during the POI (*i.e.*, 1.1437 dollars to one Euro).

We find that this action is appropriate in light of the Act's requirement to perform all currency conversions using the U.S. sale date, and the Department's request that Industeel report sales and expense information in the currency in which it was incurred. Although we requested that Industeel explain the basis of its reporting, thereby affording it an opportunity to identify its error and correct it, Industeel provided inaccurate information which was not revealed until verification. As a result, we find that Industeel did not provide information pertaining to certain U.S. freight expense in the form and manner requested, as required by section 776(a)(2)(B) of the Act, and this information could not be verified, as required by section 776(a)(2)(D) of the Act. In selecting from among the facts otherwise available, section 776(b) of the Act authorizes the Department to use an adverse inference if the Department finds that an interested party failed to cooperate by not acting to the best of its ability to comply with a request for information. Because it was possible for Industeel to have provided sales and expense data in the currency in which they were incurred, and because they failed to provide the information in the form and manner requested, and because this information cannot be verified, we find that Industeel did not act to the best of its ability in reporting this information to the Department, in accordance with section 776(b)(1) of the Act. Therefore, we find it is appropriate to apply AFA in the final determination as noted above.

Comment 3: Whether Certain of Industeel's U.S. Sales Were Made Outside the Course of Ordinary Trade

Industeel's Arguments

- During the POI, Industeel made one large U.S. sale to a customer located outside the United States. Industeel asserts that the Department should excluded this sale from its final analysis because record evidence demonstrates that this sale was unique, rendering it unrepresentative of Industeel's presence in the U.S. market. According to Industeel, sales involving similar circumstances likely will not occur again in the future.

- Industeel notes that the sale in question was initially destined for a third country market; however, after Industeel accepted the order, the customer changed the final delivery

[57] *See* Petitioner's Rebuttal Brief, at 31 and the Department's Euro exchange rates used in this investigation, available at *http://enforcement.trade.gov/exchange/euro.txt*.

destination to a location in the United States so that it could be further processed there. Industeel claims that the customer re-exported the merchandise to the originally-intended country after the further processing was completed. According to Industeel, given these facts, the sale was not a U.S. sale for dumping purposes at the time its terms were negotiated and finalized.

- Industeel also contends that the Department should disregard this this transaction because it is outside the course of ordinary trade, within the meaning of 19 CFR 351.102(b)(35).[58] Industeel notes the following differences:

    (1) The product was physically dissimilar to all other subject plate products sold by Industeel in the U.S. market (*i.e.*, this sale was "commodity-grade" plate, while Industeel's typical U.S. sales are plates in high-quality grades).

    (2) Because of the lower grade, the price charged for this sale was far lower than any other sale on Industeel's U.S. sales file, and the price was set in a different currency.

    (3) This sale was made pursuant to different delivery terms than Industeel's other U.S. sales.

    (4) Industeel paid a commission to a different sales agent; unlike Industeel's other sales, where Industeel USA acted as Industeel's sales agent in the U.S. market, and assisted with its sales activities, Industeel USA received no commission for this sale.

- Industeel contends that, under CIT and Department precedent, the Department has the authority, in an investigation, to exclude U.S. sales made outside the course of ordinary trade when the sales are "unrepresentative and extremely distortive."[59] According to Industeel, the CIT clarified that a sale is unrepresentative of a respondent's behavior when it is unlikely that a similar sale would occur after the preliminary determination,[60] and the Department recently affirmed that "its purpose in determining whether a sale is outside the ordinary course of trade is to prevent dumping margins from being based on unrepresentative sales."[61]

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[58] *See* Industeel Case Brief, at 8 (citing 19 CFR 351.102(b)(35) and *Appvion, Inc. v. United States*, 100 F. Supp. 3d 1374, 1379-80 (CIT 2015) (*Appvion*)).

[59] *See* Industeel Case Brief, at 9 (citing *FAG U.K. Ltd. v. United States*, 945 F. Supp. 260, 265 (CIT 1996) (*FAG U.K. Ltd.*) and *Stainless Steel Bar from India: Final Results of the Antidumping Duty Administrative Review, and Revocation of the Order, in Part*, 76 FR 56401 (September 13, 2011) (*Stainless Steel Bar from India*), and accompanying Issues and Decision Memorandum, at Comment 4).

[60] *See* Industeel Case Brief, at 10 (citing *Bowe Passat Reinigungs-Und Waschereitechnik GmbH v. United States*, 926 F. Supp. 1138, 1148 n.28 (CIT 1996) (*Bowe Passat*)).

[61] *See* Industeel Case Brief, at 9 (citing *Certain New Pneumatic Off-the-Road Tires from India: Final Negative Determination of Sales at Less Than Fair Value and Final Determination of Critical Circumstances*, 82 FR 4848 (January 17, 2017) (*Off-the-Road Tires from India*), and accompanying Issues and Decision Memorandum, at Comment 3).

- According to Industeel, the CIT has found that very low prices or profits may be indicative of sales outside the course of ordinary trade,[62] and the Department has adopted the same principle. For example, Industeel contends that the Department has excluded a respondent's low priced U.S. sales, and/or sales of lower quality, from its analysis in prior cases.[63]

- Industeel contends that, based on the facts and the above-cited precedent, the inclusion of the sale at question in the Department's final dumping margin calculation would be distortive and would undermine the fairness of the comparison of Industeel's home market and U.S. sales; as such, the Department should exclude this sale from its final dumping margin calculation.

The Petitioner's Arguments

- The petitioner disagrees that the Department should disregard the sale in question. The petitioner notes that this sale accounted for a significant portion of Industeel's U.S. database. According to the petitioner, because it was also the U.S. sale with the lowest price, the Department should reject Industeel's arguments as results-oriented.

- The petitioner also disagrees that there is anything truly unusual about the sale. Specifically, the petitioner asserts that, in its response, Industeel characterized changes in delivery terms as commonplace, and it was aware of the change in delivery location long before it shipped the merchandise or issued an invoice for it. The petitioner notes that Industeel has argued elsewhere in its brief that the essential terms of U.S. sales can change up until the time of invoicing,[64] and, thus, Industeel had every right and opportunity to refuse to sell the product at the price previously-agreed upon.

- Similarly, the petitioner disagrees that Industeel has established that the product itself is out of the ordinary. According to the petitioner, with the exception of the U.S. sales database, there is nothing on the record regarding the grades that Industeel has sold in the United States over time. Further, the petitioner asserts that Industeel's English-language sales brochure advertises its ability to provide various steel grades, whatever the quality and specification required, including standard ones, undermining Industeel's claim that it will make no similar sales in the future.

- The petitioner acknowledges that the currency, delivery terms, and commission payments for this sale differ, but it disagrees that these differences are significant enough to render the sale outside the ordinary course of trade. According to the petitioner, the standard for determining whether a sale is outside the ordinary course of trade is high, and the transaction must be truly unusual.

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[62] *See* Industeel Case Brief, at 8 (citing *Appvion*).

[63] *See* Industeel Case Brief, at 10-11 (citing *Certain Dried Heavy Salted Codfish from Canada: Final Determination of Sales at Less Than Fair Value*, 50 FR 20819 (May 20, 1985) (*Codfish from Canada*), and accompanying Issues and Decision Memorandum at Respondent Comment 1; *see also Fresh Kiwifruit from New Zealand: Final Determination of Sales at Less Than Fair Value*, 57 FR 13695 (April 17, 1992) (*Kiwifruit from New Zealand*), and accompanying Issues and Decision Memorandum, at Comment 6).

[64] *See* Comment 4, below.

- Finally, the petitioner contends that the fact that this sale generated higher dumping margins than other sales provides an insufficient basis to disregard it. The petitioner notes that the Department's differential pricing practice recognizes that respondents may dump selectively in the United States, and the Department should administer the dumping law in a way that captures such selective dumping.

Department's Position:

The term "outside the ordinary course of trade" is defined in section 771(15) of the Act as "the conditions and practices which, for a reasonable time prior to the exportation of the subject merchandise, have been normal in the trade under consideration with respect to merchandise of the same class or kind." Section 771(15) further directs the Department to "consider the following transactions, among others, to be outside the ordinary course of trade: (A) Sales disregarded under section 773(b)(1). (B) Transactions disregarded under section 773(f)(2). (C) Situations in which the administering authority determines that the particular market situation prevents a proper comparison with the export price or constructed export price." This definition is also found at 19 CFR 351.102(b).

As a threshold matter, the Department interprets the language in section 771(15) of the Act as applicable only to home market sales,[65] and the Courts have upheld this interpretation.[66,67] Additionally, the language in the *URAA Senate Report* and SAA clearly indicate that the

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[65] Lending support to this interpretation is that fact that section 771(15) either explicitly references section 773 of the Act (which governs the calculation of normal value) or a "particular market situation" (which also only applies to home market or third market sales, not to U.S. sales).

[66] *See Certain Steel Nails from the United Arab Emirates: Final Determination of Sales at Less Than Fair Value*, 77 FR 17029 (March 23, 2012), and accompanying Issues and Decision Memorandum, at Comment 1 ("…the antidumping laws {*sic*} does not provide that the Department will disregard U.S. sales because they as {*sic*} outside the ordinary course of trade. The courts have recognized that the ordinary course of trade provision of the Act is applicable only to sales made in the home market... we do not disregard U.S. sales as outside the ordinary course of trade…"). *See also Stainless Steel Bar from India* and accompanying Issues and Decision Memorandum, at Comment 4; *see also Notice of Final Results of Antidumping Duty Administrative Review: Granular Polytetrafluoroethylene Resin from Italy*, 68 FR 2007 (January 15, 2003), and accompanying Issues and Decision Memorandum, at Comment 4; *see also Notice of Final Determination of Sales at Less Than Fair Value; Certain Hot-Rolled Carbon Steel Flat Products From the Netherlands*, 66 FR 50408 (October 3, 2001), and accompanying Issues and Decision Memorandum, at Comment 3.

[67] *See, e.g.*, *Corus Staal BV v. United States DOC*, 259 F. Supp. 2d 1253 (CIT 2003) (*Corus Staal*) ("While the definition for NV requires that Commerce consider the price of sales in the 'ordinary course of trade,' the definitions of U.S. price contain no such requirement" and "Commerce responds that there is no requirement that it exclude sales outside the ordinary course of trade and that it properly compared these U.S. sales to similar sales in the home market. The court agrees."). *See also Mitsubishi Heavy Indus. v. United States*, 15 F. Supp. 2d 807 (CIT 1998):

> Commerce's decision not to exclude the DMN sale was consistent with both the statute and relevant case law. "As the court has made quite clear, regular exclusion of sales not in the ordinary course of trade only occurs on the home-market-sales side of the price comparison." *American Permac, Inc. v. United States*, 16 C.I.T. 41, 42, 783 F. Supp. 1421, 1423 (1992) (emphasis supplied). The reason for this is that according to the statute, the normal value of the subject merchandise is the price "at which the foreign like product is first sold . . . in the exporting country, in the usual commercial quantities and in the ordinary course of trade . . . ." The definition of export price, however, does not include an "ordinary course of trade" provision.

"ordinary course of trade" provision only applies to construction of normal value and should only be used to exclude sales of merchandise in the home market or third country markets, which may not be fair comparisons to U.S. sales.[68] Thus, we find that Industeel's reliance on 19 CFR 351.102(b)(35) is misplaced.

We agree with Industeel that the Department has the discretion to exclude U.S. sales from its margin calculation in LTFV investigations, albeit on other grounds than the "outside the ordinary course of trade" provision, and the Department has exercised that discretion in the past. However, the circumstances where the Department has disregarded U.S. sales have been rare and generally only when the sales represent a very small percent of a respondent's total sales, such that they would have an insignificant effect on the margin.[69] Further, we are not required, either by the Act or by our practice, to disregard any U.S. sales, even if made in small quantities.

In this case, we find no basis to disregard the sale at issue. As discussed more fully below, this sale represents a significant percent of Industeel's U.S. sales database, is prime merchandise,[70] and matches to identical merchandise sold in the home market.[71] Moreover, there is insufficient record evidence to determine that this is a one-off occurrence, nor is there any reason to conclude that Industeel would not make similar U.S. sales in the future, given the opportunity. Finally, the merchandise was entered for consumption into the customs territory of the United States as CTL plate meeting the physical characteristics covered by the scope description, was further processed in the United States into a different (*i.e.*, non-covered) product, and then was re-exported as that different product.

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[68] *See Uruguay Round Agreements Act: Joint Report of the Committee on Finance, Committee on Agriculture, Nutrition, and Forestry, and Committee on Governmental Affairs of the United States Senate to Accompany S. 2467* dated November 22, 1994 (*URAA Senate Report*), at 61 ("dumping is measured by comparing the export price of the product with the comparable price of the like product, in the ordinary course of trade, in the market of the exporting country. …The Committee believes that Commerce should avoid basing normal value on sales that are extraordinary for the market in question, since this could affect the 'fair comparison' required by Article 2.4 of the Antidumping Agreement."). Moreover, Congress' interpretation is consistent with that found in the *Uruguay Round Agreements Act: Statement of Administrative Action*, dated September 27, 1994, at 138 ("Article 2 reflects… the U.S. practice of disregarding, for purposes of determining normal value, home or third country sales that are below the cost of production."). Thus, the legislative history of the "ordinary course of trade" clause never contemplated that it would be applied to U.S. sales, only to sales used in the calculation of normal value.

[69] *See e.g.*, *Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Color Television Receivers from the People's Republic of China*, 69 FR 20594 (April 16, 2004), and accompanying Issues and Decision Memorandum, at Comment 27. Also, for example, in *FAG U.K. Ltd.* the Court noted that "exclusion of sales may be necessary to prevent a fraud on the Commerce's proceedings" (citing *Chang Tieh Industries Co. v. United States*, 840 F. Supp. 141, 145-46 (CIT 1993)).

[70] *See* Industeel's October 6, 2016 Supplemental B and C Questionnaire Response (Industeel October 6, 2016 SQR) (Responding to questions as to whether it sold any non-prime merchandise in either market, Industeel stated the following: "Industeel produced high quality specialty steels that are frequently used in critical applications. As a result, Industeel cannot and does not sell non-prime merchandise. Any plates which fail quality inspection are scrapped. … Industeel did not sell non-prime merchandise in the home or U.S. markets during the POI. … Industeel has only one category of prime merchandise, and no categories of non-prime merchandise. All merchandise sold by Industeel carries the same quality guarantee.").

[71] *See* Industeel Final Calculation Memorandum at 7 and Attachment II.

Information on the record indicates that the sale at issue was subject merchandise and was substantial in volume, representing a significant quantity of Industeel's U.S. sales during the POI. We acknowledge that there are differences between this sale and Industeel's other transactions reported in the U.S. sales listing (*e.g.*, the place of delivery, the currency of the transaction, and the entity receiving a commission); however, we disagree that these factors are relevant to the issue at hand. Rather, the salient question is whether the sale forms an appropriate part of the Department's dumping analysis in this case. Given that Industeel admits that it had knowledge that this merchandise was destined for the United States at the time of sale, combined with the fact that the merchandise entered the United States for consumption during the POI, we find that it is proper to continue to include it.

Further, we disagree with Industeel that this sale was not a U.S. sale for dumping purposes at the time its terms were finalized. On the date of that Industeel issued its invoice to the customer (*i.e.*, the date of sale for dumping purposes), Industeel knew that the merchandise was destined for the U.S. market. Elsewhere in its response, Industeel argued that the essential terms of U.S. sales can change up until the time of invoicing;[72] thus, as Industeel was aware of the change in delivery location long before it shipped the merchandise or issued an invoice for it, there is no reason that Industeel could not have renegotiated the terms of the sale; however, Industeel did not.

As noted above, the Department does not conduct analyses to determine if U.S. sales are "representative" of a respondent's general selling practices before including relying on them in a dumping calculation. However, even were we to find such an analysis appropriate here, we disagree that that the record supports Industeel's conclusion. Specifically, we find no support on the record for Industeel's claim that it will not make similar sales in the future, especially given that it is actively marketing CTL plate in all grades of steel for sale in the United States.[73] Further, we disagree that the record demonstrates that this was the sole sale of this class of merchandise to the United States, given that: 1) there is no designation for "commodity grade" steel in the control number (or "CONNUM");[74] and 2) Industeel failed to report a complete universe of sales to the United States during the POI. (For further discussion, *see* Comment 4, below.)

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[72] *See e.g.,* Industeel's August 30, 2016 Supplemental Section A Questionnaire Response, at 13.

[73] *See e.g.*, Industeel's June 22, 2016 Section A Response, at Exhibit A-20, Industeel's sales brochure, which states that Industeel is committed to "{r}esearching, designing, and producing the exact steel grade to fit your every technical need, whatever the quality and specifications required, from standard steel to the most elaborate special steel grades."

[74] Although Industeel asserts that this sale was a lower quality, "commodity" product, there was no code in the Department's CONNUM to indicate a "commodity" product, and indeed Industeel had no problem correctly classifying this merchandise using the Department's CONNUM coding method. Furthermore, there were other sales, to different customers, in Industeel's U.S. sales database with the same QUALITYU (*i.e.*, quality) code, indicating that this was not the sole sale of this 'quality' of merchandise to the U.S. during the POI. Additionally, while Industeel did comment on the product characteristics (*see* Industeel's June 2, 2016, letter), Industeel's comments were limited to painting and yield strength and Industeel did not request the addition of any designation for "commodity" plate products. Nowhere has Industeel provided any record evidence as to what would constitute a "commodity" steel plate, versus the plates it produces and sells.

Likewise, we find unavailing Industeel's arguments that the grade of steel used in the CTL plate at issue, and the corresponding price, are sufficiently different from the grades and prices of Industeel's other sales, such that it would be inappropriate to include the sale in question in our analysis. As noted above, Industeel actively markets lower-grade plate products in the United States. While it may well charge lower prices for "commodity-grade" plate, there is no evidence on the record that this lower price is solely attributable to the possible difference in grade. Indeed, lower prices may simply be indicative of greater dumping, a fact implicitly recognized by the CIT in *Corus Staal*.[75]

Finally, we disagree that the case precedent cited by Industeel support its arguments. Industeel's citations to *Appvion*[76] and *Off-the-Road Tires from India*,[77] are not relevant because they pertain to home market sales. Further, while the sales at issue in *Stainless Steel Bar from India*[78] and *Kiwifruit from New Zealand*[79] were made to the United States, the Department found that they were not outside the ordinary course of trade and should be included in the margin calculation.

[75] *See Corus Staal,* 259 F. Supp. 2d at 1268 ("In *FAG Italia, S.p.A. v. United States*, 948 F. Supp. 67, 71, 20 Ct. Int'l Trade 1377 (CIT 1996), the court agreed, stating that "unlike the definition of FMV {foreign market value or NV}, the definition of USP {U.S. price or EP/CEP} contains no requirement that the prices used in USP calculations be the prices charged 'in the ordinary course of trade.'" As a result, even if Corus is correct that these GalvPro sales were made outside of the ordinary course of trade, there is no requirement that Commerce exclude them.").

[76] *See Appvion*, which dealt exclusively with home market sales ("In determining whether home market sales are in the ordinary course of trade, Commerce must evaluate not just one factor taken in isolation but rather . . . all the circumstances particular to the sales in question." (citations omitted)). *Appvion*, 100 F. Supp. 3d at 1379.

[77] *See Off-the-Road Tires from India*, and accompanying Issues and Decision Memorandum, at Comment 3 (where the Department declined to exclude certain home market sales with high levels of profitability (the opposite situation to the one here), with higher dumping margins)). However, also, in *Off-the-Road Tires from India*, when faced with arguments that certain U.S. sales should be excluded from consideration, the Department's position was consistent with our position in the instant case: "{u}nlike the definition of normal value, the definition of export price contains no requirement that the prices used in export price calculations be the prices charged "in the ordinary course of trade." *Id.* at "Adverse Inference," page 27.

[78] *See Stainless Steel Bar from India*, and accompanying Issues and Decision Memorandum, at Comment 4.

[79] *See Kiwifruit from New Zealand,* at Comment 6 (where the Department explained that "{t}he ordinary course of trade exclusion (19 CFR 353.46(a)) is for foreign market value only. In an investigation, however, the Department may exclude aberrational sales from comparison, but there is no obligation to do so." We note that, like this case, *Kiwifruit from New Zealand* was an investigation and the Department did not exclude the low priced sales at issue; moreover, like here, the shipment was originally bound for a different country but was diverted to the United States and still included in the dumping calculation.

Further, in *Bowe Passat*[80] and *FAG U.K. Ltd.*,[81] the Court upheld the proposition that the Department is not required to exclude any U.S. sales. Finally, *Codfish from Canada* involved a perishable product and the case was investigated under a previous version of the Act.

With regard to this latter case, in *Codfish from Canada* the merchandise had an expiration date and the respondent was able to prove that the sale was made in such a manner to avoid loss of a perishable product. In that case, the respondent was able to demonstrate the price for one sale of large fish of marginal quality was reduced to avoid loss of product.[82] Moreover, the Department did not exclude additional sales of large fish where there was no documentation demonstrating that such merchandise was of marginal quality.[83] In contrast, Industeel's U.S. sale in question was of made-to-order steel plate; it was not a perishable product and was made explicitly for its customer who had the plate shipped to the United States during the POI. Therefore, based on the foregoing reasons, we find no reason to exclude this particular sale to the United States from the dumping calculation.

Comment 4: Date of Sale for Industeel's U.S. Sales and Application of Partial AFA

Industeel reported the invoice date as its U.S. date of sale; because this date was later than the bill of lading date (*i.e.*, Industeel's reported date of shipment), we based Industeel's date of sale on the bill of lading date in the *Preliminary Determination*.[84]

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[80] *See Bowe Passat*:

> Commerce is therefore required to exclude sales not made in the ordinary course of trade from its calculation of foreign market value. There is no parallel "ordinary course of trade" provision for the United States price component of the antidumping equation. *See* 19 U.S.C. § 1677a (1988). The statute and the underlying regulations are silent about excluding sales from United States price that are not made in the ordinary course of trade. *Id.;* 19 C.F.R. § 353.41 (1990)
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> …
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> *See also Floral Trade Council v. United States*, 15 C.I.T. 497, 508 n.18, 775 F. Supp. 1492 (1991) ("As the court has made quite clear, regular exclusion of sales not in the ordinary course of trade only occurs on the home-market side of the price comparison." The court further stated in a footnote that "United States sales both in and out of the ordinary course of trade are included in the USP calculations."). This Court agrees that Commerce's interpretation of the United States price provision of the antidumping statute to include all United States sales whether in or out of the ordinary course of trade is a permissible construction of the statute. Accordingly, Commerce's inclusion of Bowe's trade show machine in calculating United States price was appropriate.

[81] *See FAG U.K. Ltd.*, where the Court allowed that "the definition of USP contains no requirement that the prices used in USP calculations be the prices charged 'in the ordinary course of trade.'" Moreover, in *FAG U.K. Ltd.*, the Court acknowledged that "Commerce can only exclude sales from USP in an administrative review in exceptional circumstances when those sales are unrepresentative and extremely distortive."

[82] *See Codfish from Canada* at Respondent Comment 1.

[83] *Id*.

[84] *See Preliminary Determination* at "Date of Sale" ("For its U.S. sales, Industeel also reported shipment dates which predated the invoice dates… we preliminarily used the earlier of the invoice date or the shipment date as the home market and U.S. dates of sale for . . . Industeel," and footnote 30, "Industeel reported the bill of lading date as

The Petitioner's Arguments

- The petitioner argues that the Department should, instead, use the date of shipment from the factory. According to the petitioner, Industeel failed to report this information, despite the fact that it maintained it in the normal course of business and the Department verified that it would not have been unduly burdensome to report (either via its electronic SAP system or a manual search). As a result, the petitioner argues that the Department should apply partial AFA to account for the correct date of sale.

- The petitioner asserts that the Department's normal practice is to use the date of shipment from the factory, and this practice should be applied here. According to the petitioner, while the Department may select a different date if that date "better reflects the date on which the exporter or producer establishes the material terms of sale," the Department's standard has been to rely on the shipment date from the factory if the shipment date occurs before the invoice date.[85] Specifically, the petitioner notes that the Department's antidumping duty questionnaire states that, "{i}f, for any specific sale, the date selected is after the shipment date for that sale, the Department will use shipment date as the date of sale instead, but only for the sale in question."[86]

- The petitioner argues that use of factory shipment date is particularly appropriate here because Industeel's shipments can remain at the port for a long time — up to 42 days – without charge. Furthermore, the petitioner asserts that the information Industeel provided regarding recalls of orders from the port does not demonstrate that the material terms of U.S. sales can change after the shipment leaves the factory, as no U.S. shipments were recalled from the port during the POI. The petitioner states that the example Industeel provided (related to the partial recall of a sale to Singapore) demonstrates nothing with respect to U.S. sales.

- The petitioner finds it irrelevant that Industeel's plates remain in inventory as in-transit products, because any sale that is sold on a delivered basis will remain in the inventory of the seller until the merchandise reaches the designated delivery point. According to the petitioner, inventory status has no bearing on whether the material terms of the sale have been established, and, therefore, the Department cannot accept Industeel's bill of lading date as date of sale on the basis that the products remained in Industeel's inventory until that date.

- According to the petitioner, although there may not be a one-to-one correlation between plant shipment dates and U.S. invoice line items, this issue is regularly faced by the Department

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the date of shipment for its U.S. sales… we accepted the bill of lading date as the date of shipment for purposes of the preliminary determination").

[85] *See* Petitioner's Case Brief, "Certain Carbon and Alloy Steel Cut-to-Length Plate from Belgium: Case Brief of Nucor Corporation," dated February 7, 2017 (Petitioner's Case Brief), at 24 (citing Antidumping Questionnaire, at I-5 – I-6).

[86] *Id*.

and can easily be resolved by breaking up the individual shipments into separate records on the sales file.

- The petitioner argues that Industeel's failure to properly report sale date materially understates the dumping margin because: 1) prices of the subject merchandise have dropped significantly between the period immediately preceding the POI and the end of it;[87] and 2) Industeel excluded certain reportable U.S. sales and included others.

- According to the petitioner, Industeel was put on notice that date of sale was a critical issue in this investigation, and it missed repeated chances to put this information on the record. Therefore, the petitioner argues that the Department should: 1) exclude all transactions with a date of shipment from port falling within April 2015, based on the assumption that these sales were shipped from the factory prior to the POI; and 2) include an additional one-twelfth of the reported volume of U.S. sales, based on the assumption that these sales shipped from the factory during the POI. The petitioner contends that the Department should apply the petition antidumping rate for Belgium of 51.78 percent as the dumping margin for the latter category of sales.

Industeel's Arguments

- Industeel asserts that the Department, in the past, has relied on invoice date when record evidence established that the "factory shipment date is not meaningful for establishing the date of sale."[88] Industeel disagrees that a transfer from the factory to the port is a definitive event because its merchandise remains its property after transfer and is subject to recall until it is placed on a vessel for export. Industeel likens the transfer from its factory to a transfer to its finished goods warehouse.

- Industeel argues that the petitioner provided no case law for the proposition that "shipment" is defined by reference to the same terms for defining the date of sale. Industeel notes that the antidumping duty questionnaire defines date of shipment as "the date of shipment from the last facility under your control, *e.g.*, the factory or distribution warehouse to the customer."[89] According to Industeel, the last facility under its "control" is the warehouse at the port, since Industeel can and has recalled plates from the facility after their transfer. Thus, Industeel claims that it properly reported shipment from the warehouse at the port as shipment date.

- Industeel contends that, in contrast, invoice date is the appropriate date of sale, as changes to the terms of sale can and do occur up until the time of invoicing. Industeel asserts that it is willing to make changes (including to price) as late as possible in the sales process—including changes to delivery date and location.[90] Thus, defining shipment date as vessel

[87] *See* Petitioner's Case Brief, at 33 (citing Nucor Letter re: Petitioner's Pre-Preliminary Determination Comments and Additional Deficiency Comments Regarding Industeel, dated October 17, 2016, at 6-8 and Attachment 1).

[88] *See* Industeel Rebuttal Brief, at 1 (citing *WLP from Korea* and accompanying Issues and Decision Memorandum, at Comment 8).

[89] *See* Industeel Rebuttal Brief, at 3 (citing Antidumping Questionnaire, at C-9).

[90] *See* Industeel Rebuttal Brief, at 4 (citing Industeel's Sales Verification Report at 7).

export date (*i.e.*, a date proximate in time to invoice date) is not only consistent with the questionnaire definition; it is also consistent with Industeel's business practice. Industeel does not address, however, why it is appropriate to use the invoice, instead of bill of lading, date as the date of sale in light of the fact that the bill of lading date is the earlier of the two dates.

- Industeel alleges that the petitioner's argument rests on the unfounded assumption that Industeel has manipulated, to its own advantage, the Department's dumping calculation by purposefully reporting higher-priced U.S. sales transferred from the factory prior to the POI, and by excluding lower priced U.S. sales invoiced after the POI. According to Industeel, the factual basis for this argument is flawed for the following reasons:
    - First, the information cited by the petitioner demonstrating a price drop relates to commodity grade steel, which is different from the high-quality, high-specification steel sold by Industeel.
    - Second, at verification, the Department collected information regarding sales invoiced in the month following the POI, but which had departed the factory during the POI. The prices listed on these invoices are identical to the prices reported by Industeel on its U.S. sales file. Therefore, even if Industeel had reported these sales, there would have been no effect on the Department's dumping calculation. Similarly, for the sales invoiced during the POI but transferred to the port prior to the POI, the pricing dynamics are the same *(i.e.*, the prices for the merchandise are consistent with other prices of the same merchandise shipped during the POI). Thus, Industeel asserts that the Department has successfully verified that Industeel's approach to the date of sale issue does not materially understate the dumping margin.
- Industeel further argues that the facts completely undermine any possible argument by the petitioner in favor of the application of AFA:
    - First, the petitioner has not established that Industeel failed to act to the best of its ability in reporting the date of shipment, given that the date Industeel reported fits precisely within the Department's definition of "date of shipment."
    - Second, the petitioner's arguments are predicated on the erroneous assumption that prices for subject merchandise were in constant decline over the POI; however, for Industeel, that was not the case.
    - Third, the petitioner assumes that all of Industeel's April 2015 sales were shipped from the factory in March 2105; however, this was specifically disproven at verification.
- In sum, Industeel argues that the petitioner's concerns about alleged manipulation are not supported by facts and should be wholly disregarded in favor of the factual record prepared by Industeel and verified by the Department.

Department's Position:

We disagree with Industeel that the invoice date is the most appropriate date to use as the date of shipment for Industeel's U.S. sales.[91] Rather, as explained more fully below, we find that the weight of the evidence on the record indicates that the shipment date from the factory is the proper shipment date; and, because this date precedes invoice date, it is also the proper date of sale because it is on this date that the material terms of sale are set.[92] We agree with the petitioner that, although the Department normally uses the date of invoice, as recorded in the producer's or exporter's records kept in the ordinary course of business, as the date of sale, the Department's regulations at 19 CFR 351.401(i) provide that the Department may use a date other than the date of invoice if the Secretary is satisfied that a different date better reflects the date on which the exporter or producer establishes the material terms of sale (*e.g.*, price and quantity).[93]

In its initial questionnaire response, for date of shipment, Industeel reported its invoice date. Industeel explained that this choice was appropriate because the invoice date "is the date on the ocean bill of lading. The time from shipment from factory to arrival at the port of export is

[91] Although the Department used the bill of lading date as the date of shipment/sale for the *Preliminary Determination*, we now find that the bill of lading date is not the earliest reliable date upon which terms of sale are fixed.

[92] In many instances, the Department has used date of shipment from the factory as the date of shipment. *See e.g., Notice of Final Determination of Sales at Less Than Fair Value: Narrow Woven Ribbons with Woven Selvedge from Taiwan*, 75 FR 41804 (July 19, 2010) and accompanying Issues and Decision Memorandum, at Comment 5; *Silicomanganese from India: Notice of Final Determination of Sales at Less Than Fair Value and Final Negative Critical Circumstances Determination*, 67 FR 15531 (April 2, 2002) and accompanying Issues and Decision Memorandum, at Comment 19; *Stainless Steel Bar from Japan: Final Results of Antidumping Administrative Review*, 65 FR 13717 (March 14, 2000) (*Steel Bar from Japan*), and accompanying Issues and Decision Memorandum, at Comment 1; *Final Results of Antidumping Duty Administrative Review: Silicon Metal From Brazil*, 63 FR 6899, 6908 (Feb. 11, 1998); and *Silicon Metal From Brazil, Amended Final Results of Antidumping Duty Administrative Review*, 62 FR 54094, 54095 (October 17, 1997).

[93] *See* 19 CFR 351.401(i); *see also Allied Tube and Conduit Corp. v. United States*, 132 F. Supp. 2d 1087, 1090-92 (CIT 2001) (*Allied*); and *Yieh Phui Enterprise Co. v. United States*, 791 F. Supp. 2d 1319 (CIT 2011) (*Yieh-Phui*) (affirming that the Department "has some flexibility in selecting the date of sale; the presumption in favor of invoice date is not conclusive"). *See also Preamble* at 27349 ("If the Department is presented with satisfactory evidence that the material terms of sale are finally established on a date other than the date of invoice, the Department will use that alternative date as the date of sale. For example, in situations involving large custom-made merchandise in which the parties engage in formal negotiation and contracting procedures, the Department usually will use a date other than the date of invoice. However, the Department emphasizes that in these situations, the terms of sale must be firmly established and not merely proposed."). *See also Mittal Steel Point Lisas Ltd. v. United States*, 31 CIT 638 (CIT 2007) (*Mittal Steel*) ("using the date of shipment when that date is before the invoice date is a practice the Department has adhered to in other investigations, and which has been implicitly approved by the courts. . . Commerce's reasoning therefore seems to be that shipment to the customer does not occur before the material terms of sale have been determined, so that when invoicing is subsequent to shipment, the date of shipment is generally an appropriate date of sale, although depending on the facts of specific review, Commerce may find another date more appropriate.").

normally 3 days, making this a date a reasonable proxy for date of shipment."[94] In its first supplemental Section C questionnaire, however, we requested that Industeel revise both its home market and U.S. "sales databases to report a shipment date, separate from the invoice date, which matches the date the shipment left the factory."[95] Industeel declined to provide the requested information, stating that "Industeel considers shipment date and invoice date to be the same for its export sales."[96]

Having examined the information on the record, we disagree with Industeel that the material terms of its U.S. sales were subject to change until the date of shipment from the port of exportation. Specifically, we examined the documentation for multiple sales at verification, and, in each case, the terms of sale were unchanged following the date on which the merchandise left the factory.[97] Industeel provided no examples where the price, quantity, or delivery terms changed after merchandise left its factory. Further, Industeel was only able to provide a single example where a plate, bound for Singapore, was recalled from the port, though in that case the recall did not appear to be related to a change in sales terms;[98] Industeel did not recall any merchandise bound for the United States, from its factory in Belgium, back from the port during the POI.[99]

The record evidence indicates that the warehousing at the port warehouse occurs only for the purpose of transporting the merchandise to the customer in the United States after a sale has been finalized (as opposed to, for example, holding the merchandise in general inventory prior to sale).[100] For this reason, we disagree with Industeel that the port is akin to a warehouse under its "control." The warehouse at the port does not belong to Industeel. More importantly, there is no evidence on the record that Industeel can withdraw merchandise deposited there at will (for example, to sell to a different customer in a different market). Instead, record evidence demonstrates that the merchandise stored at the port is dedicated for shipment to a particular

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[94] *See* Industeel July 15, 2016 CQR, at 21. In the Industeel October 14, 2016 SQR, Industeel reported bill of lading dates for all U.S. sales. For the *Preliminary Determination*, the Department used the bill of lading dates as Industeel's date of shipment, and as the date of sale in instances where the date of shipment preceded the invoice date. Although Industeel stated that it "issues its invoice on the date of the ocean bill of lading" (*see* Industeel July 15, 2016 CQR at 20), a comparison of the invoice dates and bill of lading dates shows that Industeel's invoices are all issued after the bill of lading date.

[95] *See* Department Letter re: First Supplemental Section C Questionnaire for Industeel, dated September 14, 2016, at 5.

[96] *See* Industeel October 6, 2016 SQR, at 26.

[97] *See* Industeel Sales Verification Report, generally, and Sales Verification Exhibits 15-19 and 23-25. *See also FAG U.K. Ltd. (*"Commerce is not required to engage in a paper war to obtain response to questions it has already explicitly asked.") The Department asked Industeel once, generally, for its shipment dates, and a second time, explicitly, for the factory-shipment date; Industeel declined to provide the requested information.

[98] *See* Industeel October 6, 2016 SQR, at 22 and Industeel Sales Verification Report at 7.

[99] We note that Industeel did provide an example, at verification, of a shipment to the United States, that its affiliate in France recalled from the port. *See* Industeel Sales Verification Report at 7. Similar to the example of the recalled plate for the Singapore sale, rather than a change in terms of sale, the plate appears to have been recalled for other reasons.

[100] *See, e.g.,* Industeel October 6, 2016 SQR, at 23.

customer, at a pre-determined time, on an already-booked vessel.[101] These conditions are not indicative of "control" over the warehouse at the port.

Moreover, Industeel's products were entirely made-to-order and Industeel never asserted, nor provided any examples of, instances in which merchandise sold in the United States was 're-routed' (*i.e.*, shipped to a customer other than the one for whom it was originally destined when it left the factory).[102] Therefore, we determine that the date of shipment from the factory is the appropriate date of shipment. Moreover, we determine that the date of shipment from the factory is the appropriate date of sale for Industeel's U.S. sales in accordance with our normal practice because the date of shipment from the factory preceded the date of invoice.[103]

Given the above facts, we disagree that the circumstances here are analogous to those in *WLP from Korea*. Unlike here, the respondent in *WLP from Korea* canceled certain home market sales after the merchandise reached the port, and then the respondent resold it to a different customer and issued a new invoice.[104] Thus, the Department found that, for the canceled sales alone, the new invoice set the final terms of sale. Industeel reported no sales fitting such a pattern (*i.e.*, canceled and re-invoiced once at the port), and, thus *WLP from Korea* does not apply.

Although the petitioner provided evidence of, and assertions that, a decrease in the price of CTL plate occurred from just prior to the POI, to the last month of the POI, we do not find this evidence to be dispositive and have not relied on that evidence as part of this determination.[105]

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[101] *See* Industeel's Sales Verification Report, at 6 and Sales Verification Exhibit 4. Specifically, our report states:

> {P}ort regulations grant Industeel 42 days free storage on the port (quay). *See* VE-4 at 655-657. Company officials further stated that Industeel receives permission from the port to ship the merchandise after vessels are scheduled; until that time, the plate remains in the factory warehouse. Company officials stated that Industeel has never had merchandise stay at the port for more than 42 days because they know when the boat is scheduled to depart.

See also Industeel October 6, 2016 SQR at 23 ("When the logistics department in IB plans a shipment to the United States, it tentatively reserves space on a ship in Antwep which generates a booking number (Nr: "numéro d'instruction"). Industeel will then transfer the products by available truck or railcar, possibly mixed with other orders products, to Antwerp.")

[102] *See* Industeel's July 15, 2016 Section B Questionnaire Response (Industeel July 15, 2016 BQR), at 44 ("Industeel generally produces on a made-to-order basis, and as a result, Industeel maintains little finished goods inventory. As plates for a particular order are produced, they are placed in the finished goods warehouse; once the order is complete through testing, the entire set is shipped.").

[103] *See*, *e.g.*, *Certain Polyester Staple Fiber from the Republic of Korea: Preliminary Results of the 2007/2008 Antidumping Duty Administrative Review*, 74 FR 27281, 27283 (June 9, 2009), unchanged in *Certain Polyester Staple Fiber from the Republic of Korea: Final Results of the 2007-2008 Antidumping Duty Administrative Review*, 74 FR 65517 (December 10, 2009). *See also Certain Oil Country Tubular Goods from Taiwan: Affirmative Preliminary Determination of Sates at Less Than Fair Value and Postponement of Final Determination*, 79 FR 10495 (February 25, 2014), and accompanying Preliminary Decision Memorandum at "Date of Sale" section, unchanged in *Certain Oil Country Tubular Goods from Taiwan: Final Determination of Sales at Less Than Fair Valu*e, 79 FR41979 (July 18, 2014).

[104] *See WLP from Korea* and accompanying Issues and Decision Memorandum, at Comment 8.

[105] *See* Petitioner's Case Brief at 33.

However, the Department does agree with the petitioner that Industeel has manipulated the sales universe, and date-of-sale based calculations—possibly to its own advantage. Based upon the information viewed at verification, there were numerous shipments with relatively long lag times between factory shipment date and invoice date; though none exceeding the 42 days free storage period at port.[106] Thus, although the Department viewed some additional (previously unreported) shipment information at verification, there may be other shipments outstanding (*i.e.*, beyond the 30 day windows that the Department examined on either side of the POI),[107] which Industeel did not want the Department to analyze as part of its dumping calculations (or, conversely, which Industeel wished to remain included in the dumping calculation). Additionally, in response to Industeel's argument that its sale prices stayed the same throughout the POI, the Department observes that this too is not a dispositive argument for dumping, or a lack of dumping. Various factors can affect the dumping calculation, including exchange rates, credit period, destination, sale terms, commissions, and freight costs, which are all shipment-specific. Although Industeel observed, in its case brief, that its prices were consistent throughout the POI (a fact which the Department does not dispute),[108] because of the variable factors of each specific shipment, the same sale prices can (and do) produce a range of dumping margins.[109] Thus, it is impossible to assess what the dumping margins would be, for those unreported sales, without the additional sale-specific factors. Moreover, Industeel neglects to address the fact that, by shifting its universe of sales, there may be additional unreported sales, as noted above.

We agree with the petitioner's assertion that it would not have been too difficult for Industeel to provide shipment dates.[110] As an initial matter, Industeel has a relatively small universe of U.S. sales. It also has an integrated SAP system which tracks each individual shipment to the port and which is able to account for each plate in Industeel's inventory. Thus, there is no reason to doubt that Industeel had a way to integrate the data electronically. At the very least, given the small sales universe, we find that it could have manually located and provided the information requested by the Department. Our experience with Industeel lends support to this conclusion, as Industeel was able to quickly find, and link, the documentation (*i.e.*, invoice, out of factory bill, and bill of lading) for the multiple shipments requested at verification.[111]

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[106] *See*, *e.g.*, Industeel Sales Verification Exhibits 35 and 39.

[107] *See* Industeel Sales Verification Report at 11-12 (completeness tests 5 and 7).

[108] *See* Industeel Case Brief at 6.

[109] *See* Industeel Final Calculation Memorandum at 7 and Attachment III.

[110] Although Industeel did not explicitly rebut this argument in its rebuttal brief, it did note that it had addressed the "extreme burden" of reporting such information in prior submissions. *See* Industeel Rebuttal Brief at 2, footnote 5.

[111] *See*, Industeel Sales Verification Report, at 11-15, and Sales Verification Exhibits 10-25, 35, and 39, showing that, under the considerable time constraints at verification, Industeel was able to provide and match factory shipment documentation, including the "avis d'expédition," for 18 U.S. invoices, covering numerous U.S. sale transactions, plus eight home market sale invoices, also covering multiple sale transactions. Further, the Department observed, as part of the sale traces, that in order to calculate inland freight to the port, Industeel must have been aware of each individual plate's shipment date, in order to accurately calculate freight, because Industeel's plates were sent to the port to in multiple batches, but were accumulated onto a single invoice (*i.e.*, Industeel October 6, 2016 SQR, states "it is frequently the case that the full quantity to be shipped will be transferred in smaller lots, on different days").

Because Industeel failed to report its factory shipment dates on request, the Department does not have complete sales information on the record of this investigation. At verification, in addition to reviewing eight complete traces of Industeel's U.S. sales, the Department conducted additional completeness tests to examine the number of sales shipped on the margins of the POI. To check if merchandise had departed the factory prior to the beginning of the POI, though was invoiced during the POI, we obtained invoices and "factory out" bills (*i.e.*, the "Avis d'expédition") for all reported U.S. sales with bills of lading dates in the first month of the POI; we noted that certain shipments left the factory prior to the first day of the POI (*i.e.*, on March 17, 2015, during the month prior to the POI).[112] Additionally, to check if merchandise had departed the factory prior to the end of the POI and was not included because it was invoiced after the POI, we obtained a list of all sales made in April 2016 (*i.e.*, the month following the POI), and viewed the invoices, "factory out" bills, and bills of lading for sales of subject merchandise to the United States. We noted that, for some invoices, the merchandise departed the factory for the port prior to the end of the POI, but was not reported in Industeel's U.S. sales database, because it was not invoiced until after the POI.[113]

Based upon an extensive review of Industeel's five preselected sales traces and three surprise sales traces, plus a review of the sales at the margin of the POI for which the Department viewed invoices, "factory out" bills, and bills of lading, we determine that there was, in fact, a significant amount of time elapsed between factory shipment and issuance of the bill of lading, and thus Industeel's refusal to report factory shipment date, and all factory shipments during the POI, deprived the Department of information needed in this investigation. Industeel's refusal to provide shipment dates, when requested, precluded the Department from determining, prior to verification, that there was indeed a significant difference between factory shipment date and bill of lading date. Additionally, Industeel's refusal to provide factory shipment dates for its sales, including for all sales with shipment dates during the POI, deprived the Department of the relevant sales universe to use in this investigation.

In this case, we find that the application of facts available is appropriate under section 776(a)(2) of the Act.[114] As discussed above, the antidumping duty questionnaires issued in this review required that Industeel report: 1) factory shipment date; and 2) all sales made during the POI (pursuant to those shipments). We afforded Industeel multiple opportunities to provide this information, in accordance with section 782(d) of the Act, given that the Department issued a supplemental questionnaire explicitly requesting that Industeel report all shipments during the POI and shipment date from the factory.[115] Nonetheless, rather than report the requested information, Industeel simply maintained that invoice date was the relevant date. As a result, Industeel withheld necessary information and failed to report information by the deadline and in the manner in which it was requested, within the meaning of sections 776(a)(2)(A) and (B) of the Act, and significantly impeded proceeding, under section 776(a)(2)(C) of the Act by inhibiting the Department from timely assessing the correct universe of sales. Because Industeel possessed the necessary records to provide a complete U.S. sales database but refused to provide them, we

[112] *See* Industeel Sales Verification Report at 11 and Sales Verification Exhibit 35.

[113] *Id.*, at 12 and Sales Verification Exhibit 39.

[114] *See* 782(i) of the Act.

[115] *See* Industeel October 6, 2016 SQR, at 21-26.

also find that Industeel did not act to the best of its ability to comply with our requests for information, within the meaning of 776(b) of the Act.

We have, therefore, determined to apply partial AFA to Industeel for its refusal to report factory shipment date and, by extension, its complete universe of sales. In an investigation, the date of sale determines the universe of reportable sales, and it also determines the appropriate exchange rate used in all currency conversions. Therefore, as partial AFA, for all sales where we do not have verified shipment dates from the factory, we have set the shipment and sale dates to be 42 days prior to the reported bill of lading date, based on the Antwerp port regulations allowing 42 days free storage on the quay.[116] This effectively removes all sales during the first 42 days of the POI (where factory shipment date is unknown), and it results in more accurate currency conversions. Because we have revised the shipment dates, we re-calculated credit expenses, as well.

Finally, as partial AFA, we included unreported sales (both potential and actual) in our analysis using information obtained at verification. By Industeel's own admission, subject merchandise can wait at the port for up to 42 days before exportation.[117] Therefore, we presume that Industeel failed to report all sales made up to 42 days prior to the POI. In order to determine the quantity of such sales, we: 1) identified the quantity of unreported sales (representing 30 days of data) determined at verification; then 2) using these data, extrapolated the quantity for an additional 12 days (*i.e.*, for a total of 42 days); and 3) summed the two figures. After deriving the missing quantity, we based the margin for it on the petition rate of 51.78 percent. For further discussion, *see* the "Use of Adverse Facts Available" section, above.[118]

Comment 5: Industeel's Correction Presented During the Cost Verification

Industeel's Arguments

- During the cost verification, Industeel revised certain control numbers sold in the home and U.S. markets to correct its reporting of one particular heat treatment code.[119] Industeel asserts that the Department verified the accuracy of this change, and it labeled the revised data as a "minor correction" in its verification report. Therefore, Industeel argues that the Department must ensure that this correction is properly implemented in final determination.[120]

[116] *See* Industeel Sales Verification Report, at 6 and Sales Verification Exhibit 4.

[117] *See* Industeel October 6, 2016 SQR, at 22 ("Industeel is able to store plates at the port without charge for up to 40 days"). At verification, Industeel amended this to 42 days. *See* Industeel Sales Verification Report, at 6 ("port regulations grant Industeel 42 days free storage on the port") and Sales Verification Exhibit 4.

[118] *See* Industeel Final Calculation Memorandum.

[119] *See* Industeel Cost Verification Report, at 3-4 and 13.

[120] *See* Industeel Case Brief, at 12 (citing *Husteel Co. v. United States*, 98 F. Supp. 3d 1315, 1351-53 (CIT, September 2, 2015); *Ad Hoc Shrimp Trade Action Comm. V. United States*, 33 CIT 1906, 1925 (December 29, 2009); and *Cerro Flow Prods., LLC v. United States*, 2014 CIT 83 at 24-25 (July 18, 2014)).

The Petitioner's Arguments

- The petitioner did not provide a response to this argument.

Department's Position:

The correction in question affects a negligible volume of Industeel's sales data, representing significantly less than one quarter of one percent of the U.S. sales volume during the POI.[121] Because this error was minor, we accepted Industeel's correction at verification, and we have used this information in our calculations for the final determination.

Comment 6: Affiliated Party Transactions

Alloys Purchased from AMS

Industeel's Arguments

- Industeel argues that the Department should not adjust the cost of two particular inputs,[122] as was done at the preliminary determination. Industeel explains that ArcelorMittal Sourcing (AMS) purchased the inputs from unaffiliated suppliers that shipped directly to Industeel. AMS does not manufacture the inputs but instead acts as a purchasing agent. The sole purpose of the company is to ensure that all the ArcelorMittal companies receive the best prices for their inputs by combining the purchasing power of ArcelorMittal group companies.

- Industeel argues that the prices from the unaffiliated suppliers to AMS are themselves market prices, because the affiliated supplier charged Industeel the price charged by their unaffiliated supplier, plus a markup; and the markup exceeded the affiliated supplier's selling, general and administrative (SG&A) expense rate, resulting in a profit for AMS.

- Industeel contends that the Department should compare the monthly prices from its affiliated and unaffiliated suppliers, rather than comparing the POI annual average purchase prices of the input. Industeel asserts that the purchase price of the inputs from the affiliated supplier is higher than the purchase price from unaffiliated suppliers, when analyzed on a monthly basis.[123] Thus, Industeel argues that the Department should not adjust the cost of all other inputs received from AMS for which there is no market price, other than the market price AMS paid.

[121] *See* Industeel Sales Verification Report, at 2. Additionally, we note that, although the CONNUM change affected a larger percent of Industeel's home market sales, by volume, than it did of Industeel's U.S. sales, the only matches affected were for the home market sales matching to the very small quantity of U.S. sales that Industeel made of these products during the POI.

[122] *See* Industeel Cost Calculation Memorandum.

[123] Industeel cites to Industeel Cost Verification Report, and Cost Verification Exhibit 14 at page IB-C-2814.

The Petitioner's Arguments

- The petitioner argues that the Department should continue to adjust the cost of the two inputs received from AMS as it did in the preliminary determination and the Department should extend this adjustment to all other alloys obtained from AMS.

- The petitioner asserts that the transactions disregarded rule compares the actual prices that the responding company paid to its affiliated and unaffiliated suppliers, not whether the affiliate's markup on its sales exceed its SG&A ratio. Further, the petitioner argues that the transactions disregarded rule should be considered on the same basis as the cost of production to which it is applied, (*i.e.,* based on the POI); a two-month comparison is not an adequate basis on which to make an inference regarding the whole POI.

Electricity Purchased from AME

Industeel's Arguments

- Industeel argues that the Department should not adjust the cost of electricity obtained from its affiliated supplier ArcelorMittal Energy (AME). Industeel explains that AME purchases electricity produced by unaffiliated companies, and sells it to ArcelorMittal companies with a mark-up; the prices charged by AME to Industeel were above AME's purchase price, plus G&A expenses incurred.

- Industeel asserts that merely because the it paid more for the electricity directly obtained from its unaffiliated supplier does not mean that AME's prices to Industeel were below market.

The Petitioner's Arguments

- The petitioner argues that the Department should adjust the cost of electricity obtained from its affiliated supplier AME to reflect the market price of electricity Industeel paid directly to its unaffiliated electricity supplier.

- Further, the petitioner asserts that a company can redirect its electricity supply internally any way it wants to; how the electricity is purchased from the unaffiliated supplier or how it was used is irrelevant and should not affect the Department's analysis under the major input rule.[124]

Natural Gas Purchased from AME

Industeel's Arguments

- Industeel argues that the Department should not adjust the cost of natural gas obtained from its affiliated supplier AME.

[124] For the transfer price, the petitioner cites Industeel's Cost Verification Exhibit 12, page 1; and Industeel's October 14, 2016 Second Supplemental Section D Questionnaire Response (Industeel October 14, 2016 Cost SQR), at Exhibit D-40.

- Industeel further asserts that the petitioner's argument that AME's cost of natural gas is greater than the transfer price is incorrect. Specifically, Industeel avows that the purchase price of natural gas cited to by the petitioner reflects the purchase price of natural gas during only one month, April 2015, and is not representative of the POI average purchase price.

The Petitioner's Arguments

- The petitioner argues that the Department should adjust Industeel's CTL plate COP to account for the difference in the transfer price (*i.e.*, the price Industeel paid for the gas obtained from AME) and AME's COP, consistent with the major input rule.

- In calculating the COP for natural gas, the petitioner contends that the Department should include all costs incurred by AME (*i.e.*, the price AME paid to unaffiliated suppliers[125] for the natural gas plus its other operating costs, SG&A expenses, and interest expense).

Department's Position:

First, we note that none of the inputs discussed above are major inputs (*i.e.*, neither electricity, natural gas, alloys, nor scrap). Either the inputs themselves represent a minor percentage of the total cost of manufacturing (COM) or the percentage of the input obtained from an affiliated trader represents a minor amount, such that the percentage of COM the item represents times the percentage obtained from an affiliated party equals a minor percentage of COM.[126] In such circumstances we do not consider the item a major input.[127] Furthermore, the inputs were obtained from affiliated trading companies, not producers of the input. As such, it is section 773(f)(2) of the Act (the transaction disregarded rule) that applies to these transactions.

For the purposes of the transactions disregarded rule, when the respondent purchases inputs from an affiliated supplier, we test the transfer price between the affiliated supplier and the respondent with the available market prices for the input. Available market prices may relate to a respondent's purchases of the same input directly from unaffiliated suppliers, or an affiliated reseller's average acquisition price plus the affiliated reseller's general expenses.[128] In this case for electricity, scrap and certain alloys, we have two available sources for a market price. We have the price Industeel's affiliated supplier paid to its unaffiliated suppliers for the inputs, plus the affiliated supplier's general expenses. We also have the prices paid by Industeel directly to unaffiliated suppliers. For gas and other alloys, we have the price Industeel's affiliated supplier paid to unaffiliated suppliers for the inputs, plus the affiliated supplier's general expenses. Since both market price options are reasonable representative market prices, for the final determination

[125] For the price AME paid for natural gas, the petitioner cites to Industeel October 14, 2016, Cost SQR and Industeel Cost Verification Exhibit 12, p. 31.

[126] *See* Industeel Cost Calculation Memorandum.

[127] *See Notice of Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances: Grain-Oriented Electrical Steel from the Czech Republic*, 79 FR 58324 (September 29, 2014) and accompanying Issues and Decision Memorandum, at Comment 7.

[128] *See Notice of Final Determination of Sales at Less Than Fair Value: Polyethylene Retail Carrier Bags from Thailand*, 69 FR 34122 (June 18, 2004) and accompanying Issues and Decision Memorandum, at Comment 5.

when we have both market prices available, we calculated a weighted average market price to use in the transaction disregarded analysis, otherwise we have used just the one market price.[129]

As the Department has explained in cases where the affiliated supplier is a trading company that functions as a middleman between the respondent and the unaffiliated supplier, the trading company's cost of providing services (*e.g.*, purchasing the input, taking title to the input, and arranging for the item's sale and transportation to the respondent) should be included in the determination of the market price when performing the transactions disregarded rule analysis. [130]

We found that, for natural gas and other alloys, the transfer price was greater than the market price (*i.e.*, the affiliated supplier's purchase price plus their general expenses). Therefore, we did not make an adjustment.[131] For scrap, we found that the weighted-average market price was higher than the transfer price. Therefore, we have made an adjustment to Industeel's CTL plate COM.[132] For electricity and two alloys, we found that the respective transfer prices were at the market prices.[133]

For the two alloys at issue, we agree with the petitioner that it is the Department's practice to compare the POI average transfer price with the POI average market price, rather than making monthly comparisons. The use of a POI annual average transfer price and market price is consistent with how the POI annual average COP is calculated for the merchandise under consideration.[134]

For gas, Industeel is correct, that the purchase price of natural gas cited to by the petitioner reflects the purchase price of natural gas during only one month, April 2015, and not the annual average acquisition price during POI. A comparison of the POI average purchase price of the affiliated reseller, plus its SG&A expense, with the transfer price shows that the transfer price is higher and therefore, no adjustment is required.[135]

Finally, regarding the other alloys purchased from AMS, we disagree with the petitioner's assertion that we do not have a market price for these alloys. We therefore disagree with the petitioner that the Department should adjust the transfer price of these inputs using the average difference between the transfer prices and the market prices of the other two alloys. Record evidence shows that the transfer price exceeded the market price. Accordingly, no adjustment is warranted.

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[129] *See* Industeel Cost Calculation Memorandum.

[130] *See Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut-To-Length Carbon-Quality Steel Plate Products from Korea*, 64 FR 73196, 73208 (December 29, 1999).

[131] *See* Industeel Cost Calculation Memorandum.

[132] *Id.*

[133] *Id*

[134] *See e.g.*, *Final Results of Antidumping Duty Administrative Review Certain Cut-to-Length Carbon-Quality Steel Plate Products from the Republic of Korea*; 79 FR 54264 (September 11, 2014) accompanying Issues and Decision Memorandum, at Comment 6.

[135] *See* Industeel Cost Calculation Memorandum, at Attachment 2.

Comment 7: Including Interest Expense in the Minor Input Calculation

The Petitioner's Arguments

- The petitioner argues that the Department should include the full COP of inputs obtained from affiliated parties including interest expense, regardless of whether the affiliated party is part of the consolidated group (*i.e.*, included in the consolidated financial statements of ArcelorMittal).

- The petitioner further asserts that, excluding interest expense from the affiliates' COP contradicts the Department's long standing policy expressed in its standard Section D questionnaire, which specifies that the affiliated supplier's COP should include a portion of that affiliate's SG&A and interest expenses.

- The petitioner contends that excluding interest expense is contrary to the intent and purpose of the transactions disregarded and major input rule provisions of the Act. To be comparable, the affiliate's COP should be on the same basis as the other prices.

Industeel's Arguments

- Industeel argues that, while the Department's practice is to include interest expense when an affiliated supplier is not consolidated with the respondent company for financial reporting purposes, it does not do so when the affiliated supplier is consolidated with the respondent; and the affiliated suppliers of major inputs to Industeel are all consolidated subsidiaries of ArcelorMittal S.A. Moreover, Industeel asserts that the Department does not include interest expenses in calculating cost of production to avoid double-counting where the affiliated supplier in question is consolidated with the respondent.

- Industeel argues that section 773(f) of the Act does not specifically indicate that interest must be included in the calculation of cost of production, nor do the Department's regulations provide a definition of cost of production applicable to the major inputs rule. Thus, consistent with its practice and to avoid double-counting interest expense, Industeel maintains that the Department should not include an amount for ArcelorMittal S.A.'s interest expense when calculating a cost of production of the affiliated suppliers.

Department's Position:

We agree with the petitioner that the cost of production for inputs purchased from affiliated suppliers generally should include the affiliated suppliers' financial expenses. As Industeel notes, in instances where the supplier is not consolidated with the respondent, the Department does include the supplier's financial expense in the cost of production. However, we note that when a supplier is consolidated with the respondent and the same set of consolidated financial statements is used to calculate both the supplier's COP and the respondent's COP, the inclusion of financial expenses in the supplier's COP will result in double-counting when the adjusted item is included in the COP of the merchandise under consideration and financial expenses of the consolidated entity are applied. Thus, in such instances, to avoid double-counting when making an adjustment to the supplier's COP, the supplier's financial expenses must be excluded in this

case.[136] Accordingly, for the final determination, we continue to exclude financial expenses from the COP of Industeel's affiliated suppliers, whenever that supplier is a part of the same consolidated entity.

NLMK Belgium

Comment 8: Date of Sale for NLMK Belgium's U.S. Direct Shipments

NLMK Belgium's Arguments

- During the POI, NLMK Belgium produced certain merchandise sold by its U.S. affiliate, NLMK North America Plate LLC (NAP), in response to orders placed by NAP's customers. NLMK Belgium shipped this merchandise either to the U.S. port of entry (where the U.S. customer picked it up) or to a specific location identified by the unaffiliated customer.[137] NLMK Belgium reported NAP's invoice date – issued after the goods were in the United States – as the date of sale and shipment for these transactions.[138]

- NLMK Belgium notes that the Department, in its verification report, questioned whether the shipment date from Belgium would be a more appropriate date of sale for these made-to-order (MTO) transactions. NLMK Belgium argues that this question misapprehends the relevant facts and disregards NLMK Belgium's and NAP's information kept in the ordinary course of business, which shows that the sale to the first unaffiliated U.S. customer occurs after importation.

- Specifically, NLMK Belgium maintains that NAP's invoice date is the appropriate date of sale, given that: 1) NLMK Belgium ships and sells the plate to NAP, and NLMK Belgium's invoices merely contain transfer prices; 2) NLMK Belgium's delivery documents show NAP as the consignee, and NAP (not NLMK Belgium) releases the merchandise to the customer; 3) NAP exclusively deals with U.S. customers to establish material terms of sale; 4) NLMK Belgium and NAP maintain two separate sales and accounting systems, and, as a result, NLMK Belgium's shipment information and NAP's sales information are not electronically linked; and 5) under the Act, the Department ignores U.S. sales between affiliates, and using NLMK Belgium's shipment date to NAP would be tantamount to determining that NLMK Belgium's sale to NAP is the relevant sale for dumping purposes.

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[136] *See Sugar from Mexico: Final Determination of Sales at Less Than Fair Value*, 80 FR 57341 (September 23, 2015) and accompanying Issues and Decision Memorandum, at Comment 9; and *Certain Cold-Rolled Steel Flat Products from the Russian Federation: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances, in Part,* 81 FR 49950 (July 29, 2016) and accompanying Issues and Decision Memorandum, at Comment 9.

[137] *See* NLMK Belgium's June 27, 2016 Section A Questionnaire Response, at 20 (NLMK Belgium June 27, 2016 AQR), and NLMK Belgium's September 9, 2016 Supplemental Sections A, C, and partial B Questionnaire Response (NLMK Belgium September 9, 2016 SQR), at 12. *See also* Memorandum, "Verification of the Sales Response of NLMK North America Plate LLC in the Antidumping Duty Investigation of Certain Carbon and Alloy Steel Cut-To-Length Plate from Belgium," dated January 30, 2017 (NAP Verification Report), at 2.

[138] *See* NLMK Belgium's July 15, 2016 Section C Questionnaire Response (NLMK Belgium July 15, 2016 CQR), at 17-18, and NAP Verification Report, at 9.

- NLMK Belgium questions the Department's statement that it has a long-standing practice of finding that, where the shipment date precedes the invoice date, the shipment date better reflects the date on which the material terms of sale are established.[139] NLMK Belgium argues that this "alleged" practice is incorrect – both in general and as applied here -- because it: 1) assumes that the material terms of sale are set at shipment; and 2) confuses the date of sale with the determination of credit cost.

- Regarding the first point (related to the setting of sales terms), NLMK Belgium maintains that the final price to the customer is not established until NAP issues its invoice.[140] NLMK Belgium notes that this final price reflects any changes in quantity, product dimensions, and other circumstances of sale made after the order date.[141] Further, NLMK Belgium notes that NAP's purchase orders explicitly indicate that prices may change under certain conditions (such as the timing of deliveries), and the customer can, and sometimes does, reject merchandise after shipment.[142] Finally, NLMK Belgium notes that a single order may arrive in multiple shipments.

- Regarding the latter point (related to credit), NLMK Belgium asserts that the Department begins the credit period with the earlier of shipment or invoice date so that an exporter cannot use the intervening time to grant more favorable credit terms. NLMK Belgium contends that this concern is misplaced here, given that the Department is already deducting imputed expenses (in the form of credit and inventory carrying costs) for the entire period.

- NLMK Belgium rejects the petitioner's claim that the Department should presume a lag of two months between the time the merchandise shipped from Belgium and the time NAP issued its invoice. Instead, NLMK Belgium argues that even though a single NAP invoice, when "linked" to one issued by NLMK Clabecq, was issued slightly over two months later, the Department cannot use this outlier as the sole justification for evaluating NLMK

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[139] *See* NLMK Belgium's Case Brief, "Case Brief of NLMK Clabecq: Certain Carbon and Alloy Steel Cut-to Length Plate from Belgium," dated February 7, 2017 (NLMK Belgium Case Brief), at 2-3 (citing Preliminary Decision Memorandum, at 9).

[140] NLMK Belgium notes that price is indisputably a term of sale. *See* NLMK Belgium Case Brief, at 5-6 (citing *Polyethylene Terephthalate Film, Sheet, and Strip from India: Preliminary Results of Antidumping Duty Administrative Review*, 78 FR 48143 (August 7, 2013), and accompanying Preliminary Decision Memorandum, at 3-4; *Certain Stilbenic Optical Brightening Agents from Taiwan: Final Determination of Sales at Less Than Fair Value*, 77 FR 17027 (March 23, 2012), and accompanying Issues and Decision Memorandum, at 5-6) (*Stilbenic OBAs from Taiwan*).

[141] *See* NLMK Belgium Case Brief, at 6 (citing Memorandum, "Verification of the Sales Response of NLMK Belgium in the Antidumping Duty Investigation of Certain Carbon and Alloy Steel Cut-To-Length Plate from Belgium," dated January 30, 2017 (NLMK Belgium Sales Verification Report), at 9 and NLMK Belgium's August 31, 2016 Supplemental Section A Questionnaire Response, at Exhibit SA-7, showing different dimensions of plate on NAP's purchase order to NLMK Clabecq which affected the weight delivered to the customer, and the weight and final price invoiced to the customer, respectively).

[142] NLMK Belgium notes that the Department observed at verification that the customer "rarely" rejects merchandise that differs in dimension or otherwise from the product ordered, implicitly acknowledging that rejections can occur. *See* NLMK Belgium's Rebuttal Brief, "Rebuttal Brief of NLMK Clabecq and NLMK North America Plate Inc.: Certain Carbon and Alloy Steel Cut-to Length Plate from Belgium," dated February 13, 2017 (NLMK Belgium Rebuttal Brief), at 10 (citing NAP Verification Report, at 9).

Belgium's universe of sales. Ultimately, any invoices issued by NAP after the POI were not subject to the investigation and were appropriately not included in the U.S. sales listing.

- Finally, NLMK Belgium contends that, under 19 CFR 351.401(i), the Department has a rebuttable presumption that invoice date is the appropriate date of sale, and the Department may only deviate from this presumption when the material terms of sale are "firmly established" on a different date. Its above arguments notwithstanding, NLMK Belgium acknowledges that the Department has used the earlier of the shipment or invoicing dates as date of sale in other proceedings[143]; however, it claims that the facts here are distinguishable. Specifically, NLMK Belgium states that, in *Thai Shrimp*, the producer shipped all sales directly from Thailand (not just some, like here), and the Department found that any changes after shipment were beyond the control of both the respondent and the customer; in *Copper Pipe from Mexico*, a supply agreement with the customer set the price at the time of shipment. In contrast, NLMK Belgium contends that it only shipped certain MTO products to the customer, and it does not establish the price until NAP determines that the merchandise has arrived in the United States.

The Petitioner's Arguments

- The petitioner argues that the Department should use the shipment date from NLMK Belgium's factory as the date of sale for U.S. MTO sales. According to the petitioner, the Department is not bound to rely on invoice date as date of sale if the record supports an alternate date (*i.e.*, shipment date).[144] The petitioner points to the Department's practice that it will use shipment date as the date of sale if it precedes invoice date, based on the assumption that the material terms of sale have been established once a party ships its products to a customer.[145, 146] However, the petitioner asserts that NLMK Belgium provided no actual sales documentation showing that the material terms of sale changed after shipment. Rather, the petitioner argues that, at best, NLMK Belgium only provided documentation showing that the material terms of sale changed preceding the shipment date

[143] *See* NLMK Belgium Rebuttal Brief, at 9-10 (citing *Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Frozen and Canned Warmwater Shrimp from Thailand*, 69 FR 76918 (December 23, 2004) (*Thai Shrimp*), and accompanying Issues and Decision Memorandum, at Comment 10; and *Seamless Refined Copper Pepe and Tube from Mexico: Final Results of Antidumping Administrative Review*, 80 FR 33482 (June 12, 2015) (*Copper Pipe from Mexico*), and accompanying Issues and Decision Memorandum, at Comment 1).

[144] *See* Petitioner's Case Brief, at 13-14; and Petitioner's Rebuttal Brief, at 2-3, where the petitioner points to the *Preamble*, 62 FR at 27349. Further, the petitioner notes that the Antidumping Questionnaire, at I-5, similarly states that the Department will use a date other than the date of sale if the alternative date "better reflects the date on which the exporter or producer establishes the material terms of sale."

[145] The petitioner notes that the CIT has upheld this approach. *See Mittal Steel*, 31 CIT at 647.

[146] According to the petitioner, because the Department found at verification that the lag time between shipment from Belgium and invoicing by NAP could be more than 60 days, NLMK Belgium significantly misreported the universe of its U.S. sales.

(which are irrelevant to this analysis), and the Department noted as much when reviewing similar documents during verification.[147]

- The petitioner notes that NLMK Belgium offered additional arguments at verification (*e.g.,* it may over- or under- produce the quantity ordered, ship products with different dimensions than ordered, or change the terms of sale prior to shipping the merchandise from the port); however, the petitioner contends that NLMK Belgium failed to substantiate these claims, noting that the changes NLMK Belgium identified relate to changes which may occur between the purchase order and shipment rather than between shipment and invoicing.[148] Furthermore, the petitioner argues that neither NLMK Clabecq nor its U.S. affiliate NAP provided examples of price, quantity, or dimension changes after the date of shipment. In any event, the petitioner contends that, because NAP may not issue an invoice until after the merchandise is in the customer's possession, the material terms of sale are surely fixed and, thus, there is no basis to conclude that, for direct sales, NAP's invoice date is the appropriate date of sale.

- The petitioner disagrees that, for NLMK Belgium's MTO sales, NLMK Belgium makes a separate sales transaction to NAP, in addition to the sale invoiced to the final customer. Rather, the petitioner maintains that, "while NLMK Belgium invoiced NAP for the goods, these products were never destined for NAP's inventory," and subsequently asserts that NLMK Clabecq did not make these sales to NAP.[149]

- The petitioner dismisses NLMK Belgium's contention that the dates recorded in the producer's books and records determine the date of sale. According to the petitioner, NLMK Belgium offered no legal support for this conclusory statement, and, if it were remotely true, date of sale would never be an issue (*i.e.*, two competing dates could not exist if the producer's records contained only one date). The petitioner asserts that, instead, the date of sale occurs when the material terms of sale are set, not simply when the producer records the sale in its books.

- Finally, the petitioner disagrees that the Department confused this issue with the calculation of credit. To the contrary, the petitioner argues that it is NLMK Belgium itself that is confused, given that invoice date is not used in that calculation.

[147] *See* Petitioner's Rebuttal Brief, at 6-7. The petitioner notes that, while NLMK Belgium may have made a "blanket statement" pointing to whole exhibits on the record as "evidence" of material terms of sale changing, it provided no citations to any invoices or other sales documentation. *Id*., at 7.

[148] *See* Petitioner's Case Brief, at 15 (citing NAP Verification Report, at 8).

[149] *See* Petitioner's Rebuttal Brief, at 6 (citing NLMK Belgium Sales Verification Report, at 11).

Department's Position:

We disagree with NLMK Belgium that NAP's invoice date is the most appropriate date to use as the date of shipment for NLMK Belgium's U.S. MTO sales.[150] Rather, as explained more fully below, we find that the shipment date from the factory is the proper shipment date, and, because this date precedes invoice date, it is also the proper date of sale. We agree with the petitioner that, although the Department normally uses the date of invoice, as recorded in the producer's or exporter's records kept in the ordinary course of business, as the date of sale, the Department's regulations at 19 CFR 351.401(i) provide that the Department may use a date other than the date of invoice if the Secretary is satisfied that a different date better reflects the date on which the exporter or producer establishes the material terms of sale (*e.g.*, price and quantity).[151]

Contrary to NLMK Belgium's assertions, the Department has a long-standing practice of finding that, where shipment date precedes invoice date, the shipment date better reflects the date on which the material terms of sale are established.[152] This practice is set forth in Appendix I of the initial questionnaire, which defines the date of sale as follows:

> Because the Department attempts to compare sales made at the same time, establishing the date of sale is an important part of the dumping analysis. The Department will normally use the date of invoice, as recorded in the exporter or producer's records kept in the ordinary course of business. However, the

[150] Although the Department used NAP's invoice date as the date of shipment/sale for the *Preliminary Determination*, we now find that NAP's invoice date is not the earliest reliable date upon which terms of sale are fixed, as explained more fully below.

[151] *See* 19 CFR 351.401(i); *see also Allied*, 132 F. Supp. 2d at 1090-92; and *Yieh Phui*, 791 F. Supp. 2d 1319 (affirming that the Department "has some flexibility in selecting the date of sale; the presumption in favor of invoice date is not conclusive"). *See also Preamble*, 62 FR at 27349 ("If the Department is presented with satisfactory evidence that the material terms of sale are finally established on a date other than the date of invoice, the Department will use that alternative date as the date of sale. For example, in situations involving large custom-made merchandise in which the parties engage in formal negotiation and contracting procedures, the Department usually will use a date other than the date of invoice. However, the Department emphasizes that in these situations, the terms of sale must be firmly established and not merely proposed."). *See also Mittal Steel*, 31 CIT 638 ("using the date of shipment when that date is before the invoice date is a practice the Department has adhered to in other investigations, and which has been implicitly approved by the courts. . . Commerce's reasoning therefore seems to be that shipment to the customer does not occur before the material terms of sale have been determined, so that when invoicing is subsequent to shipment, the date of shipment is generally an appropriate date of sale, although depending on the facts of specific review, Commerce may find another date more appropriate.")

[152] *See, e.g., Thai Shrimp,* and accompanying Issues and Decision Memorandum, at Comment 10; *Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Certain Cold-Rolled Carbon Steel Flat Products from Brazil*, 67 FR 31200, 31202 (May 9, 2002) (unchanged in *Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products from Brazil*, 67 FR 62134 (October 3, 2002); *Notice of Final Determination of Sales at Less Than Fair Value: Structural Steel Beams from Luxembourg*, 67 FR 35488 (May 20, 2002), and accompanying Issues and Decision Memorandum, at Comment 4; *Notice of Final Determination of Sales at Less Than Fair Value: Certain Durum Wheat and Hard Red Spring Wheat from Canada*, 68 FR 52741 (September 5, 2003), and accompanying Issues and Decision Memorandum, at Comment 3; *Notice 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), and accompanying Issues and Decision Memorandum, at Comment 12; *Steel Bar from Japan*, at Comment 1; and *Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip in Coils from Italy*, 64 FR 30750, 30765 (June 8, 1999).

> Department may use a date other than the date of invoice (*e.g.*, the date of contract in the case of a long-term contract) if satisfied that a different date better reflects the date on which the exporter or producer establishes the material terms of sale (*e.g.*, price, quantity). (Section 351.401(i) of the regulations.) If, for any specific sale, the date selected is after the shipment date for that sale, the Department will use shipment date as the date of sale instead, but only for the sale in question.[153]

We disagree with NLMK Belgium that this practice is limited to formalized situations (such as the supply agreements in *Copper Pipe from Mexico*) or requires that all shipments be made under the same shipping pattern (such as in *Thai Shrimp*). As noted above, the Department's questionnaire instructs respondents to "use shipment date as the date of sale {where shipment date precedes invoice date}, but only for the sale in question."[154]

In its original questionnaire response, NLMK Belgium reported both date of sale and date of shipment for all U.S. sales using NAP's invoice date.[155] However, NLMK Belgium described its sales process for U.S. MTO sales as follows: "NLMK {Belgium} delivers the subject merchandise that is destined for the U.S. market directly to end U.S. customers. NLMK {Belgium} invoices NAP and NAP invoices the U.S. customer in a "back-to-back" transaction."[156] Based on this description, we instructed NLMK Belgium to revise its U.S. sales listing to report all sales that NLMK Belgium shipped directly to U.S. customers during the POI, but for which NAP did not issue the invoice until afterwards.[157]

Instead of complying, NLMK Belgium included a few additional sales[158]; specifically, NLMK Belgium stated: [159]

> NLMK Clabecq did have shipments which shipped to NAP during the POI. We have updated the U.S. database to reflect these sales. We have included custom

[153] *See* Antidumping Questionnaire, at Appendix I.

[154] *Id*.

[155] *See* NLMK Belgium July 15, 2016 CQR, at 18-19.

[156] *See* NLMK Belgium June 27, 2016 AQR.

[157] *See* NLMK Belgium September 9, 2016 SQR, at 9-10. We note that our instruction to NLMK Belgium inadvertently referenced sales in the home market; however, this error was of no moment, because NLMK Belgium correctly responded to the question with respect to its U.S. sales.

[158] At verification, we examined the data reported in this field as part of our discussion of NLMK Belgium's date of sale methodology. *See* NAP Verification Report, at 10-11. We noted that NLMK Belgium had included only 14 NAP invoices of products which had been shipped from the factory in Belgium during the POI, but for which the NAP invoice had been issued afterwards, and it had not indicated at all whether the remaining sales had shipments outside the POI. When asked, however, NLMK Belgium was only able to show that one of these invoices shipped during the POI and was invoiced afterwards; NLMK Belgium was unable to explain why the other thirteen invoices had been included in this field. Further, as noted below, we found additional sales at verification that NLMK Belgium shipped from Belgium during the POI but which were not reported. Again, when asked about the methodology for identifying sales in this field and why NLMK Belgium had not included all applicable sales, NLMK Belgium was unable to explain how the field was created or why some sales were not reported. *Id*., at 10-11.

[159] *See* NLMK Belgium September 9, 2016 SQR, at 9.

> field INV_OUT_POIU to denote which sales have been added to the U.S. sales listing. When INV_OUT_POIU contains "OUT" the shipment occurred inside the POI, but was invoiced outside the POI.
>
> We note here, as in the {Supplemental Section A Response}, that these sales should only be used as a reconciling item…NLMK Clabecq CEP sales reflect only the price and quantity shipped to affiliated CEP reseller NAP. They do not reflect the price and quantity to any final customer, which may have changed since the time NAP ordered the material…So, although the product shipped in the period, the first verifiable document associated with the sale, the document which records the final price and quantity to the first unaffiliated customer, is the NAP invoice to its customer. . .
>
> Further, it may be the case that some product shipped during the POI but has not yet been invoiced. In this case we have no meaningful way to determine the following:
>
> - The actual pay date of the material from the unaffiliated customer to NAP if the sales transaction has not yet occurred.
>
> - The final price of the material to the unaffiliated customer form NAP, because as demonstrated, the original purchase order from the customer to NAP is not a reliable data source.[160]

Further, NLMK Belgium continued to report the shipment date as invoice date (*i.e.*, the date of NAP's invoice to the customer).

In the *Preliminary Determination*, we preliminarily accepted NLMK Belgium's reported U.S. shipment and sale dates. Thereafter, we discussed NLMK Belgium's U.S. date of sale methodology with company officials at verification. However, these discussions raised serious questions as to whether NLMK Belgium's chosen methodology was appropriate. Specifically, our verification report states:[161]

> With respect to CEP MTO sales, we discussed with company officials the date of sale reported for NLMK Belgium's direct shipments of CTL plate from Belgium to U.S. customers, as described on page 12 of the September 9, 2016, supplemental response. According to company officials, NLMK Clabecq-produced these products in response to particular orders from the customer; NAP provided to NLMK Clabecq the relevant information necessary to produce the merchandise (such as customer-specific production requirements). Company officials stated, when the order was ready for shipment, NLMK Clabecq generally shipped the goods either to various ports in the United States…or to the customer's address (for Q&T products)…NLMK Belgium reported NAP's invoice date, instead of {NLMK Clabecq's}own shipment date, as the date of sale

[160] *See* NLMK Belgium's August 31, 2016 Supplemental Section A Questionnaire Response (NLMK Belgium August 31, 2016 SQR), at 9-10.

[161] *See* NLMK Belgium Sales Verification Report, at 11.

> for these transactions. According to company officials, NLMK Belgium used this methodology because NAP made the sale to the first unaffiliated customer, rather than NLMK Clabecq. We noted that, while NLMK Clabecq invoiced NAP for the goods, these products were not destined for NAP's inventory. Therefore, it may be appropriate to consider the date of shipment from the factory for these sales as the date of sale.

We also discussed the U.S. date of sale methodology with NAP during the CEP verification. Our report states:[162]

> Company officials also stated that NAP reported its own invoice date as the shipment date because NAP is not always aware of when the customer picks up the merchandise from the port. Company officials further stated this methodology does not account for the fact that merchandise may be shipped from the port to the customer in multiple shipments; rather, NAP issues a single invoice to the customer when it is notified that the customer has received, in full, the merchandise it ordered. We noted that this statement conflicts with NAP's statement that it invoices its customer at the time of shipment (see NLMK Belgium's section C response, at 19).

Given the above facts, we disagree with NLMK Belgium that the appropriate date of sale is the date that NAP issues an invoice to the U.S. customer. As noted above, it is NLMK Clabecq, not NAP, that ships the merchandise to the U.S. customer. It is irrelevant that the final delivery point is sometimes the U.S. port of entry; the customer (not NAP) requests this delivery point, and, from this perspective, it is no different than an MTO shipment made direct to the customer's door. Rather, the salient fact is that NLMK Clabecq does not ship the merchandise to NAP, the merchandise does not enter NAP's physical inventory, and NAP frequently is unaware that the customer has taken possession of the merchandise. Under these circumstances, we find that NAP's shipment date is, for all intents and purposes, unconnected to the movement of the merchandise, whereas NLMK Clabecq's shipment date is directly connected to it.

NLMK Belgium's arguments are, in part, based on the assumption that factory shipment date is inextricably linked to the sale between NLMK Clabecq and NAP, and reliance on this date signifies that the relevant sale for dumping purposes is the sale between these affiliated parties. However, this assumption is not valid. As affiliated parties, NLMK Clabecq and NAP submitted a consolidated response in this investigation, and they functioned in a coordinated manner during the POI to produce and sell subject merchandise in the United States. Consequently, we find NLMK Belgium's arguments related to intercompany invoices and transfer prices not pertinent, and its arguments with respect to the integration of its and NAP's computer systems off point.

The sole question before us is whether the material terms of the sale to the first unaffiliated U.S. customer were established at the time of shipment from Belgium. We find that they were. The final per-unit price is shown on the purchase order received by NAP and forwarded to NLMK Clabecq, while the products and quantities are on the shipping documents prepared upon shipment from Belgium. There is no dispute that NLMK Clabecq may over- or under-produce

[162] *See* NAP Verification Report, at 9.

the quantity ordered, produce to different dimensions than ordered, or send a single order in multiple shipments.[163] However, these changes, by necessity, all occur prior to shipment; once the plate leaves the factory, changes to product characteristics and quantity of the shipment are no longer possible. Thus, NLMK Belgium's argument regarding changes in these terms between purchase order date and invoice date miss the point.[164]

For this reason, we find the examples of such changes provided by NLMK Belgium unpersuasive. In its Supplemental Section A Response and during verification, NLMK Belgium presented documents relating to one U.S. sale showing that the number of plates differed between the initial purchase order and NAP's invoice to the customer.[165] Using this example, NLMK Belgium argues that it "provided sales documents that illustrated a bona fide change in quantity and corresponding price which was not established until NAP issued its invoice."[166] However, further examination of these documents reveal that the quantity of the plate was fixed upon shipment from Belgium, and the price per ton did not change.[167] Thus, while this example shows that certain terms may differ after NLMK Clabecq receives a purchase order, it does not demonstrate that the material terms of sale changed after shipment from Belgium.[168]

We disagree with NLMK Belgium that the impetus behind the use of shipment date as date of sale is to completely capture U.S. credit costs. As the petitioner correctly notes, the calculation of credit and the determination of the universe of U.S. sales are entirely separate issues. In fact, the Department does not use the date of sale in its credit calculations at all.[169, 170] To the extent

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[163] *Id*., at 8.

[164] If the issue were whether purchase order date is the correct date of sale, NLMK Belgium's arguments would be convincing. However, this is not the question at hand.

[165] *See* NLMK Belgium Case Brief, at 6 (citing NLMK Belgium August 31, 2016 SQR, at Exhibit SA-7; and NAP Verification Report, at 9).

[166] *Id*.

[167] NLMK Belgium seems to argue that the total revenue received from the sale is the relevant measure of price. However, the Department conducts its dumping analysis using per-unit amounts, and there is no evidence of per-unit price changes after shipment. Indeed, there is no instance on the record of price changing even between the purchase order and the NAP invoice for MTO sales, much less between shipment from Belgium and NAP invoice.

[168] In any event, NLMK Belgium acknowledged during the U.S. sales verification that "the customer rarely, if ever, rejects merchandise that has been shipped in a size different than ordered" (*see* NAP Verification Report, at 9). We do not dispute that NLMK Belgium's customers can reject shipments. However, NLMK Belgium failed to establish that such rejections did occur during the POI. Thus, instead of undermining the Department's decision that factory shipment date is appropriate, it fully supports it.

[169] *See* Antidumping Questionnaire, at B-19, B-20, and C-22, which instructs respondents to calculate credit expenses for both the U.S. and home markets "using the number of days between date of shipment to the customer and date of payment." *See also*, Appendix I of the questionnaire which contains the Glossary of Terms defining credit expenses as the expense incurred "between shipment of merchandise to a customer and receipt of payment from the customer."

[170] As stated in the Antidumping Questionnaire, the unit cost of credit should be calculated by using the number of days between date of shipment to the customer and date of payment, and as such, had NLMK Belgium followed these explicit instructions, accordingly, it should have known the correct formula. *See* Antidumping Questionnaire at B-19, B-20, and C-22, C-23. We note that NLMK Belgium provided the wrong formula in its narrative explaining these costs. *See* NLMK Belgium July 15, 2016 CQR, at 37; and NLMK Belgium's July 18, 2016 Section

that NLMK Belgium is arguing that the Department is selecting an earlier date of sale merely to ensure that all imputed expenses are reflected in the final determination, we have no such concern because NLMK Belgium reported both inventory carrying costs and credit expenses in its U.S. sales listing.[171] Instead, the Department's concern is to capture the correct universe of sales data, as well as to ensure that all currency conversions can be made on the appropriate date, as required by section 773A of the Act.

The Department believes that NLMK Belgium's universe of sales is incorrect, because it was not based upon factory shipment date and because there was significant lag between the time of NLMK Belgium's MTO sales departing the factory and being invoicing by NAP. Specifically, at verification, the Department observed instances of significant lag times between shipment from the factory in Belgium and the invoice being issued by NAP (*i.e.*, more than two months). We disagree with NLMK that this was an outlier or an unrepresentative and irrelevant observation. NLMK Belgium claims that only one NAP invoice, associated to one NLMK Clabecq invoice, was issued slightly over two months after NAP received the invoice from NLMK Clabecq. In fact, at verification, we identified six NAP invoices that were issued 60 days or later than the corresponding NLMK Clabecq invoice.[172] For further discussion, *see* Comment 11, below.

Finally, we agree with NLMK Belgium that price is indisputably a term of sale; however, as noted above, the unit price NLMK Belgium charged did not change after shipment from the factory, and thus the terms of sale did not change. Further, we disagree that either of the cases NLMK Belgium cited as support for this proposition furthers its argument.[173] Specifically, in *PET Film from India*, the issue before the Department was whether to choose purchase order date or invoice date as the date of sale; because the Department found changes in price and quantity between the purchase order and the invoice dates, it did not use the purchase order date, just as we have not done here. In the current case, as noted above, neither NLMK Belgium nor the Department has proposed using the purchase order date as the date of sale.

NLMK Belgium's reliance on *Stilbenic OBAs from Taiwan* is equally misplaced. In that case, even though sales were made under long-term contracts, the respondent "reported its sales using shipment date as the date of sale, because shipment occurred prior to invoicing."[174] Therefore,

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B Questionnaire Response (NLMK Belgium July 18, 2016 BQR), at 31. Despite the error, the mathematical per-unit credit expense amount is still correct, for the reason that NLMK Belgium reported invoice date as shipment date for both its home market and U.S. sales.

[171] That said, we note that NAP was unable to substantiate the accuracy of its reported U.S. inventory carrying costs. *See* NAP Verification Report, at 3 and 23. However, this issue is separate and apart from the issue of date of sale.

[172] *See* NAP Verification Report, at 10-11.

[173] *See Stilbenic OBAs from Taiwan*, 77 FR at 17028 and accompanying Issues and Decision Memorandum, at Comment 1, and *Polyethylene Terephthalate Film, Sheet, and Strip from India: Preliminary Results of Antidumping Duty Administrative Review*, 78 FR 48143 (August 7, 2013) (*PET Film from India*), and accompanying Preliminary Decision Memorandum, at 3-4.

[174] *See Stilbenic OBAs from Taiwan*, 77 FR at 17028.

like here, the Department found the date of shipment to be the appropriate date of sale in *Stilbenic OBAs from Taiwan*.

Accordingly, for the final determination, we are following our established practice of using shipment date as the date of sale when it precedes invoice date. The necessary information is, however, not on the record of this case. Although NLMK Belgium claimed to report all POI shipments from Belgium, we discovered at verification that this was not the case. Specifically, we examined the data reported in the field INV_OUT_POIU in the U.S. sales listing as part of our discussion of NLMK Belgium's date of sale methodology.[175] We noted that none of NLMK Belgium's March 2016 MTO sales shipped from NLMK Clabecq had, in fact, been included in the U.S. sales listing, despite the Department's explicit request for this information.[176]

In an investigation, date of sale information is crucial to the accurate determination of a company's dumping margin, because the date of sale determines the universe of reportable sales, and it also determines the appropriate exchange rate used in all currency conversions. Consequently, NLMK Belgium's failure to provide the requested information deprived the Department of the relevant sales universe (and the corresponding sales-specific exchange rates) to use in this investigation.

Based on the above facts, we find that NLMK Belgium's date of shipment from Belgium is the appropriate U.S. date of sale for MTO sales. As discussed above, the antidumping duty questionnaires issued in this investigation required that NLMK Belgium report all of its relevant U.S. sales during the POI. NLMK Belgium had multiple opportunities to provide its full universe of sales, given that the Department issued multiple supplemental questionnaires to NLMK Belgium regarding its sales[177] and NLMK Belgium purported to make adjustments to reported sales in its responses to the supplemental questionnaires.[178] Thus, based on our findings at the sales verifications and NLMK Belgium's failure to report all of its U.S. sales in its questionnaire and supplemental questionnaire responses,[179] we find that NLMK Belgium possessed the necessary records to provide a complete U.S. sales database but did not conduct a comprehensive investigation of all relevant records to identify all of its U.S. sales which shipped during the POI, thereby providing information that could not be verified within the meaning of section 776(a)(2)(D) of the Act. In addition, we find that NLMK Belgium's failure to report all of its U.S. sales of in-scope products during the POI, using the information over which it maintained control at all times, indicates that NLMK Belgium failed to provide information that could be verified within the meaning of section 776(a)(2)(D) of the Act. Because NMLK Belgium failed to provide information that could be verified despite having the ability to report the information and having control over the information at all time, we find that NMLK Belgium did not act to the best of its ability to comply with our requests for information. Therefore, we

[175] *See* NAP Verification Report, at 11-12.

[176] *Id*., at 12.

[177] *See* Antidumping Questionnaire, at A-9, B-9-B-10, and C-8; and Supplemental Sections B and C Questionnaire, at 2 and 7.

[178] *See* NLMK Belgium September 9, 2016 SQR, at 9-10, NLMK Belgium's September 14, 2016 Updated U.S. Sales Listing, at 2, and NLMK Belgium's September 21, 2016 Supplemental Section B Response, at 2.

[179] *See* NLMK Belgium Sales Verification Report, at 9-11.

find that an adverse inference based on facts otherwise available (AFA) is appropriate pursuant to section 776(b) of the Act. For further discussion of the application of AFA, *see* Comment 11, below.

Comment 9: Product Characteristics and Control Numbers for NLMK Belgium

At verification, we found that NLMK Belgium had misreported the chromium content, yield strength, and heat treatment for certain CONNUMs produced by NLMK Clabecq, affecting approximately two percent and 30 percent of the CTL plate that it sold by weight in the home market and the United States during the POI, respectively. It also used these incorrect data in compiling the reported control numbers.[180] Although NLMK Belgium attempted to provide corrected information in a supplemental questionnaire and during verification, we did not accept it because the changes: 1) constituted untimely-submitted new factual information; and 2) were not minor.[181]

NLMK Belgium's Arguments

- NLMK Belgium argues that: 1) throughout this investigation, the Department provided questionnaires to respondents at dates significantly later than the norm in investigations; and 2) these delays harmed NLMK Belgium's ability to provide full and accurate information (and/or to check that information) in a timely manner. NLMK Belgium notes that the Department denied NLMK Belgium's request for an extension of the deadline for new factual information until one week prior to verification, and when it attempted to submit new factual information anyway (both after the preliminary determination and at verification), the Department also rejected these data. NLMK states that it submitted a letter detailing its objections to the Department's actions, and it incorporates its arguments by reference.

- NLMK Belgium argues that the Department's rejection of this information is inconsistent with U.S. obligations established in the *Antidumping Agreement*.[182] According to NLMK Belgium, the Appellate Body first articulated the WTO obligation to accept untimely information in *Hot-Rolled Steel from Japan*, where it concluded that, "under Article 6.8, {the Department} was not entitled to reject this information for the sole reason that it was submitted beyond the deadlines for the responses to the questionnaires." NLMK Belgium notes that the issue before the Appellate Body in that case was, ironically, the

[180] *See* NLMK Belgium Sales Verification Report, at 15-16.

[181] *See* Department Letter re: Rejection of November 3, 2016, Supplemental Questionnaire Response, dated November 23, 2016 (First SQR Rejection Letter); and Department Letter re: Rejection of Resubmission, dated December 2, 2016 (Second SQR Rejection Letter). *See also* NLMK Belgium Sales Verification Report, at 2.

[182] *See* NLMK Belgium Case Brief, at 11 (citing U.S. obligations under the Agreement on Implementation of Article VI of the GATT 1994 (*Antidumping Agreement*), as articulated by the Appellate Body in *United States – Antidumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/ABR (July 24, 2001) (*Hot-Rolled Steel from Japan*).

conversion of actual weight to theoretical weight (*i.e.*, one of the issues on which NLMK Belgium attempted to submit new information itself).[183]

- NLMK Belgium argues that there is a long-standing legal precedent that a party be given the opportunity to correct its own errors on request, even when those corrections are untimely.[184] NLMK Belgium maintains that the CAFC has explicitly held that correctable errors include mistakes of methodology, substance, and judgment.[185] NLMK Belgium contends that, in this case, there is no "tension between finality and correctness" (a consideration cited in the CAFC precedent noted above) because NLMK Belgium offered the information the first time in advance of the preliminary determination and the second time at the beginning of verification.

- Further, NLMK Belgium contends that refusal to accept the proffered changes would be inconsistent with the Department's practice, because the Department has accepted similar changes at, or after, verification in prior cases.[186] Indeed, NLMK Belgium argues that accepting its coding changes here is even more justifiable, because NLMK Belgium based its classifications on an honest appraisal of the information required, rather than an intent to distort the calculations.

- NLMK Belgium claims that there is precedent, both in this case and in the companion case on CTL plate from Taiwan, for accepting new factual information, even after the preliminary determination, and for accepting product characteristics not conforming to the requirements set forth by the Department. Specifically, NLMK Belgium contends that the Department has accepted classifications based on internal specifications for Industeel, the other mandatory respondent in this investigation, despite the fact that Industeel assigned its chromium codes in a virtually-identical fashion.[187] NLMK Belgium contends that it would be ironic that, having committed essentially the same errors, NLMK Belgium would be punished, while Industeel's information would be accepted.

- NLMK Belgium argues that, for the final determination, the Department should accept NLMK Belgium's product coding as reported. NLMK Belgium contends that it is an

[183] *See* NLMK Belgium Case Brief at 11 (citing *Hot-Rolled Steel from Japan*, at paragraphs 81-89). NLMK Belgium notes that the Appellate Body provided a variety of factors which should be evaluated in considering the timing of a submission, including whether it was submitted in time to be used in the final determination. *Id*.

[184] *See* NLMK Belgium Case Brief, at 8 (citing *NTN Bearing Corp. v. U.S.*, 74 F. 3d 1204, 1208-1209 (Fed. Cir. 1995) (*NTN*); *Timken U.S. Corp. v. U.S.*, 434 F. 3d 1345, 1353-54 (Fed. Cir. 2006) (*Timken*)).

[185] *Id*.

[186] *See* NLMK Belgium Case Brief, at 9 (citing *Off-the-Road Tires from India,* and accompanying Issues and Decision Memorandum, at Comment 5; *Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 75 FR 59217 (September 27, 2010), and accompanying Issues and Decision Memorandum, at Comment 10 (*Coated Paper from the PRC*)).

[187] *See* NLMK Belgium Case Brief, at 10-11 (citing Industeel Sales Verification Report, at 8; and Industeel Cost Verification Report, at 13).

open question whether NLMK Belgium miscoded the product characteristics at issue because the reported data tied to its "internal impositions" (*i.e.*, "recipes" for the slabs used to produce its plate lines Quard and Quend). NLMK Belgium maintains that these documents are a more appropriate data source than its "Indices de Nuance" because: 1) the Indices de Nuance contain only skeletal product requirements; and 2) the slab recipes are consistent with the Indices de Nuance in every respect, but they contain more detailed technical specifications tailored to the dimensional and other special characteristics of the products to be produced.

- According to NLMK Belgium, the Department's questionnaire instructions did not explicitly prohibit reliance on internal specifications.[188] NLMK Belgium contends that, because these instructions merely provided examples using external specifications, use of its own slab recipes was reasonable.

- With respect to chromium, NLMK Belgium admits that the Department would "almost certainly" require verification of the Indices de Nuance, as these were the certified product specifications for its Quard and Quend products. According to NLMK Belgium, in order to cooperate as fully as possible, it requested to change its chromium classifications to conform to those in the Indices (*i.e.*, no minimum requirement). However, NLMK Belgium argues that, if the Department disagrees, it should accept the previously-offered changes now. NLMK Belgium claims that this approach should have no material effect on the investigation because all Quard and Quend have the same chromium requirements.

- With respect to yield strength and heat treatment, NLMK Belgium contends that the Department must accept its coding as reported, given the current stage of the investigation, and for the following reasons:

    - The company's engineers reasonably equated yield strength with hardness, and when informed that the Department did not recognize this correlation, they sought to correct the error.

    - Similarly, when NLMK Belgium discovered that it had misreported the heat treatment codes for quenched and tempered products, it informed the Department immediately, and, although the Department rejected this information, it verified that the error was accurately described and limited in scope.[189]

    - As with chromium, accepting the yield strength and heat treatment codes as reported should have no material effect on the investigation because the coding was (and any changes to it would have been) done consistently.

[188] Specifically, NLMK Belgium claims that the Department's product characteristic classification instructions were difficult to interpret, requiring that respondents report the relevant codes "based on the minimum . . . content required for the product under the specification/grade."

[189] *See* NLMK Belgium Case Brief, at 16, 17 (citing to NLMK Belgium Sales Verification Report at 2, 16, and 17).

The Petitioner's Arguments

- The petitioner argues that the Department should not accept NLMK Belgium's product coding as is, nor should it accept the corrections presented at verification. According to the petitioner, the Courts have granted the Department broad discretion to establish its own rules governing administrative procedures,[190] and the Department appropriately exercised this discretion in rejecting NLMK Belgium's extension request. The petitioner asserts that it is the Department, not respondents, who are tasked with determining what represents "good cause" for granting an extension request under 19 CFR 351.301(b). The petitioner contends that, in this case, NLMK Belgium failed to provide any justification for the requested extension, nor did it act on the Department's invitation to provide an "adequate reason."[191]

- The petitioner asserts that the Department's rejection of the information was also consistent with the instructions provided to NLMK Belgium in its verification agenda,[192] and it argues that the case precedent cited by NLMK Belgium is not on point. Specifically, the petitioner notes that in *Off-the-Road Tires from India* the Department accepted a new cost database incorporating changes in a "minor correction submission," while in *Coated Paper from the PRC* the changes were of a "type typically accept{ed} at verification" and revealed no "systemic problem."[193] The petitioner asserts that here, in contrast, NLMK Belgium's proposed corrections are extensive and systemic.

- The petitioner argues that the CAFC precedent cited by NLMK Belgium is equally inapposite.[194] The petitioner asserts that the errors at issue in both *NTN* and *Timken* were clerical, with the former merely "typing errors" and the latter involving only 17 sales. Further, the petitioner contends that the *Timken* Court determined that the Department "had sufficient factual basis for refusing to make the correction."[195]

- Similarly, the petitioner argues that NLMK Belgium's reliance on *Hot-Rolled Steel from Japan* fails to take into account the Appellate Body's position that, while the investigating authorities may extend time limits for responses, it will do so "upon cause

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[190] *See* Petitioner's Rebuttal Brief, at 10-11 (citing *Yantai Timken Co. v. United States*, 31 CIT 1741, 1755, 521 F. Supp. 2d 1356, 1371 (CIT 2007) (*Yantai Timken)* (quoting *Reiner Brach GmbH & Co. v. United States*, 26 CIT 549, 559, 206 F. Supp. 2d 1323, 1324 (CIT 2002)), aff'd, 300 Fed. Appx. 934 (Fed. Cir. 2008). Further, the petitioner notes that the Department has broad discretion to establish its own rules governing administrative procedures, including the establishment and enforcement of time limits." *Id*. *See also Hyosung Corporation v. United States*, Slip Op. 11-34 (May 13, 2011).

[191] *See* Petitioner's Rebuttal Brief, at 12 (citing Department Letter re: Extension Request for Response by NLMK Clabecq's Affiliates, dated September 22, 2016 (First NFI Rejection Letter).

[192] *See* Petitioner's Rebuttal Brief, at 11 (citing Department Letter re: NLMK Belgium Sales Verification Outline, dated December 5, 2016.

[193] *Id*., at 12-13 (citing *Off-the-Road Tires from India* and *Coated Paper from the PRC,* and accompanying Issues and Decision Memorandum, at Comment 10 ()).

[194] *Id*., at 14 (citing *NTN* and *Timken*).

[195] *Id*.

shown" and if "practicable."[196] The petitioner asserts that NLMK Belgium failed to demonstrate here that it qualified under these exceptions.

- According to the petitioner, the Department also properly rejected NLMK Belgium's new factual information at verification. Further, the petitioner contends that the Department's questionnaire instructions are neither confusing nor ambiguous, despite NLMK Belgium's claim to the contrary. Specifically, the petitioner notes that the questionnaire clearly requires respondents to report minimum chromium content (whereas NLMK Belgium reported maximum chromium content), and the fact that NLMK Belgium identified the mistake prior to verification reinforces that the instructions are clear. Further, even were it true that the instructions were confusing, this would not justify the Department's acceptance of erroneous data.

- Similarly, the petitioner contends that the Department should not accept erroneous yield strength or heat treatment data. According to the petitioner, it is unclear how NLMK Belgium based yield strength on a computation in its specifications, when those specifications do not have a requirement for yield strength. Further, as with the misreported chromium codes, the petitioner contends that there is no justification to accept erroneous yield strength or heat treatment data.[197]

- The petitioner also disagrees that there is an inconsistency in treatment of respondents in this investigation. The petitioner notes that Industeel, the other mandatory respondent, relied on internal specifications only for proprietary grades (*i.e.*, where external specifications do not exist) and correctly reported the minimum material content, rather than the maximum.[198]

- Finally, the petitioner characterizes NLMK Belgium's coding mistake as a systemic error which affected a significant portion of its home market and U.S. sales in ways that cannot be isolated or corrected. The petitioner contends that, because of the error, sales cannot be properly matched, and, thus, the Department cannot calculate an accurate dumping margin for NLMK Belgium. According to the petitioner, because the error compromises the integrity of the reported data as a whole, the Department should base NLMK Belgium's final dumping margin on AFA. For further discussion of the petitioner's AFA arguments, *see* Comment 11, below.

Department's Position:

We disagree with NLMK Belgium's assertions that the Department improperly rejected NLMK Belgium's submissions containing corrected control number and product characteristic data and that we unlawfully failed to accept such corrections at verification. We also disagree that the Department should either rely on the inaccurate information on the record to compute a final dumping margin for NLMK Belgium, or, alternatively, accept the previously-offered corrections now. As explained more fully below, we find that the inaccuracies affect a substantial portion of

[196] *Id.*, at 16 (citing *Hot-Rolled Steel from Japan*, at paragraph 82).

[197] *See* Petitioner's Rebuttal Brief, at 17-18.

[198] *See* Petitioner's Rebuttal Brief, at 14-15 (citing Industeel Sales Verification Report, at 8).

its home market and U.S. sales listings, such that these sales listings no longer form a reliable basis on which to calculate a dumping margin for NLMK Belgium. We agree with the petitioner that this systemic error renders the entire dumping calculation inaccurate, because the control number is fundamental to the Department's calculation, as it controls the allocation of costs and determines the product matches between the U.S. and home markets.

On the first day of verification conducted at NLMK Clabecq (one of the producers in the collapsed NLMK entity), NLMK Belgium notified the Department that it had incorrectly reported the product characteristics chromium, yield strength, and heat treatment (*i.e.*, the third, fifth, and seventh characteristics in the product matching hierarchy, respectively), for a significant percent of its CONNUMs – affecting 30 percent of NLMK Belgium's sales in the United States and two percent of NLMK Belgium's home market sales. Our report states:[199]

> At the start of verification, company officials stated that NLMK Belgium had miscoded data reported for the physical characteristics chromium, yield strength, and heat treatment for certain Quard and Quend products, and it had also used these incorrect data in compiling the reported control numbers. Company officials further stated that they discovered the above errors when preparing their response to Department's November 2016 supplemental questionnaire, as well as preparing for verification. A list of the affected control numbers is contained in verification exhibit 1. Sales of these control numbers (by weight) represent approximately two percent and 30 percent of the home market and U.S. sales databases, respectively.
>
> Company officials stated that, with respect to chromium, they used NLMK Belgium's internal standards (called "indices de nuance") to determine the reported values, because these grades are proprietary to NLMK Belgium. Company officials stated that they used the maximum content of this component allowed instead of the minimum. Company officials stated that they had misunderstood the questionnaire reporting instructions, and, thus, they stated that this mistake was unintentional.
>
> Regarding yield strength, company officials stated that NLMK Belgium does not perform strength tests on Quard products because they are not used for structural applications, but rather are purchased for their abrasion resistance. Company officials stated that this mistake, therefore, was limited to Quard grades. Regarding heat treatment, company officials stated that NLMK Belgium did not take into account that certain Quard and Quend products must be tempered when produced to higher thicknesses, in order to reduce stress on the material (for Quard) or to change the chemical structure of the material (for Quend).

As a threshold matter, we disagree with NLMK Belgium that the errors in question arose from an ambiguity in the Department's reporting instructions. The reporting instructions for chromium explicitly required NLMK Belgium to report the minimum chromium content of its plate products under the applicable specification/grade, whereas NLMK Belgium reported the maximum.[200] Specifically, because the Indices de Nuance contained no minimum chromium

[199] *See* NLMK Belgium Sales Verification Report, at 15-16.

[200] *See* Department Letter re: Product Characteristics for the Antidumping Duty Investigation of Certain Carbon and

measure, NLMK Belgium should have reported a "1" (*i.e.*, "no minimum specified"); however, NLMK Belgium reported the maximum. Thus, it is irrelevant in this case whether NLMK Belgium relied on its own internal standards or the corresponding external ones. The outcome would have been the same – NLMK Belgium incorrectly (and unquestionably) misreported the data at issue.

Further, we note that the internal impositions on which NLMK Belgium based its errant reporting relates to the slab used to produce the product, and not the finished product. NLMK Belgium's statement that the information contained in the internal impositions is "more detailed than the product coding evidently requested by the Department," provides another reason why this information is unreliable; it is too "product code" specific (*i.e.*, not grade/specification specific).[201] For this reason, it is imperative that the Department receive and rely on properly reported measurements of product characteristics that are based on industry standards, when available. By NLMK Belgium's own admission, in the ordinary course of business, it maintains these certified specifications for these products (*i.e.*, Indices de Nuance), and failed to recognize in a timely manner, that these are the appropriate documents from which to source certain product characteristic information. The mere fact that NLMK Belgium recognized that its internal impositions (*i.e.*, the slab recipes) yielded incorrect information gives credence to the fact that its reporting of chromium, as is, is wrong. Thus, the Department cannot rely on this information to properly calculate NLMK Belgium's dumping margin.

We also disagree with NLMK Belgium that the questionnaire permits the use of internal standards, merely because the instructions included examples using "*e.g.*" Each of the cited examples referenced an external, published standard. While we disagree that the questionnaire instructions were confusing, we note that, to the extent that NLMK Belgium was confused by them, it had ample opportunity to contact the Department for guidance prior to the submission of its questionnaire responses.[202]However, NLMK Belgium elected not to do so. Moreover, if NLMK Belgium thought that its reporting, which was not consistent with the Department's instructions, was a better or more accurate manner in which to report these characteristics, NLMK Belgium was could have to offered a suggested alternative and a full explanation of this choice in its questionnaire response.[203] Rather, NLMK Belgium's questionnaire responses indicated erroneously that it was following the requested reporting methodology.[204] Thus, we

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Alloy Steel Cut-to-Length Plate from Belgium, dated June 10, 2016 (Product Characteristics Letter), at 8-9, stating "FIELD NUMBER 3.3: Minimum Specified Chromium Content." *See also* NLMK Belgium July 18, 2016 BQR, at 10; and NLMK Belgium July 15, 2016 CQR, at 9.

[201] According to NLMK Belgium, slab "recipes" contain more detailed technical specifications tailored to the dimensional and other special characteristics of the product to be produced. However, the whole objective of product matching is to compare products on an apples-to-apples basis. It is conceivable that two products with characteristics sourced from different "standards" of documents (*i.e.*, one that's more specific verse one more general) could be incorrectly "matched," thus, undermining the integrity of the matches.

[202] *See* Antidumping Duty Questionnaire, at G-1, where we urge respondents to contact the official in charge for any clarifying consultations.

[203] *See* section 782(c) of the Act.

[204] *See* NLMK Belgium July 18, 2016 BQR, at 5-16, and NLMK Belgium July 15, 2016 CQR, at 5-15, where NLMK reported CONNUM characteristics and stated that these "field{s} {have} been reported according to

note that NLMK Belgium did not explain, upfront, that it was not following the Department's proscribed CONNUM; only at a very late stage in the investigation did NLMK Belgium inform the Department that it perceived there was a deficiency in the original reporting of numerous CONNUM characteristics, and, as noted in the verification report, the Department's verification of NLMK Belgium's CONNUM reporting confirmed that numerous, significant errors had been made by NLMK in its reporting of chromium, yield strength, and heat treatment. Thus, a detailed examination of NLMK Belgium's response, at verification, fully uncovered the fact that its CONNUM reporting was significantly deficient with respect to the Department's CONNUM characteristics for multiple products and multiple CONNUM characteristics.[205]

As for NLMK Belgium's incorrect reporting of yield strength and heat treatment, we find that NLMK Belgium did not adhere to the Department's coding instructions, despite having the correct information on hand (*i.e.*, the information contained on the Indices de Nuance). In fact, in describing its error with respect to yield strength, NLMK Belgium seemingly stated that its company engineers were "self-alerted" that the basis of their coding (*i.e.*, incorrectly equating tensile strength with hardness) was erroneous. In other words, the company informed itself that its reporting was wrong; signaling NLMK Belgium's knowledge of the error. From this fact pattern, it is evident that company officials had access to the correct information and was aware of the erroneous reporting, but failed to rectify its deficiency in a timely manner. With respect to NLMK's incorrect reporting of heat treatment, again, NLMK Belgium failed to follow the clear instructions of this product characteristic. In this instance, NLMK Belgium failed to properly code its quenched and tempered Quard products, accordingly.

When taken together, NLMK Belgium's claims that these product characteristic coding errors have "virtually no effect" on product comparisons is misleading. The Department does not have the correct product characteristic information on hand to correct all affected CONNUMs. For example, with respect to heat treatment, NLMK Belgium provides that all of its proprietary Quard products undergo quenching (*i.e.*, resulting in a heat treatment code of "5"), yet concedes that some of these are also tempered (*i.e.*, resulting in a heat treatment code of "8").[206] Therefore, contrary to NLMK Belgium's claim, the Department, with only the knowledge of the incorrectly reported CONNUMs, does not have the ability to distinguish among the incorrectly reported product codes and apply them as intended, to the appropriate corresponding "new" CONNUM, with 100 percent accuracy. Rather, the Department, can only confirm that NLMK Belgium's description of the problem is accurate,[207] and that, cumulatively, these errors affect approximately 30 percent of the U.S. database, by volume. As an example, taking NLMK Belgium's suggestion to accept its reported chromium codes from a "2" to a "1" would, at minimum, result in a change of corresponding costs as new "old" CONNUMS merge into "existing" CONNUMs.

Department instruction."

[205] *See* NLMK Belgium Sales Verification Report, at 2-3, 15-18, 25, and 28, where we discuss errors in NLMK's CONNUM reporting.

[206] NLMK Belgium notes that this is due to thickness of the plate. *See* NLMK Belgium Case Brief, at 17.

[207] *See* NLMK Belgium Sales Verification Report, at 2.

Further, we disagree with NLMK Belgium's claim that the product comparisons would not change, if the CONNUMs are revised to accept the "correct" chromium codes. Based on the extent and nature of the error, there is no way for the Department to appreciate accurately the effect NLMK Belgium's incorrect coding has on the matching process. NLMK Belgium's CONNUM coding errors pervaded all submitted data files (*i.e.*, home market and U.S. sales listings as well as the cost database); the totality of which renders it difficult to gauge the effect on product matching (*e.g.*, products matching to similar products, products matching to constructed value (CV)).

As to NLMK Belgium's contention that the Department faced a similar situation with respect to Industeel, but afforded different treatment there,[208] we disagree. Contrary to NLMK Belgium's assertion, the Department did not permit Industeel to disregard available external specifications, in preference to its own internal documents (as NLMK Belgium would have us do here); rather, the products at issue were proprietary to the respondent and produced only to internal specifications.[209] Further, while Industeel had one minor error in its control number reporting, that error was of a different nature (*i.e.*, it only affected a single heat code);[210] and, was minor in scope, affecting a single product characteristic in a limited number of CONNUMs and "significantly less than one quarter of one percent of the U.S. sales volume during the POI."[211] Therefore, given that NLMK Belgium's errors were more than 120 times more significant,[212] our acceptance of corrected data in that case signals no inconsistency in treatment.

We also disagree with NLMK Belgium's contention that, throughout this investigation, the Department provided questionnaires to respondents at dates significantly later than the norm in investigations; and that these delays harmed NLMK Belgium's ability to provide full and accurate information (and/or to check that information) in a timely manner. We point out that NLMK Belgium provided no support to substantiate its claim. We remind NLMK Belgium that other respondents, including the other mandatory respondent from Belgium, Industeel, as well as the respondents in the companion CTL plate investigations were under the same time constraints, and received the same letter establishing the product characteristics on the same date (*i.e.*, on

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[208] *See* NLMK Belgium Case Brief, at 10-11.

[209] *See* Industeel Sales Verification Report at 8, where the Department explained that, with regards to the product-matching criteria, it "noted no discrepancies or inconsistencies with the information reported in Industeel's questionnaire responses" and that "for certain proprietary grades" the reporting was based "on internal specifications" when the product sheets "did not contain detailed product specifications or minimum levels of the relevant elements, but only the maximum levels and/or approximate ranges;" and that the Department "reviewed the product sheets and confirmed that this was the case."

[210] *See* Comment 5, above ("The correction in question affects a negligible volume of Industeel's sales data, representing significantly less than one quarter of one percent of the U.S. sales volume during the POI. Because this error was minor, we accepted Industeel's correction at verification, and we have used this information in our calculations for the final determination."). Further, we note that Industeel correctly reported minimum content information, where requested, unlike NLMK Belgium, which reported its values based on the maximum content.

[211] For further discussion, *see* Comment 5, above.

[212] Using the most generous of assumptions, we estimated this figure by dividing the percentage of NLMK Belgium's U.S. sales volume with errors (*i.e.*, 30) by the maximum possible U.S. sales volume of errors with respect to Industeel (*i.e.*, 0.25 percent). However, because the volume of Industeel's U.S. sales with errors was substantially less than 0.25 percent, the magnitude of the difference is significantly understated here.

June 10, 2016),[213] 16 days after the issuance of the initial questionnaire.[214] The other respondents (including Industeel) did not experience similar difficulties in correctly reporting their CONNUMs while under the same time constraints as NLMK Belgium.[215] Thus, it is evident that the time frame at hand did not cause undue harm to the respondents with regards to reporting of CONNUMs.

With respect to investigations, we note that, it is not uncommon for the Department to issue product matching instructions on a date later than that on which the initial questionnaires are sent to respondents.[216] In fact, in *SSSS From the PRC*, the Department issued product characteristics 28 days after the initial Antidumping Questionnaire.[217] In order to afford interested parties an opportunity to comment on proposed product characteristics, the Department may issue this letter separately from the rest of the questionnaire, as appropriate. In the immediate investigation, the Department issued a proposal of product-comparison criteria to all parties on May 19, 2016, (*i.e.*, six days before the initial questionnaire was issued) allowing for comments and rebuttal comments to be submitted on the extended dates of June 2, and June 8, 2016, respectively.[218] Through this transparent process, NLMK Belgium was properly notified of the potential product matching criteria and, thus, had sufficient time to prepare for the characteristics as they were being contemplated by the Department and interested parties. Remarkably, all nine product characteristics considered in the Product Characteristics Proposal were ultimately used in the construction of the CONNUMs.[219] As to NLMK Belgium's claim that lack of time impeded its ability to report correct CONNUM information, we point out that it received the majority (nine of twelve) of the product characteristics in advance of the Antidumping Questionnaire and that, even when accounting for the 16 days "lost," (*i.e.*, the period between the issuance of the Antidumping Questionnaire and the Product Characteristics Letter), the Department granted NLMK Belgium's extension request of two weeks, in addition to the 21

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[213] *See*, *e.g.*, Product Characteristics Letter, which contained the product characteristics with which to report home market and U.S. CONNUMs.

[214] *See*, *e.g.*, Antidumping Questionnaire, which contained sections A-E of the Department's questionnaire.

[215] As noted above, in Comment 5, Industeel did make one small error related to a single CONNUM characteristic which affected a negligible quantity of its U.S. sales. However, as noted above the error was of a minor, clerical nature and was not pervasive or methodological and was very limited in scope.

[216] *See, e.g.*, *Certain Polyethylene Terephthalate Resin from Canada: Affirmative Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 80 FR 62019 (October 15, 2015), and accompanying Preliminary Decision Memorandum, at 7. Here, the time elapsed between issuance of initial questionnaire and product characteristic instructions was 24 days.

[217] *See Stainless Steel Sheet and Strip From the People's Republic of China: Preliminary Affirmative Determination of Sales at Less Than Fair Value and Preliminary Affirmative Determination of Critical Circumstances*, 81 FR 64135 (September 19, 2016), and accompanying Preliminary Decision Memorandum, at 2 and 3 (SSSS From PRC).

[218] *See* Department Letter re: Product Characteristics Proposal, dated May 19, 2016 (Product Characteristics Proposal); *see also* Department Letter re: Extension for Comments on Product Characteristics, dated May 24, 2016, in which an extension of one day was granted for the submission of comments.

[219] We note that, after receiving comments and rebuttal comments from the interested parties, we revised the order of the proposed CONNUM methodology, and included three additional characteristics, basing the CONNUM on 12 product characteristics. These characteristics (*i.e.*, nickel, paint, and descale) are identified at the 4th, 10th, and 12th places in the CONNUM. *See* Product Characteristics Letter.

days initially provided for it to respond to sections B and C of the Antidumping Questionnaire.[220] Thus, NLMK Belgium had over one month to report its CONNUM information;[221] ample time to interpret the Department's product characteristic guidelines and correctly report the information, accordingly.

With respect to time limits and turnaround times experienced by NLMK Belgium, we note that the number of supplemental questionnaires that it received were questionnaires issued to NLMK Belgium covering one section of analysis of a previous response containing multiple sections[222] while others were limited in scope, given that they contained an analysis of only portions of a previous response.[223] While NLMK Belgium complains about multiple requests and their tight turnaround times, we note that: 1) our issuance of several supplemental questionnaires covering a single response section (such as two questionnaires covering the initial section C response)[224] afforded NLMK Belgium with the maximum amount of flexibility to respond within the time constraints of the proceeding[225]; and 2) NLMK Belgium would not have received as many, nor as lengthy, information requests, had it reported more accurate and transparent data.

When NLMK Belgium submitted its original section B and C questionnaire responses on July 18 and July 15, 2016, respectively, we note that this was 79 and 82 days (nearly three months) prior to the deadline by which to submit new factual information (*i.e.*, October 5, 2016). We are unpersuaded by NLMK Belgium's claim that it did not have ample time with which to submit such information. Even after considering NLMK Belgium's first supplemental questionnaire covering sections B and C (*i.e.*, which specifically addressed product characteristics and CONNUM issues),[226] we note that NLMK Belgium still had 40 days with which to address and diligently report its product characteristic information, submit additional new factual information, as appropriate, or request guidance from the Department.

We further disagree with NLMK Belgium that, given the above facts, an extension of the deadline for the submission of new factual information was warranted. Because the Department did not extend the deadline for new factual information, we also disagree that the Department improperly rejected NLMK Belgium's untimely submissions containing corrected (new) product characteristic and control number information.

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[220] *See* Product Characteristics Letter.

[221] We note that Industeel provided its CONNUM information within the same time frame. *See* Industeel July 15, 2016 BQR; and Industeel July 15, 2016 CQR.

[222] *See* Department Letter re: First Supplemental Section A Questionnaire, dated August 11, 2016.

[223] *See* Department Letter re: Second Supplemental Section C Questionnaire, dated September 19, 2016 (which contained 13 questions); *see also* Department Letter re: Third Supplemental Section C Questionnaire, dated September 28, 2016 (which contained nine questions).

[224] *Id.*

[225] For example, instead of having a total of two to four weeks to respond to a complete supplemental all at once, it received the same amount of time separately for each portion.

[226] *See* Department Letter re: First Supplemental Sections B and C Questionnaire, dated August 26, 2016 (Supplemental Sections B and C Questionnaire).

Specifically, while preparing for its response to the Department's November 3, 2016, supplemental questionnaire, we note that NLMK Belgium discovered that it misreported the chromium content resulting in its "largest amount of changes," in addition to incorrectly reporting the heat treatment code for one CONNUM.[227] NLMK Belgium attempted to revise this information, in addition to other data changes, in its corresponding November 21, 2016, questionnaire response. We rejected this submission on November 23, 2016,[228] because the deadline to file new factual information not specifically requested by the Department in this proceeding was October 5, 2016 (*i.e.*, pursuant to 19 CFR 351.301(c)(5), all other new factual information is due "30 days before the scheduled date of the preliminary determination in an investigation, or 14 days before verification, whichever is earlier"). Notwithstanding the fact that NLMK Belgium again, attempted to include changes that were neither specifically requested by the Department nor accounted for in the resubmitted narrative response,[229] we find that NLMK Belgium's arguments contain errors of fact. NLMK Belgium, did not, in fact, offer this information in advance of the preliminary determination. Instead, as mentioned above, it proffered these changes in its November 21, 2016, response, seven days after the preliminary determination (*i.e.*, November 14, 2016). We note that, at this point, NLMK Belgium had yet to "discover" its other product characteristic errors (*e.g.*, misreported heat treatment codes); the other product coding issues were not reported until verification.[230]

With respect to NLMK Belgium's requests to extend the deadline by which to submit new factual information, we note that, on September 19, 2016, NLMK Belgium submitted a request for the Department to extend the deadline of submission of other factual information under 19 CFR 351.301(c)(5) to be one week prior to verification,[231] and on November 30, 2016,[232] NLMK Belgium asked the Department to allow NLMK Belgium to resubmit its alleged new factual information contained in its supplemental responses submitted on November 21 and November 23, 2016 (and subsequently rejected on November 23 and December 2, 2016, respectively).

Here, we address NLMK Belgium's letters individually. With respect to NLMK Belgium First NFI Request, we responded with the following:

> The Department's initial antidumping questionnaire requests that respondents report the sales and costs for all affiliates involved in selling or producing the merchandise under

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[227] *See* NLMK Belgium Letter re: Department's Letters of November 23 and 25 Rejecting Parts of Questionnaire Responses by NLMK Clabecq, NLMK Sales Europe, NLMK Plate Sales and Manage Service Center, dated November 30, 2016 (NLMK Belgium Second NFI Request).

[228] Because the Department rejected NLMK Belgium's questionnaire response, we instructed NLMK Belgium to remove all changes not specifically requested in the Department's November 3, 2016, questionnaire and resubmit the response, accordingly on November 28, 2016. *See* First SQR Rejection Letter.

[229] Again, despite the Department's clearly worded guidance, as stated in the First SQR Rejection Letter, the Department rejected NLMK Belgium's resubmitted questionnaire response and afforded NLMK Belgium one final opportunity to resubmit its response no later than December 6, 2016. *See* Second SQR Rejection Letter.

[230] *See* NLMK Belgium Sales Verification Report, at 2.

[231] *See* NLMK Belgium Letter re: NLMK Clabecq's Request for Extension of the Due Date for the Department's September 15 Request for full B and D Responses for Affiliates in Belgium and Request for Extension of Deadline for Submission of Factual Information, dated September 19, 2016 (NLMK Belgium First NFI Request).

[232] *See* NLMK Belgium Second NFI Request.

> investigation. {NLMK Belgium} did not provide this information in its initial sections B and D response, but instead offered arguments as to why it felt that it should not be required to report the information. Pursuant to 19 CFR 351.301(a), "the Secretary may request any person to submit factual information at any time during a proceeding or provide additional opportunities to submit factual information." The 30 day period for initial questionnaire responses, as specified in 19 CFR 351.301(c)(1)(i), is not applicable to this deadline, because {NLMK Belgium} received the Department's questionnaire on May 25, 2016.
>
> The Department has considered {NLMK Belgium's} request to extend the period for new factual information provided in accordance with 19 CFR 351.301(c)(5). However, we are not granting this request because {NLMK Belgium} did not provide an adequate reason for doing so. Please note that the deadline for new factual information in 19 CFR 351.301(c)(5) does not apply to information requested by the Department, which is governed by 19 CFR 351.301(a). Thus, the deadline for new factual information under this portion of the Department's regulations remains unchanged. If, at a later time, {NLMK Belgium} believes it has an adequate reason to request that the Department extend the deadline for new factual information submitted under 19 CFR 351.301(c)(5), {NLMK Belgium} may submit a request for an extension at that time.
>
> Additionally, the Department notes that {NLMK Belgium} and {Manage} may still submit new factual information in response to the Department's questionnaires and any possible supplemental questionnaires (pursuant to 19 CFR 351.301(c)(1)) and that Petitioners or other interested parties will have a chance to provide rebuttal information to such questionnaire responses and {NLMK Belgium} is provided one opportunity to rebut any factual information submitted by Petitioners or other interested parties (pursuant to 19 CFR 351.301(c)(1)(v)). None of these deadlines are precluded by the expiration of the general deadline for new factual information under 19 CFR 351.301(c)(5), on October 5, 2016.[233]

As noted above, NLMK Belgium did not provide sufficient reason to warrant special treatment and receive a blanket extension for filing new factual information under 19 CFR 351.301(c)(5). Even though the deadline for new factual information other than that described in 19 CFR 351.102(b)(21)(i)-(iv) was, pursuant to 19 CFR 351.301(c)(5), October 5, 2016 (*i.e.*, 30 days prior to the preliminary determination), it bears mentioning that NLMK Belgium still had an avenue in which to submit new factual information, pursuant to 19 CFR 351.301(c)(1); one that is unbounded by the October 5, 2016, deadline. Moreover, we informed NLMK Belgium that, should it find adequate reason to submit a request to extend the new factual information deadline again, it may do so (and we would consider it), accordingly, again, pursuant to 19 CFR 351.301(c)(5). This was not the case; instead, even though NLMK Belgium submitted its request to extend the new factual information deadline, it was after the deadline by which to submit requests of this nature. Specifically, in NLMK Belgium Second NFI Request, NLMK Belgium stated the following:

[233] *See* First NFI Rejection Letter.

At the outset, we would note that the Department rejected the alleged new factual information based on 19 CFR 351.301(c)(5). We would note at the same time that 19 CFR 351.302 (b) provides: "Extension of time limits. Unless expressly precluded by statute, the Secretary may, for good cause, extend any time limit established by this part." By letter of September 19, 2016, {NLMK Belgium} requested an extension of the deadline to submit new factual information from 30 prior to the scheduled date of the preliminary determination to one week prior to the commencement of verification and provided "good cause" for seeking this extension.

Here, despite the "offer" contained in the First NFI Rejection Letter that the Department would entertain a second extension request regarding new factual information (if submitted in accordance with 19 CFR 351.301(c)(5)), NLMK Belgium inexplicably let an opportunity slip away and submitted an untimely request (*i.e.*, 56 days after the October 5, 2016, deadline). Contrary to NLMK Belgium's claims of unfair time constraints, it is reasonable to assume that, were NLMK Belgium experiencing difficulties in reporting its data, it would have, no doubt, submitted its request in a timely fashion. Because it was untimely, we could not consider it, as noted in our response:[234]

The Department has already considered this request, and on September 22, 2016, we denied it. Further, pursuant to 19 CFR 351.301(c)(1), we note that the deadline for which to submit any additional request to extend the deadline for new factual information was no later than October 5, 2016. Therefore, your second request for an extension of the new factual information deadline is untimely. Pursuant to 19 CFR 351.302(c), an untimely filed extension request will not be considered unless the party demonstrates that an extraordinary circumstance exists; however, the reasons contained in your request were largely the same as those in your first request for an extension.

That said, however, it is the Department's practice to accept insignificant changes or corrections to a respondent's data on the first day of verification. Thus, if NPS has any information that falls into this category and wishes to present it to the Department at the start of the cost and sales verifications, it may do so at that time and the verification teams will evaluate whether the corrections are permissible then.

Despite NLMK Belgium's untimely submitted extension request, we provided it yet another "bite at the apple," however, now, given the untimeliness of the submission, the reasons for such an extension need to be considered "extraordinary."[235] Instead, we note that NLMK Belgium, reiterated its same reasons contained in NLMK Belgium First NFI Request. We further note, that at no time did NLMK Belgium provide any additional support, let alone reasons for claiming extraordinary cause exists. Regardless, we specified that, if the changes that NLMK Belgium wishes to make are minor, then it would have another opportunity to submit them at verification,

[234] *See* Department Letter re: Second NFI Deadline Extension Rejection, dated December 8, 2016 (Second NFI Deadline Extension Rejection) (citations omitted).

[235] *See* 19 CFR 351.302(c).

for appropriate Department consideration[236]; again, the Department explicitly stated this as such, in all three sales verification outlines issued to NLMK Belgium:[237]

> Please note that verification is not intended to be an opportunity for submission of new factual information. New information will be accepted at verification only when: (1) the need for that information was not evident previously; (2) the information makes minor corrections to information already on the record; or (3) the information corroborates, supports, or clarifies information already on the record.

However, after the Department's consideration of this issue, given the significance of the reporting errors, and the degree to which it impacts the Department's calculations, we find that it would be inappropriate to accept the corrections offered at verification. These errors are not minor errors, but rather they reach the threshold for new factual information. While NLMK Belgium argues that the errors were unintentional, the fact remains that errors in a factor as fundamental as the control number invalidates all the allocations, matches, and calculations that follow.

Although NLMK Belgium cites two cases where the Department accepted revisions to control numbers after verification, neither case is factually similar.[238] Specifically, in *Coated Paper from the PRC*, the Department allowed a respondent to correct a product characteristic error characterized as a typographical mistake,[239] after applying the following evaluation criteria:

> {T}he Department considers several factors in determining whether or not to accept corrections of errors submitted by interested parties. In particular, we evaluate whether the correction is clerical or methodological, whether we are able to verify the error and are satisfied with the documentary support for the reported correction, whether the error calls into question the overall integrity of the respondent's submissions, and whether it amounts to a 'substantial revision' of previously reported data.[240]

Unlike *Coated Paper from the PRC* (where the error was clerical and, thus, a minor correction of the type typically accepted at verification), here NLMK Belgium's errors: 1) are methodological (given that NLMK Belgium incorrectly based its chromium data on maximum content requirements, rather than minimums, and yield strength data on hardness, rather than tensile

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[236] *See* Second NFI Deadline Extension Rejection.

[237] *See* Department Letter re: Less-than-Fair-Value Investigation on Certain Carbon and Alloy Steel Cut-To-Length Plate from Belgium, dated December 5, 2016; Department Letter re: Less-than-Fair-Value Investigation on Certain Carbon and Alloy Steel Cut-To-Length Plate from Belgium, dated December 9, 2016; and Department Letter re: Less-than-Fair-Value Investigation on Certain Carbon and Alloy Steel Cut-To-Length Plate from Belgium, dated December 23, 2016.

[238] NLMK Belgium also cites to an apparent control number issue in the ongoing investigation of CTL plate from Taiwan, but does not provide further explanation for the significance of the case. To the extent practicable, the Department endeavors to treat the companies in various proceedings consistently, though distinct facts, within particular cases, can allow minor deviations in practice to occur from time to time.

[239] *See Coated Paper from the PRC*, and accompanying Issues and Decision Memorandum, at Comment 10.

[240] *Id*. (citations omitted).

strength); 2) call into question the overall integrity of the respondent's submissions[241] (when viewed in conjunction with the other errors and omissions found at verification; *see* Comment 11, below); and 3) amount to a "substantial revision" of previously reported data (in light of the fact that they affect 2 percent of home market sales and 30 percent of U.S. sales, by volume).[242]

In the same vein, in *Off-the-Road Tires from India*, the Department requested that the respondent correct certain minor errors in its control numbers which were presented on the first day of verification and accepted by the Department.[243] The Department's request for a new database in *Off-the-Road Tires from India* stemmed directly from its acceptance of the corrections, and, thus, it is factually dissimilar to the situation at issue here (where the errors were not deemed minor nor accepted on the first day of verification).

NLMK Belgium, citing *NTN*, argues that there is a long-standing legal precedent that a party be given the opportunity to correct its own errors prior to the final determination, even when those corrections are untimely. However, the issue before the Court in *NTN*[244] was the correction of clerical errors (*e.g.*, typing and transcription mistakes), not mistakes of the type contemplated here. Indeed, the court agreed with the *NTN* plaintiff that "clerical errors of a respondent are different in nature from substantive errors, *e.g.*, errors that result from errors of judgment."[245] Thus, contrary to NLMK Belgium's claim, *NTN* does not stand for the proposition that respondents have blanket authority to correct inaccurate data at any time in a proceeding.

We recognize that the Federal Circuit, in *Timken*, does not expressly bar the correction of other types of errors, including "methodological errors, substantive errors, or errors in judgement,"[246] and, indeed, it finds that the Department is "free to correct any type of importer error" prior to the issuance of its final results. However, the errors before the *Timken* court were limited in scope, consisting of a handful of changes to reported sales channel information and the misclassification of the export destination a few sales. While the Court did require the Department to consider the untimely-filed information in a revised dumping analysis, the Court ultimately upheld: 1) the Department's finding, on remand, that the information was unreliable; and 2) as a result, the Department's "refusal to accept Timken's corrective information." Under these facts, we disagree with NLMK Belgium that the Court has mandated the acceptance of corrective information, regardless of how substantive it is or whether the incorrect information was submitted as part of a pattern of inaccuracy (*see* Comment 11, below).

NLMK Belgium's argument, taken to its logical conclusion, would eliminate the requirement that respondents submit accurate information in a timely manner; under NLMK Belgium's

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[241] We note that, for NLMK Belgium's remaining incorrectly reported product characteristic (*i.e.*, heat treatment), this was an error resulting from careless reporting; which is part and parcel of the integrity (or lack thereof) of its reporting.

[242] *See* NLMK Belgium Sales Verification Report, at 15.

[243] *See Off-the-Road Tires from India*, 82 FR 4848 (January 17, 2017) and accompanying Issues and Decision Memorandum, at Comment 5.

[244] *See* NLMK Belgium's Case Brief, at 8.

[245] *See NTN*, 74 F.3d, at 1207.

[246] *See Timken*, 434 F.3d, 1345.

rubric, respondents could merely submit "corrections" at any point in a proceeding prior to a final determination, fully sanctioned by the Courts, even if those corrections resulted in a wholly-new response. We disagree that such an outcome was contemplated in either *Timken* or *NTN*, or that the Department has no discretion in the matter to administer the dumping law consistent with its regulations on timeliness. For further discussion of this latter point, *see* Comment 9, below.

We disagree with NLMK Belgium that our rejection of NLMK Belgium's new factual information was inconsistent with the WTO's ruling in *Hot-Rolled Steel Products from Japan*. The statute and the Department regulations are consistent with the United States' WTO obligations; and the Department has followed the statute and its regulations in this case, as indicated in the Comment, above.

Finally, we disagree with NLMK Belgium that, because it offered the information in advance of the final determination, and the Department verified the description noted above, we should accept it now.[247] As noted by the Department at verification, this information qualifies as new factual information.[248] While the Department may indeed request new factual information at any point in the proceeding, pursuant to 19 CFR 351.301(a), we find that this action would be inappropriate here, given the nature and extent of the corrections.

The ability to make accurate product comparisons goes to the heart of the Department's dumping methodology. Because NLMK Belgium's errors affected a substantial portion of its U.S. and home market sales listing, as well as its COP database, we are unable to make accurate product comparisons, or conduct an accurate sales-below-cost test, for NLMK Belgium, thereby compromising the integrity of its reported data as a whole. We therefore find that NMLK Belgium provided information that cannot be verified, thus warranting the use of facts available, in accordance with section 776(a)(2)(D) of the Act. Further, because this information was in NLMK Belgium's possession, and NLMK Belgium had the ability to seek guidance from the Department but failed to do so, we find that NLMK Belgium failed to cooperate to the best of its ability in complying with a request for information, within the meaning of section 776(b) of the Act. Therefore, we find that an adverse inference is appropriate. For further discussion, *see* Comment 11, below.

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[247] *See TMK IPSCO v. United State*s, 179 F.Supp.3d 1328, 1354-55 (CIT 2016), n.34 (Explaining that Commerce has a practice of accepting new factual information at verification when "(1) the need for the information was not evident previously, (2) the information makes minor corrections to evidence already on the record, or (3) the information corroborates, supports, or clarifies information already on the record." (citation omitted)); *see also*, *e.g.*, *Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Certain Components Thereof, from Japan; Final Results of Antidumping Duty Administrative Review*, 56 FR 65228, 65238-65239 (December 16, 1991); where we stated that, "the purpose of a verification is to ascertain the accuracy and completeness of the information submitted, not to allow wholesale revisions of the…deficient response."

[248] *See* NLMK Belgium Sales Verification Report, at 2.

Comment 10: Sales by Manage

NLMK Belgium's Arguments

- During the POI, NLMK Belgium sold CTL plate in the home market through its affiliated service center, Manage. Although the Department determined that Manage was part of the collapsed NLMK Belgium entity,[249] NLMK Belgium argues that the Department should not include Manage's sales and cost information when calculating NLMK Belgium's dumping margin for the following reasons: 1) Manage's home market sales are insignificant; 2) Manage does not produce plate;[250] and 3) none of Manage's products have the same or similar CONNUMs as the subject merchandise NLMK Belgium sold to the United States.

- NLMK Belgium acknowledges that the Department found errors in Manage's product coding at verification. However, it contends that the Department's short turnaround time in requesting Manage's information made it almost impossible for NLMK Belgium to provide timely and accurate answers.

The Petitioner's Arguments

- The petitioner disagrees that the Department should ignore Manage's sales and cost information.[251] The petitioner notes that NLMK Belgium admits that Manage is involved in the production of subject merchandise, given that it cuts thin coils into CTL plate.

- The petitioner also disagrees with NLMK Belgium's claim that Manage's sales in the home market were insignificant, and it argues that NLMK Belgium provided no support for it. According to the petitioner, the fact that Manage made even one sale of subject merchandise in the home market qualifies it for inclusion in the Department's dumping calculation.

Department's Position:

We disagree with NLMK Belgium's contention that the Department should disregard Manage's sales information. As explained below, we continue to find that Manage's sales of foreign like product are relevant and, therefore, should be included as part of NLMK Belgium's data. We agree with the petitioner that Manage's sales should be included in this investigation, as they are potential matches to NLMK Belgium's U.S. sales.

NLMK Clabecq was selected as a mandatory respondent in this investigation, and submitted its original questionnaire response on behalf of itself, its affiliated exporters/resellers, NLMK Plate and NLMK Sales Europe, and their common parent company, NLMK Belgium Holdings S.A.

[249] *See* Memorandum, "Less Than Fair Value Investigation of Certain Carbon and Alloy Steel Cut-To-Length Plate from Belgium: Preliminary Affiliation and Collapsing Memorandum for NLMK Belgium," dated October 27, 2016 (NLMK Collapsing Memorandum).

[250] Rather, according to NLMK Belgium, Manage is a service center, and sometimes cuts coiled thin plate to CTL plate. *See* NLMK Belgium Case Brief, at 18.

[251] *See* Petitioner's Rebuttal Brief, at 19.

(NLMK Belgium Holdings).[252] This response also included information on NLMK Manage and NLMK LL, both affiliated producers and both also owned by NLMK Belgium Holdings. However, NLMK Belgium requested permission to exclude the activities of Manage from its reporting.[253] Because of the potential for affiliation, in September 2016, the Department requested that Manage file a complete response to sections B and D of the Department's questionnaire,[254] which it did in October 2016.[255]

After examining these responses, the Department determined that NLMK Clabecq was affiliated with NLMK Plate Sales, NLMK Sales Europe, NLMK Manage, and NLMK LL, and that it was, therefore, appropriate to collapse these affiliates into a single entity.[256] Based on NLMK Belgium's responses, the Department found that: [257]

> During the POI, NLMK Manage and NLMK Clabecq each produced subject merchandise (*i.e.*, CTL plate) that falls within the scope of this investigation.[258] Also during the POI, NLMK LL produced plate in coils, which it transferred to NLMK Manage to be cut into CTL plate.[259]

Because the Belgian NLMK entities have common ownership, interlocking boards and managers, and intertwined operations and because NLMK Belgium Holdings directly or indirectly controls all these companies, the Department found them to be affiliated under the definitions in section 771(33)(F) of the Act and in 19 CFR 351.401(f).[260]

Since the requested Manage sales and cost information was received shortly before the *Preliminary Determination*, the Department did not use this information in the *Preliminary Determination*. NLMK Belgium maintained that the inclusion of Manage's sales would be irrelevant to the dumping calculation because Manage's products were not more similar to U.S. products than the products that NLMK Clabecq had already reported, stating that:[261]

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[252] *See* NLMK Belgium June 27, 2016 AQR.

[253] *See* NLMK Belgium Letter re: NLMK Plate Sales' Request for Exclusion from Sales and Cost Reporting Obligations: CTL Plate from Belgium, dated July 1, 2016 (NLMK Belgium Exclusion Request).

[254] *See* Department Letter re: Reporting of Manage Sections B and D Information, dated September 15, 2016.

[255] *See* NLMK Belgium's October 18, 2016 Manage Section B Questionnaire Response, and NLMK Belgium's October 18, 2016 Manage Section D Questionnaire Response.

[256] *See* NLMK Collapsing Memorandum.

[257] *Id.*, at 6.

[258] *See* NLMK Belgium June 27, 2016 AQR, at 5, 17, and A-14.

[259] *Id.*, at 5 and A-14.

[260] *See* NLMK Collapsing Memorandum, at 9.

[261] *See* NLMK Belgium Exclusion Request at 3 (emphasis in original). S*ee also* NLMK Letter re: Request for Ruling on Exclusion Request, dated August 26, 2016, and NLMK Belgium Case Brief, at 18.

> Manage did not sell any product that matches *any U.S. CONNUM or any CONNUM sold by NPS in the home market during the period*. Further, Manage sells no product to the United States.

Due to this information about Manage's products and its lack of sales to the United States, the Department focused on examining product characteristics and quantity and value reconciliation at the one-day verification at NLMK Belgium's facility in La Louviere.[262] At verification, NLMK Belgium informed the Department that:[263]

> Manage had miscoded the data reported for the physical characteristics carbon, nickel, and chromium for all products, and it had also misreported the quality and yield strength for some products; Manage also used these incorrect data in compiling the reported control numbers. Company officials further stated that they discovered these errors when preparing their response to Department's November 2016 supplemental questionnaire to NLMK Clabecq, which had similar errors….

As with the product characteristic and control number errors presented at the verification at NLMK Clabecq, we did not accept the changes presented because these errors are not minor corrections, but rather they reach the threshold for new factual information, within the meaning of 19 CFR 351.301(c)(1).[264] As with the product characteristic and control number errors presented at the NLMK Clabecq verification, we obtained a list of the affected control numbers only.[265] A second correction presented at verification, consisting of a very small number of previously unreported home market sales, representing 0.36 percent of Manage's home market sales during the POI, was accepted[266]; NLMK Belgium stated that the omission of these sales had been due to a clerical error.[267] However, the control numbers reported for these additional sales were different from control numbers previously reported by Manage, as discussed below.

At verification we examined the control number errors for the selected sales to verify Manage's description of the reporting error.[268] Further, we attempted to confirm the veracity of NLMK

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[262] *See* Memorandum, "Verification of the Sales Response of NLMK Manage Steel Center in the Antidumping Duty Investigation of Certain Carbon and Alloy Steel Cut-To-Length Plate from Belgium," dated January 12, 2017 (Manage Verification Report).

[263] *Id.*, at 6-7. Specifically, with regards to chromium, nickel, and carbon, company officials explained that "they used the final specifications of the finished product from Manage, rather than the external specification of the coil they used to produce the plate." Additionally, with regards to quality, company officials explained that "the errors in coding related to clerical errors in categorizing the products, as well as in entering the quality code numbers in the sales listing" and regarding yield strength, Manage's "own internal specifications sometimes indicate a higher yield strength than the given range/minimum in the external standard." Furthermore, company officials stated "that they made clerical errors in calculating and categorizing the strength values." *Id.*

[264] *Id.*, at 2.

[265] *See* Manage Sales Verification Exhibit 1.

[266] *See* Manage Verification Exhibit 1.

[267] *Id.*, at 3.

[268] *Id.*, at 7.

Belgium's previous statement that none of Manage's products would provide the best matches to products sold in the United States.[269] As our verification report states, to test this proposition:[270]

> we attempted to analyze whether this conclusion was impacted by the product coding errors noted above {*i.e.*, product characteristic and control number errors}. In our analysis, because quality is the first (*i.e.*, most important) characteristic in the matching hierarchy for CTL plate, we focused on the quality changes.

All quality codes in Manage's original submission were 750; the corrected quality codes examined at the Manage verification included codes 750, 785, and 800. Based on these tests, we found that the Manage control numbers examined at verification were not more similar to U.S. products than NLMK Clabecq's control numbers used in the *Preliminary Determination's* concordance.[271]

However, the control numbers of the additional sales presented as a correction during the Manage verification included quality codes 480, 750, 785, and 800. These sales and their quality codes were not examined for potential matches to U.S. sales during verification because these sales were presented as a separate correction from the control number errors. We note that while quality code 480, and the control numbers that contain this code, was not examined at the Manage verification, this code in particular is very likely to be a match to U.S. products.

Matching methodology is hierarchical, and, thus, the quality code is the most important characteristic for matching between the home and U.S. markets in this CTL plate investigation. The home market sales reported by NLMK Clabecq use quality codes 490, 750, 760, 763, 765, and 785. In the United States, NLMK Belgium sold products with quality codes 490, 750, 760, 765, and 785; however, in the concordance from the *Preliminary Determination*, all U.S. sales of plate with quality code 490 were matched with NLMK Clabecq products with quality codes 750, 765, and 785. Since Manage's data was not used for the *Preliminary Determination*, its products and their control numbers were not included in the concordance. Given the additional sales accepted as a correction at verification, however, Manage now has products with quality code 480. For matching purposes, a quality code of 480 is more similar to a 490 code than 700 series codes. Therefore, we disagree with NLMK Belgium and find it reasonable to assume that Manage's products may in fact have been the most similar matches to certain U.S. sales.

However, Manage originally reported only sales of quality code 750 product; therefore, it only reported costs for quality code 750 as well. Consequently, the Department is unable to use the additional home market sales presented at verification because, even though these additional sales could be more similar and, therefore, would be potential matches to U.S. sales, there is no accompanying cost information on the record for these sales.

As noted in Comment 9 above, control numbers are a fundamental tenant of the Department's methodology. Because the control numbers are essential and, as shown above, because

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[269] *See* NLMK Belgium Exclusion Request, at 3; *see also* NLMK Belgium Case Brief, at 18.

[270] *See* Manage Verification Report, at 8.

[271] *Id.*, at 8-9.

Manage's control numbers may in fact be the best matches to certain U.S. sales, the Department has no basis to disregard Manage's sales. Indeed, NLMK Belgium itself has stated that Manage does produce foreign like product, which is relevant to our investigation.[272] The reporting errors and omission of sales by Manage prevented the accurate matching of U.S. and home market products and further prevented the accurate calculation of the dumping margin. Further, because the correct information is not on the record of this proceeding, we find Manage's control numbers to be unusable for product matching and dumping margin calculation.

The ability to make accurate product comparisons goes to the heart of the Department's dumping methodology. Because Manage's product characteristic and control number errors affected all of its reported data, we are unable to make accurate product comparisons, or conduct an accurate sales-below-cost test for Manage, thereby compromising the integrity of its reported data as a whole. Because the errors were not evident prior to verification from the data reported, the Department did not request that Manage make any corrections. It is well settled that the onus of creating a complete and accurate record rests with the respondent. As the CIT has stated in numerous cases, "the burden of creating an accurate record rests with the respondent, not the United States Department of Commerce."[273] Based on verification at Manage, however, we find that NLMK Belgium's inability to support its reported information warrants the use of facts available, in accordance with section 776(a)(2)(D) of the Act. Further, because this information was in NLMK Belgium's possession, and NLMK Belgium had the ability to seek guidance from the Department but failed to do so, we find that NLMK Belgium failed to cooperate to the best of its ability in complying with a request for information, within the meaning of section 776(b) of the Act. Therefore, we find that an adverse inference is appropriate. For further discussion, *see* Comment 11, below.

Comment 11: Total AFA for NLMK Belgium

The Petitioner's Arguments

- The petitioner argues that the Department should base NLMK Belgium's final dumping margin on total AFA because at verification the Department found that NLMK Belgium's reported sales and cost data contained significant errors and omissions. According to the petitioner, NLMK Belgium failed to act to the best of its ability in that it submitted unreliable and unusable data, as confirmed by the Department's four verification reports.[274] With respect to the data not examined at verification, the petitioner contends that there is no basis for the Department to presume that it is not likewise tainted by errors.

[272] *See* NLMK Belgium June 27, 2016 AQR, at 5, stating that "some home market sales of subject merchandise may have been produced by Manage from LL coil," and, at 17, stating that "Manage Service Center has a small portion of coil that was further processed into CTL plate during the period of investigation." *See also* Petitioner's Rebuttal Brief, at 19 (citing NLMK Belgium Case Brief, at 18).

[273] *See e.g., Ta Chen Stainless Steel Pipe v. United States,* Slip Op. 00-107 (CIT 2000) (citing *Tianjin Machinery Import & Export Corp. v. United States*, 16 CIT 931, 936, 806 F. Supp. 1008, 1015 (1992) and *Chinsung Indus. Co. v. United States*, 13 CIT 103, 705 F.Supp. 598 (1989)).

[274] *See* Petitioner's Case Brief, at 4.

- Specifically, the petitioner contends that NLMK Belgium misreported the chromium, yield strength, and heat treatment components of its reported control numbers, as well as the associated product characteristic codes, for almost 33 percent of the products in the U.S. and home market sales listings.[275] (For further discussion, *see* Comment 9, above.) The petitioner asserts that this error rendered the price-to-price comparisons inaccurate for a significant percentage of U.S. sales, and it also resulted in "significant alterations to the reported cost databases."[276] According to the petitioner, the Department has relied on total AFA in similar situations,[277] and it should do so here because, otherwise, the record does not allow the Department to correct this error.

- In addition to the misreported CONNUMs, the petitioner argues that, because the Department discovered numerous other errors during verification, the reliability and accuracy of the data as a whole, is undermined.[278] The petitioner points out that the verification process, by nature, relies on sampling, and the Department's discovery of seemingly minor discrepancies may reveal deeper systematic errors in the databases.[279] In all, the petitioner identifies twelve distinct errors, in addition to the numerous errors presented as minor corrections,[280] which the Department found at verification: 1) 36 of 150 NAP sales invoices examined did not match the data in its accounting system;[281] 2) the gross unit price contained in two invoices did not match the corresponding reported gross unit price; 3) multiple errors with the six sales examined during the CEP sales verification;[282] 4) failure to properly account for and

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[275] *See* Petitioner's Case Brief, at 6 (citing NLMK Belgium Sales Verification Report, at 2)

[276] *See* Petitioner's Case Brief, at 5 (citing Memorandum, "Verification of the Cost Response of NLMK Clabecq SA in the Antidumping Duty Investigation of Certain Carbon and Alloy Steel Cut-to-Length Plate from Belgium," dated January 11, 2017, at 3).

[277] *See* Petitioner's Case Brief, at 7 (citing *Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut-To-Length Carbon-Quality Steel Plate Products From India*, 64 FR 73125, 73129-73130 (December 29, 1999), and accompanying Issues and Decision Memorandum, at Comment 1 (applying AFA where the respondent's data had numerous problems, including, *inter alia*, misreported product characteristics); *Stainless Steel Bar from India: Final Results of Antidumping Duty New Shipper Review*, 72 FR 72671, 72672 (December 21, 2007), and accompanying Issues and Decision Memorandum, at Comment 2 (finding that the home market sales database could not be relied on due to errors stemming from misreported CONNUMs); and *Certain Hot-Rolled Carbon Steel Flat Products From Thailand: Final Results of Antidumping Duty Administrative Review and Partial Rescission of Antidumping Duty Administrative Review,* 73 FR 33396 (June 12, 2008), and accompanying Issues and Decision Memorandum, at Comment 1 (finding that misreported yield strengths "causes the cost database, in addition to the sales databases, to be unreliable").

[278] The petitioner notes that these errors affect a wide variety of adjustments and a substantial portion of NLMK Belgium's reported sales. *See* Petitioner's Case Brief, at 10.

[279] *See* Petitioner's Case Brief, at 7-8 (citing U.S. Department of Commerce 2015 Antidumping Manual, Chapter 15, at 23. *See http://enforcement.trade.gov/admanual/index.html*).

[280] The petitioner generally lists these errors as corrections to revise sales quantities and payment dates, as well as unreported packing expenses. *See* Petitioner's Case Brief, at 9.

[281] The petitioner notes that, of the 36 invoices with errors, NLMK Belgium misreported the weight and/or gross unit price for all of those which related to subject merchandise (*i.e.*, 16 invoices).

[282] The petitioner notes that these errors related to the following issues: 1) incorrect date of sale for five sales; 2) incorrect inland freight expense for four sales; 3) incorrect delivery terms for five sales; 4) incorrect invoice price

correctly calculate U.S. warehousing expenses; 5) failure to report inland freight expenses for one invoice; 6) the inability to substantiate reported inventory carrying costs; 7) a misreported shipment date for one invoice; 8) 12 of 20 NAP invoices examined contained a different shipment date than what was reported; 9) the shipment date reported for two of four invoices examined was later than the shipment date contained in NAP's records; 10) incorrectly calculating the reported warehousing expenses incurred in Belgium for U.S. sales; 11) misreporting of handling expenses incurred in Belgium for U.S. sales; and 12) failure to report credit insurance expenses for all U.S. sales.[283] The petitioner concludes that NLMK Belgium's inattentiveness, carelessness, and inadequate record keeping resulted in a record void of usable data.

NLMK Belgium's Arguments

- NLMK Belgium argues that the use of total AFA is unjustified and contrary to law. NLMK Belgium contends that, under the Act and Court precedent, the Department must affirmatively show that: 1) NLMK Belgium did not act to the best of its ability in providing requested information;[284] and 2) the failure to provide information was so extensive that it compromised the entire base of reported information.

- NLMK Belgium argues that it has cooperated fully at all stages of the investigation. NLMK Belgium asserts that it: 1) responded to the best of its ability to the Department's initial questionnaire and numerous supplemental questionnaires in a timely manner, despite tight turn-around times;[285] 2) spent three weeks with the Department verifying its sales and cost information; 3) fully reported all of its U.S. sales information (plus a few extra sales of non-subject merchandise), as evidenced by the Department's ability to reconcile its reported sales and cost data to its accounting records; and 4) acted promptly in notifying the Department of errors and providing corrections. According to NLMK Belgium, given that it provided the Department with a complete listing of its sales and costs, it cannot reasonably be said to have withheld any information.

- Regarding the petitioner's specific arguments, NLMK Belgium claims that it is an open question whether it miscoded the product characteristics and control numbers in question. (*See* Comment 9, above.) According to NLMK Belgium, it could have justified its data as reported but instead chose to bring this issue to the Department's attention at verification. Given that NLMK Belgium alerted the Department to the issue as soon as it was discovered and offered to correct the matter, NLMK Belgium claims that it clearly acted to the best of its ability. NLMK Belgium contends that the Department has refused to apply total AFA in

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for one sale; and 5) incorrect billing adjustment for two sales.

[283] *See* Petitioner's Case Brief, at 8-9 (citing NAP Verification Report, at 3, 7-9, 12-13, 16, 19-23; and NLMK Belgium Sales Verification Report, at 3-6, 28, and 33.

[284] *See* NLMK Belgium Rebuttal Brief, at 1-2 (citing *Mannesmannrohren-werke AG et al., v. U.S.*, 77 F. Supp. 2d 1301, 1313 (CIT 1999) (*Mannesmannrohren*); *see also Ferro Union, Inc. et al., v. U.S.*, 44 F. Supp. 2d 1310, 1329 (CIT 1999) (*Ferro Union*)).

[285] NLMK Belgium notes that the Department issued these supplemental questionnaires in the six weeks prior to the commencement of verification.

other analogous cases, notably where the respondent also reported its data based on internal, rather than external, specifications.[286] Moreover, NLMK Belgium points out that because Industeel based some of its CONNUMs from internal specifications, the Department should accept NLMK Belgium's originally reported CONNUMs to ensure uniform application of the Department's product characteristic instructions.

- NLMK Belgium takes issue with the petitioner's list of "discrepancies," emphasizing that NAP's sales information was compiled, in part, manually, and thus, subject to human error. In fact, NLMK Belgium points out that the first three of these "discrepancies" only amount to minor differences between sales data reported in the U.S. sales listing and that contained physical sales documents. NLMK Belgium maintains that, while that information may contain errors, it was never hidden, manipulated, or intentionally distorted in NLMK Belgium's submitted questionnaire responses. As with the product characteristic/control number issue, NLMK Belgium contends that it acted in good faith and to the best of its ability with the information at its disposal.

Department's Position:

We determine that the application of total facts available to NLMK Belgium with an adverse inference is warranted for the final determination. As noted in the "Use of Adverse Facts Available" section above, section 776(a)(1) and 776(a)(2)(A)-(D) of the Act provide that if necessary information is not available on the record or if an interested party:

> (A) withholds information that has been requested by the Department;
>
> (B) fails to provide such information in a timely manner or in the form or manner requested subject to section 782(c)(1) and (e) of the Act;
>
> (C) significantly impedes a proceeding under the antidumping statute; or
>
> (D) provides such information but the information cannot be verified as provided for in section 782(i) of the Act,
>
> the Department shall, subject to subsection 782(d) of the Act, use facts otherwise available in reaching the applicable determination.[287]

Section 782(d) of the Act provides that, if the Department determines that a response to a request for information does not comply with the request, the Department shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person an opportunity to remedy or explain the deficiency. If that person submits further information that continues to be unsatisfactory, or this information is not submitted

[286] *See* NLMK Belgium Rebuttal Brief, at 5 (citing *Xanthan Gum from Austria: Final Determination of Sales At Less Than Fair Value,* 78 Fed. Reg. 33354 (June 4, 2013) (*Xanthan Gum from Austria*), and accompanying Issues and Decision Memorandum.

[287] *See TPEA*, at 362; *see also TPEA Application Dates*.

within the applicable time limits, the Department may, subject to section 782(e) of the Act,[288] disregard all or part of the original and subsequent responses, as appropriate.

In this case, as noted in Comments 8 through 10, above, NLMK Belgium failed to establish the accuracy and completeness of its reported sales information at verification, and the errors and omissions were substantial. In particular, NLMK Belgium failed to report the correct U.S. date of sale for approximately 15 percent of its U.S. sales database (leading, as a result, to the omission of a significant portion of its reportable U.S. sales transactions and errors in any currency conversions performed for the reported ones); incorrectly determined the product characteristics (and, by extension, the control numbers) for approximately 33 percent of its home market and U.S. sales; and it misreported the sales and cost data reported for Manage (and, by extension, failed to substantiate its claims that Manage's sales do not match to any of NLMK Clabecq's U.S. sales). Any of these significant errors, in isolation, may well have led the Department to conclude that NLMK Belgium's data is not useable. However, when these errors are viewed in combination, along with the other, extensive data problems observed at verification, that conclusion becomes inescapable.

We disagree with NLMK Belgium that any of the major problems identified above is curable, because it is within the Department's discretion either to accept the data as reported, or to request new factual information to correct the errors and omissions. While we agree that these courses of action are, theoretically, possible, we find that they both are unreasonable, as the former would lead to the calculation of a dumping margin that is based on inaccurate information, and the latter would violate the Department's practice and regulatory obligations with regard to the acceptance of new factual information. This latter action would be particularly inappropriate, given that NLMK Belgium had adequate opportunity to submit the correct information (in the case of the date of sale) or to request guidance from the Department (in the case of certain product characteristic errors). We discuss each of these errors in turn, below.

With respect to the date of sale error, we disagree with NLMK Belgium that it reported sufficient sales on which to calculate a dumping margin. As noted in Comment 8, above, in an investigation, date of sale information is crucial to the determination of a company's dumping margin, because the date of sale determines the universe of reportable sales, and it also determines the appropriate exchange rate used in all currency conversions. At verification, we found that the lag time between NLMK Belgium's shipment from Belgium and the issuance of the commercial invoice by NAP could be more than 60 days[289] (*i.e.*, more than two months). Given this finding, we conclude that NLMK Belgium failed to report a significant volume of U.S. sales. Determining the appropriate universe of sales is critical to the Department's dumping determinations and the date of sale plays a central role in determining the appropriate universe of sales. Consequently, NLMK Belgium's refusal to provide factory shipment dates for its reported

[288] Section 782(e) of the Act states that the Department shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements established by the administering authority if: (1) the information is submitted by the established deadline; (2) the information can be verified; (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination; (4) the interested party has demonstrated that it acted to the best of its ability; and (5) the information can be used without undue difficulties.

[289] We note that, contrary to NLMK Belgium's claims, at verification, we identified six NAP invoices that were issued 60 days or later than the corresponding NLMK Clabecq invoice. *See* NAP Verification Report, at 10-11.

MTO sales, as well as reporting all other sales shipped during the POI but invoiced afterwards, deprived the Department of the relevant sales universe and sales-specific exchange rates to use in this investigation. Thus, if the Department were to calculate a margin without using a full universe of U.S. sales, we would have no confidence that the margin computed would be an accurate representation of the respondent's pricing practices during the POI. Therefore, we find that NLMK Belgium's misreported universe of U.S. sales significantly undermines the Department's confidence in the reliability of using NLMK Belgium's data to calculate a dumping margin, which must be based on complete and accurate data, in the final determination. For further discussion, *see* Comment 8 above.

Similarly, with respect to the product characteristics error, we disagree that the data is acceptable as reported. The ability to make appropriate product comparisons goes to the heart of the Department's dumping methodology. Comparing two products/models with different product characteristics rather than identical or similar model matches is likely to distort dumping calculations. Because NLMK Belgium misreported its control numbers and certain product characteristics for approximately a third of its U.S. sales, we are unable to compare sales of those products to the most similar foreign like product, as required by section 773(1)(B) of the Act. Further, NLMK Belgium's equivalent errors with respect to home market products undermines our confidence in our ability to identify the "best" match for the remaining U.S. products. Finally, these errors affected how individual products are grouped into control numbers for cost reporting purposes and, thus, we do not have correct COP, constructed value, and difference-in-merchandise adjustment information for the affected sales. For further discussion, *see* Comment 9 above.

We also disagree with NLMK Belgium's contention that Manage's sales and cost information are insignificant in this investigation and, as such, the Department should disregard them. As we found in the *Preliminary Determination*, the affiliation between NLMK Belgium and Manage, "presents a significant potential for manipulation of price or production of subject merchandise, pursuant to 19 CFR 351.401(f)."[290] This significant potential for manipulation is precisely why the Department instructed NLMK Belgium to report Manage's sales and cost data. Due to the nature of the Department's collapsing analysis, it was not possible to determine if such potential for manipulation existed without first collecting information regarding the nature of the affiliation between NLMK Belgium and Manage.[291] However, contrary to NLMK Belgium's claims, the Department did not delay in instructing NLMK Belgium to report all its home market sales and cost data; rather, we instructed it to do so in the original questionnaire, where we stated:

> Report all sales of the foreign like product, whether or not you consider particular merchandise to be that which is most appropriately compared to your sales of the

[290] *See Preliminary Determination*, and accompanying Preliminary Decision Memorandum, at 5.

[291] We note that, in August 2016, we notified NLMK Belgium that the Department was considering collapsing NLMK Belgium and Manage, and that, as a result of this analysis, it could be required to report Manage's sales and cost data. *See* Supplemental Sections B and C Questionnaire, at 2, where we stated that, "If your answers to the above questions indicate that collapsing is appropriate, we will require you to revise your home market sales listing to include MSC's POI sales of CTL plate, accordingly." *See also* NLMK Belgium's Supplemental ABC Response, dated September 9, 2016, at 2-6.

> subject merchandise. The Department will then select the appropriate comparison sales from your sales listing.… Unless otherwise instructed by the Department, you should report per-unit COP information for each CONNUM included in your home market or third country sales listing submitted in response to section B of this questionnaire.[292]

Thus, when we explicitly requested this information, in September 2016, we afforded NLMK Belgium not a first, but a second, opportunity to report the sales and cost data of Manage and, while significant time lapsed between these two requests, NLMK Belgium could have used this additional time to further examine Manage's records to ensure that, if the Department explicitly requested such information, it would be provided completely and accurately. Moreover, that NLMK Belgium requested the Department exclude it from reporting sales and cost information for Manage demonstrates that it understood that the Department's initial questionnaire required a response for Manage;[293] a response NLMK Belgium chose not to prepare and include in its original response nor to accurately prepare in the time between its original submission and the Department's explicit, second request. The Department' silence regarding Manage's sales and cost, while it considered other factors in the case, does not excuse NLMK Belgium from undertaking a diligent effort to collect the necessary information and correctly and fully comply with the Department's requests. Furthermore, after the Department made its second request for this information, we granted NLMK Belgium four extensions of the deadline,[294] amounting to an additional 19 days, to submit it. Therefore, we are unconvinced by NLMK Belgium's claims that the Department failed to provide it with sufficient time to accurately report Manage's sales and cost information, and we note that NLMK Belgium had almost five months to examine and prepare this information should it be requested. Had NLMK Belgium used this time to examine Manage's sales and cost data, it may well have discovered the errors in its product characteristics far in advance of verification and corrected them in a timely manner.

At verification, the Department identified information that supports a reasonable assumption that certain of Manage's products may be the most similar matches to products sold by NLMK Belgium in the United States. Thus, contrary to NLMK Belgium's claims, sales of these products made by Manage, which may be the most similar matches to products sold by NLMK Belgium in the United States, cannot be considered insignificant in this investigation. However, because NMLK Belgium did not report its accompanying cost information for these sales on the record of this investigation, we find that the control numbers of Manage's sales are unusable for product matching. As a result, we find that NLMK Belgium's failure to accurately report sales and cost data for Manage inhibits the Department from making accurate matches of U.S. and home market products and calculating an accurate dumping margin for NLMK Belgium. This

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[292] *See* Antidumping Questionnaire, at B-2 and D-1.

[293] *See* NLMK Belgium Exclusion Request, at 3, where NLMK Belgium also first alleged that the products sold by Manage would not match to NLMK Belgium's U.S. sales during the POI.

[294] *See* Department Letters re: Extension Request for Response by NLMK Clabecq's Affiliates, dated September 22, 2016; Extension Requests for NLMK Clabecq SA and its Affiliate, dated October 5, 2016; Extension Requests for NLMK Clabecq SA and its Affiliate, dated October 12, 2016; and Extension Requests for NLMK Clabecq S.A.'s Affiliate, dated October 13, 2016.

error, like the date of sale and control number errors detailed above, compromise the integrity of NLMK Belgium's responses as a whole. For further discussion, *see* Comment 10 above.

In addition to these significant failures, NLMK Belgium had numerous other errors and omissions in its reporting that the Department identified at verification.[295] These errors and omissions were pervasive throughout NLMK Belgium's data—including NLMK Belgium's reporting of its U.S. warehousing expenses, payment dates, shipment dates, U.S. credit insurance, credit expenses, packing expenses, weight conversions, and inventory carrying costs, as well as in the transaction-specific data examined for the pre-selected and surprise sales.[296] While NLMK Belgium provided corrections to much of its misreported data at verification, it did not do so in all instances. Further, we agree with the petitioner that the existence of so many, prevalent errors undermines our confidence that other data, not specifically examined at verification, do not also suffer similar defects. Verification, by its nature, is a spot check (somewhat akin to sampling), and when spot checks reveal that the data sample examined at verification is replete with errors, omissions, and discrepancies, we have no confidence in the accuracy of any individual piece of NLMK Belgium's information not specifically examined.

In sum, we find that necessary information is not on the record, and that NLMK Belgium withheld information requested by the Department, failed to provide essential information on request and in a timely manner, provided information that could not be verified, and, as a result, significantly impeded the proceeding, in accordance with sections 776(a)(1) and 776(a)(2)(A), (B), (C), and (D) of the Act. To the extent that some information was provided,[297] it was unverifiable and/or so incomplete that it could not serve as a reliable basis for reaching the determination in this investigation.[298]

Given the above facts, we find that NLMK Belgium failed to cooperate by not acting to the best of its ability to comply with the Department's requests for information, as provided in section 776(b) of the Act, despite being afforded multiple opportunities to do so.[299] Specifically, NLMK Belgium failed to comply with specific information requests (such as sales shipped from Belgium during the POI and packing expenses,[300] etc.), and the responses that it did submit were

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[295] *See* NLMK Belgium Verification Report, at 2-6 and 24-28; *see also* NAP Verification Report, at 2-3, 8-9, 12-15, and 17-20.

[296] *See* NLMK Belgium Sales Verification Report, at 2-6, and 25-31; *see also* NAP Verification Report, at 2-4, 8-11, 15-18, and 21-22.

[297] Other information that NLMK Belgium attempted to present as corrections at verification demonstrated that the changes necessary to fill the omissions from, and errors in, NLMK Belgium's data were so significant that the Department could not accept this new information. *See Brother Industries, Ltd. v. US,* 771 F. Supp. 374, 384 (CIT 1991) (*Brother*), where the Court states, "Presumably, a "correction" correlates to matter already part of the record while an "omission" lacks such correlation. That is, a submission of previously-omitted information may well be the equivalent of entirely new data and beyond the ability of the agency to digest and incorporate." Accordingly, we find that certain changes that NLMK Belgium offered at verification were not minor and amounted to new factual information within the meaning of 19 CFR 351.301(c)(5).

[298] *See* section 782(e)(2)-(3) of the Act.

[299] *See Mannesmannrohren*, at 1313; *see also Ferro Union*, at 1329.

[300] *See* NAP Verification Report, at 2, 10, 11; *see also* NLMK Belgium Verification Report, at 5 and 34-36.

rife with errors. In addition to the instances noted above, we note that NLMK Belgium was careless in general with the data that it submitted; for example, at verification, we found that NLMK Belgium significantly underreported its U.S. warehousing expenses and was unable to substantiate any of its reported inventory carrying costs.[301]

We disagree with NLMK Belgium that the number of supplemental questionnaires that it received should be a mitigating factor in deciding this issue. As an initial matter, we observe that there would be no need to issue supplemental questionnaires if NLMK Belgium's original response was complete, accurate, and clear. Moreover, in conducting investigations, the Department routinely issues supplemental questionnaires that may identify a flaw or discrepancy in the original response and/or seek clarification from a party that submitted the original response. Some of these questionnaires issued to NLMK Belgium were only covering one section of analysis of a previous response containing multiple sections[302] and others were limited in scope, given that they contained an analysis of only portions of a previous response.[303] While NLMK Belgium complains about multiple requests and their tight turnaround times, we note that: 1) our issuance of several supplemental questionnaires covering a single response section (such as two questionnaires covering the initial section C response) afforded NLMK Belgium with the maximum amount of flexibility to respond within the time constraints of the proceeding;[304] and 2) NLMK Belgium would not have received as many, nor as lengthy, information requests, had it reported more accurate and transparent data.

Moreover, while NLMK Belgium provided timely responses to most of these questionnaires, we disagree with NLMK Belgium's claim that doing so demonstrated its full cooperation in this proceeding. Rather, as noted above, the Department was compelled to issue NLMK Belgium multiple questionnaires because its prior submissions were carelessly prepared and contained flawed, missing, and incomplete data. Additionally, rather than using the additional time afforded to it to examine Manage's sales and cost data for accuracy, NLMK Belgium applied its resources towards continuing to insist that the Department disregard Manage's sales and cost information because, "*Manage produced no CONNUMs that match to either (1) sales of subject merchandise in Belgium or (2) to any sales of subject merchandise made to the United States during the POI*,"[305] a statement that the Department has good cause to believe was inaccurate. (*See* Comment 10, above). Accordingly, we find that merely submitting timely responses, irrespective of whether they contain incomplete and inaccurate information, and presenting argument against the data collection needs of the Department, does not qualify NLMK Belgium as acting to the best of its ability to cooperate in this proceeding.

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[301] *See* NAP Verification Report, at 3, 20, 21, and 23.

[302] *See* Department Letter re: First Supplemental Section A Questionnaire, dated August 11, 2016.

[303] *See* Department Letter re: Second Supplemental Section C Questionnaire, dated September 19, 2016 (which contained 13 questions); *see also* Department Letter re: Third Supplemental Section C Questionnaire, dated September 28, 2016 (which contained nine questions).

[304] For example, instead of having a total of two to four weeks to respond to a complete supplemental all at once, it received the same amount of time separately for each portion.

[305] *See* NLMK Belgium's Ruling Request, at 2-3 (emphasis in original). *See also* NLMK Belgium Exclusion Request, at 3 (emphasis in original); and NLMK Belgium Case Brief, at 18.

As explained by the CAFC:

> {b}efore making an adverse inference, Commerce must examine respondent's actions and assess the extent of respondent's abilities, efforts, and cooperation in responding to Commerce's requests for information. Compliance with the "best of ability" standard is determined by assessing whether respondent has put forth its maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation. While the standard does not require perfection, and recognizes that mistakes sometimes occur, it does not condone inattentiveness, carelessness, or inadequate record keeping.[306]

We find that the scope of the errors and omissions identified at verification in NLMK Belgium's data are the result of both inattentiveness and carelessness, if not of a more serious misconduct. Even though the Department does not require perfection in questionnaire responses and recognizes that mistakes sometimes occur, the Department does not condone submission of incomplete and misleading responses, which are replete with errors and discrepancies. While the Department was willing to accept minor data revisions, NLMK Belgium attempted to present revisions to significant portions of its databases, many of which were substantial. Accepting such revisions would amount to accepting a wholly-new response.[307]

Finally, we are unpersuaded by NLMK Belgium's reliance on *Xanthan Gum from Austria* and find that this case is not applicable here. In *Xanthan Gum from Austria*, like here, the Department determined it was appropriate to apply AFA where the respondent did not provide revised information to reclassify certain misreported product characteristics. In this regard, we find that *Xanthan Gum from Austria* supports the use of AFA here, rather than calls its use into question. As we stated in that case: [308]

> The issue is not the value of the errors as a percentage of total U.S. sales, or the number of instances of errors. Rather the issue is the nature of the errors and their effect on the validity of the submission.

While the Department did not assign the respondent in *Xanthan Gum from Austria* a final dumping margin based on AFA, the respondent's data there (unlike NLMK Belgium) did not suffer from additional significant errors and omissions that rendered them unverifiable under section 776(a)(2)(d) of the Act and unreliable for determining an accurate dumping margin. As stated above, the Department was not able to verify the completeness or accuracy of NLMK Belgium's reported sales information because NLMK Belgium failed to cooperate to the best of its ability in this investigation by failing to comply with our multiple requests for information.

Therefore, for the foregoing reasons, the Department concludes that NLMK Belgium failed to cooperate to the best of its ability to comply with the Department's requests for information in accordance with section 776(b) of the Act and 19 CFR 351.308(a), and determines that it is

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[306] *See Nippon Steel*, 337 F.3d, at 1382-83.

[307] *See Brother*, at 384.

[308] *See* NLMK Belgium Rebuttal Brief, at 5 (citing *Xanthan Gum from Austria*, and accompanying Issues and Decision Memorandum, at 3-4).

appropriate to use an adverse inference when selecting from among the facts otherwise available. As AFA, we have assigned a rate of 51.78 percent, which is the highest dumping margin contained in the petition. For a discussion of the selection and corroboration of this rate, *see* the "Use of Adverse Facts Available" section, above.

Comment 12: Other NLMK Belgium Adjustments

The Petitioner's Arguments

- The petitioner contends that, if the Department does not base NLMK Belgium's final margin on AFA, it should make several adjustments to NLMK Belgium's reported expense and cost data, based on its findings at verification.[309]

NLMK Belgium's Arguments

- NLMK Belgium argues that the Department should not conduct a differential pricing analysis with respect to its sales. Additionally, NLMK Belgium argues that the Department should use the movement expenses, as verified.
- Regarding warehousing, NLMK Belgium disagrees with the petitioner's argument that it underreported these expenses. Even though the Department chose to rely on a different denominator than the one originally submitted,[310] NLMK Belgium affirms that nothing in the NLMK Belgium Sales Verification Report indicated that it underreported warehousing expenses. NLMK Belgium also acknowledges that the Department should revise its U.S. warehousing expenses, it argues that the Department should not apply the highest calculated U.S. warehousing expense to all sales; rather, it should use the expenses for its two warehouses as separately calculated by NAP.[311]

Department's Position:

Because of the Department's decision to base NLMK Belgium's final dumping margin on AFA, any issues relating to NLMK Belgium's expenses and costs, as well as the differential pricing analysis for NLMK Belgium, are moot. Therefore, we have not addressed these issues for purposes of the final determination.

[309] *See* Petitioner's Case Brief, at 10-12 and 18-23.

[310] NLMK Belgium notes that, in the Department's recalculation of these expenses, it chose to rely on the total tonnage that was reported in the U.S. sales listing as having passed through these warehouses as the denominator, rather than rely on NLMK Clabecq's volume that was transported via the warehouse during the POI. *See* NLMK Belgium Rebuttal Brief, at 6 (citing NLMK Belgium Sales Verification Report, at 1, 31, and Exhibit 1.

[311] *See* NLMK Belgium Rebuttal Brief, at 7.

Recommendation

Based on our analysis of the comments received, we recommend adopting the above positions. If this recommendation is accepted, we will publish the final determination in the investigation and the final weighted-average dumping margins in the *Federal Register*.

☒ ☐

Agree Disagree

3/29/2017

X Ronald K. Lorentzen

Signed by: RONALD LORENTZEN

Ronald K. Lorentzen
Acting Assistant Secretary
for Enforcement and Compliance