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 Italy

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 Italy. As a result of our analysis, and based on our findings at verification, we made changes to the margin calculations for Officine Tecnosider s.r.l. (OTS), 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 NLMK Verona SpA (NVR) on adverse facts available (AFA). Finally, we are continuing to base the margin assigned to the third, non-participating respondent, Marcegaglia SpA (Marcegaglia), on 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:

NVR

Comment 1: Date of Sale for NVR's U.S. Direct Shipments

Comment 2: Product Characteristics and Control Numbers for NVR

Comment 3: Misreported Quantities for NVR

Comment 4: AFA

Comment 5: Other NVR Adjustments

OTS

Comment 6: Differential Pricing Methodology

INTERNATIONAL TRADE ADMINISTRATION

Comment 7: Weight Basis for OTS

Comment 8: OTS's Home Market Commissions

Comment 9: U.S. Short-Term Borrowing Rate

Comment 10: Home Market Freight Expenses

Comment 11: Disregarding Sales Where OTS Provided Only Tolling Services

Comment 12: Ministerial Error in the Cost Test for OTS

Comment 13: Cost Recovery Test

Comment 14: Financial Expense Ratio

Comment 15: Foreign Exchange Offset to Reported Direct Material Costs

Comment 16: Trasteel's Stab Acquisition Cost

II. Background

On November 14, 2016, the Department of Commerce (the Department) published the *Preliminary Determination* of sales of CTL plate from Italy at LTFV.[1] 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.[2]

In November 2016 and January 2017, we conducted verification of the sales and cost of production (COP) data reported by NVR and OTS, in accordance with section 782(i) the Tariff Act of 1930, as amended (the Act). In January 2017, we requested that OTS submit a revised cost database; we received the database 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

[1] *See Certain Carbon and Alloy Steel Cut-To-Length Plate From Italy: Preliminary Determination of Sales at Less Than Fair Value, Affirmative Determination of Critical Circumstances, and Postponement of Final Determination*, 81 FR 79423 (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 Italy" (Preliminary Decision Memorandum).

[2] *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, one of the petitioners (*i.e.*, Nucor Corporation),[3] NVR, and OTS 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 NVR and OTS from those calculated in the *Preliminary Determination*.

III. Use of Adverse Facts Available

Sections 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 sections 782(c)(1) and (e) of the Act; (C) significantly impedes a proceeding under the antidumping statute; or (D) provides such information but the information cannot be verified 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.[4]

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 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.

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[3] The petitioners in this investigation are ArcelorMittal USA LLC, Nucor Corporation, and SSAB Enterprises, LLC.

[4] Under the Trade Preferences Extension Act of 2015, numerous amendments to the AD and CVD laws were made. *See Trade Preferences Extension Act of 2015*, Pub. L. No. 114-27, 129 Stat. 362 (June 29, 2015) (*TPEA*). *See also 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*).

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. 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.[5] Section 776(b)(2) states 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."[6] Further, affirmative evidence of bad faith on the part of a respondent is not required before the Department may make an adverse inference.[7]

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.[8] 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, sections 776(a)(1) and 776(a)(2)(A), (B), (C), and (D) of the Act provide that if an interested party fails to provide or withholds necessary information within the established deadlines, significantly impedes a proceeding, or provides information but the 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

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

[6] *See Statement of Administrative Action accompanying the Uruguay Round Agreements Act*, H.R. Rep. 103-316, Vol. 1, 103d Cong. at 870 (1994) (*SAA*).

[7] *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*, 62 FR 27296, 27340 (May 19, 1997); and *Nippon Steel Corp. v. United States*, 337 F. 3d 1373, 1382-83 (Fed. Cir. 2003) (*Nippon Steel*).

[8] *See SAA*, at 870.

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."[9]

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."[10] Thus, according to the CAFC precedent, 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.[11] 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.[12]

Application of AFA for Marcegaglia and NVR

In the *Preliminary Determination*, we applied AFA, in accordance with sections 776(a) and (b) of the Act and 19 CFR 351.308, to Marcegaglia, due to this mandatory respondent's failure to respond to the Department's questionnaire.[13] In the *Preliminary Determination,* we were able to corroborate the petition dumping margin of 130.63 percent, to the extent practicable within the meaning of section 776(c) of the Act, using the highest transaction-specific dumping margins calculated for NVR[14] and, thus, we assigned this dumping margin to Marcegaglia as AFA. The Department received no comments regarding its preliminary application of the AFA dumping margin to Marcegaglia. For the final determination, we continue to find it appropriate to apply AFA to Marcegaglia.

As discussed further in Comments 1, 2, 3, and 4 below, we discovered multiple deficiencies in NVR's reporting at verification and we find that the application of adverse facts available is appropriate under section 776(a)(1) and 776(a)(2)(A), (B), (C), and (D) of the Act. As evidenced by its ability at verification to identify factual information sought by the Department, it is clear that NVR possessed, prior to verification, the records necessary to present a complete and

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[9] *Id.*; *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).

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

[11] *Id*., at 1382.

[12] *Id.*

[13] *See Preliminary Determination*, and accompanying Preliminary Decision Memorandum, at 23-25.

[14] *Id.*, at 25.

accurate U.S. sales database, including factory shipment dates, but did not conduct a comprehensive investigation of all relevant records to ensure that the reported information is accurate and complete in a timely manner. The failure to provide such information significantly impeded the conduct of this proceeding. In addition, we find that NVR'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 NVR did not act to the best of its ability to comply with our requests for information. Hence, we find that the application of AFA is appropriate under section 776(b) of the Act for NVR's margin.

Selection and Corroboration of the AFA Rate

In an investigation, the Department's practice is to select, as an AFA rate, the higher of: 1) the highest dumping margin alleged in the petition, or (2) the highest calculated dumping margin of any respondent in the investigation.[15] As stated above, in the *Preliminary Determination*, we assigned the petition margin of 130.63 percent to Marcegaglia as AFA and we corroborated this rate using the highest transaction-specific dumping margins calculated for NVR. However, because NVR failed to cooperate to the best of its ability and its reported information cannot be verified, we are no longer using the dumping margins calculated for NVR as information that corroborates the petition margin.

In this case, the only dumping margin in the petition is 130.63 percent, which is significantly higher than the highest transaction-specific dumping margin of 22.19 percent calculated for OTS, the remaining mandatory respondent. Therefore, we have not selected the petition rate as AFA because we find that it cannot be corroborated, within the meaning of section 776(c) of the Act, because it falls considerably outside the range of individual model-specific margins calculated for OTS and, thus, it is insufficiently reliable and relevant for purposes of corroboration.

Furthermore, we find that it would not be appropriate to use as AFA the weighted-average dumping margin calculated for OTS (*i.e.*, 6.08 percent) because this rate is the rate determined for a respondent that, unlike NVR and Marcegaglia, fully cooperated. Moreover, it is lower than the dumping rate of 12.53 percent computed for NVR in the *Preliminary Determination*.[16] Therefore, we find that this rate is not sufficiently adverse, "so as to effectuate the statutory purposes of the adverse facts available rule, which is to induce respondents to provide the Department with complete and accurate information in a timely manner."[17]

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[15] *See*, *e.g.*, *Certain Uncoated Paper From Indonesia: Final Determination of Sales at Less Than Fair Value*, 81 FR 3101 (January 20, 2016), and accompanying Issues and Decision Memorandum, at Comment 1; *Welded Line Pipe from the Republic of Turkey: Final Determination of Sales at Less Than Fair Value*, 80 FR 61362 (October 13, 2015), and accompanying Issues and Decision Memorandum, at Comment 20; *Certain Stilbenic Brightening Agents From the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 77 FR 17436, 17438 (March 26, 2012).

[16] *See Preliminary Determination*, 81 FR at 79425.

[17] *See e.g.*, *Certain Steel Concrete Reinforcing Bars from Turkey; Final Results and Rescission of Antidumping Duty Administrative in Part*, 71 FR 65082, 65084 (November 7, 2006).

Given these facts, we find that the highest rate appropriate for NVR and Marcegaglia is 22.19 percent, which is the highest transaction-specific margin of any individual model sold during the POI by OTS. This margin is based on sales and cost information OTS submitted to the Department in the underlying investigation, which the Department ensured was accurate through the collection of record evidence gathered through supplemental questionnaires and verification. Therefore, this margin is a reasonably accurate estimate of Marcegaglia and NVR's actual rates, albeit with some built-in increase intended as a deterrent to noncompliance.[18] The *SAA* states 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."[19] In this case, the Department has done so by selecting the highest transaction-specific margin, a higher rate than the weighted-average dumping margin of the cooperating company, and assigned this margin as the AFA rate applicable to Marcegaglia and NVR.

IV. Critical Circumstances

In the *Preliminary Determination*, the Department found that critical circumstances existed for Marcegaglia, NVR, and OTS, but not for all other Italian producers or exporters based on trade data submitted through August 2016.[20] 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 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 previously had an AD order on CTL plate in the United States.[21] As a result, the Department finds that there is a history of injurious dumping of CTL plate from Italy, pursuant to section 735(a)(3)(A)(i) of the Act. 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

[18] *See De Cecco*, 216 F. 3d at 1032.

[19] *See SAA*, at 870; and *Certain Polyester Staple Fiber from Korea: Final Results of the 2005-2006 Antidumping Duty Administrative Review*, 72 FR 69663, 69664 (December 10, 2007); *see also Steel Threaded Rod From Thailand: Preliminary Determination of Sales at Less Than Fair Value and Affirmative Preliminary Determination of Critical Circumstances*, 78 FR 79670 (December 31, 2013), and accompanying Preliminary Decision Memorandum, at 4, unchanged in *Steel Threaded Rod From Thailand: Final Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances*, 79 FR 14476 (March 14, 2014).

[20] *See Preliminary Determination*, 81 FR at 79424; *see also* Preliminary Decision Memorandum, at 5-8.

[21] *See Notice of Amendment of Final Determinations of Sales at Less Than Fair Value and Antidumping Duty Orders: Certain Cut-To-Length Carbon-Quality Steel Plate Products From France, India, Indonesia, Italy, Japan and the Republic of Korea*, 65 FR 6585 (February, 10, 2000).

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.[22]

On October 13, 2016, the Department requested OTS and NVR to report their respective monthly "report monthly quantity and value data for subject merchandise shipped to the United States, beginning with August 2015, through October 2016."[23] As such, respondents 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.[24]

Accordingly, for the *Preliminary Determination*, the Department compared the total volume of shipments from November 2015 through March 2016 (the base period), to shipment data for April 2016, through August 2016 (the comparison period).[25] For "all others," the Department used Global Trade Atlas (GTA) data, and subtracted exports reported by OTS and NVR from the monthly GTA data.[26]

With respect to the specific analysis, pursuant to our request for parties to report shipment data from August 2015 through October 2016, we note that the analysis now considers the seven-month comparison period of April 2016 through October 2016 to the seven-month base period of September 2015 through March 2016.

With regard to the non-individually investigated companies receiving the all-others rate, in the *Preliminary Determination* we analyzed GTA import statistics specific to CTL plate, less the mandatory respondents' reported shipment data, to determine if imports in the comparison period for the subject merchandise were massive. However, because in this case, we are basing the final antidumping margins for two mandatory respondents on AFA, we find the normal method of subtracting the mandatory respondent's data (*i.e.*, that of OTS) from the GTA data to be an unreliable indicator of the experience of the all-others companies for purposes of the "massive" determination. Thus, we are basing the finding of massive imports on the shipment data provided by OTS, the only mandatory respondent which provided reliable data and to not warrant AFA. As explained below, we find that OTS's imports were massive. Thus, we also

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

[23] *See* Letters to OTS and NVR, "Less-than-Fair-Value Investigation of Certain Carbon and Alloy Steel Cut-To-Length Plate from Italy: Request for Monthly Quantity and Value Shipment," dated October 13, 2016.

[24] *See* Memorandum, "Antidumping Duty Investigation of Certain Carbon and Alloy Steel Cut-to-Length Plate from Italy: Critical Circumstances Analysis," dated November 2, 2016 (Preliminary Critical Circumstances Memo); *see also* Letter from OTS, "Certain Carbon and Alloy Steel Cut-to-Length Plate from Italy: OTS' October Shipment Data to the United States," dated November 3, 2016 (OTS October Sales Letter), and Letter from NVR, "NLMK Verona's Monthly U.S. Shipment Data in Response to Department Request: Certain Cut-to-Length Carbon and Alloy Steel Plate from Italy," dated November 4, 2017.

[25] *See* Preliminary Critical Circumstances Memo, at Attachment.

[26] *Id.*

find this to be a reasonable assumption to apply to the all-other companies. Moreover, we are basing the all-others rate on OTS's calculated margin. Therefore, we find this to be a reasonable assumption. For the foregoing reasons, we find affirmative critical circumstances for the all-others companies.

OTS submitted updated shipment data, through October 2016, as requested.[27] Based on the information submitted by OTS (*i.e.*, for the comparison period April 2016 through October 2016, with the base period of September 2015 through March 2016); we find massive imports for OTS (*i.e.*, an increase greater than or equal to 15 percent between the base and comparison periods), and thus we find critical circumstances exist for OTS, for this final determination.[28]

Concerning NVR and Marcegaglia, as noted above, we determined to apply total AFA with regards to these companies, as described under sections 776(a) and 776(b) of the Act. Thus, for purposes of the massive analysis, because we lack the necessary reliable shipment data from NVR and Marcegaglia (*see* our analysis below, applying total AFA to NVR and Marcegaglia), we determine that, pursuant to sections 776(a) and 776(b) of the Act, that NVR and Marcegaglia 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 NVR and Marcegaglia.

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

[27] *See* OTS October Sales Letter.

[28] *See* Memorandum, "Antidumping Duty Investigation of Certain Carbon and Alloy Steel Cut-to-Length Plate from Italy: Final Critical Circumstances Analysis," dated concurrently with this memorandum.

application of either the nominal or actual measurement would place it within the scope based on the definitions set forth above; and

(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.

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.

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.[29]

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.[30]

VII. Margin Calculations

We calculated export price (EP) and normal value (NV) for OTS using the same methodology as stated in the *Preliminary Determination*,[31] except as follows:[32]

1. We revised OTS's margin calculations to take into account our findings from the sales and cost verifications.[33]

2. We corrected a clerical error related to the application of the cost test on our quarterly cost methodology in the calculation of the final dumping margin for OTS. *See* Comment 12.

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[29] *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.

[30] *See* Final Scope Memorandum.

[31] *See* Preliminary Decision Memorandum, at 12 and 13.

[32] *See* Memorandum, "Final Determination Calculations for Officine Tecnosider s.r.l.," dated March 29, 2017 (OTS Final Sales Calculation Memorandum), and Memorandum, "Cost of Production and Constructed Value Calculation Adjustments for the Final Determination – Officine Tecnosider s.r.l.," dated March 29, 2017 (OTS Final Cost Calculation Memorandum); *see also* Memorandum, "Verification of the Sales Response of Officine Tecnosider S.R.L. in the Antidumping Investigation of Certain Carbon and Alloy Steel Cut-To-Length Plate from Italy," dated January 17, 2017 (OTS Sales Verification Report); and Memorandum, "Verification of the Cost Response of Officine Tecnosider S.r.l. in the Antidumping Duty Investigation of Certain Carbon and Alloy Steel Cut-to-Length Plate from Italy," dated January 23, 2017 (OTS Cost Verification Report).

[33] *See* OTS Sales Verification Report; *see also* OTS Cost Verification Report; OTS Final Sales Calculation Memorandum; and OTS Final Cost Calculation Memorandum.

3. We reclassified the release of the provision related to foreign exchange gains and losses from OTS's direct material cost to financial expenses.

VIII. Discussion of Issues

NVR

Comment 1: Date of Sale for NVR's U.S. Direct Shipments

NVR's Arguments

- During the POI, NVR produced certain merchandise sold by its U.S. affiliate, North America Plate (NAP), in response to orders placed by NAP's customers. NVR 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.[34] NVR reported NAP's invoice date – issued after the goods were in the United States -- as the date of sale and shipment for these transactions.[35]

- NVR notes that the Department, in its verification report, questioned whether the shipment date from Italy would be a more appropriate date of sale for these made-to-order (or "MTO") transactions. NVR argues that this question misapprehends the relevant facts and disregards NVR'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, NVR maintains that NAP's invoice date is the appropriate date of sale, given that: 1) NVR ships and sells the plate to NAP, and NVR's invoices merely contain transfer prices; 2) NVR's delivery documents show NAP as the consignee, and NAP (not NVR) releases the merchandise to the customer; 3) 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 4) under the Act, the Department ignores U.S. sales between affiliates, and using NVR's shipment date to NAP would be tantamount to determining that NVR's sale to NAP is the relevant sale for dumping purposes.

- Further, NVR 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.[36] NVR argues that this

[34] *See* Memorandum, "Verification of NLMK North America Plate in the Antidumping Duty Investigation of Certain Carbon and Alloy Steel Cut-To-Length (CTL) Plate from Italy," dated January 25, 2017 (NAP Verification Report), at 2.

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

[36] *See* NLMK Verona SpA and NLMK North America Plate Inc. Case Brief, "Case Brief of NLMK Verona SpA and NLMK North America Plate Inc.," dated February 2, 2017 (NVR Case Brief), at 4 (citing Preliminary Decision Memorandum at 11).

"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), NVR maintains that the final price to the customer is not established until NAP issues its invoice.[37] NVR notes that this final price reflects any changes in quantity, product dimensions, and other circumstances of sale made after the order date.[38] Further, NVR notes that NAP's purchase orders explicitly indicate that prices may change under certain conditions (such as the timing of deliveries). Finally, NVR notes that a single order may arrive in multiple shipments.

- Regarding the latter point (related to credit), NVR 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. NVR 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.

The Petitioner's Arguments

- The petitioner argues that the Department should use the shipment date from NVR's factory as the date of sale for U.S. MTO sales. According to the petitioner, NVR has the burden of demonstrating that the price actually changed after shipment, not merely that it could change, and NVR failed to meet this burden. The petitioner asserts that NVR's examples all show changes preceding the shipment date (which are irrelevant to this analysis), and the Department noted as much when reviewing similar documents during verification.[39]

- The petitioner disagrees that NVR ships the sales in question to NAP, rather than to the final customer.[40] The petitioner notes that NVR itself stated that it shipped the merchandise

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[37] NVR notes that price is indisputably a term of sale. *See* NVR Case Brief, at 7 (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 (*PET Film from India*); *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*)).

[38] *See* NVR Case Brief, at 8 (citing NVR Verification Exhibit 24, showing different dimensions of plate on NAP's purchase order to NVR which affected the weight and final price to the customer). According to NVR, the Department implicitly conceded at verification that the price can change up until the time that NAP issues its invoice. *See also* NLMK Verona SpA and NLMK North America Plate Inc. Rebuttal Brief, "Rebuttal Brief of NLMK Verona SpA and NLMK North America Plate Inc.," dated February 7, 2017 (NVR Rebuttal Brief), at 10 (citing NAP Verification Report, at 2, which indicates that NAP's invoice "generally" reflected the order quantity and price).

[39] *See* Petitioner's Rebuttal Brief, "Rebuttal Brief of Nucor Corporation," dated February 7, 2017 (Petitioner's Rebuttal Brief), at 4 (citing NAP Verification Report, at 9).

[40] Specifically, the petitioner notes that NVR finds relevant the facts that NVR delivers the merchandise to the U.S. port, and its U.S. affiliate is not always aware of the date on which the U.S. customer picks up the merchandise. The

directly to the customer in its initial questionnaire response, and it changed its story only after the Department instructed it to revise its date of sale to report the earlier of factory shipment date or NAP's invoice date. The petitioner maintains that the Department confirmed at verification that the first response was the true one,[41] and, as a result, NVR should have reported the factory shipment date when it was explicitly asked to do so.

- The petitioner notes that NVR 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 NVR failed to substantiate these claims, noting that the U.S. customer rarely, if ever, rejects merchandise shipped in a different size, and neither NVR 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 NAP appears to be completely disengaged from the shipment process and, thus, there is no basis to conclude that, for direct sales, NAP's invoice date is the date when the material terms of sale are established.

- The petitioner dismisses NVR's contention that the dates recorded in the producer's books and records determine the date of sale. According to the petitioner, NVR 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 NVR itself that is confused, given that invoice date is not used in that calculation.

Department's Position:

We disagree with NVR that NAP's invoice date is the most appropriate date to use as the date of shipment for NVR's U.S. MTO sales.[42] Rather, as we explain 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. 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

petitioner disagrees that these facts make the sales non-direct, and the Department suggested as much in its verification report.

[41] The petitioner notes that NAP sent NVR purchase orders from U.S. customers and that NVR shipped the merchandise to its final destination or to a U.S. port. *See* Petitioner's Rebuttal Brief, at 5 (citing Memorandum, "Verification of the Sales Response of NLMK Verona SpA in the Antidumping Duty Investigation of Certain Carbon and Alloy Steel Cut-To-Length (CTL) Plate from Italy," dated January 11, 2017 (NVR Sales Verification Report), at 2).

[42] 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.

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).[43]

Contrary to NVR'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.[44] This practice is reflected 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 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

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[43] *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); *Yieh Phui Enterprise Co. v. United States*, 791 F. Supp. 2d 1319 (CIT 2011) (affirming that the Department "has some flexibility in selecting the date of sale; the presumption in favor of invoice date is not conclusive"); *Antidumping Duties; Countervailing Duties; Final Rule*, 62 FR 27296, 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."); *Mittal Steel Point Lisas Ltd. v. United States*, 31 CIT 638, 647 (April 24, 2007) ("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.")

[44] *See, e.g., 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) and accompanying Issues and Decision Memorandum, at Comment 10 (*Shrimp from Thailand*); *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; *Stainless Steel Bar from Japan: Final Results of Antidumping Duty Administrative Review*, 65 FR 13717 (March 14, 2000) and accompanying Issues and Decision Memorandum, 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).

> 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.[45]

In its original questionnaire response, NVR reported both date of sale and date of shipment for all U.S. sales using NAP's invoice date.[46] However, NVR described its sales process for U.S. MTO sales as follows: "NVR receives purchase orders from customers in the U.S. through NAP. Upon shipment, NVR issues an invoice to NAP and NAP issues an invoice to the U.S. customer. NVR ships the finished goods directly to the U.S. customer."[47] Based on this description, we instructed NVR to revise the U.S. date of sale to be the earlier of the date that the invoice is issued by NAP or the date that the merchandise is shipped to the U.S. customer from the factory.[48] We also requested that NVR report all sales that NVR shipped directly to U.S. customers during the POI, but for which NAP did not issue the invoice until afterwards.[49] In response, NVR revised its description of the sales process for direct sales as follows:

> In NVR's sales process, the price to the first unaffiliated customer is not known at the time of shipment to the U.S. Key points of the distribution process:
>
> - NVR never directly ships to any unaffiliated customer in the U.S. from its factory.
> - All of NVR's sales are made to NAP. "Direct shipment" (channel 1) is only a phrase to refer to non-consignment sales (channel 2).
> - NVR only ships merchandise from its factory to the U.S. port.
> - Upon arrival of the merchandise at the U.S. port, NAP either delivers to its customer or the customer picks up at the port.
> - For direct (non-consignment/made to order) sales NAP issues the invoice to the customer upon shipment to the customer.
>
> In light of NVR and NAP's sales process for U.S. sales, we have not revised the sales listing to reflect the date of shipment from NVR as the sale date because the terms of the sale are not known at that point in time…. To address the Department's request, however, in the revised U.S. sales listing to be submitted with its supplemental Section C response, NVR will include a custom field

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[45] *See* the Department Letter re: Antidumping Questionnaire, dated May 25, 2016, at Appendix I (Initial Antidumping Questionnaire).

[46] *See* NVR's July 16, 2016 Section C Response, at 18-19.

[47] *See* NVR's June 15, 2016 Section A Response (NVR June 15, 2016 AQR), at 14.

[48] *See* NVR's September 2, 2016 Supplemental Section A Questionnaire Response (NVR September 2, 2016 SQR), at 16.

[49] *Id.*, at 17.

> labeled as DSHIPDATU that contains the date on which NVR shipped the merchandise from its factory.[50]

Despite this latter statement, NVR did not, in fact, include a field with the shipment date from Italy in its supplemental section C response. Instead, NVR merely included a field purporting to show whether NAP issued the invoice during or after the POI.[51]

In the *Preliminary Determination*, we preliminarily accepted NVR's reported U.S. shipment and sale dates, subject to verification. Thereafter, we discussed NVR's U.S. date of sale methodology with company officials at verification. However, the company officials' statements raised serious questions as to whether NVR's chosen methodology was appropriate. Specifically, our verification report states:[52]

> At verification, we reviewed the purchase order for certain direct-shipment (also known as "made to order" or "MTO") sales, as well as the freight documents maintained by NVR related to the shipment to the U.S. border. We noted that NVR produced these products in response to particular orders from the unaffiliated customer; NAP provided to NVR either the purchase order itself or a spreadsheet with the relevant information necessary to produce the merchandise for the sale. Company officials stated that, when the order was ready for shipment, NVR shipped the goods to various ports in the United States…Company officials stated that NAP shipped the merchandise from this point to the customer or it arranged for the customer to pick the goods up from the port. We noted that while NVR invoiced NAP for the goods and NAP cleared the products at the U.S. border, NVR shipped these products to their final destination (or to an interim point on the way to their final destination). Therefore, it may be appropriate to treat the date of shipment from the factory as the shipment date to the customer; in this case, NVR's shipment date would also be the date of sale.

We also discussed the U.S. date of sale methodology with NAP during the CEP verification. Our report states:[53]

> Company officials also stated that NAP reported its own shipment date as the date it invoiced its customer because NAP is not always aware of when the customer

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[50] *Id.*

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

[52] *See* NVR Sales Verification Report, at 11.

[53] *See* NAP Verification Report, at 8-9.

> picks up the merchandise from the port. Company officials further stated that they did not account for sales that are shipped from the port to the customer in multiple shipments when reporting the date of the sale. Rather, company officials explained that NAP issues its invoice to the customer when it is notified that the customer has received, in full, the merchandise it ordered; and NAP reported this date as both its date of shipment and its date of sale. We noted that this statement conflicts with NAP's statement that it invoices its customer at the time of shipment (see NVR Supp A Response, at 17).

Given the above facts, we disagree with NVR that the appropriate date of sale is the date that NAP issues an invoice to the U.S. customer. As noted above, it is NVR, 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 NVR 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 unconnected to the movement of the merchandise, whereas NVR's shipment date is directly connected to its movement.

NVR's arguments are, in part, based on the assumption that factory shipment date is inextricably linked to the sale between NVR 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, NVR 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 NVR'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 Italy. We find that they were. The final per-unit price is shown on the purchase order received by NAP and forwarded to NVR, while the products and quantities are on the shipping documents prepared upon shipment from Italy. NVR may over- or under-produce the quantity ordered, produce to different dimensions than ordered, or send a single order in multiple shipments.[54] 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, NVR's argument regarding changes in these terms between purchase order date and invoice date miss the point.[55]

[54] *See* NAP Verification Report, at 8.

[55] If the issue raised had been whether purchase order date was a more appropriate source to use as the date of sale, the Department might have been more persuaded in light of the facts on the record. However, this was not the argument made by NVR.

For this reason, we find the examples of such changes provided by NVR unpersuasive. During verification, NVR presented several invoices which show that it shipped certain products in different lengths than those initially ordered by the customer.[56] Using these examples, NVR argues that "the dimensions of the plate varied from NAP's purchase order to NVR, thus affecting the weight and final price to the U.S. customer."[57] However, as noted above, the plate dimensions and weight were fixed upon shipment from Italy, and the price per ton did not change.[58, 59] Thus, while these examples show that certain terms may differ after NVR receives a purchase order, it does not demonstrate that the material terms of sale changed after shipment from Italy.[60]

Similarly, we disagree with NVR that the price condition cited in its case brief, related to timing of delivery, is relevant here. There is no evidence on the record that prices actually did change pursuant to this condition in the purchase order, only that NVR could receive more or less money under a specific formula if the clause were triggered. Further, the fact that the purchase order contains a formula for a price adjustment has no bearing on this question; the Department finds that prices set by formula may be established on the date of agreement of the formula, not the date that the formula triggers a price-related event.[61] Furthermore, the formula for the potential price adjustment was known or should have been known to the parties to the transaction, because the purchase order specified it.[62]

We disagree with NVR that the impetus behind the use of shipment date as date of sale is to completely capture U.S. credit costs. The calculation of credit and the determination of the

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[56] *See* NVR Case Brief, at 8 (citing NVR Sales Verification Report Exhibit 24 and NAP Verification Exhibits 7 and 12).

[57] *Id*.

[58] NVR 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 Italy and NAP invoice

[59] In NVR Case Brief, at 10, NVR claimed that the Department conceded that "NAP invoice quantity and price 'generally' reflected the order quantity and price, implying that in some cases they do not." In making this claim, however, NVR fails to mention the footnote following the phrase "generally reflected the final price" (*see* NAP Verification Report, at 2), which references billing adjustments. Thus, we find NVR's claim misleading; further, given that the quotation relates to differences between the purchase order and invoice, rather than shipment and invoice, it is also off point.

[60] In any event, NVR 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), further supporting the Department's decision that factory shipment date is appropriate.

[61] *See, e.g., Seamless Refined Copper Pipe and Tube From Mexico: Final Determination of Sales at Less Than Fair Value*, 75 FR 60723 (October 1, 2010) and accompanying Issues and Decision Memorandum, at Comment 5; *Notice of Preliminary Results of Antidumping Duty Administrative Review, Intent to Rescind and Partial Rescission of Antidumping Duty Administrative Review: Stainless Steel Bar from India*, 72 FR 10151, 10154 (March 7, 2007) (unchanged in final results); *Notice of Final Determination of Sales at Less Than Fair Value: Emulsion Styrene-Butadiene Rubber From Mexico*, 64 FR 14872, 14879 (March 29, 1999).

[62] *See* NVR Case Brief, at 8 (citing NVR Verification Exhibit 23).

universe of U.S. sales are distinct issues. In fact, the Department does not rely on the date of sale concept in its credit calculations.[63, 64] To the extent that NVR 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 NVR reported both inventory carrying costs[65] and credit expenses in its U.S. sales listing. Instead, the Department's goal 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.

Finally, we agree with NVR that price is indisputably a term of sale. However, we disagree that either of the cases NVR cited as support for this proposition furthers its argument.[66] First, 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, no party has proposed using the purchase order date as the date of sale.

NVR'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."[67] Therefore, 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 practice of using shipment date as the date of sale when it precedes invoice date and there is no evidence that the terms of sale changed between shipment date and invoice date. However, despite a direct request for factory shipment dates in a supplemental questionnaire,[68] NVR failed to provide them. The necessary information is, therefore, not on the record of this case. In an investigation, date of sale information is crucial to the accurate determination of a company's dumping margin, because the

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[63] *See* Initial 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*, Initial Antidumping Questionnaire, at Appendix I, 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."

[64] NVR is well aware of this practice, given that in supplemental questionnaires, the Department explicitly instructed NVR to revise its credit expense calculation to use shipment date instead of sale date, and NVR stated that it complied. *See* NVR's September 23, 2016 Supplemental Section B Questionnaire Response, at 20; *see also* NVR's September 29, 2016 Second Supplemental Sections A and C Questionnaire Response (NVR September 29, 2016 SQR), at 4.

[65] 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 23-24. However, this issue is separate and apart from the issue of date of sale.

[66] *See Stilbenic OBAs from Taiwan*, 77 FR at 17028, and Comment 1; *see also PET Film from India*.

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

[68] *See* NVR September 2, 2016 SQR, at 16-17. We note that the response states that NVR would include a field with the shipment date from Italy in its supplemental section C response; however, as noted above, no such field was ever included, and the limited alternative information provided was fatally flawed.

date of sale determines the universe of reportable sales, and it also determines the appropriate exchange rate used in all currency conversions. Consequently. NVR's refusal to provide factory shipment dates for its reported 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. Even if NVR disagreed with the Department's practice regarding determining the date of sale, it had an obligation to cooperate to the best of its ability and provide information that the Department requested. If NVR cooperated to the best of its ability and provided the information, it could have still advanced its legal arguments regarding the date of sale in its case brief.

Based on the above facts, we find that NVR's date of shipment from Italy is the appropriate U.S. date of sale for MTO sales. Because we requested that NVR provide this information for all MTO sales made during the POI and it failed to do so, information essential to the Department's analysis is missing from the record of this investigation. As a result, we find that NVR withheld requested necessary information within the meaning of sections 766(a)(1) and 776(a)(2)(A) of the Act. Further, because this information was in NVR's possession, we find that NVR 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, as explained above. Therefore, we find that an adverse inference is appropriate. For further discussion, *see* Comment 4, below.

Comment 2: Product Characteristics and Control Numbers

NVR's Arguments

- At verification, we found that NVR had misreported the chromium and nickel content of more than 20 percent of the CTL plate that it sold in the U.S. and home markets during the POI, and it also used these incorrect data in compiling the reported control numbers.[69] Although NVR offered to provide corrected information, we did not accept it because the changes were not minor.[70]

- NVR argues that, for the final determination, the Department should either accept NVR's product coding as reported or accept the changes that NVR offered at verification. NVR contends that it is an open question whether NVR miscoded the product characteristics at issue, because the reported data tied to its internal specifications, reliance on which was not explicitly prohibited by the Department's questionnaire instructions.[71]

[69] *See* NVR Sales Verification Report, at 13.

[70] *Id*.

[71] Specifically, NVR 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." NVR contends, however, that, instead of clearly indicating which specifications (*i.e.*, internal to the company or external (*i.e.*, published)) were acceptable, the instructions merely provided examples using external specifications. In light of this ambiguity, NVR argues that its use of its own specifications was reasonable.

- NVR contends that the Department has accepted classifications based on internal specifications in other cases, including for another respondent in a companion proceeding involving CTL plate.[72] NVR maintains that equal facts require equal treatment under the law, and, thus, the Department should adopt the same approach for NVR here.

- NVR argues that, if the Department continues to find the use of internal specifications improper, it should accept the necessary corrections now. According to NVR, such an action would be consistent with the acceptance of similar changes at, or after, verification in prior cases.[73] Further, NVR maintains that this action would be justifiable because NVR based its classifications on an honest appraisal of the information required, rather than an intent to distort the calculations.

- NVR 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.[74] NVR maintains that the CAFC has explicitly held that correctable errors include mistakes of methodology, substance, and judgment.[75]

- Finally, NVR contends that, in this case, there is no "tension between finality and correctness" (a consideration cited in the CAFC precedent noted above) because NVR offered the information more than four months before the final determination, and the Department verified that the description of NVR's proffered changes is correct. Thus, NVR argues that the Department should accept these changes now.

The Petitioner's Arguments

- The petitioner argues that the Department should not accept NVR's product coding as is, nor should it accept the corrections presented at verification. According to the petitioner, the questionnaire instructions are neither confusing nor ambiguous, despite NVR's claim to the contrary. Specifically, the petitioner notes that the questionnaire clearly requires respondents to report minimum material contents, whereas NVR reported maximum contents.

- The petitioner contends that NVR lacks credibility when it suggests that the questionnaire did not require reliance on external specifications. The petitioner notes that the instructions referenced official ASTM specifications, demonstrating that internal specifications are not

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[72] *See* NVR Case Brief, at 10-11 (citing 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, at 8).

[73] *Id*., at 11 (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) and accompanying Issues and Decision Memorandum, at Comment 5 (*OTR from India*); *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*)).

[74] *Id*., at 12 (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*)).

[75] *Id*.

appropriate where external specification exist. Indeed, the petitioner asserts that NVR's identification of the error on its own demonstrates that the instructions were sufficiently clear.

- The petitioner also disagrees that there is an inconsistency in treatment of respondents across the CTL plate cases. The petitioner notes that, in the companion case referenced by NVR, the producer in question 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.

- The petitioner contends that the Department is under no obligation to accept corrected data, and it is free to reject untimely or unsolicited material under its regulations at 19 CFR 351.302(d). The petitioner maintains that, contrary to NVR's assertions, both the CIT and CAFC have long deferred to the Department's judgement regarding the disposition of such information.[76]

- The petitioner argues that the case precedent cited by NVR is not on point. Specifically, the petitioner notes that in *OTR 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."[77] The petitioner asserts that here, in contrast, NVR's proposed corrections are extensive and systemic.

- The petitioner argues that the CAFC precedent cited by NVR is equally inapposite.[78] 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."[79]

- Finally, the petitioner characterizes NVR's coding mistake as a systemic error which affected a significant portion of its home market and U.S. sales. The petitioner contends that, because the error affected all product matches, it compromises the integrity of the reported data, and, as a result, the Department should base NVR's final dumping margin on AFA. For further discussion, *see* Comment 4, below.

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[76] *See* Petitioner's Rebuttal Brief, at 11 (citing *An Giang Fisheries Imp. & Exp. Joint Stock Co. v. United States*, Consol. Ct. No. 15-00044, Slip. Op. 17-4 at 50-53 (CIT 2017) (*An Giang*); *Dongtai Peak Honey Indus. V. United States*, 777 F. 3d 1343, 1351 (Fed. Cir. 2015) (*Dongtai Peak*) (quoting *Yantai Timken Co. v. United States*, 521 F. Supp. 2d 1356, 1371 (CIT 2007)).

[77] *Id*., at 12-13 (citing *OTR from India* and *Coated Paper from the PRC*).

[78] *Id*., at 13-14 (citing *NTN* and *Timken*).

[79] *Id*., at 14.

Department's Position:

We disagree with NVR that the Department should use the product characteristics as reported or accept the corrections offered at verification. Rather, we find that NVR incorrectly reported its product characteristics, and, by extension, its control numbers for a substantial portion of its home market and U.S. sales listings. Because a single control number may encompass multiple product grades and, as NVR argued at verification, one product grade could potentially fall under two different control numbers depending on plate thickness,[80] the errors affect a variety of control numbers in ways that are not able to be isolated and corrected, given the data currently on the record. This 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, NVR notified the Department that it had incorrectly reported the product characteristics chromium and nickel, the third and fourth characteristics in the product matching hierarchy, respectively, for a significant number of sales in both the U.S. and home markets. Our report states:[81]

> At the start of verification, company officials stated that NVR had miscoded data reported for the physical characteristics nickel and chromium for 22 percent of its U.S., and 24 percent of its home market, products, and it had also used these incorrect data in compiling the reported control numbers. Company officials stated that they used NVR's internal standards to determine the reported values, and they used the maximum content of each 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. Although NVR offered to provide corrected information, we did not accept it because the changes were not minor.
>
> Company officials stated that they discovered the error when preparing the product characteristic information reported for the sales selected by the Department for individual examination.… In particular, company officials stated that this error affected certain (but not all) of the control numbers in both markets having quality codes of 760, 763, 765, and 800.

We disagree with NVR that the errors in question arose from an ambiguity in the Department's reporting instructions. The reporting instructions for chromium and nickel explicitly required NVR to report the minimum chromium and nickel contents of its plate products under the applicable specification/grade, whereas NVR reported the maximum.[82] Thus, regardless of

[80] *See* NVR Sales Verification Report, at 14-15.

[81] *Id*., at 13-14.

[82] *See* Department Letter, "Product Characteristics for the Antidumping Duty Investigation of Certain Carbon and Alloy Steel Cut-to-Length Plate from Italy," dated June 10, 2016, at 8-9, stating "**FIELD NUMBER 3.3:** Minimum Specified Chromium Content" and "**FIELD NUMBER 3.4:** Minimum Specified Nickel Content." *See also* NVR's July 15, 2016 Section B Questionnaire Response (NVR July 15, 2016 BQR), at 10-11, and NVR July 15, 2016 CQR, at 8-9.

whether NVR relied on its own internal standards or the corresponding external ones, it failed to report the minimum chromium and nickel content of a significant number of its plate products. Regardless of what standard is applied (internal or external), NVR incorrectly (and unquestionably) misreported the data at issue.

In any event, we disagree with NVR that the questionnaire invites respondents to use internal standards, merely because the instructions included examples using "*e.g.*" Each of the cited examples referenced an external, published standard. Although we acknowledge that there may be circumstances under which the use of an internal standard is appropriate (*e.g.*, when reporting company-specific proprietary grades), the use of internal standards is not appropriate in this case. At verification, NVR indicated that it produced its plate products to external standards, as well as to its own (somewhat more restrictive) internal ones.[83] Furthermore, to the extent that NVR believed that the Department's questionnaire instructions were confusing, it had ample opportunity to seek clarification and guidance from the Department prior to the submission of its questionnaire responses. However, NVR did not do so. Furthermore, the other mandatory respondent, OTS, reported its product characteristics correctly and did not express any confusion with the Department's product characteristic reporting instructions.[84]

As to NVR's contention that the Department faced a similar situation in the companion antidumping duty proceeding involving Belgium, but afforded different treatment to the respondent there,[85] we disagree. Contrary to NVR's assertions, in the CTL plate from Belgium investigation, the Department did not permit the respondent in question to disregard available external specifications, in preference to its own internal documents (as NVR would have us do here); rather, the products at issue were proprietary to the respondent and produced only to internal specifications. Further, while the respondent in that case had some minor errors in its control number reporting, those errors were of a different nature because they were minor in scope, affecting "significantly less than one quarter of one percent of the U.S. sales volume during the POI."[86,87] Therefore, given that the magnitude of NVR's errors is at least 50 times

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[83] At verification, we observed that NVR produced certain products only to internal specifications. *See* NVR Verification Report, at 15, footnote 3. Because: 1) there were no corresponding external specifications for these products; and 2) NVR correctly reported the product characteristics and control numbers using the only available specifications, its own internal specifications, we found no discrepancies with NVR's reporting with respect to these products.

[84] *See* OTS's July 1, 2016 Sections B and C Questionnaire Reponses. *See also* OTS September 6, 2016 SQR, at SA-3 to SA-5.

[85] *See* NVR Case Brief, at 10-11.

[86] *See Certain Carbon and Alloy Steel Cut-To-Length Plate From Belgium: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances*, 82 FR _____, and accompanying Issues and Decision Memorandum, at Comment 5, issued concurrently with this final determination, ("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, in that case, the respondent correctly reported minimum content information, where requested, unlike NVR which reported its values based on the maximum content.

[87] *Id.*

greater than errors in the Belgium investigation,[88] our conclusion that the errors in this case are not minor is not undermined by acceptance of corrected data in the companion Belgium investigation. Different facts may lead to different conclusions and, thus, there is no inconsistency in treatment of different respondents in different investigations.

Given the significance of NVR's reporting errors, and the degree to which they impact the Department's calculations, we find that it would be inappropriate to accept the corrections offered at verification. These errors are not minor clerical errors, but rather they reach the threshold for new factual information. Furthermore, accepting such substantive corrections at verification precludes the Department and other parties from having the opportunity to thoroughly analyze, examine, and/or submit comments[89] on the revised data. While NVR argues that the errors were unintentional, errors made in a factor as fundamental to this investigation as a control number invalidates all the allocations, matches, and calculations that follow.

Although NVR cites two cases where the Department accepted revisions to control numbers after verification, neither case is factually similar. Specifically, in *Coated Paper from the PRC*, the Department allowed a respondent to correct a product characteristic error characterized as a typographical mistake.[90] The Department explained it applied 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.[91]

Unlike *Coated Paper from the PRC* (where the error was clerical and thus a minor correction of the type typically accepted at verification), here NVR's errors: 1) are methodological (given that NVR based its data on maximum content requirements, rather than minimums); 2) call into question the overall integrity of the respondent's submissions (when viewed in conjunction with the other errors and omissions found at verification; *see* Comment 4, below); and 3) amount to a "substantial revision" of previously reported data (in light of the fact that they affect 23.74

[88] Using the most generous of assumptions, we estimated this figure by dividing the percentage of NVR's U.S. sale volume with errors (*i.e.*, 13.42) by the maximum possible U.S. sales volume of errors in the companion case (0.25 percent). However, because the volume of U.S. sales with errors in the Belgium case was substantially less than .25 percent, the magnitude of the difference is significantly understated here.

[89] We note that in this proceeding, the petitioner filed pre-preliminary comments pertaining to NVR. *See* Petitioner Letter re: Pre-Preliminary Comments for NLMK, dated October 19, 2016.

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

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

percent of home market, and 21.73 percent of U.S., control numbers, and 25.42 percent and 13.42 percent of transactions, respectively).[92]

In the same vein, in *OTR 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.[93] The Department's request for a new database in *OTR from India* stemmed directly from its acceptance of the corrections, which the Department found to be minor, and, thus the facts are distinct from the situation at issue here (where the errors were not deemed minor nor the corrections of them accepted on the first day of verification).

NVR argues that court cases mandate that a party be given the opportunity to correct its own errors on request, even when those corrections are untimely. However, the errors at issue before the CAFC in *NTN*[94] were only input errors that inadvertently included four Canadian sales in the U.S. sales database and misreported a single digit in the control number for 23 sales; the Court found that the correction required a straightforward mathematical adjustment, which was easy to make. Indeed, the CAFC 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."[95] Thus, contrary to NVR's claim, *NTN* is inapposite. NVR's errors affected a variety of control numbers in ways that are not able to be isolated and corrected which makes it fundamentally distinct from the minor errors, which were easily correctable, that were present in the *NTN* case.

We recognize that the CAFC, in *Timken*, held that the Department has discretion to correct non-clerical errors, including "methodological errors, substantive errors, or errors in judgement," [96] and, indeed, the CAFC held that the Department is "free to correct any type of importer error" prior to the issuance of its final results. The CAFC did not say that the Department "must" correct all errors regardless of circumstances, but rather the CAFC rejected the interpretation of its *NTN* decision that maintained that only clerical errors may be corrected and, rather, held that the Department is "free to correct" (*i.e.*, the Department has discretion), any type of error prior to the final results.

Moreover, the errors before the CAFC in *Timken* only affected 17 transactions, which were incorrectly categorized. Under these facts, we disagree with NVR that the CAFC has mandated the acceptance of corrective information, regardless of circumstances or whether the incorrect information was submitted as part of a pattern of inaccuracy (*see* Comment 4, below). In this case, NVR misreported a significant percentage of its control numbers, in addition to a litany of other errors; we find that this renders NVR's situation distinct from the minor error that warranted correction in *Timken*.

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[92] *See* NVR Sales Verification Report, at 4.

[93] *See OTR from India*, at Comment 5.

[94] *See* NVR Case Brief, at 12.

[95] *See NTN*, 74 F. 3d at 1207-08.

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

NVR's argument, taken to its logical conclusion, would eliminate the requirement that respondents submit accurate information in a timely manner; under NVR's rubric, respondents could merely submit "corrections" at any point in a proceeding prior to a final determination, fully sanctioned by the Courts. However, the CAFC and CIT have consistently affirmed the Department's discretion in determining what corrections are acceptable[97] and the Department's ability to enforce deadlines for the submission of information in a proceeding.[98] In NVR's case, the number, extent, and type of "corrections" would amount to a *de facto* new response, which we are reluctant to accept. In this case, NVR was provided with repeated opportunities through supplemental questionnaires to provide complete and accurate information, but repeatedly failed to do so. We did not find it acceptable to reward a respondent which repeatedly provides incomplete and inaccurate information in response to the initial questionnaire and several rounds of supplemental questionnaires, by accepting the so-called "corrections" so late in the proceeding. The respondent should have made the necessary corrections in its responses to several supplemental questionnaires, but did not do so. We disagree that such an outcome was deemed acceptable by the CAFC in either *Timken* or *NTN*, or that the Department has no discretion in the matter. For further discussion of this latter point, *see* Comment 3, below.

As the CIT stated in *An Giang* when considering the rejection of untimely and unrequested new factual information:[99]

> "[i]n order for Commerce to fulfill its mandate to administer the antidumping duty law, including its obligation to calculate accurate dumping margins, it must be permitted to enforce the time frame provided in its regulations." . . .Indeed, an interested party could nearly always claim that consideration of untimely new factual information might result in more accurate margins."

This sentiment is echoed in the CAFC's decision in *Dongtai Peak*, which also considered the untimely submissions of a supplemental questionnaire response and an extension request:[100]

> It is fully within Commerce's discretion to "set and enforce deadlines" and this court "cannot set aside application of a proper administrative procedure because it believes that properly excluded evidence would yield a more accurate result if the evidence were considered". . .As to Dongtai Peak's presumption that Commerce had adequate time to process this review, Commerce should not be burdened by requiring acceptance of untimely filings closer to the final deadline for the administrative review.

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[97] *See, e.g. Timken.*

[98] *See, e.g. Timken, NTN.*

[99] *See An Giang*, Slip. Op. 17-4 at 50-53.

[100] *See Dongtai Peak*, 777 F. 3d at 1351 (quoting *PSC VSMPO-Avisma Corp. v. United States*, 688 F. 3d 751, 760-761 (Fed. Cir. 2012).

Finally, we disagree with NVR that, because it offered the information more than four months before the final determination, and the Department verified the information noted above, we should accept it now. As noted by the Department at verification, this information qualifies as new factual information.[101] 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 circumstances of this case, including the timing, nature, and extent of the corrections.

The ability to make accurate product comparisons goes to the heart of the Department's dumping methodology. Because NVR'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 NVR, thereby compromising the integrity of its reported data as a whole. As a result, we find that NVR'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 NVR's possession, and NVR had the ability to seek guidance from the Department but failed to do so, we find that NVR 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 4, below.

Comment 3: Misreported Quantities for NVR

NVR's Arguments

- In supplemental questionnaires, the Department directed NVR to report all sales and cost information on a theoretical weight basis,[102] and in its questionnaire response NVR indicated that it had complied.[103] At verification, however, NVR informed us that it had reported all of its home market sales, and half of its U.S. sales, in actual weight. As with the product coding mistakes discussed above (*see* Comment 2), NVR offered to provide corrected information at the verification, but we did not accept it because the changes were not minor.[104]

- NVR argues that, for the final determination, the Department should either accept NVR's data as reported or accept the changes that NVR offered at verification. NVR notes that the Department found at verification that the difference between the actual and theoretical weight for a sample of transactions ranged from -8.0 percent to +0.55 percent. However, NVR contends that this finding grossly overstates the extent of the problem, given that: 1) the 8 percent difference applied to only one outlier sale, with a low quantity; 2) much of the tonnage examined had a difference of substantially less than one percent; and 3) the average observed difference was quite small. Because the Department has statutory and regulatory

[101] *See* NVR Sales Verification Report, at 2.

[102] *See* NVR September 13, 2016 Supplemental Section D Questionnaire Response, at 1; *see also* Department Letter re: NVR Fifth Supplemental Questionnaire, dated October 4, 2016, at 1 (Department's Fifth Supplemental Questionnaire); and Memorandum, "Phone Call with Counsel to NLMK Verona (NVR)," dated October 12, 2016.

[103] *See* NVR October 11, 2016 Fifth Supplemental Questionnaire Response (NVR October 11, 2016 SQR), at 1.

[104] *See* NVR Sales Verification Report.

authority to ignore minor adjustments, NVR argues that it should ignore these minimal weight differences for the final determination, especially since NVR's reporting of actual weight was not intended to affect the calculation of the margin.

- Alternatively, NVR argues that the Department should accept corrected data now because the corrections are not "new factual information" within the meaning of 19 CFR 351.301(c)(5). Instead, NVR contends that the proffered information falls under paragraphs (c)(1)-(4) of that regulation, given that it is "relating to" questionnaire responses as set forth in paragraph (c)(1). However, to the extent that the information does fall under 19 CFR 351.301(c)(5), NVR argues that it is not untimely because it corrects information requested after the 30-day deadline in that provision.

- Finally, NVR contends that legal precedent requires the Department to use the most up-to-date and accurate information possible when calculating dumping margins,[105] and by failing to request corrected information, the Department would violate this mandate.

The Petitioner's Arguments

- The petitioner disagrees that the difference between the actual and theoretical weights is small, noting that the error not only affected a large number of sales, and NVR's argument failed to account for differences observed at the U.S. verification. According to the petitioner, even minor variations in weight can critically affect the sales prices and adjustments, a fact which the Department recognizes.[106] Thus, the petitioner finds the impact of NVR's error significant.

- The petitioner asserts that the Department's decision not to accept corrected information is consistent with its decision in *Hot-Rolled Steel from Japan*, a case with similar circumstances.[107] In contrast, the petitioner disagrees that NVR's cited precedent is applicable, given that none of them addressed the issue of untimely new factual information.[108] Rather, the petitioner asserts that the Courts have upheld the Department's ability to reject untimely submissions and have explicitly stated that the Department must be permitted to enforce the time limits in its regulations.[109]

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[105] *See* NVR Case Brief, at 17 (citing *Albemarle Corporation v. U.S.*, 821 F. 3d 1345, 1357 (Fed. Cir. 2016) (*Albemarle*) citing *Freeport Minerals Co. v. U.S.*, 776 F.2d 1029, 1032 (Fed. Cir. 1985); *Yangzhou Bestpak Gifts & Crafts Co. v. U.S.*, 716 F. 3d 1370, 1379 (Fed. Cir. 2013) (*Yangzhou Bestpak*); *Rhone Poulenc, Inc. v. U.S.*, 889 F.2d 1185, 1191 (Fed. Cir. 1990) (*Rhone Poulenc*)).

[106] *See* Petitioner's Rebuttal Brief, at 16 (citing *Notice of Final Determination of Sales at Less Than Fair Value: Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Japan*, 64 FR 24329, 24361 (May 6, 1999) (*Hot-Rolled Steel from Japan*) (where the Department stated "accurate conversion information is necessary to the margin calculation")).

[107] *Id*.

[108] *Id*., at 17-18 (citing *Albemarle; Yangzhou Bestpak.*; and *Rhone Poulenc*).

[109] *Id*., at 18 (citing *An Giang*, Slip. Op. 17-4 at 50-53; and *Dongtai Peak Honey*, 777 F. 3d at 1351).

- Finally, the petitioner maintains that it is difficult to believe that NVR did not know on what basis it sells its products, and NVR's discovery of the error itself indicates that the information was readily available. Thus, the petitioner argues that NVR did not act to the best of its ability in providing information, and, as a result, the Department should base NVR's final dumping margin on AFA. For further discussion, *see* Comment 4, below.

Department's Position:

As with NVR's misreported control numbers (*see* Comment 2, above), we disagree that the Department should use NVR's reported weights, per-unit prices, and per-unit expenses or allow NVR to provide corrected information. NVR's errors affect all of its home market sales, and approximately half of its U.S. sales, and the differences between the reported weights and weights offered as a correction are significant. Because per-unit prices and expenses are the basis of the dumping calculation, we agree with the petitioner that this systemic error renders the entire dumping calculation inaccurate.

In its initial response to sections B and C of the antidumping duty questionnaire (*i.e.*, the sections relating to home market and U.S. sales, respectively), NVR stated that it sold CTL plate in the home market in metric tons and in the U.S. market in both metric tons and hundredweight.[110] Although NVR reported all quantities and per-unit amounts in terms of metric tons (*i.e.*, a nominally-standard unit of measure), it did not indicate whether these amounts were stated in theoretical or actual (*i.e.*, scale-weight) units.[111]

However, in response to a supplemental section D response (*i.e.*, the section relating to COP and constructed value (CV)), NVR stated that it reported all costs in theoretical metric tons, and its sales data in actual weight.[112] As a result of this disclosure, we instructed NVR to "{r}evise the home market and U.S. sales listings to report all prices and expenses on theoretical weight basis."[113] Prior to the receipt of this response, we also notified NVR that the product characteristic information contained on certain previously-submitted invoices did not match information reported in the U.S. sales listing,[114] and we asked NVR to: 1) link these

[110] *See* NVR July 15, 2016 BQR, at 24, and NVR July 15, 2016 CQR, at 21-22.

[111] *See* NVR July 15, 2016 BQR, at 23-24, and NVR July 15, 2016 CQR, at 21-22.

[112] *See* NVR October 11, 2016 SQR, at 16, where NVR stated "NVR uses theoretical weight for its inventory of finished plates. Theoretical weight is calculated by multiplying the nominal length, width and thickness of the plate by the density of the specific plate produced. However, when the merchandise is sold, it is weighed on a scale before shipment to the customer. NVR has used actual weights in its sales reporting," and "We confirm that NVR's sales files are on an actual weight basis."

[113] *See* Department's Fifth Supplemental Questionnaire.

[114] *See* Department Letter re: NVR Third Supplemental Questionnaire, dated September 20, 2016, (Department's Third Supplemental Questionnaire); *see also* Memorandum, "Less-than-Fair-Value Investigation of Certain Carbon and Alloy Steel Cut-to-Length Plate from Italy; Phone Call with Counsel to NLMK Verona (NVR)," dated October 3, 2016 (Call with NVR Memo). We note that the Department requested the same information in both the Department's Third Supplemental Questionnaire and via a telephone call. NVR provided unresponsive answers to the first round of questions (*i.e.*, instead of linking the information on the invoices to information in the sales listing, NVR merely provided second copies of the same invoices). *See* NVR's September 29, 2016 Third Supplemental

characteristics to the reported information;[115] and 2) explain whether the observed discrepancies had "any bearing on the theoretical quantities which NVR was instructed to report."[116]

In its October 11, 2016, response, NVR stated that changes to its reported weight information were unnecessary because "{a}ll costs, {sic} the home market and U.S. sales listings were reported on a theoretical weight basis."[117] However, NVR provided no response to the additional questions related to the specific invoice-related product characteristic discrepancies, and the impact of these discrepancies on the reported theoretical weights, by the deadline for providing such a response.[118]

On the first day of verification, NVR notified the Department that it had incorrectly reported its weight information for a significant number of sales in both the home and U.S. markets. The NVR Sales Verification Report states: [119]

> At the start of verification, company officials informed the Department that NVR made all of its reported sales on an actual weight basis, and they offered to provide a revised sales listing with these actual quantities converted to theoretical weight. We did not accept this revised database because it contained new factual information. Instead, we confirmed that NVR's sales were indeed made on an actual weight basis, and we determined the difference between the actual and theoretical weights for a handful of reported transactions. We found that the difference in the actual and theoretical weights for these sampled transactions ranged from -8.0 percent to +0.55 percent. . .
>
> Company officials stated that NVR made a similar error with respect to a portion of its U.S. sales. Specifically, company officials stated that its U.S. affiliate, North America Plate (NAP), made all sales during the POI (on both a consignment and non-consignment basis). However, at verification, company officials stated that: 1) NAP generally sells on consignment by actual weight; and 2) it also made three non-consignment sales on an actual weight basis. We will examine this error during the upcoming verification currently scheduled at NAP for January 2017.

Section C Response (NVR Second September 29, 2016 SQR). Because the discrepancies highlighted potentially-serious errors and it appeared that NVR had not understood the Department's questions, we afforded NVR one final opportunity to research the answers and either clarify the record or correct the information.

[115] *Id*.

[116] *See* Second Call with NVR Memo.

[117] *See* NVR October 11, 2016 SQR, at 1.

[118] NVR ultimately attempted to answer the Department's questions after the deadline. However, because this submission was untimely, we rejected it. *See* the Department Letter, "Less-than-Fair-Value Investigation of Certain Carbon and Alloy Steel Cut-To-Length Plate from Italy: Rejection of Untimely Submission on October 12, 2016," dated October 14, 2016 (Rejection Memo).

[119] *See* NVR Sales Verification Report, at 2.

We also examined this problem during the U.S. sales verification conducted at NAP. The NAP Verification Report states:[120]

> In its October 11, 2016, questionnaire response, NAP stated that it reported all price, quantity, and expense data for its sales of NVR's plate on a theoretical-weight basis. However, at verification, we found that, for a substantial portion of its sales during the {POI}, it reported its data on an actual-weight basis instead. Further, we also found that NAP had not attempted to restate the denominators of any allocated expenses on a theoretical-weight basis. We determined the difference between the actual and theoretical weights for a number of reported transactions. We found that the difference in the actual and theoretical weights for these sampled transactions ranged from -2.76 percent to +3.66 percent.

We disagree with NVR that the differences noted above are minor, or that the Department should assess the impact of the error based on the average of the differences observed at the home market sales verification. During that verification, we determined the theoretical weights for 12 transactions, including the eight "pre-selected" and "surprise" sales and four additional transactions selected at random.[121] We then compared those weights to the actual weights reported in NVR's home market sales listing. We found that the differences were not uniform (*e.g.*, some were positive and others, negative), nor were they insignificant (*i.e.*, some were as much as eight percent).

Further, while the weighted-average difference in the "pre-selected" and "surprise" sales was, in the aggregate, just over one percent, we cannot overlook the fact that in the sampled transactions the discrepancies were widespread and that the averaging of positive and negative differences tends to result in lower weighted-average weights. Specifically, we note that, of the 12 transactions examined, three quarters of them had individual differences in the two to eight percent range, and most had differences of more than four percent.[122] In fact, of the 12 transactions examined, we observed differences in 10 (including all of the additional ones randomly selected) which exceeded the weighted-average figure relied upon by NVR.[123]

We performed a similar exercise at the U.S. sales verification, examining the differences for 16 pre-selected and surprise sales, as well as for 17 additional invoices (representing, collectively,

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[120] *See* NAP Verification Report, at 2.

[121] *See* NVR Sales Verification Report, at 22. Note that the "pre-selected" sales are sales identified in the verification agenda provided to NVR to aid in its preparations for verification, while the "surprise" sales are sales selected during verification itself.

[122] *See* NVR Sales Verification Report, at 22 and NVR Sales Verification Exhibit 12. For example, with respect to the four transactions selected at verification, "we noted that the difference in the actual and theoretical quantities for these sales ranged from -6.18 percent to -1.42 percent."

[123] *See* NVR Sales Verification Report, at 22. For example, with respect to the four transactions selected at verification, "we noted that the difference in the actual and theoretical quantities for these sales ranged from -6.18 percent to -1.42 percent."

77 transactions).[124] We found that NVR failed to report theoretical weight data for 12 of the 16 sales in the first group, and 34 of the 77 transactions in the second. Further, we found that the actual weights reported differed from the (correct) theoretical weights by -2.76 percent to 3.66 percent.[125]

We agree with NVR that the Department has the authority under 19 CFR 351.413 to disregard insignificant adjustments, which are defined as:

> any individual adjustment having an *ad valorem* effect of less than 0.33 percent, or any group of adjustments having an *ad valorem* effect of less than 1.0 percent, of the export price, constructed export price, or normal value, as the case may be. Groups of adjustments are adjustments for differences in circumstances of sale under 351.410, adjustments for differences in the physical characteristics of the merchandise under 351.411, and adjustments for differences in the levels of trade under 351.412.

However, NVR provided no calculation that demonstrates that any individual adjustment having an *ad valorem* effect of less than 0.33 percent, or any group of adjustments having an *ad valorem* effect of less than 1.0 percent, of the export price, constructed export price, or normal value. In any event, even if the requested corrections could hypothetically qualify as insignificant adjustments that may be disregarded, given the misleading and inaccurate statements that NVR has made with respect to its weight reporting and NVR's failure to provide in a timely manner theoretical weight data on request, we are not inclined to disregard NVR's reporting errors altogether, even if we had the ability to do so.

Given the significance of the reporting error, and the degree to which it impacts the Department's calculations, we disagree that we should accept the corrections offered at verification. As with the control number error noted above, these errors are not minor clerical errors, but rather they reach the threshold for new factual information, within the meaning of 19 CFR 351.102(b)(v). While NVR argues that the errors were unintentional, the errors impact the calculation of per-unit prices and adjustments, touching virtually every aspect of the Department's dumping analysis. As noted above, given discrepancies between the sales listing NVR submitted and the invoices that it provided with its September 12, 2016, supplemental questionnaire response, we requested on two occasions (September 20 and October 3, 2016)[126] that NVR demonstrate how product dimensional information shown on the U.S. invoices tied to the dimensional characteristics reported in the U.S. sales listings; further, on October 7, 2016, we also requested that NVR explain how these dimensional differences impacted the calculation of

[124] *See* NAP Verification Report, at 22 and Appendix I.

[125] *Id*. Further, in performing this exercise, we found that NAP made inaccurate statements at verification when describing on what weight basis it sells. *Id*., at 16-17 (stating, alternately, that NAP sells to a particular customer on the basis of theoretical weight alone, then revising this explanation to state that NAP sells to the customer on both a theoretical- and an actual-weight basis, and it sometimes sells on both weight bases on the same invoice).

[126] *See* Department's Third Supplemental Questionnaire, and Call with NVR Memo.

theoretical weight.[127] NVR provided no meaningful answers to the first request,[128] and it provided an untimely response to the second.[129] Had NVR actually conducted the research requested by the Department, it may well have discovered this error well before verification, and corrected it in a timely manner.

We disagree with NVR that 19 CFR 351.301(c)(v) does not apply because the time limits regulating the submission of the information at issue fall under paragraphs (c)(1)-(4) of that regulation, given that it is "relating to" questionnaire responses. However, those provisions relate to factual information submitted under 19 CFR 351.102(b)(21)(i)-(iv), and not, as here, under 19 CFR 351.301(c)(v).

Specifically, factual information is defined under 19 CFR 351.102(b)(21) as:

> (i) Evidence, including statements of fact, documents, and data submitted either in response to initial questionnaires, or to rebut, clarify, or correct such evidence submitted by any other interested party;
>
> (ii) Evidence, including statements of fact, and data submitted either in support of allegations, or to rebut, clarify, or correct such evidence submitted by any other interested party;
>
> (iii) Publicly available information submitted to value factors of production under 351.408(c) or to measure the adequacy of remuneration under 351.511(a)(2), or to rebut, clarify, or correct publicly available information submitted by any other interested party;
>
> (iv) Evidence, including statements of fact, documents, and data placed on the record by the Department, or, evidence submitted by any interested party to rebut, clarify, or correct such evidence submitted by any other interested party; and
>
> (v) Evidence, including statements of fact, documents, and data, other than factual information described in paragraphs (b)(21)(i)-(iv) of this section, in addition to evidence submitted by any other interested party to rebut, clarify, or correct such evidence.

The new weight data do not fall under 19 CFR 351.102(b)(i), because there is no outstanding questionnaire requesting the information. Although the Department did request this information on October 4, 2016,[130] NVR responded to that supplemental questionnaire on October 11, 2016, within the time limits specified (albeit with information later found to be inaccurate). Further, while NVR seeks to correct its response, 19 CFR 351.102(b)(i) only permits corrections

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[127] *See* Second Call with NVR Memo.

[128] *See* NVR Second September 29, 2016 SQR, at 1-2.

[129] *See* Rejection Memo.

[130] *See* Department's Fifth Supplemental Questionnaire, at 1.

submitted by other interested parties (*i.e.*, submitters of data are not authorized to correct their own data under this provision).

Similarly, subsections (ii)-(iv) do not apply because the weight information does not support an allegation or intend to value factors of production, nor is it information placed on the record by the Department. Subsection (v) governs all remaining factual information, and, thus, it applies here. Further, the time limits for information submitted under subsection (v) are found in 19 CFR 351.301(c)(v), which states (emphasis added):

> (5) *Factual information not directly responsive to or relating to paragraphs (c)(1)-(4) of this section).* Paragraph (c)(5) applies to factual information other than that described in 351.102(b)(21)(i)-(iv). The Secretary will reject information filed under paragraph (c)(5) that satisfies the definition of information described in 351.102(b)(21)(i)-(iv) and that was not filed within the deadlines specified above. All submissions of factual information under this section are required to clearly explain why the information contained therein does not meet the definition of factual information described in 351.102(b)(21)(i)-(iv), and must provide a detailed narrative of exactly of what information is contained in the submission and why it should be considered. <u>The deadline for filing such information will be 30 days before the scheduled date of the preliminary determination in an investigation</u> . . .

Thus, the deadline for the submission of corrected weight information in this investigation was October 5, 2016 (*i.e.*, 30 days prior to the November 4, 2016, preliminary determination). Note that, despite NVR's claim, this provision sets no 30-day correction period for supplemental questionnaire responses, nor does it allow such unsolicited corrections after the specified 30-day deadline. Thus, the Department's rejection of NVR's weight corrections at verification was correct, given that this information was new factual information within the meaning of 19 CFR 351.102(b)(21)(v) which was untimely-offered under 19 CFR 351.301(c)(v). This finding is consistent with the CIT's holding in *An Giang*, which stated:[131]

> However, just because Commerce's initial questionnaire asked for fingerling size data does not mean that Commerce's supplemental questionnaires implicitly invited any further response to Commerce's initial questionnaire other than those items for which Commerce specifically requested clarification.

Finally, we disagree with NVR that any of the case law cited requires the Department to request accurate information possible for the final determination. All of the cases cited related to the assignment of dumping margins to the respondents at issue, not whether the Department must request and accept untimely-filed information in doing so. [132] Therefore, those cases are

[131] *See An Giang*, Slip. Op. 17-4, at 52.

[132] *See Albemarle*, 821 F. 3d at 1345; *Yangzhou Bestpak*, 716 F. 3d at 1370; and *Rhone Poulenc*, 889 F.2d at 1185.

factually distinct and do not apply here. Instead, however, the CIT recently decided an almost-identical issue in *An Giang,*[133] noting:

> Commerce's exercise of its discretion {to not accept untimely filed product characteristic information} was made with a rational explanation and followed its established regulations concerning the timely submission of factual information. See Final Decision Memo at 52; see also 19 C.F.R. § 351.302(c)(1). Moreover, Agifish points to no reasonable excuse as to why the length information could not have been timely filed, nor did it raise any such reasonable excuse before Commerce. The court will not disturb Commerce's justifiable enforcement of the time frames provided in its regulations.

Accurate conversion information is essential to the margin calculation.[134] Because NVR's errors affected all of the home market, and a substantial portion of its U.S. sales listing, we are unable to compute accurate NVs or U.S. prices for NVR, nor are we able to conduct an accurate sales-below-cost test. This error, like other errors in NVR's submissions discussed in Comments 1 and 2, above, compromise the integrity of NVR's reported data as a whole. As a result, we find that NVR's failure to provide necessary, accurate information, despite the Department's explicit request for it, thereby impeding the proceeding and preventing the Department from verifying such information, warrants the use of facts available, in accordance with sections 776(a)(2)(A), (B), and (C) of the Act. Further, because this information was in NVR's possession, we find that NVR 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 4, below.

Comment 4: AFA for NVR

The Petitioner's Arguments

- The petitioner argues that the Department should base NVR's final dumping margin on total AFA because, at verification, the Department found that NVR's reported U.S. and home market sales data contained significant errors and omissions. According to the petitioner, NVR failed to act to the best of its ability by repeatedly and willfully refusing to provide necessary information and engaging in a pattern of intentionally withholding information crucial to calculating an accurate dumping margin.

- The petitioner bases its argument on six points. Specifically, the petitioner contends that NVR: 1) incorrectly reported the product characteristics and control numbers for a significant percentage of its U.S. and home market sales; 2) failed to report its per-unit prices, expenses, and costs on a theoretical weight basis in both markets; 3) misidentified the date of sale for more than half of the U.S. database; 4) refused to report transaction-specific

[133] *See An Giang,* Slip. Op. 17-4, at 53.

[134] *See Hot-Rolled Steel Products from Japan*, 64 FR at 24361 ("{T}imely, accurate conversion information is necessary to the margin calculation and can have a significant impact… Because NSC's conversion data was untimely and did not constitute a minor correction, the Department informed NSC at verification that it would not accept the theoretical to actual weight conversions factors").

movement expenses; 5) excluded sales of subject merchandise produced by other affiliated manufacturers from the U.S. sales listing; and 6) failed to identify sales of overruns in the home market sales listing. Each of these points is addressed in turn below.

- First, the petitioner notes that NVR misreported the chromium and nickel components of its reported control numbers, as well as the associated product characteristic codes, for almost 25 percent of the products in the U.S. and home market sales listings.[135] (For further discussion, *see* Comment 2, 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 the inaccurate assignment of costs to the associated control numbers. According to the petitioner, the Department has relied on total AFA in similar situations, [136] and it should do so here because the error was not discovered until verification.

- Second, the petitioner notes that NVR failed to report all of its home market, and approximately half of its U.S., sales data on a theoretical weight basis, despite its explicit statement that it had done so. (For further discussion, *see* Comment 3, above.) The petitioner points out that NVR made multiple inconsistent statements regarding weight throughout the course of this investigation, including at verification. The petitioner applauds the Department's decision not to accept revised weight data, finding this decision particularly appropriate, given that tests performed at verification showed significant differences between NVR's actual and theoretical weights. As with the control number errors, the petitioner argues that these inaccuracies greatly affect the dumping margin and require the use of AFA, consistent with the Department's practice.[137] The petitioner argues that, here too, NVR failed to provide necessary information, certified to the accuracy of false statements in its responses, and misled the Department at verification.

- Third, the petitioner contends that NVR misreported the dates of sale and shipment for a significant portion of its U.S. sales database (relating to direct shipments to the U.S. customer), in violation of the Department's clear instruction that it use the date of shipment from the factory in Italy. The petitioner notes that, instead of complying with this instruction, NVR argued why it was not valid, and it failed to substantiate its claims either before, or during, verification. (For further discussion, *see* Comment 1, above.) The petitioner argues that the Department has a longstanding practice of using shipment date as

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[135] *See* Petitioner's Case Brief, "Case Brief of Nucor Corporation," dated February 2, 2017 (Petitioner's Case Brief), at 4 (citing NVR Sales Verification Report, at 2)

[136] *See* Petitioner's Case Brief, at 5 (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 73126, 73130 (December 29, 1999) and accompanying Issues and Decision Memorandum, at Comment 1; *see also Notice of Final Determination of Sales at Less Than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products From Taiwan*, 66 FR 49618 (September 28, 2001) and accompanying Issues and Decision Memorandum, at Comment 4)).

[137] *See* Petitioner's Case Brief, at 8 (citing *Notice of Final Determination of Sales at Less Than Fair Value: Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From Japan*, 64 FR 24329, 24361 (May 6, 1999) and *Persico Pizzamiglio, S.A. v. United States*, 18 CIT 299, 305 (April 14, 1994)).

the date of sale when the shipment date precedes the invoice date.[138] According to the petitioner, because the Department found at verification that the lag time between shipment from Italy and invoicing by NAP could be more than 100 days, NVR significantly misreported the universe of its U.S. sales, which is common grounds for the application of total AFA.[139]

- Fourth, the petitioner maintains that NVR failed to report transaction-specific movement charges, despite two direct instructions by the Department to do so. The petitioner contends that NVR misrepresented its ability to report the requested information, a fact which the Department discovered at verification. According to the petitioner, NVR's outright refusal to provide the information, combined with the deliberately false explanation, warrants the application of total AFA.

- Fifth, the petitioner claims that NVR failed to report numerous U.S. sales of plate produced by affiliated parties. The petitioner argues that NVR was obligated to either report these sales or demonstrate that that the manufacturer knew the product was destined for the United States.

- Finally, the petitioner argues that NVR made contradictory statements regarding overruns and failed to identify these sales as such in its home market database. According to the petitioner, although these products were likely to be sold at lower prices than non-overrun products, NVR forced the Department to treat them the same when determining NV, potentially masking dumping.

NVR's Arguments

- NVR argues that the use of total AFA is unjustified and contrary to law. NVR contends that, under the Act and Court precedent, the Department must affirmatively show that: 1) NVR did not act to the best of its ability in providing requested information;[140] and 2) the failure to provide information was so extensive that it compromised the entire base of reported information.

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[138] *See* Petitioner's Case Brief, at 11 (citing *Shrimp From Thailand*, and accompanying Issues and Decision Memorandum, at Comment 10; *see also Notice of Final Determination of Sales at Less Than Fair Value: Structural Steel Beams From Germany*, 67 FR 35497 (May 20, 2002) and accompanying Issues and Decision Memorandum, at Comment 2; *Seamless Refined Copper Pipe and Tube From Mexico: Final Results of Antidumping Duty Administrative Review; 2012-2013*, 80 FR 33482 (June 12, 2015) and accompanying Issues and Decision Memorandum, at Comment 1).

[139] *See* Petitioner's Case Brief, at 14 (citing *Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2013-2014*, 81 FR 23272 (April 20, 2016) and accompanying Issues and Decision Memorandum, at Comment 1; *see also Final Determination of Sales at Less Than Fair Value; Stainless Steel Sheet and Strip in Coils From Germany*, 64 FR 30710 (June 8, 1999) and accompanying Issues and Decision Memorandum, at Comment 10).

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

- NVR argues that it has cooperated fully at all stages of the investigation. NVR asserts that it: 1) responded to the best of its ability to the Department's initial questionnaire and a total of seven sales and cost supplemental questionnaires in a timely manner, despite tight turn-around times;[141] 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 NVR, 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, NVR claims that it is an open question whether it miscoded the product characteristics and control numbers in question. (*See* Comment 2, above.) According to NVR, it could have justified its data as reported but instead chose to bring this issue to the Department's attention at verification. Given that NVR alerted the Department to the issue as soon as it was discovered and offered to correct the matter, NVR claims that it clearly acted to the best of its ability. NVR contends that the Department has refused to apply total AFA in other analogous cases, notably where the respondent also reported its data based on internal, rather than external, specifications.[142]

- NVR maintains that the weight basis error was understandable, occurring in response to numerous rapid-fire and short-deadline supplemental questionnaires. (*See* Comment 3, above.) NVR points out that the error was discovered the week before verification and reported to the Department on the first day. As with the product characteristic/control number issue, NVR contends that it acted to the best of its ability when it offered to provide the Department with corrected information.

- NVR disagrees that it failed to report all U.S. direct sales, and it contends that the petitioner's arguments to the contrary mischaracterize the facts. (*See* Comment 1, above.) However, NVR states that, if the Department ultimately determines otherwise, there are sufficient reported sales on which to calculate a dumping margin.

- Regarding freight, NVR contends that it never maintained that it could not report transaction-specific expenses, but rather than it could not do so systematically, a fact that the Department appears to recognize. According to NVR, reporting transaction-specific expenses was not feasible, given that NVR and NAP operate separate sales systems. Thus, NVR argues that the way that it kept its data in the ordinary course of business would have required an extensive manual review (which NVR calls an "administrative nightmare"), and, given the short time frame allotted, the fact that this was theoretically possible is beside the point. NVR highlights the fact that it provided transaction-specific freight expenses for virtually all

[141] NVR notes that the Department issued these supplemental questionnaires in the six weeks prior to the commencement of verification.

[142] *See* NVR Rebuttal Brief, at 5 (citing *Xanthan Gum from Austria Xanthan Gum From Austria: Final Determination of Sales At Less Than Fair Value,* 78 Fed. Reg. 33354 (June 4, 2013), and accompanying Issues and Decision Memorandum (*Xanthan Gum from Austria*), at 3-4).

its direct sales. According to NVR, providing the POI average cost for the remaining sales was eminently reasonable, particularly in light of the fact that shipments went from the same factory through the same European ports, and, therefore, freight costs did not vary significantly from shipment to shipment.

- NVR disagrees that it failed to report U.S. sales of plate produced by affiliated parties. NVR notes that the plates in question were not produced in Italy, and, thus, they are not subject to this investigation.

- Finally, NVR disagrees that it failed to report home market sales of overruns. According to NVR, it has no such category of products, nor does it have a category identified as extra plates. NVR contends that, nonetheless, it manually compiled a list of "extra" plates produced for one customer but ultimately delivered to another, as well as "out-of-tolerance" plates, at the Department's request, and it submitted this list in an exhibit in a supplemental questionnaire response. NVR states that it included the sales in its home market sales listing, and the Department confirmed the accuracy of its reported data at verification. NVR does not disagree that extra and out-of-tolerance plates likely have lower sales prices; however, it maintains that these are real sales, they were reported as such, and if the Department wishes to treat them differently, it has provided all the information necessary to identify them.

Department's Position

We determine that the application of total facts available to NVR with an adverse inference is warranted for the final determination. As noted in the "Use of AFA" 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;
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> (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.[143]

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

[143] *See TPEA*, at 362; *see also TPEA Application Dates*, 80 FR at 46794.

within the applicable time limits, the Department may, subject to section 782(e) of the Act,[144] disregard all or part of the original and subsequent responses, as appropriate.

In this case, as noted in Comments 1 through 3, above, NVR failed to establish the accuracy and completeness of its reported sales information at verification, and the errors and omissions were substantial. In particular, NVR incorrectly reported weight information (and, by extension, its per-unit price and expense information) for all of its home market sales and approximately half of its U.S. sales; it incorrectly determined the product characteristics (and, by extension, the control numbers) for approximately 25 percent of its home market and U.S. sales; and it failed to report the correct U.S. date of sale for approximately half 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). Any one of these significant errors, in isolation, may well have led the Department to conclude that NVR's data are 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 NVR 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 NVR had adequate opportunity to submit the correct information (in the case of the date of sale and weight errors) 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 NVR that it reported sufficient sales on which to calculate a dumping margin. As noted in Comment 1, 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 NVR's shipment from Italy and the issuance of the commercial invoice by NAP could be more than 100 days (*i.e.*, more than three months, or over a quarter of the POI). Given this finding, we conclude that NVR 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, NVR's refusal to provide factory shipment dates for its reported MTO sales, as well as reporting all other sales shipped during the POI but invoiced afterwards, deprived the Department of the opportunity to assess the accuracy of the reported relevant sales universe and sales-specific

[144] 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.

exchange rates to use in this investigation. Thus, if the Department were to calculate a margin without using an accurate 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 NVR's incomplete reporting regarding the universe of U.S. sales significantly undermines the Department's confidence in the reliability of using NVR'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 1 above.

Similarly, with respect to the product characteristics errors, we disagree that the data are 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 NVR misreported its control numbers and certain product characteristics for approximately a quarter 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, NVR's equivalent errors with respect to home market products undermines our confidence in accurately identifying 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, CV, and difference-in-merchandise adjustment information for affected sales. For further discussion, *see* Comment 2 above.

Further, we disagree with NVR that the weight basis error was understandable and that it should be overlooked. As noted in Comment 3, above, we requested explicitly that NVR report its sales data on a theoretical-weight basis, and when we noticed apparent discrepancies in the data relevant to the calculation of theoretical weights (*i.e.*, dimensions shown on NAP's invoices), we afforded NVR not one, but two, opportunities to examine the discrepancies and correct them. In fact, in our second request, we asked NVR directly to explain how these dimensional differences impacted the calculation of theoretical weight. NVR provided no meaningful answers to the first request and it provided an untimely response to the second. Had NVR actually conducted the research requested by the Department, it may well have discovered this error far in advance of verification and corrected it in a timely manner. Accurate conversion information is essential to the margin calculation. NVR's errors affected all of the home market, and a substantial portion of its U.S. sales listing, and the errors were significant (with differences ranging from -8.00 to 3.66 percent). As a result, we are unable to compute accurate NVs or U.S. prices for NVR, nor are we able to conduct an accurate sales-below-cost test. This error, like the date of sale and control number errors, compromise the integrity of NVR's responses as a whole. For further discussion, *see* Comment 3 above.

In addition to these significant failures, we agree with the petitioner that NVR also chose not to report transaction-specific movement charges, despite receiving instruction from the Department on two occasions that it must do so. We do not agree with NVR's claims that the Department's instructions were overly burdensome, and we note that NVR provided transaction-specific movement expenses for roughly half its U.S. sales. We disagree with NVR that it requested that the Department allow it to provide an alternative reporting method for the requested information, as required under section 782(c) of the Act. Rather, NVR simply refused to comply with the Department's instruction, stating instead that there was "no systemic way" for it to report

transaction-specific movement expenses for NAP's consignment U.S. sales.[145] However, at verification, we observed that it was possible to link all these U.S. sales to transaction-specific freight expenses with a similar degree of effort as that expended for direct sales. Therefore, we find that NVR failed to act to the best of its ability to comply with the Department's instructions that it report transaction-specific movement expenses for all its U.S. sales.

Furthermore, we disagree with NVR that the average freight expenses reported for its consignment sales was reasonable, given that freight costs did not vary significantly from shipment to shipment. At verification, we found that the transaction-specific expenses could vary by as much as 20 percent from the reported average.[146] Given that, in the *Preliminary Determination*, the Department applied the average-to-transaction method to all U.S. sales to calculate NVR's dumping margin,[147] we find NVR's refusal to report transaction-specific movement expenses for all its U.S. sales to be significant; where the Department uses the average-to-transaction method, any difference to specific transactions can ultimately affect the margin calculation.

With respect to NVR's sales of overruns, while we agree with NVR that the necessary information is on the record of this investigation, by not identifying its sales of overruns in its home market sales listing, as instructed, NVR failed to report this information in a format easily useable by the Department in its calculations. Further, NVR admitted at verification that these transactions were properly considered overruns, contrary to its previous statements.[148] At a minimum, pursuant to section 776(a)(2)(C) of the Act, we find that NVR impeded the proceeding by failing to identify overruns in the home market sales listing, as instructed in the Department's initial questionnaire, and, because NVR admits that the prices for its sales of overruns were lower,[149] we find this failure material. We agree, however, with NVR that it properly did not report U.S. sales of CTL plate produced by affiliated parties. Because the plate in question was not produced in Italy, it is not subject to this investigation.[150]

Finally, NVR had numerous other errors and omissions in its reporting that the Department identified at verification.[151] These errors and omissions were pervasive throughout NVR's data (including NVR's reporting of its billing adjustments, freight expenses, shipment dates, packing expenses, indirect selling expenses, inventory carrying costs, commissions, and credit expenses, as well as in the transaction-specific data examined for the pre-selected and surprise sales).[152]

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[145] *See* NVR's November 2, 2016 Sixth Supplemental Questionnaire Response, at 2-3.

[146] *See* NVR Sales Verification Report, at 28-29.

[147] *See* Preliminary Decision Memorandum, at 10.

[148] *See* NVR Sales Verification Report, at 18-19.

[149] *See* NVR Rebuttal Brief, at 12.

[150] *See* NVR's Supplemental Section C Questionnaire Response, dated September 12, 2016, at 7.

[151] *See* NVR Sales Verification Report, at 2-3; *see also* NAP Verification Report, at 2-3.

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

While NVR provided corrections to much of its misreported data at verification, it did not do so in all instances. Further, 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 other pieces of NVR's information not specifically examined.

In sum, we find that necessary information is not on the record, and that NVR 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,[153] it was unverifiable and/or so incomplete that it could not serve as a reliable basis for reaching the determination in this investigation.[154]

Given the above facts, we find that NVR 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.[155] Specifically, NVR failed to comply with specific information requests (such as shipment dates from Italy, theoretical weight information, explanations for observed discrepancies in product characteristic information, packing expenses,[156] etc.), and the responses that it did submit were rife with errors. In addition to the instances noted above, we note that NVR was careless in general with the data that it submitted; for example, in its response to the Department's First Supplemental Questionnaire, NVR provided a U.S. sales database that was corrupt and incomplete, and NVR admitted to deleting over 200 sales and several previously-reported fields.[157]

We disagree with NVR 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 NVR'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 questionnaire response

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[153] Other information that NVR attempted to present as corrections at verification demonstrated that the changes necessary to fill the omissions from, and errors in, NVR'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 held, "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 NVR offered at verification were not minor and amounted to new factual information within the meaning of 19 CFR 351.301(c)(5).

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

[155] *See Mannesmannröhren*, 77 F. Supp. 2d at 1313; *see also Ferro Union*, 44 F. Supp. 2d at 1329.

[156] *See* NVR Sales Verification Report, at 3 and 30-31.

[157] *See* NVR's September 22, 2016 Second Section C Supplemental Questionnaire Response.

and/or seek clarification from a party that submitted the original response. Some of these questionnaires issued to NVR were only one or two questions,[158] and others were limited in scope, given that they contained an analysis of only portions of a previous response.[159] While NVR 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 NVR with the maximum amount of flexibility to respond within the time constraints of the proceeding;[160] and 2) NVR would not have received as many, nor as lengthy, information requests, had it reported more accurate and transparent data.

Moreover, while NVR provided timely responses to most of these questionnaires, we disagree with NVR's claim that doing so demonstrated its full cooperation in this proceeding. Rather, as noted above, the Department was compelled to issue NVR multiple questionnaires because its prior submissions were carelessly prepared and contained flawed, missing, and incomplete data. Additionally, NVR failed to provide a full response to the Department's Third Supplemental Questionnaire by not demonstrating how the item numbers reflected on certain invoices tied to the data reported in its U.S. sales listing.[161] Finally, rather than undertaking a thorough review of its data, NVR's response to the Department's Fifth Supplemental Questionnaire contained the inaccurate statement that it had reported all of its home market and U.S. sales on a theoretical-weight basis.[162] Accordingly, we find that merely submitting timely responses, irrespective of whether they contain incomplete and inaccurate information, does not qualify NVR as acting to the best of its ability to cooperate in this proceeding.

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

[158] *See* Department Letter re: NVR Sixth Supplemental Questionnaire, dated October 24, 2016.

[159] *See* Department Letter re: NVR Supplemental Questionnaire, dated August 22, 2016 (Department's First Supplemental Questionnaire); *see also* Department Letter re: NVR Second Section B Supplemental Questionnaire, dated September 9, 2016; and Department's Third Supplemental Questionnaire.

[160] 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.

[161] *See* NVR September 29, 2016 SQR, at 1-2. We note that, had NVR provided a full response to this questionnaire, it likely would have identified its misreported product characteristics prior to preparing for verification.

[162] *See* NVR October 11, 2016 SQR, at 1.

> recognizes that mistakes sometimes occur, it does not condone inattentiveness, carelessness, or inadequate record keeping.[163]

We find that the scope of the errors and omissions identified at verification in NVR's data are the result of both inattentiveness and carelessness. 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 NVR argues that certain of its errors were, "in effect, a mile wide but only an inch deep,"[164] we disagree. Rather, while the Department was willing to give NVR an inch (by accepting minor data revisions),[165] NVR attempted to take a mile (by presenting revisions to nearly every field in NVR's database, many of which were substantial). Accepting such revisions would amount to accepting a wholly-new response.[166]

Finally, we are unpersuaded by NVR'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:[167]

> 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 in that case (unlike NVR's) 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 NVR's reported sales information because NVR failed to cooperate to the best of its ability in this investigation by failing to comply with the Department's multiple requests for information.

Therefore, for the foregoing reasons, the Department concludes that NVR 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 appropriate to use an adverse inference when selecting from among the facts otherwise available. As AFA, we have assigned a rate of 22.19 percent, which is the highest transaction-specific margin calculated

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

[164] *See* NVR Case Brief, at 15.

[165] *See* NVR Sales Verification Report, at 3-6. The Department did accept minor changes at verification but was unwilling to accept wholesale revisions to NVR's data.

[166] *See Brother*, 771 F. Supp. at 384.

[167] *See Xanthan Gum from Austria*, and accompanying Issues and Decision Memorandum, at 3-4.

for OTS, the other respondent participating in this proceeding. For a discussion of the selection of this rate, *see* the "Use of AFA" section, above.

Comment 5: Other NVR Adjustments

The Petitioner's Arguments

- The petitioner argues that, if the Department does not base NVR's final margin on AFA, it should make several adjustments to NVR's reported sales and expenses based on its findings at verification.[168]

NVR's Arguments

- NVR argues that the Department should not conduct a differential pricing analysis with respect to NVR's sales. It also argues that the Department should accept NVR's slab costs as reported.[169]

Department's Position:

Because of the Department's decision to base NVR's final dumping margin on AFA, any issues relating to NVR's sales, expenses, and costs are moot. Therefore, we have not addressed these issues for purposes of the final determination.

OTS

Comment 6: Differential Pricing Methodology

OTS's and the European Commission's Arguments

- In the *Preliminary Determination*, the Department applied a "differential pricing" analysis to determine whether to make average-to-average (A-to-A) or alternative comparisons to calculate OTS's dumping margin. The Department's analysis showed that: 1) 99.21 percent of the value of OTS's U.S. sales passed the Cohen's *d* test, which confirmed the existence of a pattern of prices that differ significantly among purchasers, regions, or time periods; and 2) the A-to-A method could not appropriately account for such differences. Accordingly, to calculate OTS's weighted-average dumping margin, the Department applied the average-to-transaction (A-to-T) method to all U.S. sales.

- OTS and the European Commission argue that a World Trade Organization (WTO) dispute settlement panel recently held that the Department's differential pricing methodology is inconsistent with the WTO Antidumping Agreement.[170] Specifically, OTS notes that the

[168] *See* Petitioner's Case Brief, at 20-22 and 28-29.

[169] *See* NVR Case Brief, at 1, 2, and 15-31.

[170] *See* Officine Tecnosider S.R.L. Case Brief, "OTS' Case Brief," dated February 2, 2017, at 10-11 (OTS Case Brief) (citing *United States – Anti-dumping and Countervailing Measures on Large Residential Washers from Korea*, WT/DS464/R (March 11, 2016) (*U.S. – Washers*)).

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.[171] According to OTS, 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."[172] Thus, OTS contends that the Department should suspend its use of differential pricing and instead calculate OTS's weighted-average dumping margin using the A-to-A method in the final determination.

- However, OTS argues that, if the Department continues using this methodology, it should index U.S. prices based on raw material price changes before conducting its differential pricing analysis to eliminate price differences related to raw material price changes.

The Petitioner's Arguments

- The petitioner did not comment on the above arguments.

Department's Position:

As an initial matter, the Department notes that there is nothing in section 777A(d) of the Act that mandates how the Department measures whether there is a pattern of prices that differs significantly or explains why the A-to-A method or the transaction-to-transaction (T-to-T) method cannot account for such differences. On the contrary, carrying out the purpose of the statute[173] here is a gap filling exercise properly conducted by the Department.[174] As explained in the *Preliminary Determination*, as well as in various other proceedings,[175] the Department's

[171] *Id*.

[172] *See* OTS Case Brief, at 11 (citing *U.S. – Washers*).

[173] *See Koyo Seiko Co., Ltd. v. United States*, 20 F. 3d 1156, 1159 (Fed. Cir. 1994) ("The purpose of the antidumping statute is to protect domestic manufacturing against foreign manufacturers who sell at less than fair market value. Averaging U.S. prices defeats this purpose by allowing foreign manufacturers to offset sales made at less-than-fair value with higher priced sales. Commerce refers to this practice as 'masked dumping.' By using individual U.S. prices in calculating dumping margins, Commerce is able to identify a merchant who dumps the product intermittently—sometimes selling below the foreign market value and sometimes selling above it. We cannot say that this is an unfair or unreasonable result." (internal citations omitted)).

[174] *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) (recognizing deference where a statute is ambiguous and an agency's interpretation is reasonable); *see also Apex*, 37 F. Supp. 3d at 1302 (applying *Chevron* deference in the context of the Department's interpretation of section 777A(d)(1) of the Act).

[175] *See, e.g.*, *Welded Line Pipe From the Republic of Korea: Final Determination of Sales at Less Than Fair Value,* 80 FR 61366 (October 13, 2015) (*Line Pipe from Korea*) and the accompanying IDM at Comment 1; *Circular Welded Non-Alloy Steel Pipe From the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2012-2013,* 80 FR 32937 (June 10, 2015), and the accompanying IDM at Comments 1 and 2; and *Welded ASTM A–312 Stainless Steel Pipe From the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2013–2014*, 81 FR 46647 (July 18, 2016), and accompanying IDM at Comment 4.

differential pricing analysis is reasonable, including the use of the Cohen's *d* test as a component in this analysis, and it is in no way contrary to the law.

The Department disagrees with the entire basis of the arguments set forth by both the European Commission and OTS regarding the effect that the WTO Appellate Body's findings in *US – Washing Machines (Korea)* has on the Department's methodology utilized in AD proceedings. As a general matter, 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 URAA.[176] In fact, Congress adopted an explicit statutory scheme in the URAA for addressing the implementation of WTO reports.[177] Indeed, the SAA noted that "WTO dispute settlement panels will have no power to change U.S. law or order such a change. Only Congress and the Administration can decide whether to implement a WTO panel recommendation and, if so, how to implement it."[178] As is clear from the discretionary nature of this scheme, Congress did not intend for WTO reports to automatically trump the exercise of the Department's discretion in applying the statute.[179] The Department has not revised or changed its use of the differential pricing methodology, nor has the United States adopted changes to its methodology pursuant to the URAA's implementation procedure.

To date, the United States has fully complied with all adverse panel and Appellate Body reports adopted by the Dispute Settlement Body with regards to Article 2.4.2 of the Antidumping Agreement. 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.

The Department also disagrees with OTS that it must adjust the differential pricing analysis, specifically the Cohen's *d* test, to index U.S. prices based on raw material price changes. The purpose of applying the differential pricing analysis for OTS is to determine whether the A-to-A method is appropriate,[180] and to conduct this analysis in this investigation, the Department has used a differential pricing analysis to examine the statutory criteria under section 777A(d)(1)(B) of the Act. The purpose of section 777A(d)(1)(B)(i) of the Act (pattern requirement) is to determine whether conditions exist (*i.e.*, prices that differ significantly among purchasers, regions or time periods) which may lead to "targeted" or masked dumping.[181] This is a factual analysis which does not include requiring the Department to explain why prices that differ

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[176] *See Corus Staal BV v. U.S. Dep't of Commerce, 395 F. 3d 1343, 1347-49 (Fed. Cir. 2005)*, *cert. denied* 126 S. Ct. 1023 (2006); *accord Corus Staal BV v. United States*, 502 F.3d 1370, 1375 (Fed. Cir. 2007).

[177] *See*, *e.g.*, 19 U.S.C. § 3533, 3538 (sections 123 and 129 of the URAA).

[178] *See SAA,* at 659.

[179] *See*, *e.g.*, 19 U.S.C. § 3538(b)(4) (implementation of WTO reports is discretionary).

[180] *See* 19 CFR 351.414(c)(1).

[181] *See SAA,* at 843.

significantly exist, or does not exist. The CAFC has affirmed this approach.[182] If the pattern requirement has been satisfied, then the Department explain why the A-to-A method cannot account for significantly different prices in the respondents U.S. pricing behavior, as exemplified in the findings from the pattern requirement. If such differences, whether they are caused by changing raw material costs or for any other reason, then the Department will continue to apply the standard A-to-A method. However, for OTS in this investigation, the A-to-A method was found to not be able to account for its significant price differences in the U.S. market, including changing cost of production or any other underlying cause for changing U.S. prices, and, therefore, the Department has used an alternative comparison method based on the A-to-T method for this final determination. In any event, OTS provided no evidence or analysis that demonstrates that the cost of raw materials fluctuated significantly and caused the prices of finished merchandise to fluctuate accordingly.

Comment 7: Weight Basis for OTS

OTS's Arguments

- OTS reported its per-unit sales, expenses, and production costs on both an actual- and a theoretical-weight basis; in the preliminary determination, the Department used the per-unit theoretical weights in our calculations. OTS disagrees with this decision, arguing the use of actual weight yields a more reasonable and more accurate result because it makes its home market sales on an actual-weight basis. According to OTS, the Department has the discretion to choose actual weight over theoretical weight for margin calculations.[183]

- OTS contends that the Department's use of theoretical weight is distortive for four reasons. First, OTS argues that theoretical weight does not allow an apples-to-apples comparison because OTS produces heavier plates in the home market. According to OTS, converting per-unit home market prices and costs from actual to theoretical weight artificially inflates OTS's dumping margin by the difference in actual weight.[184] OTS maintains that this distortion not only affects price-to-price comparisons, but it also affects the COP because OTS's production process varies slightly depending on the end plate.

- Second, OTS argues that actual weight is more appropriate because it is more closely aligned with OTS's normal course of business. Specifically, OTS notes that it tracks the majority if

[182] *See JBF RAK LLC v. United States*, 991 F. Supp. 2d 1343 (CIT 2014), aff'd *JBF RAK LLC v. United States*, 790 F.3d 1358 (Fed. Cir. 2015); and *Borusan Mannesmann Boru Sanayi Ve Ticaret A. S. v. United States*, 990 F. Supp. 2d 1384 (CIT 2014), *aff'd Borusan Mannesmann Boru Sanayi Ve Ticaret A.S. v. United States*, 608 Fed. Appx. 948 (Fed. Cir. 2015).

[183] *See* OTS Case Brief, at 8 (citing *Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from Mexico: Final Determination of Sales at Less Than Fair Value*, 81 FR 47352, (July 21, 2016), and accompanying Issues and Decision Memorandum, at Comment 1).

[184] OTS provided specific numbers in its case brief. Because OTS claimed business proprietary treatment for these figures, we are unable to disclose them here. For further discussion, *see* OTS Case Brief, at 7-8.

its global sales, 99 percent of its home market sales, and all of its production quantity in the normal course of business using actual weight.

- Third, OTS notes that the Department verified both the theoretical and actual weights, and therefore it has verified data upon which to calculate an accurate final dumping margin. According to OTS, the Department's rationale for converting all quantities to the same weight basis is accuracy.[185]

- Fourth, OTS argues that the facts in this case differ from those in other cases where the Department used theoretical weight. OTS asserts that, for example, the Department chose theoretical weight in *Welded Stainless Pressure Pipe from India* because "certain commercial issues and concerns….outweigh" other considerations.[186] According to OTS, however, those considerations are not present here because: 1) as noted above, theoretical weight is not the most consistent basis to perform the margin calculations, given that 99 percent of OTS's home market sales were made on an actual weight basis; and 2) thickness and width are controlled by minimum tolerances and length is not a model matching product characteristic.

- OTS argues that, if the Department disagrees with the above arguments, it should, at a minimum, equalize the difference in weight between markets by applying an adjustment factor.

The Petitioner's Arguments

- The petitioner argues that the Department should continue to use theoretical weight for the final determination. According to the petitioner, OTS's assertion that using theoretical weight does not allow an apples-to-apples comparison is simply untrue; rather, converting all sales and costs to the same basis eliminates distortions that would exist if no conversions were made and renders the calculations accurate. The petitioner maintains that OTS cited no facts or Department decisions to support its conclusory statements, and there is just as much support for the opposite conclusion (*i.e.*, that actual weight is not a consistent basis on which to perform the margin calculations).

- The petitioner finds irrelevant OTS's argument that 99 percent of its home market sales are made in actual weight, because OTS made 100 percent of its U.S. sales in theoretical weight. According to the petitioner, given that U.S. sales are the subject of the investigation, it makes sense to convert everything else to match them.

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[185] *See* OTS Case Brief, at 7 (citing *Final Results of Antidumping Duty Administrative Review and Partial Termination of Administrative Review: Circular Welded Non-Alloy Steel Pipe from the Republic of Korea*, 62 FR 55574, 55576, (October 27, 1997)).

[186] *See* OTS Case Brief, at 8-9 (citing *Welded Stainless Pressure Pipe from India: Final Determination of Sales at Less Than Fair Value*, 81 FR 66921 (September 29, 2016) and accompanying Issues and Decision Memorandum (*Welded Stainless Pressure Pipe from India*), at Comment 2).

- The petitioner maintains that OTS's argument that using theoretical weights artificially inflates OTS's dumping margin is factually incorrect, because quantity only affects the way that individual margins are weighted together, not whether there is a margin in the first place.

Department's Position:

We continue to base the antidumping margin for OTS on theoretical weight for the final determination. It is within the Department's prerogative to choose between two methods, as long as it articulates a rationale that is consistent with record evidence.[187] Our rationale for electing to use theoretical weight in this investigation follows naturally from our current practice to convert all prices and quantities into the same units as those in which the products under consideration are sold in the United States.[188] While the Department may depart from this practice for case-specific reasons, OTS's arguments provide insufficient basis to do so here. The facts on the record show that: 1) all of OTS's U.S. sales are sold in theoretical weight; 2) OTS maintains its home market sales and cost data in both actual and theoretical weight;[189] and 3) OTS keeps its inventory records in theoretical weight.[190]

Moreover, our use of theoretical weight here is consistent with the calculations performed for other respondents in the companion CTL plate cases, and none of those respondents have argued generally that actual weight is preferable. In and of itself, this consideration would be an insufficient reason for choosing or rejecting theoretical weight. But, in light of the fact that OTS keeps certain important records in such a manner, we find theoretical weight is the more appropriate basis on which to base OTS's calculations for the final determination.[191]

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[187] *See Hynix Semiconductor Inc. v. United States*, 391 F.Supp.2d 1337, 1342 (CIT 2005), which states: "[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence."

[188] *See Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from the Republic of Korea: Final Determination of Sales at Less Than Fair Value*, 81 FR 47347, (July 21, 2016), and accompanying Issues and Decision Memorandum, at Comment 2; *see also Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from the Republic of Turkey: Final Determination of Sales at Less Than Fair Value*, 81 FR 47355, (July 21, 2016), and accompanying Issues and Decision Memorandum, at Comment 2; *Light-Walled Rectangular Pipe and Tube from Mexico: Notice of Final Determination of Sales at Less Than Fair Value,* 69 FR 53677 (September 2, 2004), and accompanying Issues and Decision Memorandum, at Comment 16; and *Certain Welded ASTM A-312 Stainless Steel Pipe From the Republic of Korea; Final Results of Antidumping Duty Administrative Review*, 65 FR 30071 (May 10, 2000), and accompanying Issues and Decision Memorandum, at Comment 1.

[189] *See* OTS Sales Verification Report, at 9 and OTS Sales Verification Exhibits 5 and 7 through 13; *see also* OTS Cost Verification Report, at 13 through 14 and OTS Cost Verification Exhibits 5 and 6. With respect to home market sales, we observed at verification that OTS made the majority of its home market sales in actual weight; however, we also found that OTS recorded the total quantity of each invoice in its accounting system in both theoretical and actual weight.

[190] *See* OTS Cost Verification Report, at 8, 13 through 14, and OTS Cost Verification Exhibits 5 and 6.

[191] *See*, *e.g.*, OTS Cost Verification Report, at 13.

Comment 8: OTS's Home Market Commissions

The Petitioner's Arguments

- OTS reported that it incurred commission expenses in the home market during the POI. The petitioner argues that the Department should reclassify these expenses as indirect selling expenses for the final determination, because information on the record indicates that OTS's selling agents act more like OTS employees than commissionaires.[192] As support for this assertion, the petitioner cites to a contract with one of OTS's sales agents, provided by OTS as part of its initial questionnaire response.

- The petitioner notes that the Department has reclassified commissions as indirect selling expenses for home market sales in other cases and should do the same in the present proceeding.[193]

OTS's Arguments

- OTS maintains that the Department correctly treated the expenses in question as commission expenses in the preliminary calculations, and it should continue to do so for the final determination. According to OTS, the sample contract on the record, as well as the numerous other selling agent contracts examined at verification (along with invoices from the selling agents to OTS and OTS's payments to the agents on a sale-specific basis) demonstrate that OTS's selling agents are independent agents.

Department's Position:

For this final determination, we have continued to treat the expenses in question as commissions and deduct them from home market price, because, as the Department has stated in other cases, "{c}ommissions are payments to parties (selling agents) who facilitate a sale. Commissions compensate selling agents for providing services relating to the sale of merchandise."[194] Thus,

[192] *See* OTS's July 15, 2016 Section B Questionnaire Response (OTS July 15, 2016 BQR), at Exhibit B-11. Because OTS claimed that the specific provisions of this agreement are business proprietary in nature, we are unable to discuss them here. For further discussion, *see* the contract, as well as Petitioner's Case Brief, at 27.

[193] *See* Petitioner's Case Brief, at 27 (citing *Stainless Steel Sheet and Strip in Coils from Italy: Notice of Amended Final Results of Antidumping Administrative Review*, 68 FR 11521 (March 11, 2003) (*SSSSC from Italy Amended Final*); *Stainless Steel Bar from Germany: Final Results of Antidumping Duty Administrative Review*, 71 FR 42802 (July 28, 2006) (*SS Bar from Germany*) and accompanying Issues and Decision Memorandum, at Comment 5, and *Notice of Preliminary Results of Antidumping Duty Administrative Review, Notice of Intent to Revoke in Part: Individually Quick Frozen Red Raspberries from Chile*, 71 FR 450000 (August 8, 2006), upheld in *Notice of Final Results of Antidumping Duty Administrative Review, and Final Determination to Revoke the Order In Part: Individually Quick Frozen Red Raspberries from Chile*, 72 FR 6524 (February 12, 2007) (*Chilean Raspberries).*

[194] *See 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), and accompanying Issues and Decision Memorandum, at Comment 4.

where fees are paid to independent selling agents (*i.e.* not an employee), the Department treats them as a commission expense.

The petitioner's argument is premised on the fact that many of the features in the agent's contracts could be required by a company of its permanent employees, and thus the petitioner equates salary payments to employees with commission expenses to agents. However, the petitioner's analysis overlooks the fundamental difference between the two types of payments: salaries are paid even if the employee makes no sales; commissions are not. Thus, it is proper to treat only the expenses in the former category as indirect, because they are not directly linked to specific sales transactions.

We disagree that the cases cited by the petitioner are on point. Because determinations regarding commission expenses are fact-specific, any relevance of the record of another case must contain similar facts. In *Chilean Raspberries*, unlike here, the Department reclassified certain commissions paid by the respondent as indirect selling expenses because they "were not sale-specific payments to a selling agent working on behalf of the {respondent}. Rather, these expenses were related to general selling services (*i.e.*, not directly facilitating sales) performed by another company."[195] This fact pattern is not present in this case.

With respect to *SS Bar from Germany* and *SSSSC from Italy*, likewise the facts were not the same as in this case. In *SSBAR from German*, we treated some payments as commissions, and others as indirect selling expenses:

> We agree with Petitioners that the Department does not normally treat the type of payment made to Agent A as a commission. Instead, we are treating these payments to Agent A as indirect selling expenses and have modified the indirect selling expense ratio used in our calculations to include this amount for the *Final Results*. *See* Proprietary Analysis Memo at Comment 5. However, for commissions BGH paid to Agent B, we disagree with the petitioners and, for the *Final Results*, we are continuing to allow these commissions as a deduction to normal value. *See* Proprietary Analysis Memo at Comment 5.[196]

In *SSSSC from Italy Amended Final*, we revised our treatment of certain payments in light of facts on the record between the preliminary and final results:

> Following the Preliminary Results, the Department recalculated Ken-Mac's indirect selling expenses to account for expenses related to selling agents determined by the Department to be employees of Ken-Mac. *See* Analysis of Comments Received Concerning Commissions for the Final Results of the Antidumping Duty Administrative Review of Stainless Steel Sheet and Strip in Coils from Italy--ThyssenKrupp Acciai Speciali Terni S.p.A (TKAST) dated February 3, 2003. The Department inadvertently applied the revised indirect selling expenses to all of TKAST's U.S. sales, not just to those U.S. sales through

[195] *See Chilean Raspberries*, 71 FR at 45002.

[196] *See SS Bar from Germany,* 71 FR 42802, and accompanying Issues and Decision Memorandum, at Comment 5.

Ken-Mac. For the amended final results, we have applied the revised indirect selling expenses associated with U.S. sales through Ken-Mac to Ken-Mac sales only. *See* Analysis for the Amended Final Results of the Antidumping Duty Administrative Review of Stainless Steel Sheet and Strip in Coils from Italy - ThyssenKrupp Acciai Speciali Terni S.p.A (TKAST) (Final Amended Analysis Memorandum) from Stephen Bailey to Robert Bolling dated March 6, 2003.[197]

In contrast to those proceedings, evidence on the record of this investigation supports a finding that OTS's unaffiliated selling agents are independent selling agents, rather than OTS employees.[198] Specifically, the record demonstrates that OTS pays these individuals only after a sale is made, at the rates set forth in their contracts.[199] At verification, OTS demonstrated that this was the case by providing a number of selling agent contracts, as well as invoices from, and payments to, the agents for their fees in making home market sales.[200] These documents showed that the fees were linked to each sale made by the agent on OTS's behalf, and they were incurred as a direct result of the sale.[201] This information was consistent with information previously supplied by OTS in its questionnaire response.[202] Therefore, we disagree that it is appropriate to treat these expenses as indirect selling expenses.

Comment 9: U.S. Short-Term Borrowing Rate

OTS's Arguments

- In the preliminary determination, the Department calculated OTS's U.S. credit expenses and inventory carrying costs using a U.S. dollar borrowing rate derived from the Federal Reserve, because OTS had no short-term loans in U.S. dollars during the POI.[203] The petitioner argues that instead the Department should base the U.S. short-term borrowing rate on an average of the POI short-term prime rates from the top 25 U.S. commercial banks, as posted by the Federal Reserve.

- According to the petitioner, the Department has the discretion to base U.S. borrowings on commercial bank loans. In this case, the petitioner maintains that the commercial bank loan rate is more appropriate rate because it: 1) comes from the top 25 U.S. commercial banks and is used by those banks to price short-term business loans; and 2) is the average

[197] *See SSSC from Italy Amended Final*, 68 FR at 11523

[198] *See* OTS's September 6, 2016 Supplemental Sections A – C Questionnaire Response (OTS September 6, 2016 SQR), at Exhibit SB-24; and OTS Sales Verification Report, at Exhibits 7, 9, 12, and 13.

[199] *Id*.

[200] *See* OTS Sales Verification Report, at OTS Sales Verification Exhibits 7, 9, 12, and 13.

[201] *Id*.

[202] *See* OTS September 6, 2016 SQR, at Exhibit SB-24.

[203] *See* OTS September 6, 2016 SQR, at SC-2 and Exhibit SC-4.

of each month's interest rates over the entire POI. The petitioner notes that the Federal Reserve rate used in the preliminary determination only covers four weeks of the POI.

OTS's Arguments

- OTS did not respond to the petitioner's argument.

Department's Position:

We continue to use the same Federal Reserve short-term loan rate for the final determination. The Department has a long-standing preference of using publicly-available information to establish a short-term interest rate which meets the following criteria: 1) the rate should be reasonable; 2) it should be readily obtainable and predictable; and 3) it should be a short-term interest rate actually realized by borrowers in the course of 'usual commercial behavior' in the United States.[204]

The Department directs respondents to use the selected short-term loan rate because it represents the actual rate charged for commercial and industrial loans maturing between one month and one year from the time the loan is made. The rate proposed by the petitioner is not a rate realized by borrowers but instead is a rate used by banks to price short-term business loans. Therefore, it does not meet the Department's criteria for establishing a short-term interest rate.

Further, while the short-term loan rate at issue is from four weeks during the POI, those weeks were selected by the Federal Reserve to be representative of the entire quarter. Therefore, we find that the short-term loan rate is representative of the rates during the entirety of the POI.

Comment 10: Home Market Freight Expenses

The Petitioner's Arguments:

- OTS based its home market freight expenses on the contract rates charged by its freight providers.[205] The petitioner argues that evidence on the record shows that these rates are inaccurate, and, thus, the Department should disallow them for purposes of the final determination.

- Specifically, the petitioner notes that, at the Department's request (both in a supplemental questionnaire and at verification), OTS provided its actual freight expenses for a number of home market sales. The petitioner argues that this information shows that the home

[204] *See, e.g., Final Determination of Sales at Not Less Than Fair Value: Prestressed Concrete Steel Rail Tie Wire from Thailand,* 79 FR 25574 (May 5, 2014) and accompanying Issues and Decision Memorandum, at 31.

[205] *See* OTS July 15, 2016 BQR, at B-34 and Exhibit B-9.

> market freight rates differ significantly from the actual freight expenses in a preponderance of the instances examined.[206]

OTS's Arguments

- OTS argues the Department correctly relied on OTS's reported freight contract rates in the *Preliminary Determination*, and the Department should continue do so in the final determination. OTS notes that the Department preliminarily found that the reported freight expenses were conservative because they were generally lower than actual freight costs.[207]

- OTS asserts that the Department verified OTS's submitted freight chart, used as the basis for its reported expenses, and confirmed that it was directly based on negotiated freight rates by destination agreed upon between OTS and its freight providers. Thus, OTS asserts the Department can therefore continue to rely on the reported rates, which conservatively represent OTS's freight expenses.

Department's Position

We continue to use the inland freight reported in OTS's sales listing as an adjustment in the final determination. OTS based these expenses on the contract rates with its freight suppliers during the POI, which were set forth in a chart contained in its original questionnaire response.[208] In order to evaluate whether these rates were accurate, we requested in a supplemental questionnaire that OTS provide supporting documentation for the freight expenses related to certain invoices. While the documents provided by OTS showed that the actual freight amount paid differed from the freight chart, we noted that the reported amounts were generally lower than the actual costs incurred.[209] Therefore, in the *Preliminary Determination*, we accepted the reported rates, stating:

> OTS reported freight expenses in the home market based on contract rates established with its freight suppliers. Because OTS provided source documentation demonstrating that it generally paid freight costs that were higher than the reported per-unit amounts, *i.e.*, OTS's reporting was conservative, we have accepted the reported freight expenses for this preliminary determination. *See* OTS's Supplemental Sections A-C Response, at Exhibit SB-22; and OTS's Supplemental Sections B-D response, dated September 21, 2016, at 19-23.[210]

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[206] *See* Petitioner's Case Brief, at 25-26 (citing OTS's September 21, 2016 Supplemental Sections B - D Questionnaire Response (OTS September 21, 2016 SQR), at SB-20 to SB-23; and OTS Sales Verification Report, at 12-13).

[207] *See* Preliminary Determination Memorandum, at FN 76 pg. 21.

[208] *See* OTS July 15, 2016 BQR, at B-34; *see also id.*, at Exhibit B-9.

[209] *See* OTS September 21, 2016 SQR, at SB-20 to SB-23.

[210] *See* Preliminary Determination Memorandum, at FN 76 pg. 21.

At verification, we further discussed OTS's freight rate chart with company officials and tied the rates in the chart for all of the sales selected for individual examination to the home market sales listing, as well as to source documentation. Specifically, we stated:

> Company officials stated that OTS's sales team maintains a freight rate chart created by OTS's transportation/logistics division, which includes all destination shipping rates based on contracts or rate negotiations with each of its third-party trucking companies. Company officials explained that they used this chart to compile the truck rates by destination contained in Exhibit B-9.
>
> For each of the selected home market and U.S. sales, we tied the reported freight expenses to the freight rate chart contained in Exhibit B-9. In addition, we selected certain freight rates from Exhibit B-9 and tied these rates to the detailed freight rate chart maintained by OTS's sales department and to the home market sales listing. We noted no discrepancies.[211]

In addition, we obtained documentation on the actual freight expenses for each of the examined home market sales. While we noted differences between the actual expenses and contract rates for five of the seven transactions, we also noted that the amounts reported for the overwhelming majority of transactions were lower than the actual costs incurred.[212]

We disagree with the petitioner that, given the above facts, it would be appropriate to disregard OTS's reported freight expenses. OTS disclosed the basis of its reported expenses to us prior to verification, and it responded completely to our questions posed in a supplemental questionnaire. Because we did not request that OTS revise its reporting methodology after it had disclosed it to us, we find no basis to deem OTS uncooperative. Therefore, we accepted its reported expenses for the final determination (revised only to use the actual expenses contained on the administrative record, where available). However, if an antidumping duty order is issued in this proceeding, we expect that respondents will report their expenses as accurately as possible in the future segments of this administrative proceeding and are open to reconsider the issue in future segments if it is raised.

Comment 11: Disregarding Sales Where OTS Provided Only Tolling Services

The Petitioner's Arguments:

- In its questionnaire response, OTS reported its sales of services related to CTL plate processed under tolling arrangements for three unaffiliated companies in the home market. In the *Preliminary Determination*, the Department disregarded the costs associated with this processing, as well as the sales of tolling services. The petitioner argues that the Department should continue to do so in the final determination.

[211] *See* OTS Sales Verification Report, at 15.

[212] *Id*.

OTS's Arguments

- OTS did not comment on this issue.

Department's Position:

We have continued to disregard the fees charged by OTS to certain unaffiliated home market customers for tolling services, as well as the associated costs, in our final calculations for OTS, because they are related to tolling services provided by OTS and do not constitute sales of merchandise.

Comment 12: Ministerial Error in the Cost Test for OTS

OTS's Arguments

- In the *Preliminary Determination*, the Department determined that that a quarterly cost methodology was warranted for OTS. OTS argues that the Department made a ministerial error in performing this test because it failed to compare NVs to U.S. prices in the same quarter. OTS requests that the Department correct this error for purposes of the final determination.

The Petitioner's Arguments:

- The petitioner did not comment on this issue.

Department's Position:

We examined the *Preliminary Determination* calculations and agree with OTS. Therefore, we made the requested corrections in our final margin calculations.

Comment 13: Cost Recovery Test

OTS's Arguments

- In the *Preliminary Determination*, the Department determined that there was linkage between OTS's sales prices and costs during the POI and, as such, a quarterly-average COP was warranted for OTS. OTS maintains that the Department adopted this alternative methodology, which considers quarterly indexing, to reduce the distortive impact that a significantly-changing cost of manufacturing (COM) has on the annual average cost calculation.[213]

- However, according to OTS, the Department's *Preliminary Determination*: 1) fails to clearly identify how the Department conducted the cost recovery test; 2) is unclear as to which cost

[213] *See* OTS Case Brief, at 4-5 (citing *Certain Welded Stainless Steel Pipes from the Republic of Korea: Final Results of Antidumping Duty Administrative Review*, 74 FR 31242 (June 30, 2009) (*Welded Stainless Steel Pipes from Korea*) and accompanying Issues and Decision Memorandum, at Comment 1.

recovery methodology the Department applied (*i.e.*, annual or quarterly);[214] and 3) contains a narrative which appears to conflict with the SAS program log output.

- OTS argues that, as instructed by the CIT, the Department should conduct the cost recovery test using both the weighted-average per-unit COP for the POI and quarterly indexed methodology, and report the specific figures used in, and resulting from, each methodology.[215] OTS further asserts that, after conducting the cost recovery test under both methodologies, the Department should then identify which methodology reduces the distortive impact and yields the fairest and most reasonable result.

The Petitioner's Arguments:

- The petitioner contends that OTS's arguments amount to form over substance and should be dismissed. The petitioner argues that, if quarterly costs are used, running the sales-below-cost test based on POI costs will always be more distortive than running it based on quarterly costs.

- According to the petitioner, the primary reason for the remand in *SeAH* was that the Department did not provide an explanation for which cost period it used in the sales-below-cost test.

- The petitioner argues that in the final determination, the Department should explain the obvious distortion present here (*i.e.*, that the reasons for using the quarterly costing methodology requires the use of the quarterly costs in the sales-below-cost test).

Department's Position

We agree with OTS in part. In the *Preliminary Determination,* we used the approach for testing for cost recovery when using our alternative quarterly cost methodology adopted in *Welded Carbon Steel Pipe and Tube from Turkey* and *Welded Carbon Steel Pipe and Tube from Turkey Final*, subsequent to *Welded Stainless Steel Pipes from Korea*.[216] In *Welded Carbon Steel Pipe and Tube from Turkey* and *Welded Carbon Steel Pipe and Tube from Turkey Final* the Department determined it appropriate to rely on our alternative quarterly cost calculation methodology. As such, in performing the sales-below-cost test, we compared each home market sale to the quarterly average cost of production for the quarter in which the sale was made. We then determined whether those sales that failed the cost test provided for cost recovery over the

[214] *See* OTS Case Brief, at 5.

[215] *See* OTS Case Brief, at 5 (citing *SeAH Steel Corp. v United States*, 704 F. Supp. 2d 1353 (CIT May 19, 2010) (*SeAH*)).

[216] *See Certain Welded Carbon Steel Pipe and Tube from Turkey: Notice of Preliminary Results of Antidumping Duty Administrative Review*, 76 FR 33204 (June 8, 2011) (*Welded Carbon Steel Pipe and Tube from Turkey*). *See also Certain Welded Carbon Steel Pipe and Tube from Turkey: Notice of Final Results of Antidumping Duty Administrative Review*, 76 FR 76939 (December 9, 2011) (*Welded Carbon Steel Pipe and Tube from Turkey Final*) and accompanying Issues and Decision Memorandum, at Comment 2.

POR. In light of the CIT's decisions in *SeAH* and *SeAH II*,[217] where the Court ruled that the Department should perform the cost recovery test using a non-indexed annual weighted-average COP, we developed a new approach for testing for cost recovery when using our alternative quarterly cost methodology.[218] Under this new approach, we calculate CONNUM-specific weighted-average annual prices using only those sales that failed the cost test and compare the resulting annual weighted average of the below-cost sales to the annual weighted average costs per CONNUM. If the annual weighted-average of the below-cost sales per CONNUM is above the annual weighted-average cost per CONNUM, we restore all of the below-cost sales of that CONNUM to the NV pool of sales available for comparison with U.S. sales. This approach complies with the statutory mandate at section 773(b)(2)(D) of the Act to use a weighted-average cost for the period. It also conforms with the *SAA*, which explains that "the determination of cost recovery is based on an analysis of actual weighted-average prices and costs during the period of investigation or review ... ."[219] Therefore, for the final determination, consistent with the *Preliminary Determination*, we have used the new approach for testing for cost recovery when using our alternative quarterly cost methodology as adopted in *Welded Carbon Steel Pipe and Tube from Turkey* and *Welded Carbon Steel Pipe and Tube from Turkey Final*.

Further, we note that in the *Preliminary Determination*, the Department inadvertently used the annual weighted-average of all sales per CONNUM.[220] Accordingly, for this final determination we corrected the programming language in the Department's SAS program to use the annual weighted-average of the below-cost sales per CONNUM when determining which below-cost sales to restore to the NV pool of sales available for comparison with U.S. sales.[221]

Comment 14: Financial Expense Ratio

OTS's Arguments

- In the *Preliminary Determination*, the Department used the interest rate calculation as submitted by OTS. OTS notes that, during verification, the Department determined that OTS had excluded certain financial expenses reported in its financial statements from the interest rate calculation. For the final determination, OTS argues that the Department must revise OTS's financial expense ratio to reflect the updated information determined at verification.

[217] *See SeAH Steel Corp. v United States*, 764 F. Supp. 2d 1322, 1335-1336 (CIT 2011) (*SeAH II*).

[218] *See Certain Welded Carbon Steel Pipe and Tube from Turkey; see also Welded Carbon Steel Pipe and Tube from Turkey Final*, at Comment 2.

[219] *SAA*, at 832.

[220] *See* Memorandum, "Preliminary Determination Calculations for Officine Tecnosider S.R.L. (OTS)," dated November 4, 2016, at Attachment II.

[221] *See also* OTS Final Sales Calculation Memorandum.

The Petitioner's Arguments:

- The petitioner argues if the Department revises OTS's financial expense ratio as requested, it should also adjust the direct material costs by the amount of the provision added to interest expenses.

Department's Position

We agree with OTS. As discussed in the OTS Cost Verification Report, when tracing the financial expense components to OTS's fiscal year 2015 audited financial statements, we noted that OTS inadvertently excluded certain items from the financial expense rate calculation. The excluded amounts were comprised of items that were classified as financial income and charges under note 3.11 of the financial statements and items classified as financial expenses in OTS's management report. These items were of the nature normally included in the financial expense rate calculation.[222] Therefore, for the final determination, we have recalculated OTS's financial expense rate to include these items as suggested in the OTS Cost Verification Report.[223]

We also agree with the petitioner. As discussed in the OTS Cost Verification Report, because the provision in question is associated with foreign exchange gains and losses, it is appropriate to treat the release of the provision as a financing cost rather than a material cost.[224] Accordingly, for the final determination, we have revised OTS's slab costs to exclude the release of the provision reclassified as financing cost and include it in the recalculated financial expense rate as noted above. *See* Comment 15 below for further discussion of this issue.

Comment 15: Foreign Exchange Provision Offset to Reported Direct Material Costs

The Petitioner's Arguments

- The petitioner notes that OTS's reported slab costs include the POI portion of the release of a foreign exchange rate provision related to raw material purchases, recorded in OTS's books and records in 2014. The petitioner asserts that it is the Department's practice to treat foreign exchange gains and losses as financial expenses and to include them in the interest expense calculation.

- The petitioner contends the Department should not allow foreign exchange fluctuations to affect OTS's reported costs. The petitioner argues that the Department should adjust OTS's direct material costs as suggested in the OTS Cost Verification Report for the final determination. [225]

[222] *See* OTS Cost Verification Report, at 22-23.

[223] *Id.*

[224] *Id.,* at 15.

[225] *Id.,* at 14-15.

OTS's Arguments

- OTS argues the Department's practice is to adjust raw material costs for exchange losses related to purchases of raw materials.[226] According to OTS, the petitioner misstates the Department's position and provides no citation or reference to a regulation for treating foreign exchange gains and losses as interest expenses.

- OTS contends the Department must consider what record data and calculation methodology for expenses produce the most accurate dumping margin.[227] Therefore, OTS argues the Department should continue to measure raw materials costs inclusive of offsets for exchange gains associated with raw material purchases in the final determination.

Department's Position

We agree with the petitioner. Subsequent to *Round Wire from Taiwan* and *Brass Sheet and Strip from Canada*, the Department's practice regarding the treatment of foreign exchange gains and losses changed. Our current practice is to include the entire amount of the net foreign exchange gain or losses in the financial expense rate calculation.[228] In *Mushrooms from India*, the Department implemented a change in practice regarding the treatment of foreign exchange gains and losses.[229] The Department's previous practice was to have respondents identify the source of all foreign exchange gains and losses (*e.g.*, debt, accounts receivable, accounts payable, cash deposits) at both a consolidated and unconsolidated corporate level.[230] At the consolidated level, the current portion of foreign exchange gains and losses generated by debt or cash deposits was included in the interest expense rate computation. At the unconsolidated producer level, foreign exchange gains and losses on accounts payable were either included in the G&A rate computation, or under certain circumstances, in the COM. Gains and losses on accounts receivable at both the consolidated and unconsolidated producer levels were excluded from the COP and CV calculations.[231]

Under the current practice, instead of identifying foreign exchange gains and losses separately by source and level of corporate structure, we include in the financial expense ratio calculation all foreign exchange gains and losses from the consolidated financial statements of the respondent's

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[226] *See* Officine Tecnosider S.R.L. Rebuttal Brief, "OTS' Rebuttal Brief," dated February 7, 2017 (OTS Rebuttal Brief), at 2-4 (citing *Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Round Wire from Taiwan*, 64 FR 17336 (April 9, 1999) (*Round Wire from Taiwan*) at Comment 4, and *Brass Sheet and Strip from Canada: Final Results of Antidumping Duty Administrative Review*, 65 FR 37520 (June 15, 2000) (*Brass Sheet and Strip from Canada*) and accompanying Issues and Decision Memorandum, at Comment 4.)

[227] *See* OTS Rebuttal Brief, at 2 (citing *Union Steel Mfg. Co. Ltd. V. United States*, 837 F. Supp. 2d 1307,1317-18 (CIT 2012).

[228] *See Certain Preserved Mushrooms from India: Preliminary Results of Antidumping Duty Administrative Review*, 68 FR 11045 (March 7, 2003) (*Mushrooms from India*).

[229] *Id.*

[230] *Id.*

[231] *Id.*

highest-level parent company.[232] This approach recognizes that the critical factor in analyzing the appropriate amount to include in the COP/CV is not the source of the foreign exchange gain or loss, but rather how the entity as a whole manages its foreign currency exposure.[233]

Accordingly, in the instant case, because the provision is associated with foreign exchange gains and losses, we have treated the release of the provision as a financing cost rather than a material cost. Accordingly, for the final determination, we have revised OTS's slab costs to exclude the POI portion of the release of the provision, and have revised OTS's financial expenses to include the release of the provision.

Comment 16: Trasteel's Slab Acquisition Cost

The Petitioner's Arguments

- In the cost verification report, the Department noted that it may be appropriate to calculate the market price for the transactions-disregarded analysis using Trasteel International SA's (Trasteel's) original mill purchase price paid to the unaffiliated suppliers, plus an amount for selling, general and administrative (SG&A) expenses and financial expense based on Trasteel's reported SG&A and financial expense rate.

- The petitioner argues that Trasteel provides valuable procurement services to OTS which should be included in OTS's purchase price of slab from Trasteel. The petitioner asserts that, for the final determination, the Department should: 1) calculate the market price for slab by adding Trasteel's SG&A and interest expense to Trasteel's slab purchase price; and 2) use this market price to value slab if it exceeds the transfer price currently being used.

OTS's Arguments

- OTS notes that, in the *Preliminary Determination*, the Department added the amount of commissions paid to Trasteel in calculating OTS's slab acquisition costs and resulting COP. According to OTS, this commission covers the costs incurred by Trasteel, and, as a result, adding the commissions paid by OTS and general and administrative expenses incurred by Trasteel would result in double-counting.

- OTS argues that, if the Department determines that additional expenses should be added to the slab acquisition cost for the final determination, it should add either the commissions paid to Trasteel or Trasteel's general and administrative expenses (but not both).

Department's Position

We agree with the petitioner. The Department's established practice when a respondent purchases inputs from an affiliated reseller is to value the input at the higher of the transfer price

[232] *Id.; see also Silicomanganese from Brazil: Final Results of Antidumping Duty Administrative Review*, 69 FR 13813 (March 24, 2004) and accompanying Issues and Decision Memorandum, at Comment 14.

[233] *Mushrooms from India.*

or the adjusted market price for the input (*i.e.*, the affiliate's average acquisition cost from the unaffiliated supplier plus the affiliate's SG&A costs).[234] Because the affiliated reseller is providing a service related to the acquisition of the input, as well as the input itself, the SG&A expenses of the affiliate must be included.[235] The Department must ensure that the market price it uses for comparison incorporates the activities related to both the service and the input.[236] Therefore, for the final determination, the Department has calculated the market price for the transactions disregarded analysis using Trasteel's acquisition cost (*i.e.*, the purchase price paid to the unaffiliated suppliers) plus an amount for SG&A and financial expense based on Trasteel's reported SG&A and financial expense rate.

We disagree with OTS that the amount of commissions paid to Trasteel should not be added to the reported transfer prices because this results in double counting. As discussed in the OTS Cost Verification Report, OTS's slab prices as recorded in its normal books and records include all ancillary costs associated with the purchases and all commissions paid to Trasteel.[237] However, for reporting purposes, OTS reduced the per-unit slab costs by the per-unit commission.[238] Accordingly, OTS's transfer prices, as reported, do not capture the full amount paid to Trasteel. Therefore, for the final determination, the Department has continued to revise OTS's reported direct material costs to include the commission paid to Trasteel. Further, the Department has analyzed the affiliated purchases of slab in accordance with the transactions disregarded rule in section 773(f)(2) of the Act. Because the Department has relied on the higher of the revised transfer price (including the commission paid to Trasteel) or the market price calculated above (including an amount for SG&A and financial expense), there is no double counting.

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[234] *See Notice of Final Determination of Sales at Less Than Fair Value and Affirmative Critical Circumstances Determination: Bottom Mount Combination Refrigerator-Freezers from Mexico*, 77 FR 17422 (March 26, 2012) and accompanying Issues and Decision Memorandum, at Comment 28.

[235] *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 6.

[236] *Id.*

[237] *See* OTS Cost Verification Report, at 16.

[238] *Id.*

IX. 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