

**FINAL RESULTS OF REDETERMINATION  
PURSUANT TO COURT REMAND**

*Xi'an Metals & Minerals Import & Export Co., Ltd. v. United States*  
Consol. Court No. 15-00109, Slip Op. 17-120 (CIT September 6, 2017)

**I. SUMMARY**

The Department of Commerce (Commerce) has prepared these final results of redetermination pursuant to the decision and remand order of the Court of International Trade (CIT or Court) in *Xi'an Metals & Minerals Import & Export Co., Ltd. v. United States*, Consol. Court No. 15-00109, Slip Op. 17-120 (CIT September 6, 2017) (Remand Order). These final results of redetermination concern certain aspects of Commerce's final results in the fifth administrative review of the antidumping duty order on certain steel nails from the People's Republic of China (China).<sup>1</sup> Specifically, these final results concern: (1) potential double counting of certain labor costs by including line items such as "Salary & Bonus," "Welfare," and "Social Security and Compensation" as selling, general, and administrative (SG&A) expenses in the surrogate financial ratios;<sup>2</sup> and (2) the transcription error in the Stanley Works (Langfang) Fastening Systems Co., Ltd.'s (Stanley) post-verification factors of production (FOP) database.<sup>3</sup> Discussion of Commerce's application of the limiting rule (*i.e.*, whether Commerce may apply the alternative average-to-transaction methodology only to those sales found to have passed the

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<sup>1</sup> See *Certain Steel Nails from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 2012-2013*, 80 FR 18816 (April 8, 2015) (*Final Results*) and accompanying Issues and Decision Memorandum (IDM).

<sup>2</sup> See Remand Order at 18-24.

<sup>3</sup> *Id.* at 25-27.

Cohen's *d* test) is not included in these final results of redetermination, consistent with the Court's November 3, 2017, order granting the United States' motion for reconsideration.<sup>4</sup>

As set forth in detail below, we have made certain adjustments to comply with the Court's finding that, "by not removing the various line items such as 'welfare' and 'social security and compensation' that are presumptively included already in the Thai NSO rate, the SV for labor is inflated,"<sup>5</sup> and have done so under respectful protest.<sup>6</sup> In addition, consistent with the Court's order,<sup>7</sup> we have corrected the transcription error made by Stanley in its post-verification FOP database, also under respectful protest. As a result of these changes, we have revised the weighted-average dumping margins assigned to Stanley and Xi'an Metals & Minerals Import & Export Co. Ltd. (Xi'an Metals).

## **II. REMANDED ISSUES**

### **1. Allocation of Labor Costs**

#### **A. Background**

Section 733(c) of the Tariff Act of 1930, as amended (the Act) provides that, for purposes of normal value (NV), Commerce will value the factors of production (FOP) in NME cases using the best available information regarding the value of such factors in a market economy (ME) country or countries considered to be appropriate by the administering authority. Section 773(c)(4) of the Act requires that, when valuing FOPs, Commerce utilize, to the extent possible, the prices or costs of factors of production in one or more ME countries that are (1) at a comparable level of economic development, and (2) significant producers of comparable

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<sup>4</sup> See Consol. Court No. 15-00109, Docket No. 78; Remand Order at 34-37.

<sup>5</sup> See Remand Order at 24.

<sup>6</sup> See *Viraj Group Ltd. v. United States*, 343 F.3d 1371 (Fed. Cir. 2003) (*Viraj*). While Commerce respectfully disagrees with the Court, it complies with the Court's order under respectful protest.

<sup>7</sup> See Remand Order at 27.

merchandise. Pursuant to 19 CFR 351.408(c)(4), Commerce will normally value overhead, SG&A, and profit using “nonproprietary information gathered from producers of identical or comparable merchandise in the surrogate country.”<sup>8</sup> Additionally, Commerce weighs the available information with respect to each input value and, on a case-by-case basis, makes a product-specific determination as to what constitutes the “best” available surrogate value for each input.<sup>9</sup>

On June 21, 2011, in *Labor Methodologies*, in response to comments requested on the means by which Commerce could “best capture all relevant costs in its wage rate calculation in NME antidumping proceedings,”<sup>10</sup> Commerce revised its labor cost calculation methodology in NME antidumping proceedings to rely on International Labor Organization (ILO) Chapter 6A (Labor Cost in Manufacturing) data, rather than Chapter 5B (Wages in Manufacturing) data, for the primary surrogate country.<sup>11</sup> As stated by Commerce, “Commerce has decided to change to the use of Chapter 6A data, on the rebuttable presumption that Chapter 6A data better accounts for all direct and indirect labor costs.”<sup>12</sup> This methodological change did not prompt Commerce to preclude all other sources, *i.e.*, other than Chapter 6A data, for evaluating labor costs in NME antidumping proceedings. Rather, Commerce continued to follow its practice of selecting the “best information available” to determine surrogate values for inputs such as labor.<sup>13</sup>

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<sup>8</sup> See 19 CFR 351.408(c)(4).

<sup>9</sup> See *Certain Preserved Mushrooms from the People’s Republic of China: Final Results and Final Partial Rescission of the Sixth Administrative Review*, 71 FR 40477 (July 17, 2006) and accompanying IDM at Comment 1.

<sup>10</sup> See *Antidumping Methodologies in Proceedings Involving Non-Market Economies: Valuing the Factor of Production: Labor*, 76 FR 36092 (June 21, 2011) (*Labor Methodologies*).

<sup>11</sup> See *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review*, 76 FR 56158 (September 12, 2011) and accompanying IDM at Comment 2.I. Due to concerns that reliance on data from Chapter 5B of the ILO may under-count the NME producer’s labor costs, Commerce was considering alternative data sources for valuing labor to ensure all labor costs incurred by the NME producer are accounted for in the normal value (NV) calculation.

<sup>12</sup> See *Labor Methodologies* at 36093.

<sup>13</sup> See *Certain Polyester Staple Fiber from the People’s Republic of China: Final Results of the Antidumping Duty Administrative Review; 2012-2013*, 80 FR 4542 (January 28, 2015) and accompanying IDM at Comment 5.

As part of this revised methodology, Commerce stated that “{i}f there is evidence submitted on the record by interested parties demonstrating that the NME respondent’s cost of labor is overstated, Commerce will make the appropriate adjustments to the surrogate financial statements subject to the available information on the record. Specifically, when the surrogate financial statements include disaggregated overhead and selling, general and administrative expense items that are already included in the ILO’s definition of Chapter 6A data, Commerce will remove these identifiable costs items.”<sup>14</sup>

In the *Preliminary Results*, Commerce determined normal value pursuant to section 773(c) of the Act and selected Thailand as the primary surrogate country, consistent with section 773(c)(4) of the Act.<sup>15</sup> Commerce also calculated the respondents’ surrogate financial ratios for overhead, SG&A, and profit using the 2012 financial statements of LS Industries Co., Ltd. (LSI) – a Thai producer of identical merchandise. Additionally, Commerce calculated the labor input using data from the 2007 Industrial Census data published by Thailand’s National Statistics Office (the 2007 NSO data), finding that the 2007 NSO data are the best available information for valuing labor.<sup>16</sup> Commerce further indicated that the 2007 NSO data reflected all costs related to labor, including wages, benefits, housing, training, *etc.*,<sup>17</sup> and noted that where the financial statements used to calculate the surrogate financial ratios include itemized detail of

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<sup>14</sup> See *Labor Methodologies* at 36094.

<sup>15</sup> See *Certain Steel Nails from the People’s Republic of China: Preliminary Results of the Antidumping Duty Administrative Review; 2012-2013*, 79 FR 58744 (September 30, 2014) (*Preliminary Results*) and accompanying Preliminary Decision Memorandum (PDM) at 9-15.

<sup>16</sup> See Preliminary Results Surrogate Value Memorandum, dated September 18, 2014 (Prelim SV Memo), at 8 and 12.

<sup>17</sup> Commerce has previously found that the 2007 NSO data include (1) wages/salaries; (2) overtime payment, bonus, special payment, cost of living allowance and commission; (3) fringe benefits such as “food, beverages, lodgings, rent, medical care, transportation recreational and entertainment services, *etc.*” and (4) employers’ contribution to social security, *e.g.*, “social security fund, workmen’s compensation fund and health insurance, *etc.*” See *Drawn Stainless Steel Sinks from the People’s Republic of China: Investigation, Final Determination*, 78 FR 13019 (February 26, 2013) and accompanying IDM at Comment 4, amended by, but unchanged in *Drawn Stainless Steel Sinks from the People’s Republic of China: Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order*, 78 FR 21592 (April 11, 2013), (collectively, “*Sinks Final Determination*”).

labor costs, Commerce made adjustments to certain labor costs in the surrogate financial ratios. For instance, although the “Welfare,” “Social Security and Compensation,” and “Salary and Bonus” line items were classified in LSI’s financial statements as SG&A expenses, Commerce classified the first two as part of Labor under MLE (Materials, Labor, and Energy) in the denominator, while classifying “Salary and Bonus” as part of SG&A expenses in the numerator of the financial ratio calculation.<sup>18</sup> As a result, Commerce calculated the following financial ratios for the preliminary results: overhead, 3.84%; SG&A, 7.78%; and profit, 2.08%.<sup>19</sup>

In the *Final Results*, Commerce continued to calculate the respondents’ surrogate financial ratios for overhead, SG&A, and profit using the 2012 financial statements of LSI and continued to value the labor input using the 2007 NSO data.<sup>20</sup> However, Commerce stated that its analysis had evolved since the *Preliminary Results* pursuant to the Court’s decision in *Elkay I*, and, thus, that it would classify line items in the financial ratio calculation consistent with the manner in which LSI treated these expenses in its financial statements.<sup>21</sup> Commerce reviewed LSI’s financial statements, and determined: “The record demonstrates that in LSI’s financial statements, the salary for selling and administrative staff and/or welfare benefits were unambiguously classified under a separate section (*e.g.*, selling and administrative expenses) from the cost-of-production or cost-of-good sold section (which included labor costs).”<sup>22</sup> As a result, Commerce continued to classify the line item “Salary and Bonus” as part of SG&A expenses in the numerator, as it had done in the *Preliminary Results*, but moved the “Welfare” and “Social Security and Compensation” line items from Labor under MLE in the denominator

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<sup>18</sup> See Prelim SV Memo at Attachment 9.

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

<sup>20</sup> See IDM at Comments 1 and 4.

<sup>21</sup> *Id.* at Comment 4 (citing *Elkay Mfg. Co. v. United States*, 34 F. Supp. 3d 1369 (CIT 2014) (*Elkay I*)).

<sup>22</sup> See *Final Results* at Comment 4.

to SG&A expenses in the numerator of the financial ratio calculations.<sup>23</sup> These changes resulted in the following financial ratios for the final results: overhead, 3.86%; SG&A, 8.27%; and profit, 2.08%.<sup>24</sup>

## **B. Court's Holding and Remand Order**

Before the Court, Xi'an Metals argued that, “{b}ecause the labor rate captures all types of labor, all types of labor are already accounted for in the normal value. Because of this fact, Commerce...must remove the disaggregated labor items from the numerators (including SG&A) of the financial ratio calculations in order to avoid double-counting.”<sup>25</sup> Such labor costs include those for “welfare” and “social security and compensation.”<sup>26</sup> According to Xi'an Metals, such modification would adhere to Commerce's practice, as enshrined in *Labor Methodologies*.<sup>27</sup>

In the Remand Order, the Court held, in relevant part, that:

{T}he source and labor rate ITA has deliberately chosen pursuant to *Labor Methodologies* apparently includes all types and forms of labor as well as labor benefits, and, in that announcement of new methodology, the agency recognized that it would be over-counting the labor rate for production labor and specifically indicated therein that the financial ratios would have to be adjusted so labor was not double-counted; the implicit remedy would be to move all labor costs explicitly incorporated in the SG&A source and rate chosen to the ratio denominators.

In this case, by not removing the various line items such as “welfare” and “social security and compensation” that are presumptively included already in the Thai NSO rate, the SV for labor is inflated, which requires correction initially via the court's grant of the pertinent part of plaintiff Xi'an's motion for agency reconsideration. On remand therefor, if ITA continues to select a source and rate that includes all labor positions and benefits, it needs to ensure that all forms of labor costs on the financial statements are in the “materials-labor-energy” (or “MLE”) denominator of the ratios in accordance with its *Labor Methodologies*,

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<sup>23</sup> *Id.*

<sup>24</sup> See Final Results Surrogate Value Memorandum, dated March 30, 2015 (Final SV Memo), at 3 and Attachment 5.

<sup>25</sup> See Xi'an Metal's opening brief at 45. See also Xi'an Metals' reply brief at 18-22.

<sup>26</sup> *Id.* at 44.

<sup>27</sup> *Id.* at 45. See also *Labor Methodologies*, 76 FR at 36092.

but whatever course it chooses will need to obviate the double counting that is manifest in the AR5 final results.<sup>28</sup>

### C. Analysis

For these final results of redetermination, Commerce has continued to calculate the respondents' surrogate financial ratios for overhead, SG&A, and profit using the 2012 financial statements of LSI. Additionally, Commerce has continued to rely on the 2007 Thai NSO labor data to value labor. However, for purposes of the financial ratio calculation, Commerce has complied with the Court's Remand Order by "ensur{ing} that all forms of labor costs on the financial statements are in the 'materials-labor-energy' (MLE) denominator of the ratios...."<sup>29</sup> As explained further below, Commerce has enacted these changes under respectful protest.<sup>30</sup>

As discussed above, in the *Final Results*, consistent with the *Preliminary Results*, Commerce continued to find that the 2012 financial statements of LSI represented the best available information on the record to calculate surrogate financial ratios.<sup>31</sup> In addition, Commerce continued to find that the 2007 NSO data constituted the best available information to value the labor input.<sup>32</sup> However, Commerce reevaluated its decision from the *Preliminary Results*, and determined, when calculating the surrogate SG&A ratio, to treat "Salary and Bonus," "Welfare," and "Social Security and Compensation" as SG&A expenses, mirroring the manner in which LSI treated these expenses in its own financial statements.<sup>33</sup> Specifically, these expenses were classified in the portion of LSI's financial statements entitled "Details of Selling Expenses and Administration Costs," which covers selling expenses and administration costs,

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<sup>28</sup> See Remand Order at 23-24.

<sup>29</sup> *Id.* at 24.

<sup>30</sup> See *Viraj*.

<sup>31</sup> See IDM at 13-14.

<sup>32</sup> *Id.* at Comment 4.

<sup>33</sup> *Id.*

rather than expenses that pertain specifically to the production of merchandise. In addition, these expenses were separated in LSI's financial statements from "Direct Wages" and "Outsourced Wage," which were classified under the portion of LSI's financial statements that covers "Details of Cost of Sales"<sup>34</sup> (*i.e.*, production expenses). Accordingly, Commerce followed its practice by classifying expenses in the financial ratio calculations as they are classified in the surrogate company's own financial statements.<sup>35</sup>

Commerce's determination in the *Final Results*, which was a departure from the *Preliminary Results* as well as the *Nails AR4 Final Results*,<sup>36</sup> was informed by the Court's decision in *Elkay I* concerning the *Sinks Final Determination*<sup>37</sup> which resulted in the *Sinks Remand*.<sup>38</sup> In the *Sinks Final Determination*, Commerce relied on three financial statements from certain Thai companies to calculate the financial ratios, and further relied on the 2007 NSO data to value labor.<sup>39</sup> In addition, Commerce determined that, because the 2007 NSO data included "total labor costs (*i.e.*, manufacturing and SG&A)" such as wages, earnings, overtime, and bonus, "{u}sing a surrogate financial ratio that includes SG&A labor costs in addition to the NSO-based surrogate labor rate would double-count those costs in normal value because both include an amount for SG&A labor."<sup>40</sup> As a result, "Commerce excluded certain labor costs identified in the three surrogate financial statements as 'SG&A labor costs' from the numerators

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<sup>34</sup> See Xi'an Metals' surrogate value submission, dated August 19, 2014, at Attachment SV-17.

<sup>35</sup> See IDM at Comment 4. See *Certain Steel Threaded Rod from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 79 FR 71743 (December 3, 2014) (*Steel Threaded Rod*) and accompanying IDM at Comment 3.

<sup>36</sup> See *Certain Steel Nails from the People's Republic of China: Final Results of the Fourth Antidumping Duty Administrative Review*, 79 FR 19316 (April 8, 2014) and accompanying IDM at Comment 2 (*Nails AR4 Final Results*).

<sup>37</sup> See IDM at Comment 4 (citing *Elkay*); see also *Sinks Final Determination* at Comments 3 and 4.

<sup>38</sup> See *Elkay Mfg. Co. v. United States*, Court No. 13-00176; Slip Op. 14-150 (CIT 2017), Final Results of Redetermination Pursuant to Court Remand (April 22, 2015), available at <https://enforcement.trade.gov/remands/14-150.pdf> (*Sinks Remand*).

<sup>39</sup> See *Sinks Final Determination* at Comments 3 and 4.

<sup>40</sup> *Id.* at Comment 4.



of the SG&A ratios and included those costs in the denominators of those ratios to avoid double-counting those costs in the calculation of {NV}.”<sup>41</sup>

In *Elkay I*, the Court held that the underlying conclusion for Commerce’s determination was not supported by substantial evidence. According to the Court: “The NSO information supports a finding that the NSO rate was derived from an average remuneration paid for ‘persons engaged’ in various production-related and non-production-related activities. It also supports a finding that the NSO rate is a much broader average than one representing only wages and salaries.”<sup>42</sup> The Court further found that this evidence supported a conclusion “that the NSO labor rate is higher than it would have been had it been derived solely from data on wages and salaries.”<sup>43</sup> However, the Court determined that:

{1}ess clear is that the NSO labor rate is higher than it would have been had it been derived solely from data on production workers. It may be reasonable to infer that some non-production employees, *e.g.*, high-level salaried managerial employees, receive higher remuneration than persons engaged in production. The record data, however, do not support an actual finding that the NSO labor rate was higher—or by what percentage it was higher—than it would have been had it been derived solely from Thai data on production labor rather than from a combination of Thai data on production labor and various types of non-production labor.<sup>44</sup>

Therefore, the Court held that Commerce’s reliance on any double-counting was “too much a matter of speculation.”<sup>45</sup>

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<sup>41</sup> See *Sinks Remand* at 6-7 (citing *Sinks Final Determination* at Comment 4). See also *Elkay I*, 34 F. Supp. 3d at 1380 n. 16 (“The financial statement of Stainless Steel Home Equipment Manufacturing Co., Ltd. (“Stainless Steel”), one of the three surrogate companies, lists “Salaries and bonuses” under the category of “Cost of Administration” and “Wages of producing” under the category of “cost of production.” ... In the Final Determination, Commerce regarded both of these cost line items as labor costs, not SG&A expenses, for the purpose of calculating the SG & A/interest expense ratio.... In addition to “Salaries and bonuses,” the “Cost of Administration” category reported line items for “Welfare,” “Social Security,” and “Compensation Fund.” ...In the Final Determination, Commerce also regarded these three cost line items as labor costs.”) (internal citations omitted).

<sup>42</sup> See *Elkay I*, 34 F. Supp. 3d at 1381.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

In the *Sinks Remand*, Commerce determined that it was appropriate to treat the labor-related SG&A expenses in the surrogate financial statements as SG&A expenses in the numerator of the financial ratio calculation. Commerce found that “{t}hough the record supports that the NSO data includes labor expenses for persons engaged in various manufacturing and non-manufacturing activities, there is not substantial evidence establishing that, as the Court held, ‘the NSO labor rate was higher—or by what percentage it was higher—than it would have been had it been derived solely from Thai data on production labor rather than from a combination of Thai data on production labor and various types of non-production labor.’”<sup>46</sup> The Court sustained the *Sinks Remand* in *Elkay II*,<sup>47</sup> which was recently sustained by the CAFC in a non-precedential opinion.<sup>48</sup>

Commerce continues to find the *Elkay* decisions and the *Sinks Remand* – rather than the *Preliminary Results*, *Nails AR4 Final Results*, and *Sinks Final Determination* – instructive for purposes of this remand redetermination. For instance, here, like in the *Sinks Remand*, we also find that the 2007 NSO rate was derived from an *average* remuneration paid for persons engaged in various manufacturing and non-manufacturing related activities.<sup>49</sup> In addition, we find that the NSO rate is likely to be a much broader average than one representing only wages and salaries, because the 2007 NSO data additionally include items such as bonus, social security, workmen’s compensation fund and health insurance, *etc.*<sup>50</sup> However, we find that the record is lacking evidence to support a finding that the NSO labor rate was higher – or by what percentage

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<sup>46</sup> See *Sinks Remand* at 7-10.

<sup>47</sup> See *Elkay Manufacturing Company v. United States*, 180 F. Supp. 3d 1245, 1257 (Ct. Int’l Trade 2016) (*Elkay II*).

<sup>48</sup> See *Guangdong Dongyuan Kitchenware Indus. Co. v. Elkay Mfg. Co.*, No. 2016-2637, 2017 U.S. App. LEXIS 22629 (Fed. Cir. Nov. 13, 2017) (non-precedential).

<sup>49</sup> See the petitioner’s surrogate value submission, dated April 4, 2014, at Exhibit 9; see also *Sinks Remand* at 7-10 (emphasis added).

<sup>50</sup> See the petitioner’s surrogate value submission, dated April 4, 2014, at Exhibit 9; see also *Elkay I*, 34 F. Supp. 3d at 1381.

– than it would have been had it been derived solely from data on production labor. For example, there is no record evidence indicating that those employees engaged in non-production related activities would receive higher remuneration than persons engaged in production, and to what extent. Absent such evidence, we respectfully disagree with the Court and find that the presumption of double-counting is “too much a matter of speculation”<sup>51</sup> on this record to warrant a departure from Commerce’s practice to treat labor in its financial ratio calculation in the same manner the surrogate company disaggregates its labor costs.

Furthermore, notwithstanding that the record shows that the NSO labor rate was derived from an average remuneration paid for persons engaged in various manufacturing and non-manufacturing activities, it does not follow that the labor expenses calculated using the NSO labor rate capture all labor expenses. This is because, under the FOP methodology for calculating NV, labor expenses capture the labor cost only for manufacturing—obtained by multiplying a respondent’s reported direct and indirect labor hours to manufacture subject merchandise by the surrogate labor rate (*e.g.*, the NSO labor rate). Here, the respondents did not report labor hours associated with the selling and administrative staff,<sup>52</sup> and we also find that the NSO labor rate is not high enough to compensate for those unreported hours. As a result, the staff’s labor costs must be included in the SG&A expenses, and the SG&A labor expenses in LSI’s financial statements must be included in the numerator of the SG&A ratio associated with that company. In other words, the SG&A labor expenses listed in LSI’s financial statements

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<sup>51</sup> See *Elkay I*, 34 F. Supp. 3d at 1382.

<sup>52</sup> See the original questionnaires issued to the mandatory respondents, dated January 13, 2014, at Section D, page D-8.

must be respectively classified under the SG&A expenses and included in the respective numerator of the SG&A ratio.<sup>53</sup>

Moreover, as noted above, it is Commerce's practice to treat labor in its financial ratio calculations in the same manner the surrogate company disaggregates its labor costs.<sup>54</sup> This is because the nature of the information that serves as the source for financial ratio calculations in NME cases (*i.e.*, surrogate financial data from a company that is not a party to the proceeding) does not allow Commerce to "go behind" a surrogate financial statement to determine precisely what each item includes or to what activity it relates. Therefore, when assigning various line items to particular categories for financial ratio calculations, Commerce prefers to rely on the classification of these items from the surrogate financial statements, unless there is good reason to believe the classification is not accurate. As already described above, Commerce respectfully disagrees that such a reason exists here. Specifically, the three line items in question in LSI's financial statements were categorized as Selling Expenses and Administration Costs,<sup>55</sup> and there is no information on the record indicating that these expenses apply to production labor, which is categorized as an element of Cost of Sales in LSI's financial statements.

We further note that Commerce's findings above are consistent with Commerce's practice in other cases, which have been sustained by the Court.<sup>56</sup> Importantly, in litigation involving the same financial statement as that used in the *Final Results*, which the Court found instructive to the instant litigation,<sup>57</sup> the Court ultimately sustained Commerce's determination

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<sup>53</sup> See *Sinks Remand* at 8-9.

<sup>54</sup> See *Steel Threaded Rod* at Comment 3.

<sup>55</sup> See Xi'an Metals' surrogate value submission, dated August 19, 2014, at Attachment SV-17.

<sup>56</sup> See, *e.g.*, *Clearon Corp. v. United States*, Consol. Court No. 13-00073, Slip Op. 16-110 (CIT November 23, 2016).

<sup>57</sup> See *Remand Order* at 23 ("The problem here... appears similar to that which was recently considered in *Yingqing v. United States*.")

not to adjust the financial ratios in response to arguments that it had double-counted certain labor costs.<sup>58</sup> Specifically, in *Hangzhou Yingqing II* the Court sustained Commerce’s remand redetermination in which Commerce continued to determine that the surrogate financial ratios should not be adjusted.<sup>59</sup> As Commerce explained in the *Hangers AR4 Remand* sustained by the Court:

When calculating the surrogate SG&A ratio, Commerce treated “Employees Welfare Cost,” and “Subsidy of Social Security Fund and Workmen Compensation Fund” as SG&A expenses, mirroring the manner in which LSI treated these expenses in its own financial statements. Specifically, in LSI’s financial statements, these expenses were classified in the portion of LSI’s financial statements entitled “Details of Selling Expenses and Administration Costs,” which covers selling expenses and administration costs, rather than expenses that pertain specifically to the production of merchandise. Additionally, in LSI’s own financial statements, these expenses were distinctly separated from “Direct Wages” and “Outsourced Wage,” which were classified under the portion of LSI’s financial statements that covers “Details of Cost of Sales,” (which covers expenses specifically pertaining to production). Further, while “it is Commerce’s longstanding practice to avoid double counting costs where the requisite data are available to do so,” Commerce determined that respondent’s surrogate financial ratios should not be adjusted, as there was no record evidence to suggest that double counting of labor costs had occurred. Furthermore, Commerce followed its practice to classify expenses in its financial ratio calculations as they are allocated within the surrogate company’s own financial statements.<sup>60</sup>

Considering the overlap in factual circumstances before Commerce in the *Hangers AR4 Remand* and the *Final Results*, Commerce respectfully notes that it appears that the Court’s holding in the instant litigation may be inconsistent with the ultimate outcome in the *Hangzhou Yingqing* decisions.

In sum, although in *Labor Methodologies*, Commerce addressed concerns of double-counting labor costs when it stated that it would adjust “the surrogate financial ratios when the

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<sup>58</sup> See *Hangzhou Yingqing Material Co. v. United States*, 195 F. Supp. 3d 1299 (CIT 2016) (*Hangzhou Yingqing I*); *Hangzhou Yingqing Material Co. v. United States*, 222 F. Supp. 3d 1292 (CIT 2017) (*Hangzhou Yingqing II*).

<sup>59</sup> See *Hangzhou Yingqing II*, 222 F. Supp. 3d at 1292.

<sup>60</sup> See <https://enforcement.trade.gov/remands/16-118.pdf> (March 15, 2017) (*Hangers AR4 Remand*) at 5-6.

available record information – in the form of itemized indirect labor costs – demonstrates that labor costs are overstated,” after reexamining the record of this review, Commerce respectfully disagrees with the Court and continues to find that the labor costs in the NV calculation are not overstated.<sup>61</sup> However, notwithstanding our findings above, to comply with the Remand Order, under respectful protest, Commerce has executed changes to the surrogate financial ratio calculation pursuant to the Remand Order. Specifically, because, on remand, Commerce has continued to rely on the 2007 NSO data, which “includes all labor positions and benefits,”<sup>62</sup> Commerce has further “ensure{d} that all forms of labor costs on the financial statements are in the ‘materials-labor-energy’ (or “MLE”) denominator of the ratios....”<sup>63</sup> Accordingly, we have reclassified the line items for “Welfare” and “Social Security and Compensation,” as well as “Salary and Bonus,” the largest of the line items at issue, from the SG&A expenses in the numerator to Labor under MLE in the denominator of the financial ratio calculation. Doing so results in the following calculated financial ratios: overhead, 3.66%; SG&A, 2.55%; and profit, 2.08%.<sup>64</sup>

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<sup>61</sup> See *Labor Methodologies*, 76 FR at 36092-94.

<sup>62</sup> As noted on page 10 above, the surrogate labor rate used represents the *average* remuneration paid for persons engaged in various manufacturing and non-manufacturing related activities, inclusive of benefits.

<sup>63</sup> See Remand Order at 24.

<sup>64</sup> See “Remand Redetermination for the Fifth Administrative Review of Certain Steel Nails from the People’s Republic of China: Surrogate Value Memorandum for the Draft Results of Redetermination,” dated December 11, 2017 (Draft Remand SV Memo); “Remand Redetermination for the Fifth Administrative Review of Certain Steel Nails from the People’s Republic of China: Draft Results Analysis Memorandum for Stanley,” dated December 11, 2017 (Stanley Draft Remand Analysis Memorandum); and “Remand Redetermination for the Fifth Administrative Review of Certain Steel Nails from the People’s Republic of China: Draft Results Analysis Memorandum for Xi’an Metals & Minerals Import & Export Co. Ltd.,” dated December 11, 2017 (Xi’an Metals Draft Remand Analysis Memorandum).

## **2. Correction of the Transcription Error in Stanley’s Post-Verification FOP Database**

### **A. Background**

In the underlying review, Stanley argued that Commerce should correct a transcription error, which it alleged was a ministerial error, present in its post-verification FOP database.<sup>65</sup> According to Stanley, the continued presence of the error in the database – the omission of a zero to the right of the decimal point in the field “V \_DLCROD” – overstated the per-unit usage ratio of low-carbon steel wire rod and other assorted minor wire-drawing FOPs by nearly nine percent, resulting in a significant overstatement of Stanley’s normal values.<sup>66</sup> Commerce declined to correct the alleged ministerial error, determining that it did not constitute a ministerial error under Commerce’s regulations (*i.e.*, the error was made by Stanley, not Commerce).<sup>67</sup> In the Remand Order, the Court held that “{t}he Department will only correct a respondent’s error when that error is ‘so egregious and so obvious’ that failing to correct the error would be arbitrary and capricious. ... {I}n light of the Stanley presentment, it is difficult to fathom how their ministerial error could have been concluded otherwise, especially given its impact on their overall dumping margin.”<sup>68</sup>

### **B. Analysis**

In light of the Court’s holding, Commerce is correcting the transcription error present in Stanley’s post-verification FOP database under respectful protest.<sup>69</sup> As an initial matter, we note that Stanley’s dumping margin increased between the *Preliminary Results* and the *Final Results* from 6.69 percent to 13.19 percent, and 3.09 percent of this change was attributable to the

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<sup>65</sup> See Stanley’s ministerial error comments, dated April 7, 2015.

<sup>66</sup> *Id.*

<sup>67</sup> See Fifth Administrative Review of Certain Steel Nails from the People’s Republic of China: Ministerial Error Allegation Memorandum, dated April 30, 2015.

<sup>68</sup> See Remand Order at 27.

<sup>69</sup> See Stanley Draft Remand Analysis Memorandum.

transcription error (*i.e.*, 30 percent higher than the margin would have been without the error). Although Commerce is correcting the transcription error, Commerce respectfully disagrees with the Court that the existence of the error was “‘so egregious and so obvious’ ... especially given its impact on their overall dumping margin.”<sup>70</sup> In particular, beyond the transcription error present in the relevant database, there were a number of changes between the preliminary and final results that affected Stanley’s margin (*e.g.*, for the final results, unlike the preliminary results, Commerce applied the average-to-transaction (A-to-T) comparison methodology to all of Stanley’s U.S. sales) and which substantially accounted for the change in its margin from 6.69 percent to 13.19 percent.<sup>71</sup> Accordingly, Commerce was not in a position to attribute changes in Stanley’s margin for the final results to any particular change that occurred since the preliminary results, let alone the omission of a zero to the right of the decimal point in certain FOP values reported by Stanley.<sup>72</sup> For these reasons, although Commerce is correcting the transcription error present in Stanley’s post-verification FOP database, it is doing so under respectful protest.

#### **IV. COMMENTS FROM INTERESTED PARTIES**

Commerce released the draft remand results on December 11, 2017. Interested parties submitted comments on December 14, 2017.<sup>73</sup>

##### **Issue 1: Allocation of Labor Costs**

###### *The Petitioner’s Comments*

- In the draft remand, Commerce correctly noted and discussed several judicial decisions which indicate that this Court’s ruling on this issue appears to be at odds with *Hangzhou Yingqing*, which discusses the identical financial statement. Unfortunately, rather than

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<sup>70</sup> Remand Order at 27.

<sup>71</sup> See IDM at Comments 3, 4, 6, 12, and 19 for discussions of these changes.

<sup>72</sup> See, *e.g.*, *Mannesmannrohren-Werke AG v. United States*, 120 F. Supp. 2d 1075, 1095-1096 (CIT 2000) (“{E}ven if {Commerce} has the information on the record to rectify the respondent’s error in its submission, the respondent cannot expect {Commerce} to correct its submissions and guarantee their accuracy.”)

<sup>73</sup> See Stanley’s December 14, 2017, submission; the petitioner’s December 14, 2017 submission.



defend its previously-affirmed approach on this matter, Commerce abandoned its position to remove certain labor expenses from the SG&A data, regardless of the fact that the approach it took in the final results was supported by substantial record evidence and clearly in accordance with law, as evidenced by the fact that the CIT affirmed the exact approach taken in a different case.<sup>74</sup>

- Commerce should not lay out a well-supported analysis only to abandon it under protest, which in this case means defending its approach, providing more explanation, and not altering its calculation of SG&A.<sup>75</sup> At the very least, if Commerce continues to take its proposed approach in the final remand determination, it should explicitly request that the Court reevaluate its determination in light of the analysis provided.<sup>76</sup>

**Commerce Position:** As discussed above, the Court held:

In this case, by not removing the various line items such as “welfare” and “social security and compensation” that are presumptively included already in the Thai NSO rate, the SV for labor is inflated, which requires correction initially via the court’s grant of the pertinent part of plaintiff Xi’an’s motion for agency reconsideration. On remand therefor, if ITA continues to select a source and rate that includes all labor positions and benefits, it needs to ensure that all forms of labor costs on the financial statements are in the “materials-labor-energy” (or “MLE”) denominator of the ratios in accordance with its *Labor Methodologies*, but whatever course it chooses will need to obviate the double counting that is manifest in the AR5 final results.<sup>77</sup>

Although we agree with the petitioner that our original determination in the *Final Results* was correct,<sup>78</sup> in light of the court’s holding, we find that the Department has no other option but to make the adjustments on remand, under respectful protest. Specifically, because, on remand, Commerce has continued to rely on the 2007 NSO data, which “includes all labor positions and benefits,”<sup>79</sup> Commerce has further “ensure{d} that all forms of labor costs on the financial statements are in the ‘materials-labor-energy’ (or ‘MLE’) denominator of the ratios...”<sup>80</sup>

Accordingly, we have reclassified the line items for “Welfare” and “Social Security and

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<sup>74</sup> See the petitioner’s December 14, 2017 submission at 2 - 4.

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

<sup>76</sup> *Id.*

<sup>77</sup> See Remand Order at 23-24.

<sup>78</sup> See pages 7-14 above.

<sup>79</sup> As noted on page 10 above, the surrogate labor rate used represents the *average* remuneration paid for persons engaged in various manufacturing and non-manufacturing related activities, inclusive of benefits.

<sup>80</sup> See Remand Order at 24.

Compensation,” as well as “Salary and Bonus,” the largest of the line items at issue, from the SG&A expenses in the numerator to Labor under MLE in the denominator of the financial ratio calculation.

## **Issue 2: Transcription Error**

### *Stanley’s Comments*

- Although Commerce stated that it respectfully disagrees with the Court that the existence of the ministerial error was egregious and obvious given its impact on Stanley’s margin, this is merely second guessing the Court’s conclusion, and the Court should not reach a different conclusion on this matter.<sup>81</sup>
- To be more specific, more than 30 percent of the increase in Stanley’s margin was driven by the transcription error, and the Court’s use of the term “especially” confirms that the impact of the transcription error on Stanley’s margin was only the most salient of the reasons supporting the Court’s conclusion that failing to correct the error was arbitrary and capricious.<sup>82</sup>
- The Court was aware, for example, that the revised database was submitted on the same day as Stanley’s administrative case brief, rendering it impossible for Stanley to point out the error when it filed the case brief.<sup>83</sup>
- The Court was also aware that the transcription error appeared in a FOP database that was revised at Commerce’s direction to incorporate minor corrections from verification that should have reduced Stanley’s margin.<sup>84</sup> The fact that the database did not do so should have signaled to Commerce that something was incorrect.<sup>85</sup>

### *The Petitioner’s Comments*

- The Court’s decision appears to attribute all of the increase in Stanley’s margin to the alleged transcription error.<sup>86, 87</sup> However, Commerce provided a substantial analysis describing the relevant circumstances leading to Stanley’s increased margin for the final results. Yet, in this remand, Commerce abandons its position and “under protest” made the change desired by the Court.<sup>88</sup> As a general matter, this approach undermines the agency’s authority in both the courts and its own proceedings.

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<sup>81</sup> See Stanley’s December 14, 2017 submission at 2 - 4.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> See Remand Order at 27.

<sup>87</sup> See the petitioner’s December 14, 2017 submission at 4.

<sup>88</sup> *Id.*

**Commerce Position:** As discussed above, in the Remand Order, the Court held that “{t}he Department will only correct a respondent’s error when that error is ‘so egregious and so obvious’ that failing to correct the error would be arbitrary and capricious. . . . {I}n light of the Stanley presentment, it is difficult to fathom how their ministerial error could have been concluded otherwise, especially given its impact on their overall dumping margin.”<sup>89</sup> Although we agree with the petitioner that our original determination in the *Final Results* was correct,<sup>90</sup> in light of the Court’s holding, we find that the Department has no other option but to correct the transcription error on remand, under respectful protest.

## **V. FINAL RESULTS OF REDETERMINATION**

Commerce has made certain adjustments to the *Final Results* pursuant to the Court’s Remand Order. Commerce has adjusted the allocation of certain labor costs, and has done so under respectful protest. Commerce has also corrected the transcription error made by Stanley in its post-verification FOP database, and has also done so under respectful protest. As a result of these changes, Commerce has revised the weighted-average dumping margin for Xi’an Metals to 64.27 percent, and for Stanley to 8.04 percent.<sup>91</sup>

In the event that the final remand redetermination is sustained by the Court, Commerce intends to publish a notice of amended final results which will notify the public of the revised rates for Xi’an Metals and Stanley and issue liquidation instructions accordingly. However, Commerce does not intend to alter the cash deposit rates for these companies as a result of this

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<sup>89</sup> See Remand Order at 27.

<sup>90</sup> See pages 15-16 above.

<sup>91</sup> See Draft Remand SV Memo; Stanley Draft Remand Analysis Memorandum; and Xi’an Metals Draft Remand Analysis Memorandum.

litigation, because revised cash deposit rates have been established in later reviews for these companies.<sup>92</sup>

12/21/2017

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Signed by: GARY TAVERMAN

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Gary Taverman  
Deputy Assistant Secretary  
for Antidumping and Countervailing Duty Operations,  
performing the non-exclusive functions and duties of the  
Assistant Secretary for Enforcement and Compliance

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<sup>92</sup> See, e.g., *Certain Steel Nails from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2013–2014*, 81 FR 14092 (March 16, 2016); and *Certain Steel Nails from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, Final Determination of No Shipments and Final Partial Rescission; 2014–2015*, 82 FR 14344 (March 20, 2017).