

Mid Continent Steel & Wire, Inc. v. United States
Consol. Court No. 15-00214, Slip Op. 17-05 (January 26, 2017)
FINAL RESULTS OF REDETERMINATION
PURSUANT TO COURT ORDER

I. SUMMARY

The Department of Commerce (the Department) prepared these final results of redetermination (Final Remand Results) pursuant to the opinion and order of the U.S. Court of International Trade (court) issued on January 26, 2017.¹ These Final Remand Results concern the Department's final determination in the antidumping duty (AD) investigation on certain steel nails from the Sultanate of Oman (Oman).² For these Final Remand Results, the Department continues to use the profit data of the financial statement of Hitech Fastener Manufacture (Thailand) Co., Ltd., (Hitech), a third-country producer of comparable merchandise, to value Oman Fasteners, LLC's (Oman Fasteners) profit rate. Additionally, the Department has further explained its determination with regard to a profit cap. Accordingly, the Department continues to find that the weighted-average dumping margin for Oman Fasteners is 9.10 percent.

II. BACKGROUND

On May 20, 2015, the Department found in its *Final Determination* that certain steel nails from Oman were being sold at less than fair value in the United States.³ In the course of its

¹ See *Mid Continent Steel & Wire, Inc., v. United States v. Oman Fasteners*, Slip Op. 17-05, Court No. 15-00214 (CIT 2017) (*Mid Continent Steel & Wire*).

² See *Certain Steel Nails from the Sultanate of Oman: Final Determination of Sales at Less Than Fair Value*, 80 FR 28972 (May 20, 2015) and accompanying Issues and Decision Memorandum at Comment 1 (*Final Determination*).

³ See *Final Determination*.

investigation, the Department examined the sales of Oman Fasteners, and determined for it a weighted-average dumping margin of 9.10 percent. As part of its determination, the Department found that it was appropriate to calculate Oman Fasteners' constructed value (CV) profit rate using data sources other than Oman Fasteners' home market sales.⁴ The Department ultimately relied upon the financial statement of Hitech, a Thai producer of comparable merchandise, to calculate a CV profit rate under section 773(e)(2)(B)(iii) of the Tariff Act of 1930, as amended (the Act).⁵ The Department did not rely upon the financial statements of Al Jazeera Steel Products SAOG Co. (Al Jazeera) or Larsen & Toubro—both of which were located in Oman—because it determined that neither company produced merchandise comparable to steel nails.⁶ Finally, the Department determined that, although it was relying on section 773(e)(2)(B)(iii) of the Act to calculate CV profit, it was “unable to calculate the profit normally realized by producers other than Oman Fasteners in connection with domestic market sales of merchandise in the same general category as the subject merchandise,” and, therefore, did not calculate a profit cap.⁷

In its January 26, 2017, opinion and order, the court held that the Department “failed to explain” why, in the *Final Determination*, it “departed from its prior practice” of “rely{ing} on home-market data rather than third-country data to calculate CV profit.”⁸ Although the court acknowledged that the Department explained that “the Omani companies did not produce identical or comparable merchandise” to steel nails, it held that this explanation was “{in}adequate.”⁹ Accordingly, the court remanded the *Final Determination* to the Department

⁴ *Id.* at 12-14.

⁵ *Id.* at 18.

⁶ *Id.* at 15.

⁷ *Id.* at 19.

⁸ *Mid Continent Steel & Wire* at 23.

⁹ *Id.* at 24.

for it to further explain or reconsider “why third-country data {of a producer} of comparable merchandise better represents Omani sales of steel nails than home-market sales data from Omani steel producers.”¹⁰ On remand, the court also ordered the Department to “more fully explain any profit cap determinations, unless {the} issue is rendered moot on remand.”¹¹ Specifically, if the Department continues to calculate CV profit under section 773(e)(2)(B)(iii) of the Act, the court directed the Department to provide “a thorough explanation as to why the available data prevents” the Department from calculating a profit cap, particularly addressing whether the Department can calculate a profit cap through the use of facts otherwise available.¹² The Department issued the draft results of redetermination on April 6, 2017.¹³ We received comments on April 13, 2017, from Mid Continent Steel & Wire, Inc. (Mid Continent) and Oman Fasteners.¹⁴

III. ANALYSIS

Pursuant to the court’s opinion and order, the Department has provided additional explanation regarding why the profit data of Hitech, a third-country producer of comparable merchandise, better represents the profit experience of an Omani producer of steel nails than the profit data of Omani steel producers. Further, the Department provides a more thorough explanation for its determination regarding the profit cap.

¹⁰ See *Mid Continent Steel & Wire* at 24.

¹¹ *Id.* at 5.

¹² *Id.* at 32.

¹³ See Draft Results of Redetermination Pursuant to Court Order: *Mid Continent Steel & Wire, Inc. v. United States*, Court No. 15-00214, Slip Op. 17-05 (CIT January 26, 2017) (“Draft Remand Results”).

¹⁴ See Submission from Oman Fasteners, “Certain Steel Nails from Oman; Antidumping Remand Proceeding: Comments on Draft Redetermination Pursuant to Court Order,” dated April 13, 2017 (Oman Fasteners’ Comments), and Submission from Mid-Continent, “Certain Steel Nails from Oman: Comments on Draft Results of Redetermination Pursuant to Court Order in *Mid Continent Steel & Wire, Inc. v. United States*, Consol. Ct. No. 15-00214, Slip Op. 17-05 (Jan. 26, 2017),” dated April 13, 2017 (Mid Continent Steel & Wire, Inc.’s Comments).

The Department's Decision to Rely on Third-Country Profit Data Rather Than Home Market Profit Data

In evaluating financial statements for use in the CV profit calculation under section 773(e)(2)(B)(iii) of the Act, we first consider whether each of the proposed companies produces products that are in the same general category of product as the subject merchandise (*i.e.*, comparable merchandise).¹⁵ We do so because we find that the similarity of a potential surrogate's products and production processes to those of the respondent is a significant indicator of the similarity of their profitability.¹⁶ Generally, the more similar a company's products and production processes are, the more likely its profit experience will be a reasonable surrogate for that respondent. Conversely, the greater the difference between a company's products and production process from those of the respondent, the less likely that company's profit experience can reasonably represent the profit experience of the respondent.

When two companies produce products comparable to each other, using comparable production processes, those companies share many similar qualities that have an impact on profitability. We must evaluate these similarities from both a production and sales perspective, because profit is a function of both cost and price. Accordingly, in terms of cost, two companies that produce comparable products would consume the same or similar raw material inputs. These raw material inputs would be subject to the same supply and demand conditions in the global marketplace and any fluctuation in their prices would have a similar impact on each company's profit margins. In this case, both Oman Fasteners and Hitech consume the same

¹⁵ See *Final Determination* at 15; see also, *Certain Oil Country Tubular Goods from the Republic of Korea: Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances*, 79 FR 41983 (July 18, 2014) and accompanying Issues and Decision Memorandum at Comment 1 (*OCTG from Korea*).

¹⁶ See, e.g., *OCTG from Korea* at Comment 1.

commodity raw material input, *i.e.*, drawn wire,¹⁷ and both companies would be purchasing this commodity drawn wire in the same global marketplace, subject to the same market conditions and the same pricing fluctuations. In contrast, Al Jazeera consumes hot-rolled coils and billets,¹⁸ both very different inputs than drawn wire, and subject to very different market conditions and pricing fluctuations. The Larsen & Toubro companies are engaged in the execution of construction contracts,¹⁹ rather than the production of fasteners from drawn wire and, as such, would not be subject to purchase conditions in terms of material inputs in the same manner as a producer, much less a producer of fasteners from drawn wire.

In addition to the consumption of the same or similar commodity raw material inputs, similarity in production processes has a significant impact on similarity in cost, and, thus, profitability. For example, when companies use the same or similar production process, they use the same or similar types of plant facilities, machinery, and equipment. Accordingly, they are both subject to similar levels of capital expenditures and are also subject to similar market conditions when purchasing or replacing machinery. In the instant case, Oman Fasteners produces nails and Hitech produces screws, two variations of fasteners that share a similar production process, whereby drawn wire is cut to length, heads are formed, and the cut pieces are heat treated and galvanized.²⁰ Further, both may undergo threading and collation for use in nail gun applications.²¹ As a result, both Oman Fasteners and Hitech would utilize similar formation

¹⁷ See Letter to the Department, *Certain Steel Nails from the Sultanate of Oman; Submission of Factual Information on Constructed Value Profit and Selling Expenses*, dated October 31, 2014 at exhibit 7 (*Petitioner's CV Submission*).

¹⁸ See *Petition for the Imposition of Antidumping and Countervailing Duties, Certain Steel Nails from India, Korea, Malaysia, Oman, Taiwan, Turkey and Vietnam*, Volume V (May 29, 2014) at exhibit Oman AD-18 ("Petition").

¹⁹ See Letter to the Department, *Certain Steel Nails from Oman; Antidumping Investigation: Submission of Factual Information for CV Profit and Selling Expenses*, dated October 6, 2014 at exhibits CV-2 through CV-4 (Oman Fasteners CV Submission).

²⁰ See Oman Fasteners September 18, 2014 Section D Questionnaire Response at p. 1-2 and exhibit 1.

²¹ See Petitioner's CV Submission at exhibit 4.

and collation machinery in their production processes and both companies would be subject to very similar levels of processing costs and capital investment requirements, with similar impacts on profitability.²² In contrast, Al Jazeera consumes hot-rolled coils and billets to produce pipes, hollow sections, and bar mill products at a tube mill and a merchant bar mill,²³ facilities with vastly different machinery and capital investment requirements than a facility that produces fasteners. Consequently, Al Jazeera's cost structure, and, thus, its profit, would be significantly different from those of a nail producer. Larsen & Toubro, being a construction service provider, would not have any facilities even remotely similar to a nail manufacturing plant and would, thus, also have a vastly different cost structure.

Two companies that produce comparable products also sell their products in the same or similar markets for the same end use applications, and, as the industry in which a product is sold and a product's ultimate end use are significant price drivers, both companies are subjected to the same forces of supply and demand. In this case, both Oman Fasteners and Hitech sell their products (*i.e.*, nails and screws) in the market for fasteners for the same end use, *i.e.*, the fastening of surfaces, and are subject to similar market conditions and the same forces that drive demand and prices. This similarity in pricing conditions, taken together with the similarity in cost structures discussed above, leads to the logical conclusion that Oman Fasteners and Hitech would be similar in terms of profitability. In contrast, Al Jazeera's products (*i.e.*, pipes, tubes, and bar products) are sold in completely different industries for completely different end uses, *i.e.*, the conveyance of fluids and gases or large scale infrastructure projects.²⁴ Larsen & Toubro is involved in the execution of construction contracts in the offshore oil and gas industry,²⁵ and,

²² *Id.*

²³ *See Petition* at exhibit Oman AD-18.

²⁴ *Id.*

²⁵ *See Oman Fasteners Factual Information* submission of October 6, 2014 at exhibit CV-2.

therefore, provides services to a completely different market than the market for steel nails with a dissimilar cost structure to that of a producer of steel nails. This dissimilarity in markets and end uses coupled with the dissimilar nature of the cost structure of a steel producer or a construction company versus a producer of nails leads to the logical conclusion that these companies are highly dissimilar in terms of profitability.

Under section 773(e)(2)(B)(iii) of the Act, the “reasonable method” the Department chooses to calculate CV profit is limited: the CV profit applied by the Department “may not exceed the amount normally realized by exporters or producers ... for consumption in the foreign country, of merchandise that is in the same general category of merchandise as the subject merchandise.” Accordingly, as the Department is weighing the merits of imperfect sources to calculate CV profit under “any other reasonable method,” the statute places equal importance on both: (1) the foreign country in which the respondent operates, as compared to the potential source; and (2) the comparability of the subject merchandise to the potential source’s produced merchandise. While our preference for the calculation of CV profit under section 773(e)(2)(B)(iii) of the Act would be to use the financial statements of a producer of identical or comparable merchandise in the home market in order to satisfy both of these statutory preferences,²⁶ there are no financial statements of Omani producers of steel nails or any type of merchandise comparable enough to steel nails to satisfy the statutory preferences on the record of this proceeding. Consequently, in selecting among the alternatives, the Department must determine which surrogate data source most closely fulfills the aim of the statute. As discussed extensively above, the Department’s analysis of the differing inputs, uses, and market demands between the fasteners industry vis-à-vis the steel industry or a construction company servicing

²⁶ See *Final Determination* at 15.

the oil and gas industry demonstrates that, by using the profit of products sold and used in the same industry (*i.e.* screws) instead of that of a vastly different industry (*i.e.* steel pipes and/or construction), the Department reaches a comparable profit for the sale of steel nails. In contrast, there is no evidence on the record that suggests that the mere fact that Al Jazeera and Larsen & Toubro operate in Oman would cause them to have comparable profit rates to all other companies operating in Oman.

Moreover, the Department's ultimate choice of CV profit in any given proceeding must be sourced from the record—and, thus, the Department's determination of what constitutes the best information on the record will vary by the choices available to the Department. For example, given the choice among exclusively home-market profit sources in *EMD from Australia*, the Department used a home-market zinc producer to calculate CV profit because that producer's profit data "relate{d} more closely to the production of merchandise that is in the same general category of products as the subject merchandise."²⁷ Indeed, as we stated in the preliminary determination in that case, "{t}he greater the similarity in business operations and products, the more likely that there is a greater correlation in the profit experience of the two companies."²⁸ Similarly, here, we chose Hitech because the production of screws related more closely to the production of nails than any other options on the record, and, accordingly, it best approximated Oman Fasteners' profit. As no third-country profit sources were on the record in *EMD from Australia*, unlike here, the Department was not forced to choose whether a third-country profit source better approximated the profit of the respondent than a home-market

²⁷ See *Electrolytic Manganese Dioxide from Australia: Notice of Final Determination of Sales at Less Than Fair Value and Termination of Critical Circumstances Investigation*, 73 FR 47586 (August 14, 2008) and accompanying Issues and Decision Memorandum at comment 1 (*EMD from Australia*).

²⁸ *Electrolytic Manganese Dioxide from Australia: Notice of Preliminary Determination of Sales at Less Than Fair Value and Affirmative Preliminary Determination of Critical Circumstances*, 73 FR 15982 (March 26, 2008) at "Normal Value" (*EMD from Australia Prelim*).

source. Furthermore, in *Bottom Mount Refrigerator-Freezers from Mexico*, the Department used as CV profit the weighted average of the profit of the other two respondents which are attributable to the production and sales of merchandise produced in Mexico—and accordingly, was able to calculate CV profit taking into account both the comparability of the merchandise (highly comparable as it was subject merchandise) and the home market.²⁹ In this case, there are no other respondents in the investigation, and no available choices to calculate CV profit that were both highly comparable to steel nails and were from companies located in the home market.

Finally, in *Steel Nails from the UAE*, we shifted sources of CV profit between the Department’s preliminary and final determinations because we determined that the source used for the final determination had “business operations and products {that} appear to be more similar to those of” the respondent.³⁰ Specifically, we found that the source used for the final determination had the same “customer base, the construction industry,” as the respondent, and that both the source used for the final determination and the respondent operated steel processing facilities to cut and bend steel.³¹ These determinations mirror our findings with regard to the comparability between Hitech and Oman Fasteners’ production processes and industry overlap. Although we determined, in *Steel Nails from the UAE*, that a third-country producer of steel did not reflect the profit experience of a UAE producer of steel nails “because these companies are not UAE companies,” we provided no further analysis or record citation to support why, despite the comparability of merchandise between the UAE-producer of nails and the third-country producer of nails, we concluded that the companies would not have comparable profits.³² Since

²⁹ See *Bottom Mount Refrigerator-Freezers from Mexico: Notice of Final Determination of Less Than Fair Value*, 77 FR 17422 (March 26, 2012) and accompanying Issues and Decision Memorandum at comment 26.

³⁰ See *Certain Steel Nails from the United Arab Emirates: Notice of Final Determination of Sales at Less Than Fair Value and Termination of Critical Circumstances Investigation*, 77 FR 17029 (March 23, 2012) and accompanying Issues and Decision Memorandum at comment 6 (*Steel Nails from the UAE*).

³¹ *Id.*

³² *Id.*

Steel Nails from the UAE, we have reconsidered that position,³³ and concluded, based on the statutory language, that comparability of merchandise may be just as important as the location of the potential CV profit source when determining the best available information to calculate CV profit. Indeed, notwithstanding our lack of analysis of comparability between the third-country producer of nails and our respondent in *Steel Nails from the UAE*, we stated that “the greater the similarity in business operations and products, the more likely that there is a greater correlation in the profit experience of the companies.”³⁴ Here, record evidence supports finding that Oman Fasteners and Hitech produce significantly comparable merchandise, as demonstrated by their similarity in inputs, uses, and industry, while no record evidence supports finding that Oman Fasteners and the Omani steel companies would reap comparable profits merely because they are located in the same country. The Department believes that it should not revert to focusing primarily on home market sources of CV profit, to the detriment of the comparability of merchandise, when the statutory language places equal emphasis on location and comparability.

In sum, section 773(e)(2)(B)(iii) of the Act does not mandate that the profit source be in the foreign country under investigation, merely that the profit reflect the amounts normally realized by a producer for sale in the foreign country. As discussed above, in the face of an alternative, comparable, source of CV profit, it would not be reasonable for the Department to select a set of financial statements for a manufacturer of pipes and tubes or a construction service provider to value CV profit solely based on the fact that the company is located in Oman, while ignoring the significant dissimilarity of the company’s products and production processes and its consequent impact on profitability. Although none of the sources on the record of this investigation perfectly satisfies the statutory preference for both the home market and

³³ See, e.g., *OCTG from Korea* at Comment 1.

³⁴ *Id.*

comparability in merchandise, record evidence suggests that the profitability of Oman Fasteners and Hitech would be significantly comparable, because both produce fasteners. Conversely, no record evidence supports a finding that the profitability of Oman Fasteners and either Al Jazeera or Larsen & Toubro would be comparable on the basis that all operate in Oman. Thus, we continue to find that the financial statements of Hitech, a producer and seller of comparable merchandise, better represent the profit experience of Oman Fasteners than those of Al Jazeera or Larsen & Toubro, and we have continued to use Hitech's financial statements for the calculation of CV profit.

The Department's Decision to Not Calculate a Profit Cap

As discussed above, when the Department calculates CV profit under section 773(e)(2)(B)(iii) of the Act, it is directed to use "the amounts incurred and realized for ... profits, based on any other reasonable method, except that the amount allowed for profit may not exceed the amount normally realized by ... producers ... in connection with the sale, for consumption in the {home market}, of merchandise that is in the same general category of products as the subject merchandise," *i.e.*, the profit cap. We continue to find that there is no information available to calculate a profit cap for Oman, as set forth under section 773(e)(2)(B)(iii) of the Act because, as discussed above, we do not have home market profit data for other exporters and producers in Oman of the same general category of products. However, the Statement of Administrative Action (SAA)³⁵ makes clear that the Department might have to apply a profit cap under alternative (iii) on the basis of facts available. Thus, we have further examined the evidence presented by all parties to determine whether there is any source on the record of this proceeding to serve as a suitable facts available profit cap.

³⁵ See Uruguay Round Agreement Act, SAA, H.R. Doc. No. 103-316 at 843 (1994), reprinted in 1994 U.S.C.C.A.N. 4040, 4161.

Based on our analysis, we have found that Hitech’s 2012 financial statements are the only useable source for a profit earned on identical or comparable merchandise, *i.e.*, merchandise in the same general category of products, and represent the best information available on the record to calculate CV profit, in accordance with the intent of the statute. The only other useable information presented by the parties—namely, the financial statements of Al Jazeera and Larsen & Toubro—fail to meet these minimum requirements, because they do not represent sales of “merchandise that is in the same general category of products as the subject merchandise,” and have been rejected as viable options for CV profit. Moreover, as discussed above, no record evidence suggests that Al Jazeera and Larsen & Toubro would have a profit rate comparable to Oman Fasteners merely because all three are located in Oman, when record evidence does demonstrate a significant lack of comparability between the types of products and services they provide as compared to Oman Fasteners. Accordingly, we find that the options rejected as unsuitable for the calculation of CV profit likewise fail to provide a reasonable basis for a facts available CV profit cap.

The financial statements of Hitech, our selected source for CV profit, represent the profits of a producer of comparable merchandise in the global marketplace for a commodity product, *i.e.*, fasteners used in a construction setting,³⁶ and the parties did not present any viable evidence on the record of this proceeding to indicate that its profits are in any way abnormal or anomalous. While there are other financial statements of producers of both identical and comparable merchandise on the record (*i.e.*, Thai L.S. Industry Co. Ltd. (LSI), Chun Yu Works & Co., Ltd. (Chun Yu) and Sumeeko Industry Co., Ltd. (Sumeeko)),³⁷ each of these statements

³⁶ See Petitioner’s CV Submission at exhibit 7.

³⁷ See Letter to the Department, *Certain Steel Nails from Oman; Antidumping Investigation: Submission of Factual Information for CV Profit and Selling Expenses*, dated October 31, 2014 at exhibit SCV-5 (Supplemental CV Submission) and Petitioner’s CV Submission at exhibits 1, 2 and 11.

suffers from significant flaws that render them unusable as a source for comparison to the selected CV profit data. The financial statements from LSI, Chun Yu, and Sumeeko are each missing information that renders them unreliable as both a source of CV profit and as a metric of what constitutes a “normal” profit for a producer of nails. For example, each of these financial statements is missing an auditor’s report.³⁸ Without the auditor’s report, we have no way of knowing whether any of these companies has properly captured their revenues and costs (and, thus, their profits) in accordance with generally accepted accounting principles (GAAP).

Further, the financial statements of LSI, Chun Yu and Sumeeko are all missing a majority of the data disclosures required under each company’s home country GAAP.³⁹ These data disclosures are critical components that are essential to the users of a company’s financial statements, and they are essential to our analysis of whether the statements can serve as reliable sources for the profit normally experienced by a producer of nails. Without this missing information, we cannot reasonably rely on such statements either as a source of CV profit or as a metric by which we can measure the appropriateness of other CV profit sources.

Additionally, we do not find that Oman Fasteners’ own home market sales would serve as a reliable facts available CV profit cap, because the volume of those sales is too small to constitute the profits normally experienced in the construction fasteners industry.⁴⁰ Nor, for the reasons delineated above, would the financial statements of Al Jazeera or Larsen & Toubro serve as a reliable metric for a producer of nails. Thus, we find that there are no sources on the record of this proceeding that can reliably serve as facts otherwise available to which we would be able

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ See *Final Determination* at 12-14; *cf.*, *Mid Continent Steel & Wire* at 18-20 (holding that Commerce’s determination not to use Oman Fasteners’ nonviable home market sales to value CV profit, because the volume was “too insignificant to reflect a meaningful home market profit rate,” was reasonable).

to compare the financial statements of Hitech, our selected source of CV profit.

We note that, in *Husteel*, the court “did not accept” the Department’s argument that selecting as a profit cap a rate that is the same as the profit rate without the cap was a reasonable interpretation of the statute and the SAA’s profit cap requirement.⁴¹ The court found, however, that the failure to cap the profit rate was reasonable based on that record, because none of the other possible profit cap sources “fulfill the statute any better than no cap.”⁴² Here, as in *Husteel*, we are faced with a fact pattern whereby several of the potential profit cap sources on the record suffer from imperfections that render them unusable, and none of the remainder fulfill the purpose of the statute better than the Hitech rate due to their lack of comparability with steel nails. Accordingly, we are faced with the difficult decision of using unreliable or incomparable sources as a profit cap or calculating no profit cap at all. Therefore, in the complete absence of any suitable information that would allow us to calculate a CV profit cap, as facts available, we have continued to use Hitech’s profit rate without a profit cap.

IV. COMMENTS ON DRAFT REMAND RESULTS

Comments received from Mid Continent and Oman Fasteners on the Department’s Draft Remand Results are addressed below. After considering Mid Continent’s and Oman Fasteners’ comments, we have not made any changes to our conclusion in the Draft Remand Results in these Final Remand Results.

⁴¹ See *Husteel Co. v. United States*, No. 14-00215, Slip Op. 16-76 at 30 (Ct. Int’l Trade 2016) (*Husteel*).

⁴² *Id.*

Comment 1: Whether the Draft Remand Results' CV Profit Rate is Unreasonably and Unlawfully High

Oman Fasteners' Comments:

Oman Fasteners asserts that the 19.74 percent profit rate used by the Department is unreasonable and unlawful as a measure of profit for an Omani nail producer, and has no support in the administrative record. According to Oman Fasteners, the record shows that “a reasonable rate for an Omani producer and a producer of nails” is lower than Hitech’s 19.74 percent profit rate, pointing to the profit rates used for CV profit in *Steel Nails from China*,⁴³ the profit rates reflected in Oman Fasteners’ responses regarding its own sales of nails in the home market,⁴⁴ and the profit rates demonstrated in Al Jazeera’s and Larsen & Toubro’s financial statements. Oman Fasteners contends that the Department has not addressed those data points and why they are not relevant indicators of Oman Fasteners’ CV profit rate.

Oman Fasteners also argues that the Department’s failure to rely on this record evidence to calculate a reasonable profit results in an unlawful and unrepresentative profit rate for a producer of steel nails in Oman.

Department’s Position:

We disagree with Oman Fasteners that the Department used an unreasonably high CV profit rate in its Draft Remand Results, or improperly ignored record evidence. The court remanded certain issues to the Department with the directive for the Department to further explain or reconsider “why third-country data {of a producer} of comparable merchandise better represents Omani sales of steel nails than home-market sales data from Omani steel producers,” in particular, Al Jazeera and/or Larsen & Toubro.⁴⁵ In the extensive discussion above, the

⁴³ See Supplemental CV Submission at SCV-6.

⁴⁴ See Cost Verification Report at 20.

⁴⁵ See *Mid Continent Steel & Wire* at 24.

Department has addressed why, in this determination, the third-country data of a producer of comparable merchandise (*i.e.*, merchandise in the same general category of steel nails) better represents Omani sales of steel nails than home-market sales data from Omani steel producers. As discussed above, neither Al Jazeera nor Larsen & Toubro produce merchandise that is comparable to steel nails, in terms of inputs for the production process, company cost structure, use of the produced product, and industry in which the produced product is sold when compared to Oman Fasteners. Furthermore, no record evidence supports finding that Oman Fasteners and the Omani steel companies would reap comparable profits merely because they are located in the same country, and Oman Fasteners has not indicated any such record evidence in their comments. Therefore, the Department continues to find that each of the Omani steel companies would have a very different profit experience than that of Oman Fasteners.

Although Oman Fasteners proposes its own profit rate from sales of nails in the Omani market as a suitable benchmark against which to measure whether our chosen CV profit rate is unreasonably high, we note that the court upheld the Department's determination that Oman Fasteners' home market sales were unsuitable for use in calculating CV profit in this proceeding.⁴⁶ The court specifically concluded that the "meager proportion of home market sales is substantial evidence supporting Commerce's finding of a lack of viability," and that Commerce reasonably refused to use these sales to calculate CV profit due to their unreliability as an indicator of a home market profit rate.⁴⁷ Accordingly, we continue to find that Oman Fasteners' home market sales are an unreliable indicator of home market profit, and are unconvinced that the CV profit rate reflected in Hitech's financial statements is unreasonable simply because it is larger than Oman Fasteners' home market sales' profit rate.

⁴⁶ *Id.* at 20.

⁴⁷ *Id.*

Finally, we remind ourselves that the average profit rate used in the administrative reviews of *Steel Nails from China* is drawn from the financial statements of LSI, which Commerce rejected from use in its final determination, having found that the statements were unreliable due to a substantial lack of vital information. Commerce's rejection of LSI's financial statements was upheld by the court in this proceeding.⁴⁸ Accordingly, we continue to find that the profit rate reflected in *Steel Nails from China*, *i.e.*, the profit rate reflected in LSI's financial statements, is not appropriate for use as a CV profit rate for Oman Fasteners, nor, due to the lack of vital information, is it a reliable indicator of whether CV profit rate applied by the Department is unreasonably high.

Comment 2: Whether the Department's Interpretation of the CV Profit Statute is Unlawful Because It Fails to Apply the Required Preference for Home Market Sources of Profit Data and is Inconsistent with Past Practice

Oman Fasteners' Comments:

Oman Fasteners argues that the statute favors data sources that reflect the home market over sources that reflect the production of comparable merchandise. According to Oman Fasteners, the statute does not place equal importance on comparability, but rather, all three alternatives under section 773(e)(2)(B) of the Act reflect a clear preference for data sources that have a connection to the home market. Oman Fasteners asserts that if the statute was intended to place the same weight on comparability as it does to location, the statute would instruct the Department to use third-country sources. Oman Fasteners contends that the Department has, in previous cases, determined that the statute does not permit the use of third-country data under

⁴⁸ *Id* at 25.

any of the options under section 773(e)(2)(B) of the Act,⁴⁹ and that the use of third-country data is not contemplated by the *Preamble*.⁵⁰

Oman Fasteners asserts that the Draft Remand Results unlawfully fail to give equal weight to home market profit sources. Oman Fasteners contends that the Department's first criterion is comparability of merchandise, and that the Department effectively discards consideration of home-market sources. According to Oman Fasteners, the Draft Remand Results treat comparability as the only factor used to select sources for CV profit. Oman Fasteners argues that, in treating comparability as the only factor in its analysis, the Department unlawfully departed from its long-standing four-factor test as established in *CTVs from Malaysia*.⁵¹ Oman Fasteners maintains that prior to the Draft Remand Results, the Department had consistently applied the four-factor test to evaluate potential sources of CV profit. Oman Fasteners notes that under this long-standing methodology, the Department considers: 1) the similarity between a potential surrogate's business operations and products and the products and operations of the respondent; 2) the extent to which a potential surrogate has sales in the United States and the home market; 3) the contemporaneity of the surrogate data; and 4) the similarity of the customer base between a potential surrogate and the respondent.⁵² Oman Fasteners asserts that the Department's failure to apply this analysis departs from even the most recent determinations regarding CV profit such as *OCTG from Korea*.⁵³ Oman Fasteners contends that the Department has essentially abandoned the four-factor test in favor of the single criterion of whether the

⁴⁹ See, e.g., *Shop Towels from Bangladesh; Final Results of Antidumping Duty Administrative Review*, 61 FR 55957, 55961 (October 30, 1996).

⁵⁰ See *Antidumping Duties; Countervailing Duties*, 62 FR 27296, 27,358 (May 19, 1997) (*Preamble*).

⁵¹ See *Notice of Final Determination of Sales at Not Less Than Fair Value: Certain Color Television Receivers from Malaysia*, 69 FR 20592 (April 16, 2004), and accompanying Issues and Decision Memorandum at Comment 26 (*CTVs from Malaysia*).

⁵² *Id* at Comment 26.

⁵³ See *OCTG from Korea* at Comment 1.

surrogate produces comparable merchandise. Oman Fasteners asserts that the Department failed to consider Al Jazeera's and Larsen & Toubro's significant connections to the Omani market and the lack of Omani market ties by third-country producer Hitech.

Further, Oman Fasteners argues, the Department now claims to repudiate its decision in *Steel Nails from the UAE* simply because that decision is irreconcilable with the Draft Remand Results, notwithstanding the fact that the Department defended its determination in *Steel Nails from the UAE* in the Court of International Trade. Oman Fasteners asserts that in *Steel Nails from the UAE*, the Department rejected third-country data without further analysis of their comparability.⁵⁴ Oman Fasteners contends that the Department provided no reasonable or lawful explanation of its departure from its long-standing practice of implementing a preference for home market sources of CV profit as required by the statute and as applied in *Steel Nails from the UAE* and numerous prior determinations.

Department's Position:

We disagree with Oman Fasteners that there is a clear statutory preference for home market sources of CV profit under section 773(e)(2)(B)(iii) of the Act over sources that are comparable to the subject merchandise. Under that provision, the Department may calculate CV profit using "any other reasonable method, except that the amount allowed for profit may not exceed the amount normally realized by exporters or producers ... in connection with the sale, for consumption *in the foreign country, of merchandise that is in the same general category of products as the subject merchandise.*"⁵⁵ The Department's regulations further define "foreign country" as the home market.⁵⁶ Accordingly, although the Department is using CV profit as a

⁵⁴ *Id* at Comment 1.

⁵⁵ See section 773(e)(2)(B)(iii) of the Act (emphasis added).

⁵⁶ See 19 CFR 351.405(b)(2).

proxy for the specific respondent’s home market profit experience, section 773(e)(2)(B)(iii) of the Act directs the Department to choose a profit rate for merchandise that is also comparable to the subject merchandise—*i.e.*, merchandise that is in the same general category of products as the subject merchandise. Accordingly, the comparability of the merchandise must be part of the Department’s analysis regarding which CV profit source would best reflect the profits normally realized by a respondent in the home market.

Oman Fasteners argues that the use of third-country sources is prohibited by the statute because the language does not direct the Department to use third-country data, in contrast with section 773(c) of the Act, which deals with calculating surrogate values for companies located in non-market economy countries. However, in the absence of an express statutory prohibition on the use of third-country sources under section 773(e)(2)(B)(iii) of the Act, we are not persuaded that use of such sources are prohibited to calculate CV profit for a market economy country simply because a separate statutory provision expressly directs the Department to use third-country, market economy, sources when calculating profit for a respondent located in a non-market economy. Instead, we interpret the term “any other reasonable method” to mean any method that could reasonably reflect the experience of the producers at issue, including information from a third country.

To the extent that Oman Fasteners relies on the *Preamble* to support its argument that the Department cannot use third country sources for CV profit under section 773(e)(2)(B)(iii) of the Act, we disagree. That statement was made in connection with promulgating a regulation to define “foreign country” as specific to the home market, or to include a third country market,⁵⁷ because “foreign country” as used in section 773(e)(2)(B)(iii) of the Act is not statutorily

⁵⁷ See *Preamble* at 27358.

defined. Moreover, it is clear from the *Preamble*'s discussion of the two comments from interested parties on the subject that the *Preamble*'s drafters did not contemplate a situation in which the record did not contain a financial statement that reflected both profit from the home market and profit from merchandise in the same general category of products.⁵⁸ As discussed extensively above, in the two decades since the *Preamble* was published, the Department has changed its practice to the use of third-country financial statements for CV profit under limited circumstances: where the record does not contain information that reflects *both* home market profit experience and also the profit experience of merchandise in the same general category of products as the subject merchandise. Because the record does not contain information reflecting both of those statutory criteria—home market profit and profit in the same general category of products as the subject merchandise—we have explained above why the record supports finding that Hitech, a source that reflects only merchandise in the same general category of products as steel nails, is the best available source of CV profit.

Furthermore, we disagree with Oman Fasteners that we somehow failed to give adequate weight to Al Jazeera's and Larsen & Touboro's links to the home market in our Draft Remand Results. First, we note that in our *Final Determination*⁵⁹ and in our brief to the court,⁶⁰ we initially evaluated the Omani sources included in the nine financial statements available under alternative (iii) and acknowledged that "we would prefer to use the financial statements of a producer of steel nails that primarily produces and sells steel nails in Oman;" however, "none of the Omani producers on the record produces steel nails or any type of merchandise that can be considered comparable to steel nails."⁶¹ In the *Final Determination*, we addressed the failings of

⁵⁸ *Id.*

⁵⁹ See *Final Determination* at 15.

⁶⁰ See *Mid Continent Steel & Wire* at 25.

⁶¹ See *Final Determination* at 15.

each of the Omani sources at length, and in these Final Remand Results, we have continued to find that there is no record evidence supporting that the Omani steel companies, Al Jazeera and Larsen & Touboro: (1) produce merchandise that would have a comparable profit experience, such that it is in the same general category of products as steel nails; or (2) would have a similar profit experience as Oman Fasteners simply by virtue of all three companies being located in Oman. Accordingly, we continue to find that there are no financial statements on the record of this proceeding from Omani producers of merchandise that is comparable to steel nails, such that it could be considered in the same general category of merchandise as steel nails.⁶² We have used a third-country profit source to measure CV profit only because no home market profit source reflects profit on merchandise in the same general category as steel nails, and because no record evidence supports a finding of comparable profitability due to geographic location notwithstanding the lack of comparability in merchandise.

We agree, in part, and disagree, in part, with Oman Fasteners' assertion that we failed to apply the four factor test as established in *CTVs from Malaysia*. We disagree to the extent that, as we noted in both our *Final Determination*⁶³ and in our brief to the court,⁶⁴ to determine the most appropriate profit under alternative (iii), we followed the analysis established in *Pure Magnesium from Israel*⁶⁵ and *CTVs from Malaysia*.⁶⁶ In making our *Final Determination*, we stated that we considered: 1) the similarity of the potential surrogate companies' business operations and products to the respondent's business operations and products; 2) the extent to which the financial data of the surrogate company reflects sales in the home market and does not

⁶² *Id.*

⁶³ See *Final Determination* at Comment 1.

⁶⁴ See *Mid Continent Steel & Wire* at 24.

⁶⁵ See *Notice of Final Determination of Sales at Less Than Fair Value: Pure Magnesium from Israel*, 66 FR 49349 (Sept. 27, 2001) (*Pure Magnesium from Israel*) and accompanying decision memorandum at Comment 8.

⁶⁶ See *CTVs from Malaysia* at Comment 26.

reflect sales to the United States; 3) the contemporaneity of the data to the period of investigation (POI); and, 4) the extent to which the customer base of the surrogate and the respondent were similar.⁶⁷ However, we agree with Oman Fasteners that our Draft Remand Results did not explicitly reference these two tests, or analyze one of the factors of the tests. Our Draft Remand Results include an extensive discussion of factors 1 and 4: the similarity of the business operations and products and the similarity of the customer base between Oman Fasteners and Hitech, and the lack of any record evidence suggesting a similar similarity between either Oman Fasteners and Al Jazeera or Oman Fasteners and Larsen & Toubro. With regard to factor 2, our Draft Remand Results stated that the financial statements from Al Jazeera and Larsen & Toubro reflected sales in Oman, but noted that no other record evidence supported a finding of comparable profitability with other Omani companies simply by virtue of the companies being located in Oman. There is no information on the record of this proceeding that would allow us to evaluate the extent to which the financial statements reflect U.S. sales. With regard to factor 3, which we did not discuss in the Draft Remand Results, all of the financial statements under consideration are dated 2012 and 2013, and accordingly, all are reasonably contemporaneous to the POI (2013-2014). However, the 2013 financial statement of Al Jazeera overlaps with our POI, and is, thus, more contemporaneous with the POI than the 2012 financial statement from Hitech or the 2012 financial statement from Larsen & Toubro.

Weighing the *Pure Magnesium from Israel* and *CTVs from Malaysia* factors in these final results, we continue to find that, while none of the sources on the record of this proceeding perfectly satisfies the statutory preference for both the home market and comparability of merchandise, the financial statements of Hitech continue to be the source that best represents the

⁶⁷ See *Mid Continent Steel & Wire* at 24.

profit experience of an Omani producer of steel nails. For the reasons discussed above, we continue to determine that Hitech is extremely similar to Oman Fasteners in business operations, produced merchandise, and customer base. Although Al Jazeera, in particular, is preferable to Oman Fasteners on two factors—*i.e.*, contemporaneity, and that it reflects the profit of a company also located in Oman—we determine that the benefits of Al Jazeera’s financial statements with regard to these two factors does not outweigh the benefits of Hitech, which in addition to the extreme comparability in business operations, produced merchandise, and customer base, is also reasonably contemporaneous to the POI. Furthermore, as discussed above, to the extent that Al Jazeera reflects the profit of a company also located in Oman, this benefit is limited, because no record evidence supports a finding that all Omani companies are similarly profitable, notwithstanding any lack of comparability in their business operations, produced merchandise, or customer base. We similarly determine that any benefit gained from using the Larsen & Toubro financial statement is limited, because no record evidence supports a finding that all Omani companies are similarly profitable, notwithstanding any lack of comparability in their business operations, produced merchandise, or customer base; further, the financial statement from Larsen & Toubro is equally contemporaneous as the financial statement from Hitech. Accordingly, the Larsen & Toubro statement is only somewhat preferable to the Hitech statement on one factor, while the Hitech statement is significantly preferable to the Larsen & Toubro statement on two factors. Thus, weighing the *Pure Magnesium from Israel* and *CTVs from Malaysia* factors, we find that the Hitech financial statement is preferable to the Al Jazeera and Larsen & Toubro statements, and continue to base Oman Fasteners’ CV profit rate on the profit reflected in Hitech’s financial statements.

Finally, we address Oman Fasteners' assertion that we have repudiated our decision in *Steel Nails from the UAE*, even though we defended that determination in the Court of International Trade. As stated above, we have reconsidered the position adopted in that case and have concluded that, where no home market profit sources are available that also reflect sales of the same general category of merchandise as the subject merchandise, the Department is not statutorily limited to home market sources of CV profit. That the Department defended a determination, which was made in accordance with the Department's practice at the time, is unremarkable and has no bearing on whether the Department may later change its practice, whether the new practice is statutorily permitted, or whether a determination implementing that new practice is supported by substantial record evidence.

Comment 3: Whether the Department's Draft Remand Results Fail to Explain Why Hitech's Profit Data Better Represent Omani Sales of Steel Nails Than the Profit Experience of Omani Steel Producers

Oman Fasteners' Comments:

Oman Fasteners argues that the Department's comparisons of material inputs, production processes, and end uses in the Draft Remand Results "add virtually nothing to the Department's original analysis"⁶⁸ provided in the *Final Determination*, and fail to explain why comparability of merchandise should take priority over ties to the home market, in accordance with the court's order. Oman Fasteners states that the Department does not discuss the statute's preference for home market profit data or the reasons for such a preference. Further, Oman Fasteners asserts, the Department fails to consider that the home market profit data reflect conditions of competition unique to each country that invariably effect the profit rates of producers within the country. Moreover, Oman Fasteners contends that the Department's claim that there is no record

⁶⁸ See Oman Fasteners' Comments at 13.

evidence to show that Al Jazeera and Larsen & Toubro would reap profits comparable to Oman fasteners imposes a standard that is results oriented and “precisely the opposite of the statutory framework,” which, according to Oman Fasteners, contemplates home market experience as the most relevant measure of the profit experience of the respondent.

Oman Fasteners argues that the Department’s findings related to comparability are flawed and unsupported by substantial evidence. First, Oman Fasteners asserts, Hitech’s financial statements are significantly flawed: Hitech has no ties to Oman, no sales or production of steel nails, and was found in another proceeding to have received countervailable subsidies.⁶⁹ Oman Fasteners argues that the Department’s Draft Remand Results failed to address these alleged flaws. Second, Oman fasteners contends, the Department’s assertion that the end use of screws and nails is the fastening of surfaces, and that screws and nails are subject to similar market conditions, is factually incorrect. Oman Fasteners asserts that the Department acknowledged that not all fasteners are comparable merchandise when it found that third-country producer Sundram was not a producer of comparable products.⁷⁰ Further, Oman Fasteners maintains, the record shows that Hitech’s fasteners are not substitutable with steel nails and are used for entirely different end uses, and, thus, are sold to different industries. According to Oman Fasteners, the U.S. International Trade Commission (ITC) has found that there is generally no substitute for steel nails.⁷¹

Mid Continent’s Comments:

Mid Continent supports the Department’s continued use of Hitech’s financial statements to calculate CV profit. Mid Continent argues that the Department has correctly reasoned that

⁶⁹ See *Steel Wire Garment Hangers from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review; 2012-2013*, 79 FR 65616, 65618 (November 5, 2014).

⁷⁰ See *Final Determination* at 14.

⁷¹ See Supplemental CV Submission at SCV-5, II-13.

Hitech's products are more similar to Oman Fasteners' products than those of Al Jazeera or Larsen & Toubro. As a result, Mid Continent reasons, Hitech and Oman Fasteners would be more similar in terms of profitability. According to Mid Continent, the Department made the reasonable determination that, based on the statutory language, the comparability of merchandise is just as important as the location of the CV data source when determining the best available information to calculate CV profit.

Department's Position:

We disagree with Oman Fasteners' assertion that we have failed to explain why, based on the record, we are choosing a CV profit source that is more comparable to the subject merchandise over one that is also located in the home market, in accordance with the court's remand order. As explained in the Draft Remand Results, Hitech and Oman Fasteners are significantly comparable in terms of business operations, produced merchandise, end use for the product, and the industry of their customers. In contrast, as explained in the Draft Remand Results, no record evidence supports a finding that Oman Fasteners would have a similar profit experience as Al Jazeera or Larsen & Toubro simply by virtue of all being located in Oman, notwithstanding the lack of similarity in their business operations, produced merchandise, end use for the product, or industry of their customers. Furthermore, in response to Oman Fasteners' comment, we have again explicitly weighed the factors discussed in *Pure Magnesium from Israel* and *CTVs from Malaysia*, and determined that among Hitech, Al Jazeera, and Larsen & Toubro, Hitech's profit rate is the best rate available to value profit for a producer of steel nails in Oman. Accordingly, we disagree that we have not explained our determination in accordance with the court's opinion.

We do not address Oman Fasteners' assertion of a statutory preference for a CV profit source from the home market because, as discussed with regard to Comment 2, we disagree that, where no home market CV profit source is on the record that also reflects profit from sales of merchandise in the same general category of products as the subject merchandise, the statute inherently prefers a source from the home market. While the statute prefers a source that reflects the country in which the respondent operates, it places equal importance on the comparability of the source's merchandise to that of the respondent, such that the source's merchandise is in the same general category as the subject merchandise. As noted above, our preference under section 773(e)(2)(B)(iii) of the Act would be to satisfy both of these equally important statutory criteria and use the financial statements of a producer of identical or comparable merchandise in the home market; however, there are no such sources available on the record of this proceeding.

Oman Fasteners asserts that the Department fails to consider that by virtue of sharing a home market, Al Jazeera and Larsen & Toubro's profit data reflect conditions of competition unique to Oman. While it may be true that the three companies' individual profit rates are similarly affected by the conditions of competition unique to Oman—*e.g.*, that the three companies' profits are relatively high during periods of high growth in the country and relatively low during periods of low growth in Oman—we continue to find that no record evidence indicates that the rate of profit itself is similar across all three companies; nor does Oman Fasteners point to record evidence indicating that Oman Fasteners, Al Jazeera, and/or Larsen & Toubro could be similarly profitable due to certain conditions of competition in Oman.

Moreover, we disagree with Oman Fasteners' various arguments that our findings related to comparability are flawed and unsupported by substantial evidence. We first address Oman Fasteners' contention that our findings are unsupported because we have not addressed certain

alleged flaws in Hitech's financial statement. While we agree that Hitech does not produce steel nails or operate a facility in Oman, as we have discussed in our *Final Determination*⁷² and in these Final Remand Results, we have weighed the *Pure Magnesium from Israel* and *CTVs from Malaysia* factors and determined that Hitech's financial statements best represent the profit of an Omani producer of steel nails. We have so found, notwithstanding Hitech's lack of ties to Oman, due largely to the greater degree of comparability in business operations, produced merchandise, end use, and customers, between steel nails and steel screws than between steel nails and steel pipes or between steel nails and construction contracts. Further, we note that no party to this proceeding has found any actual deficiencies in Hitech's financial statements that would render them unusable for calculating CV profit. Hitech's financial statements are complete, relatively contemporaneous to the POI, have a clean audit opinion, and, for the reasons discussed above, reflect the production and sales of merchandise in the same general category as steel nails. Although Oman Fasteners asserts that the fact that Hitech was found to receive countervailable subsidies is somehow a flaw, we addressed this point in our *Final Determination* and determined that it was not.⁷³ Specifically, the Department regards evidence of countervailable subsidies in a financial statement as a flaw solely in non-market economy proceedings. In market economy proceedings, we use a respondent's normal books and records even if they reflect lower costs due to countervailable subsidies.⁷⁴ The Department's established practice with regard to market economy proceedings is to include in the cost calculation amounts actually paid for raw material inputs, even if they reflect countervailable subsidies, and to allow

⁷² See Final Determination at Comment 1.

⁷³ *Id.*

⁷⁴ See, e.g., *Certain Pasta from Italy: Notice of Final Results of the Twelfth Administrative Review*, 75 FR 6352 (February 9, 2010) and accompanying Issues and Decision Memorandum at Comment 9 and *Stainless Steel Bar from Brazil: Final Results of Antidumping Duty Administrative Review*, 74 FR 33995, July 14, 2009 and accompanying Issues and Decision Memorandum at Comment 3.

income from subsidies as an offset to a respondent's general & administrative expenses.⁷⁵ As such, relying on a financial statement for CV profit that may include countervailable subsidies is consistent with how the Department calculates the cost of production to which it applies the profit rate. Accordingly, contrary to Oman Fasteners' assertion, the receipt of countervailable subsidies by a company in a market economy proceeding does not preclude the use of that company's financial statements for the calculation of CV profit. In any event, we determine that the evidence of countervailable subsidies in Hitech's financial statement, when weighed in addition to the *Pure Magnesium from Israel* and *CTVs from Malaysia* factors, is not a detraction that would cause us to alter our finding, based on the evidence on this record, that Hitech's financial statements better reflect the profit of an Omani producer of steel nails, due to the extreme comparability in their business operations, produced merchandise, and customer base, than a producer of dissimilar products located in Oman.

Furthermore, despite Oman Fasteners' assertions, we continue to find that nails and screws have the same basic end use, *i.e.*, the fastening of surfaces together in construction applications. We find that Oman Fasteners' attempt to discredit this finding, by pointing out that the Department rejected Sundram's financial statements, to be misleading. In our *Final Determination*, based on the record information, we found that Sundram was a "producer of auto parts and fasteners," and "that the majority of its production consists of various automotive products that cannot be considered comparable to steel nails."⁷⁶ Not only is the majority of Sundram's production not related to fasteners—which, the Department determined, are not comparable to steel nails—but also, Sundram's fastening products are not comparable to either screws or steel nails. First, Sundram's fasteners would be used in automotive end use

⁷⁵ *Id.*

⁷⁶ See Final Determination at Comment 1.

applications, in contrast to steel nails and screws, which are used in construction applications. Thus, the fasteners that Oman Fasteners and Sundram produce are not particularly similar, and there would be little overlap in customer base. Second, Sundram's fasteners would not involve the same input or production process as either nails or screws; thus, Oman Fasteners' and Sundram's business operations would not be similar. Accordingly, these two companies' fasteners are not in the same general category of merchandise. Our determination that Oman Fasteners' steel nails and Sundram's automotive products and fasteners are not comparable has no bearing on our determination, based on record evidence, that Oman Fasteners' fasteners and Hitech's fasteners are in the same general category of products due to comparable business operations, produced merchandise, and customer bases.

Finally, we disagree with Oman Fasteners that steel nails and screws are used for entirely different purposes. Oman Fasteners appears to base this assertion largely on the results of a survey found in a report prepared by the ITC. In the survey, seven of nine responding U.S. producers of steel nails found that screws are not "substitutable" for steel nails.⁷⁷ We note, however, that the term "substitutable" as used in the ITC report does not have the same meaning as having the same end use and being sold in the same industry, and the fact that steel screws and steel nails may not be "substitutable" is not unequivocally indicative of whether they are in the same general category of products. Whether or not screws and nails can be used for precisely the same application (for example, a nail might be used to build the frame for a door or attach roofing materials, and a screw might be used to attach a door to the frame or attach boards to a deck) within the construction of a house does not take away from the fact that both have the same end use, *i.e.*, the construction of housing or other buildings, and both are sold to the same

⁷⁷ See Supplemental CV Submission at SCV-5, II-13.

customer base, *i.e.*, the construction and retail industries.⁷⁸ Nor does it take away from the fact that both screws and nails share a very similar production process. Further, two of the nine firms surveyed in the ITC report did, in fact, find that screws were substitutable for steel nails, *i.e.*, that they were suitable for the exact same applications.⁷⁹ Thus, the ITC report does not diminish our finding that screws and nails are comparable products with comparable end uses such that they are in the same general category of products, and that the steel pipes produced by Al Jazeera or the service contracts executed by Larsen & Toubro have very little in common with steel nails such that they are not in the same general category of products.

Comment 4: Whether, In Failing to Apply the Profit Cap, the Department Has Ignored the Potential Profit Cap Sources That Would Replicate the Profit of an Omani Nail Producer

Oman Fasteners' Comments:

Oman Fasteners argues that the Draft Remand Results fail to explain why the record prevented the Department from calculating a profit cap, including a facts-available profit cap, as mandated by the court. Oman Fasteners asserts that the Department is obligated to examine whether the record data permit the calculation of a profit cap that replicates a reasonable profit for a nail producer in Oman. Oman Fasteners contends that the facts here are different than they were in *Husteel*, where the Department's decision not to apply a profit cap was based on the conclusion that none of the proposed caps would have furthered the goal of more accurately reflecting the merchandise under consideration.⁸⁰

⁷⁸ The situation is analogous to that of steel plates or hot-rolled steel used in the construction of pipes. While two grades of steel might be used to produce two different pipe products, and are therefore not "substitutable" for each other, no one would argue that the end uses of the two grades of steel (*i.e.*, the production of pipes) is not comparable. Thus, substitutability and comparability are two completely different concepts. Further, the ITC report cited by Oman Fasteners includes a discussion of whether foreign made nails are substitutable for U.S. made nails (*see* Supplemental CV Submission at SCV-5, II-13). The report notes that there is a moderate to high degree of substitutability, implying that sometimes a nail is not "substitutable" for another nail simply by virtue of where it was produced. In such a case, no one would argue that the two types of nails are not comparable.

⁷⁹ *See* Supplemental CV Submission at SCV-5, II-13.

⁸⁰ *See Husteel* at 30.

Oman Fasteners argues that the Department should use the profit rates determined in the *Steel Nails from China* cases and Oman Fasteners' own home market sales data as a profit cap. Oman Fasteners asserts that the Department has consistently calculated profit rates for steel nails of less than four percent in *Steel Nails from China*, far below Hitech's 19.74 percent rate. Oman Fasteners contends that the Department's failure to use these same rates as a cap on profit for a steel nails producer in Oman is unlawful. According to Oman Fasteners, the Department has, in other cases, used information from earlier administrative reviews to calculate profit, and asserts that using the profit rate from *Steel Nails from China* as a profit cap would be consistent with this practice.⁸¹ Oman Fasteners maintains that capping the Hitech profit rate at the rates used in *Steel Nails from China* would also further the statute's goal of ensuring that the CV profit rate does not lead to an irrational and unrepresentative result for an Omani producer of steel nails.

Oman Fasteners argues that the Department could also use as a profit cap the home market sales of Oman Fasteners. Oman Fasteners asserts that the verified data on Oman Fasteners' home market sales reflects both the precise merchandise under consideration and the home country. According to Oman Fasteners, given the strong factors in favor of using these data as a basis for or as a part of a profit cap calculation, the Department's explanation that the home market sales are too small has no merit.

Oman Fasteners contends that the court specifically noted that, while the profit cap provision establishes that a cap should reflect comparable merchandise in the home market, in a facts available situation, the Department must still attempt to comply with the profit cap requirement. Oman Fasteners argues that the Department's reason for declining to use the Omani data on the record of Al Jazeera or Larsen and Toubro, *i.e.*, that they do not reflect

⁸¹ See *Notice of Final Results of the Ninth Administrative Review of the Antidumping Duty Order on Certain Pasta from Italy*, 72 FR 7011 (February 14, 2007) and accompanying Issues and Decision Memorandum at Comment 2.

comparable merchandise, fails to explain why record evidence of Omani steel producers and those involved in construction projects cannot be used as a basis for a facts available profit cap. Indeed, Oman Fasteners claims, the Department's interpretation would permit it to disregard the statutory profit cap provision any time the home market lacked data reflecting identical or comparable merchandise.

Mid Continent's Comments:

Mid Continent supports the Department's decision not to apply a profit cap, as there is no available record information from Omani producers of the same general category of products. Mid Continent asserts that all of the other financial statements on the record besides Hitech's financial statements are not suitable sources for a profit cap. Further, Mid Continent maintains, Oman Fasteners' own home market sales cannot serve as a profit cap, due to their insignificant volume, which renders them unreliable. Therefore, Mid Continent concludes, on the basis of this particular record, no potential profit cap sources fulfill the statute any better than no cap at all.

Department's Position:

We disagree with Oman Fasteners that our profit cap determination fails to comply with the court's instruction to "more fully explain any profit cap determinations," and, specifically, to provide "a thorough explanation as to why the available data prevents" the Department from applying, at minimum, a facts available profit cap.

We agree with Oman Fasteners that the profit cap is a separate requirement from a decision regarding the source of CV profit, but both provisions are bound by the same statutory preference for a source that reflects profit, in the home market, from sales of merchandise in the same general category as the subject merchandise. Accordingly, both determinations—the CV

profit source under “any other reasonable method,” and the profit cap—will largely track the same analysis.

Oman Fasteners argues that we have ignored potential profit cap sources that would replicate the profit of an Omani nail producer. While we have acknowledged that the SAA makes clear that the Department might be required to calculate a profit cap under alternative (iii) on the basis of facts available,⁸² we find that the options rejected as suitable sources of CV profit likewise fail to provide a reasonable basis for a facts available CV profit cap. Oman Fasteners attempts to distinguish this fact pattern from *Husteel*⁸³ on the basis that in *Husteel*, the Department’s decision not to apply a cap was based on the conclusion that none of the proposed caps would have furthered the goal of more accurately reflecting the merchandise under investigation, because CV profit was based on identical merchandise. However, the applicable statutory language requires only that the profit cap rely on the profit of merchandise in the same general category of products, rather than identical merchandise.⁸⁴ Accordingly, that the third-country source used in *Husteel* was from a producer of identical merchandise, whereas the third-country sourced used in these Final Remand Results is a producer of comparable merchandise, is unimportant, as in both cases, the third-country producer produced merchandise in the same general category of products as the subject merchandise. Moreover, as we discuss below, the sources that Oman Fasteners proposes the Department use as a profit cap do not more accurately reflect profit from an Omani producer of steel nails than does the profit rate of Hitech. Accordingly, this situation is not distinguishable from *Husteel*, because in both cases, the

⁸²See Uruguay Round Agreement Act, SAA, H.R. Doc. No. 103-316 at 843 (1994), reprinted in 1994 U.S.C.C.A.N. 4040, 4161.

⁸³ See *Husteel* at 30.

⁸⁴ See section 773(e)(2)(B)(iii) of the Act (“{T}he amount allowed for profit may not exceed the amount normally realized by ... producers ... in connection with the sale, for consumption in the {home market}, of merchandise that is in the same general category of products as the subject merchandise.”) (emphasis added).

Department was faced with a situation where all of the potential profit cap sources (with the exception of the selected source for CV profit) suffered from significant weaknesses such that none of them would fulfill the purpose of the statute better than the chosen CV profit source. Accordingly, similar to *Husteel*,⁸⁵ in the complete absence of a useable profit cap, we have continued to use the selected CV profit rate without a cap as facts available.

Oman Fasteners continues to assert that the profit rates calculated in *Steel Nails from China* would make a suitable facts available profit cap. However, as previously discussed, this rate is based on the financial statements of LSI, which the Department rejected from use in its final determination due to a substantial lack of vital information. The Department's rejection of the LSI financial statements was upheld by the court,⁸⁶ and we find that its unreliability for purposes of calculating CV profit would also make it a poor choice on which to calculate a facts available profit cap. Further, we do not find that Oman Fasteners' own home market profit data are useful as a facts available profit cap, because its volume of sales is too small to represent the profit normally experienced by a producer of steel nails in the Omani market. As noted above, our rejection of Oman Fasteners' home market profit data was upheld by the court in this proceeding,⁸⁷ and applying Oman Fasteners' home market profit data as a profit cap would have the same effect as using it under sections 773(e)(2)(A) or (e)(2)(B)(i) of the Act. Finally, with regard to Al Jazeera and the Larsen & Toubro companies, we continue to find that these companies produce merchandise that is not in the same general category of products of steel nails, and therefore not suitable as a profit cap. Accordingly, in the complete absence of any

⁸⁵ *Id.*

⁸⁶ See *Mid Continent Steel & Wire* at 25.


⁸⁷ *Id.* at 25.

reliable or comparable profit information that would allow us to calculate a CV profit cap, as facts available, we have continued to use Hitech's profit rate without a profit cap.

V. FINAL RESULTS OF REDETERMINATION

Based on the above analysis, the Department will continue to calculate the CV profit ratio using Hitech's financial statements, and Oman Fasteners' weighted-average dumping margin continues to be 9.10 percent.

5/18/2017

X 

Signed by: RONALD LORENTZEN

Ronald K Lorentzen
Acting Assistant Secretary
for Enforcement and Compliance