

DATE: August 9, 2006

MEMORANDUM TO: Joseph A. Spetrini
Acting Assistant Secretary
for Import Administration

FROM: Stephen J. Claeys
Deputy Assistant Secretary
for Import Administration

RE: Final Determination of Sales at Less Than Fair Value and
Affirmative Final Determination of Critical Circumstances of the
Antidumping Investigation: Certain Lined Paper Products from
Indonesia

SUBJECT: Issues and Decision Memorandum for the Final Determination of
Sales at Less Than Fair Value and Affirmative Final
Determination of Critical Circumstances: Certain Lined Paper
Products from Indonesia

Summary

We have analyzed the comments in the case and rebuttal brief submitted by interested parties in this investigation of certain lined paper products (“CLPP”) from Indonesia. We recommend that you approve the positions we have developed in the “Discussion of the Issues” section of this memorandum. Below is a complete list of the issues in this investigation for which we have received comments from the parties.

Comment 1: The Use of Facts Available

Comment 2: TK’s Submitted Information

Comment 3: Statutory Conditions for Adverse Facts Available (“AFA”)

Comment 4 : TK’s Participation

Comment 5: Justification for Application of Adverse Inferences

Comment 6: The Preliminary Margin Rate of 118.63%

Comment 7: Whether TK’s Information is Considered Verifiable

Comment 8: Use of TK’s Past Submissions as “Secondary Information”

Comment 9: Explanation of Corroboration of Petition

Comment 10: Adequacy of Corroboration of Petition Information

Comment 11: Inconsistencies and Flaws in the Petition Information

Comment 12: Critical Circumstances

Background

On March 27, 2006, the Department of Commerce (“the Department”) published the notice of preliminary determination of sales at less than fair value of CLPP from Indonesia.¹ The period of investigation (“POI”) is July 1, 2004, through June 30, 2005. We invited parties to comment on the Preliminary Determination.² On May 1, 2006, the respondent, PT. Pabrik Kertas Tjiwi Kimia Tbk. (“TK”), submitted a case brief. On May 9, 2006, Petitioner³ submitted a rebuttal brief. TK initially requested a public hearing but later withdrew its request.

Discussion of the Issues

Comment 1: The Use of Facts Available

Respondent’s Comments: TK contends that according to 19 USC 1677e(a), the Department may resort to facts available if necessary information is not available or an interested party withholds requested information, fails to provide requested information by the deadline, or significantly impedes a proceeding. TK argues that none of the conditions required to resort to facts available are present in this investigation. TK further argues that the Department’s authority to apply facts available is contingent upon the Department providing TK with an opportunity to remedy or explain deficiencies in light of the time limits established for the completion of the investigation.⁴ TK argues that the Department provided no such opportunity to TK in this investigation.

Petitioner’s Rebuttal: Petitioner disagrees with TK’s contentions and argues that the Department conformed to the requirements specified in 19 USC 1677m(d) for notification, and that TK was given a meaningful opportunity to respond in the investigation. Petitioner contends

¹ See Notice of Preliminary Determination of Sales at Less Than Fair Value: Certain Lined Paper Products from Indonesia, 71 FR 15162 (March 27, 2006) (“Preliminary Determination”).

² See Preliminary Determination, 71 FR 15162, at 15167-68.

³ Association of American School Paper Suppliers and its individual members (MeadWestvaco Corporation; Norcom, Inc.; and Top Flight, Inc.) (“Petitioner”) See Initiation of Antidumping Duty Investigations: Certain Lined Paper Products from India, Indonesia, and the People’s Republic of China, 70 FR 58374 (October 6, 2005).

⁴ See TK’s Case Brief at 31-32, citing 19 USC 1677m(d) & (e); and WTO Antidumping Agreement, Annex II, paragraph 6.

that rather than participate, TK made a willful determination to cease its participation. Petitioner states that TK did not request assistance or specify any particular action by the Department that would induce TK to participate in the proceeding. Petitioner contends that if TK means to argue that it was not advised that its failure to answer supplemental questionnaires could be construed as deficient, Petitioner notes that the Department did indeed notify TK of the consequences of its withdrawal but, nonetheless, TK confirmed that it would not respond to further questioning.⁵ Petitioner contends that if TK means to argue that TK was not advised that its submissions prior to its withdrawal were deficient, Petitioner notes that the Department issued extensive supplemental questionnaires that covered a wide range of information that is necessary to calculate a margin. Petitioner argues that TK cannot contend that because the Department's supplemental questionnaires did not specifically use the word "deficiency," that TK lacked notice of substantial deficiencies identified in each supplemental questionnaire.

The Department's Position: The conditions required to resort to facts available according to section 776(a) of the Tariff Act of 1930, as amended ("the Act") are present in this investigation. As stated in the Preliminary Determination,⁶ section 776(a)(2) of the Act provides that, when a respondent withholds information requested by the Department, fails to provide such information by the deadlines requested, impedes the proceeding, or submits information that cannot be verified, the Department shall use, subject to section 782(d) of the Act, facts otherwise available in reaching the applicable determination. We acknowledge that TK initially cooperated in the investigation by responding to the original questionnaire and the Department's first supplemental questionnaire. Nevertheless, TK later withheld information that was requested by the Department, thereby significantly impeding the proceeding. Specifically, TK failed to respond to two supplemental questionnaires issued by the Department on January 26, 2006, and February 3, 2006. Further, the information that was provided could not be verified, as required by section 782(i) of the Act because TK withdrew from active participation in the investigation.⁷ TK's withdrawal from active participation in the proceeding precluded the Department from verifying TK's information. As we explain in comment 2, we warned TK of the consequences for failure to respond.⁸ Because the Department was unable to verify TK's information, we cannot use TK's response to calculate a margin. Accordingly, the Department is forced to utilize facts otherwise available.

Comment 2: TK's Submitted Information

⁵ See Petitioner's Rebuttal Brief at 38-39, citing Withdrawal Conversation Memorandum (March 20, 2006). Petitioner also cites to Braco Peres Citrus, S.A. v. United States, 25 CIT 1179, 1184, 173 F. Supp. 2d 1363, 1370 (2001).

⁶ See Preliminary Determination, at 71 FR 15164-66.

⁷ See Memorandum to the File, Re: Conversation with Counsel for TK Regarding Respondent's Withdrawal from Active Participation, (March 20, 2006) ("Withdrawal Conversation Memorandum"); and see Letter from Arnold & Porter, re: Certain Lined Paper Products from Indonesia (March 22, 2006) at 6, ("TK's Withdrawal Letter").

⁸ See Withdrawal Conversation Memorandum; and see second supplemental questionnaire for Section D (January 26, 2006) ("Second Supplemental"), and third supplemental questionnaire on sections A-C (February 3, 2006) ("Third Supplemental").

Respondent's Argument: TK argues that facts available may not be used unless the Department first addresses TK's submitted information. According to TK, the Department may use "facts available" only to "fill in the gaps" needed to make a determination when the Department has received incomplete facts.⁹ TK contends that the Department has failed to adequately describe the gaps in the record and, therefore, TK argues that the Department may not resort to facts available. TK claims that its responses to the Department's original questionnaire and first supplemental questionnaire contain every element needed for the Department to determine whether there have been sales made at less than fair value.¹⁰ TK argues that the Department must consider TK's response because: 1) the information submitted by TK was timely submitted; 2) at the time the information was submitted, it was verifiable; 3) the information was responsive and complete; 4) TK "acted to the best of its ability" in responding to the Department, in light of the improper release of TK's information; and 5) "the information can be used without undue difficulties."¹¹

Petitioner's Rebuttal: Petitioner disagrees with TK's argument and contends that the Department is not required to use TK's submitted information. Petitioner notes that 19 USC 1677m(e) states that if the information, among other things, can be verified, is not so incomplete as to be unreliable, and the interested party has acted to the best of its ability, the Department must use the information to calculate a margin.¹² Petitioner argues that TK declined to be verified,¹³ the information submitted is incomplete to the point of being useless, and TK clearly did not act to the best of its ability to provide the Department information, as it withdrew from this case and ceased all active participation.

Petitioner argues that TK cannot contend that because the Department's supplemental questionnaires did not specifically use the word "deficiency," that TK lacked notice of substantial deficiencies identified in each supplemental questionnaire. Petitioner argues that the information that TK submitted on the record did not provide the Department with full and complete information, which would allow the Department to calculate an accurate and correct margin based on verifiable data. Petitioner notes that without TK's responses to the two supplemental questionnaires, it would be impossible for the Department to be familiar with which costs were from affiliates, in what currency sales were being reported, how overhead and movement costs were calculated, and whether information could be reconciled with actual documents kept in the ordinary course of business. Petitioner argues that because TK refused to provide answers to these supplemental questionnaires, and refused verification, the record in this case does not provide the Department with enough information to determine constructed value without resorting to the facts otherwise available.

⁹ See TK's Case Brief at 28, citing Nippon Steel Corporation v. United States, 337 F.3d at 1373 (Fed. Cir. 2003) ("Nippon Steel").

¹⁰ See id. at 28-29, citing 19 USC 1677m(d).

¹¹ See id. at 30, citing 19 USC 1677 m(e)(1)-(5); and Gerber Food (Yunnan) Co. v. United States, 387 F. Supp. 2d at 1280-81.

¹² See Petitioner's Rebuttal Brief at 37, citing 19 USC 1677m(e).

¹³ See id. at 37, citing Withdrawal Conversation Memorandum; and see TK's Withdrawal Letter at 6.

The Department's Position: As explained in response to Comment 1, we are applying facts available to TK because TK's refusal to respond to our supplemental questionnaires significantly impeded this proceeding and because we were not able to verify TK's data. In these circumstances, we disagree with TK's argument that, based upon section 776(a)(2)(B), the Department can only apply facts otherwise available if subsections 782(c)(1) and (e) are satisfied. In this case, the Department has based its determination to resort to facts available upon section 776(a)(2)(A) where a respondent withholds information that has been requested by the Department, subsection (2)(C) where a respondent significantly impedes a proceeding, and subsection (2)(D) where a respondent provides information, but the information cannot be verified. Nonetheless, the application of facts available under section 776(a)(2) is subject to section 782(d), the provision on deficient submissions. In this case, the Department notified TK that its response was deficient when it issued supplemental questionnaires. TK, however, submitted no response to the Department's supplemental questionnaires. In addition, because TK chose not to participate further in this proceeding, the information that TK did submit could not be verified, as required under section 782(e)(2) for purposes of using such information. Moreover, TK's argument that the information was verifiable when submitted is irrelevant because the information could not be verified, as described in section 776(a)(2)(D). Based upon the above, the Department's resort to facts available in this case is necessary and appropriate.

Comment 3: Statutory Conditions for Adverse Facts Available (“AFA”)

Respondent's Argument: TK argues that the Department's application of AFA in the Preliminary Determination is inconsistent with the Act because TK fully complied with each of the Department's requests for information. TK asserts that 19 USC 1677e(b) establishes that an adverse inference may be used when a party “has failed to cooperate by not acting to the best of its ability to comply with a request for information.” TK notes that prior to its withdrawal, TK submitted responses to the Department's original questionnaire and one supplemental questionnaire. TK contends that it acted to the best of its ability to comply with the Department's request for information.

Petitioner's Rebuttal: Petitioner contends that as a result of TK's actions in this investigation, the Department correctly reached its Preliminary Determination. First, Petitioner notes that TK failed to provide requested information by not responding to the Department's supplemental questionnaires, necessitating the Department to resort to the facts otherwise available. Then, Petitioner notes that TK willfully withdrew from the investigation and that TK's non-responsiveness resulted in TK not acting to the best of its ability to comply with the Department's requests for information. Petitioner notes that TK acknowledged that the Department would be unable to verify TK's submissions once it withdrew from the investigation. Petitioner argues that where a respondent either does not cooperate in a proceeding, or withdraws from an investigation prior to, or during verification, application of adverse inferences is an invariable result under 19 USC 1677e(a)-(b).¹⁴

¹⁴ See Petitioner's Rebuttal Brief (May 9, 2006) (“Petitioner's Rebuttal Brief”) at 6, citing Live Swine from Canada, 70 FR 12181 (March 11, 2005) (final); Certain Crepe Paper from the People's Republic of China, 69 FR 70223 (December 3, 2004) (final); Wooden Bedroom Furniture from the People's Republic of China, 69 FR 67313 (November 17, 2004) (final); Carbon and Certain Alloy Steel Wire Rod from Brazil, 67 FR 55792 (August 30, 2002) (final) (“Wire Rod from Brazil”); Stainless Steel Butt-Weld Pipe Fittings from the Philippines, 65 FR 47393 (August 2, 2000) (prelim. results); Certain Cold-Rolled Carbon-Quality Steel Products from Brazil, 65 FR 5554 (February 4, 2000) (final); Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from the Russian Federation, 64

The Department's Position: The use of an adverse inference pursuant to Section 776(b) is warranted in this case because TK has not cooperated to the best of its ability. TK chose not to respond to the Department's supplemental questionnaires¹⁵ and TK withdrew from active participation in the investigation.¹⁶ TK's withdrawal from active participation in the proceeding precluded the Department from verifying TK's information. Compliance with the "best of its ability" standard "is determined by assessing whether respondent has put forth its maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation."¹⁷ As explained in the Statement of Administrative Action ("SAA"), "where a party has not cooperated, Commerce . . . may employ adverse inferences about the missing information to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully."¹⁸ Given TK's willful actions of refusing to provide requested information and deciding to withdraw from active participation in the proceeding, the Department is justified in utilizing an adverse inference in this proceeding.

Comment 4: TK's Participation

Respondent's Argument: TK argues that it is unreasonable for the Department to expect TK to submit additional information in this proceeding because (1) the Department improperly released proprietary information; and (2) the Department failed to take immediate action to provide adequate assurances regarding measures that would protect TK's information. TK contends that "{a}n adverse inference may not be drawn merely from a failure to respond, but only under circumstances in which it is reasonable for the {the Department} to expect that more forthcoming responses should have been made."¹⁹ According to TK, the improper release of proprietary information presented TK with "no alternative but to withdraw from the proceedings as an active participant."²⁰ Finally, TK contends that after the improper release of proprietary information, TK did not have the ability to cooperate further without "endangering the company's wellbeing." Therefore, TK believes that it was denied a meaningful opportunity to participate in the investigation.

TK contends that World Finer Foods supports its argument that the Department is prohibited by 19 USC 1677m(c) from applying adverse facts available because the Department failed to offer assistance to TK in responding to the Department's supplemental questionnaires by modifying

FR 38626 (July 19, 1999) (final).

¹⁵ TK failed to respond to two supplemental questionnaires issued by the Department on January 26, 2006, and February 3, 2006.

¹⁶ See Withdrawal Conversation Memorandum.

¹⁷ See Nippon Steel, 337 F.3d 1373, 1382 (Fed. Cir. 2003).

¹⁸ See SAA at 870.

¹⁹ See TK's Case Brief at 14, citing Nippon Steel Corporation v. United States, 337 F.3d at 1383 (2003).

²⁰ See TK's Withdrawal Letter, at 6.

the Department's requests for information.²¹ TK also contends that the Department may not apply adverse facts where it failed to consider a respondent's ability to respond.²² TK believes that in such unusual cases of extenuating circumstances, the CIT has held that the Department may not use adverse inferences.²³ In the instant case, TK contends that extenuating circumstances precluded TK from responding to the Department's supplemental questionnaires and, therefore, the Department may not draw adverse inferences particularly because the Department itself caused TK's inability to respond.

TK also contends that the function of the adverse inference provision established by 19 USC 1677e(b) is not to impose punitive margins, but instead to provide respondents with incentive to cooperate. TK states that the application of the preliminary margin rate would give rise to doubts about the Department's "commitment to the appearance of concern for the preservation of confidentiality."²⁴ Therefore, TK argues that the application of an adverse inference is "purely punitive," and thus, will not encourage respondents to provide confidential information.²⁵

Petitioner's Rebuttal: Petitioner contends that TK admittedly was aware of the possibility that lawyers for an entity that did not qualify as an "interested party to the investigation" had applied for, and been granted access to, the administrative protective order ("APO"). Petitioner states that despite TK's awareness, TK did not invoke the Department's regulatory provisions for challenging the entity's application for interested party status, which provides for a seven-day period in which any person may file an objection to an application.²⁶ Also, Petitioner contends that TK had a meaningful opportunity to participate in the proceeding, and made a willful determination to cease its participation. Further, Petitioner argues that TK's withdrawal from this investigation provides the appearance that TK took advantage of the release of its information to the counsel for a possibly ineligible interested party to create a false cover for its withdrawal.

Petitioner notes that TK does not deny that it refused to provide requested information or argue in its case brief that TK was unable to comply by reason of being either physically or legally incapable of doing so.²⁷ Petitioner asserts that TK's attempts to blame the Department for TK's

²¹ See TK's Case Brief at 15, citing World Finer Foods, Inc. v. United States, 24 CIT 541, 544-45 (2000) ("World Finer Foods").

²² See TK's Case Brief at 15 and 16, citing World Finer Foods, 24 CIT 541, at 544-45 (2000).

²³ See id. at 16, citing Mannesmannrohren-Werke AG v. United States, 23 CIT 826, 841-842 (1999) ("Mannesmann"); and American Silicon Tech. v. United States, 24 CIT 612, 624-25 (2000) ("American Silicon").

²⁴ See id. at 14, citing Hyundai Pipe v. United States Dep't of Commerce, 11 C.I.T. 238, 241 (1987) ("Hyundai Pipe").

²⁵ See id. at 11.

²⁶ See Petitioner's Rebuttal Brief at 14, citing 19 CFR 356.10(a)(2).

²⁷ See id. at 5, citing Nippon Steel, 337 F.3d at 1382 (2003) (explanation of "best to its ability" standard as laid out within 19 USC 1677e(b)).

failure to cooperate and respond to the Department’s supplemental questionnaires, does not demonstrate why an improper release of information in any way affected TK’s ability “to do the maximum it is able to do” in responding to the Department’s inquiries.²⁸ Petitioner notes that Department regulations provide for a separate investigation of the possible failure to protect confidential company information that is detached from the antidumping investigation. Therefore, Petitioner argues that an antidumping investigation may not just be halted because TK is uncomfortable with proceeding.

Petitioner disagrees with TK’s interpretation of World Finer Foods as a means to argue that the Department may not use adverse inferences unless the Department first offered assistance to accommodate TK. Petitioner notes that in World Finer Foods and consistent with 19 USC 1677(m), a company at the outset of the investigation advised the Department of its financial difficulties and inability to respond fully.²⁹ Petitioner states that the respondent was still willing to provide information that the Department found helpful, commensurate with its abilities. Therefore, the Court found that the Department had to respond to the company’s proposition and attempt to find a solution before implementing adverse facts available.

Petitioner contends that the facts of World Finer Foods and this case are dissimilar because TK participated, with many deficiencies, until counsel for a possibly ineligible interested party had withdrawn its entry of appearance and certified to the destruction of all APO-related materials. Petitioner notes that once counsel withdrew its appearance in the investigation, TK’s information was no longer in jeopardy of being released to possibly ineligible interested parties in this case. Also, only after counsel for a possibly ineligible interested party withdrew its entry of appearance and certified to the destruction of all APO-related materials did TK inform the Department of its intent to withdraw from participation in the investigation.³⁰

Petitioner argues that TK never requested help in responding to the Department’s supplemental questionnaires or specified any particular action by the Department that would induce TK to participate in the proceeding. Instead, Petitioner notes that TK only demanded that the Department investigate the possible improper release of TK’s information. Petitioner notes that the Department did in fact ask TK if it would like to be sent supplemental questionnaires, and TK confirmed that it would not respond to further questioning, and acknowledged that it did not expect to be verified.³¹ Unlike the respondent in World Finer Foods, Petitioner asserts that TK was unwilling to provide any further information to the Department. Petitioner argues that while 19 USC 1677m(c) encourages the Department to provide assistance to respondents, particularly with small companies, it does not require that the Department refrain from using an adverse inference against a respondent who refuses to answer questions.

Petitioner contends that TK’s use of American Silicon actually detracts from TK’s argument because the Court found that the Department had sufficient reason to apply adverse facts

²⁸ See id.

²⁹ See id. at 18, citing World Finer Foods, 24 CIT 541, 543-544 (2000).

³⁰ See id. at 18, citing TK Withdrawal Letter.

³¹ See id. at 19, citing Withdrawal Conversation Memorandum.

available in that case. Petitioner states that while the Court in American Silicon remanded to Commerce for failure to explain its finding that the respondent had failed to act to the best of its ability, the Court upheld the remand determination as adequately explaining the respondent's failure to cooperate as a willful determination on the respondent's part.³²

The Department's Position: We disagree with TK's argument that the Department failed to take immediate action to address TK's concerns relating to the improper release of its information and TK's claim that it was, therefore, denied a meaningful opportunity to participate in the investigation. While the Department did not immediately respond in writing to TK on this issue, it acted as soon as it was alerted to the concern by TK's counsel. The Department took immediate action despite the fact that TK's concerns were expressed well after the ten-day period for making an objection to an APO access request as described in 19 CFR 356.10(c)(2) and even though TK declined the opportunity to make a formal submission regarding this matter.³³ After receiving a call from TK's counsel, the Department immediately contacted the law firm whose client's status as an interested party TK had questioned. The law firm responded that it had made an error, that its client was not, in fact, an interested party in the cases involving Indonesia, but rather only in the cases involving China and India. The law firm promptly withdrew its application for APO access in the cases involving Indonesia and certified destruction of all APO material it had received related to the Indonesia cases. TK did not express concerns about any other party with APO access.

During the course of this investigation, TK has been under the same APO rules as every other company in every other case conducted by the Department. TK has had the same access to all legal means of redress should it believe its information to have been compromised. Also, consistent with 19 CFR 351.305(b), access to TK's confidential information was only granted to counsel for the possibly ineligible interested party, not the possibly ineligible interested party itself. Because our investigation relies upon the submission of information, parties cannot unilaterally cease to cooperate to remedy a concern about the APO process. Under the Department's regulations, authorized APO applicants acknowledge that the Department may sanction an authorized applicant pursuant to 19 CFR 354.6 for any disclosure of business proprietary information obtained under APO to any other person who is not an authorized applicant. Therefore, the fact that TK at one point in the investigation had a concern about counsel for a possibly ineligible interested party cannot serve as an excuse to cease cooperation with the Department's investigation, especially given that the law firm in question removed itself from the APO. TK at no time indicated that it was unable to provide the requested information because of a physical or legal incapability.³⁴ Rather, TK chose not to provide the requested information to the Department. Therefore, TK was not denied a meaningful opportunity to participate in the investigation.

³² See id. at 16 and 17, citing American Silicon, 26 CIT 1216, 240 F. Supp. 2d 1306 (2002).

³³ See letter from Stephen J. Claeys, Deputy Assistant Secretary to the respondents, re: Antidumping and Countervailing Duty Investigations on Certain Lined Paper Products from Indonesia, dated April 26, 2004 at page 4.

³⁴ See id. at 5, citing Nippon Steel, 337 F.3d at 1382 (“‘Ability’ refers to ‘the quality or state of being able,’ especially ‘physical, mental, or legal power to perform.’”).

With regards to TK's citation to World Finer Foods, to support its position that the Department was obliged to help TK because it was experiencing difficulty complying with the Department's request for information, we find this citation to be inapposite. In that case, the respondent notified the Department of its inability to comply with the requirements of the questionnaire due to financial resource constraints but it did offer to supply "limited information that {the Department} felt might be worthwhile or helpful."³⁵ In the instant case, TK did not indicate it could not respond, but rather that it would not respond. Further, by taking steps to ensure that its APO regulations regarding interested party status were being correctly followed, the Department paved the way for TK to comply with the Department's request for information. Also, despite the fact that TK withdrew from the investigation, the Department asked TK if it would like to be sent additional supplemental questionnaires.³⁶ However, TK decided that it was unable to fully comply with the Department's requests. Based upon our examination, we find that TK has not made a persuasive argument that the Department did not assist TK in this case.

With regards to TK's reliance on American Silicon to support its position that the Department may not utilize adverse inferences because the Department failed to consider how extenuating circumstances precluded TK from responding to the Department's supplemental questionnaires, we disagree. In American Silicon, the Court initially found that the Department failed to adequately explain its finding that the respondent failed to act to the best of its ability.³⁷ The Court in American Silicon eventually upheld the remand determination as adequately explaining the respondent's failure to cooperate as willful determination on the respondent's part.³⁸ In the instant case, the Department has adequately described the basis for applying an adverse inference with respect to TK in this investigation.

Citing Hyundai Pipe, TK claims that, because of the Department's failure to respond to TK's concerns regarding its business proprietary information, an adverse inference would be purely punitive, and would give rise to doubts about the Department's "commitment to the appearance of concern for the preservation of confidentiality."³⁹ Contrary to this claim, Hyundai Pipe does not support this position. In that case, the respondent objected to the release of its information under APO to a certain law firm which it understood may have violated the terms of an APO and disclosed confidential information in another case. The respondent requested that the law firm be denied access to confidential information in its case until the pending dispute in the other case with regards to the law firm in question was resolved.⁴⁰ Further, in Hyundai Pipe, the respondent made its objection as soon as the application for protective order was filed, and the Court issued a preliminary injunction prior to any information being released under APO. In that case, the respondent was still obliged to respond to the Department's request for information. In the

³⁵ See World Finer Foods, 24 CIT 541, 542-43 & 544 (2000).

³⁶ See Withdrawal Conversation Memorandum.

³⁷ See American Silicon, 24 CIT 612, at 624-25 (2000).

³⁸ See American Silicon, 26 CIT 1216, 240 F. Supp. 2d 1306 (2002).

³⁹ See Hyundai Pipe, 11 C.I.T. 238, 241 (1987)

⁴⁰ See id. at 239.

instant case, TK did not formally object to the law firm’s application until after the Department sought additional information from the firm. By the time TK officially objected, the law firm in question had withdrawn its appearance in the investigation and certified to the destruction of all documents relating to the investigation.⁴¹ Thus, we find that TK was in no danger of its subsequent responses being released to the law firm in question. Again, because in the instant case the Department immediately took steps to prevent the release of any additional business proprietary information (“BPI”) to the law firm whose interested party status TK challenged, it is unclear how or why TK reached the conclusion that continuing to cooperate in this investigation could have resulted in disclosure of its BPI to a competitor. We address TK’s arguments that the AFA rate is not supposed to be punitive in comment 6 below.

Comment 5: Justification for Application of Adverse Inferences

Respondent’s Argument: TK argues that although the Department stated in the Preliminary Determination and Corroboration Memorandum⁴² that TK’s withdrawal had resulted in significant gaps in the record, in order to apply adverse inferences, the Department “must articulate why it concluded that a party failed to act to the best of its ability, and explain why the absence of this information is of significance to the progress of its investigation.”⁴³ TK contends that the Department improperly equates TK’s failure to provide a response to the Department’s supplemental questions with the separate issue of whether TK failed to cooperate to the best of its ability.⁴⁴ TK argues that the Department incorrectly asserts that TK did not act to the best of its ability simply because TK proffered reasons for not participating. TK contends that parties facing difficulties will proffer reasons for being unable to submit information requested by the Department.⁴⁵ TK asserts that the Department should not use adverse inferences in the final determination because we may not rely on “conclusory” assertions on non-cooperation to justify the use of adverse inferences.

Petitioner’s Rebuttal: Petitioner argues that the CIT has held that the requirements of both 19 USC 1677e(a) and (b) are met where, as in this case, a respondent purposefully withholds information.⁴⁶ Petitioner asserts that the courts have also required separate findings as to both subsections, along with explanations that describe why the respondent against whom adverse

⁴¹ See Letter from Cowam, Liebowitz & Latman, P.C., to the Department, re: Certain Lined Paper Products from Indonesia (sent February 1, 2006, and officially received February 6, 2006).

⁴² See Memorandum to File, Re: Preliminary Determination in the Antidumping Duty Investigation of CLPP from Indonesia; Corroboration of Total Adverse Facts-Available Rate, (March 20, 2006) (“Corroboration Memo”).

⁴³ See TK’s Case Brief at 12, quoting Mannesmann, 23 CIT at 826, 839 (1999).

⁴⁴ See id. at 13, citing Nippon Steel, 337 F.3d at 1381; and Tung Fong Indus. Co., Inc. v. United States, 318 F. Supp. 2d. at 1321, 1334-36 (CIT 2004).

⁴⁵ See id. at 14, citing 19 USC 1677m(c)(1).

⁴⁶ See Petitioner’s Rebuttal Brief at 8, citing Shanghai Taoen Int’l Trading Co., Ltd. V. United States, 29 CIT 360 F. Supp. 2d 1339,1345 (2005).

inferences have been applied has been determined not to have acted to the best of its ability.⁴⁷ Therefore, Petitioner advocates that the Department provide a more comprehensive justification of its use of adverse inferences with respect to TK in the final determination.

The Department's Position: As explained in comment 3, section 776(b) of the Act provides that the Department may use an inference adverse to the interests of a party that has failed to cooperate by not acting to the best of its ability to comply with the Department's requests for information.⁴⁸ In the instant case, TK has not cooperated to the best of its ability because it willfully chose not to respond to the Department's supplemental questionnaires and TK withdrew from active participation in the review. TK's withdrawal from active participation in the proceeding precluded the Department from verifying TK's information. The absence of verified information is significant to the progress of the investigation because section 782(i)(1) of the Act specifies that the Department "shall verify all information relied upon in making a final determination in an investigation." Accordingly, given the fact that TK willfully chose not to participate in the proceeding and declined verification, the Department concludes that TK did not cooperate with the Department to the best of its ability. Based upon this finding, the use of an adverse inference pursuant to section 776(b) of the Act is warranted in this case.

Comment 6: The Preliminary Margin Rate of 118.63%

Respondent's Argument: TK argues that the preliminary margin rate of 118.63 percent is "absurd." TK believes its submitted sales and cost databases would produce a margin that demonstrates that TK was not dumping. TK contends that the Department may not impose the Petition rate because it has no relationship with TK's actual dumping margin.⁴⁹ Therefore, TK argues that the application of adverse inferences is "erroneously" applied.

Petitioner's Rebuttal: Petitioner states that TK fails to provide any reasons that explain why the rate applied by the Department in its Preliminary Determination should be considered punitive, as opposed to accomplishing the very argument that TK makes, which is ensuring that respondents participate in investigations by successfully creating a simple "incentive to cooperate."

The Department's Position: For the reasons discussed above, the Department is correct to apply adverse facts available in this case. In these circumstances, it is irrelevant whether TK's own data shows that dumping is occurring or not. Consistent with the Department's established practice in cases where a respondent is considered uncooperative, as adverse facts available, we have assigned to TK the margin based on information from the petition.⁵⁰

⁴⁷ See id. at 8 and 9, citing Mannesmann, 23 CIT 826, at 839 (1999).

⁴⁸ See Uruguay Round Agreement Act, Statement of Administrative Action, HR Doc. No. 103-316 (December 8, 1994), reprinted in 1994 USCCAN 4040, 4198 ("SAA").

⁴⁹ See TK's Case Brief at 27, citing F.LII De Cecco Di Filippo Fara S. Martiono S.p.A. v. United States, 216 F.3d at 1032 ("De Cecco").

⁵⁰ See PET Resin from India, 62858 (October 28, 2004) (prelim.); PET Resin from Indonesia, 69 FR 62861 (October 28, 2004) (prelim.); Certain Crepe Paper from the People's Republic of China, 69 FR 70233 (December 3, 2004) (final); Wooden Bedroom Furniture from the People's Republic of China, 69 FR 67313 (November 17, 2004) (final); Wire Rod from Brazil, 67 FR 55792 (August 30, 2002) (final); Hot-Rolled Flat-Rolled Carbon-Quality Steel

Comment 7: TK's Information

Respondent's Arguments: TK argues that the Department is obligated to conduct a full review of TK's submitted information to identify any inaccuracies that may support the conclusion that the information is no longer verifiable.⁵¹ TK also argues that the Department disregarded TK's "voluminous" submissions because there will be no on-site verification. TK contends that there is no set formula for conducting verification and the Department can decide on a case-by-case basis which procedures to use in its verification.⁵² TK notes that the Department does not request sales documentation for every sale within the POI.⁵³ Instead, the Department relies on supporting documentation for a limited number of sales that can be used to spot check a party's submissions. TK asserts that the four sample sales traces provided by TK should be used as verification of TK's submitted information.⁵⁴ TK argues that the sales traces can be used to verify the methodology used to generate TK's sales databases and the information contained in those databases.⁵⁵ TK also argues that TK's audited financial statements are generally considered to be reliable or self-verified.⁵⁶

TK contends that the Department may, under unique circumstances, exercise its "wide latitude" in verification so as to verify a respondent's submissions without actually having to conduct an on-site verification.⁵⁷ TK notes that in Cattle from Canada, the Department found that the information submitted by the respondent in that case satisfied the verification requirement because: 1) the information was voluntarily submitted by the company and certified as being complete and accurate; 2) the information supported a more accurate dumping rate; 3) there was no evidence on the record to suggest that the data submitted was aberrational or suspect.⁵⁸ Finally, TK argues that public interest will be better served if the Department used TK submissions because it will help ensure that respondents will continue to be willing to provide the Department with responses.

Products from the Russian Federation, 64 FR 38626 (July 19, 1999) (final); also see Analysis Memorandum, from Damian Felton, International Trade Compliance Analyst, to the File, Re: Final Results of the Antidumping Investigation (August 9, 2006) ("Analysis Memo").

⁵¹ See TK's Case Brief, at 34, citing Gerber Food, 387 F. Supp. 2d at 1282-83 (2005).

⁵² See id. at 35, citing American Alloys, Inc. v. United States, 30 F.3d 1469, 1475 (Fed. Cir. 1994).

⁵³ See id. citing Micron Tech., Inc., v. United States, 177 F.3d 1386, 1397 (Fed. Cir. 1997).

⁵⁴ See id. citing Section A Response, Exhibits A-9 and A-10 (December 9, 2005); and Supplemental Questionnaire Response, Exhibits SA-5 and SA-6 (January 19, 2006).

⁵⁵ See id. at 36, citing Maui Pineapple Co. v. United States, 264 F. Supp 2d, 1344, 1258-1259 (CIT 2003).

⁵⁶ See id. citing Guem Poong, 26 CIT 322, 325-26, 193 F. Supp.2d 1363, 1367-68 (2002).

⁵⁷ See id. citing Cattle from Canada from Canada, 34 FR 56739, 56744 (October 21, 1999).

⁵⁸ See id. at 37, citing Cattle from Canada from Canada, at 56744.

Petitioner's Comments: Petitioner disagrees with TK's argument that the Department should consider TK's submissions as verifiable. Petitioner notes that TK's submissions, no matter how "voluminous" they may be, were not useful to the Department because they were incomplete and, as a result, cannot be viewed as verifiable. Petitioner contends that verification should not be conducted under a respondent's direction, as TK would suggest. Petitioner asserts that although verification is a "spot check," the Department would normally select "surprise" sales from the respondent's sales databases. Petitioner contends that if the Department were to use unverified sales traces to verify other unverified information as TK requests, it would be an unprecedented action and would not satisfy the requirement that all information relied upon in making a final determination be verified.⁵⁹

Petitioner argues that the financial statements that TK submitted on the record cannot be used to verify other portions of TK's unverified information. Petitioner believes that TK's citation to Geum Poong Corp. in support of the proposition that financial statements are "self verifying," is incorrect. According to Petitioner, Geum Poong Corp. is factually inapposite to the instant case because it involves utilizing audited financial statements from parties other than the respondent to aid in calculating a margin under facts available.⁶⁰ Petitioner states that the financial statements submitted by TK were incomplete. Petitioner also states that there appears to be problems with TK's submitted financial statements because of the unavailable affiliate financial information, concerns raised by the company's auditors, and TK's payment problems with debt as noted in its financial statements.

Petitioner argues that TK's use of Cattle from Canada to support TK's argument that the Department has in the past used a respondent's unverified data to determine the margin is inappropriate in this proceeding. Petitioner notes that Cattle from Canada is the only investigation to date in which the Department has used a respondent's unverified data to calculate a margin. In addition, Petitioner notes that the Department has since repeatedly refused to rely on the logic of Cattle from Canada because the case is distinguishable by the risk that the all other's rate would be manipulated downward by the use of adverse inferences.⁶¹ Petitioner notes that in Cattle from Canada, a respondent withdrew from the investigation just after the Department confirmed that certain data that the respondent had submitted would raise its preliminary margin from 5.43 percent to 15.69 percent. The Department then determined to use the respondent's own unverified data, as that data would, in fact, lead to a higher margin than was present in the petition. Petitioner contends that if the Department had not relied on the respondent's data, the "all others" rate would have been significantly affected in such a way as to benefit the withdrawing respondent.⁶² Petitioner argues that Cattle from Canada is incomparable

⁵⁹ See Petitioner's Rebuttal Brief, at 41, citing 19 USC 1677m(i).

⁶⁰ See Geum Poong Corp., 26 CIT 322, 325-26, 193 F. Supp.2d 1363, 1367-68 (2002).

⁶¹ See Petitioner's Rebuttal Brief at 42 citing Memorandum to James J. Jochum, Assistant Secretary for IA, Re: Issues and Decision Memorandum for Less-Than-Fair Value Investigation of Wooden Bedroom Furniture from the People's Republic of China (November 8, 2004) at 107; and Wire Rod from Brazil, 67 FR 55792, 55796 (August 30, 2002).

⁶² See Petitioner's Rebuttal Brief, at 42, citing to Cattle from Canada at 56742.

to this investigation because the use of TK's information, by its own admission, would serve to lower the dumping rate, which would serve to encourage further non-compliance by TK.

The Department's Position: We disagree with TK's argument that the Department is obligated to conduct a full review of TK's submitted information to prove that it is no longer verifiable. Essentially, TK implies that because its submitted information is "voluminous," and was submitted to the Department under the assumption that it would be verified, it is complete and verifiable and the Department must prove otherwise. The factual information we rely on to make a final determination is contained in respondent's questionnaire responses. The verification process is designed to focus on a prioritized, cross section of information, and to check the validity of the factual information submitted by the respondent in the questionnaire response and, therefore, confirm whether we can rely on the factual information to make our final determination.

In order to determine that TK properly reported its home market and U.S. sales, we would examine and tie TK's reported quantity and value of sales figures for the period of investigation POI, first to TK's accounting records and then to its financial statements. Also, as a completeness check, we would select the quantity and value figures for a month or two of the POI for each of TK's markets and confirm that TK properly reported all sales of subject merchandise. Also, in reviewing sales traces, we would frequently request original source documentation to confirm that TK had correctly reported its sales data, such as sales price, quantity, date of sale, and sales-related expenses. In addition, we would tie this key sales data back to TK's accounting records to confirm that this reported data is correct. For sales-related expenses, we would examine TK's chart of accounts and select several accounts which could possibly be expenses not reported to the Department, especially for TK's U.S. sales. When TK receives payment from its customers, we would confirm payment, sales prices, and payment date (which is used to calculate imputed credit expenses).

Next, with regards to TK's argument that there is no set formula for conducting verifications and, therefore, the Department should utilize the four sample sales traces provided by TK to verify TK's methodology used to generate its sales databases, we disagree. It is the Department's practice that prior to verification, we identify specific sales transactions from the sales databases for detailed examination at verification. We also agree with Petitioner, that during verification, the Department would normally select several surprise sales from the sales databases and attempt to confirm the information on the record. To the extent possible, the specific sales selected should cover the full spectrum of terms of sales, charges, adjustments, product models, etc., as well as sales with unusual characteristics. While the method of confirming the accuracy and completeness of the criteria used by the respondent in preparing the sales databases varies from case to case, if the Department were to use the four unverified sales traces (selected by TK and not the Department) to verify the unverified methodology used by TK to generate its sales databases, it would be an unprecedented action and would not satisfy the requirement that all information relied upon in making a final determination be verified.⁶³

⁶³ See section 782(i)(1) of the Act (The Department shall verify all information relied upon when making a final determination.).

Regarding TK's argument that according to Geum Poong Corp., TK's audited financial statements should be considered reliable or self-verified, we agree that the Department may occasionally rely on audited financial statements, but they will not be used to construct a response that a respondent refused to provide or where verification is not conducted because of a respondent's withdrawal. Also, we agree with Petitioner that Geum Poong Corp. does not support TK's argument. Unlike this case, in Geum Poong Corp. the Department utilized audited financial statements from parties **other than the respondent** to aid in calculating a margin under facts available.⁶⁴

Next, we agree with Petitioner that TK's use of Cattle from Canada is inapposite and not germane to the instant case. In Cattle from Canada, the Department used the data of the uncooperative respondent in order to prevent the manipulation of the "all others" rate. No such circumstances exist in the instant case. The Department applied AFA "to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully."⁶⁵ Contrary to TK's position, we believe that treating TK's information as verifiable would encourage further non-compliance by other respondents in similar factual situations.

Comment 8: Use of TK's Past Submissions as "Secondary Information"

Respondent's Argument: TK argues that even if the Department continues to apply some form of adverse facts available, the Department should utilize the information that TK submitted on the record as "secondary information" because the information is the most relevant and accurate information available to the Department. TK also notes that all of its submissions were certified by a company official as being accurate and were submitted with the understanding that the information would be verified. TK contends that the Department cannot reject its information simply because TK submitted it. TK specifically argues that its public and audited financial statements are the best available source of information that the Department can use in its cost calculations. TK argues that in Geum Poong Corp., the CIT held that when the applying "facts available," the Department cannot refuse to consider audited financial statements simply because they have been submitted by the respondent.⁶⁶

Petitioner's Rebuttal: Petitioner argues that the case cited by TK in support of its position that the Department should use TK's financial statements is factually different from this proceeding. Petitioner contends that in Geum Poong Corp., the respondent submitted public data of multiple companies other than the respondent for use in calculating constructed value.⁶⁷ Petitioner also asserts that Geum Poong Corp. does not require the Department to use the submitted reports, but instead, only states that the Department should provide an explanation of why the reports were considered unreliable. Petitioner asserts that because TK's financial statements are incomplete and that TK has not acted to the best of its ability to comply, there is no reason to assume that

⁶⁴ See Geum Poong Corp., 26 CIT 322, 325-26, 193 F. Supp.2d 1363, 1367-68 (2002).

⁶⁵ See SAA at 870.

⁶⁶ See TK's Case Brief at 40, citing Geum Poong Corp., 26 CIT 322, 325-26 (2002).

⁶⁷ See Petitioner's Rebuttal Brief at 44, citing Geum Poong Corp., 26 CIT 322, 325-26 193 F. Supp.2d 1363, 1367-68 (2002).

TK's incomplete financial statements are as reliable as the pool of reports presented in Geum Poong Corp. Petitioner also notes that Geum Poong Corp. was not an adverse inferences case.

The Department's Position: We disagree with TK that the Department should use TK's submissions as "secondary information." TK's information cannot be secondary, because it is primary information that is unusable for the purposes of calculating a dumping margin. Furthermore, the company's decision to discontinue its participation precluded the Department from verifying the accuracy and completeness of the information that remained on the record. Thus, in accordance with section 782(i)(1) of the Act, the Department is unable to rely on the unverified information submitted by TK for purposes of the final determination.

With regard to TK's citation to Geum Poong Corp. to support its position that the Department should calculate costs based on TK's audited and publicly available 2004 financial statements, we find this citation to be inapposite. In Geum Poong Corp., which is not an adverse inferences case, the respondent submitted the financial statements for three companies to be utilized in calculating constructed value.⁶⁸ The Court held that the Department did not provide an adequate explanation to indicate why these financial statements were not used.⁶⁹ However, the Court stated that the Department was not bound to use the financial statements in question.⁷⁰

Moreover, as discussed below in comment 11, the submitted financial statements are not suitable for our calculations. The Department requires the financial expense rate to be calculated using financial statements for the highest level of consolidation that include the respondent. The Department's supplemental questionnaires requested copies of the consolidated financial statements that were either not submitted on the record, or not available in their public form, and directed TK to recalculate a consolidated financial expense rate based on the highest level of consolidated financial statements. Thus, we find that TK's publicly available financial statements are incomplete and unusable.

Comment 9: Explanation of Corroboration of Petition

Respondent's Argument: TK contends that the "antidumping statute" does not allow the Department to utilize AFA to reach a dumping margin that has "no basis in reality."⁷¹ TK asserts that the Department must establish dumping margins that are as accurate as possible⁷² even when the Department decides to apply facts available.⁷³ TK states that the Department must perform a corroboration that examines whether the secondary information used to corroborate the

⁶⁸ See Geum Poong Corp., 26 CIT 322, 325 (2002).

⁶⁹ See id.

⁷⁰ See id.

⁷¹ See TK's Case Brief at 18, citing World Finer Foods, 24 CIT at 547 (2000).

⁷² See id. citing FMC Corp. v. United States, SLIP Op. 03-15, 2003 WL 648958 at *4 (CIT February 11, 2003); and Rhone Poulenc, Inc. v. United States, 899 F.2d 1185, 1191 (Fed. Cir. 1990).

⁷³ See id. citing D&L Supply Co. v. United States, 113 F.3d 1220, 1223 (Fed. Cir. 1997) ("D&L Supply").

information used has probative value.⁷⁴ Further, TK asserts that an adverse facts available rate must be a reasonable estimate of TK's actual rate under the circumstances.⁷⁵ TK believes that the Department may not simply state that the rate is reasonable and has some basis in reality.⁷⁶ Instead, TK contends that the Department must provide a reasonable explanation for the connection between the facts used and the choices the Department used to corroborate.⁷⁷

Petitioner's Rebuttal: Petitioner argues that pursuant to 19 USC 1677e, the Department has consistently used facts otherwise available when a party withholds information, has not provided information within the deadlines determined by the Department, or submits information that cannot be verified.⁷⁸ Petitioner contends that according to 19 USC 1677e(b), information obtained from 1) the petition, 2) the final determination, 3) a prior review, 4) or any other information placed on the record may be used by the Department to apply adverse inferences when a party has not cooperated to the best of its ability.

Petitioner asserts that the Department should attempt to corroborate secondary information to the extent that the Department is satisfied that the secondary information has probative value.⁷⁹ However, Petitioner contends that when corroboration may not be practicable due to the circumstances of a case, the Department is not prevented from applying adverse inferences under section 776(b) of the Act.⁸⁰ Petitioner notes that in Wire Rod from Brazil⁸¹ the Department used the petition rate when the respondent withdrew from the investigation. Petitioner argues that in Wire Rod from Brazil, much like in this case, the Department corroborated the petition rate by re-examining the petition, and its own Initiation Checklist and examining whether the export price and normal value calculations were reasonable to the extent practicable.⁸² Petitioner asserts that the Department has frequently used petition rates in past cases to derive margins where adverse facts have been inferred.

The Department's Position: When corroboration may not be practicable due to the circumstances of a case, the Department is not prevented from applying adverse inferences under

⁷⁴ See *id.* at 19, citing 19 CFR 351.308(d); and 19 USC 1677e(c).

⁷⁵ See *id.* citing *De Cecco*, 216 F.3d 1027, 1032 (2000); and *SAA 4040*, 4198.

⁷⁶ See *id.* citing *Shandong Huarong Gen. Group Corp. v. United States*, Slip. Op. 04-177, 2004 WL 2203486 at *7 (CIT) (September 13, 2004) ("*Shandong Huarong*").

⁷⁷ See *id.* citing *Steel Auth. of India v. United States*, 24 CIT 482, 149 F. Supp. 2d 921, 930 (2001).

⁷⁸ See Petitioner's Rebuttal Brief at 21, citing 19 USC 1677e.

⁷⁹ See *id.* at 22 citing *Hevafil Sdn. Bhd. V. United States*, 25 CIT 147, 153 (2001) (citing the *SAA 4040*, 4199).

⁸⁰ See *id.* at 22-23, citing *SAA 4040*, 4198.

⁸¹ See *id.* at 23., citing *Wire Rod from Brazil*, 67 FR 55792, 55796.

⁸² See *id.*, also citing *Bottle-Grade Polyethylene Terephthalate (PET) Resin from India*, 69 FR 62865, 62858 (October 28, 2004) ("*PET Resin from India*").

section 776(b) of the Act.⁸³ Moreover, the Department’s regulations state that “{t}he fact that corroboration may not be practicable in a given circumstance will not prevent the Secretary from applying an adverse inference as appropriate and using the secondary information in question.”⁸⁴ In the instant case, further corroboration was not practicable because the Department did not have additional information which it could use as an independent source for corroboration purposes. The Petition is the only usable information on the record because there are no prior determination margins and no other respondents in this proceeding. Therefore, consistent with Wire Rod from Brazil,⁸⁵ the Department considers it reasonable to corroborate the Petition rate by re-examining the petition and corresponding Initiation Checklist, as we did in our Preliminary Determination to determine whether the export price and normal value calculations were reasonable to the extent practicable. Moreover, although we are not relying on TK’s data to corroborate the AFA rate, we note that TK’s data is consistent with the data the Department used in calculating the AFA rate in the Petition. See Analysis Memo.

Comment 10: Adequacy of Corroboration of Petition Information

Respondent’s Argument: TK argues that the Corroboration Memorandum⁸⁶ fails to meet the higher standard applicable to preliminary and final determinations in comparison to the level of scrutiny the Department applied at initiation⁸⁷ because the Department did not compare the information in the Petition with an independent source of information.⁸⁸ Next, TK contends that the Department fails to state with any specificity why it was impractical to corroborate the Petition with an independent source of information. TK believes that the Department should utilize TK’s submitted information as an independent source of information to corroborate the “highly suspect, unreliable, and unusable” Petition data.

Petitioner’s Rebuttal: Petitioner disagrees with TK’s argument by stating that the SAA and the WTO Antidumping Agreement references to “where practicable” indicate that there are situations where independent sources of information may not exist or information from other interested parties may not be usable. Petitioner contends that where the WTO Antidumping Agreement refers to information from other interested parties, the reference is made to parties other than the party to which an adverse inference is being made. Petitioner argues that the WTO did not intend to use information from the very respondent to which an adverse inference is being applied as a source of information used to corroborate the information in the Petition.⁸⁹

⁸³ See SAA.

⁸⁴ See 19 CFR 351.308(d).

⁸⁵ See Wire Rod from Brazil, 67 FR 55792, 55796.

⁸⁶ See TK’s Case Brief at 20, citing Corroboration Memo.

⁸⁷ See id. at 21, citing SAA, at 4199.

⁸⁸ See id. citing 19 USC 1677e(c); 19 CFR 351.308(d); and the WTO Antidumping Agreement at Paragraph 7 of Annex II.

⁸⁹ See Petitioner’s Rebuttal Brief at 24 and 25, citing to SAA; and the WTO Antidumping Agreement at paragraph 7.

Petitioner argues that the Department did in fact perform additional corroboration at the Preliminary Determination beyond what it did at initiation, although as Petitioner argues the Department was not required to do so. Petitioner notes that lacking other secondary information, the Department examined the veracity of the Petition data, made methodological adjustments, and found that the values had probative value. Petitioner contends that this approach is consistent with prior Department practice as exhibited in both Wire Rod from Brazil and PET Resin from India.

Petitioner notes that unlike Shandong Huarong, DSL Supply Co, and World Finer Foods, the Department does not have additional record information with which it could use as an independent source for corroboration purposes in this investigation.⁹⁰ Moreover, Petitioner asserts that the Petition is the only usable information on the record because there are no prior determination margins and no other respondents in this proceeding. As a result, Petitioner argues that the Department has corroborated the Petition data to the extent practicable.

Petitioner disagrees with TK's argument that TK's partial submission of information should be used by the Department as the basis for verification or corroboration of secondary information. Petitioner argues that it would be illogical to expect the Department to corroborate using partial and unverified information from the very respondent who refused to cooperate in the proceeding. Petitioner notes that the "burden of creating an adequate record lies with respondents not with Commerce."⁹¹ Petitioner believes that the WTO Antidumping Agreement simply fails to consider the illogical situation in which the Department determines the use of adverse inferences is warranted with respect to a respondent, but then, as a basis for corroboration, would be forced to utilize the very data the Department has disregarded as being deficient, incomplete, and/or unusable.

The Department's Position: We believe that the corroboration performed for the Preliminary Determination meets the higher standard applicable to preliminary and final determinations. Consistent with Wire Rod from Brazil and, in accordance with section 776(c) of the Act, to the extent practicable, we examined the key elements of the export-price, normal-value calculations, made methodological adjustments, and found that the values in the Petition had probative value.⁹² TK maintains that the Act must be interpreted consistent with our international obligations. We note that the Act is fully consistent with the international obligations of the United States. In any event, the Department is governed by U.S. law and our interpretation of the attribution regulations is fully consistent with the statute.

As demonstrated above, section 351.308(d) of the Department's regulations states, "the fact that **corroboration** may not be practicable in a given circumstance will not prevent the {Department} from applying an adverse inference as appropriate and using the secondary information in question." The SAA at 870 states specifically that "the fact that corroboration

⁹⁰ See id. at 26-27, citing Shandong Huarong, Slip Op. 04-117 CIT (September 13, 2004); D&L Supply Co. v. United States, 24 CIT 541, 546-47 (2000) ("DSL Supply Co."); and World Finer Foods, 24 CIT 541, 546-47 (2000).

⁹¹ See id. at 28, quoting Tianjin Machinery Import and Export Corp. v. United States, 16 CIT 931, 936, 806 F. Supp. 1008, 1015 (CIT 1992).

⁹² See Corroboration Memo.

may not be practicable in a given circumstance will not prevent the agencies from applying an adverse inference...⁹³ Therefore, we consider the margins in the Petition corroborated to the extent practicable, and the application of adverse facts available is reasonable under the circumstances for the final determination.

Comment 11: Inconsistencies and Flaws in the Petition Information

Respondent's Argument: TK argues that the Department's attempt to corroborate the secondary information supplied by the Petition was inadequate. Specifically, TK contends that the affidavits submitted by Petitioner within the Petition are unreliable. TK asserts that two identical affidavits submitted by the Petitioner on September 8, 2005,⁹⁴ and September 23, 2005,⁹⁵ which relate to transaction price information used in Petitioner's dumping calculation provide contradictory information. As a result, TK argues that the Petition information is unreliable. Instead, TK proposes that the Department should use TK's partial submissions of information for corroboration purposes.

TK also argues that the home market price affidavit that Petitioner used for its dumping calculation relies on an unrealistic hypothetical sale.⁹⁶ TK asserts that the price quote used relates to a dissimilar product. TK contends corroboration of adverse inference facts should be reasonable and have some basis in reality.⁹⁷ TK also argues that the home market price quote affidavit is unrealistic because it was not conducted in the usual commercial quantities and in the ordinary course of trade.⁹⁸ According to TK, the affidavit's price quote of less than 1000 units is not an adequate basis for calculating TK's pricing data. Therefore, TK argues that the AFA rate should be rejected because the Department failed to properly corroborate the Petition. Instead, TK contends that the Department should use the sales price data that is contained within TK's sales database.

TK argues that the cost information submitted by Petitioner and used by the Department is unreliable. TK notes that the 1999 consolidated financial statements for Asia Pulp and Paper ("AP&P") were used to calculate SG&A and financial expense ratios. Instead of AP&P's 1999 financial statements, TK argues that the Department should use TK's publicly available, audited and consolidated 2004 financial statements submitted in response the Department's original Section A questionnaire at Exhibit A-12. TK contends that TK's financial statements are the

⁹³ See, e.g., Notice of Preliminary Determination of Sales at Less Than Fair Value: Stainless Steel Plate in Coils From Canada, 63 FR 59527, at 59529 (November 4, 1998).

⁹⁴ See TK's Case Brief at 23, citing Petition, Volume III, at Exhibit III-3.

⁹⁵ See id., citing Petitioner's Letter to the Department: Response to Request for Clarification, at Exhibit III-Supp-9 (September 23, 2005) ("Petition Supplemental").

⁹⁶ See id. at 24 and 25; citing Exhibit III-11, Volume III of the Petition, at paragraphs 1-3; Memorandum from Audrey Twyman re: Telephone Call to Market Research Firm, at 3 (September 23, 2005) ("Market Research Verification Memo").

⁹⁷ See id. at 25, citing De Cecco, 216 F.3d 1027, 1034 (2000).

⁹⁸ See id. citing 19 USC 1677b(a)(1)(B)(i).

most appropriate to use when calculating SG&A and financial expense ratios because they closely correspond to the POI.

Petitioner's Rebuttal: Petitioner notes that the transaction price stated in the exhibit submitted with the Petition on September 8, 2005, was incorrect but was corrected by the Petition Supplemental submitted on September 23, 2005. Petitioner notes that the correct price was reported on September 23, 2005.⁹⁹ Petitioner asserts that a review of import data provided in the Petition and available from the U.S. Department of Commerce, Bureau of Census shows that product pricing during the first two calendar quarters of 2005 is consistent with the Petition.¹⁰⁰

Petitioner disagrees with TK's argument that the price quote used relates to a dissimilar product. Petitioner argues that TK's product catalog states that TK sells the dissimilar product under a specific brand name. Petitioner also notes that this specific brand name sells subject merchandise that is reported in TK's own Section B sales database. Petitioner disagrees with TK's argument that the related price quote of less than 1000 units used in the Petition may not be considered as an adequate basis for calculating TK's pricing data. Petitioner notes that TK's Section B sales database indicates that TK sells subject merchandise in the home market in quantities that are similar to the quantities supplied in the Petition.¹⁰¹ Therefore, based on TK's home market sales database, Petitioner argues that TK has indeed customarily shipped the same quantity amounts in the home market when compared to a U.S. price quote in the Petition.

Petitioner argues TK's financial statements may not be used to calculate and corroborate SG&A and financial expense ratios because they do not include information from affiliated companies. Petitioner notes that financial statements from affiliated entities, including PT Lontar Papyrus Pulp and Paper Industry ("Lontar"), PT Purina Ekapersafa ("Purinsa"), PT Arara Abadi ("Arara Abadi"), and PT Wirakarya Sakti ("WKS"), and AP&P itself would be required for the Department to corroborate. Petitioner notes that these financial statements are either not submitted on the record, or not available in their public form. Petitioner also argues that TK's financial statements are not reliable because of the uncertainty they present. Petitioner notes that the independent auditor's report states that the financial activities of TK's affiliates, which represent 14 percent of the total entity's assets and 25 percent of the entity's sales, were not or could not be audited.¹⁰² Petitioner contends that the auditors of TK's 2004 financial statements have concerns regarding the uncorroborated nature of most of TK's affiliated entities' activities. Therefore, Petitioner asserts that TK's financial statements are "dubious" in nature and should not be relied on.¹⁰³ Further, Petitioner notes that TK's "negative" financial expense ratios are

⁹⁹ See Petitioner's Rebuttal Brief at 31, citing Petition, at Exhibit III-3; and Petition Supplemental, at Exhibit III-Supp-9.

¹⁰⁰ See id.

¹⁰¹ See id. at 33.

¹⁰² See id. at 34, citing to TK's Section A Response at Exhibit A-12 (TK's 2004 Financial Statements at Moores Rowland "Report of Independent Auditors").

¹⁰³ See id. at 35.

due to TK being in technical default on nearly one billion U.S. dollars.¹⁰⁴ Petitioner argues that as a result of unavailable affiliate financial information, concerns raised by the company's auditors, and TK's payment problems with debt as noted in its financial statements, the Department should reject the use of TK's financial statements and continue to utilize the 1999 AP&P financial reports provided in the Petition for purposes of corroborating constructed value.

The Department's Position: In accordance with section 776(c) of the Act and consistent with Wire Rod from Brazil, to the extent practicable, for the Preliminary Determination we examined the key elements of the export-price, normal-value calculations, made methodological adjustments, and found that the values in the petition had probative value.¹⁰⁵ Based on our efforts to corroborate information contained in the petition and in accordance with section 776(c) of the Act and section 351.308(d) of the Department's regulations, we considered the margins in the petition corroborated to the extent practicable for purposes of the Preliminary Determination.

We disagree with TK that the affidavits submitted by Petitioner within the Petition are unreliable. We note that the Petition Supplemental submitted on September 23, 2005, was meant to correct and/or clarify the Petition submitted on September 8, 2005. We disagree with TK's argument that the home market price quote affidavit used in the Petition is unrealistic because it was not conducted in the usual commercial quantities and in the ordinary course of trade pursuant to section 773(a)(1)(B)(i) of the Act. What constitutes "usual commercial quantities" and "ordinary course of trade" are methods decided in the course of an investigation based on complete, verified data submitted by a respondent.

We disagree with TK's argument that the financial expense ratios submitted by Petitioner and used by the Department to corroborate are unreliable and that the Department should instead use TK's publicly available, 2004 financial statements submitted in response to the Department's original Section A questionnaire. The Department requires the financial expense rate to be calculated using financial statements at the highest level of consolidation that include the respondent. The Department's supplemental questionnaires requested copies of the consolidated financial statements that were either not submitted on the record, or not available in their public form, and directed TK to recalculate a consolidated financial expense rate based on the highest level of consolidated financial statements. TK failed to respond to our questions.

Moreover, although we are not relying on TK's data to corroborate the AFA rate, we note that TK's data is consistent with the data the Department used in calculating the AFA rate in the Petition. See Analysis Memo. We note that we have not changed our determination that the data in the Petition was properly corroborated, to the extent practicable from the Preliminary Determination, and, for the final results, we have continued to use this AFA rate.

Comment 12 Critical Circumstances

Respondent's Argument: TK argues that the Department cannot make an affirmative finding for "critical circumstances" given the facts of this case. First, TK contends that consistent with

¹⁰⁴ See id. at 35 and 36, citing Section A Response at Exhibit A-12 (TK's 2004 Financial Statements Item 17, Item 18, and Item 29).

¹⁰⁵ See Corroboration Memo.

what the Department found in the Preliminary Determination, there is no history of dumping in the United States or elsewhere of the subject merchandise. Second, TK disagrees with the Preliminary Determination by arguing that the Department improperly used the Petition margin of 118.63 percent to impute “importer knowledge” of dumping by TK. TK contends that “total adverse facts available” cannot be used in this case because the submitted sales and cost data by TK produces no dumping margin. As a result, TK asserts that importers could not have had knowledge of dumping to support a critical circumstances finding. TK contends that the Petition rate cannot be used as the basis for imputing importer knowledge because the Petition rate “is not a real number.”

Third, TK disagrees with the Preliminary Determination that there is a reasonable basis to believe or suspect that TK’s imports were massive over a relatively short amount of time. TK argues that the Department cannot disregard its data, and the Department may not rely on adverse inferences because TK participated to the best of its abilities. TK argues that the standard for critical circumstances in the final determination is different than the preliminary determination. Specifically, TK states that, “it is not whether ‘there is a reasonable basis to believe or suspect’ (which is the standard for a preliminary determination) but whether ‘there have been’ massive imports over a relatively short period.”¹⁰⁶ TK believes that the Department has no evidence that supports a finding that TK’s imports were massive over a relatively short period.

TK notes that the Department stated in a February 1, 2006 memorandum that there was no basis at that time to determine critical circumstances existed.¹⁰⁷ TK argues that the monthly shipment data for January 2003 through January 2006 submitted by TK, which was certified by company officials and submitted with the understanding that the data would be verified, shows that there have not been massive imports. TK contends that the Department may not disregard this data. Further, TK argues that if the Department applies the critical circumstances determination methodology utilized by the contemporaneous investigation of CLPP from China,¹⁰⁸ the official Customs data on imports from Indonesia of products in the tariff classification covering subject merchandise shows that there was no “massive” surge of imports.

Petitioner’s Rebuttal: The Petitioner argues that the Department, in its final determination, should make an affirmative determination of critical circumstances. Petitioner notes that in TTR from Japan¹⁰⁹ there is a similar fact pattern with this investigation. Petitioner notes that in TTR from Japan, the Department initially investigated two respondents. One respondent refused outright to participate in the investigation. The second respondent participated initially by

¹⁰⁶ See TK’s Case Brief, at 42, citing 19 USC 1673d(a)(3).

¹⁰⁷ See id., at 43, citing Memorandum from Susan H. Kuhbach, re: Whether Critical Circumstances Exist with Respect to CLPP, at 1 (February 1, 2006).

¹⁰⁸ See id., at 44, citing Preliminary Determination of Sales at Less Than Fair Value, Affirmative Critical Circumstances, In Part, and Postponement of Final Determination: Certain Lined Paper Products from the People’s Republic of China, 71 FR 19695, 19703 (April 17, 2006) (prelim.) (“CLPP from China”).

¹⁰⁹ See id., at 47, citing Wax and Was/Resin Thermal Transfer Ribbons from Japan, 68 FR 71072, 71073 (December 22, 2003) (prelim. Results) (“TTR from Japan”).

submitting responses to the Department's questionnaires as well as several supplemental questionnaires. However, the second respondent opted to withdraw from the investigation. The second respondent did however submit a response to the critical circumstances investigation after the date in which it notified the Department that it would no longer participate in the investigation. Petitioner notes that despite the fact that the second respondent filed a critical circumstances response, the Department found that the lack of a complete record with respect to both the critical circumstances data and the standard questionnaire data precluded the Department from making a reasoned critical circumstance assessment.¹¹⁰ Petitioner also notes that in TTR from Japan, a respondent failed to participate in the investigation, which prohibited the Department from verifying any of the respondents' submitted questionnaire responses, or critical circumstances data. Petitioner notes that because there was an incomplete record in TTR from Japan, the Department could not verify the respondent's information.

Petitioner argues that the Department should continue to use adverse inferences in the final determination for critical circumstances. Petitioner notes that TK submitted critical circumstances data only through January 2006. As a result, TK's shipment data for February and March 2006 are not on the record in this investigation. Petitioner notes that the Department is unable to verify any of the information supplied by TK. Petitioner also notes that the factual information on the record in the preliminary phase, which served as a basis for a preliminary critical circumstances finding, remains the same factual information for the final phase of the Department's investigation. Petitioner disagrees with TK's argument that the Department should utilize TK's unverified and incomplete critical circumstances response for the purposes of the final determination. Petitioner contends that the selective cooperation through the submission of data that may be potentially advantageous to the respondent should not be allowed. Petitioner argues that the Department should follow the precedent set in TTR from Japan, and should find that it cannot utilize unverified and incomplete information to make a finding concerning critical circumstances. Further, Petitioner states that because of TK's lack of cooperation, the Department must make a determination on facts otherwise available and must make a determination with adverse inferences.

Petitioner argues that the Department should continue to find that the first prong of 19 USC 1673d(a)(3)(ii), is satisfied in that the Department found that TK's dumping margin exceeded the 15/25 percent threshold. Petitioner notes that there have been no factual changes to the administrative record and given TK's failure to cooperate in the investigation by submitting incomplete and unverified data, the Department is well within its statutory discretion to not only base its final determination on facts available with adverse inferences but also to use the corroborated Petition rate of 118.63 percent for the final critical circumstances determination.

Petitioner disagrees with TK's argument that the Department should not use the Petition rate of 118.63 percent for the final critical circumstances determination. Petitioner notes that TK states that the submitted sales and cost data produces no dumping margin. Petitioner contends TK's reasoning is "absurd" because the Department has never accepted a respondent's calculations or assertions simply because the respondent says it to be true. Petitioner disagrees with TK's assertion that the Department must accept TK's incomplete and unverified critical circumstances data. Petitioner notes that in TTR from Japan, when a respondent has failed to submit both antidumping questionnaire data and critical circumstances data for the entire period leading up to

¹¹⁰ See Petitioner's Rebuttal Brief, at 47, citing TTR Decision Memo, at cmt 2.

the preliminary determination, the Department disregards the data and, instead, bases its massive imports determination on facts otherwise available. Petitioner argues that the Department, in its attempts to corroborate that data through a review of Customs information, correctly disregarded the data because the HTS numbers encompassing subject merchandise also encompass large amounts of non-subject merchandise. Citing to the SAA, Petitioner believes the Department may assign adverse facts where corroboration is not possible. Petitioner argues that TK's methodology of comparing its unverified shipment data to official U.S. import statistics is not applicable because, as noted above, the official U.S. import data encompasses a large quantity of non-subject merchandise. Petitioner also notes that there other Indonesian producers of subject merchandise and, therefore, it is unclear which merchandise is applicable to which producer.

Finally, Petitioner contends that TK's analysis is fatally flawed in its attempts to draw methodological similarities between this investigation and CLPP from China. Petitioner notes that TK omitted the fact that in the China investigation, the Department made identical critical circumstances findings (i.e., the use of adverse inference) with respect to several producers including the PRC-wide entity. Also, Petitioner notes that in TK's case brief at Appendix C, TK arbitrarily shifted the official import data one month without providing any explanation. This shift of data gives the impression that certain information was submitted on the record in its February 6, 2006 submission of import data when in fact it was not. Petitioner asserts that lacking any usable information from TK, the factual information on the record in the preliminary phase, which served as a basis for the preliminary critical circumstances finding remain unchanged for the final determination.

The Department's Position: As noted in the Preliminary Determination, on November 28, 2005, in accordance with 19 CFR 351.206(c)(2)(i), Petitioner requested that the Department make an expedited finding that critical circumstances exist with respect to CLPP from Indonesia.

We preliminarily found that the first prong and second prong of the critical circumstances test, according to sections 733(e)(1)(A) and (B) of the Act, were met.

With regard to TK's argument that the Department improperly used the Petition margin of 118.63 percent to impute "importer knowledge" of dumping by TK because "it is not a real number" and the submitted sales and cost data by TK produces no dumping margin, we disagree. As discussed above, we consider the margins in the Petition corroborated to the extent practicable, and the application of adverse facts available is reasonable under the circumstances for the final determination. As a result, the Department continues to find that AFA rate of 118.63 percent is adequate to impute "importer knowledge" that TK was selling the subject merchandise at less than its fair value in accordance with section 733(e)(1)(A)(ii) of the Act.

With regard to TK's argument that the Department may not disregard TK's own shipment data, we disagree. As demonstrated above, TK willfully chose to withhold information that was requested by the Department and the information that was provided could not be verified, as provided in section 782(i) of the Act because TK withdrew from active participation the review.¹¹¹ By refusing verification, TK effectively made its response unverified. Accordingly,

¹¹¹ See Withdrawal Conversation Memorandum.

TK's company-specific monthly import data was not considered for the Preliminary Determination and is not being utilized for the final determination.

Next, TK argues that unlike preliminary determinations where the standard for critical circumstances is whether there is a reasonable basis to believe or suspect, the standard for final determinations is whether there is a finding of critical circumstances. TK further argues the Department has no evidence that supports a finding that TK's imports were massive over a relatively short period of time. In this case, however, the Department cannot rely upon the information submitted by TK as discussed above, and therefore, the Department is required to base its finding upon an adverse inference, as discussed further below.

We disagree with TK's argument that the Department may not rely on adverse inferences because TK participated to the best of its ability. The SAA states that facts available may be an inference which is reasonable to use under the circumstances. Specifically the SAA states section 776 of the Act will require:

Commerce to reach a determination by filling gaps in the record due to deficient submissions and other causes. Therefore, neither Commerce nor the Commission must prove that the facts available are the best alternative information. Rather, **the facts available are information or inferences which are reasonable to use under the circumstances.** . . . {W} here Commerce uses the facts available to fill gaps in the record, proving that the facts selected are the best alternative facts would require that the facts available be compared with the missing information, which obviously cannot be done. In conformity with the Antidumping Agreement and current practice, new section {776(b)} permits Commerce and the Commission to draw an adverse inference where a party has not cooperated in a proceeding.

SAA at 869-870 (emphasis supplied). The SAA statement that "facts available . . . are inferences which are reasonable to use under the circumstances," SAA at 869, supports the Department's practice. The Department has made such findings in the context of affirmative critical circumstances determinations.¹¹²

Information provided by a respondent in an investigation includes information such as quantity and value of sales, corporate structure and affiliations, date of sale, sales process, etc., which are key to understanding the less than fair value ("LTFV") determination, but also needed when analyzing a critical circumstances allegation with respect to specific producers. For example, because questions remain unanswered regarding TK's affiliation with other entities due to TK's withdrawal from the investigation, the Department is unable to determine whether the import data that was provided by TK was complete. Furthermore, the Department is unable to determine the accuracy of the dates used by TK to report the import volumes (e.g., date of sale, date of shipment, etc.). Given that information key to an analysis of critical circumstances is missing because TK withdrew from the investigation, the Department is unable to use company-specific information. Therefore, although the Department may separately determine the LTFV

¹¹² See TTR from Japan, 68 FR 71,076.

determination and the critical circumstances allegations, both determinations share significant amounts of necessary information. Hence, the application of an adverse inference for both the LTFV determination and the critical circumstances is warranted in this situation.

Finally, with regard to TK's argument that the Department should apply the critical circumstances determination methodology utilized in the contemporaneous investigation of CLPP from China for separate rate entities, we disagree. In CLPP from China, in order to determine imports of subject merchandise were massive pursuant to section 733(e)(1)(B) of the Act, the Department compared a base period of April 2005 to August 2005 to a comparison period of October 2005 to February 2006. In order to address the seasonality issues of CLPP imports, the Department also analyzed data from 2003 to 2005 and established corresponding previous base periods and previous comparison periods. The Department then calculated the rate of change in imports from the previous base period (e.g., April 2004 through August 2004) to its comparison period (e.g., October 2004 through February 2005) and compared it to the rate of change in imports from the current base period (e.g., April 2005 through August 2005) to its comparison period (e.g., October 2005 through February 2006). If the drop in the current periods' rate of change in imports was not as great in the previous periods' rate of change in imports by 15 percent or more, the Department found imports to be massive.

In the instant case, we did not conduct similar critical circumstances analysis for our Preliminary Determination because we lacked adequate usable information on the record of this proceeding. We agree with Petitioner that in TK's Case Brief at Appendix C, TK shifted the official import data one month without providing any explanation. This data is used by TK to support its argument that the Department should use TK's import data to determine there were not massive imports of subject merchandise over a relatively short period of time by way of the methodology applied in CLPP from China. The shift of data gives the impression that February 2006 import data was submitted on the record in TK's February 6, 2006, submission when in fact it was not. In fact, TK submitted its shipment data on February 6, 2006, which would preclude TK from reporting imports of subject merchandise that had not yet occurred. Further, as noted in the Preliminary Determination, we are unable to use information supplied by U.S. Customs and Border Protection ("CBP") to corroborate whether massive imports occurred because the HTS numbers listed in the scope of the investigation include non-subject merchandise and, thus, do not permit the Department to make an accurate analysis.¹¹³ We find TK's responses to be deficient and unverifiable. Therefore, lacking any usable shipment information from TK, the Department is precluded from conducting the critical circumstances analysis performed by the Department in CLPP from China for separate rate entities.

Based on facts noted above, we have not changed our determination with respect to the critical circumstances determinations for TK from the Preliminary Determination.

¹¹³ See Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip in Coils From Japan, 64 FR 30573, 30585.

RECOMMENDATION:

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

AGREE _____ DISAGREE _____

Joseph A. Spetrini
Acting Assistant Secretary
for Import Administration

(Date)