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Investigation
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DATE: August 4, 2016

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

FROM: Christian Marsh 
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Final Affirmative
Determination in the Antidumping Duty Investigation of Certain
Hot-Rolled Steel Flat Products from Japan

I. SUMMARY

The Department of Commerce (the Department) determines that certain hot-rolled steel flat products (hot-rolled steel) from Japan is being, or is likely to be, sold in the United States at less than fair value (LTFV), as provided in section 735 of the Tariff Act of 1930, as amended (the Act). The period of investigation (POI) is July 1, 2014, through June 30, 2015.

We analyzed the comments of the interested parties in this investigation. As a result of this analysis, and based on pre-verification corrections and our findings at verification, we made certain changes to the margin calculations for the mandatory respondents Nippon Steel & Sumitomo Metal Corporation/Nippon Steel & Sumikin Bussan Corporation (collectively, the Nippon Group or Nippon) and JFE Steel Corporation (JFES)/JFE Shoji Trade Corporation (JFE Shoji) (collectively, the JFE Group or JFE). The estimated weighted-average dumping margins are shown in the “Final Determination” section of the accompanying *Federal Register* notice. We recommend that you approve the positions in the “Discussion of the Issues” section of this memorandum.

Below is the complete list of the issues in this LTFV investigation for which we received comments from interested parties:

Nippon Group

- Comment 1: Whether the Department Should Continue to Apply AFA to Steelscape’s Sales of Non-prime Merchandise
- Comment 2: Whether the Department Should Continue to Apply AFA to Home Market Sales by Certain of Nippon Group’s Affiliated Downstream Resellers

- Comment 3: Whether the Department Should Include Freight Revenue and Fuel Revenue on U.S. Sales Made by Steelscape
- Comment 4: Whether the Department Should Reduce the Weight of the Margin Calculated for Sales by One of the Nippon Group's CEP Resellers
- Comment 5: Whether the Department Should Accept the Destination Key for One of its CEP Resellers as a Minor Correction
- Comment 6: Whether the Department Should Apply AFA on Unreported Data and Whether the Department Should Decline to Increase the Cost of Further Manufacturing to Reflect its Calculation of a Markup that Steelscape Washington Charged to its Parent, Steelscape LLC, for Processing Services Performed by Steelscape Washington
- Comment 7: Whether the Department Should Find that Critical Circumstances Exist for Imports of the Merchandise Under Consideration Shipped by Nippon Group
- Comment 8: Whether the Department Should Revise its Differential Pricing Analysis
- Comment 9: Whether the Department Should Exclude Certain Products Produced by Nippon Group from the Scope of the Investigation
- Comment 10: Whether the Department Should Make an Adjustment for Nippon Group's Purchases of Iron Ore at Below Market Value
- Comment 11: Whether the Department Should Accept Nippon Group's Value-Added Calculation and Its Unreported Further-Manufactured U.S. sales
- Comment 12: Further Manufacturing Financial Expense Ratio
- Comment 13: General & Administrative Expense Ratio

JFE Group

- Comment 14: Whether the Department Erred in Applying Adverse Facts Available to Certain Downstream Home Market Sales
- Comment 15: Whether Adverse Facts Available is Warranted for Other Unreported Downstream Sales
- Comment 16: Whether Shoji America's Indirect Selling Expense Should be Increased
- Comment 17: Whether Shoji America's Freight Expense Should be Increased
- Comment 18: Whether Verification Minor Corrections Should be Incorporated into the Final Determination
- Comment 19: Whether the Department Erred by Resetting JFES's Reported Home Market Credit Expense
- Comment 20: Whether the Department Should Apply a CEP Offset on JFE's CEP Sales
- Comment 21: Whether the Department Should Exclude Sales by CSI from its Antidumping Calculation
- Comment 22: Whether the Department Should Continue to Apply AFA to the Cost of Inputs Supplied by JFE Shoji
- Comment 23: Whether the Department Erred in Applying the Transactions Disregarded Adjustment
- Comment 24: Whether the Department Should Adjust JFE's COM for Non-Prime Products
- Comment 25: Whether the Department Should Increase JFE's COM for Reconciliation Differences

Tokyo Steel

Comment 26: Whether the Department's Refusal to Select Tokyo Steel as a Mandatory Respondent Is Unlawful

Comment 27: Whether the Department Should Correct the Clerical Error in Its Preliminary Determination

II. BACKGROUND

On March 22, 2016, the Department of Commerce (the Department) published the *Preliminary Determination* of sales at LTFV of hot-rolled steel from Japan.¹ The period of investigation (POI) is July 1, 2014, through June 30, 2015. During the period March through May 2016, the Department conducted sales and cost verifications at the offices of the Nippon Group and JFE Group, in accordance with section 782(i) of the Act.

We invited parties to comment on the *Preliminary Determination*. During the month of June 2016, we received timely case and rebuttal briefs from petitioner, United States Steel Corporation,² and respondents Nippon Group, and the JFE Group. We also received a timely case brief from Tokyo Steel Manufacturing Co., Ltd. (Tokyo Steel), a company that was not selected as a mandatory respondent in this proceeding. On June 17, 2016, the Department informed the JFE Group of untimely new factual information in its case brief, requesting the JFE Group to either identify the information on the record or to remove the new information and refile its brief. On June 20, 2016, the JFE Group refiled its case brief without the new factual information. The public hearing in this case was held on June 28, 2016. Based on our analysis of the comments received, as well as our findings at verification and pre-verification corrections, we recalculated the weighted-average dumping margins for the Nippon Group and the JFE Group from the *Preliminary Determination*, which in turn resulted in a recalculation of the estimated all-others rate.

III. FINAL DETERMINATION OF CRITICAL CIRCUMSTANCES, IN PART

The Department preliminarily found, that critical circumstances exist for imports of hot-rolled steel from Japan.³ In the *Preliminary Determination*, the Department determined that critical circumstances existed for both the mandatory respondents, the Nippon Group and the JFE Group, but did not exist for all other producers or exporters of hot-rolled steel from Japan.

For the final determination, we continue to find there is a history of injurious dumping of hot-rolled steel from Japan pursuant to section 735(a)(3)(A) of the Act. Further, pursuant to section 735(a)(3)(B) of the Act, we examined the shipping data to determine whether the

¹ See *Certain Hot-Rolled Steel Flat Products from Japan: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 81 FR 15222 (March 22, 2016) and accompanying Preliminary Decision Memorandum (*Preliminary Determination* and PDM).

² Other petitioners, which did not file comments, include AK Steel Corporation, ArcelorMittal USA LLC, Nucor Corporation, SSAB Enterprises, LLC, and Steel Dynamics, Inc.

³ See *Antidumping Duty Investigations of Certain Hot-Rolled Steel Flat Products from Australia, Brazil, Japan, and the Netherlands and Countervailing Duty Investigation of Certain Hot-Rolled Steel Flat Products from Brazil: Preliminary Determinations of Critical Circumstances*, 80 FR 76444 (December 9, 2015).

increase in imports was massive, by comparing shipments over the period of August 2014 through May 2015, with the period June 2015 through March 2016.⁴ Thus, for the final determination, we find that critical circumstances exist for the Nippon Group and for all other producers or exporters from Japan, but do not exist for the JFE Group.

IV. SCOPE OF THE INVESTIGATION

The products covered by this investigation are hot-rolled steel from Japan. For a complete description of the scope of this investigation, *see* the “Scope of the Investigation,” in Appendix I of *Federal Register* notice.

V. SCOPE COMMENTS

In the *Preliminary Determination*, we did not modify the scope language as it appeared in the *Initiation Notice*.⁵ No interested parties submitted scope comments, except for the Nippon Group in its case brief and Petitioner in its rebuttal brief. These comments are addressed in the “Discussion of Issues” section at comment 9. The scope of this investigation remains unchanged for this final determination.

VI. CHANGES SINCE THE PRELIMINARY DETERMINATION

Based on our review and analysis of the comments received from parties, corrections presented at verification, and various errors identified during verification, we made certain changes to the margin calculations for both respondents. *See* Nippon Final Determination Calculation Memorandum and JFE Final Determination Calculation Memorandum.⁶

VII. COMPARISON TO FAIR VALUE

In the *Preliminary Determination*, the Department applied a differential pricing analysis to determine whether application of the average-to-transaction method is appropriate to calculate the weighted-average dumping margins, pursuant to 19 CFR 351.414(c)(1) and section 777A(d)(1)(B) of the Act. For the Nippon Group, we preliminarily applied the average-to-transaction method and for the JFE Group we applied the average-to-average method, for all U.S. sales to calculate the weighted-average dumping margins. For this final determination, we have applied the mixed alternative comparison method for the Nippon Group, and continue to apply the average-to-average method for the JFE Group as in the *Preliminary Determination*.

⁴ *See* Memorandum “Calculations for Final Determination of Critical Circumstances in the Antidumping Duty Investigation of Certain Hot-Rolled Steel Flat Products from Japan” dated August 4, 2016.

⁵ *See Preliminary Determination* PDM at “Scope Comments.”

⁶ *See* Memoranda to the File “Analysis for the Final Determination of the Less-Than-Fair Value Investigation of Certain Hot-Rolled Steel Flat Products from Japan – Nippon Steel & Sumitomo Metal Corporation and Nippon Steel & Sumikin Bussan Corporation,” (Nippon Final Determination Calculation Memorandum) and “Analysis for the Final Determination of the Less-Than-Fair-Value Investigation of Certain Hot-Rolled Steel Flat Products from Japan – JFE Steel Corporation/JFE Shoji Trade Corporation (JFE Group),” (JFE Final Determination Calculation Memorandum), both dated August 4, 2016.

VIII. DISCUSSION OF ISSUES

Nippon Group

Comment 1: Whether the Department Should Continue to Apply AFA to Steelscape's Sales of Non-prime Merchandise

Nippon Group Argues

- The Department incorrectly concluded that Steelscape LLC's (Steelscape) sales of non-prime products should have been included in Nippon Group's U.S. sales database and resorted to adverse facts available (AFA) in the *Preliminary Determination*.
- Contrary to the Department's assertion in the *Preliminary Determination*, the Department is not required to calculate the dumping margin for each entry of subject merchandise during the POI.
- Steelscape's sales of non-prime products are manifestly not sales of non-prime subject merchandise.
- Including Steelscape's sales of non-prime products in the U.S. sales database would be inconsistent with the purpose of the calculation of constructed export price (CEP).
- Even if the Department requires these sales, Steelscape's manufacturing costing system already reflects the impact of the value reduction based on the "downgrades" for non-prime products.
- The Department failed to satisfy the statutory requirements for applying facts available and AFA because the Department failed to provide a second chance to Nippon Group to submit these non-prime sales.

Petitioner Argues

- Where imported subject merchandise is further manufactured in the United States into non-subject CEP sales, the transaction relevant to the Department's margin analysis is the imported subject merchandise. Respondents are required to report the CEP transaction - from which the Department makes the required CEP adjustments, including an adjustment for all further manufacturing costs incurred. As such, the final U.S. net price the Department uses in its margin calculations is that for the imported subject merchandise.
- Nippon Group imported prime quality subject merchandise into the United States from Japan, Nippon Group should have reported these CEP sales such that the Department would be able to execute its further manufacturing analysis and properly include subject imported coils in its margin calculations.
- The fact that Steelscape's further manufacturing costs for prime product apparently have been adjusted to account for non-prime merchandise is not a basis for excluding the non-prime CEP sales from the U.S. database.
- Nippon Group failed to provide basic sales information necessary to accurate margin calculations. As such, Nippon Group ignored the Department's long-standing practice to exclude U.S. sales from the margin calculation only where the circumstances are exceptional and the respondent demonstrates that the inclusion of those sales would be extremely distortive.

- These non-prime CEP sales by Steelscape should be reported to the Department as there is no record evidence demonstrating the sale of the imported prime hot-rolled coil to be unusual or in any way extraordinary, and there is no record evidence demonstrating the non-prime CEP sales to be exceptional or highly usual. The Department did not grant Nippon Group an exclusion from reporting these sales at issue. Nippon Group had ample opportunity to remedy the situation by providing the data in any one of its numerous supplemental responses.
- The Department has discretion to apply adverse inferences against a party to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.
- The Department appropriately applied partial AFA in the *Preliminary Determination* and should continue to do so in the final determination.

Department Position:

We have continued apply AFA to Nippon Group because it has failed to cooperate to the best of its ability to comply with our request for information on the sales at issue.

As explained in the Department's *Preliminary Determination*,⁷ the Department applied facts available with an adverse inference to Steelscape's unreported non-prime CEP sales in the U.S. market. For this final determination, the Department continues to disagree with Nippon Group that Steelscape's sales of non-prime merchandise are not required for a margin calculation. The unreported non-prime CEP product was produced from imported subject merchandise of prime quality hot-rolled steel. Where imported subject merchandise is further manufactured in the United States into non-subject CEP sales, the transaction relevant to the Department's margin analysis is the imported subject merchandise. Steelscape imported into the United States prime quality subject merchandise that it purchased from Nippon Group. Regardless of how Steelscape processed this prime subject merchandise into prime, non-prime, subject or non-subject merchandise, the Department would need these CEP sales to execute its further manufacturing analysis and properly include subject imported hot-rolled products in the Department's margin calculations.

The Department's questionnaire clearly instructed the Nippon Group to report the sales at issue. In its response to our questionnaire, the Nippon Group could have reported these non-prime CEP sales and provide its reasoning as to why these sales should be excluded from the margin calculations. Instead, the Nippon Group unilaterally determined that these sales were not required for the margin calculation and did not report them.⁸ Thus, the Nippon Group's argument that 782(d) of the Act somehow required the Department ask for the sales again is misplaced. The Nippon Group had already declined to submit the information despite clear instructions from the Department. Issuing a supplemental question asking for this information again would have effectively granted an extension of time to the Nippon Group that it did not request to submit information that it had already refused to submit. Thus, the Department applied AFA in the *Preliminary Determination*.

⁷ See PDM at 16.

⁸ See Nippon Group Section C questionnaire response, dated December 17, 2015, at 11-14.

Therefore, the Department continues to apply facts available pursuant to sections 776(a)(1) and (2)(A) and (C) of the Act because we find that necessary information is not available on the record of the investigation and that the Nippon Group withheld requested information and significantly impeded the proceeding. Pursuant to section 776(b) of the Act, we are using an adverse inference in applying the facts otherwise available because the Nippon Group has failed to cooperate to the best of its ability to comply with our request for information. As adverse facts available, we continue to apply the highest Nippon Group-specific margin calculated in the petition to these unreported sales by Steelscape.⁹

Comment 2: Whether the Department Should Continue to Apply AFA to Home Market Sales by Certain of Nippon Group’s Affiliated Downstream Resellers

Nippon Group Argues

- Consistent with 19 CFR 351.403(d), the Department should not include the resales by Nippon Group’s affiliated customers in the calculation of normal value, as the aggregate sales to the affiliated customers that did not pass the arm’s length test in the comparison market constitute less than five percent of Nippon Group’s total sales in the home market.
- Since it fully complied with the Department’s request to report downstream sales by Nippon Group’s affiliated customers whenever possible and provided relevant documentation demonstrating its attempts to obtain the unreported data, the Department has no statutory basis for applying AFA.

Petitioner Argues

- Nippon Group had many opportunities but failed to provide the Department’s required standard arm’s length analysis, and made no other attempt to otherwise demonstrate its home market sales to affiliated resellers to be at arm’s length.
- Record evidence demonstrates that Nippon Group did not act to the best of its ability with regard to obtain downstream sales by affiliated resellers
- Nippon Group was aware of the Department’s reporting requirements, aware that its sales to affiliated resellers would fail the arm’s length test, and aware of its responsibility to properly respond to this issue. However, Nippon Group intended to delay and avoid this issue and to ignore the Department’s reporting requirements for as long as possible.
- Department acted properly in applying AFA in its *Preliminary Determination* and should continue to do so for the final determination.

Department Position:

We have continued apply AFA to Nippon Group because it has failed to cooperate to the best of its ability to comply with our request for information on the home market sales at issue.

We disagree with Nippon Group’s argument that the Department should not include the resales by Nippon Group’s affiliated customers in the normal value calculation, as the aggregate sales to the affiliated customers that did not pass the arm’s length test in the comparison market constitute less than five percent of Nippon Group’s total sales in the home market. In

⁹ See Nippon Group Final Calculation Memorandum.

accordance to 19 CFR 351.403(d) and the Department's section B questionnaire,¹⁰ the Department's regulation and practice apply the five percent threshold to sales to affiliates in the aggregate, and not to the volume of sales to affiliates that fail the Department's arm's length test:

(d) Sales through an affiliated party. If an exporter or producer sold the foreign like product through an affiliated party, the Secretary may calculate normal value based on the sale by such affiliated party. However, the Secretary normally will not calculate normal value based on the sale by an affiliated party if sales of the foreign like product by an exporter or producer to affiliated parties account for less than five percent of the total value (or quantity) of the exporter's or producer's sales of the foreign like product in the market in question or if sales to the affiliated party are comparable, as defined in paragraph (c) of this section.¹¹

In a supplemental questionnaire, the Department requested that the Nippon Group report sales of all its home market affiliated downstream resellers that were not made at arm's length, as the Nippon Group's sales to all these affiliated customers accounted for more than five percent of its total sales of foreign-like product in the home market.¹² However, the Nippon Group argued that gathering such data would be time-consuming and would cause unnecessary administrative burden to both the Department and the respondent.¹³ The Nippon Group did not provide any documentary evidence to support its argument and failed to provide any evidence demonstrating the burden. In addition, the Nippon Group failed to provide the Department's required arm's length analysis or otherwise demonstrate the arm's length nature of its home market sales to affiliated resellers.

Therefore, the Department continues to find that the Nippon Group failed to provide the required analysis and information requested from the Department, and that the Nippon Group did not meet the burden of establishing that it should be exempt from reporting the sales of these affiliated downstream resellers. As a result, the Department is unable to further assess or analyze these home market resales. The Department continues to apply facts available pursuant to sections 776(a)(1) and (2)(A) and (C) of the Act because we find that necessary information is not available on the record of the investigation and that the Nippon Group withheld requested information and significantly impeded the proceeding. Pursuant to section 776(b) of the Act, we are using an adverse inference in applying the facts otherwise available because the Nippon Group has failed to cooperate to the best of its ability to comply with our request for information. As adverse facts available, we have continued to apply the highest Nippon Group home market price for unaffiliated customers to these unreported affiliated resellers' resales.¹⁴

¹⁰ See Department's Initial Section B Questionnaire to the Nippon Group, at Part III.B.2, dated October 27, 2015.

¹¹ 19 CFR 351.403(d).

¹² See Department's supplemental section A questionnaire, dated December 22, 2015 at question 10.

¹³ See Nippon Group's Section A QR at A-32-33, dated November 23, 2015.

¹⁴ See Nippon Group Preliminary Calculation Memorandum.

Comment 3: Whether the Department Should Include Freight Revenue and Fuel Revenue on U.S. Sales Made by Steelscape

Nippon Group Argues

- In its preliminary margin calculations, the Department failed to include freight revenue and fuel revenue earned on U.S. sales by Steelscape. The Department should correct this error in its final margin calculations.
- When a respondent establishes a direct link between the reported revenues and the related expenses, and separately reports these revenues and expenses in its U.S. sales database, as Nippon Group did in this investigation for the Steelscape sales, the Department's normal practice is to deduct from the gross unit selling price the expenses actually paid by the respondent and then add back any directly related payments received from the customer up to the amount of the expenses.
- In the final determination, the Department should offset the actual freight and fuel expenses incurred by Steelscape (Field INLFWCU) with the associated freight revenue (Field FRTREVU) and fuel revenue (Field FUELREVU) for each sale.

Petitioner Argues

- Where the Department determines it appropriate to adjust U.S. price for Steelscape's reported fuel and freight revenues, it should adhere to its standard practice to treat revenues as offsets to the specific expenses for which they are intended to compensate and cap the amount added to U.S. price at the amount of the freight expense incurred.
- The freight and fuel revenues were intended to compensate for the freight expenses reported under the variable INLFWCU, accordingly, the Department should cap the amount of revenues added at the amount of INLFWCU expense reported.

Department Position:

We agree with Nippon Steel and we have made an offset to the actual freight and fuel expenses incurred by Steelscape with associated freight revenue and fuel revenue to each sale in this final determination. In addition, the Department agrees with petitioner and has capped the amount of revenue added to U.S. price at the amount of the freight expense incurred, consistent with the Department's standard practice regarding these revenues.¹⁵ We have made such an adjustment for the final determination.¹⁶

Comment 4: Whether the Department Should Reduce the Weight of the Margin Calculated for Sales by One of the Nippon Group's CEP Resellers

Nippon Group Argues

- This CEP reseller does not link the production and sale of its products to the source of the steel consumed, and the company could not identify the source of the steel for each sale. Instead it reported all sales of products whose manufacture could have consumed Nippon

¹⁵ See, e.g., *Large Power Transformers From the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2013-2014*, 81 FR 14087 (March 16, 2016), and accompanying IDM at Comment 3.

¹⁶ See Nippon Group Final Calculation Memorandum.

Group hot-rolled production. As a result, the share of the company's sales of hot-rolled coil in the United States in the reported U.S. sales database was much smaller.

- To account for this over-reporting, when calculating the overall weighted-average U.S. dumping margin in the final determination, the Department should reduce the weight of the dumping margin calculated on this CEP reseller's sales reported in the U.S. sales database accordingly.

Petitioner Argues

- The methodology proposed by Nippon Group is overly simplistic, has no underlying "first in, first out" or similar inventory basis, and relies on only a few broad estimates and percentages as the basis for excluding significant sales volumes from the margin calculations; a few percentage estimates cannot serve as the basis for making the critical distinction between subject and non-subject U.S. sales.
- The Department should reject Nippon Group's attempt to artificially lower its margin and continue to include the entirety of this CEP reseller's U.S. sales volume in its final calculations.

Department Position:

We have not utilized the methodology proposed by the Nippon Group in this final determination as it relies on a few broad estimates and percentages as the basis for excluding significant sales volumes from the margin calculations. Without a specific accounting for what is used in subject and non-subject merchandise, any division of this CEP reseller's sales of hot-rolled coil in the United States would be arbitrary and unsupported by record evidence. Therefore, the Department has continued to include the entirety of this CEP resellers' U.S. sales volume in the final determination.

Comment 5: Whether the Department Should Accept the Destination Key for One of its CEP Resellers as a Minor Correction

Nippon Group Argues

- The minor correction presented to the Department during the sales verification in Tokyo and CEP sales verification in Kalama, WA, regarding one of Nippon Group's CEP resellers involves a key that supports and clarifies the destination codes of this reseller's customers. As this key was only a minor correction to information on the record, the Department erred by not accepting the destination key.
- The Department should have considered the destination key reported at the outset of verification to be a minor correction to the destination codes already on the record and therefore accepted this key for use in the calculation of Nippon Group's margin in the final determination, as this correction impacted a very small percentage of the total reported U.S. sales and clearly meets the definition of minor.
- The Department may still remedy its error by requesting Nippon Group to place this information on the record prior to the final determination.

Petitioner Argues

- Given the importance of the DESTU field to the Department's differential pricing analysis, regardless of the volume of sales impacted by the error, Nippon Group's correction on the destination field was not minor.
- Based on Nippon Group's description of the data rejected at verification, it is apparent the Department's preliminary Cohen's *d* calculations and differential pricing analysis is compromised and potentially distorted as a result of improperly reported customer locations.
- For the final determination, regardless of the calculated Cohen's *d* ratio, the Department should apply, as AFA, the alternative average-to-transaction margin calculation methodology to all of Nippon Group's sales and assign to Nippon Group the alternative overall antidumping margin.

Department Position:

The Department continues to find its decision not to accept the destination key for this CEP reseller as a minor correction to be appropriate.

For this particular CEP reseller, the Department requested Nippon Group to report all the further manufactured CEP sales made by this reseller and submit complete Section C and Section E questionnaire responses, including all sales data with destination codes of the reseller's customers, as requested in the Department's initial questionnaire.¹⁷ In its last U.S. sales database submission before the Department's *Preliminary Determination*, the Nippon Group failed to submit the destination codes for this CEP reseller's U.S. customers, despite the multiple questionnaire response extensions granted by the Department. The Nippon Group tried to submit these destination codes as minor correction during the Department's sales and CEP verifications. However, the Department's verification is not intended to be an opportunity for submission of new factual information which were subject to a past reporting deadline. New information will be accepted at verification only when: (1) the need for that information was not evident previously; (2) the information makes minor corrections to information already on the record; or (3) the information corroborates, supports, or clarifies information already on the record.¹⁸ The Department considers these destination codes to be new factual information and therefore did not accept them as a minor correction.

Comment 6: Whether the Department Should Apply AFA on Unreported Data and Whether the Department Should Decline to Increase the Cost of Further Manufacturing to Reflect its Calculation of a Markup that Steelscape Washington Charged to its Parent, Steelscape LLC, for Processing Services Performed by Steelscape Washington

Petitioner Argues:

- The Department should apply partial AFA to account for Nippon Group's failure to provide critical data and information.

¹⁷ See The Department's Supplemental Questionnaire to Nippon Group, dated January 29, 2016, Question 15.

¹⁸ See The Department's verification outline letter to the Nippon Group at 3, dated March 14, 2016.

- From the onset of this proceeding, the Nippon Group failed to provide the Department with accurate descriptions and explanations regarding the two Steelscape entities (Steelscape LLC and Steelscape Washington) and declined to provide data that is critical to an accurate margin calculation in this case.
- In its first section E supplemental, it was the Department, not the Nippon Group, that first pointed to the fact that there are two Steelscape entities.¹⁹ In doing so, the Department provided the Nippon Group with another opportunity to properly calculate its further manufacturing costs and to provide information and data regarding the transactions between the two Steelscape entities. The Nippon Group ignored the Department's requests, revealing virtually nothing about these transactions.
- In its March 1, 2016 section E supplemental the Department provided the Nippon Group with yet another chance to provide information regarding these transactions.²⁰ It failed to do so yet again.
- It took the Department three questionnaires to establish that the further manufacturing costs reported on the record were for the wrong entity. The Nippon Group provided further manufacturing information based on a consolidated Steelscape entity when it should have based those costs on Steelscape LLC from the very beginning.
- Most damaging is the fact that the Nippon Group clearly had access to this information and could have readily provided it. During the further manufacturing verification, Steelscape explained that it was able to derive separate amounts for the two entities using its cost accounting system.²¹ Further, Steelscape tried to provide transfer price information at verification, which was properly declined by the Department as new information.²²
- The Nippon Group could not have misunderstood the Department's references to transfer price.
- Given the record evidence, for the final determination the Department should apply AFA to Steelscape's reported further manufacturing costs by assigning to each of the further manufactured sales the highest percentage margin calculated for any U.S. transaction.
- 19 CFR 351.401(f)(1) is not applicable to the Steelscape entities. The applicable provisions are sections 773(f)(2) and (3) of the Act, *i.e.*, the transactions disregarded and major input rules. The Department has found that when a further manufacturer uses the services of another affiliate in the United States the correct analysis is transactions disregarded, not collapsing.²³
- The purpose of collapsing affiliated producers is to eliminate the potential of manipulation of the antidumping order. Where this concern does not exist, the Department has found that section 351.401(f)(1) is not relevant.²⁴ The Nippon Group has

¹⁹ See, e.g., Nippon's Section E Questionnaire Response dated December 17, 2015 at 1.

²⁰ See Nippon's Section E Questionnaire Response dated February 10, 2016 at 2.

²¹ See Memorandum from Robert B. Greger to the File entitled "Verification of Steelscape LLC and Steelscape Washington LLC in the Antidumping Duty Investigation of Hot-Rolled Steel Flat Products from Japan," dated June 7, 2016 ("Further Manufacturing Verification Report") at 4.

²² *Id.*, at 4.

²³ See, e.g., *Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip in Coils from France*, 64 FR 30820 (June 8, 1999) at Comment 26 ("SSSSC from France").

²⁴ See, e.g., *Notice of Final Determination of Sales at Less Than Fair Value: Live Swine from Canada*, 70 FR 12181 (March 11, 2005) and accompanying Issues and Decision Memorandum at Comment 41 ("Live Swine from

failed to explain how failing to collapse two U.S. entities that produce non-subject merchandise somehow leaves the door open to the manipulation of the antidumping order covering subject merchandise.

- The record indicates that Steelscape Washington LLC acted only as a toller. Under 19 CFR 351.401(h) the Department will not consider tollers or subcontractors to be a manufacturer or producer. In *Pipe Fittings from Italy* the Department refused to collapse the entities in question, concluding that as affiliated subcontractors the production services provided by the affiliates were subject to the major input rule.²⁵
- Should the Department ignore the overwhelming evidence and decide to rely on the further manufacturing costs as submitted, it should at a minimum revise the adjustment made at the preliminary determination.²⁶
- If the Department continues to estimate the markup and transfer price based on consolidated information, it should revise the amount for indirect selling expense in the gross profit ratio.
- Further, the Department should apply Steelscape Washington LLC's G&A expense ratio.

Nippon Group Argues

- The Department erred in its preliminary determination by increasing the cost of further manufacturing to reflect an estimated markup charged by Steelscape Washington LLC for processing services performed for Steelscape LLC.
- The Department should have followed the provisions of 19 CFR 351.401(f) and treated Steelscape Washington LLC and Steelscape LLC as a single entity.
- Section 351.401(f)(1) provides that the Department will treat two or more entities as a single entity where those producers have production facilities for similar or identical products that would not require substantial retooling and there is a significant potential for the manipulation of price or production. It is plain that Steelscape Washington LLC and Steelscape LLC satisfy each of these requirements.
- Petitioner's AFA claim wholly ignores the background and context of Steelscape Washington's operations. Steelscape Washington was set up for a very specific purpose wholly unrelated to the business operations of Steelscape LLC.
- The Nippon Group reasonably understood that the Department was interested in whether a transfer price was charged for the processing services and explained that there was no transfer price but rather a markup. The Nippon Group's response was based upon the understanding of a transfer price as an actual price between parties, and there is no such price charged between the two Steelscape entities.
- The Department cannot apply AFA or even facts available even if it found the Nippon Group's understanding of a transfer price deficient without first identifying this deficiency and providing the Nippon Group with an opportunity to cure it.

Canada").

²⁵ See *Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Butt-Weld Pipe Fittings from Italy*, 65 FR 81830 (December 27, 2000) and accompanying Issues and Decision Memorandum at Comment 1a ("Pipe Fittings from Italy").

²⁶ See Memorandum from Robert B. Greger to Neil M. Halper entitled *Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Determination – Nippon Steel & Sumitomo Metal Corporation*, dated March 14, 2016 ("Preliminary Cost Calculation Memo").

- It would have been easy for the Department to request the markup, yet it never did. The failure to request further information from the Nippon Group is inconsistent with the statutory requirements of section 782(d) of the Act, which expressly requires the Department to provide parties with an opportunity to remedy any deficiencies.
- The Department overstated the amount of the markup charged by Steelscape Washington LLC to Steelscape LLC.
- The Department made two methodological errors in its markup calculation. First, it based the markup calculation on the consolidated entity when it should have based it on the information for Steelscape Washington LLC.²⁷ Second, the full amount of the gross profit percentage that it calculated to estimate the markup was applied only to Steelscape's processing costs when some of it should have been allocated to the cost of hot-rolled steel.²⁸

Department Position:

We have continued to increase the cost of further manufacturing to reflect the transfer price charged by Steelscape Washington LLC for processing services sold to Steelscape LLC. However, in the final determination, we have made several changes to our adjustment to the reported cost of further manufacturing as made at the *Preliminary Determination*.²⁹

Section 776(a)(2) of the Act provides that, if an interested party (A) withholds information that has been requested by the Department; (B) fails to provide such information by the deadlines for such information or in the form and manner requested; (C) significantly impedes a proceeding under the antidumping statute; or (D) provides information which cannot be verified the Department shall use, subject to sections 782(d), and (e) facts otherwise available in reaching the applicable determination. Further, section 776(b) of the Act provides that, if the Department finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information, the Department may use an inference adverse to the interests of that party in selecting the facts otherwise available.

In this investigation, the Nippon Group failed to provide the necessary information regarding the value of transactions between Steelscape LLC, its affiliated further manufacturer in the United States, and Steelscape Washington LLC, an affiliated toll processor. As detailed below, we requested this information on several occasions. This information is a necessary component of the Department's further manufacturing cost calculation in this proceeding.

We find that by not providing the requested information regarding the value of transactions between Steelscape LLC and Steelscape Washington LLC, despite numerous attempts by the Department to gather this information, the Nippon Group withheld information requested of it and significantly impeded the proceeding, within the meaning of sections 776(a)(2)(A) and (C) of the Act. Without the requested information, we are unable to properly analyze whether Steelscape LLC's affiliated purchases of processing services represent arm's length transactions, as required by the statute. Accordingly, we find that necessary information is missing from the

²⁷ See Preliminary Cost Calculation Memo.

²⁸ *Id.*

²⁹ See Nippon Final Cost Calculation Memorandum.

record, within the meaning of section 776(a)(1) of the Act. Therefore, because the Nippon Group failed to cooperate by not acting to the best of its ability to provide information we requested, we have determined that application of partial adverse facts available, within the meaning of section 776(b) of the Act, is appropriate with respect to Steelscape LLC's purchases of processing services. As partial AFA, therefore, we have calculated an estimated transfer price for the processing services using record information.

We disagree with the Nippon Group's assertion that application of an estimated transfer price at the *Preliminary Determination* was inconsistent with the statutory requirements of section 782(d) of the Act. Section 782(d) holds that "if the administering authority...determines that a request for information under this title does not comply with the request, the administering authority shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency." When requested by the Department in its initial section E questionnaire to "list the inputs used to further manufacture the subject merchandise, including...subcontractor services. Indicate whether any of these materials or services were purchased from an affiliated party,"³⁰ the Nippon Group failed to disclose any information regarding the purchase of processing services by Steelscape LLC from Steelscape Washington LLC. In the same questionnaire, the Nippon Group also failed to comply with the Department's request to provide "the total volume and value of the input...purchased from each affiliated party" with regard to the processing services, information that the Department normally uses to calculate transfer prices between affiliated entities, stating that the only input purchased from affiliated parties was hot-rolled steel.³¹

In its first supplemental section D questionnaire, the Department provided the Nippon Group with an opportunity to remedy its deficiency with regard to the processing services purchased by Steelscape LLC from Steelscape Washington LLC, asking for "a full description of the activities of both entities and any transactions between them."³² Despite this opportunity, the Nippon Group again failed to disclose any information regarding the transfer of processing services. At this point, the Department had fulfilled its obligation under section 782(d). However, the Department again asked for information regarding the transactions between the two entities in its third section E supplemental.³³ This time, the Nippon Group stated that there were indeed processing service transactions between the two entities, but again failed to provide any information regarding the value of the processing transaction(s) as it did in the initial section E questionnaire. Thus, despite being given several opportunities to do so, the Nippon Group failed to provide the information that would have enabled the Department to properly value the processing service transactions between Steelscape LLC and Steelscape Washington LLC. We therefore properly resorted to the use of adverse facts available to estimate the missing information.

³⁰ See Nippon's Section E Questionnaire Response dated December 17, 2015 at 6.

³¹ *Id.*, at 8.

³² See Nippon's Section E Questionnaire Response dated February 10, 2016 at 2.

³³ See Nippon's Section E Questionnaire Response dated March 1, 2016 at 2-5.

With regard to the Nippon Group’s argument that the Department should have followed the provisions of 19 CFR 351.041 and treated Steelscape LLC and Steelscape Washington LLC as a single entity, we disagree. Section 351.401(f)(1) of the Department’s regulations provides that two affiliated companies may be treated as a single entity if the following two criteria are met: (1) the affiliated producers “have production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities;” and (2) “there is a significant potential for manipulation of price or production.” In this case, the record evidence shows that the regulatory criteria of 19 CFR 351.401(f)(1) have not been met, as neither Steelscape LLC nor Steelscape Washington LLC produces hot-rolled coil and neither is involved in the export or sale of subject merchandise. There is therefore no basis to conclude that a significant potential for the manipulation of price or production exists.³⁴

Accordingly, because the Department’s criteria for collapsing have not been met, we have continued to treat Steelscape LLC and Steelscape Washington LLC as affiliated entities and in accordance with our practice we have evaluated the processing service transactions between them consistent with the major input rule.³⁵ As the Nippon Group failed to provide the information that would have enabled us to calculate a transfer price for these transactions, we have continued to estimate a transfer price as we did at the *Preliminary Determination*³⁶ based on the available record information, and have adjusted the reported cost of manufacturing to reflect the estimated transfer price.

As noted above, both the Nippon Group and petitioner have commented on the specific details of how we calculated the estimated transfer price at the *Preliminary Determination*. With regard to the Nippon Group’s arguments regarding the gross profit calculation used in the estimate of the transfer price, we disagree that the Department made two methodological errors in its mark-up calculation. We consider it appropriate to use the consolidated entities results as no separate company information that includes the effects of transactions between the two distinct Steelscape legal entities exists on the record of this proceeding. Thus, the consolidated information is the only reliable source of data available to calculate a gross profit. In addition, we have continued to attribute the full amount of the profit to the processing costs since we are resorting to partial AFA and we do not know what portion of the profit relates to materials versus processing costs. We note, however, that we have adjusted the gross profit calculation used in the estimated transfer price calculations to correct for a copying error related to the amount for indirect selling expenses as noted by petitioner.³⁷

³⁴ See, e.g., *Xanthan Gum from the People’s Republic of China: Final Determination of Sales at Less Than Fair Value*, 78 FR 33351 (June 4, 2013) (“*Xanthan Gum from the PRC*”) and accompanying Issues and Decision Memorandum at Comment 13.

³⁵ See, e.g., *Internal Combustion Forklift Trucks from Japan; Amendment to Final Results of Antidumping Duty Administrative Review*, 60 FR 30518 (June 9, 1995).

³⁶ See Preliminary Cost Calculation Memo.

³⁷ See Memorandum from Robert B. Greger to Neil M. Halper entitled Cost of Production and Constructed Value Calculation Adjustments for the Final Determination – Nippon Steel & Sumitomo Metal Corporation, dated August 4, 2016 (“Final Cost Calculation Memo”).

Comment 7: Whether the Department Should Find that Critical Circumstances Exist for Imports of the Merchandise Under Consideration Shipped by Nippon Group

Nippon Group Argues

- The Department’s use of speculative press articles as evidence that “importers, or exporters or producers, had reason to believe, at some time prior to the beginning of the proceeding, that a proceeding was likely”³⁸ was inappropriate. The Department should not have relied on these articles to utilize a comparison period beginning in June, 2015 which was prior to the date the petitions were filed.
- Even with evidence demonstrating “reason to believe,” the Department did not take into account the time lag between negotiation of sale and entry of merchandise, which would properly place the beginning of the comparison period at August 2015.
- The Department’s regulation dictates that an increase of imports is considered “massive” if there has been an increase of 15 percent or more.³⁹ However, between a comparison period beginning on the date of the petitions (December 2014-July 2015; August 2015-March 2016), the increase of imports does not reach this level and thus, was not “massive.”
- If the Department continues to utilize a comparison date prior to the date of the petitions:
 - it should use a comparison date beginning on May 2015 (June 2014 to April 2015; May 2015 to March 2016) because the evidence used to support “reason to believe” arguments were already common knowledge by this time. Using these periods, the percentage change in imports is negative, and thus not “massive”;
 - it should also take into context the Nippon Group’s shipment data for a longer period of time. The average volume of shipments for June-March 2015-2016 period was significantly lower than in the 2013-2014 and 2014-2015 periods. Additionally, a lull in shipments from August 2014-May 2015 explains the higher shipment volume in the base shipment period.

Petitioner Argues

- The Department has reasonable evidence that Japanese producers had “reason to believe” the proceeding was likely as of June 2015, as evidenced by the *Preliminary Critical Circumstances Determination*.
- It is not in accordance with the Department’s longstanding practice to take into account time lag between the negotiation of a sale and the entry of merchandise when considering critical circumstances.
- Using the comparison period beginning in August 2015 is irrelevant because of the Department’s evidence that Japanese producers had “reason to believe” a proceeding was likely as of June 2015.
- May 2015 is not a reasonable date to begin the comparison period because there was only one article published by this date. The ultimate decision that Japanese producers had “reason to believe” was based on cumulative knowledge from multiple articles, warranting a comparison period beginning date of June 2015.

³⁸ See 19 CFR 351.206(h)(2)(I).

³⁹ *Id.*

- The Nippon Group does not provide adequate explanation of what it meant by “broader context” and “lull in shipments,” and thus does not give ample evidence to why the increase in imports should not have been considered “massive” during the Department’s June 2015 comparison period.

Department Position:

We continue to find that critical circumstances exist with respect to the Nippon Group because “massive imports” occurred over a “relatively short period” of time, in accordance with sections 703(e)(1)(B) and 733(e)(1)(B) of the Act.

Section 735(a)(3) of the Act provides that the Department will determine that critical circumstances exist in antidumping duty investigations if: (A)(i) there is a history of dumping and material injury by reason of dumped imports in the United States or elsewhere of the subject merchandise, or (ii) the person by whom, or for whose account, the merchandise was imported knew or should have known that the exporter was selling the subject merchandise at less than its fair value and that there was likely to be material injury by reason of such sales, and (B) there have been massive imports of the subject merchandise over a relatively short period. Section 351.206 of the Department’s regulations provides that imports must increase by at least 15 percent during the “relatively short period” to be considered “massive” and defines a “relatively short period” as normally being the period beginning on the date the proceeding begins (*i.e.*, the date the petition is filed) and ending at least three months later.⁴⁰ The regulations also provide, however, that, if the Department finds that importers, or exporters or producers, had reason to believe, at some time prior to the beginning of the proceeding, that a proceeding was likely, the Department may consider a period of not less than three months from that earlier time.⁴¹

Consistent with our practice, the Department used available factual information to determine that there were sufficient reasons to believe that forthcoming petitions were likely by June 2015. In particular, four press articles, issued by industry specialists and authorities, referenced the impending trade cases on hot-rolled steel in May and June of 2015.⁴² These articles reasonably demonstrated that Japanese producers had reason to believe that the trade cases were likely, and as such, we disagree with the Nippon Group the evidence was speculative. As these articles were dated May 11, May 29, June 4, and June 9, 2015, the Department concluded that by the end of June 2015, steel importers, exporters and producers had sufficient reasons to believe that forthcoming petitioners were likely. Further, we disagree with the Nippon Group that the Department should take into account the time lag between the sale of the merchandise and the entry into the United States. The Department’s regulations do not contemplate the time lag period nor has the Nippon Group cited to any case precedent where the Department accounted for a time lag in its analysis.

⁴⁰ See 19 CFR 351.206(i).

⁴¹ *Id.*

⁴² See Attachment 2 of Certain Hot-Rolled Steel Flat Products From Australia, Brazil, Japan and the Netherlands – Critical Circumstances Allegations, October 23, 2015, and Certain Hot-Rolled Steel Flat Products From Australia, Brazil, Japan and the Netherlands – Critical Circumstances Allegations, November 2, 2015 (making public certain information in Attachment of original submission).

Further, the Nippon Group has given no explanation as to what it means by a “lull” in shipments nor offered any reason as to why the volume of shipments during the period of August 2014-May 2015 are low compared to the two preceding ten month periods or the base period. Neither has the Nippon Group pointed to cases where the Department has relied on volumes in two prior periods to find the base period unusable in its critical circumstances analysis. Finally, we note that Nippon has not made a “seasonality” argument in determining massive imports in the period at issue nor has it offered sufficient data that would support finding a pattern of seasonality. Thus, in order to determine whether there was a massive surge in imports, the Department compared the total volume of shipments during the period June 2015 through October 2015 (all months for which data was available) with the volume of shipments during the preceding five-month period of January 2015 through May 2015, preliminarily finding that the Nippon Group had a massive surge in imports.⁴³

For the final determination, as noted in Section III above, we examined whether the increase in imports was massive by comparing shipments over the period of August 2014 through May 2015, with the period June 2015 through March 2016, and find that critical circumstances continue to exist for the Nippon Group.

Comment 8: Whether the Department Should Revise its Differential Pricing Analysis

Nippon Group Argues

- The Department’s differential pricing analysis fails to identify a pattern of export prices that differ significantly among purchasers, regions, or time periods for the following reasons.
 - The Cohen’s *d* coefficient is not a measure of statistical significance but rather of “effect size.” Thus it cannot be used to determine the significance of the difference in the prices and “does not reveal whether ‘targeted dumping’ exists.”⁴⁴
 - The Cohen’s *d* coefficient cannot differentiate between ‘targeted dumping’ and the myriad of other potential causes of variations in price.”⁴⁵ Failure to consider other reasons is a fundamental flaw in the Department’s analysis.
 - The Cohens’ *d* test does not even identify “targeted dumping” since it considers prices which are not only lower, but also ones which are higher, as having passed the Cohen’s *d* test. “Targeted dumping” can only exist when the sales in the test group are priced significantly below the average price.
 - The Cohen’s *d* test excludes the sales in the test group from being in the comparison group, which, “by definition,”⁴⁶ must represent the “normal pattern of pricing”⁴⁷ used in the A-to-A comparisons, and must include all sales. “As a

⁴³ See *Antidumping Duty Investigations of Certain Hot-Rolled Steel Flat Products From Australia, Brazil, Japan, and the Netherlands and Countervailing Duty Investigation of Certain Hot-Rolled Steel Flat Products from Brazil: Preliminary Determinations of Critical Circumstances*, 80 FR 76444 (December 9, 2015).

⁴⁴ See Nippon’s Case Brief at 56.

⁴⁵ *Id.*

⁴⁶ *Id.*, at 57.

⁴⁷ *Id.*

result, the Department’s method simply makes a finding of differential pricing more likely, and thus inappropriately biases the results.”⁴⁸

- The ratio test inappropriately aggregates the results of the Cohen’s *d* test across purchasers, regions and time period. As a result, it “does not unmask ‘targeted dumping,’ but masks the fact that sales are in fact *not* differentially priced by {purchaser, region or time period}.”⁴⁹
- The Department fails to explain why any targeted dumping identified cannot be taken into account by a standard comparison methodology. *BTIC I and BTIC II* support the argument that the Department’s analysis fails in this respect.⁵⁰
- The Department’s differential pricing analysis is manifestly arbitrary and unreasonable.
- If average-to-transaction comparisons are permissible, the Department may undertake such comparisons for only those sales in which it has found targeted dumping to exist.

Petitioner Argues

- The Department’s differential pricing analysis and the Cohen’s *d* test has been repeatedly challenged by numerous respondents in the past, and Nippon Group’s case brief presents no new facts or legal analysis to those prior challenges - all of which have been rejected by the Department.
- Petitioner provided relevant pages from the Department’s final decision memorandum on a recent case, in which the Department fully addresses the concerns that have been raised with its Cohen’s *d* test. Petitioner argues that the Department’s analysis is fully applicable to address the arguments raised by Nippon Group.

Department Position:

As an initial matter, we note that there is nothing in section 777A(d) of the Act that mandates how the Department measures whether there is a pattern of prices that differs significantly or explains why the average-to-average (A-to-A) method or the transaction-to-transaction (T-to-T) method cannot account for such differences. On the contrary, carrying out the purpose of the statute⁵¹ here is a gap filling exercise properly conducted by the Department.⁵² As explained in the *Preliminary Determination*, as well as in various other proceedings,⁵³ the Department’s

⁴⁸ *Id.*, at 58.

⁴⁹ *Id.* (emphasis in the original).

⁵⁰ See Nippon’s Case Brief at 60-61, citing to *Beijing Tianhai Indus. Co. Ltd. v. United States*, 7 F.Supp.3d 1318 (CIT 2014) (*BTIC I*) and *Beijing Tianhai Indus. Co. Ltd. V. United States*, 106 F.Supp.3d 1342 (*BTIC II*).

⁵¹ See *Koyo Seiko Co., Ltd. v. United States*, 20 F.3d 1156, 1159 (Fed. Cir. 1994) (“The purpose of the antidumping statute is to protect domestic manufacturing against foreign manufacturers who sell at less than fair market value. Averaging U.S. prices defeats this purpose by allowing foreign manufacturers to offset sales made at less-than-fair value with higher priced sales. Commerce refers to this practice as ‘masked dumping.’ By using individual U.S. prices in calculating dumping margins, Commerce is able to identify a merchant who dumps the product intermittently—sometimes selling below the foreign market value and sometimes selling above it. We cannot say that this is an unfair or unreasonable result.” (internal citations omitted)).

⁵² See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) (*Chevron*) (recognizing deference where a statute is ambiguous and an agency’s interpretation is reasonable); see also *Apex*, 37 F. Supp. 3d at 1302 (applying *Chevron* deference in the context of the Department’s interpretation of section 777A(d)(1) of the Act).

⁵³ See, e.g., *Welded Line Pipe From the Republic of Korea: Final Determination of Sales at Less Than Fair Value*, 80 FR 61366 (October 13, 2015) (*Lipe Pipe from Korea*) and the accompanying Issues and Decision Memorandum

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

With Congress' enactment of the Uruguay Round Agreements Act (URAA), section 777A(d) of the Act states:

(d) Determination of Less Than Fair Value.--

(1) Investigations.--

(A) In General. In an investigation under subtitle B, the administering authority shall determine whether the subject merchandise is being sold in the United States at less than fair value--

- (i) by comparing the weighted average of the normal values to the weighted average of the export prices (and constructed export prices) for comparable merchandise, or
- (ii) by comparing the normal values of individual transactions to the export prices (or constructed export prices) of individual transactions for comparable merchandise.

(B) Exception. The administering authority may determine whether the subject merchandise is being sold in the United States at less than fair value by comparing the weighted average of the normal values to the export prices (or constructed export prices) of individual transactions for comparable merchandise, if--

- (i) there is a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time, and
- (ii) the administering authority explains why such differences cannot be taken into account using a method described in paragraph (1)(A)(i) or (ii).

(2) Reviews.--In a review under section 751, when comparing export prices (or constructed export prices) of individual transactions to the weighted average price of sales of the foreign like product, the administering authority shall limit its averaging of prices to a period not exceeding the calendar month that corresponds most closely to the calendar month of the individual export sale.

at comment 1; *Circular Welded Non-Alloy Steel Pipe From the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2012-2013*, 80 FR 32937 (June 10, 2015) (*CWP from Korea*), and the accompanying Issues and Decision Memorandum at comments 1 and 2, and *Welded ASTM A-312 Stainless Steel Pipe From the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2013-2014*, 81 FR 46647 (July 18, 2016) at comment 4.

The Statement of Administrative Action (SAA) expressly recognizes that:

New section 777A(d)(1)(B) provides for a comparison of average normal values to individual export prices or constructed export prices in situations where an A-to-A or transaction-to-transaction methodology cannot account for a pattern of prices that differ significantly among purchasers, regions, or time periods, *i.e.*, where targeted dumping may be occurring.⁵⁴

The SAA further discusses this new section of the statute and the Department's change in practice to using the A-to-A method:

In part the reluctance to use the A-to-A methodology had been based on a concern that such a methodology could conceal "targeted dumping." In such situations, an exporter may sell at a dumped price to particular customers or regions, while selling at higher prices to other customers or regions."⁵⁵

With the enactment of the URAA, the Department's standard comparison method in an LTFV investigation is normally the A-to-A method. This is reiterated in the Department's regulations, which state that "the Secretary will use the {A-to-A} method unless the Secretary determines another method is appropriate in a particular case."⁵⁶ As recognized in the SAA, the application by the Department of the A-to-A method to calculate a company's weighted-average dumping margin has raised concerns that dumping may be masked or hidden. The SAA states that consideration of the average-to-transaction (A-to-T) method, as an alternative comparison method, may respond to such concerns where the A-to-A method, or the T-to-T method, "cannot account for a pattern of prices that differ significantly among purchasers, regions, or time periods, *i.e.*, where targeted dumping *may* be occurring."⁵⁷ Neither the Act nor the SAA state that "targeted dumping" only occurs where there is a pattern of prices that differ significantly. In other words, the U.S. sales which constitute a pattern are not necessarily the only sales where "targeted dumping" *may* be occurring or dumping *may* be masked. As stated in the Act, the requirements for considering whether to apply the A-to-T method are that there exist a pattern of prices that differ significantly and that the Department explains why either the A-to-A method or the T-to-T method cannot account for such differences.

Accordingly, the Department finds that the purpose of section 777A(d)(1)(B) of the Act is to evaluate whether the A-to-A method is the appropriate tool to measure whether, and if so to what

⁵⁴ See Uruguay Round Agreement Act, Statement of Administrative Action (SAA), H.R. Doc. No. 103-316 at 843 (1994), reprinted in 1994 U.S.C.C.A.N. 4040, 4161

⁵⁵ See SAA at 842.

⁵⁶ See 19 CFR 351.414(c)(1). This approach is also now followed by the Department in administrative and new shipper reviews. See *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification*, 77 FR 8101 (February 14, 2012) (*Final Modification for Reviews*) (where the Department explained that it would now "calculate weighted-average margins of dumping and antidumping duty assessment rates in a manner which provides offsets for non-dumped comparisons while using monthly average-to-average ("A-A") comparisons in reviews, paralleling the WTO-consistent methodology that the Department applies in original investigations").

⁵⁷ See SAA at 843 (emphasis added).

extent, a given respondent is dumping the subject merchandise at issue in the U.S. market.⁵⁸ While “targeting” and “targeted dumping” may be used as a general expression to denote this provision of the statute,⁵⁹ these terms impose no additional requirements beyond those specified in the statute for the Department to otherwise determine that the A-to-A method is not appropriate based upon a finding that the two statutory requirements have been satisfied. Furthermore, “targeting” implies a purpose or intent on behalf of the exporter to focus on a subgroup of its U.S. sales. The court has already found that the purpose or intent behind an exporter’s pricing behavior in the U.S. market is not relevant to the Department’s analysis of the statutory provisions of section 777A(d)(1)(B) of the Act.⁶⁰ The Court of Appeals for the Federal Circuit (CAFC) has stated:

Section 1677f-1(d)(1)(B) does not require Commerce to determine the reasons why there is a pattern of export prices for comparable merchandise that differs significantly among purchasers, regions, or time periods, nor does it mandate which comparison methods Commerce must use in administrative reviews. As a result, Commerce looks to its practices in antidumping duty investigations for guidance. Here, the {U.S. Court of International Trade (CIT)} did not err in finding there is no intent requirement in the statute, and we agree with the CIT that requiring Commerce to determine the intent of a targeted dumping respondent “would create a tremendous burden on Commerce that is not required or suggested by the statute.”⁶¹

As stated in section 777A(d)(1)(B) of the Act, the requirements for considering whether to apply the A-to-T method are that there exists a pattern of prices that differ significantly and that the Department explains why either the A-to-A method or the T-to-T method cannot account for such differences. The Department’s application of a differential pricing analysis in this investigation provides a complete and reasonable interpretation of the language of the statute, regulations and SAA to identify when pricing cannot be appropriately taken into account when using the standard A-to-A method, and it provides a remedy for masked dumping when the conditions exist.

As described in the *Preliminary Determination*, the differential pricing analysis addresses each of these two statutory requirements. The first requirement, the “pattern requirement,” is addressed using the Cohen’s *d* test and the ratio test. The pattern requirement will establish whether conditions exist in the pricing behavior of the respondent in the U.S. market where dumping may be masked or hidden, where higher-priced U.S. sales offset lower-priced U.S.

⁵⁸ See 19 CFR 351.414(c)(1).

⁵⁹ See, e.g., *Samsung v. United States*, Slip Op. 15-58, p. 5 (“Commerce may apply the A-to-T methodology ‘if (i) there is a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or period of time, and (ii) the administering authority explains why such differences cannot be taken into account using’ the A-to-A or T-to-T methodologies. Id. § 1677f-1(d)(1)(B). Pricing that meets both conditions is known as ‘targeted dumping.’”).

⁶⁰ See *JBF RAK LLC v. United States*, 991 F. Supp. 2d 1343, 1355 (CIT 2014); *aff’d JBF RAK LLC v. United States*, 790 F.3d 1358 (Fed. Cir. 2015) (*JBF RAK*), see also *Borusan Mannesmann Boru Sanayi Ve Ticaret A.S. v. United States*, 608 Fed. Appx. 948 (Fed. Cir. 2015) (*Borusan*).

⁶¹ See *JBF RAK*, 790 F.3d at 1368 (internal citations omitted).

sales. Consistent with the pattern requirement, the Cohen's *d* test, for comparable merchandise, compares the mean price to a given purchaser, region or time period to the mean price to all other purchasers, regions or time periods, respectively, to determine whether this difference is significant. The ratio test then aggregates the results of these individual comparisons from the Cohen's *d* test to determine whether the extent of the identified differences in prices which are found to be significant is sufficient to find a pattern and satisfy the pattern requirement, *i.e.*, that conditions exist which may result in masked dumping.

When the respondent's pricing behavior exhibits conditions in which masked dumping may be a problem – *i.e.*, where there exists a pattern of prices that differ significantly – then the Department considers whether the standard A-to-A method can account for “such differences” – *i.e.*, the conditions found pursuant to the pattern requirement. To examine this second statutory requirement, the “explanation requirement,” the Department considers whether there is a meaningful difference between the weighted-average dumping margin calculated using the A-to-A method and that calculated using the appropriate alternative comparison method based on the A-to-T method. Comparison of these results summarize whether the differences in U.S. prices mask or hide dumping when normal values are compared with average U.S. prices (the A-to-A method) as opposed to when normal values are compared with sale-specific U.S. prices (the A-to-T method). When there is a meaningful difference in these results, the Department finds that the extent of masked dumping is meaningful to warrant the use of an alternative comparison method to quantify the amount of a respondent's dumping in the U.S. market, thus fulfilling the language and purpose of the statute and the SAA.

1. The Department's Differential Pricing Analysis Fails to Identify a “Pattern”

As stated in the *Preliminary Determination*, the purpose of the Cohen's *d* test is to evaluate “the extent to which the net prices to a particular purchaser, region, or time period differ significantly from the net prices of all other sales of comparable merchandise.”⁶² The Cohen's *d* coefficient is a recognized measure which gauges the extent (or “effect size”) of the difference between the means of two groups.

In the final determination for *Xanthan Gum from the PRC*, the Department explained that “{e}ffect size is a simple way of quantifying the difference between two groups and has many advantages over the use of tests of statistical significance alone.” In addressing Deosen's comment in *Xanthan Gum from the PRC*, the Department continued:

Effect size is the measurement that is derived from the Cohen's *d* test. Although Deosen argues that effect size is a statistic that is “widely used in meta-analysis,” we note that the article also states that “{e}ffect size quantifies the size of the difference between two groups, and may therefore be said to be a true measure of *the significance of the difference*.” The article points out the precise purpose for which the Department relies on the Cohen's *d* test to satisfy the statutory language, to measure whether a difference is significant.⁶³

⁶² See Preliminary Decision Memo at page 10.

⁶³ See *Xanthan Gum from the PRC* at comment 3 (emphasis in original, internal citations omitted).

The Cohen's d coefficient is based on the difference between the means of the test and the comparison groups relative to the variances within the two groups, *i.e.*, the pooled standard deviation. When the difference in the weighted-average sale prices between the two groups is measured relative to the pooled standard deviation, then this value is expressed in standardized units, and is based on the dispersion of the prices within each group. In other words, the "significance" of differences between the average prices of the test group and the comparison group (*i.e.*, between a specific purchaser, region or time period and all other purchasers, regions or time periods, respectively) is measured by how widely the individual prices differ within these two groups. When there is little variation in prices within each of these groups (*i.e.*, not between the two groups), then a small difference in the mean prices of the test and comparison groups will be found to be significant. Conversely, when there are wide variations in prices within each of these groups, then a much larger difference in the mean prices of the test and comparison groups will be necessary in order to find that the difference is significant.

The Department thus relies on the Cohen's d coefficient as a measure of effect size to determine whether the observed price differences are significant. In this application, the difference in the weighted-average (*i.e.*, mean) U.S. price to a particular purchaser, region or time period (*i.e.*, the test group) and the weighted-average U.S. price to all other purchasers, regions or time periods (*i.e.*, the comparison group) is measured relative to the variance of the U.S. prices within each of these groups (*i.e.*, all U.S. prices).

Subsequently, the ratio test aggregates the sales value for each U.S. sale whose price has been found to differ significantly among purchasers, regions or time periods. As described in the *Preliminary Determination*, when 66 percent or more of the U.S. sales value are represented by U.S. prices which differ significantly, then the Department finds that the "pattern" requirement of the statute has been met and that the Department should consider that the appropriate alternative comparison method is the application of the A-to-T method to all U.S. sales. When between 33 percent and 66 percent of the U.S. sales value are represented by U.S. prices which differ significantly, then the Department also finds that the "pattern" requirement of the statute has been met and that the Department should consider that the appropriate alternative comparison method is the application of the A-to-T method to those U.S. sales which exhibit prices that differ significantly (*i.e.*, which pass the Cohen's d test) and the application of the A-to-A method to those sales which do not exhibit prices that differ significantly.

First, the Department disagrees with Nippon that the Department must consider the statistical significance of its results. In order to determine the "significance" of the difference in the pattern of prices among purchasers, regions, or time periods, the Department has relied upon a concept called the "effect size," and in particular a specific approach developed by Jacob Cohen called the " d " statistic or, as the Department has labeled it, the "Cohen's d coefficient." This "significance" denotes whether this difference is significant and has meaning, and it is distinct from the concept of "statistical significance" discussed above in relationship to the estimation of the actual values of statistical measures of a given population of data. In the final determination of *Xanthan Gum from the PRC*, the Department described "effect size" in response to a comment from Deosen, an examined respondent in that investigation:

Nothing in Deosen's submitted articles undermines the Department's reliance on the Cohen's *d* test. Deosen's reliance on the article "It's the Effect Size, Stupid" does not undermine the validity of the Cohen's *d* test or the Department's reliance on it to satisfy the statutory language. Interestingly, the first sentence in the abstract of the article states: 'Effect size is a simple way of quantifying the difference between two groups and has many advantages over the use of tests of statistical significance alone.' Effect size is the measurement that is derived from the Cohen's *d* test. Although Deosen argues that effect size is a statistic that is "widely used in meta-analysis," we note that the article also states that "{e}ffect size quantifies the size of the difference between two groups, and may therefore be said to be a true measure of the significance of the difference." The article points out the precise purpose for which the Department relies on Cohen's *d* test to satisfy the statutory language, to measure whether a difference is significant.⁶⁴

The analysis employed by the Department, including the use of the Cohen's *d* test, fills the statutory gap as to how to determine whether a pattern of prices "differ significantly."⁶⁵ Further, the use of other statistical measures is to determine from a sample (*i.e.*, the data at hand) of a larger population an estimate of what the actual values (*e.g.*, the mean or variance) of the larger population may be with a "statistical significance" attached to that estimate. However, the Department's use of the Cohen's *d* test is based on the entire population of U.S. sales by the respondent, and, therefore, there are no estimates involved in the results.

Furthermore, in examining the requirement provided in section 777A(d)(1)(B)(i) of the Act, the Department has relied upon "effect size," and specifically the Cohen's *d* coefficient, to evaluate whether the difference in the pattern of prices for comparable merchandise among purchasers, regions, or time periods is significant. However, unlike in the description above, the data upon which the statistical measure of effect size is based are not random samples, but rather the entire population of data (*i.e.*, the U.S. sales to each purchaser, region, and time period). Nippon Group has reported all of its sales of subject merchandise in the U.S. market during the period of investigation, and it is this data upon which the Department is basing its analysis consistent with the requirements of section 777A(d)(1)(B) of the Act, just as it has when calculating Nippon Group's weighted-average dumping margin. Accordingly, the Department's calculation of the Cohen's *d* coefficient includes no noise or sampling error as the underlying means and variances used to calculate the Cohen's *d* coefficient are not estimates, but the actual values based on the complete U.S. sales data as reported by Nippon Group in this investigation.

Second, the Department disagrees with Nippon that it must divine the reason(s) for the observed price differences beyond "targeted dumping." The SAA expressly recognizes that the statute "provides for a comparison of average normal values to individual export prices or constructed

⁶⁴ See *Xanthan Gum From the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 78 FR 33351 (June 4, 2013) ("*Xanthan Gum from the PRC*") and the accompanying Issues and Decision Memorandum at Comment 3 (emphasis in the original, internal citations omitted); quoting from Coe, "It's the Effect Size, Stupid: What effect size is and why it is important," Paper presented at the Annual Conference of British Educational Research Association (Sept. 2002), <http://www.leeds.ac.uk/educol/documents/00002182.htm>.

⁶⁵ See *Apex* at 27, footnote 19.

export prices in situations where an {A-to-A} or {T-to-T} methodology cannot account for a pattern of prices that differ significantly among purchasers, regions, or time periods, *i.e.*, where targeted dumping may be occurring.”⁶⁶ As the SAA implies, the Department is not tasked with determining whether targeted dumping is, in fact, occurring. Rather, the SAA recognizes that targeted dumping may be occurring where there is a pattern of prices that differ significantly among purchasers, regions, or time periods. In our view, the purpose of section 777A(d)(1)(B) of the Act is to evaluate whether the A-to-A method or the T-to-T method is the appropriate tool to measure whether, and if so to what extent, a given respondent is dumping the merchandise at issue.⁶⁷ While “targeted dumping” may be occurring with respect to such sales, it is not a requirement, nor a precondition, for the Department to otherwise determine that the A-to-T method is warranted, due to finding of a pattern of prices that differ significantly, as provided in the statute. As noted above, the court has already found that the purpose or intent behind an exporter’s pricing behavior in the U.S. market which exhibit prices that differ significantly is not relevant to the Department’s analysis.⁶⁸

Third, the Department disagrees with Nippon that only low prices as being, by definition, part of “targeted dumping.” Indeed, the statute is silent on what price differences the Department should consider when evaluating whether there exists a pattern of prices that differ significantly. The Department must fill this gap and use its discretion to consider sales information on the record in its analysis and to draw reasonable inferences as to what that data show. As noted above, the SAA states that “targeted dumping” is a situation where “exporter may sell at a dumped price to particular customers or regions, while selling at higher prices to other customers or regions.”⁶⁹ Thus, it is reasonable for the Department to consider both lower priced and higher priced sales in the Cohen’s *d* analysis because higher priced sales are equally capable as lower priced sales to create a pattern of prices that differ significantly. Further, higher priced sales will offset lower priced sales, either implicitly through the calculation of a weighted-average sale price for a U.S. averaging group, or explicitly through the granting of offsets when aggregating the A-to-A comparison results, that can mask dumping. The statute states that the Department may apply the A-to-T comparison method if “there is a *pattern of export prices . . . for comparable merchandise that differ significantly among purchasers, regions, or periods of time,*” and the Department “explains why *such differences* cannot be taken into account” using the A-to-A comparison method.⁷⁰ The statute directs the Department to consider whether a pattern of prices differ significantly. The statutory language references prices that “differ” and does not specify whether the prices differ by being priced lower or higher than the comparison sales. The statute does not provide that the Department consider only higher priced sales or only lower priced sales when conducting its analysis, nor does the statute specify whether the difference must be the result of certain sales being priced higher or lower than other sales. The Department explained that higher priced sales and lower priced sales do not operate independently; all sales

⁶⁶ See SAA at 843.

⁶⁷ See 19 CFR 351.414(c)(1).

⁶⁸ See *JBF RAK and Borusan*.

⁶⁹ See SAA at 842.

⁷⁰ See section 777A(d)(1)(B) of the Act (emphasis added).

are relevant to the analysis.⁷¹ By considering all sales, higher priced sales and lower priced sales, the Department is able to analyze an exporter's pricing practice and to identify whether there is a pattern of prices that differ significantly. Moreover, finding such a pattern of prices that differ significantly among purchasers, regions, or periods of time, signals that the exporter has a varying pricing behavior between purchasers, regions, or periods of time within the U.S. market rather than following a more uniform pricing behavior. Where the evidence indicates that the exporter is engaged in such pricing behavior, "where targeted dumping may be occurring,"⁷² there is cause to continue with the analysis to determine whether the A-to-A method or the T-to-T method can account for such pricing behavior and is the appropriate tool to evaluate the exporter's amount of dumping. Accordingly, both higher- and lower- priced sales are relevant to the Department's analysis of the exporter's pricing behavior.⁷³

Fourth, the Department disagrees with Nippon that all sales of comparable merchandise must be in the comparison group, including those sales in the test group. The statute directs the Department to examine the significance of price differences among purchasers, regions or time periods. The Department's methodology does that. The Cohen's *d* test examines the weighted-average price to each purchaser, region or time period with the weighted-average price for all other sales of comparable merchandise. The Department continues to find that this is a reasonable, transparent and predictable approach to implement the language of the statute and the SAA.

Furthermore, the inclusion of the test group of sales in the comparison group obviously results in a comparison group that is not independent from the test group the inclusion of the test group of sales in the comparison group of sales would result in the sales in the test group being compared to themselves which would skew the comparison group toward the group of test sales. A skewed comparison group could then mask any potential price difference that the test group may represent.

As an example, there are two customers accounting for 90 percent and 10 percent of the sales, customer A and customer B, respectively. Sales to each customer are only compared to the sales to the other customer (as in the Department's differential pricing analysis) and not to the combined set of sales to both customers. As a result, if the sales to customer A are found to be at significantly different prices than the sales to customer B, then the sales to customer B will also be found to be at significantly different prices than those to customer A. That is, all of the sales will be at significantly different prices. However, under Nippon's argument, the sales of both customer A and customer B would be compared to all sales to both customers A and B, with the result that sales to customer B may be different than sales to both customers A and B, but the sales to customer A may not be different than the sales to both customers. The

⁷¹ See *Hardwood and Decorative Plywood From the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 78 FR 58273 (September 23, 2013) ("*Plywood*") and accompanying Issues and Decision Memorandum at Comment 5.

⁷² See SAA at 843.

⁷³ See *Apex* at 36. "All sales are subject to the differential pricing analysis because its purpose is to determine to what extent a respondent's U.S. sales are differentially priced, not to identify dumped sales. (citation omitted) Commerce is not restricted in what type of sales it may consider in assessing the existence of such a pattern so long as its methodological choice enables Commerce to reasonably determine whether application of A-T is appropriate."

Department disagrees with Nippon's approach as it skews the results and does not fully recognize the differences in pricing behavior to the two customers. The Department finds it logical to find that if customer A is different from customer B, then customer B is different from customer A.

Lastly, the Department disagrees with Nippon that it must somehow segregate the results of the ratio test by purchasers, by regions, *and* by time periods. As stated above, the purpose of a differential pricing analysis is to determine whether the A-to-A method is appropriate for calculating Nippon's weighted-average dumping margin. Obviously, the Department calculates a single weighted-average dumping margin to evaluate the respondent's pricing behavior in the U.S. market. When examining whether there exists a pattern of prices that differ significantly, the results of the Cohen's *d* test determine whether the sales in the test group are at prices which differ significantly from the prices in the comparison group of sales. Both the test group and the comparison group are composed of multiple U.S. sales with individual prices; these are not the patterns to which the Act refers. The Act refers to "a" single pattern for the respondent. This pattern is manifested to the extent that prices for comparable merchandise differ significantly among purchasers, regions or time periods.

The existence, or not, of a pattern of prices that differ significantly may indicate that conditions exist in the respondent's pricing behavior to consider whether the A-to-A method is appropriate. To subdivide the respondent's pricing behavior into multiple groups, by purchaser, by region, and by time period, and to separately consider each result would individually be an incomplete examination of the respondent's overall pricing behavior. Thus, the Department's Cohen's *d* and ratio tests are consistent with this idea of "a" single pattern found in the language of the Act.

Contrary to the arguments submitted by Nippon, the Department continues to find that this approach reasonably fills the gap in the statute in how to identify whether there exists a pattern of prices that differ significantly.⁷⁴

2. The Department's Differential Pricing Analysis Fails to Address Why the A-to-A Method Cannot Account for Such Differences

For Nippon in these final results, the Department finds that the weighted-average dumping margins calculated using the average-to-average method and an alternative comparison method based on the average-to-transaction method are 0.00 percent and above *de minimis*, respectively. Thus, Nippon's calculated results move across the *de minimis* threshold, which the Department reasonably finds as a meaningful difference such that the average-to-average method cannot account for Nippon's pricing behavior in the U.S. market. The CIT has affirmed the Department's use of the "meaningful difference" test to find that the average-to-average method cannot account for such differences.⁷⁵

⁷⁴ See *Apex Frozen Foods Pvt. Ltd. v. United States*, 144 F. Supp.3d 1308, 1330, (CIT 2016), *appeal pending* (*Apex Frozen Foods*) ("Commerce is not restricted in what type of sales it may consider in assessing the existence of such a pattern so long as its methodological choice enables Commerce to reasonably determine whether application of A-T is appropriate.")

⁷⁵ See *Apex Frozen Foods* at 38-45; see generally *Samsung Electronics Co. v. United States*, Slip Op. 15-158 (CIT

The Department disagrees with Nippon that its differential pricing analysis fails to explain why the A-to-A method cannot account for such differences. First, Nippon posits:

The only way for the Department to provide that explanation is to consider the underlying bases for the price differences it has found to exist, and then explain why, in light of those bases, a departure from one of the standard methodologies is justified.⁷⁶

As explained above, there is no requirement for the Department to understand the reasons why there are significant price differences exhibited in the respondent's U.S. pricing behavior. Nor does the statute require that the Department use these same reasons as the foundation for explaining why the A-to-A method cannot account for such differences. Beyond providing the two requirements in section 777A(d)(1)(B) of the Act, Congress has not detailed how the Department must address these two requirements. As noted above, the court has already affirmed that the Department does not need to identify why price differences exist, and consequently, according to Nippon's claim, there is no foundation to "explain why, in light of those bases," why the A-to-A method cannot account for the respondent's U.S. pricing behavior where prices differ significantly. Therefore, Nippon's argument is misplaced.

Second, Nippon claims that the Department's meaningful difference test, which address the "explanation requirement" (*i.e.*, section 777A(d)(1)(B)(ii) of the Act), "effectively permits the Department to use an alternative methodology *whenever* a significant pattern of price differences exists."⁷⁷ The Department agrees with both Nippon and the court in *BTIC I* with the general proposition that when a group of differing prices are averaged, that the low and high prices will offset one another with the result that the average price will lie somewhere within the range of the individual prices. However, this "mathematical truism" does not result in the Department being able to apply an alternative comparison method whenever it wants, contrary to Nippon's assertion. For the differential pricing analysis used in this investigation, not only do the price differences need to be significant and to an extent that a pattern is found to exist which indicate that conditions exist that masked dumping is occurring, but these conditions must also exist to the extent that there is a meaningful difference in the calculated weighted-average dumping margins.

The difference in the calculated results specifically reveals the extent of the masked, or "targeted," dumping which is being hidden when applying the average-to-average method.⁷⁸ As

June 12, 2015) (*Samsung*) (although *Samsung* involves the Department's earlier target dumping analysis rather than a differential pricing analysis, the question here is the same – whether the explanation requirement has been met. Further, *Samsung* not only affirmed the situation when the weighted-average dumping margin moves across the *de minimis* threshold, but also when there is a relative change in the weighted-average dumping margins of at least 25 percent as being "meaningful" and thus both thresholds provide an explanation which satisfies section 777A(d)(1)(B)(ii) of the Act (*Samsung* also involves an investigation where the two statutory requirements are mandatory)).

⁷⁶ See Nippon's Case Brief at 60.

⁷⁷ *Id.* (emphasis in the original), citing *BTIC I* ("Thus, it is the case that any time a pattern of disparate pricing exists, averaging the prices will 'mask' the differences in the individual prices.").

⁷⁸ See *Koyo Seiko Co., Ltd. v. United States*, 20 F.3d 1156, 1159 (Fed. Cir. 1994) ("The purpose of the antidumping

noted by Nippon, the difference in these two results is caused by higher U.S. prices offsetting lower U.S. prices where the dumping, which may be found on lower priced U.S. sales, is hidden or masked by higher U.S. prices,⁷⁹ such that the A-to-A method would be unable to account for such differences.⁸⁰ Such masking or offsetting of lower prices with higher prices may occur implicitly within the averaging groups or explicitly when aggregating the A-to-A comparison results. Therefore, in order to understand the impact of the unmasked “targeted dumping,” the Department finds that the comparison of each of the calculated weighted-average dumping margins using the standard and alternative comparison methodologies exactly quantifies the extent of the unmasked “targeted dumping.”

The simple comparison of the two calculated results belies all of the complexities in calculating and aggregating individual dumping margins (*i.e.*, individual results from comparing export prices, or constructed export prices, with normal values). It is the interaction of these many comparisons of export prices or constructed export prices with normal values, and the aggregation of these comparison results, which determine whether there is a meaningful difference in these two calculated weighted-average dumping margins. When using the A-to-A method, lower-priced U.S. sales (*i.e.*, sales which may be dumped) are offset by higher-priced U.S. sales. Congress was concerned about offsetting and that concern is reflected in the SAA which states that “targeted dumping” is a situation where “an exporter may sell at a dumped price to particular customers or regions, while selling at higher prices to other customers or regions.”⁸¹ The comparison of a weighted-average dumping margin based on comparisons of weighted-average U.S. prices that also reflects offsets for non-dumped sales, with a weighted-average dumping margin based on comparisons of individual U.S. prices without such offsets (*i.e.*, with zeroing) precisely examines the impact on the amount of dumping which is hidden or masked by the A-to-A method. Both the weighted-average U.S. price and the individual U.S. prices are compared to a normal value that is independent from the type of U.S. price used for comparison, and the basis for normal value will be constant because the characteristics of the individual U.S. sales⁸² remain constant whether weighted-average U.S. prices or individual U.S. prices are used in the analysis.

Consider the simple situation where there is a single, weighted-average U.S. price, and this average is made up of a number of individual U.S. sales which exhibit different prices, and the two comparison methods under consideration are the A-to-A method with offsets (*i.e.*, without

statute is to protect domestic manufacturing against foreign manufacturers who sell at less than fair market value. Averaging U.S. prices defeats this purpose by allowing foreign manufacturers to offset sales made at less-than-fair value with higher priced sales. Commerce refers to this practice as ‘masked dumping.’ By using individual U.S. prices in calculating dumping margins, Commerce is able to identify a merchant who dumps the product intermittently—sometimes selling below the foreign market value and sometimes selling above it. We cannot say that this is an unfair or unreasonable result.” (internal citations omitted)).

⁷⁹ See SAA at 842.

⁸⁰ See *Union Steel v. United States*, 713 F.3d 1101, 1108 (Fed. Cir. 2013) (“{the A-to-A} comparison methodology masks individual transaction prices below normal value with other above normal value prices within the same averaging group.”).

⁸¹ See SAA at 842.

⁸² These characteristics include may include such items as product, level-of-trade, time period, and whether the product is considered as prime- or second-quality merchandise.

zeroing) and the A-to-T method with zeroing.⁸³ The normal value used to calculate a weighted-average dumping margin for these sales will fall into one of five scenarios with respect to the range of these different, individual U.S. sale prices:

- 1) the normal value is less than all of the U.S. prices and there is no dumping;
- 2) the normal value is greater than all of the U.S. prices and all sales are dumped;
- 3) the normal value is nominally greater than the lowest U.S. prices such that there is a minimal amount of dumping and a significant amount of offsets from non-dumped sales;⁸⁴
- 4) the normal value is nominally less than the highest U.S. prices such that there is a significant amount of dumping and a minimal amount of offsets generated from non-dumped sales;
- 5) the normal value is in the middle of the range of individual U.S. prices such that there is both a significant amount dumping and a significant amount of offsets generated from non-dumped sales.

Under scenarios (1) and (2), either there is no dumping or all U.S. sales are dumped such that there is no difference between the weighted-average dumping margins calculated using offsets or zeroing and there is no meaningful difference in the calculated results and the A-to-A method will be used. Under scenario (3), there is a minimal (*i.e., de minimis*) amount of dumping, such that the application of offsets will result in a zero or *de minimis* amount of dumping (*i.e.,* the A-to-A method with offsets and the A-to-T method with zeroing both results in a weighted-average dumping margin which is either zero or *de minimis*) and which also does not constitute a meaningful difference and the A-to-A method will be used. Under scenario (4), there is a significant (*i.e., non-de minimis*) amount of dumping with only a minimal amount of non-dumped sales, such that the application of the offsets for non-dumped sales does not change the calculated results by more than 25 percent, and again there is not a meaningful difference in the weighted-average dumping margins calculated using offsets or zeroing and the A-to-A method will be used. Lastly, under scenario (5), there is a significant, *non-de minimis* amount of dumping and a significant amount of offsets generated from non-dumped sales such that there is

⁸³ The calculated results using the average-to-average method with offsets (*i.e.,* no zeroing) and the calculated results using the average-to-transaction method with offsets (*i.e.,* no zeroing) will be identical. See Attachment IV of Nippon's Final Calculation Memorandum (pages 185-187 of the SAS output); and Attachment IV of JFE's Final Calculation Memorandum (pages 134-136 of the SAS output), where the calculation results of the average-to-average method and each of the alternative comparison methods are summarized. The sum of the "Positive Comparison Results" and the "Negative Comparison Results" for each of the three comparison methods (*i.e.,* the average-to-average method, the "mixed" method, and the average-to-transaction method, are identical, *i.e.,* with offsets for all non-dumped sales (*i.e.,* negative comparison results), the amount of dumping is identical. As such, the difference between the calculated results of these comparison methods is whether negative comparison results are used as offsets or set to zero.

⁸⁴ As discussed further below, please note that scenarios 3, 4 and 5 imply that there is a wide enough spread between the lowest and highest U.S. prices so that the differences between the U.S. prices and normal value can result in a significant amount of dumping and/or offsets, both of which are measured relative to the U.S. prices.

a meaningful difference in the weighted-average dumping margins calculated using offsets and zeroing. Only under the fifth scenario can the Department consider the use of an alternative comparison method.

Only under scenarios (3), (4) and (5) are the granting or denial of offsets relevant to whether dumping is being masked, as there are both dumped and non-dumped sales. Under scenario (3), there is only a *de minimis* amount of dumping such that the extent of available offsets will only make this *de minimis* amount of dumping even smaller and have no impact on the outcome. Under scenario (4), there exists an above-*de minimis* amount of dumping, and the offsets are not sufficient to meaningfully change the results. Only with scenario (5) is there an above-*de minimis* amount of dumping with a sufficient amount of offsets such that the weighted-average dumping margin will be meaningfully different under the A-to-T method with zeroing as compared to the A-to-T / A-to-A method with offsets. This difference in the calculated results is meaningful in that a non-*de minimis* amount of dumping is now masked or hidden to the extent where the dumping is found to be zero or *de minimis* or to have decreased by 25 percent of the amount of the dumping with the applied offsets.

This example demonstrates that there must be a significant and meaningful difference in U.S. prices in order to resort to an alternative comparison method. These differences in U.S. prices must be large enough, relative to the absolute price level in the U.S. market, where not only is there a non-*de minimis* amount of dumping, but there also is a meaningful amount of offsets to impact the identified amount of dumping under the A-to-A method with offsets. Furthermore, the normal value must fall within an even narrower range of values (*i.e.*, narrower than the price differences exhibited in the U.S. market) such that these limiting circumstances are present (*i.e.*, scenario (5) above). This required fact pattern, as represented in this simple situation, must then be repeated across multiple averaging groups in the calculation of a weighted-average dumping margin in order to result in an overall weighted-average dumping margin which changes to a meaningful extent.

Further, for each A-to-A comparison result which does not result in set of circumstances in scenario (5), the “meaningfulness” of the difference in the weighted-average dumping margins between the two comparison methods will be diminished. This is because for these A-to-A comparisons which do not exhibit a meaningful difference with the A-to-T comparisons, there will be little or no change in the amount of dumping (*i.e.*, the numerator of the weighted-average dumping margin) but the U.S. sales value of these transactions will nonetheless be included in the total U.S. sales value (*i.e.*, the denominator of the weighted-average dumping margin). The aggregation of these intermediate A-to-A comparison results where there is no “meaningful” difference will thus dilute the significance of other A-to-A comparison results where there is a “meaningful” difference, which the A-to-T method avoids.

Additionally, the extent of the amount of dumping and potential offsets for non-dumped sales is measured relative to the total export value (*i.e.*, the denominator of the weighted-average dumping margin) of the subject merchandise. Thus, the “targeted dumping” analysis accounts for the difference in the U.S. prices relative to the absolute price level of the subject merchandise. Only under scenario (5) above will the Department find that the A-to-A method is not appropriate – where there is an identifiable above *de minimis* amount of dumping along with

an amount of offsets generated from non-dumped sales such that the amount of dumping is changed by a meaningful amount when those offsets are applied. Both of these amounts are measured relative to the total export value (*i.e.*, absolute price level) of the subject merchandise sold by the exporter in the U.S. market.

The individual results for this investigation also demonstrate that finding prices that differ, even some prices that differ significantly, does not mean that the Department will resort to applying an alternative comparison method. For JFE, the Department found that 19.28 percent of the value of its U.S. sales represented prices that differ significantly. Even with finding JFE U.S. prices that differ significantly, the Department did not consider the application of an alternative comparison method. For Nippon, the Department found that 39.48 percent of the value of its U.S. sales represented prices that differ significantly. As such, the Department considered an alternative comparison method based on applying the A-to-T method to the U.S. sales which passed the Cohen's *d* test and the A-to-A method to the U.S. sales which did not pass the Cohen's *d* test. When comparing these calculated results, the Department found that the margin crossed the *de minimis* threshold, such that with only the A-to-A method, dumping would have been masked to such a meaningful extent that no margin would have been found for Nippon and Nippon would have been excluded from the antidumping order, if published. Without doubt, either having or not having a remedy for Nippon is a meaningful difference.

Therefore, both on a general basis, and specific to the facts of this investigation, Nippon's claim, as reflected in *BTIC I*, that the Department resorts to the A-to-T method whenever it finds prices that differ significantly fails.

Lastly, Nippon's statement "that using the alternative A-T methodology generates higher dumping margins is not sufficient to explain why the price differences measured by the Cohen's *d* test cannot be taken into account using {the A-to-A method}" is inconsistent with the Department's practice. First, the "mathematical truism" of unmasking "targeted dumping" is that more dumping will be revealed, which will lead to a higher dumping margin. Second, as detailed above, the difference in the calculated results does precisely unmask dumping where higher-priced sales offset lower-priced sales. Furthermore, even if there are significant price differences, this does not indicate that "targeted dumping" is being masked to a meaningful extent, as this will only be found when the variation in the prices are great enough, and the normal value falls within a restricted range within the range of prices, such that there is a non-*de minimis* amount of dumping and a meaning amount of non-dumped sales to offset such dumping.

3. The Department's Differential Pricing Analysis is Manifestly Arbitrary and Unreasonable

The Department disagrees with Nippon that the thresholds which it has established are arbitrary and unreasonable. These thresholds include (1) there must be two observations in each of the test and comparison groups, and the quantity of the sales in the comparison group must be at least five percent of the quantity of all sales of comparable merchandise in order to calculate a Cohen's *d* coefficient for the test group; (2) the Cohen's *d* coefficient must be at least 0.8 or greater to find that the prices within the test group differ significantly; (3) the 33 percent and 66 percent thresholds of value of sales passing the Cohen's *d* test when considering what the appropriate alternative comparison method, based on the A-to-T method, would be; and (4) the

two thresholds for finding that the difference in the calculated results between the application of the standard A-to-A method and an alternative comparison method.

As an initial matter, the Department would like to repeat that neither the statute nor the SAA provides guidance in determining whether the requirements of sections 777A(d)(1)(B)(i) and (ii) of the Act are satisfied and, if satisfied, how to apply the average-to-transaction method. Accordingly, the Department has reasonably created a framework to determine how the average-to-transaction method may be considered as an alternative to the standard average-to-average method based on the extent of the pattern of prices that differ significantly as identified by the Cohen's d and ratio tests and whether the A-to-A method can account for such differences with the meaningful differences test.

The Department disagrees that the requirements (*i.e.*, two observations in each of the test and comparison groups and the sales quantity in the comparison group must be at least five percent of the quantity sold for the comparable merchandise) used in the Cohen's d test are unreasonable or arbitrary. The requirement to have more than one sale in each group will establish that such transactions are not a one-off, exceptional behavior that will not be repeated. The unrepeated pricing decision for a single transaction may not be representative of the respondent's pricing behavior in general, which the Department does not see as contributing to a pattern of prices that differ significantly. Similarly, the requirement that the comparison group represent at least five percent of the respondent's sales of comparable merchandise is to ensure that the comparison group is an adequate basis for examining whether the prices in the test group differ significantly. This is analogous to home and third-country viability in section 773(a)(1) of the Act and 19 CFR 351.404(b). Accordingly, the Department continues to consider these requirements to be reasonable and not arbitrary.

The Department disagrees with Nippon's assertion that the three thresholds established by Dr. Cohen are arbitrary and impermissible in its analysis. As noted above, the Department's examination of the two statutory requirements under section 777A(d)(1)(B) of the Act is by necessity a gap-filling exercise. The Department must exercise its discretion in order to fill such gaps in a reasonable and logical manner. Otherwise, the Department would be unable to execute its obligation to administer the statute.

In the final results of the administrative review of *Shrimp from Vietnam*, the Department stated:

The Department disagrees with VASEP's claim that the Cohen's d test's thresholds of "small," "medium," and "large" are arbitrary, and that consequently the Department should use a higher threshold for the Cohen's d coefficient in order to find that the sales of the test group pass the Cohen's d test. In his text *Statistical Power Analysis for the Behavioral Sciences*, Dr. Cohen himself describes these three cut-offs. The effect size at the small threshold "is the order of magnitude of the difference in mean IQ between twins and non-twins, the latter being the larger. It is also approximately the size of the difference in mean height between 15- and 16-year-old girls." For the medium threshold, the "effect size is conceived as one large enough to be visible to the naked eye. That is, in the course of normal experience, one would become aware of an average difference

in IQ between clerical and semiskilled workers or between members of professional and managerial occupational groups” or “the magnitude of the difference in height between 14- and 18-year-old girls.” For the large threshold, the difference “is represented by the mean IQ difference estimated between holders of the Ph.D. degree and typical college freshmen, or between college graduates and persons with only a 50-50 chance of passing an academic high school curriculum. These seem like grossly perceptible and therefore large differences, as does the mean difference in height between 13- and 18-year-old girls...”⁸⁵

Although these descriptions by Dr. Cohen are qualitative in nature, they are not arbitrary but represent real world observations. As noted above from Webster’s dictionary,⁸⁶ “significant” has the following meanings:

1. having meaning;
2. a. having or likely to have influence or effect, of a noticeably or measurably large amount;
b. probably caused by something other than mere chance.

Thus, the term “prices that differ significantly” connotes different prices where the difference has meaning, where it has or may have influence or effect, where it is noticeably or measurably large, and where it may be beyond something that occurs by chance. Certainly the examples for both Dr. Cohen’s medium and large thresholds for effect size reasonably meet this level of difference. But as the Department noted in its Preliminary Decision Memorandum, the Department used the large threshold because “the large threshold provides the strongest indication that there is a significant difference between the means of the test and comparison groups...”⁸⁷ In other words, the significance required by the Department in its Cohen’s *d* test affords the greatest meaning to the difference of the means of the prices among purchasers, regions and time periods.

In the final determination of *Xanthan Gum from the PRC*, the Department recognized:

In “Difference Between Two Means,” the author states that “there is no objective answer” to the question of what constitutes a large effect. Although Deosen focuses on this excerpt for the proposition that the “guidelines are somewhat arbitrary,” the author also notes that the guidelines suggested by Cohen as to what constitutes a small effect size, medium effect size, and large effect size “have been widely adopted.” The author further explains that Cohen’s *d* is a “commonly

⁸⁵ See *Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Final Results of Antidumping Duty Administrative Review*, 20132014, 80 FR 55328 (September 15, 2015); quoting from Cohen, Jacob, *Statistical Power Analysis for the Behavioral Sciences*, Lawrence Erlbaum Associates, Publishers (1988), at 27 (citations omitted).

⁸⁶ See Webster’s Ninth New Collegiate Dictionary (1989), p. 1096.

⁸⁷ See PDM at 10.

used measure” to “consider the difference between means in standardized units.”⁸⁸

Therefore, the Department continues to find that three thresholds established by Dr. Cohen have a substantive foundation in the real world and have engendered wide acceptance in the academic community. Accordingly, the Department also continues to find that their use as part of the Cohen’s *d* test is appropriate.

Next, the Department disagrees with Nippon’s assertion that the 33 percent and 66 percent thresholds are arbitrary and unreasonable. In fact, the use of these thresholds is reasonable and was recently affirmed by the CIT in *United States Steel Corporation et. al., v. United States*, Slip Op. 16-004 (CIT May 5, 2016) at 18-19 (*U.S. Steel*). It continues to be the Department position that it has reasonably created a framework, as a gap filling exercise and consistent with the statute and the SAA, to determine how the average-to-transaction method may be considered as an alternative to the standard average-to-average method based on the extent of the pattern of prices that differ significantly as identified by the Cohen’s *d* and ratio tests.

When 66 percent or more of the value of a respondent’s U.S. sales are found to establish a pattern of prices that differ significantly, then the Department finds that the extent of these price differences throughout the pricing behavior of the respondent does not permit the segregation of this pricing behavior which constitutes the identified pattern of prices that differ significantly from that which does not. Accordingly, the Department determines that considering the application of the average-to-transaction method to all U.S. sales to be reasonable. Further, when 33 percent or less of the value of a respondent’s U.S. sales constitute the identified pattern of prices that differ significantly, then the Department considers the extent of this pattern not to be significant and does not consider the application of the average-to-transaction method as an alternative comparison method to be appropriate. When between 33 percent and 66 percent of the value of a respondent’s U.S. sales constitute a pattern of prices that differ significantly, then the Department considers the extent of this pattern not to be significant in applying the average-to-average method, in part, but also finds that segregating this pricing behavior from the pricing behavior which does not contribute to the pattern to be reasonable, and accordingly considers the application of the average-to-transaction method as an alternative comparison method to this limited portion of a respondent’s U.S. sales.

As the court recently held in *U. S. Steel*, the above “rationale for adopting such thresholds is reasonably explained,” and it “is inherent in the concept of a threshold that observations that fall on the margins of either side will be treated disparately from those on the other side.”⁸⁹ The CIT held that if it can be discerned “from Commerce’s explanation that Commerce has developed its ratio test to identify the existence and extent to which there is a pattern of export prices for comparable merchandise that differ significantly among purchasers, regions or periods of time,” then the use of the 33- and 66- percent test is legally permissible.⁹⁰ In this case, as the

⁸⁸ See *Xanthan Gum from the PRC* Issues and Decision Memorandum at Comment 3 (internal citations omitted); quoting from David Lane, et al., Chapter 19 “Effect Size,” Section 2 “Difference Between Two Means.”

⁸⁹ See *U.S. Steel* at 18.

⁹⁰ *Id.*, at 19.

Department has in many investigations and administrative reviews before, it has explained its ratio test and revealed the existence of a pattern of export prices. Accordingly, the Department disagrees with Nippon's argument in this regard.

Lastly, the Department disagrees with Nippon's contention that the two established thresholds for finding that the difference in the calculated weighted-average dumping margins is "meaningful," thus confirming that the A-to-A method cannot account for such differences (*i.e.*, the respondent's pricing behavior in the U.S. market as exemplified by the existence of a pattern of prices that differ significantly). As stated in the Preliminary Decision Memorandum:

A difference in the weighted-average dumping margins is considered meaningful if 1) there is a 25 percent relative change in the weighted-average dumping margins between the average-to-average method and the appropriate alternative method where both rates are above the *de minimis* threshold, or 2) the resulting weighted-average dumping margins between the average-to-average method and the appropriate alternative method move across the *de minimis* threshold.⁹¹

These two thresholds of the meaningful difference test mirror the Department's standard when it considers whether a ministerial error is "significant" and the Department will publish a corrected preliminary determination.⁹²

Accordingly, the Department's framework when considering the requirement under section 777A(d)(1)(B)(i) of the Act. It reasonably reflects the Department's practice provided elsewhere when determining whether a change in calculated results are significant or meaningful.

4. The Department May Not Apply the A-to-T Method to All U.S. Sales

The Department disagrees with Nippon Group's claim that if A-to-T comparisons are permissible, the Department may undertake such comparisons for only those sales in which it has found "targeted dumping" to exist. Neither the statute nor the SAA provide guidance in determining how to apply the A-to-T method once the requirements of section 777A(d)(1)(B)(i) and (ii) have been satisfied. Accordingly, the Department has reasonably created a framework to fill the gap in the statutory language to determine how the A-to-T method may be considered as an alternative to the standard A-to-A method based on the extent of the pattern of prices that differ significantly as identified with the Cohen's *d* test. As part of that gap, Congress has not set forth a prescription on how the A-to-T method must be applied as an alternative comparison

⁹¹ See PDM at 11.

⁹² See 19 CFR 351.224(e). 19 CFR 351.224(g) defines a significant ministerial error as one which

- (1) Would result in a change of at least five absolute percentage points in, but not less than 25 percent of, the weighted-average dumping margin ...calculated in the original (erroneous) preliminary determination; or
- (2) Would result in a difference between a weighted-average dumping margin ... of zero (or *de minimis*) and a weighted-average dumping margin ... rate of greater than *de minimis*, or vice versa.

method to either of the standard comparison methodologies (*i.e.*, the A-to-A method or the T-to-T method). Likewise, this discretion has been affirmed by the court.⁹³

As stated in the *Preliminary Determination*, the purpose of the Cohen's *d* test is to evaluate ". . . all purchasers, regions, and time periods to determine whether a pattern of prices that differ significantly exists."⁹⁴ When 66 percent or more of the value of a respondent's U.S. sales are found to establish a pattern of prices that differ significantly, then the Department finds that the extent of these price differences throughout the pricing behavior of the respondent does not permit the segregation of this pricing behavior which constitute the identified pattern or prices that differ significantly from that which does not. Accordingly, the Department determines that considering the application of the A-to-T method to all U.S. sales to be reasonable. Further, when 33 percent or less of the value of a respondent's U.S. sales constitute the identified pattern of prices that differ significantly, then the Department considers this extent of the pattern to not be significant in considering whether the A-to-A method is appropriate, and has not considered the application of the A-to-T method as an alternative comparison method. When between 33 percent and 66 percent of the value of a respondent's U.S. sales constitute a pattern of prices that differ significantly, the Department considers the extent of this pattern to be meaningful to consider whether the A-to-A method is appropriate, but also finds that segregating this pricing behavior from the pricing behavior which does not contribute to the pattern to be reasonable, and has then only considered the application of the A-to-T method as an alternative comparison method to this limited portion of a respondent's U.S. sales.

5. Summary

Accordingly, for all of the foregoing reasons, we find that the Department's differential pricing analysis is consistent with section 777A(d)(1)(B) of the Act and the SAA. Furthermore, the differential pricing analysis represents a reasonable framework to determine whether the A-to-A method is appropriate, and if not, then how the A-to-T method may be considered as an alternative to the standard A-to-A method based on the extent of the pattern of prices that differ significantly, as identified by the Cohen's *d* test.

Comment 9: Whether the Department Should Exclude Certain Products Produced by Nippon Group from the Scope of the Investigation

Nippon Group Argues

- The Department erred by failing to exclude certain products produced by Nippon Group from the scope of this investigation.
- The Department should exclude the following four products from the scope of this investigation: (1) certain hot-rolled steel used in automotive stabilizer tubes, (2) certain hot-rolled coil with special characteristics, (3) certain hot-rolled dual phase steel, and (4) certain hot-rolled precipitation strengthened steel; because they have the special chemical, physical, or mechanical properties described in Nippon Group's scope

⁹³ See, *e.g.*, *Apex Frozen Foods*, 144 F. Supp. 3d at 1319; see also *Timken v. United States*, 2016 WL 2765448 at *5 (CIT May 10, 2016)

⁹⁴ See PDM at 10.

comments, and products with these precise specifications are not produced by the U.S. industry to a caliber that satisfies U.S. customers' technical and performance requirements.

Petitioner Argues

- There is nothing in Nippon Group's case brief that is new to the record (factual, argumentative or otherwise) that should lead the Department to a final decision that is any different than its *Preliminary Determination*.
- Nippon Group's comments were properly and fully considered by the Department in conjunction with the *Preliminary Determination*, and there is nothing new in Nippon Group's case brief that warrants or supports a reversal of the Department's scope decision in the final determination.

Department Position:

The Department has not changed its scope decision in the final determination. We note that the arguments made by Nippon Group were fully addressed by the Department in its Preliminary Scope Memorandum and are hereby adopted for the final results.⁹⁵

Comment 10: Whether the Department Should Make an Adjustment for Nippon Group's Purchases of Iron Ore at Below Market Value

Petitioner Argues

- The Department should correct its adjustment for the Nippon Group's purchases of iron ore from affiliated parties for a minor methodological inconsistency.
- In its calculation made at the Preliminary Determination, the Department mistakenly mixed ratios based on both quantities and values.⁹⁶ The Department should correct these calculations by using all value based ratios.

Nippon Group Argues

- The Nippon Group did not comment on this issue.

Department Position:

We have revised the adjustment for the Nippon Group's purchases of iron ore from affiliated parties to consistently reflect ratios based on values, rather than a mixture of quantities and values, throughout the calculation in this final determination.⁹⁷

⁹⁵ See Memorandum to Christian Mash, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, "Certain Hot-Rolled Steel Flat Products from Australia, Brazil, Japan, the Netherlands, the Republic of Korea, Turkey and the United Kingdom: Scope Comments Decision Memorandum for the Preliminary Determinations," dated March 14, 2016.

⁹⁶ See Preliminary Cost Calculation Memo.

⁹⁷ See Final Cost Calculation Memo.

Comment 11: Whether the Department Should Accept Nippon Group’s Value-Added Calculation and Its Unreported Further-Manufactured U.S. sales

Petitioner Argues

- The Department should apply its standard value-added calculations across all of Steelscape’s further manufactured U.S. sales.
- Nippon Group has attempted to manipulate the special rule analysis to achieve its desired results of excluding certain Steelscape sales to affiliates from its U.S. database and its Section E. The Department should account for these unreported U.S. further-manufactured sales in the final determination by applying facts available.
- Should the Department determine that Nippon Group’s disaggregated value-added analysis is a reasonable methodology, the inconsistencies inherent to Nippon Group’s revised value-added methodology render it unusable. Specifically, Nippon Group compared a “the price for the products sold by” Steelscape’s affiliates to the weighted average of Steelscape’s imported coils. In particular, petitioner takes issue with the fact that the Nippon Group “eliminated details related to Steelscape’s imported coils and sales of products to” the affiliates.⁹⁸ The Department should apply a facts available margin to U.S. sales further-manufactured by Steelscape’s U.S. affiliates.

Nippon Group Argues

- These same arguments were raised by petitioner earlier in this investigation and not accepted by the Department in the *Preliminary Determination*.
- The Department should again decline to accept these arguments in the final determination because: (1) Nippon Group’s value added calculations are consistent with the methodology set forth in 19 CFR 351.402(c); and (2) the Department may not resort to facts otherwise available without first notifying Nippon Group of the nature of the deficiency and providing Nippon Group with an opportunity to remedy or explain the deficiency, as expressly required by 782(d) of the Act.

Department Position:

Consistent with the *Preliminary Determination*, the Department has continued to exclude certain sales made by Steelscape to affiliates pursuant to the “special rule”⁹⁹ for this final determination. Moreover, we have continued to assign the calculated weighted-average margin of 4.99 percent to the excluded Steelscape sales.

In its questionnaire response,¹⁰⁰ Nippon Group demonstrated that the value added by Steelscape for certain sales to affiliates satisfied the threshold of 65 percent as provided by 19 CFR

⁹⁸ See Petitioner Case brief on Nippon Group at 25.

⁹⁹ Section 772(e) of the Act states that when the respondent sells the subject merchandise through an affiliated importer, and the value added by that affiliate substantially exceeds the value of the subject merchandise, the Department will use an alternative calculation method for constructed export price. The alternative calculation method is to base constructed export price for the sales to affiliates on the respondent’s sales to unaffiliated purchasers, or, if there are insufficient sales to unaffiliated purchasers, to use some other reasonable basis.

¹⁰⁰ See Nippon Group IQR Section A at Exhibit A-42, dated November 23, 2015; and Nippon Group 2nd QR at Exhibit SA-8, dated January 12, 2016.

351.402(c),¹⁰¹ therefore, the CEP sales by these further manufacturers were exempted from reporting and not included in the U.S. sales database. Conversely, Nippon Group reported Steelscape's sales to unaffiliated parties as they did not satisfy the threshold of 65 percent as provided by 19 CFR 351.402(c).

Notwithstanding petitioner's arguments, there is no basis on the record to find that Nippon Group attempted to manipulate the value-added calculations to its own benefit. While petitioner correctly notes that the Department has accepted aggregated value-added in past cases, the Department has discretion to base its value-added calculations on averages from disaggregated groups of products.¹⁰² In *CORE from Korea*, the Department exempted Hyundai from reporting the completed automobile sales based aggregated data. However, the Department also instructed Hyundai to provide separate value-added calculations for tailor welded blanks and auto parts.¹⁰³ These latter product groups did not meet the 65 percent value added threshold. Moreover, in *Wire Rod from Brazil*, the Department specifically instructed the respondent to "provide a further breakdown of value-added merchandise into subgroups."¹⁰⁴

Petitioner has argued that the Nippon Group's value-added methodology for Steelscape's sales to affiliates were made on an inconsistent basis. Specifically, Nippon Group compared product-specific prices for merchandise sold by Steelscape's affiliates to the average price for hot-rolled steel paid by Steelscape to Nippon Steel. We note, however, that our comparison of the weighted average price for all products sold by Steelscape's affiliates to the weighted-average price for hot-rolled steel paid by Steelscape to Nippon Steel also shows that the value added by Steelscape and its affiliates is above the 65 percent threshold discussed in 19 CFR 351.402(c)(2).¹⁰⁵ As noted above 19 CFR 351.402(c)(2) states that we will normally "estimate the value added based on the difference between the price charged to the first unaffiliated purchaser for the merchandise as sold in the United States and the price paid for subject merchandise by the affiliated person." Therefore, price information for the sales between Steelscape and its affiliates is not relevant to our value-added calculation. Thus, notwithstanding petitioner's arguments to the contrary, we continue to find that Nippon Group's value-added calculation for Steelscape's sales to affiliates are consistent with 19 CFR 351.402(c)(2).

¹⁰¹ 19 CFR 351.402(c)(2) sets the threshold for value added at 65 percent and states that we will normally "estimate the value added based on the difference between the price charged to the first unaffiliated purchaser for the merchandise as sold in the United States and the price paid for subject merchandise by the affiliated person."

¹⁰² See *Certain Corrosion-Resistant Steel Products From the Republic of Korea: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances*, 81 FR 35303, (June 2, 2016) (*CORE from Korea*) and the accompanying IDM at Comment 2; see also *Final Results of the First Administrative Review of Carbon and Certain Alloy Steel Wire Rod from Brazil*, 70 FR 28271, (May 17, 2005) (*Wire Rod from Brazil*) and the accompanying IDM at Comment 5.

¹⁰³ The Department advised that if Hyundai believed that the sales of subject merchandise further manufactured into other types of merchandise sold by any of Hyundai's U.S. affiliates to unaffiliated parties in the United States might qualify for the special exemption under section 772(e) of the Act, Hyundai would need to demonstrate this claim for each product type at the appropriate stage in the sales chain (*i.e.*, by affiliated reseller) and provide complete supporting documentation. See *CORE from Korea* IDM at 9.

¹⁰⁴ See *Wire Rod from Brazil* and the accompanying IDM at Comment 5.

¹⁰⁵ See Nippon Group Final Calculation Memorandum.

Finally, the Department has not applied a facts available margin to Nippon Group's U.S. further-manufactured sales by Steelscape. As an initial matter, all the necessary information is on the record so there is no rationale for resorting to facts available. We note that section 772(e) of the Act states that when the respondent sells the subject merchandise through an affiliated importer, and the value added by that affiliate substantially exceeds the value of the subject merchandise, the Department will use an alternative calculation method for constructed export price. The alternative calculation method is to base constructed export price for the sales to affiliates on the respondent's sales to unaffiliated purchasers, or, if there are insufficient sales to unaffiliated purchasers, to use some other reasonable basis. Pursuant to section 772(e)(2) of the Act and consistent with our standard practice,¹⁰⁶ the Department has assigned the calculated weighted-average margin of 4.99 percent to the Steelscape sales that were excluded under the special rule.

Comment 12: Further Manufacturing Financial Expense Ratio

Petitioner Argues

- The Department should apply the further manufacturing financial expense ratio to Steelscape's further manufacturing costs plus the cost of production of the imported hot-rolled coil so that the denominator is on the same basis as the amounts to which the ratio is applied.

Nippon Group Argues

- If the Department recalculates the financial expense ratio by excluding material costs from the denominator, then the recalculated ratio should only be applied to labor and factory overhead.

Department Position:

We have recalculated the further manufacturing financial expense to ensure that the denominator of the ratio is on the same basis as the amounts to which it is applied. Accordingly, because the denominator of the calculation reflects all materials, including imported hot-rolled coils, we have applied the financial expense ratio to Steelscape LLC's total cost of further processing plus the cost of the purchased hot-rolled coils.¹⁰⁷

Comment 13: General & Administrative Expense Ratio

Petitioner Argues

- The Department should include the Nippon Group's losses on inactive facilities in the G&A expense ratio calculation at the final determination.
- These losses appear to be similar to depreciation on idle assets, which are included in COP under the Department's long-established practice.¹⁰⁸

¹⁰⁶ See, e.g., *CORE from Korea*; see also *Final Determination of the Antidumping Duty Investigation of Polyethylene Terephthalate Film, Sheet, and Strip from Thailand* and accompanying IDM at 16.

¹⁰⁷ See Nippon Final Cost Calculation Memo.

¹⁰⁸ See, e.g., *Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Bar from Italy*, 67 FR 3155 (January 23, 2002) and accompanying Issues and Decision Memorandum at Comment 48.

Nippon Group Argues

- The Department should reject the petitioner’s arguments regarding the inclusion of losses on inactive facilities in the Nippon Group’s G&A expenses. These losses were non-routine dispositions of fixed assets that are not part of the Nippon Group’s normal business operations.
- The Department’s practice is to include gains or losses related to routine disposals of fixed assets, because it is expected that a producer will periodically replace production equipment.¹⁰⁹
- The Department does not include losses related to non-routine dispositions of fixed assets in the calculation of G&A expenses because they do not related to the general operations of the company.¹¹⁰
- In this case, the disposals are related to the retirement or disassembly of facilities in response to a decision to discontinue or phase out their operation with no intent to restore them. The majority of the losses relate to major facilities such as a power plant and a continuous annealing and processing line.
- In previous cases, the Department has excluded losses incurred on dispositions of fixed assets similar to those reported by the Nippon Group.¹¹¹

Department Position:

We have included the losses on inactive facilities in the Nippon Group’s total G&A expenses for the final determination. As noted by the Nippon Group in its questionnaire responses, all of the losses are related to assets that were in the process of disposal and were either already sold or awaiting sale.¹¹² The Department performed detailed testing of these disposals at the cost verification and noted that each transaction was related to either a production line or a piece of equipment.¹¹³ Further, as noted in the cost verification report, the Nippon Group provided no record evidence to show that any of these transactions were related to the sale or permanent shutdown of an entire facility or plant.¹¹⁴ Thus, contrary to the Nippon Group’s assertions, the record evidence indicates that the losses are related to the routine disposition of fixed assets.

It is the Department’s established practice to include gains or losses incurred on the routine disposition of fixed assets in the G&A expense ratio calculation.¹¹⁵ The Department follows this

¹⁰⁹ See, e.g., *Stainless Steel Sheet and Strip in Coils from Mexico; Final Results of Antidumping Duty Administrative Review*, 75 FR 6627 (February 10, 2010) and accompanying Issues and Decision Memorandum at Comment 8 (“SSSSC from Mexico”) and *Certain Softwood Lumber Products From Canada: Notice of Final Results of Antidumping Duty Administrative Review*, 70 FR 73437 (December 12, 2005) and accompanying Issues and Decision Memorandum at Comment 8 (“Softwood Lumber from Canada”).

¹¹⁰ See, e.g., *SSSSC from Mexico* at Comment 8 and *Softwood Lumber from Canada* at Comment 8.

¹¹¹ See, e.g., *Softwood Lumber from Canada at Comment 8 and Polyethylene Terephthalate Film, Sheet, and Strip from the Republic of Korea: Final Results of Antidumping Duty Changed Circumstances Review and Reinstatement of the Antidumping Duty Order*, 73 FR 18259 (April 3, 2008) and accompanying Issues and Decision Memorandum at Comment 8 (“PET Film from Korea”).

¹¹² See Nippon’s January 20, 2016 Section D Questionnaire Response.

¹¹³ See Memorandum from Robert B. Greger to the File entitled “Verification of Nippon Steel & Sumitomo Metal Corporation in the Antidumping Duty Investigation of Hot-Rolled Steel Flat Products from Japan,” dated May 16, 2016 (“Cost Verification Report”) at 2.

¹¹⁴ *Id.*, at 2.

¹¹⁵ See, e.g., *Certain Orange Juice from Brazil: Final Results of Antidumping Duty Administrative Review*,

practice because it is expected that a producer will periodically replace production equipment and, in doing so, will incur miscellaneous gains or losses. Replacing or disposing of production equipment is a normal and necessary part of doing business. The Department includes such gains and losses from the routine disposal of assets in G&A expense, rather than as a manufacturing expense, because the equipment, having been removed from the production process prior to the sale or disposal, is not an element of production when the disposal or sale takes place. Rather, it is simply a miscellaneous asset awaiting disposal. The gains or losses on the routine disposal or sale of assets of this type relate to the general operations of the company as a whole because they result from activities that occurred to support on-going production operations. In short, it is a cost of doing business. The Department's approach for these types of gains and losses is to allocate them over the entire operations of the producer.¹¹⁶

Therefore, for the final determination, we have adjusted the Nippon Group's G&A expense ratio to include the losses on inactive facilities.

JFE Group

Comment 14: Whether the Department Erred in Applying Adverse Facts Available to Certain Downstream Home Market Sales

JFE Group Argues

- From the outset of the investigation, JFE has indicated that it was not possible to provide an extremely small amount of sales due to linking difficulties because such information is not kept in the ordinary course of business. The decision to apply AFA suffers from several errors. First, it was impossible to provide the linking information as it is not kept in the ordinary course of trade.
- Second, JFE provided all available information. Thus, the appropriate approach is to use facts-available, not adverse facts available, and JFE should not be punished.
- Third, the reporting by the JFE Group is identical to that used in prior investigations of Kawasaki Steel Corporation, JFE's predecessor company, where the inability to link sales of processed product to "mother coil" was verified and accepted by the Department. It is highly arbitrary for the Department to reverse course, without explanation, for the exact same fact pattern for the exact same company.
- The Department should use the sales to these companies rather than the sales by these companies as facts available when calculating the margin.

Petitioner Argues

- Given the changes in technology since 1999 when JFE's predecessor Kawasaki was investigated, and the application of that technology to computerized accounting systems and record keeping, JFE Group's ability to link sales information should be far more

Determination Not To Revoke Antidumping Duty Order in Part, and Final No Shipment Determination, 76 FR 50176 (August 12, 2011) and accompanying Issues and Decision Memorandum at Comment 7 ("*Orange Juice from Brazil*"); *SSSSC from Mexico* at Comment 8; and, *Softwood Lumber from Canada* at Comment 8.

¹¹⁶ See, e.g., *Orange Juice from Brazil* at Comment 7 and *Softwood Lumber from Canada* at Comment 8.

advanced. Regardless, the Department's findings must be based on record evidence in this case and not facts from 1999.

- The specific facts in this investigation demonstrate that at no time throughout this proceeding JFE has provided a substantive explanation and clear record evidence why the linkage back to JFE is apparently lost by certain of its affiliated resellers. Moreover, JFE's explanations and actions regarding its apparent inability to provide downstream sales have been inconsistent.
- Neither the facts nor the law on this issue have changed, and thus the Department should continue to apply partial AFA to these affiliated resellers.

Department Position:

The Department properly applied AFA after its review of the information on the record. In the *Preliminary Determination*, the Department stated:

In a supplemental questionnaire, the Department requested the JFE Group to confirm that it had provided a full list of affiliated parties that resold subject merchandise in the home market and to identify all affiliated resellers that re-sold hot-rolled steel sourced from JFES, JFE Shoji, or any of JFE Shoji's subsidiaries.¹¹⁷ In its response the JFE Group explained that sales to certain affiliated resellers are an extremely small quantity of home market sales, and the JFE Group is reporting all its sales to these companies, rather than by the affiliated companies that resell, based upon its request to exempt the reporting of their downstream sales.¹¹⁸ The Department then requested the JFE Group to conduct an arm's length analysis and provide the downstream sales of those affiliated resellers that fail the arm's length test.¹¹⁹ The JFE Group responded with regard to two of the affiliated reseller's customers that the sales were a small quantity of home market sales and due to the short amount of time to prepare its response, the JFE Group was not reporting the sales for the two affiliated customers.¹²⁰

Because the JFE Group has not provided these sales, the Department is unable to further assess or analyze these sales. Therefore, the Department preliminarily determines to apply facts available pursuant to sections 776(a)(1) and (2)(A) and (C) of the Act because we find that necessary information is not available on the record of the investigation and that the JFE Group withheld significant information and significantly impeded the proceeding.¹²¹

The argument the JFE Group now makes that it had informed the Department at the outset that it would not be able to provide downstream sales due to linking difficulties were not specific to these two affiliated reseller's customers. As noted above, when the Department asked for the downstream sales of specific resellers' customers that failed the arm's length test, the JFE Group

¹¹⁷ See Department's Supplemental Section A Questionnaire to JFE Group, dated December 21, 2015 at question 6; see also Department's Supplemental Sections A-C questionnaire, dated January 29, 2016 at question 10.

¹¹⁸ See JFE Group Supplemental Section A Questionnaire Response Part 1, dated January 4, 2016 at 7.

¹¹⁹ See Department's Supplemental Sections A-C Questionnaire, dated January 29, 2016 at question 10.

¹²⁰ See JFE Group Supplemental Sections A-C Questionnaire Response Part 2, dated February 16, 2016, question 10 at 10-11 and footnote 6.

¹²¹ See *Preliminary Determination* and PDM at 18-19.

acknowledged that these customers had failed the arm's length test and stated "Due to the short amount of time permitted to prepare this response and the miniscule amount of POI hot-rolled sales that occurred, JFE is not reporting the sales for the two affiliated customers..."¹²² This statement is not indicative of not having the data available as the JFE Group now argues, but rather a clear statement that it was not providing the data; nor did the JFE Group request an extension to provide the data. Thus, the Department found it appropriate to apply AFA because the JFE Group did not cooperate to the best of its ability, and we continue to do so for the final determination.

With regard to the JFE Group's argument that the reporting by the JFE Group is identical to that used in prior investigations of Kawasaki Steel Corporation (JFES' predecessor company), where the inability to link sales was accepted by the Department, we note again that the JFE Group's response when requested for the specific information in the instant investigation was "Due to the short amount of time permitted to prepare this response and the miniscule amount of POI hot-rolled sales that occurred, JFE is not reporting the sales for the two affiliated customers..."¹²³ The JFE Group did not explain the specific difficulties it was having with regard to these two resellers, but rather because of the short amount of time within which to respond and the miniscule amount of sales. Decisions made with regard to Kawasaki were based on record evidence submitted in the context of that proceeding, and any comparison to the record of this proceeding which is 16 years apart, is not only not possible but not relevant. Further, there is nothing binding on the Department to simply follow what was done with Kawasaki. Rather, the Department must first weigh the facts presented on the record of this investigation when making its determination. As detailed in the *Preliminary Determination*, and hereby incorporated into this final determination, the JFE Group did not provide the downstream sales at issue and also did not ask for an extension of time to provide the information.

With respect to the JFE Group's argument that the Department should use the sales to these companies rather than by these companies, the Department's regulations and initial questionnaire make clear the treatment of sales to affiliated parties. In accordance with section 351.403(c) of the Department's regulations, we include home market or third-country affiliated party sales in our analysis only if the respondent's sales are made at "arm's length."

Comment 15: Whether Adverse Facts Available is Warranted for Other Unreported Downstream Sales

Petitioner Argues

- In the *Preliminary Determination*, the Department applied partial AFA because JFE did not act to the best of its ability to provide certain downstream sales. However, the Department did not address JFE's failure to report sales of JFE Shoji's affiliated resellers.
- Under sections 776(a)(1) and (2) and 776(b) of the Act, the Department may use facts otherwise available in reaching the applicable determination and an adverse inference if a party failed to cooperate to the best of its ability. The SAA explains may employ an

¹²² See JFE Group Supplemental Sections A-C Questionnaire Response Part 2, dated February 16, 2016, at 11 footnote 6.

¹²³ *Id.*

adverse inference “to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had fully cooperated.” Further, affirmative evidence of bad faith on the part of a respondent is not required before the Department may make an adverse inference.

- As detailed in the *Preliminary Determination*, several affiliated resellers fail the arm’s length test. Therefore, the Department should apply partial AFA to these sales as it did with certain other downstream sales.
- JFE has repeatedly maintained that it is not necessary to run an arm’s length test because these sales are not relevant. In a supplemental questionnaire the Department warned JFE that it would be required to provide downstream sales if the results of the arm’s length test changed. The Department also repeated its initial instructions noting that AFA may be applied where sales to the first unaffiliated party are not provided.
- Despite clear indications that JFES and JFE Shoji would likely be collapsed, and a clear reminder of AFA, JFE continued to maintain that the downstream sales were not relevant.
- In an attempt to placate the Department and seemingly lessen the impact of an AFA determination, JFE apparently decided to provide some downstream sales but not all.
- JFE may likely rebut that it is unable to provide downstream sales because of its inability to link to JFES coil. Yet, JFE has never provided substantive explanation and clear record evidence why the linkage is not possible.
- Moreover, JFE ultimately provided downstream sales for certain resellers that it initially stated were not possible to provide due to inability to link. JFE asserted that these certain resellers are representative of all other resellers where the linkage is lost. Thus, JFE should be able to provide the downstream sales for the other resellers.
- In keeping with the *Preliminary Determination*, the Department should likewise apply AFA to these resellers as well, applying as AFA for each transaction the highest home market price JFE reported.

JFE Group Argues

- AFA can only be applied if a respondent failed to comply with a request for information. The Department never indicated it would be collapsing JFES and JFE Shoji until the *Preliminary Determination*, nor did it request the downstream sales of JFE Shoji.
- To support the AFA request, petitioner creates an elaborate alternative history which is not true. The record shows otherwise -- the Department never indicated it was contemplating collapsing or request the downstream sales. There is no basis for petitioner’s claims.
- Petitioner itself appears to have been surprised that collapsing occurred. At no point in the proceeding, including its pre-preliminary determination comments did petitioner request the two companies be collapsed.
- When petitioner commented on requesting downstream sales, it only requested direct downstream sales of JFES. The reason is clear that petitioner itself accepted that such sales were not relevant on a non-collapsed basis.
- The Department affirmatively stated that it was relying on the application of the arms-length test and it might request downstream information in the future. However, at no point did the Department request the downstream sales in question.
- It would be improper to apply facts available because the two sales patterns are not analogous. The Department applied AFA to sales that failed the arms-length test. The

situation is the exact opposite here.

- The Department's practice and regulation state that the Department normally will not require reporting of home-market sales that are less than five percent of the total. The aggregate total of the sales is below the five-percent threshold. Further, the majority sales are unlikely matches as they are further processed and sold at a different level of trade.
- The Department not only did not request the downstream sales, it affirmatively stated that JFE was not required to submit such information at that time.
- Further, the Department cannot use AFA to punish JFE for not providing downstream sales information it does not possess. JFE has explained numerous times that sales tracing information to identify the merchandise and apply the DOC product characteristics was not available. Moreover, the Department verified the missing linkage in its sales verification.
- JFE timely notified the Department of its difficulties in reporting downstream sales and also provided alternatives which approach the Department has used before.
- JFE has acted to the best of its ability and provided all information that was requested, including even some downstream sales information that was not requested. The Department should use a facts available approach, using the prices to those affiliated customers found to be at arms-length, and disregarding those transactions found not to be at arms-length. This approach is consistent with prior practice. Alternatively, the selling prices to the downstream affiliated resellers should be used as if they were sales to unaffiliated customers. Choosing a single high aberrational sale price as a benchmark, as petitioner suggests, would be punitive.

Department Position:

We are not applying AFA to the JFE Shoji downstream sales in question in this final determination as the Department did not specifically request this information. Although the Department had asked JFE to be prepared to provide the information if required, the Department did not make such a request. Thus, there is no basis upon which to resort to AFA for this information because it cannot be said that the JFE Group failed to cooperate to the best of its ability. While the Department did apply AFA to certain downstream sales in the *Preliminary Determination* for certain companies,¹²⁴ in that instance the record demonstrates that JFE failed to cooperate to the best of its ability by not providing the information requested, and thus, AFA was warranted. With regard to these downstream sales, because the Department did not request the information, we find there is no basis to apply AFA. Regardless, of whether JFE attempted to placate the Department and provide some downstream sales for some resellers as petitioner contends, the fact remains that the information with regard to these specific resellers was not requested and thus we cannot find JFE to be uncooperative.

We are not addressing JFE's contention on whether the sales patterns are analogous, as this argument is moot.

¹²⁴ See *Preliminary Determination* and PDM at 18.

Comment 16: Whether Shoji America's Indirect Selling Expense Should be Increased

Petitioner Argues

- The record demonstrates that the indirect selling expense reported by JFE was incorrect. The new, higher, indirect selling expense verified by the Department should be used for the final determination.

JFE Group Argues

- JFE agrees that the corrected figures should be used to calculate JFE Shoji America's indirect selling expense and provides SAS program code to implement the change.

Department Position:

We have used the indirect selling expense as verified by the Department and detailed in the CEP verification report.¹²⁵

Comment 17: Whether Shoji America's Freight Expense Should be Increased

Petitioner Argues

- The record demonstrates that Shoji America's reported freight expense was incorrect or incomplete. The new, higher, freight expense should be used for the final determination.

JFE Group Argues

- The freight expense verified by the Department was for a single U.S. sale, on which an additional unusual charge was incurred. JFE agrees this expense should be taken into account and provides SAS program code to implement the change.

Department Position:

We have used the freight expense as verified by the Department and detailed in the CEP verification report.¹²⁶

Comment 18: Whether Verification Minor Corrections Should be Incorporated into the Final Determination

Petitioner Argues

- The Department should utilize the corrections presented at the three separate on-site verifications for the final determination.

JFE Group Argues

- JFE agrees minor corrections should be incorporated into the final determination, and towards that end has already provided corrected sales and cost files.

¹²⁵ See Memorandum to the File "Verification of the Sales Response of JFE Shoji America, Inc. in the Antidumping Investigation of Certain Hot-Rolled Flat Products from Japan" dated June 3, 2016 at 2.

¹²⁶ *Id.*

Department Position:

The Department has incorporated the minor corrections from verification for the final determination. Details of these changes are provided in the JFE final calculation memorandum.¹²⁷

Comment 19: Whether the Department Erred by Resetting JFES's Reported Home Market Credit Expense*JFE Group Argues*

- When collapsing JFES and JFE Shoji, the Department inadvertently set the credit expenses to zero for not only JFES sales to JFE Shoji but JFES sales to third parties.
- The collapsed entity incurred credit expenses on JFES' sales to third parties as submitted and verified by the Department, and should be corrected.

Petitioner Argues

- Petitioner agrees with correcting the credit expenses, but contends that JFE provides only half of the solution by not mentioning the additional inventory carrying costs.
- The Department determined that inventory carrying costs for JFE Shoji sales were equivalent to the credit expenses incurred by JFES on its sales to JFE Shoji. Since there is no way to link JFES sales to JFE Shoji with sales by JFE Shoji, there is no way to know the exact credit JFES incurred for each sale by JFE Shoji.
- The Department should have calculated JFES's reported average credit expenses for sales to JFE Shoji and applied that expense to sales by JFE Shoji.

Department Position:

We have revised the credit expenses for JFES's sales to third parties for the final determination. In the *Preliminary Determination*, the Department's intent was to remove credit expenses only for the intercompany sales between JFES and JFE Shoji while collapsing the two companies and treat these expenses as inventory carrying costs. We have, therefore, corrected this error for the final determination. We also agree with petitioner that since there is no way to link these expenses to sales made by JFE Shoji, we have calculated an average credit expense on JFES sales to JFE Shoji and applied that expense as inventory carrying costs on sales made by JFE Shoji.

Comment 20: Whether the Department Should Apply a CEP Offset on JFE's CEP Sales*JFE Group Argues*

- Collapsing JFES and JFE Shoji should not have any impact on whether the use of a CEP offset is appropriate. The collapsed entity performs significant selling activities on home market sales that are not reflected in the CEP sales price. Therefore, the home market level-of-trade (LOT) is more advanced than the CEP LOT.
- The Department's regulations and practice indicate that a CEP offset is warranted.¹²⁸

¹²⁷ See JFE Final Determination Calculation Memorandum.

¹²⁸ See *Stainless Steel Sheet and Strip in Coils from France: Final Results of Antidumping Administrative Review*, 70 FR 7240 (February 11, 2005) and accompanying Issues and Decision Memorandum at Comment 1.

- Shoji America performs significant selling activities in the U.S. market on CEP sales that are performed by the collapsed entity in the home market. The home market LOT is necessarily more advanced than the CEP LOT because Shoji America's activities are excluded in the determination of the LOT pursuant to section 772(d) of the Act.
- The regulations state that in determining the basis for identifying LOTs, the Department will identify the LOT for the CEP LOT based on the starting price, as adjusted under section 772(d) of the Act, which deducts selling expenses associated with economic activities occurring in the U.S. Therefore, the Department should not consider the selling functions performed by the U.S. affiliate when analyzing the CEP LOT because those selling functions associated with sales to the first unaffiliated U.S. customer, are deducted from the CEP selling price.
- By grouping together every JFE selling company in its analysis, the Department effectively assumes away the entire object of its CEP offset inquiry, which is to determine whether Shoji America is undertaking additional selling activities that relieve JFES of selling activities that it undertakes in the home market, such that it is operating at a different distribution stage. If the companies are considered as a collective whole, then the answer will appear to be operating at the same distribution stage.
- Given the limited nature of what is required for JFES to accomplish its EP sales, it is readily apparent Shoji America performs qualitatively and quantitatively more selling functions that relieve JFES of selling activities it accomplishes on its home market sales.
- Regardless of whether the Department considers these companies as a single entity, it must consider the discrete selling activities that occur by the CEP entity (Shoji America) and the home market selling entity. Several activities performed in the home market LOT are handled by Shoji America for the U.S. market (and have been deducted from the US price); therefore, the CEP LOT does not include any of these activities. The differences are significant and merit the use of a CEP offset.

Petitioner Argues

- JFE fundamentally misunderstands the basis for the Department's determination to deny the CEP offset. The decision had nothing to do with collapsing JFES and JFE Shoji, treating the CEP entity as part of a single JFE entity, or with the incorrect interpretation of application of section 772(d) of the Act. Rather, the Department's analysis had everything to do with the record information regarding JFE's channels of distribution and the selling activities performed in each of those channels.
- The Department considers not only whether a particular activity was performed, but the degree to which that activity was performed. Identifying no significant differences the Department concluded there was no basis for a LOT adjustment or CEP offset. This decision is in accordance with statute and record evidence.
- The Department reference to selling functions "in Japan" with regard to its U.S. LOT analysis clearly indicates the Department did not consider selling activities performed by the U.S. affiliate Shoji America. There is no indication the Department considered Shoji America's selling activities and no evidence that it acted contrary to section 772(d), or somehow was confused by collapsing the two companies.
- JFE's chart at Exhibit A-12 indicates the level of responsibility the entity had for performing the selling activity and has nothing to do with the degree to which that

activity was performed. The Department's focus is clearly on the types of selling activities performed.

- The Department examined and observed no inconsistencies with the selling activity information at verification. Record information on selling activities remain unchanged, and the Department's preliminary decision remains reasonable and in accordance with statute.

Department Position:

We have continued to not grant a CEP offset adjustment to JFE for the final determination. Contrary to JFE's arguments, the Department examined the collapsed entity's selling functions in the home market and in the United States in making its decision. As stated in the *Preliminary Determination*, we determined that the JFE Group made sales through three channels of distribution (*i.e.*, direct sales to unaffiliated trading companies (J-1), sales to unaffiliated customers through affiliated trading companies (J-2), and direct sales to affiliated customers (J-3)). The JFE Group performed the following selling functions for sales to all home market customers: demand forecasting; information on market potential and customers; developing sales strategy; advertising/marketing services; visiting customers; promoting products; technical advice/product brochures; warranty and other after-sales services; entering orders into the computer system; claim reports; technical advice regarding use of product; pricing; scheduling production and delivery; inventory maintenance; administrative support; arranging transportation; pre-sale warehousing; freight and delivery arrangements; sales processing; rebate administration; and collection payments/follow-up on unpaid customer invoices.¹²⁹ For our analysis, we grouped the selling activities into four selling function categories: 1) sales and marketing; 2) freight and delivery services; 3) inventory maintenance and warehousing; and 4) warranty and technical support. Based on these selling function categories, we found that the JFE Group performed the same selling functions at the same relative level of intensity for its sales in the home market.

For the U.S. market, we examined the JFE Group's sales for two channels of distribution: EP sales through unaffiliated trading companies for sales to U.S. customers (US-1); and CEP sales through JFE Shoji America to unaffiliated customers (US-2). As noted in the *Preliminary Determination*, we did not take into consideration the CEP sales through JFE Shoji America to affiliated customer CSI (US-3).¹³⁰ Further, we did not consider the functions performed by Shoji America for our analysis, as JFE appears to contend. We found that the JFE Group performed virtually the same selling functions as the home market with very limited exceptions. Because we found that there were no significant differences in selling activities performed by the JFE Group for channels US-1 and US-2, we determined that these sales are at the same LOT.

Further, we compared the U.S. LOT to the home market LOTs and found that the selling functions that the JFE Group performed for its home market customers were not significantly different than those performed for its U.S. customers. The differences were not sufficient to determine that the U.S. LOT is different from the Home Market LOT. Consequently, we

¹²⁹ See JFE IQR Section A at 33-34 and Exhibit 12. See also JFE Supplemental Section A Part 1, dated January 4, 2016 at 13-14.

¹³⁰ See *Preliminary Determination* and PDM at 28.

determined that the JFE Group's sales to the United States and home market during the POI were made at the same LOT and, as a result, no LOT adjustment is warranted. Further, we did not find the JFE Group's home market LOT to be at a more advanced stage of distribution than its U.S. LOT, and thus a CEP offset was not warranted.

In order to grant a CEP offset adjustment to normal value (NV), the Department must first determine that the NV LOT is more remote from the factory than the CEP LOT by examining whether sales are made at different marketing stages, as set forth in section 773(a)(7)(B) of the Act and 19 CFR 351.412(f). Once this determination is made, the Department examines whether there is available data to permit a LOT adjustment, in accordance with section 773(a)(7)(B) of the Act. As explained above, upon examination of JFE's information we determined that the selling activities conducted in both markets were generally the same with limited exceptions. Furthermore, most of these activities were performed at relatively the same level of intensity in both markets as provided by JFE in its questionnaire responses.¹³¹ While there may be some differences in selling functions, these differences are limited, and are not sufficient to find the NV LOT constitutes a more advanced stage of distribution than the CEP LOT. Therefore, for the final determination, we continue to find that a CEP offset adjustment to NV is not warranted.

Comment 21: Whether the Department Should Exclude Sales by CSI from its Antidumping Calculation

JFE Group Argues

- JFE's request at the outset to exempt reporting of California Steel Industries' (CSI) sales was reasonable not only because of the small amount of such sales, but also because the Department had excused reporting in analogous circumstances where the Department stated it was appropriate to exempt such reporting.¹³²
- In response to JFE's letter requesting exemption, petitioner submitted a case in which the Department turned down a request for exemption. It is notable that counsel for petitioner in that case argued that an exemption was warranted, whereas in this case the same counsel protests against a similar request by JFE, which cannot be given much credibility.
- In some cases the Department has turned down requests while in other cases it has proceeded in the opposite fashion. In light of the fact that the Department does not have a consistent approach, using AFA in this instance makes no sense.
- To apply a facts-available approach to CSI which timely requested an exemption, while exempting other comparably situated companies, makes it appear the Department is picking and choosing situations where it will punish respondents. The Department should reverse its decision with regard to CSI's sales.

¹³¹ See JFE IQR Section A at 33-34 and Exhibit 12. See also JFE Supplemental Section A Part 1, dated January 4, 2016 at 13-14

¹³² See *Certain Crystalline Silicon Photovoltaic Products from Taiwan: Affirmative Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 79 FR 44395 (July 31, 2014). See also *Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Static Random Access Memory Semiconductors from the Republic of Korea*, 62 FR 51437 (October 1, 1997).

Petitioner Argues

- All of the relevant facts and arguments with regard to CSI's sales were on the record at the time of the Preliminary Determination, when the Department decided to apply AFA due to JFE's non-cooperation. JFE's case brief provides no new facts or legal analysis that suggests a reversal on this issue is warranted.
- The Department's practice in situations analogous to the situation faced by CSI/JFE is to require the reporting of further manufacturing data, and the Department should continue to apply AFA with respect to CSI's refusal to provide further manufacturing data.

Department Position:

We continue to apply AFA to CSI's further manufactured sales for the final determination. As an initial matter, we note that neither the Act, nor the Department's regulations direct the Department to disregard or exempt a respondent from reporting further manufactured sales based on volume.

In its request for exemption, the JFE Group argued that the granting exemption was appropriate because: 1) the sales at issue were a small proportion of its total sales to the United States; 2) reporting such sales would impose a significant burden on the Department and itself; and 3) the elimination of such sales would not be distortive to any antidumping margin calculated for its sales.¹³³ Although the record confirms that the sales at issue are a small proportion the JFE Group's total U.S. sales, the JFE Group's request provides no detail with respect to the "significant burden" reporting these sales would impose on it beyond the claim that it would be "difficult to determine the value of the underlying hot-rolled steel."

Moreover, the JFE Group offered no basis for its claim that elimination of these sales would not lead to distortions or inaccuracies in the antidumping duty margin calculated for the JFE Group. It is recognized by the CIT and the CAFC that the Department's responsibility in an Antidumping proceeding is to calculate "margins as accurately as possible."¹³⁴ The CAFC recently clarified that the case law and statute "teach that a Commerce determination . . . is 'accurate' if it is correct as a mathematical and factual matter, thus supported by substantial evidence."¹³⁵ Requesting further-processing information on CSI's sales is a necessary element to determine an accurate dumping margin for JFE, and by refusing to provide such information, JFE did not cooperate to the best of its ability, and therefore adverse facts available is warranted.

We note that the initial questionnaire sent to JFE notifies them that:

You are not currently required to respond to section E (Cost of Further Manufacturing or Assembly Performed in the United States). However, we may request a response to this

¹³³ See JFE Letter "Certain Hot-Rolled Steel Flat Products from Japan (A-588-874): Request for Exemption from Reporting Further-Manufactured U.S. Sales," dated November 25, 2015.

¹³⁴ See, e.g., *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (CAFC 1990).

¹³⁵ See *Nan Ya Plastics Corp. v. United States*, 810 F.3d 1333, 1344 (citing *Essar Steel Ltd. v. United States*, 678 F.3d 1268, 1275-76 (Fed. Cir. 2012) and *KYD, Inc. v. United States*, 607 F.3d 760, 768 (Fed. Cir. 2010))

section if we determine, based on your response to section A, that we require the information to account for further-processing expenses incurred in the United States.¹³⁶

Thus, JFE was informed that, subsequent to an analysis of Section A by the Department, they may be required to respond to Section E. The Department required JFE to respond to Section E in question 51 of its January 29, 2016, supplemental questionnaire.¹³⁷ In its February 16, 2016, response to the Department, JFE declined to provide a response to Section E, claiming that it would not be possible “within the time limits provided.”¹³⁸ However, JFE fails to explain how much time would be needed to submit Section E, and it does not request an extension of the relevant deadline.

We disagree with JFE that the Department has not applied a consistent approach in exempting further manufactured sales. While examples of such requests for exemption have been granted or denied in the past, we note that the analysis needed to reach a decision requires an examination of the facts on the record. Indeed, the questionnaire states that “based on your response to section A,” the Department may require respondents to submit a Section E response. Thus, the analysis is tied to the information contained in Section A, and subsequent supplemental responses to Section A. This makes any decision to grant or deny an exemption a case-by-case decision. The facts in the case supported requesting information on further manufactured sales by CSI because the information was needed to calculate an accurate margin for JFE.

Finally, we note that JFE does not dispute that it did not respond to a request from the Department, nor did it further state that it attempted to contact the Department to reconsider its request or extend any relevant deadline.¹³⁹ Thus, the application of AFA was warranted pursuant to the statute because the Department lacks the information needed to determine the U.S. prices of these sales and JFE was uncooperative because it did not provide the requested information.

Comment 22: Whether the Department Should Continue to Apply AFA to the Cost of Inputs Supplied by JFE Shoji

JFE Group Argues

- The Department repeatedly stated that JFE Shoji should provide the input mark-up information *only if* JFE believed it appropriate to collapse JFES and JFE Shoji.

¹³⁶ See Department’s initial questionnaire to JFE dated October 27, 2015.

¹³⁷ See Department’s supplemental questionnaire “Hot-Rolled Steel Flat Products from Japan: Antidumping Duty Investigation – JFE Steel Corporation Second Supplemental Questionnaire,” dated January 29, 2016, question 51.

¹³⁸ See JFE Group Supplemental Sections A-C Questionnaire Response Part 2, dated February 16, 2016, response to question 51.

¹³⁹ We note that in the 1999 LTFV of Hot-Rolled Steel from Japan, Kawasaki Steel Corporation (KSC), the predecessor company to JFE, also declined to provide information on further manufactured sales by CSI to the Department, and was found not to have cooperated to the best of its ability, and facts available with an adverse inference was used to calculate KSC’s margin for these sales. That JFE now would think the same actions with even less information on the record would permit the Department to grant an exemption to report sales to CSI is misplaced. See *Notice of Final Determination of Sales at Less Than Fair Value: Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From Japan*, 64 FR 24329 (May 6, 1999), at Comment 31.

- No affiliated input cost information was missing, and the Department’s investigation was not “impeded” in any way.
- It does not believe that it is appropriate to be collapsed; further JFE stated in both of its responses that its cost data was submitted on a non-collapsed basis.
- The Department failed to provide any notice to JFE that there was any deficiency in its response, as required by the statute. Further, JFE’s counsel sought clarification of the Department’s confusing supplemental question, which the Department refused to discuss or clarify, as it is required to do. Thus, there is no basis for AFA.
- Even if the Department resorts to facts available, there is no basis to use AFA given the misleading way in which the information was requested and failure to clarify. As facts-available, submitted input cost information should be used without application of AFA.

Petitioner Argues

- JFE by its own submissions of consolidated section D response and certifications for both companies was requesting that the Department collapse the two companies.
- The Department’s requests for costs of inputs and profit mark-up were both clear and warranted. JFE intentionally misreads the question by reading-in/inserting the word “only” (*i.e.*, as in, report this data “only” if JFE continues to believe...). However, the Department did not use the word “only.” It is perplexing why JFE refused to provide the data despite repeated requests.
- There is no record basis to claim that missing cost data would have been favorable.
- The Department satisfied the procedural requirement applying AFA as JFE was given two or three bites of the apple.

Department Position:

We have not applied AFA to the cost of inputs supplied by JFE Shoji in this final determination.

In its initial questionnaire responses, JFES and JFE Shoji provided a single combined response, as instructed, and referred to themselves collectively, as JFE.¹⁴⁰ In their section D questionnaire response, JFES and JFE Shoji referred to themselves again as collectively JFE.¹⁴¹ In a supplemental cost questionnaire dated January 15, 2016, we informed JFE that “if it continued to believe that JFES and JFE Shoji should be collapsed,” JFE should revise JFE’s COP data to include a separate data field that reports the per-unit adjustment necessary to eliminate JFE Shoji’s mark-up or loss on its sales of inputs to JFES.¹⁴²

On February 5, 2016, in a response to the supplemental cost questionnaire, JFES stated that JFE Shoji is not a producer of hot-rolled steel and that its section D response is based on JFES as the producer, not collectively as JFE.¹⁴³ JFES asserted it was responding to this cost supplemental questionnaire only on behalf of itself, as the producer, and that it did not include any information on behalf of JFE Shoji. Neither JFES nor JFE Shoji provided the markup information on their joint transactions as we requested in our January 15, 2016, Supplemental Section D

¹⁴⁰ See JFE Section A Questionnaire Response dated November 23, 2015, cover letter, and at A-2.

¹⁴¹ See Section D Questionnaire Response, dated December 17, 2015.

¹⁴² See Supplemental Section D Questionnaire, dated January 15, 2016.

¹⁴³ See JFE Section D Supplemental Response, dated February 5, 2016, cover letter and question 3 at 2.

questionnaire. In a supplemental cost questionnaire dated February 10, 2016, we requested the information for a second time, noting that JFES indicated that its refusal to provide the information rests on the fact that JFE Shoji was not a producer.¹⁴⁴ Thus, we explained in our second request that the Department's practice is to treat companies that meet the criteria of 19CFR 351.401(f) as a single entity, including in some circumstances non-producers, and we referenced case precedence.¹⁴⁵

In the *Preliminary Determination*, we made the decision to treat JFES and JFE Shoji as a single entity, and applied AFA to JFE with respect to the cost of inputs supplied by JFE Shoji to JFES, by adjusting the transfer prices between JFE Shoji and JFES by the single highest transactions disregarded adjustment calculated. In situations where the Department treats two entities as a single entity, we have not applied the transactions disregarded rule to transactions between the entities and instead have eliminated the inter-company profit or loss on those transactions.¹⁴⁶ It was this information that we requested but did not obtain from JFE.

Our review of the record indicates that JFES and JFE Shoji responded with a single response from the start of the proceeding, with the exception of the supplemental cost responses, at which point it identified itself solely as JFE Steel (JFES). In the *Preliminary Determination*, the Department interpreted the companies' description of themselves as "collectively JFE" to mean that it was JFE's position that both companies were responding as a single entity, at least for U.S. Sales purposes. The record shows that JFES and JFE Shoji never requested to be collapsed, nor did either state a belief that they should be treated as a single entity. Since the *Preliminary Determination*, JFE has argued that the cost supplemental question at issue was conditional on its purported belief that JFES and JFE Shoji should be treated as a single entity. We note that JFES and JFE Shoji sought clarification from the Department on the question at issue.¹⁴⁷

While we have not reconsidered our preliminary decision to treat JFES and JFE Shoji as a single entity for this final determination, we note that the Department did not request the information at issue after it determined to treat the companies as a single entity. Therefore, we find that there is

¹⁴⁴ *Id.*, at cover letter.

¹⁴⁵ The questionnaire referenced *Frozen Concentrated Orange Juice From Brazil: Final Results of Antidumping Duty Administrative Review*, 65 FR 60406 (October 11, 2000) and accompanying Issues and Decision Memorandum at Comments 1, (Where the Department treated two producers and a trading company as a single entity, explaining that, "Based on this analysis, we found that: 1) these companies had production facilities for similar or identical products which would not require substantial retooling in order to restructure manufacturing priorities; and 2) there was a significant potential for the manipulation of prices or production between these companies. Consequently, we treated them as a single entity and calculated a single cash deposit rate for them for purposes of the preliminary results. Specifically, we combined Citrovita's POR sales and cost data with the data reported for Cambuhy and Cambuhy Exportadora beginning with the time period that affiliation began." We further stated in that case, "Regarding pricing, we agree that neither Cambuhy nor Cambuhy Exportadora had sales to the United States during or after September 1998. However, the presence or absence of U.S. sales is not determinative when deciding whether it is appropriate to collapse affiliated producers. Rather, the relevant factor is whether the potential for manipulation of pricing exists between these affiliated companies.").

¹⁴⁶ See *Certain Steel Nails from the United Emirates: Notice of Final Determination of Sales at Not Less Than Fair Value*, 73 FR 33985 (June 16, 2008), and accompanying Issues and Decision Memorandum at Comment 10.

¹⁴⁷ See JFE Cite Brief at 3. JFES's use of individual email for purposes of communicating with the Department on case issues was not appropriate, thus the Department shutdown the informal inquiry by reiterating that the questionnaire stands as written.

no basis to find that JFE failed to cooperate to the best of its ability and the application of AFA is not warranted. Thus, for the final determination, as facts available, we estimated as facts available the cost of the inputs supplied by JFE Shoji to JFES, by adjusting the transfer prices between JFE Shoji and JFES by the average of the transactions disregarded adjustments.

Comment 23: Whether the Department Erred in Applying the Transactions Disregarded Adjustment

Petitioner Argues

- Department erred in applying its transactions disregarded adjustment to only those suppliers whose inputs represented a certain percentage of total costs.¹⁴⁸ The Department should apply its adjustment to all affiliated suppliers that supplied inputs to JFES during the POI.
- Contrary to JFE’s allegations, the Department used facts available rather than AFA to adjust the reported transfer prices for those inputs purchased from unaffiliated suppliers where JFE alleges that market prices were not available.¹⁴⁹
- In calculating the FA adjustment, Department appropriately used only those comparisons where affiliated transactions were below market value rather than the weighted average percentage difference of affiliated transactions that were both above and below market value as argued by JFE.
- The Department's reliance on affiliated transactions below market value is not an adverse inference, but a reasonable assumption in accordance with the statute, the Department’s practice and the record evidence.¹⁵⁰
- Where there are clear indications that certain inputs from affiliated suppliers are obtained at below market prices, the Department normally, in the absence of the evidence to the contrary, assumes the same in regard to other inputs.¹⁵¹
- Contrary to JFE’s arguments, the Department evaluated the record with regard to each of the inputs to which it applied FA and found the information submitted by JFE - primarily financial statements of the affiliated suppliers - did not “adequately support or represent market price.” The fact that the affiliated suppliers may be profitable overall does not conclusively demonstrate profitability on sales of a particular input to a particular customer, particularly where that customer is an affiliated company.
- In response to JFE’s assertion that the data for a certain input purchased from a particular affiliated party was aberrational, the Department has long held in NME cases that the party claiming a surrogate value aberrant must provide evidence to show why a said surrogate value is inadequate, beyond citing to lower price points.¹⁵²

¹⁴⁸ See Petitioner Case Brief at 11-12.

¹⁴⁹ See Petitioner Rebuttal Brief at 8.

¹⁵⁰ See Petitioner Rebuttal Brief at 12-13.

¹⁵¹ Petitioner cites to *Oil Country Tubular Goods from the Republic of Korea*, 79 FR 41983 (July 18, 2014) (*OCTG from Korea*) and accompanying Issues and Decision Memorandum at Comment 12.

¹⁵² Petitioner points to *Final Results of Antidumping Duty Administrative Review: Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People’s Republic of China*, 76 FR 3086 (January 19, 2011) and accompany Issues and Decision memorandum at Comment 14-B.

- JFE simply asserts the data is aberrational because the transfer prices with affiliated suppliers are the lowest comparatively, thus generating the highest percentage differential and adjustment to TOTCOM. Yet, JFE compares this differential only to those for the other inputs on the record - all of which are products significantly different from the input in question. There is no record evidence and no basis to conclude that transactions between affiliated and unaffiliated suppliers of this input should have percentage differences similar to those for these other very dissimilar inputs.
- Petitioner’s claim that the Department should extrapolate its use of FA to even the smallest percentage of inputs obtained from affiliated suppliers.

JFE Group Argues

- The Department’s transactions disregarded FA adjustments in the Preliminary Determination failed to take into account that the information the Department requested did not exist and that JFE did in fact provide some probative information regarding the market price of the affiliated inputs, namely the financial statements of the affiliated companies.¹⁵³
- The Department erred in its statement that JFE “has not substantiated its claim to have paid a market price for the inputs where the Department relied on FA.” JFE provided, where available, the information required by the “transactions disregarded” rule, and JFE notified the Department that for certain inputs there was no comparison price information as JFES did not purchase those inputs from any unaffiliated suppliers.¹⁵⁴
- In prior determinations, the Department has determined that where the record is missing information, in a situation where the Respondent attempted to respond to the Department’s inquiries, any missing information should be filled in using facts available, without an adverse inference.¹⁵⁵
- JFE’s fact pattern is identical to that in *Cut-to-Length Plate from France* where the respondent provided the financial statements of the affiliated party to prove the arms’ length nature of the transactions at issue.¹⁵⁶ Consistent with *Cut-to-Length Plate from France*, the Department should use the reported transfer prices of those inputs from affiliated suppliers where JFE provided a financial statement as non-adverse FA.
- The Department’s FA adjustment for the six affiliated suppliers where JFE could not provide market prices ignored the four benchmark companies engaged in transactions that *were* at market prices.¹⁵⁷ Instead, the Department based its FA calculation solely on transactions with affiliates that were below market prices.¹⁵⁸
- An additional error in the comparison is that the Department made no attempt to consider whether the transactions in the benchmark were aberrational.¹⁵⁹ Including aberrational

¹⁵³ See JFE’s Case Brief at 32.

¹⁵⁴ *Id.*, at 22.

¹⁵⁵ JFE refers to *Final Determination of the Antidumping Duty Investigation of Barium Carbonate from the People’s Republic of China*, 68 FR 46577 (July 30, 2003) and accompanying Issues and Decision Memorandum at Comment 4.

¹⁵⁶ See *Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut-To-Length Carbon-Quality Steel Plate Products from France*, 64 FR 73143, 73147 (December 29, 1999).

¹⁵⁷ See JFE’s Case Brief at 34-35.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*, at 25-26.

pricing difference within the comparison benchmark, as was done in the Preliminary Determination, has no rational connection to the types of purchases being made by the six affiliated suppliers that could not provide market price data and equates to an adverse inference against JFE.¹⁶⁰

- The Department's adjustment double counts the impact of the aberrational difference, once when it adjusts upwards the cost of that input, and a second time when it uses the aberrational adjustment as part of the adjustment to the six affiliated suppliers where JFE could not provide a market price.¹⁶¹
- The affiliated party highlighted in petitioner's case brief is not involved in the manufacture of the MUC.¹⁶² Therefore, the transactions disregarded rule does not apply to these inputs.
- There is no basis for petitioner's claim that the Department should extrapolate its use of FA to even the smallest percentage of inputs obtained from affiliated suppliers. The transactions disregarded rule is written to give the Department discretion in its application. As such, it is reasonable for the Department to put in place a commonsense cut-off for which affiliated-input information it is going to seek and analyze as it did for the preliminary determination.¹⁶³ Furthermore, it would illegitimate for the Department to inflate the cost of inputs that fall below this threshold for the final determination, as suggested by petitioner.

Department Position:

We agree with JFE that the FA transactions disregarded adjustment is not intended to be punitive. As such, we included all transactions, not just those where market prices exceeded the transfer prices, in our FA transactions disregarded adjustment calculation. In addition, we applied the FA transactions disregarded adjustment to all affiliated party input transactions exceeding a certain threshold,¹⁶⁴ where market input prices were not available. Section 773(f)(2) of the Act, the transaction disregarded rule, does not require that we perform the arm's length analysis to all affiliated party transactions. Rather, we have discretion as to which transactions to test.

We disagree with JFE that any of the amounts calculated from their reported data were aberrational. All of the information reflected JFE's own data and represented its own transactions in the normal course of business. Simply because one such transaction represents the highest of all of the transactions does not in of itself make it aberrant. Moreover, an overall profit from a financial statement of an entity provides no information as to the arms-length nature of the individual transactions of the entity, or the range of markups or losses therein. JFE's reference to *Cut-to-Length Plate from France* is misplaced. In that case we determined that the submitted affiliate's financial statements did not prove the arm's length nature of the

¹⁶⁰ See JFE's Case Brief at 25-26.

¹⁶¹ See JFE's Case Brief at 25-26.

¹⁶² See JFE's Rebuttal Brief at 29.

¹⁶³ See JFE's Case Brief at 29-30.

¹⁶⁴ See Memorandum from Michael P. Martin to Neal M. Halper entitled Cost of Production and Constructed Value Calculation Adjustments for the Final Determination – JFE Steel Corporation, dated August 4, 2016 (“Final Cost Calculation Memo”).

affiliated transactions at issue. Lastly, we agree with the respondent that record evidence does not support petitioner's claim that a certain affiliate provided inputs associated with the production of the merchandise under consideration. As such, no adjustment is considered appropriate for transactions with this affiliate.

Comment 24: Whether the Department Should Adjust JFE's COM for Non-Prime Products

Petitioner Argues

- The Department should discontinue the adjustment it made at the *Preliminary Determination* for those non-prime products that JFE values at net realizable value in the normal course of business. The Department found at verification that they misinterpreted JFE's treatment of these products for reporting purposes and stated in the Cost Verification Report for JFE that "for purposes of the final determination it may be appropriate for the Department to discontinue its preliminary adjustment."¹⁶⁵
- The Department should continue to deny JFE's offset to its reported costs for those non-prime second-quality products resulting from the steel-making process.¹⁶⁶ However, in doing so, the Department should be aware that the reconciliation schedule in the Cost Verification Report for JFE indicates that JFE appears to be deducting and not adding the "JFE's Byproduct Adjustment" from the "Total Actual COM Prime MUC" in order to calculate its reported costs.¹⁶⁷ Therefore, for the final calculations, the Department should add the adjustment to JFE's costs.

JFE Group Argues

- The Department should discontinue the adjustment made at the preliminary determination for those non-prime products that JFE values at net realizable value as suggested by petitioner.
- The Department should reject petitioner's argument that JFE's costs should be adjusted for those non-prime second-quality products resulting from the steel-making process. JFE conservatively reported costs that were greater than were actually incurred. If the Department were to further increase costs by the adjustment suggested by petitioner, the net result would be the use of a cost file that overstates JFE's cost of production.

Department Position:

We have revised JFE's reported costs related to how it treated non-prime merchandise for the final determination. As we stated in the cost verification report,¹⁶⁸ we misinterpreted how JFE accounted for the costs associated with the production of non-prime merchandise. Accordingly, for the final results we eliminated the non-prime downward adjustment made at the preliminary determination.

¹⁶⁵ See Petitioner Case Brief at 14-15.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*, at 15.

¹⁶⁸ See JFE Cost Verification Report at 2.

We disagree with petitioner that we should deny JFE's reported offset to its reported costs for non-prime merchandise. JFE values its non-prime production at a standard net realizable value in their normal books and records. The remaining total costs (*i.e.*, total manufacturing cost less the amounts assigned to the non-prime merchandise) are allocated to production of prime merchandise in JFE's reported costs. We consider this treatment, which is in accordance with JFE's normal books and records, to be reasonable.

Petitioner claims that the verification report indicates that JFE appears to be deducting, not adding the non-prime byproduct adjustment in determining the reported costs, and accordingly should add such costs to the reported cost information. While we agree that JFE is deducting the costs associated with the production of non-prime by products, we disagree that such treatment is in wrong. JFE appropriately deducted the standard cost associated with the production of non-prime merchandise and allocated the remaining costs only to production of prime merchandise. The confusion appears to be the result of how the verification report was worded. At page 16 of the cost verification report we say that "the company added the byproduct offsets back to the actual COM of the reported prime merchandise." Since the byproduct offset is a negative, saying "added the byproduct offset back" was meant to mean it was subtracted, which is what JFE did. Accordingly, for the final results we do not consider it appropriate to make any adjustments to JFE's reported costs for non-prime products.

Comment 25: Whether the Department Should Increase JFE's COM for Reconciliation Differences

Petitioner Argues

- The Department should adjust JFES's reported costs for the final determination to account for the reconciliation difference between the total costs in JFES's inventory system and the summation of costs by JFES's production orders.¹⁶⁹

JFE Group Argues

- While petitioner correctly notes a small difference between JFES's inventory and production order data system, and the inventory system, differences of this magnitude are expected and do not represent unallocated or unassigned costs.¹⁷⁰
- If reconciliation differences are to be used to adjust costs as suggested by petitioner, this would mean the Department should be looking at the actual (overall) reconciliation difference which is a negative (but still small) reconciliation difference.¹⁷¹

Department Position:

We have adjusted JFE's reported costs for the unreconciled differences in the final determination.¹⁷² As noted in the JFE Cost Verification Report, the reconciliation of JFES's inventory system and production order data system show a difference as described by petitioner

¹⁶⁹ See Petitioner Case Brief at 12.

¹⁷⁰ See JFE's Case Brief at 31.

¹⁷¹ See JFE's Rebuttal Brief at 32.

¹⁷² See JFE Final Cost Memo at 2.

and concurred by JFE.¹⁷³ We disagree with JFE that the small difference in the reconciliation of the total actual COM of prime merchandise as per the production order data system and the total extended costs submitted by JFE in its cost data file negates the adjustment proposed by petitioner.¹⁷⁴ The reconciliation reflected in the JFE Cost Verification Report that was verified by the Department and to which JFE has not objected shows a difference that has no impact on the adjustment argued for by petitioner.¹⁷⁵

Tokyo Steel

Comment 26: Whether the Department's Refusal to Select Tokyo Steel as a Mandatory Respondent Is Unlawful

Tokyo Steel Argues

- As the only unexamined producer of the three involved in the investigation, Tokyo Steel is entitled to an individual dumping margin because, under section 777A(c)(2) of the Act, the Department is only authorized to limit the number of respondents examined for individual dumping margins when there is a “large number” involved in the investigation. Tokyo Steel cites prior CIT decisions that state “numbers ranging from three to eight do not constitute ‘large’ numbers.”¹⁷⁶
- There is no specific deadline for the decision on whether to employ the exception to limit examined respondents, as per section 777A(c)(2) of the Act. The Department’s respondent selection was determined so early in the process of the antidumping duty investigation (October 27, 2015), that it inhibited the Department’s analysis on the matter.
- The Department did not consider credible evidence that there were only five producers of Japanese hot-rolled steel, presented prior to respondent selection, but instead relied on U.S. Customs and Border Protection (CBP) data that oftentimes misidentifies companies as manufacturers. With credible evidence, including the Petition’s identification of only five Japanese hot-rolled steel producers and the U.S. International Trade Commission’s (ITC’s) preliminary injury report that found that five companies accounted for nearly all of the overall production of hot-rolled steel in Japan,¹⁷⁷ the Department should have concluded that there were only five producers of Japanese hot-rolled steel, which still does not fit the threshold for a “large number” of producers under section 777A(c)(2) of the Act.
- The Department utilized an analysis of a “large number” of producers and exporters *relative* to available resources, citing *Husteel*,¹⁷⁸ when in fact the decision emphasized the court’s general disapproval of the Department’s use of workload as a justification for

¹⁷³ See Cost Verification Report at 14.

¹⁷⁴ See JFE’s Rebuttal Brief at 32.

¹⁷⁵ See JFE Cost Verification Report at 16 and JFE Final Cost Memo at 2.

¹⁷⁶ See *Sheijiang Native Produce & Animal By-Products Import & Export Corp. v. United States*, 637 F.Supp.2d 1260, 1264 (Ct. Int’l Trade 2009); *Husteel Co. v. United States*, 98 F.Supp.3d 1327 (Ct. Int’l Trade 2015) (citing *Carpenter Tech. Corp. v. United States*, 662 F.Supp.2d 1337, 1341-44 (Ct. Int’l Trade 2009)).

¹⁷⁷ See *Hot-Rolled Steel Flat Products from Australia, Brazil, Japan, Korea, the Netherlands, Turkey and the United Kingdom*, (USITC Pub. 4570 October 2015).

¹⁷⁸ See *Husteel* at 3.

limiting mandatory respondents: the court “urges Commerce to focus solely on the number of exporters or producers involved in the investigation or review, rather than its workload caused by other proceedings, in determining whether there is a large number of potential respondents.”¹⁷⁹ The three producers involved in this investigation is an objectively small number.

Petitioner Argues

- Tokyo Steel’s narrow interpretation of the term “involved,” seemingly to mean “full activity in the investigation,” is unprecedented and misconstrues the fact that there are more than three companies involved. The fact is that there are more than three producers or exporters involved in this investigation.
- The timeline to determine whether to exercise the section 777A(c)(2) exemption is within the discretion of the Department and based on long-standing practice, was appropriately and reasonably employed when selecting mandatory respondents.
- Even if there were only five Japanese hot-rolled steel companies, the subjective nature of the word “large” within section 777A(c)(2) allows the Department to proceed with its customary practice to define “large” in terms of the particular investigation or review. In this case, the investigation required substantial effort: no less than seven different verifications for just two mandatory respondents.

Department Position:

We disagree with Tokyo Steel. For the final determination, and for the reasons discussed in the Respondent Selection Memorandum¹⁸⁰ and our Voluntary Respondent Selection Memorandum,¹⁸¹ we continue to find that there were a large number of potential respondents involved in this investigation, and that it was appropriate to select as the two mandatory respondents, the Nippon Group and the JFE Group, the two largest producers/exporters of subject merchandise during the POI. Further, we determine that, in light of the Department’s available resources and the burdens presented by selecting additional respondents, it was not unlawful for the Department to not select additional mandatory respondents as Tokyo Steel argues.

Section 777A(c)(2) of the Act permits the Department to limit its examination of all known exporters and producers of subject merchandise to a reasonable number of exporters or producers, if it is not practicable to determine individual dumping margins because of the large number of exporters or producers involved. Under section 777A(e)(2)(A)(i) and (ii) of the Act, the Department may limit its examination to (1) a sample of exporters or producers that it determines is statistically valid based on the information available to it at the time of selection, or (2) exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that the Department determines can be reasonably examined. The SAA

¹⁷⁹ *Id.*

¹⁸⁰ See Memorandum to Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations “Respondent Selection for the Antidumping Duty Investigation of Certain Hot-Rolled Steel Flat Products from Japan,” dated October 27, 2015 (Respondent Selection Memorandum).

¹⁸¹ See Memorandum to Edward Yang, Director, Office VII, Antidumping and Countervailing Duty Operations, “Antidumping Duty Investigation of Certain Hot-Rolled Steel Flat Products from Japan: Whether to Select Additional Mandatory and/ or Voluntary Respondents,” dated March 14, 2016.

interprets these provisions to mean that the authority to select respondents, whether by using a “statistically valid” sample or by examining respondents accounting for the largest volume of subject merchandise, rests exclusively with the Department.¹⁸² Thus, the Department is authorized under section 777(A)(c)(2) of the Act to limit its examination to a reasonable number of exporters or producers, and did so lawfully.

As we stated in the Respondent Selection Memorandum, although the Petition listed five exporters and/or producers, the CBP data showed there were over 50 companies which potentially had entries of subject merchandise during the POI, which constitutes a large number. We therefore determined that it was not practicable to individually examine each of them. We arrived at that conclusion by evaluating the number of producers and/or exporters in relation to our anticipated workload and deadlines, and by considering the nature of this investigation. Specifically, we determined that this particular investigation would require significant resources to analyze the requisite information for each company, conduct verifications, and calculate individual weighted-average dumping margins. Furthermore, we found that the complexity of these factors combined with overlapping statutory deadlines of other antidumping duty and countervailing duty proceedings, as well as Office VII’s additional workload, constrained the number of respondents the Department could reasonably individually examine. As a result, the relative number of potential respondents was too large to individually examine.¹⁸³

With respect to Tokyo Steel’s arguments that the CBP data underlying our analyses were inaccurate and not credible, we note that none of the parties provided information prior to our initial respondent selection indicating that the entry data were unreliable. In past cases, we have found CBP data to be unreliable for respondent selection purposes where they reflected inconsistent units of measure or were otherwise technically flawed.¹⁸⁴ There was no such showing here. In fact, Tokyo Steel stated “Based on the released CBP import data in this investigation, it is clear that Tokyo Steel is a significant producer/exporter of hot-rolled steel from Japan.”¹⁸⁵ As such, there was no reason for the Department to reject the CBP entry data in this investigation and to seek alternative import data for purposes of selecting respondents. Therefore, in accordance with our normal practice in investigations, we continue to find that the CBP entry data provide the most consistent and reliable basis for respondent selection.

We disagree with Tokyo Steel that three respondents is an objectively small number. We determined that we could reasonably examine two mandatory respondents given the circumstances of this investigation. We selected those respondents on the basis of the information available at the time, *i.e.*, CBP data. Given our resource constraints and the

¹⁸² See SAA at 872.

¹⁸³ See Respondent Selection Memorandum.

¹⁸⁴ See, e.g., *Wooden Bedroom Furniture From the People’s Republic of China: Preliminary Results of Antidumping Duty Administrative and New Shipper Reviews and Partial Rescission of Review*, 74 FR 6372, 6373 (February 9, 2009), unchanged in *Wooden Bedroom Furniture from the People’s Republic of China: Final Results of Antidumping Duty Administrative Review and New Shipper Reviews*, 74 FR 41374 (August 17, 2009)

¹⁸⁵ See Tokyo Steel letter “Tokyo Steel’s Request for Mandatory or Voluntary Respondent Treatment, Certain Hot-Rolled Steel Flat Products from Japan,” dated September 17, 2015 at 3.

complexities in this case, we could not practicably select an additional mandatory respondent for this investigation. As the Department previously noted in its analysis¹⁸⁶:

Conducting an AD investigation requires the analysis of the questionnaire response of each company examined, including the company's corporate structure, selling practices, pricing data, financial records, facilities, and costs. After analyzing the questionnaire responses, the Department typically issues supplemental questionnaires that are specific to each respondent that the Department individually examines. Furthermore, because this is an investigation, we intend to conduct verification.¹⁸⁷ After analyzing and verifying each respondent's submitted information, individual weighted-average dumping margins must be calculated. Conducting this investigation will thus require significant resources for each company individually examined.

Furthermore, in addition to this investigation, AD/Countervailing Duty (CVD) Operations Office VII, the office to which this investigation is assigned, is conducting numerous concurrent AD and CVD proceedings.¹⁸⁸ The complexity of the above-referenced factors required for this AD investigation, combined with overlapping statutory deadlines of other AD and CVD proceedings, as well as Office VII's additional workload, place a significant constraint on the number of respondents the Department can reasonably individually examine. Moreover, because of the significant workload throughout Enforcement and Compliance, Office VII does not anticipate receiving any additional resources to devote to this investigation. Thus, we do not have the resources to examine all known producers in this investigation, and we must limit their number for examination.

Further, given the statutory deadlines in which to complete this investigation, we also could not delay the selection of the mandatory respondents. We also disagree with Tokyo Steel with regard to *Husteel*. In that case, the court rejected the Korean producers' argument that only companies that requested to be examined should have been included in the Department's determination of whether there was a "large number" of producers involved in the investigation. Thus, the Department appropriately selected the two mandatory respondents in this investigation.

Comment 27: Whether the Department Should Correct the Clerical Error in Its Preliminary Determination

Tokyo Steel Argues

- When calculating the all-others antidumping duty rate the Department did not use the calculation process laid out in the preliminary determination: to calculate "(A) a weighted average of the dumping margins calculated for the mandatory respondents; (B) a simple

¹⁸⁶ See Respondent Selection Memorandum at 3-4.

¹⁸⁷ See section 782(i)(1) of the Act.

¹⁸⁸ In the Respondent Selection Memorandum at 3, the Department noted that, in addition to the this investigation, Office VII was conducting five AD investigations, four CVD investigations (including, two additional concurrent investigations concerning the same product), 14 AD administrative reviews, four CVD administrative reviews, one new shipper review, eight sunset reviews, two scope inquiries, four remands, and one changed circumstances review.

average of the dumping margins calculated for the mandatory respondents; and (C) a weighted average of the dumping margins calculated for the mandatory respondents using each company's publicly-ranged values for the merchandise under consideration. We would compare (B) and (C) to (A) and select the rate closest to (A) as the most appropriate rate for all other companies."¹⁸⁹ Instead, the Department set the all-others rate at (C) (10.25 percent), when in fact, (B) (9.04 percent), is closer to (A).¹⁹⁰

Petitioner Argues

- As previously addressed in the Ministerial Error Memo,¹⁹¹ the Department correctly calculated the all-others antidumping duty rate and maintained consistent methodological practice used in other antidumping cases.

Department Position:

We have revised the methodology used to calculate the all-others rate for the final determination.¹⁹² We note that Tokyo Steel's brief raised the same argument it put forth after the *Preliminary Determination* in its ministerial error allegation. At that time the Department fully addressed this argument providing a detailed analysis of the all-others rate calculation in the Ministerial Error Memo in response to Tokyo Steel's allegation and which we hereby incorporate into the final results. The Department made clear that it used the mandatory respondents' sales value and their amount of dumping from the SAS program output. However, consistent with its practice,¹⁹³ the Department has modified its methodology to use the companies' weighted-average margins instead of their amount of dumping from the SAS program outputs.

¹⁸⁹ See *Certain Hot-Rolled Steel Flat Products from Japan: Preliminary Determination of Sales at Less than Fair Value and Postponement of Final Determination*, 81 FR 15241 (March 22, 2016).

¹⁹⁰ See Case Brief from Interested Party Re: "Antidumping Case Brief of Tokyo Steel Manufacturing Co., Ltd.: Certain Hot-Rolled Steel Products from Japan," dated June 10, 2016.

¹⁹¹ See Memorandum to Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, "Ministerial Error Memorandum for the Affirmative Preliminary Determination of the Antidumping Duty Investigation of Certain Hot-Rolled Steel Products from Japan," dated April 22, 2016.

¹⁹² See, e.g., "Antidumping Duty Investigation of Hot-Rolled Steel Flat Products from Japan: Final Determination Calculation for the "All-Others" Rate," dated concurrently with this final determination.

¹⁹³ See, e.g., *Ball Bearings and Parts Thereof From France, Germany, Italy, Japan, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews, Final Results of Changed-Circumstances Review, and Revocation of an Order in Part*, 75 FR 53661, 53663 (September 1, 2010).

RECOMMENDATION

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

✓

Agree

Disagree

Ronald K. Lorentzen

Ronald K. Lorentzen
Acting Assistant Secretary
for Enforcement and Compliance

August 4, 2016

(Date)