

February 16, 2010

MEMORANDUM TO: Ronald K. Lorentzen
Deputy Assistant Secretary
for Import Administration

FROM: John M. Andersen
Acting Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Cut-to-Length Carbon Steel Plate from the People's Republic of
China: Issues and Decision Memorandum for the Final Results of
Administrative Review

SUMMARY:

We have analyzed the case briefs and rebuttal briefs submitted by Nucor Corporation (“Nucor”), a domestic interested party and Hunan Valin Xiangtan Iron & Steel Co., Ltd. (“Valin Xiangtan”), respondent in the 2007-2008 administrative review of the antidumping duty order on certain cut-to-length carbon steel plate (“CTL plate”) from the People’s Republic of China (“PRC”). As a result of our analysis, we have made changes to *Certain Cut-to-Length Carbon Steel Plate From the People’s Republic of China: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review*, 74 FR 39921 (August 10, 2009) (“*Preliminary Results*”).

We recommend that you approve the positions described in the “Discussion of the Issues” section of this Issues and Decision Memorandum. Below is the complete list of the issues in this antidumping duty administrative review for which we received comments.

Case Issues:

- Comment 1: Whether to deny Valin Xiangtan a separate rate
- Comment 2: Whether the Department’s separate rate test is flawed
- Comment 3: Whether to collapse Valin Xiangtan with other producers
- Comment 4: Selection of POR for SVs, ME purchases, and FOP data
- Comment 5: Surrogate value of certain gas by-products
- Comment 6: Valuation of dolomite
- Comment 7: Valuation of ferric oxide
- Comment 8: Selection of financial statements
- Comment 9: Treatment of subsidized countries in import statistics
- Comment 10: Whether to grant by-product offsets
- Comment 11: Programming errors – distances
- Comment 12: Valuing electrodes

Background:

The merchandise covered by the order is CTL plate, as described in the “Scope of the Order” section of the *Preliminary Results*. The period of review (“POR”) is November 1, 2007, through October 31, 2008. In accordance with 19 CFR 351.309(c)(ii), we invited parties to comment on our *Preliminary Results*.

Valin Xiangtan submitted its case brief and rebuttal brief on October 1, and October 13, 2009, respectively. Nucor submitted its case brief and rebuttal brief on October 1, and October 9, 2009, respectively. On November 20, 2009, the Department extended the deadline for the final results of review. *See Certain Cut-to-Length Carbon Steel Plate from the People’s Republic of China: Notice of Extension of Time Limit for Final Results of Administrative Review*, 74 FR 60237 (November 20, 2009).

DISCUSSION OF THE ISSUES

Comment 1: Whether to deny Valin Xiangtan a separate rate

Nucor disagrees with the Department’s decision to grant Valin Xiangtan a separate rate in the *Preliminary Results*. Nucor argues that Valin Xiangtan is ineligible for a separate rate because, due to ownership and control over Valin Xiangtan by the provincial State-owned Assets Supervision and Administration Commission (“SASAC”), Valin Xiangtan cannot meet its burden of establishing an absence of *de facto* and *de jure* government control.

First, Nucor argues, Valin Xiangtan cannot demonstrate an absence of *de facto* government control due to ownership and control over Valin Xiangtan by one of the company’s parents, Hunan Valin Iron & Steel Group Co., Ltd. (“Valin Group”). Ownership of the Valin Group over Valin Xiangtan, Nucor contends, is demonstrated by record evidence detailing both direct and indirect equity interests that could reach 44.9 percent, or higher, of Valin Xiangtan’s equity.¹

Nucor argues the Valin Group is a state owned enterprise (“SOE”) that is 100 percent owned by the provincial SASAC. Nucor further argues that the provincial SASAC is under the control of the central SASAC, an agent of PRC government control. Therefore, according to Nucor, Valin Xiangtan is affiliated with the provincial and central SASACs within the meaning of section 771(33)(E) of the Tariff Act of 1930, as amended (“the Act”), and so, by virtue of the laws governing SASACs, must be found ineligible for separate rate status. Nucor argues that this control is confirmed by Valin Xiangtan’s auditors’ description of the relationship between Valin Xiangtan and the Valin Group. Moreover, Nucor contends that SASAC control over Valin Xiangtan is also exercised through Hunan Valin Steel Tube & Wire Co., Ltd. (“Valin Tube”), one of Valin Xiangtan’s corporate parents. Nucor cites Valin Tube’s 2007 annual report for several examples of evidence of this control.

¹ See Nucor’s case brief at 9.

With respect to the Department's separate rate test, Nucor argues Valin Xiangtan failed to establish an absence of *de jure* government control or to demonstrate an absence of restrictive stipulations associated with its business and export licenses. Citing, *inter alia*, the 2004 Foreign Trade Law of the PRC, Nucor argues that substantial record evidence demonstrates that the government of the PRC exerts significant *de jure* control over export activity through a variety of government laws and regulations. One example, Nucor contends, is an export licensing scheme applicable to exports of certain steel products from the PRC during the POR.

Nucor argues, further, that Valin Xiangtan has failed to demonstrate the existence of legislative enactments and other formal measures decentralizing control. In particular, Nucor contends, the 2006 Company Law of the People's Republic of China ("Company Law") and the Interim Measures for the Supervision and Administration of State-Owned Assets ("Interim Measures") explicitly centralize government control over SOEs, including Valin Xiangtan. Nucor argues that these laws create a legal framework in which SASAC has the authority to exert control over SOE's, including the ability to hire and fire a company's management and to approve or disprove a company's articles of association.

Additionally, Nucor contends Valin Xiangtan has failed to demonstrate an absence of *de facto* control by the PRC government. Nucor argues that the record provides evidence that the PRC government has exercised control over prices, the ability to enter contracts, the selection of a company's management, and the disposition of its profits. For example, Nucor argues that the PRC Ministry of Commerce established an export licensing system during the POR with the goal of limiting exports of steel products. This regime, according to Nucor, manipulated the level of the export tariff, effectively setting a portion of the export price of steel.

Similarly, Nucor contends that Valin Xiangtan was not free from government influence regarding the selection of its managers and the disposition of its profits because the provincial SASAC has a mechanism for control over these aspects of Valin Xiangtan's operations. Further, Nucor argues that SASAC's authority over financial decisions and to select and remove management contradicts two of the five elements of the Department's *de facto* control test: (3) whether the respondent has autonomy from the central, provincial, or local governments in making decisions regarding the selection of its management; and (4) whether the respondent retains the proceeds of its export sales and makes independent decisions regarding disposition of profits or financing of losses. Citing *Notice of Final Determination of Sales at Less Than Fair Value, and Affirmative Critical Circumstances, In Part: Certain Lined Paper Products from the People's Republic of China*, 71 FR 53079 (September 8, 2006), Nucor argues that the Department has already recognized SASAC's direct role in the management and financial direction of SOEs. Moreover, Nucor contends SASAC's ability to remove management also gives it effective control over export prices, as it can simply remove managers who set prices contrary to SASAC's goals. Nucor argues this ability undermines elements (1) and (2) of the Department's *de facto* test. In addition, Nucor contends the fifth criterion of the *de facto* test, whether the government is pervasively involved in financing the company, is demonstrated to be contradicted by record evidence showing government involvement in Valin Xiangtan's finances. In sum, Nucor argues, the authorities and actions of SASAC directly contradict four of the eight criteria in the Department's two pronged separate rate test and cast serious doubt on Valin

Xiangtan's ability to disprove three additional criteria, making Valin Xiangtan ineligible for a separate rate.

Valin Xiangtan rebuts that, as a limited liability company, it is not owned or controlled by the provincial SASAC or any other level of the PRC government. Consequently, Valin Xiangtan argues, Nucor's arguments directed at SOEs are irrelevant. Valin Xiangtan argues that only one of its minority stakeholders, the Valin Group, is actually an SOE company. According to Valin Xiangtan, because the Valin Group's direct ownership is dwarfed by that of Valin Tube, the Valin Group cannot exercise control over Valin Xiangtan – as it simply does not command enough shareholder or board member votes. Instead, Valin Xiangtan argues, ArcelorMittal and the public shareholders of Valin Tube collectively own the majority shareholding interests in Valin Xiangtan, giving them control, not the Valin Group.

With respect to the licensing scheme in effect during the POR, Valin Xiangtan argues that it confirmed that there were no restrictions on its export activities, other than acquiring an export license which was granted automatically after filling out an online form.

Moreover, Valin Xiangtan contends that Nucor's reliance on certain provisions of the Interim Measures and the Company Law to demonstrate government control over Valin Xiangtan is misplaced, as these provisions do not apply to Valin Xiangtan, nor do they apply to Valin Xiangtan's majority shareholder, Valin Tube.

Moreover, Valin Xiangtan contends that record evidence demonstrates a lack of *de facto* government control over its operations. Further, according to Valin Xiangtan, Nucor's arguments on SASAC control over Valin Xiangtan consist of often unsupported statements directed at SASAC control over Valin Group, not Valin Xiangtan, the respondent in this review. Citing *Final Determination of Sales at Less Than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products from the People's Republic of China*, 66 FR 49632 (September 28, 2001), Valin Xiangtan contends the Department has previously found a lack of *de facto* control even when the PRC government actually exercised a degree of control over respondents, because those controls did not impact the Department's separate rate eligibility test.

Department's Position: We continue to find that Valin Xiangtan has established that it is free from government control over its export activities and therefore eligible for a separate rate. Specifically, with respect to the lack of *de jure* control over Valin Xiangtan's export activities, the Department considers the following *de jure* criteria in determining whether an individual company may qualify for a separate rate: 1) an absence of restrictive stipulations associated with an individual exporter's business and export licenses; 2) any legislative enactments decentralizing control of companies; 3) any other formal measures by the government decentralizing control of companies.² See *Final Determination of Sales at Less Than Fair Value: Sparklers from the People's Republic of China*, 56 FR 20588, 20589 (May 6, 1991) ("*Sparklers/PRC*"). The Department typically considers four factors in evaluating whether each

² We address Nucor's arguments regarding the Department's separate rate test, as a matter of general policy, in Comment 2, below.

respondent is subject to *de facto* government control of its export functions: (1) whether the export prices are set by, or subject to the approval of, a government authority; (2) whether the respondent has authority to negotiate and sign contracts and other agreements; (3) whether the respondent has autonomy from the government in making decisions regarding the selection of management; and (4) whether the respondent retains the proceeds of its export sales and makes independent decisions regarding the disposition of profits or financing of losses. *See Notice of Final Determination of Sales at Less Than Fair Value: Silicon Carbide From the People's Republic of China*, 59 FR 22586, 22587 (May 2, 1994) (“*Silicon Carbide/PRC*”); *see also Final Determination of Sales at Less Than Fair Value: Furfuryl Alcohol from the People's Republic of China*, 60 FR 22544, 22545 (May 8, 1995).

While Nucor has argued that Valin Xiangtan is not free from *de jure* control because it operates under provisions of the Company Law specific to state-owned enterprises, and because of the centralizing nature of the Interim Measures, we find that the section of the Company Law specific to SOEs, and the Interim Measures themselves are not applicable to Valin Xiangtan. Specifically, because Valin Xiangtan is a general limited liability company,³ not an SOE, Section 4 of the Company Law (“Special Provisions on Wholly State-owned Companies”) and the entirety of the Interim Measures outlining the authorities of the provincial and central SASACs, are not applicable to Valin Xiangtan. Instead, rather than being incorporated through sole state investment, Valin Xiangtan has three shareholders, only one of which, the Valin Group, is an SOE. Valin Xiangtan’s majority shareholder, Valin Tube, is, like Valin Xiangtan, a limited liability company.⁴ While the Valin Group may operate under the Hunan SASAC’s authorities outlined in the Interim Measures, and remains subject to Section 4 of the Company Law, these authorities do not apply to Valin Tube, or to Valin Xiangtan, the respondent in this administrative review.

With respect to Nucor’s allegations of export restrictions, such as export licensing schemes or export taxes, on subject merchandise, we note that the focus of Department’s separate rate test is on export decisions made at the individual firm level, and generally not with macroeconomic border-type controls.⁵ Consistent with our criteria outlined above with respect to finding absence

³ *See* Valin Xiangtan’s April 28, 2008, supplemental Section A response at 4.

⁴ *See Id.* at A-21.

⁵ *See* Policy Bulletin 05.1, “Separate-Rates Practice and Application of Combination Rates in Antidumping Investigations Involving Non-Market Economy Countries,” stating:

The Department’s separate rate test is not concerned, in general, with macroeconomic border-type controls (*e.g.*, export licenses, quotas, and minimum export prices). Rather, the test focuses on controls over the decision-making process on export-related investment, pricing, and output decisions at the individual firm level. *See, e.g., Final Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon Steel Plate from Ukraine*, 62 FR 61754, 61757 (November 19, 1997); and *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 62 FR 61276, 61279 (November 17, 1997).

of *de jure* control, we examined Valin Xiangtan's business and export licenses in addition to the company's application for an export license, and we found no indication of restrictive stipulations. Therefore, evidence on the record does not support a finding of direct government involvement in day-to-day export activities/operations at the firm level. Rather, the record evidence supports the conclusion that there is a lack of *de jure* control over Valin Xiangtan's export activities.

With respect to *de facto* government control over Valin Xiangtan's export activities, again, we find that Valin Xiangtan has demonstrated independence from the government. Valin Xiangtan is guided by its articles of association, in which each of its shareholders is granted the power, in proportion to the ownership they hold in the respondent, to elect the executive director and determine the distribution of profits.⁶ Additionally, the management of Valin Xiangtan, primarily its sales manager and vice general manager, is responsible for binding the company to contracts and setting prices.⁷ Moreover, record evidence indicates that Valin Xiangtan makes independent decisions with respect to its profit distribution, and retains the profits from its export sales.⁸

Because the articles of association stipulate that the shareholders make decisions with respect to the selection of management and profit distribution, we find that the Valin Group, the SOE, is not controlling Valin Xiangtan in these respects, because the Valin Group does not have majority ownership in Valin Xiangtan.

In addition, we find the record supports the conclusion that the PRC government does not control Valin Xiangtan's export activities through Valin Group and Valin Tube because the Valin Group's equity position in Valin Tube (respondent's majority shareholder), at 33.92 percent, is neither a majority interest, nor sufficiently larger than the equity interests of other shareholders to constitute a practical majority.⁹ In other words, the Valin Group is not in a position to either 1) elect a majority of board members to Valin Tube;¹⁰ or 2) exert *de facto* majority control by virtue of a commanding minority interest.

With respect to Nucor's argument that the Department did not address the "fifth criteria" (*i.e.*, "whether the government is pervasively involved in the financing of the company"¹¹), the

⁶ See Valin Xiangtan's April 28, 2008, supplemental Section A response at Exhibit A-15.

⁷ See Valin Xiangtan's March 5, 2008, Section A response at 13.

⁸ See *Id.* at 15.

⁹ See Valin Xiangtan's March 5, 2008, Section A response at 7.1 and A-21.

¹⁰ See Valin Tube's annual report at Valin Xiangtan's April 28, 2008, supplemental Section A response at A-19, page 13 "...the Company's 3rd Board of Directors, which consisted 15 directors including 5 non-independent directors recommended by Valin Group..."

¹¹ See Nucor's case brief at 24, citing to 70 FR 24389.

Department notes this “fifth criteria” is not articulated as one of the factors the Department typically considers in its *de facto* analysis. See *Silicon Carbide/PRC*, 59 FR at 22587. In *Brake Rotors From the People’s Republic of China: Preliminary Results and Partial Rescission of the Seventh Administrative Review and Preliminary Results of the Eleventh New Shipper Review*, 70 FR 24382, 24388 (May 9, 2005) (“*Brake Rotors/PRC*”), unchanged in *Brake Rotors From the People’s Republic of China: Final Results and Partial Rescission of the Seventh Administrative Review; Final Results of the Eleventh New Shipper Review*, 70 FR 69937 (November 18, 2005), the Department included involvement in key operations of the company with respect to export activity as *further* evidence that the respondent was not separate from the government in making export decisions. However, the Department typically looks to the above-mentioned four criteria in its *de facto* separate rate analysis,¹² which the Department finds Valin Xiangtan has satisfied in the instant review.

As we stated in *Certain New Pneumatic Off-The-Road Tires from the People’s Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances*, 73 FR 40485 (July 15, 2008) (“*Tires/PRC*”), and accompanying Issues and Decision memorandum at Comment 25:

The mere existence of government-owned shares in the producer is not a basis for denying separate rate status. The Department has previously granted separate rate status to both wholly state-owned producers and producers... whose stock was partially owned by a government state assets management company (citations omitted).

In the instant case, Nucor alleged that SASAC has re-centralized control over state-owned assets and therefore, Valin Xiangtan should not be eligible for a separate rate. However, we find that the facts here mirror *Tires/PRC*, in that Valin Xiangtan’s shares are partially owned by a state-owned enterprise but we find no evidence that either the central or the provincial Hunan SASAC, through the Valin Group or Valin Tube, exerted control over Valin Xiangtan’s export activities.¹³

Here, as outlined above, Valin Xiangtan provided evidence rebutting the presumption of *de jure* control in the form of a business license, export license, the Company Law, and the Foreign Trade Law of the People’s Republic of China.¹⁴ Additionally, as outlined above, respondent rebutted the presumption of *de facto* control by demonstrating that it negotiates its own contracts, sets its own prices, selects its own management (based on the votes of its shareholders), makes independent decisions with respect to its profit distribution, and retains the proceeds from its

¹² See *Silicon Carbide/PRC*, 59 FR at 22587.

¹³ See, e.g., *Qingdao Taifa Group Co. v. United States*, Slip Op. 09-83 (CIT 2009) “Reliance on evidence of *de facto* government control beyond a mere local government ownership interest is consistent with the purposes of the antidumping statute, which ‘recognizes a close correlation between a nonmarket economy and government control of prices, output decisions, and the allocation of resources’” (quoting *Sigma Corp. v. U.S.*, 117 F.3d 1401, 1405–06).

¹⁴ See Valin Xiangtan’s March 5, 2008, Section A response at Exhibits A-3 and A-4.1. See also Valin Xiangtan’s April 28, 2008, response at Exhibit 23.

export sales. Accordingly, the Department finds that record evidence demonstrates that Valin Xiangtan was able to operate with a degree of independence with regard to its export activities. In other words, despite the presumption of broad government control, substantial record evidence supports the Department's finding that the government does not control Valin Xiangtan's export activities. Therefore, based on the above outlined criteria, because it has shown an absence of *de jure* and *de facto* control with respect to its export activities, we find that Valin Xiangtan is eligible for a separate rate.

Comment 2: Whether the Department's Separate Rate Test is Flawed

Nucor contends that, in practice, the Department fails to apply a rebuttable presumption of government control over respondents. Nucor argues that in so doing, the Department has shifted the evidentiary burden away from respondents like Valin Xiangtan, and shifted the burden onto other parties to provide evidence of government control over the respondent. Nucor states that this shift in burden contradicts the Department's stated practice, as developed in *Sparklers/PRC*¹⁵ and *Silicon Carbide/PRC*.¹⁶

Nucor further contends that, notwithstanding this shift of burden, the Department's separate rate test is flawed because the documents required by the Department are either guaranteed to not produce evidence confirming government control or are outdated. As an example of this flaw, Nucor cites the Department's reliance on respondents' business and export licenses. These documents, Nucor contends, have never been shown to include the type of restrictive stipulation that the Department is looking for as evidence of government control over export activities. As a consequence, Nucor argues the Department has established an evidentiary standard that will never be met. Nucor contends that there have been only two instances where the Department has denied a separate rate, excluding occasions where paperwork was untimely or incompletely filed.¹⁷

Further, Nucor argues the Department's *de facto* test, as applied in the *Preliminary Results*, is flawed for the same reasons cited above. Specifically, Nucor contends respondents like Valin

¹⁵ *Final Determination of Sales at Less Than Fair Value: Sparklers From the People's Republic of China*, 56 FR 20588 (May 6, 1991).

¹⁶ *Notice of Final Determination of Sales at Less Than Fair Value: Silicon Carbide From the People's Republic of China*, 59 FR 22585 (May 2, 1994).

¹⁷ See *Brake Rotors From the People's Republic of China: Preliminary Results and Partial Rescission of the Seventh Administrative Review and Preliminary Results of the Eleventh New Shipper Review*, 70 FR 24382 (May 9, 2005) unchanged in *Brake Rotors From the People's Republic of China: Final Results and Partial Rescission of the Seventh Administrative Review; Final Results of the Eleventh New Shipper Review*, 70 FR 69937 (November 18, 2005). See *Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, from the People's Republic of China: Final Results and Rescissions of the 2005-2006 Administrative Review*, 72 FR 51787 (September 11, 2007). The Respondent, SMC claimed to have supplied the Department with all the information and documentation necessary to demonstrate eligibility for a separate rate. The Department disagreed because of SMC's refusal to answer questions about its ownership structure. See *id.*, Issues and Decisions Memorandum at cmt. 1.

Xiangtan should not be able to overcome the evidentiary standard for establishing freedom from *de facto* government control simply by answering questions with a “yes” or “no” response. This system, Nucor argues, is flawed in that it “asks respondents to prove that government control does not exist but accepts as proof a document that fails to achieve that proof, all under a presumption that the respondent is subject to control and has a vested interest in not allowing evidence to the contrary on the record.”¹⁸ Nucor urges the Department to explain the logical integrity of this system for the final results.

Moreover, Nucor argues the Department’s separate rate test is based on an outdated framework. Nucor contends that SASAC’s legal authority, spelled out in the Interim Measures, reverses the decentralization of SOEs that occurred in the PRC during the 1990s. Therefore, according to Nucor, the Department should not only deny a separate rate for Valin Xiangtan, but also engage in a fresh analysis of the new authorities granted to central and provincial SASACs, and modify its separate rate test accordingly.

Finally, Nucor argues the Department’s separate rate analysis, as applied in the *Preliminary Results*, was fundamentally inconsistent with recent countervailing duty (“CVD”) cases. Nucor contends that, in CVD cases including *Light-Walled Rectangular Pipe and Tube From People’s Republic of China: Final Affirmative Countervailing Duty Investigation Determination* 73 FR 35642 (June 24, 2008), the Department has treated major PRC steel companies which were owned and controlled by SASAC as part of the PRC government.

Valin Xiangtan argues that Nucor’s arguments about the Department’s separate rate test amount to an attempt to replace the substantial evidence standard of review with a metric, namely that more PRC companies should be denied separate rate status. According to Valin Xiangtan, Nucor ignores the significant burden of proof placed on respondents to show both *de jure* and *de facto* independence from government control. Valin Xiangtan contends that Nucor’s desire for more PRC companies to be denied separate rate status speaks to the threshold required by the Department to prove absence of government control, not a shifting of burden of proof from respondents to petitioners, nor any alleged failings of the Department’s separate rate methodology.

Further, Valin Xiangtan contends, the Department has analyzed the Enterprise Law and found that it decentralized control from the PRC government. Valin Xiangtan argues that this analysis, established in *Sparklers/PRC*, set the foundation for an agency practice on separate rate eligibility that has been in place for almost two decades. Thus, Valin Xiangtan contends, Nucor’s attempt to reverse this practice cannot be considered without comparing the Interim Measures and the Company Law with the Enterprise Law.

Comparing these measures, Valin Xiangtan argues, demonstrates that the Enterprise Law provides for a level of control that either equals or exceeds that of the Company Law in all areas relevant to the Department’s separate rate test. As an example, Valin Xiangtan cites the Enterprise Law at article 44, which gives the government the sole power to appoint and remove

¹⁸ See Nucor’s case brief at page 32.

factory directors. Under the Company Law, according to Valin Xiangtan, for non wholly-state-owned companies, management is approved by the board of directors, themselves appointed by the shareholders, with no government involvement. Similarly, Valin Xiangtan cites the Enterprise Law at article 22, which states that PRC enterprises shall operate under the guidance of state plans. According to Valin Xiangtan, there is no parallel provision in either the Company Law or the Interim Measures. Valin Xiangtan contends the Department has been granting separate rate status to companies operating under the more centralizing Enterprise Law since the separate rate test was established in *Sparklers/PRC* and the Department has no basis to reverse that practice in the instant case.

Additionally, Valin Xiangtan argues that Nucor has ignored the explicit guarantee of operational freedom accorded to companies which operate under the Enterprise Law,¹⁹ the Interim Measures,²⁰ and the Company Law.²¹ Valin Xiangtan argues these provisions form the basis for the wall that has been erected in wholly-state-owned companies between government authorities and company management. This separation, Valin Xiangtan contends, has been recognized by the Department's actions granting separate rates to wholly-state-owned companies since it began the separate rate policy in *Sparklers/PRC*. Citing *Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, From the People's Republic of China: Final Results of Antidumping Duty Administrative Reviews and Final Rescission and Partial Rescission of Antidumping Duty Administrative Reviews*, 71 FR 54269 (September 14, 2006) ("*Heavy Forged Hand Tools/PRC*"), and accompanying Issues and Decision Memorandum at Comment 3, Valin Xiangtan argues that the Department has already found that the Interim Measures decentralize control in the PRC economy.

Department's Position: As noted above, the aim of the Department's separate rate test is to allow commercial exporters in an NME to overcome a presumption of government control by providing specific evidence of autonomy from the government with respect to export activities. Substantial evidence, beyond simple certifications of "yes" or "no," is required for a respondent to demonstrate such independence. In fact, while an exporter's narrative responses to the Department's questionnaires are carefully considered, they are only analyzed in the context of substantial documentary evidence; evidence which must support a respondent's claims.²² Moreover, respondents' answers are all subject to extensive follow-up questions in addition to a possible on-site verification.

Further, we find Nucor's argument unconvincing that the type of evidence required by the Department (*e.g.*, business license and export license) has rarely demonstrated government

¹⁹ Valin Xiangtan cites article 7 of the Enterprise Law.

²⁰ Valin Xiangtan cites article 2 of the Interim Measures.

²¹ Valin Xiangtan cites section 4 of the Company Law.

²² Evidence submitted by the respondent in the instant case includes: business and export licenses, articles of associations, legislative enactments and regulations, audited financial statements, business plans, sales contracts and correspondences, export documents, and certifications regarding export decisions. *See* Comment 1, above.

control over export activities and thus this evidence should not support a claim of no government control. Cooperation with the Department's antidumping proceedings is voluntary on the part of the respondent. While Nucor is correct in noting that the denial of a separate rate has been rare for fully cooperative respondents, the Department has denied several separate rates for respondents that voluntarily withdraw from a proceeding.²³

With respect to the *de jure* aspect of the Department's separate rate test, Nucor has placed on the record the Interim Regulations, which allegedly undermine the independence of all enterprises "within SASAC's control."²⁴ Nucor requested that the Department engage in an analysis of these regulations with respect to our separate rate test. We have not performed such an analysis, because, as noted in Comment 1 above, we found that these regulations were not applicable to the respondent in the instant review. We have also not engaged in an analysis of the Company Law with respect to SOEs, and whether or not those measures have re-centralized government control, because again, as noted in Comment 1, Valin Xiangtan does not operate under Section 4 of the Company Law applicable to SOEs.

However, as we stated in *Hand Trucks and Certain Parts Thereof From the People's Republic of China; Preliminary Results and Partial Rescission of Administrative Review and Preliminary Results of New Shipper Review* 72 FR 937 (January 9, 2007), as in prior cases, we have analyzed the Company Law and have found it to establish sufficiently an absence of *de jure* control over privately owned companies in the PRC. *See, e.g., Final Determination of Sales at Less than Fair Value: Furfuryl Alcohol from the People's Republic of China*, 60 FR 22544, 22546-47 (May 8, 1995); and *Preliminary Determination of Sales at Less Than Fair Value: Certain Partial-Extension Steel Drawer Slides with Rollers from the People's Republic of China*, 60 FR 29571, 29573 (June 5, 1995) (unchanged in the final determination).

Moreover, we note that the Department has consistently found an absence of *de jure* control when a company has supplied business licenses and export licenses, each of which have been found to demonstrate an absence of restrictive stipulations and decentralization of control of the company.²⁵

²³ *See, e.g., Wooden Bedroom Furniture From the People's Republic of China: Rescission of Antidumping Duty New Shipper Review*, 75 FR 339, (January 5, 2010) (the Department did not grant an exporter a separate rate after the firm withdrew its request for a review); *see also 1-Hydroxyethylidene-1, 1-Diphosphonic Acid from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 74 FR 10545, (March 11, 2009) (the Department did not grant an exporter a separate rate after the firm withdrew from the investigation).

²⁴ *See* Nucor's case brief at 33.

²⁵ *See Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, From the People's Republic of China: Final Results of Antidumping Duty Administrative Reviews and Final Rescission and Partial Rescission of Antidumping Duty Administrative Reviews*, 71 FR 54269, September 14, 2006; *See also Honey From the People's Republic of China: Preliminary Results, Partial Rescission, and Extension of Final Results of Second Antidumping Duty Administrative Review*, 69 FR 77184, 77186-87 (December 27, 2004), unchanged in Final Results; *see also Final Determination of Sales at Less Than Fair Value and Final Partial Affirmative Determination of Critical Circumstances: Diamond Sawblades and Parts Thereof from the People's Republic of China*, FR 71 29303 (May 22, 2006) and accompanying Issues and Decision Memorandum at Comment 9.

Finally, the longstanding practice of granting separate rates based on the Department's *de jure* and *de facto* criteria has been consistently affirmed by the United States Court of Appeals for the Federal Circuit and the Court of International Trade ("CIT").²⁶ Moreover, the CIT has recently stated that, even in the case of a partially uncooperative respondent whose ownership structure is unclear, the Department cannot deny a separate rate without actual evidence that the government exercised *de facto* control over the respondent's prices, export activities, or operations because "government ownership is not tantamount to government control."²⁷

While Nucor has requested that the Department reexamine its separate rate test with respect to the role of SASAC, we note that SASAC's role in the PRC economy is evolving, and the Department plans to closely follow developments in this area and carefully analyze relevant facts and information that are placed on the record in future antidumping proceedings and future segments of this proceeding. Finally, we find Nucor's claim of inconsistency between the Department's separate rate test and CVD law and practice misplaced. CVD and antidumping ("AD") proceedings are regulated by separate statutes and so CVD law and practice has no application in an AD proceeding such as this.

Comment 3: Whether to Collapse Valin Xiangtan with Other Producers

Nucor contends that pursuant to 19 C.F.R 351.401(f), the Department should collapse Valin Xiangtan with Valin Group and then collapse Valin Group with Baosteel and Anshan Steel because (1) the companies are affiliated pursuant to section 771 (33) of the Act; (2) the companies produce subject merchandise or produce similar merchandise on similar machines; and (3) there is a significant potential for manipulation of price or production in the absence of collapsing.

Nucor argues that the first step to the collapsing analysis is met because Valin Xiangtan is affiliated with a number of parties including Baosteel, Anshan Steel, and Valin Group. With respect to Valin Group, Nucor claims that Valin Xiangtan and the Valin Group are affiliated pursuant to section 771(33)(E) of the Act, as Valin Group is a direct and indirect shareholder of Valin Xiangtan. Nucor claims that Valin Xiangtan and the Valin Group are also affiliated under section 771(33)(G) of the Act because the financial statements of Hunan Valin Tube & Wire Co., Ltd., ("Valin Tube"), one of Valin Xiangtan's shareholders, is consolidated into the Valin Group's financial statements, and because the financial statements of Valin Xiangtan are consolidated into Valin Tube's financial statements. Thus, Nucor argues, as Valin Xiangtan has

²⁶ See *Sigma Corp. v. United States*, 117 F.3d 1401 (Fed. Cir. 1997); *Peer Bearing Co.-Changshan v. United States*, 587 F.Supp. 2d 1319 (CIT 2008); *Tianjin Mach. Imp.& Exp. Corp. v. United States*, 806 F.Supp. 1008 (CIT 1992).

²⁷ See *Qingdao Taifa Group Co. v. United States*, Slip Op. 09-83 (CIT 2009). While the Department agrees that government ownership alone does not suffice to warrant denying a party a separate rate, the Department respectfully disagrees with the implied premise of the Court's remand instruction which shifts the burden of proof in the application of the Department's separate rate test away from the respondent claiming a separate rate.

claimed that it is “controlled by Valin Tube,”²⁸ Valin Xiangtan is effectively a division within Valin Tube.

Next, Nucor contends that the Valin Group is affiliated with Baosteel and Anshan Steel under 771(33)(F) of the Act because the Valin Group is under the auspices of the Hunan Provincial State-owned Assets Supervision and Administration Commission (“SASAC”), the provincial-level division of the Central SASAC located in Hunan Province.²⁹ Nucor also asserts that both Baosteel and Anshan Steel are under the direct control of the Central SASAC due to their size and importance to the PRC economy.³⁰ Nucor argues that the provincial level SASACs are subordinate to the Central SASAC,³¹ and thus, the Valin Group, Baosteel, and Anshan Steel are all under the control of the PRC government.

Nucor argues that the second step to the collapsing analysis is met because Anshan Steel and Baosteel are producers of subject-merchandise, as is the Valin Group. Specifically, Nucor points to the China Iron and Steel Association Yearbook (2006),³² Valin Group’s financial statements,³³ and Valin Tube’s financial statements.³⁴

In addition to meeting the first and second step of the collapsing analysis, Nucor argues that the third step of the collapsing criteria has been met because there is significant potential for Valin Xiangtan and Valin Group to manipulate price or production in the absence of collapsing. First, the level of common ownership between the Valin Group and Valin Xiangtan is high. Second, Nucor claims that there is a high level of cross-management among the companies. Finally, Nucor states that the operations of these companies are interwoven. For example, Nucor argues, these companies have participated in at least two joint ventures.³⁵ Furthermore, Nucor contends that there are significant transactions among Valin Xiangtan, the Valin Group, and Valin Tube. Moreover, Nucor offers examples of shared sales information between the Valin Group

²⁸ See Valin Xiangtan’s Section A Response at 4.

²⁹ See Nucor’s March 14, 2008, New Factual Submission at Exhibit 10, Appendix 2.

³⁰ See Nucor’s May 15, 2009 Factual Submission at Tab 42. See also Nucor’s March 14, 2008, New Factual Information at Exhibit 1, “2007 Report to Congress of the U.S.-China Economic and Security Review Commission” (Appendix VII-C at page 347).

³¹ See *id.* at Tab 7, Exhibit 3 “Interim Regulations on Supervision and Management of State-Owned Assets of Enterprises.”

³² See Nucor’s March 14, 2008, New Factual Information at Exhibit 16.

³³ See Valin Xiangtan’s June 9, 2009, Supplemental Response at Exhibit 2.2.

³⁴ Valin Xiangtan’s Supplemental Section A Response at Exhibit 21 p. 11 in the section entitled “About Controlling Shareholders.”

³⁵ Valin Xiangtan’s Supplemental Section A Response at Exhibit A-20, ch. 9, p. 46 and ch. 10, pgs. 25-27.

companies, provides evidence of involvement in production and pricing decisions,³⁶ shared facilities and employees,³⁷ and examples of financial transactions and interdependence.³⁸ Finally, Nucor argues that in addition to these traditional categories that the Department has considered in prior collapsing analysis, there are new categories of intertwined relationships, including entering into a trademark use agreement³⁹ and a share trustee agreement.

Nucor also requests that the Department establish the record with respect to Baosteel and Anshan Steel, including following up on the Department's requests for a separate rate application, in order for the Department to conduct a collapsing analysis and to determine Baosteel and Anshan Steel's continued eligibility for a separate rate.

Valin Xiangtan rebuts Nucor's claim that evidence exists on the record that Valin Group produces subject merchandise. First, Valin Xiangtan argues that the "evidence" cited by the Nucor cannot be relied upon by the Department because the China Steel Yearbook data reports production for the years 2004 and 2005—both years outside the POR. Second, Valin Xiangtan argues that there is no explanation of the reporting methodology or what production from which companies was included in the 2004 and 2005 data. Valin Xiangtan argues that the publisher of China Steel Yearbook did not mention what comprised the Valin Group in 2004, 2005, or more importantly during the POR. Third, Valin Xiangtan argues that Nucor's assertion that Valin Group's consolidated financial statements show that Valin Group is a "manufacturer," and that Valin Group has "substantial" amounts of construction and expansion of heavy plate lines does not withstand scrutiny. According to Valin Xiangtan, these are consolidated financial statements, and the construction project mentioned in the financial statements duplicates the one found in the financial statements of Valin Tube and is attributable to Valin Xiangtan. Valin Xiangtan argues that it has already stated, and certified, that none of its affiliates or shareholders has the capability to produce subject merchandise, and none own a rolling mill and other equipment that would be necessary to manufacture subject merchandise. Additionally, Valin Xiangtan rebuts Nucor's claim that a potential for price manipulation exists. Valin Xiangtan argues that the business transactions that Nucor cites are mundane business transactions that are to be expected between any group of affiliated companies.

Finally, Valin Xiangtan rebuts that it is not affiliated with any producers through common ownership. Valin Xiangtan argues that Hunan SASAC does not "own" Valin Group, and thus does not "own" any equity interest in Valin Xiangtan. Valin Xiangtan cites to the "Industrial

³⁶ Valin Group and Valin Steel Tube & Wire entered into a technology cooperation contract along with ArcelorMittal. *See id.* Exhibit A-21, p. 46.

³⁷ Valin Steel Tube & Wire's 2007 financial statements acknowledge that the respondent occupied land on which Xiangtan Group's plant and buildings were situated. *See id.* at Exhibit A-21, p. 141.

³⁸ *See id.* at Exhibit A-21, p. 140.

³⁹ *See* Valin Xiangtan's Supplemental Section A Response at Exhibit A-21, p.146.

Enterprise Owned By the Whole People Law” (“Enterprise Law”)⁴⁰, the Interim Measures⁴¹, and the Company Law⁴² and argues that it is clear that the assets held by state-owned companies are owned by the state. Because ownership of state-company assets remain with the state, Valin Xiangtan contends that there is no traceable “affiliation” from Valin Xiangtan, to Valin Group, to Hunan SASAC, to Central SASAC, and back down to other state-owned companies. According to Valin Xiangtan, Nucor’s assertion of affiliation to the PRC entity through the exercise of SASAC “control” over Valin Group is substantively similar to allegations that the Department has already rejected in other proceedings, such as *Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, From the People’s Republic of China: Final Results of Antidumping Administrative Reviews and Final Rescission and Partial Rescission of Antidumping Duty Administrative Reviews* and accompanying Issue and Decision Memorandum at Comment 3, 71 FR 54269 (Sept. 14, 2006). As such, the Department should reject Nucor’s arguments of affiliation through equity ownership.

Department’s Position: According to 19 C.F.R. 351.401(f), the Department will treat “two or more affiliated producers as a single entity where those 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 the {Department} concludes that there is a significant potential for the manipulation of price or production.”

Before deciding whether to treat multiple entities as a single entity, the Department must first reach a finding of affiliation. The Department determines affiliation under section 771(33) of the Act, which provides that:

The following persons shall be considered to be “affiliated” or “affiliated persons”:

- (A) Members of a family, including brothers and sisters (whether by the whole or half blood), spouse, ancestors, and lineal descendants.
- (B) Any officer or director of an organization and such organization.
- (C) Partners.
- (D) Employer and employee.
- (E) Any person directly or indirectly owning, controlling, or holding with power to vote, 5 percent or more of the outstanding voting stock or shares of any organization and such organization.
- (F) Two or more persons directly or indirectly controlling, controlled by, or under

⁴⁰ Article 2 of the Enterprise Law states that “the property of the enterprise shall be owned by the whole people, and shall be operated and managed by the enterprise with the authorization of the state...” Further, “[t]he enterprise shall obtain the status of a legal person in accordance with law and bear civil liability with the property which the state has authorized it to operate and manage.”

⁴¹ Under the Interim Measures “{t}he state-owned assets in enterprises belong to the state.”

⁴² Under the Company Law “{t}he term ‘wholly state-owned company’ as mentioned in this Law refers to a limited liability company incorporated wholly through investment by the state, for which the State Council or the local people’s government authorizes the state-owned.”

common control with, any person.

(G) Any person who controls any other person and such other person.

For purposes of this paragraph, a person shall be considered to control another person if the person is legally or operationally in a position to exercise restraint or direction over the other person.

The Statement of Administrative Action to the Uruguay Round Agreement Act states the following:

The traditional focus on control through stock ownership fails to address adequate modern business arrangements, which often find one firm “operationally in a position to exercise restraint or direction” over another in the absence of an equity relationship. A company may be in a position to exercise restraint or direction, for example, through corporate or family groupings, franchise or joint venture agreements, debt financing, or close supplier relationships in which the supplier or buyer becomes reliant upon the other.

Based on the record evidence and consistent with section 771(33)(E) of the Act, we find that the record evidence demonstrates that Valin Xiangtan and Valin Group are affiliated under 771(33)(E) of the Act through equity ownership.⁴³ Specifically, Valin Group is a minority shareholder of Valin Xiangtan.⁴⁴ Thus, Valin Xiangtan and the Valin Group satisfy the first step of the Department’s collapsing analysis.

The second step of the collapsing analysis is whether the companies produce the subject merchandise or similar merchandise on similar machines. Section 351.401(f)(1) of the Department’s regulations outlines the criteria for treating affiliated producers for purposes of calculating antidumping margins in antidumping proceedings –

- (1) In general. In an antidumping proceeding under this part, the Secretary will treat two or more affiliated producers as a single entity where those 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 the Secretary concludes that there is a significant potential for the manipulation of price or production.

We continue to find that the collapsing criteria have not been met because the Valin Group does not produce subject merchandise. As we stated in the *Preliminary Results*, the Valin Group does not have any production capabilities at all. According to Valin Xiangtan, the Valin Group is a holding company with no manufacturing activities.⁴⁵ Valin Xiangtan’s statement and

⁴³ See Valin Xiangtan’s Section A response at Exhibit 7-1.

⁴⁴ See *id.* See also Valin Xiangtan’s Supplemental Separate Rate response dated July 13, 2009, at 4.

⁴⁵ See Valin Xiangtan’s October 17, 2008, supplemental response at 5.

certification is supported by Valin Group's consolidated financial statements which state that there is no "main business income" after adjustments for consolidated entities are made. *See* Supplemental Section A and D dated 6/9/2009 at Exh. 2.2, p. 32. Although Nucor claims that Valin Group's financial statements reveal a long term payable to "Yeuyang steel rolling mill," we do not find that this indicates that the Valin Group is a producer of subject merchandise or that the Valin Group necessarily owns a steel rolling mill and, therefore, has the capability to produce subject merchandise without substantial retooling. This transaction is listed in Valin Group's financial statements as a "long term payable," not a "long term investment," and could indicate any number of transactions. However, without supporting detail explaining the "long term payable," we find that it is inappropriate for the Department to speculate as to the type of transaction. Moreover, we find that the project to expand the heavy plate lines that is included in the Valin Group's consolidated financial statements are applicable to Valin Xiangtan since Valin Group's financial statements are consolidated with Valin Tube & Wire and Valin Tube & Wire's financial statements (which are consolidated with Valin Xiangtan) include this project on behalf of our respondent. *See* Supplemental Section A at Exh. A-21, p. 24.

While Nucor has cited to the China Steel Yearbook 2006 and placed on record the China Steel Yearbook 2008, which Nucor asserts is evidence that Valin Group is a producer of merchandise under consideration, we find that the data submitted by Nucor is not conclusive as to whether Valin Group was a producer of identical or similar merchandise. *See* Nucor's March 14, 2008, new factual information submission at Exhibit 16. We agree with Valin Xiangtan that it is unclear from the China Steel Yearbook 2006 how the data was compiled for this publication or which companies are included in the data for the Valin Group. For example, the China Steel Yearbook 2006 includes data related to the output of certain steel products, including plate, for years that pre-date the POR (*i.e.*, for 2004 and 2005), but there is no mention of the reporting methodology or how the data was compiled. Additionally, the China Steel Yearbook 2006 states that "Valin Group was composed by Xiangtan Iron and Steel Group Company Limited, Lianyuan Iron and Steel Group Company Limited and Hengyang Steel Tube Group Company Limited in 1997. The total crude steel production capacity of the group achieved 9 million tonnes at the end of 2004." However, according to Valin Group's financial statements and other information on our record,⁴⁶ Valin Group has several subsidiaries, including our respondent, which this publication may be including in its data.

Similarly, the China Steel Yearbook 2008 does not specify which companies are included in the data for the Valin Group or how the data was compiled for this publication. Therefore, we find that the China Steel Yearbook 2006 and 2008 are inconclusive as to whether Valin Group is a producer of similar or identical merchandise. Because Valin Xiangtan stated that Valin Group is a holding company with no manufacturing activities,⁴⁷ the Valin Group financial statement appears to support this statement,⁴⁸ and there is nothing on the record to indicate otherwise, we

⁴⁶ *See* Valin Xiangtan's June 10, 2009, supplemental response at Ex. 2.2.

⁴⁷ *See* Valin Xiangtan's October 17, 2008, supplemental response at 5.

⁴⁸ *See* Supplemental Section AD dated 6/9/2009 at Exh. 2.2, p. 32.

continue to find that Valin Group is not a producer of similar or identical merchandise. As such, the collapsing criteria under 19 CFR 351.401(f)(1) are not satisfied. Therefore, the Department declines to analyze the potential for price manipulation under 19 CFR 351.401(f)(2) and declines to collapse Valin Xiangtan with the Valin Group.

Because we are not collapsing Valin Xiangtan with Valin Group, we have not addressed whether Valin Group and Baosteel and Anshan Steel are affiliated because this has no effect on the respondent in this case.

Finally, with respect to Nucor's argument that the Department did not follow up its requests for a separate rate application from Baosteel and Anshan Steel, we note that in the *Preliminary Results*, we rescinded the review with respect to Baosteel and Anshan Steel, pursuant to 19 CFR 351.213(d)(1), because the requests for reviews of Baosteel and Anshan Steel were timely withdrawn. Accordingly, these companies were not required to submit a separate rate application or certification.

Comment 4: Selection of Period of Review for Surrogate Values, Market-Economy Purchases and Factors of Production Data

Nucor argues that the Department must use surrogate value ("SV") and factors of production ("FOP") data for the POR. Nucor asserts that the Department's decision to calculate normal value for the current 2007-2008 POR using data from 2006-2007 POR from the prior new shipper review ("NSR"); 1) is unprecedented in non-market economy ("NME") cases; 2) goes against the Department's past practices; 3) creates a "mismatch" between the POR in which Valin Xiangtan's single sale was made and the POR used for calculating FOPs and surrogate values, and; 4) dangerously relies upon and misapplies precedent from market economy cases.

Nucor states that while Valin Xiangtan's entry is being reviewed under the appropriate POR in which it entered, the Department lacks precedent from NME methodology to support its preliminary decision to use FOP data and surrogate values from the prior period. Nucor contends that the Department's statement that it has rescinded the new shipper review and transferred relevant documents to the current proceeding does not warrant the Department's determination to use data from the 2006-2007 POR.

Nucor also argues that the Department's methodology contradicts its established practices. Nucor contends that while the standard antidumping duty questionnaire has clearly defined exceptions for reporting FOPs from a prior period, there are no exceptions for reporting by-product offsets and market economy inputs made outside the POR. Nucor argues that even in the rare instances where the Department has used prior-POR FOP data, it still uses surrogate values and financial ratios from the current POR, citing *Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Preliminary Partial Determination of Critical Circumstances: Diamond Sawblades and Parts Thereof from the People's Republic of China*, 70 FR 77121, 77132-77133 (December 29, 2005). Nucor argues that because the Department is measuring the margin of dumping during the POR, an entry in the POR should be matched against constructed value for the same POR in order to ensure an apples-to-apples match. Therefore, Nucor concludes that the Department's decision to use prior

period factors of production as well as prior period surrogate values are contrary to its past practices and will set a dangerous precedent.

Moreover, Nucor argues that the Department's methodology inappropriately borrows from market economy methodology. According to Nucor, in *Certain Hot-Rolled Carbon Steel Flat Products from Romania: Final Results of Antidumping Duty Administrative Review*, 72 FR 18204 (April 11, 2007) ("*Flat Products from Romania*"), the Department was faced with U.S. sales with a date of sale in a prior review period for which the Department looked for contemporaneous home market sales under the "60/90" rule. According to Nucor, this market economy case does not apply because in a non-market economy proceeding, the Department does not look for contemporaneous home market sales, nor does it determine whether sales are outside the ordinary course of trade. Because normal value is not based upon a sales comparison, Nucor contends that the date of sale is not relevant to any timing issues. Moreover, Nucor contends that the Department's reliance on this particular case as precedent is inappropriate in an NME proceeding where the Department is using a factors approach because, under Section 773(c)(1)(B), the Department has already determined that available information does not permit that normal value be determined under a market economy methodology.

Finally, Nucor argues that, notwithstanding the arguments above, if the Department continues to use this methodology based on its market economy practices, the Department must follow all of its market economy methodologies and obtain quarterly surrogate values and market economy inputs. Nucor contends that in a recent remand, the Department determined that, if a party can show changes of 25 percent or more in costs in any two quarters during the POR, the use of annual costs should be abandoned and quarterly costs should be used.⁴⁹ According to Nucor, the Department appears to have determined that this new policy will apply for all market economy cases, including pending cases.⁵⁰

Valin Xiangtan rebuts that, in relying on *Flat Products from Romania*, and *Stainless Steel Wire Rods from India: Preliminary Results of Antidumping Duty Administrative Review and Notice of Intent to Rescind Antidumping Duty Administrative Review in Part*, 72 FR 52079 (Sept. 12, 2007) ("*Stainless Steel Wire Rods from India*") (unchanged in final), the Department acted

⁴⁹ See Final Results of Redetermination Pursuant to Court Remand, *Habas Sinai ve Tibbi Gazlar Istihsal Endustrisi A.S. v. United States*, Slip Op 09-55 (CIT June 15, 2009) at 6. See also *Certain Steel Concrete Reinforcing Bars From Turkey: Final Results of Antidumping Duty Administrative Review and Determination To Revoke in Part*, 73 FR 66218 (Nov 7, 2008) at cmt. 2; *Stainless Steel Plate in Coils from Belgium: Final Results of Administrative Review of Antidumping Order*, 73 FR 75398 (Dec. 11, 2008) at cmt. 4; *Certain Welded Stainless Steel Pipes from the Republic of Korea: Final Results of Antidumping Duty Administrative Review*, 74 FR 31242 (June 30, 2009) at cmt. 1; *Stainless Steel Sheet and Strip Coils from Mexico: Final Results of Antidumping Duty Administrative Review*, 74 FR 6365 (Feb 9, 2009) at cmt. 5.

⁵⁰ See the Post-Preliminary supplemental questionnaires filed in *Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea*. Letter from Theresa C. Deely to J. David Park on behalf of HYSCO (September 9, 2009). See also Letter from Theresa C. Deely to Donald Cameron on behalf of Union (September 4, 2009); Letter from Theresa C. Deely to J. David Park on behalf of POSCO (September 14, 2009) (on file in the Central Records Unit).

consistently with prior practice. Valin Xiangtan argues that the Department was faced with an identical fact pattern in *Flat Products from Romania*. In that case the Department relied upon respondent's costs from the prior segment (*i.e.* the same segment as when the foreign-like product was produced and sold) when performing a below-cost test on those sales.⁵¹ Although the instant review is a non-market economy case and normal value is not based on sales of foreign-like product but on FOPs used by Valin Xiangtan in the prior segment to produce the subject merchandise, Valin Xiangtan argues that the language in the statute is silent with respect to the time frame from which the Department may select FOPs and SVs used to calculate normal value in non-market economy cases.⁵² According to Valin Xiangtan, the statute actually supports the Department's methodology because the FOPs utilized to produce all of the subject merchandise under review were both purchased and consumed during the segment prior to entry, and the use of prior segment surrogate values to value those FOPs is, therefore, the best available information.⁵³

Additionally, Valin Xiangtan rebuts Nucor's argument that the Department's methodology contradicts established Department practice. Valin Xiangtan argues that Nucor's use of the Department's standard NME questionnaire carries no force of law and that the Department is not bound by the instructions contained in its standard NME questionnaire. Therefore, Valin Xiangtan disagrees with Nucor's argument that Valin Xiangtan must report its market economy purchases and byproducts offsets for the 2007-2008 POR because the Department is not legally bound by the contents of the standard NME questionnaire. Valin Xiangtan argues that because the Department instructed Valin Xiangtan to place evidence from the new shipper review on the record of this review, and further instructed that it would be using that evidence as the basis for its normal value calculation, the Department's instructions made clear that Valin Xiangtan need not request, as articulated in the NME questionnaire, that the Department consider using FOPs from another POR.

Finally, Valin Xiangtan disagrees with Nucor's contention that the Department is borrowing from decisions in market economy cases and, consequently, must follow all of its market economy methodologies. According to Valin Xiangtan, the Department acted fully within its authority when drawing on prior segment FOPs and SVs and did not borrow from market economy methodology in its analysis. Valin Xiangtan adds that the Department's broad authority in calculating normal value for the current 2007-2008 POR using FOP and surrogate value data from 2006-2007 is supported by the Department's decisions in *Flat Products from Romania*, which is directly analogous to the facts on the record, and *Stainless Steel Wire Rods from India*.

Department's Position: For the final results, we have continued to use data and responses from the NSR POR (11/1/06-10/31/07). Section 773(c)(1) of the Act states that "the valuation of the

⁵¹ See *Flat Products from Romania* at cmt 2.

⁵² See section 773(c) of the Act.

⁵³ See *Goldlink Indus. Co., Ltd. v. United States*, 431 F.Supp. 2d 1323, 1327 (CIT 2006).

factors of production shall be based on the best available information regarding the values of such factors...” The statute does not define the term “best available information;” however, the Department is provided with “broad discretion to determine the best available information” in a reasonable manner on a case-by-case basis. See *Goldlink Indus.Co., Ltd.* 431 F.Supp. 2d at 1327. In this particular case, we find that the best available information to calculate normal value is to use FOP and SV data from the prior period (*i.e.*, 11/1/06-10/31/07). As we stated in *Cut-to-Length Carbon Steel Plate, from the People’s Republic of China: Notice of Rescission of Antidumping Duty New Shipper Review*, 74 FR 15930 (April 8, 2009), “section 351.214(j)(1) of the Department’s regulations states that ‘if a review (or a request for review) under § 351.213 (administrative review), § 351.214 (new shipper review), § 351.215 (expedited antidumping review), or § 351.216 (changed circumstances review) covers merchandise of an exporter or producer subject to a review (or request for a review) under this section, the Secretary may, after consulting with the exporter or producer: (1) rescind, in whole or part, a review in progress under this subpart...’. In the instant case, the entry made by Valin Xiangtan covered by the new shipper review is also covered by the period of review of the administrative review that the Department initiated on December 24, 2008.” Thus, the Department rescinded the new shipper review for Valin Xiangtan and determined to review Valin Xiangtan’s entry in the current administrative review.

While Valin Xiangtan had a single entry covered by the POR of the instant administrative review, Valin Xiangtan’s sale was made in the prior POR, the production of the subject merchandise occurred in the prior POR, and it had no subsequent sales of subject merchandise during the current POR. Because of these particular circumstances, the Department requested that all interested parties transfer certain data from record of the prior NSR to the record of the current AR, including all data responses submitted by Valin Xiangtan.⁵⁴ However, with respect to separate rates, it is the Department’s practice to require a party to submit evidence that it operates independently of the government in each segment of a proceeding in which it requests separate rate status. See *Tapered Roller Bearings and Parts Thereof, Finished or Unfinished, from the People’s Republic of China: Final Results of 2005-2006 Administrative Review and Partial Rescission of Review*, 72 FR 56724 (October 4, 2007), and *Peer Bearing Co. Changshan v. United States*, 587 F.Supp. 2d 1319, 1324-25 (CIT 2008) (affirming the Department’s determination in that review). Thus, the Department issued a supplemental questionnaire specific to Valin Xiangtan’s separate rate eligibility during the current POR.⁵⁵

While the Department generally calculates margins using data from the current POR, there have been specific instances where the Department has used prior POR data. Specifically, in *Flat Products from Romania* and *Wire Rods from India*, where all production and sales occurred in the previous POR but the entry was made during the current POR, and there were no subsequent

⁵⁴ See Letter to All Interested Parties, regarding “2007-2008 Administrative Review of the Antidumping Duty Order On Certain Cut-to-Length Carbon Steel Plate from the People’s Republic of China: Extension of the Deadline for the (1) Transfer of Certain Information from One Record to Another and (2) Submission of Factual Information (other than that transferred from the NSR record) for the 2007-2008 Administrative Review,” (April 24, 2009).

⁵⁵ See Valin Xiangtan’s July 13, 2009, supplemental questionnaire response.

sales made during the POR, the Department relied on cost data and responses transferred from the record of the previous proceeding. Because the facts in this review mirror the facts in *Flat Products from Romania* and *Wire Rods from India*, the Department finds that case precedent supports our determination to use data and responses from the prior POR. While Nucor asserts that the issue in *Flat Products from Romania* and *Wire Rods from India* involved the use of which costs to use, for purposes of conducting the cost test, which is not done in NME cases, we still find the rationale behind using prior data to be relevant here. In *Flat Products from Romania*, not only did the Department gather costs from the prior period to conduct the cost test, the Department also relied on home market sales from the prior period, in addition to U.S. sales from the prior period, because of the “unusual circumstances” in that review (*i.e.*, though there were entries in the current period, all of the sales occurred in the prior period, and there were no subsequent sales during the POR). Thus, the Department not only conducted the cost test with prior data, but also calculated MS Galati’s margin using home market sales and U.S. sales both from the prior period. See *Flat Products from Romania* at Comment 2. In the instant case, we have the same “unusual circumstances” outlined in *Flat Products from Romania*; therefore, we continue to find it appropriate to use prior FOP and SV data from the prior period.

While Nucor has relied on the Department’s standard NME questionnaire and instructions as examples of the Department’s practice to only use current POR data, we find that the questionnaire holds no authority and is solely for the purpose of gathering data. Moreover, we disagree with Nucor’s assertion that if the Department decides to use prior POR data, in line with certain market-economy cases, we should also adopt other market-economy methodologies, such as the use of quarterly costs.⁵⁶ Although the precedent on which the Department relies for using a prior POR’s data is from market-economy reviews, the Department has not adopted market-economy methodology by doing so. As described above, the circumstances regarding the timing of Valin Xiangtan’s sale, production, and entry of the subject merchandise mirror the facts in *Flat Products from Romania* and *Wire Rods from India*. Thus, the Department finds that it is not “improperly relying on or borrowing from market-economy methodology.” We are not employing market-economy methodology in calculating normal value, as we are continuing to calculate normal value in the instant review using FOPs, pursuant to section 773(c) of the Act and 19 C.F.R. 351.408. Therefore, because we are not following “market-economy methodologies,” we have not obtained quarterly surrogate values or quarterly market-economy inputs, to determine normal value.

Comment 5: Valuation of Certain Gas By-products

Valin Xiangtan argues that the conversion calculation which the Department relied on, in the *Preliminary Results*, to convert natural gas from kilograms (“KG”) to cubic meters (“M³”)

⁵⁶ We note that Nucor has relied on the issuance of supplemental questionnaires as indicative of the Department’s new policy to use quarterly costs in all market economy cases. Supplemental questionnaires are for purposes of gathering data, and the responses of which are used in making the Department’s determinations. Supplemental questionnaires in and of themselves are not statements of Department policy.

contained an inadvertent error, leading to an incorrect valuation of Valin Xiangtan's gas by-products. Valin Xiangtan contends the Department should use the correct conversion ratio for the final results.

Nucor argues that Valin Xiangtan's gas by-products should not be valued at the full SV rate for natural gas because these gases, namely coke oven gas and blast furnace gas, have a significantly lower energy potential than natural gas. Citing *Notice of Preliminary Determination of Sales at Less Than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products From the People's Republic of China* 66 FR 22183, (May 3, 2001), Nucor contends the Department should multiply the natural gas surrogate value it calculates by the appropriate energy equivalent values provided by Valin Xiangtan.

Department's Position: We agree with both parties. Accordingly, we have adjusted our conversion calculation to correctly convert from KG to M³. Additionally, we have adjusted the SVs for coke oven gas and blast furnace gas by multiplying the full SV for natural gas by Valin Xiangtan's reported energy percentages for the two gases, yielding SVs that reflect the appropriate energy equivalent values.

Comment 6: Valuation of Dolomite

Valin Xiangtan argues that the Department erred in the *Preliminary Results* by using World Trade Atlas ("WTA") data to calculate the SV for dolomite. Valin Xiangtan contends that dolomite is not a homogenous product, in that the cost of dolomite varies depending on the grade. Valin Xiangtan argues that it consumes low-value commodity dolomite—that has a corresponding lower price—in the production of iron and steel; whereas, the more expensive high-value dolomite, such as white lime, hydrated lime, or calcined limestone, is not used in the production of iron or steel.⁵⁷ Valin Xiangtan argues that because of the large differences in each country's average unit value ("AUV") in the WTA data, imports from certain countries must represent higher value-added dolomite.⁵⁸ Thus, Valin Xiangtan asserts that the calculated average SV from the WTA is skewed as a result of including the AUVs of Greece, Italy, and the United States. Valin Xiangtan argues that the average price for dolomite in India during the period of May 2007 through April 2008 was 2.47 rupees per kilogram, which is much lower than the AUV of imports from Greece, Italy, and the United States.⁵⁹ Thus, Valin Xiangtan recommends that the Department exclude imports from Greece, Italy, and the United States from the weighted average SV calculation for dolomite in order to more accurately represent the low-value commodity dolomite consumed by Valin Xiangtan.

Nucor rebuts Valin Xiangtan's argument that the Department should recalculate the SV for dolomite for the final results. Nucor concurs with the Department's determination that Valin

⁵⁷ See Letter from Arent Fox titled "Certain Cut-to-length Carbon Steel Plate From The People's Republic of China; Surrogate Value Submission" (Sept. 8, 2009) at Exh. 4, p. 46 and Exh. 5, p. ii. ("Valin Xiangtan SV Submission").

⁵⁸ See Preliminary Results FOP Memo at Attachment 3 and Valin Xiangtan SV Submission at Exhibit 3

⁵⁹ See Valin Xiangtan SV Submission at Exhibit 7.

Xiangtan did not provide record evidence to support that its dolomite is materially different from Indian imports under HTS 2518.10.00. Nucor argues that Valin Xiangtan's reliance on *Pure Magnesium from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 73 FR 76336 (December 16, 2008) ("*Pure Magnesium/PRC*") and accompanying Issues and Decision Memorandum at Comment 1, where the Department declined to use the WTA data because the data reflected "a different quality product than the dolomite used for magnesium production," is misplaced. Nucor argues that unlike the respondents in *Pure Magnesium/PRC*, Valin Xiangtan didn't provide record evidence to support that its dolomite differs from the dolomite represented in the WTA data. Nucor also contends that the Department should not parse WTA data because the WTA data does not contain individual shipment data in order to determine the specific type of ore quality by country. Citing *Asociasion Columbiana de Exportadores de Flores v. United States*, 704 F. Supp. 1114 (CIT 1989), Nucor argues that the Department is prohibited from using speculation in its determinations, which it would be doing if it speculated about the product quality by country in the WTA data. Thus, Nucor recommends that the Department should continue to use the Indian imports of dolomite under Indian HTS number 2518.1000 to calculate the SV for Valin Xiangtan's consumption of dolomite.

Department's Position: The Department's practice when selecting the best available information for valuing FOPs, in accordance with section 773(c)(1) of the Act, is to select, to the extent practicable, surrogate values which are product-specific, representative of a broad market average, publicly available and contemporaneous with the POR. While there is no hierarchy for applying the surrogate value selection criteria, "the Department must weigh available information with respect to each input value and make a product-specific and case-specific decision as to what the "best" surrogate value is for each input." See *Notice of Final Determination of Sales at Less Than Fair Value: Polyethylene Terephthalate Film, Sheet, and Strip from the People's Republic of China*, 74 FR 55039 (September 24, 2008), and accompanying Issues and Decision Memorandum at comment 2.

In the *Preliminary Results*, we stated that we valued Valin Xiangtan's dolomite input using WTA data because we had insufficient evidence, other than alleged price differences, to conclude that respondent's dolomite was materially different than the dolomite imported into India under HTS 2518.10.00 as compiled by WTA.⁶⁰ As noted by Nucor, the Department has consistently found that the existence of higher prices alone does not necessarily indicate that price data is distorted or misrepresented, and thus, is not sufficient to call into question SV import data, absent specific evidence the data are otherwise unrepresentative.⁶¹

However, subsequent to the *Preliminary Results*, Valin Xiangtan argued that the dolomite it uses is not typically traded internationally and, in support of this argument, submitted additional information, including *British Geological Survey* (2006) and *A Review of the Dolomite and*

⁶⁰ See Preliminary Results FOP Memo at page 5.

⁶¹ See, e.g., *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China: Final Results of the 2007-2008 Administrative Review of the Antidumping Duty Order*, 75 FR 844 (January 6, 2010), and accompanying Issues and Decision Memorandum at Comment 2.

Limestone Industry in South Africa Report R43/2003.⁶² We have reviewed this information in the context of information Valin Xiangtan previously placed on the record describing its dolomite input.⁶³ We have concluded that substantial record evidence indicates 1) internationally traded dolomite, due to the high cost of transport, is likely to be a high-end, high-quality product, and 2) Valin Xiangtan's dolomite input is a low-end, low-quality product, unlikely to be traded internationally. In other words, internationally traded dolomite appears to be materially different than the dolomite used by Valin Xiangtan in the production of subject merchandise.

Consequently, we have determined that the dolomite WTA import data is inappropriate to use for purposes of valuing Valin Xiangtan's dolomite input. Accordingly, for the final results we have valued Valin Xiangtan's dolomite input using purchase prices for dolomite reflected in the 2006-2007 financial statements of Tata Sponge Iron Ltd., ("Tata Sponge").⁶⁴ Consistent with *Pure Magnesium from the People's Republic of China: Final Results of 2004-2005 Antidumping Duty Administrative Review*, 71 FR 61019 (October 17, 2006), and accompanying Issues and Decision Memorandum at Comment 1, the Tata Sponge value is specific to the input consumed by Valin Xiangtan, publicly available, and contemporaneous with the 2006-2007 NSR POR (*see* comment 4 above). Therefore, we find that this value represents the best available information on the record to value dolomite.

Comment 7: Valuation of Ferric Oxide

Nucor contends that the Department erred by using Valin Xiangtan's market economy ("ME") purchase price of ferric oxide in its input calculations. Nucor challenges Valin Xiangtan's assertion that the ferric oxide vendor is a U.S. company, asserting that the vendor is affiliated with the Chinese central government and should be considered part of the PRC-wide entity and therefore the vendor does not qualify for a separate rate. Nucor claims there is evidence on the record that shows that this vendor is vital to China's national economic goals as a result of the government's control over the steel industry.⁶⁵ Nucor also argues that the Department should not treat purchases from a government-owned supplier differently in an antidumping case than it does in a countervailing duty case, citing *Circular Welded Carbon Quality Steel Line Pipe from the People's Republic of China: Final Affirmative Countervailing Duty Determination*, 73 FR 70961 (November 24, 2008) and accompanying Issues and Decision Memorandum at Comments 1-4. Nucor asserts that in countervailing duty cases, the Department places the burden on the respondent to demonstrate that the supplier is not government owned, and in the instant case, there is no evidence on the record to support that Valin Xiangtan's ferric oxide purchases were paid at commercial prices. Further, Nucor contends that there are no other ME purchases of ferric oxide to compare the prices at which Valin Xiangtan purchased the input.

⁶² See Valin Xiangtan SV Submission.

⁶³ Valin Xiangtan also provided testing certificates and purchase contracts for dolomite. See 12/15/08 submission at Exhibits 2 and 4.

⁶⁴ See Valin Xiangtan's SV Submission dated 1/6/2009 at Exhibit 11.

⁶⁵ See Nucor's Supplemental New Factual Information at Attachment 1

If the Department upholds its decision to support ME purchases from government-owned suppliers, Nucor claims this new precedent will trigger a type of manipulation called “diversionary input dumping,” which will allow respondents to ask government-owned trading companies to purchase ME inputs for them at a commercial rate and sell the inputs to the respondents at an artificially low rate. Nucor contends that the government-owned trading companies are willing to bear the burden of paying higher input prices to further the national interests of the domestic steel industry. To prevent this type of manipulation, Nucor argues for the Department to conduct an arm’s-length analysis between Valin Xiangtan and the ferric oxide vendor to prove that the price paid for ferric oxide was an arm’s-length transaction. Nucor claims an arm’s-length transaction does not exist because Valin Xiangtan is affiliated with the parent company of the ferric oxide vendor pursuant to section 771(33)(F) of the Act; consequently, Nucor argues that both parties are controlled by the Chinese central government vis-à-vis SASAC. In making this claim, Nucor recommends that the Department should apply an SV for Valin Xiangtan’s purchases of ferric oxide using Indian data.

Valin Xiangtan rebuts Nucor’s position and argues that the Department should uphold its decision from the *Preliminary Results* to use Valin Xiangtan’s ME purchase price of ferric oxide because its ferric oxide vendor is a U.S. company unaffiliated with the Chinese central government that sold ferric oxide in U.S. dollars.⁶⁶ Valin Xiangtan argues against Nucor’s assertion that the Department should conduct a separate rate test on the ferric oxide vendor, because there is no statutory or regulatory requirement that the Department conduct a separate rate test for suppliers of material inputs. Based on a contract signed between Valin Xiangtan and the ferric oxide vendor, Valin Xiangtan contends that the ferric oxide it purchased represented an arm’s-length transaction, evidenced by an irrevocable letter of credit between the parties. Citing to *Asociasion Columbiana de Exportadores de Flores v. United States*, 704 F. Supp. 1114 (CIT 1989), Valin Xiangtan argues that Nucor’s speculation is not an appropriate basis for the Department to determine which value to apply to its consumption of ferric oxide, or for the Department to determine that Valin Xiangtan and its ferric oxide vendor are affiliated.

Department’s Position: We have continued to value a portion of Valin Xiangtan’s consumption of ferric oxide using its ME purchase, as we did in the *Preliminary Results*. In accordance with the Department’s practice, as outlined in *Antidumping Methodologies: Market Economy Inputs, Expected Non-Market Economy Wages, Duty Drawback; and Request for Comments*, 71 FR 61716 (October 19, 2006), where at least 33 percent of an input was sourced from market-economy suppliers and purchased in a market-economy currency, the Department will use actual weighted-average purchase prices to value these inputs. Where the quantity of the input purchased from market-economy suppliers during the period was below 33 percent of its total volume of purchases of the input during the period, the Department will weight-average the weighted average market-economy purchase price with an appropriate surrogate value. *See, e.g., Folding Metal Tables and Chairs from the People’s Republic of China: Final Results of Antidumping Duty Administrative Review*, 74 FR 68568 (December 28, 2009), and accompanying Issues and Decision Memorandum at Comment 2. In the instant case, Valin

⁶⁶ See 2nd Supplemental AD and 1st Supplemental C Response at Exh. 13.2,

Xiangtan has provided sufficient documentation to substantiate its market economy purchase of ferric oxide by providing invoices and sales contracts demonstrating that it purchased the input from an ME supplier (a U.S. company) in a market economy currency (U.S. dollars).

With respect to Nucor's argument that Valin Xiangtan's vendor of ferric oxide does not qualify for a separate rate, the Department notes that it does not conduct separate rate tests of ME suppliers of raw material inputs. As discussed above, the Department's separate rate test is used specifically to determine whether an NME respondent has established that it is free from government control over its export activities. *See Sparklers/PRC* and *Silicon Carbide/PRC*. Therefore, we have not conducted a separate rate test of Valin Xiangtan's ME supplier of raw material inputs.

Regarding Nucor's argument that the Department is inconsistent in how it treats purchases from a government-owned supplier in an antidumping ("AD") case versus how it does in a CVD case, we find that there are separate sets of laws and regulations applicable to AD and CVD proceedings, each with separate purposes.

Finally, with respect to Nucor's other arguments, although Nucor argues that the Department should not rely on the prices of Valin Xiangtan's market economy purchases of ferric oxide to value that portion of its ferric oxide FOP that was purchased from an ME source, the Department finds that rejection of the market economy prices would have an insignificant impact on normal value, and no impact Valin Xiangtan's margin calculation. Accordingly, the Department finds that it is not necessary to further address Nucor's arguments that the market economy purchase price of certain ferric oxide inputs should not be relied upon by the Department in its calculations.

Comment 8: Selection of Financial Statements

Nucor contends that the Department should use the 2007-2008 financial statements of Tata Steel Limited ("Tata"). Nucor argues that it is the Department's practice in selecting financial statements to consider whether the surrogate company produces subject merchandise, whether the data is publicly available, and whether the data is contemporaneous.⁶⁷

Nucor argues that Tata is an integrated producer of a variety of steel products, including the merchandise subject to this order (*i.e.*, carbon and alloy steel plate). Specifically, Nucor points to information on the record indicating that Tata produces and sells CTL plate in grades and sizes that mirror the scope of this order.⁶⁸ Further, Nucor contends that Tata has stated to the Department that it manufactures steel plate in questionnaire responses during the December 1,

⁶⁷ See, *e.g.*, *Wooden Bedroom Furniture from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and New Shipper Review*, 73 FR 49162 (August 20, 2008), and accompanying Issues and Decision Memorandum at Comment 1C.

⁶⁸ See Letter from Wiley Rein LLP to the Secretary of Commerce re: *New Shipper Review in Certain Cut-to-Length Carbon Steel Plate from the People's Republic of China* (Jan. 6, 2009) at Exhibit 6 ("Nucor's Jan. 6 Surrogate Submission").

2005, through November 30, 2006, period of review of *Certain Hot-Rolled Carbon Steel Flat Product from India*.⁶⁹ Additionally, Nucor argues that Tata's company officials and its attorneys have stated and certified that Tata produces subject merchandise. Moreover, Nucor claims that the Department issued a report stating that Tata's corporate officers directly told the Department that the company's Jamshedpur facilities produces "hot-rolled plate."⁷⁰ Finally, Nucor argues that Valin Xiangtan's arguments not to use Tata's financial statements because "Tata Steel does not appear to manufacture ...subject merchandise" and the "company operates a huge number of subsidiaries" are not reliable because these claims were based solely upon a review of the company's 2006-2007 annual report. Nucor also argues that both entities, Tata and Valin Xiangtan, are similarly diversified. Consequently, Nucor argues that Tata's 2007-2008 financial statements serve as an ideal source of surrogate financial information.

Valin Xiangtan argues that the Department correctly rejected the financial statements of Tata and used the financial statements of Essar Steel Limited ("Essar"). Valin Xiangtan argues that (1) Tata is much different than Valin Xiangtan both from the production point of view (*i.e.*, integration and diversification) and its corporate structure (*i.e.*, global company); (2) the financial ratios of Tata advocated by Nucor are aberrational on their face; and (3) while the Department was correct to use Essar's financial statements, the financial statements of Ispat Industries Limited ("Ispat") are potentially useable as well.

First, Valin Xiangtan argues that Essar's financial statements are more appropriate because its level of integration is similar to that of Valin Xiangtan. Valin Xiangtan argues that Tata, on the other hand, is much more integrated than Valin Xiangtan because it produces and sources its own coal and iron ore. Thus, Valin Xiangtan argues, unlike Valin Xiangtan, Tata produces its own key raw materials, which are the most important raw materials in steel production.

Second, Valin Xiangtan argues that Tata's financial statements should not be used because Tata is a more diversified company than Valin Xiangtan. Valin Xiangtan argues that, according to Tata's annual report, it produces the following types of products: coal, iron ore, bearings, steel tubes and pipes, steel, chrome ore and alloys and electricity. Valin Xiangtan disagrees with Nucor's contention that Valin Xiangtan and the companies affiliated to Valin Xiangtan are more diversified. According to Valin Xiangtan, a review of its Section A responses confirms that Valin Xiangtan is essentially a steel producer and while companies affiliated with Valin Xiangtan are more diversified, Valin Xiangtan itself is not remotely as diversified as Tata. Valin Xiangtan contends that while the evidence regarding Tata's steel plate production is somewhat confusing, because of the significant amount of non-flat rolled steel products produced by Tata, Tata's data is fundamentally flawed and should not be used to calculate surrogate financial ratios.

Third, Valin Xiangtan argues that Tata's financial statements should not be used because they reflect the ratios of a multinational company, not an Indian company. As such, Tata's financial

⁶⁹ See *id.* at Exhibit 3.

⁷⁰ See Nucor's Jan. 6 Surrogate Submission at Exhibit 5 (Tata Verification Report at 4).

statements contain a great number of subsidiaries, many of which do not produce steel, or are located overseas.

Fourth, Valin Xiangtan argues that Tata's financial statements should not be used because Tata's overhead, SG&A, and profit ratios are aberrational. According to Valin Xiangtan, almost 25% of Tata's overhead rate of 62.81% is "conversion charges," that are not related to the production of flat steel products. Valin Xiangtan states that Essar's financial statements do not show this type of conversion cost and are, therefore, more appropriate. Additionally, Valin Xiangtan contends that Tata's SG&A ratio of 35.35% is aberrational due to Tata's recent acquisition of Corus, a British and Dutch Steel Company. Finally, Valin Xiangtan argues that Tata's profit ratio of 53.02% is aberrational and likely caused by Tata's coal and iron ore operations and other non-steel divisions.

Finally, Valin Xiangtan contends that the Department should continue to use Essar's financial statements, but also argues that the financial ratios of Ispat are also potentially useable because Ispat is as integrated as Valin Xiangtan and Ispat is a producer of comparable merchandise (*i.e.* steel sheet).

Department's Position: Section 773(c)(1) of the Act states that "the valuation of the factors of production shall be based on the best available information regarding the values of such factors..." In choosing surrogate financial ratios, it is the Department's practice to use data from market-economy surrogate companies based on the "specificity, contemporaneity, and quality of the data." See *Diamond Sawblades and Parts Thereof from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Final Partial Affirmative Determination of Critical Circumstances*, 71 FR 29303 (May 22, 2006), and accompanying Issues and Decision Memorandum at Comment 1.

As we stated in *Tires/PRC* at Comment 17A, it is the Department's practice to disregard financial statements where we have reason to suspect that the company has received actionable subsidies, where there is other usable data on the record. However, in *Tires* at Comment 17A, we also stated that exceptions to this practice apply when the circumstances of the particular case warranted. In *Polyethylene Terephthalate Film, Sheet, and Strip from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 73 FR 55039 (Sept. 24, 2008) ("*PET Film*"), and accompanying Issues and Decision Memorandum at Comment 3, we found that circumstances in that case warranted an exception to the Department's practice. Specifically, the Department used financial statements from companies that received actionable subsidies because all of the financial statements on the record indicated the existence of actionable subsidies, and there were no other financial statements on the record. In the instant case, similar to *PET Film*, we found evidence of countervailable programs in all four companies' financial statements.

We then looked to the other criteria the Department considers when selecting financial statements. In reviewing each annual report, we find Essar's financial statements to be the best available information to calculate surrogate financial ratios because they are complete, legible, publicly-available, contemporaneous with the POR, and from a producer of identical merchandise.

We have determined that Essar's 04/01/07-03/31/08 financial statements are also suitable because Essar is at the same level of integration as Valin Xiangtan. In contrast, Tata is more integrated than Valin Xiangtan because it is a steel company that mines its own inputs, including coal and iron ore. According to page 6 and page 132 of Tata's 04/01/07-03/31/08 financial statements, Tata is 100% self-sufficient in its current requirement of iron ore for its Jamshedpur operations and 60% of its coal requirement from its own mines. By contrast, Essar purchases all of its coal and iron.⁷¹ Thus, Essar's experience is closer to that of Valin Xiangtan, which also purchases all of its coal and iron ore.⁷² We find the level of vertical integration to be an important distinction among the potential steel companies' financial statements because the costs associated with mining operations would not accurately reflect the costs of Valin Xiangtan.⁷³ In addition, it is the Department's practice to select financial statements of surrogate companies which best approximate the respondent's experience.⁷⁴ As such, we have determined not to use Tata's 04/01/07-03/31/08 financial statements since Essar purchases its iron ore and coal and is therefore at the same level of integration as Valin Xiangtan.⁷⁵

Although both Ispat and Essar are at the same level of integration as Valin Xiangtan, we have determined to rely on Essar's financial statements, because Essar produces identical merchandise while Ispat only produces comparable merchandise. Based on its 04/01/07-03/31/08 financial statements, Essar produces identical merchandise. According to page 3 and page 37 of Essar's 04/01/07-03/31/08 financial statements, Essar produces flat-rolled products and "PLATES." In contrast, Ispat does not produce hot-rolled plates. According to page 34 of Ispat's 04/01/07-03/31/08 financial statements, Ispat produces comparable merchandise, *i.e.*, hot-rolled coil. Although the financial statements indicate that Ispat intends to produce plates for ship building, the project is only under development. Therefore, because Essar is a producer of identical rather than comparable merchandise, we selected Essar's financial statement for purposes of the final results.⁷⁶

⁷¹ See Essar's 04/01/07-03/31/08 Annual Report at 32.

⁷² See Valin Xiangtan's Section D response at Exhibit 5.

⁷³ See, *e.g.*, *Electrolytic Manganese Dioxide From the People's Republic of China: Final Determination of Sales at Less than Fair Value*, 73 FR 48195 (August 18, 2008), and accompanying Issue and Decision Memorandum at cmt. 3.

⁷⁴ See, *e.g.*, *Certain Steel Nails from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances*, 73 FR 33977 (June 16, 2008), and accompanying Issue and Decision Memorandum at cmt. 11.

⁷⁵ See Essar's 04/01/07-03/31/08 Annual Report at 32, *see also* Section D response at Exhibit 5.

⁷⁶ See *Persulfates from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 66 FR 42628 (August 14, 2001), and accompanying Issue and Decision Memorandum at cmt. 5; *see also* *Antidumping Duties; Countervailing Duties, Notice of Proposed Rule Making and Request for Public Comments*, 61 FR 7308, 7342 (February 27, 1996).

Comment 9: Treatment of Subsidized Countries in Import Statistics

Valin Xiangtan argues that the Department should not have excluded Indonesia data from its surrogate value calculations on the grounds that Indonesia may have broadly-available, non-industry specific export subsidies. Valin Xiangtan argues that in recent Indonesian CVD cases, the Department has found no evidence of export subsidies. For example, Valin Xiangtan claims that in the most recent CVD case involving Indonesia, the subsidies at issue related to equity infusions and loans, and were not export subsidies.⁷⁷ As such, Valin Xiangtan contends that the Department cannot make a blanket determination that Indonesia may have broadly-available export subsidies when it has not made such a determination for several years. Valin Xiangtan contends that including or excluding Indonesian data has a significant impact on the coal surrogate value.

Nucor argues that the Department should continue to apply its longstanding practice of excluding surrogate data from countries that maintain generally available export subsidies. According to Nucor, where generally available export subsidy programs do exist, there is no requirement that a petitioning party allege them in order to prove their existence. Nucor cites to *Final Affirmative Countervailing Determination and Final Negative Critical Circumstances Determination: Certain Lined Products from Indonesia*, 71 FR 47174 (Aug. 16, 2006) (“*Certain Lined Products from Indonesia*”) as an example where the Department found domestic subsidies in excess of 40 percent, which far outweighed any subsidies that would have been derived from export programs. Nucor notes that in *Certain Lined Products from Indonesia*, allegations of export subsidies were not made, but that there is no evidence that these programs no longer exist.

According to Nucor, there is evidence that export subsidies continue to exist because in *Certain Cut-to-Length Carbon-Quality Steel Plate from Indonesia: Final Results of Expedited Sunset Review*, 70 FR 45692 (Aug. 8, 2005) (“*CTL Plates from Indonesia*”), the Department found evidence of active Indonesian export subsidy programs. Specifically, Nucor points to the “Rediscount Loan Program,” in which the Ministry of Industry and Trade, the Ministry of Finance, and the Bank of Indonesia (“BoI”) provide support for certain exporters.⁷⁸ Nucor argues that this export program was originally found to be countervailable in 1999, and was found to continue to exist as of the Department’s first sunset review in August 2005. As the Department noted in *CTL Plates from Indonesia*, Nucor contends, “{t}here have been no administrative reviews and no evidence submitted to the Department that any programs found to be countervailable in the investigation have been terminated.”⁷⁹ Therefore, Nucor argues it is reasonable for the Department to presume that export subsidies continue to exist, and because no Indonesian party has presented any evidence to the contrary, the Department should not abandon its longstanding policy of disregarding import values from Indonesia.

⁷⁷ See *Coated Free Sheet Paper from Indonesia: Final Affirmative Countervailing Duty Determination*, 72 FR 60642 (Oct. 25, 2007). See also *Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination: Certain Lined Paper Products from Indonesia*, 71 FR 47174 (Aug. 16, 2006).

⁷⁸ See *CTL Plates from Indonesia* at Comment 3.

⁷⁹ See *CTL Plates from Indonesia* at Comment 1.

Department’s Position: In upholding the Department’s practice to reject prices the Department has reason to believe may be dumped or subsidized, the courts have required “substantial, specific and objective evidence in support of its suspicion that the prices are distorted.” See *China Nat’l Mach. Imp. & Exp. Corp. v. United States*, 293 F. Supp. 2d 1334, 1339 (CIT 2003) *aff’d*, 104 Fed. Appx. 183 (Fed. Cir. 2004); *Kerr-McGee Chem. Corp. v. United States*, 985 F. Supp. 1166 (CIT 1997). The evidentiary requirement of “reasonable grounds to believe or suspect,” as required by section 773b(b)(1) of the Act, is satisfied by “specific, particularized” evidence, which does not have to rise to the level of an actual finding of subsidies. *China Nat’l Mach. Imp. & Exp. Corp.*, 293 F. Supp. 2d at 1338. The Department notes that the courts have found the fact that CVD programs exist in the specific country at question suffices to meet the evidentiary standard in support of the Department’s suspicion that the prices are distorted. See *id.*; *Tehnoimportexport, UCF. America, Inc. v. United States*, 783 F. Supp. 1401, 1406 (CIT 1992) (finding the existence of product-specific antidumping duty orders and non-product specific subsidies as determined by CVD orders provides a reasonable basis to believe or suspect surrogate export prices were dumped or subsidized).

The Department only needs to show that the industry in question may have benefitted from generally available subsidies. See *China Nat’l Mach. Imp. & Exp. Corp.*, 293 F. Supp. 2d at 1339. The statute does not provide any particular criteria for the Department to consider in making a determination to avoid subsidized prices. As is explained in the legislative history, Congress’s intent in applying the suspicion policy was not for the Department to “conduct a formal investigation to ensure that such prices are not dumped or subsidized, but rather that {the Department} base its decision on information generally available to it at that time.” See H.R. Conf. Rep. No. 100-576, at 590-91 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1623-24. This policy has been affirmed by the courts, *i.e.*, stating that Congress clearly instructed that no formal investigation is necessary for prices that the Department has reason to believe or suspect may be distorted. See *China Nat’l Mach. Imp. & Exp. Corp.*, F. Supp. 2d at 1338. Thus, the courts have found that Congress has clearly provided the Department with ample discretion to disregard suspected distorted prices, as long as this finding is supported by substantial record evidence. *Id.*

Based on Congress’s intent that the Department should disregard prices that it has reason to believe or suspect may be dumped or subsidized for surrogate value purposes, as discussed above, and based on a formal investigation of *CTL Plates from Indonesia*, the Department found that generally available export subsidies continue to exist and are being used in Indonesia. See *CTL Plates from Indonesia* at Comment 1. Specifically, as cited by Nucor, the Department found that there was a rediscount loan program where the government of Indonesia and the Bank of Indonesia provide working capital for certain exporters through the sale of letters of credit or export drafts at lower interest rates than they would normally pay on short-term commercial loans. See *id.* at cmt 3. Additionally, there was no evidence submitted to the Department that the rediscount loan program found countervailable during the investigation has been terminated. See *id.* Thus, the Department finds that it is reasonable to assume that this program continued to exist and may have been utilized by exporters in Indonesia during the relevant period of review. See *Certain Helical Spring Lockwashers from the People’s Republic of China: Final Results of Antidumping Duty Administrative Review and Determination Not to Revoke the Antidumping*

Duty Order, in Part, 69 FR 12119 (March 15, 2004), and accompanying Issues and Decision Memorandum at Comment 1 (the Department noted, absent evidence that the program had been terminated, it was reasonable to assume that these subsidy programs continued to exist and were utilized). Therefore the Department continues to apply its practice of excluding surrogate values from countries that maintain broadly available export subsidies, including Indonesia.

Comment 10: By-products Offsets

Valin Xiangtan argues that the Department should grant byproduct offsets for three types of steel scrap it generated during the production of subject merchandise, based on data Valin Xiangtan submitted after the *Preliminary Results*.

No other interested party commented on this issue.

Department's Position: In the *Preliminary Results*, the Department noted that while Valin Xiangtan requested that we grant certain steel by-product offsets and had provided the requisite supporting documentation in its questionnaire responses, Valin Xiangtan did not report these requested offsets in its FOP database.⁸⁰ The Department stated that it would provide Valin Xiangtan with the opportunity to submit the missing data.⁸¹ Additionally, we stated that, consistent with *Silicon Metal from the People's Republic of China: Preliminary Results and Preliminary Rescission, in Part, of Antidumping Duty Administrative Review*, 74 FR 32885 (July 9, 2009) ("*Silicon Metal/PRC*"), the Department was changing its practice on byproduct offsets and, going forward, granting byproduct offsets based on total production rather than using the "lower of" the quantity of byproduct produced or the quantity sold in each POR. Accordingly, we provided Valin Xiangtan with the opportunity to report its byproduct figures based on the new reporting criteria.

Valin Xiangtan submitted the missing steel scrap byproduct quantities.⁸² Accordingly, the Department has granted Valin Xiangtan offsets for those byproducts. Additionally, Valin Xiangtan revised its byproduct claim for one of its byproducts (molten iron) in accordance with the new reporting criteria.⁸³ Therefore, consistent with *Silicon Metal/PRC*, the Department has granted this byproduct offset based on total production of the byproduct.

Comment 11: Programming Errors – Distances

⁸⁰ See *Preliminary Results* at 74 FR 39927.

⁸¹ *Id.* at 39927-8

⁸² See Valin Xiangtan's August 19, 2009, surrogate value submission.

⁸³ See Valin Xiangtan's September 2, 2009, supplemental Section D response.

Valin Xiangtan argues the Department made a number of errors in the calculation of normal value and proposed alternative SAS language to correct the errors. Valin Xiangtan contends the Department inadvertently used the rail distances of several FOPs to calculate inland water transportation costs instead of the distances reported for water transit.

No other interested party commented on this issue.

Department's Position: The Department has examined the SAS language programming and agrees with Valin Xiangtan; accordingly, we determined that it is appropriate to correct the undisputed errors. *See* memorandum to the file titled "2007-2008 Administrative Review of Cut-to-Length Carbon Steel Plate from the People's Republic of China: Analysis of the Final Results Margin Calculation for Hunan Valin Xiangtan Iron & Steel Co., Ltd." ("Analysis Memo").

Comment 12: Valuing Electrodes

Nucor argues that the Department should treat Valin Xiangtan's consumption of graphite electrodes as a direct input, rather than as an overhead item.

No other interested party commented on this issue.

Department's Position: After considering record evidence, including an affidavit by an experienced metallurgist⁸⁴ and Valin Xiangtan's statement that the Department should value its electrodes as a direct material input instead of overhead,⁸⁵ we have determined to value electrodes as a direct material input using Indian WTA data under HTS 8545.1100 – "electrodes, of a kind used for furnaces."

⁸⁴ *See* Nucor's rebuttal surrogate value submission dated 10/27/2008.

⁸⁵ *See* Valin Xiangtan's supplemental section D submission dated 12/15/08 at 10-11.

RECOMMENDATION:

Based on our analysis of the comments received, we recommend adopting all of the above positions. If accepted, we will publish the final results of this new shipper review and the final weighted-average dumping margin in the *Federal Register*.

AGREE _____

DISAGREE _____

Ronald K. Lorentzen
Deputy Assistant Secretary
for Import Administration

Date