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January 19, 2020

MEMORANDUM TO: Jeffrey I. Kessler
Assistant Secretary
for Enforcement and Compliance

FROM: James Maeder
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Decision Memorandum for the Final Results of the Antidumping
Duty Administrative Review of Certain Carbon and Alloy Steel
Cut-To-Length Plate from the People's Republic of China; 2018-
2019

I. SUMMARY

The Department of Commerce (Commerce) has analyzed the case and rebuttal briefs submitted by interested parties and, consistent with the *Preliminary Results*, continues to find it appropriate to rescind this review because we have determined that the single U.S. sale reported by the mandatory respondent in this case, Jiangsu Tiangong Tools Company LTD (TG Tools), is not a *bona fide* sale for purposes of the antidumping duty law.¹ We recommend that you approve the positions described in the “Discussion of the Issues” section of this memorandum. Below is the complete list of issues in this review for which we received comments from interested parties:

- Comment 1: Whether Commerce Has Legal Authority to Apply *Bona Fides* Sales Analysis in Administrative Reviews
- Comment 2: Whether Record Evidence Supports Finding that TG Tools’ U.S. Sale was not *Bona Fide*
- Comment 3: Whether Commerce Should Apply AFA for Importer’s Failure to Provide Requested Information
- Comment 4: Surrogate Country and Surrogate Values Selection

¹ See *Certain Carbon and Alloy Steel Cut-To-Length Plate from the People’s Republic of China: Preliminary Intent To Rescind Antidumping Duty Administrative Review; 2018–2019*, 85 FR 18915 (April 3, 2020) (*Preliminary Results*).

II. BACKGROUND

On April 3, 2020, Commerce published the *Preliminary Results* of this review and invited interested parties to comment.² On June 22, 2020, we received a case brief from TG Tools.³ On July 1, 2020, we received a rebuttal brief from ArcelorMittal USA LLC (the petitioner).⁴

III. SCOPE OF THE ORDER

The products covered by this order are certain carbon and alloy steel hot-rolled or forged flat plate products not in coils, whether or not painted, varnished, or coated with plastics or other non-metallic substances (cut-to-length plate). Subject merchandise includes plate that is produced by being cut-to-length from coils or from other discrete length plate and plate that is rolled or forged into a discrete length. The products covered include (1) universal mill plates (*i.e.*, flat-rolled products rolled on four faces or in a closed box pass, of a width exceeding 150 mm but not exceeding 1250 mm, and of a thickness of not less than 4 mm, which are not in coils and without patterns in relief), and (2) hot-rolled or forged flat steel products of a thickness of 4.75 mm or more and of a width which exceeds 150 mm and measures at least twice the thickness, and which are not in coils, whether or not with patterns in relief. The covered products described above may be rectangular, square, circular or other shapes and include products of either rectangular or non-rectangular cross-section where such non-rectangular cross-section is achieved subsequent to the rolling process, *i.e.*, products which have been “worked after rolling” (*e.g.*, products which have been beveled or rounded at the edges).

For purposes of the width and thickness requirements referenced above, the following rules apply:

(1) except where otherwise stated where the nominal and actual thickness or width measurements vary, a product from a given subject country is within the scope if application of either the nominal or actual measurement would place it within the scope based on the definitions set forth above unless the product is already covered by an existing order (*e.g.*, *Notice of the Antidumping Duty Order: Certain Hot-Rolled Carbon Steel Flat Products From the People’s Republic of China*, 66 FR 59561 (November 29, 2001)); and

(2) where the width and thickness vary for a specific product (*e.g.*, the thickness of certain products with non-rectangular cross-section, the width of certain products with non-rectangular shape, *etc.*), the measurement at its greatest width or thickness applies.

Steel products included in the scope of this order are products in which: (1) iron predominates, by weight, over each of the other contained elements; and (2) the carbon content is 2 percent or less by weight.

² *Id.*

³ See TG Tools’ Letter, “Administrative Review of the Antidumping Duty Order on Carbon and Alloy Steel Cut-to-Length Plate from the People’s Republic of China: Case Brief,” dated June 22, 2020 (TG Tools Case Brief).

⁴ See Petitioner’s Letter, “Carbon and Alloy Steel Cut-To-Length Plate from the People’s Republic of China: Petitioner’s Rebuttal Brief,” dated July 1, 2020 (Petitioner Rebuttal Brief).

Subject merchandise includes cut-to-length plate that has been further processed in the subject country or a third country, including but not limited to pickling, oiling, levelling, annealing, tempering, temper rolling, skin passing, painting, varnishing, trimming, cutting, punching, beveling, and/or slitting, or any other processing that would not otherwise remove the merchandise from the scope of the order if performed in the country of manufacture of the cut-to-length plate.

All products that meet the written physical description, are within the scope of this order unless specifically excluded or covered by the scope of an existing order. The following products are outside of, and/or specifically excluded from, the scope of this order:

(1) products clad, plated, or coated with metal, whether or not painted, varnished or coated with plastic or other non-metallic substances;

(2) military grade armor plate certified to one of the following specifications or to a specification that references and incorporates one of the following specifications:

- MIL-A-12560,
- MIL-DTL-12560H,
- MIL-DTL-12560J,
- MIL-DTL-12560K,
- MIL-DTL-32332,
- MIL-A-46100D,
- MIL-DTL-46100-E,
- MIL-46177C,
- MIL-S-16216K Grade HY80,
- MIL-S-16216K Grade HY100,
- MIL-S-24645A HSLA-80;
- MIL-S-24645A HSLA-100,
- T9074-BD-GIB-010/0300 Grade HY80,
- T9074-BD-GIB-010/0300 Grade HY100,
- T9074-BD-GIB-010/0300 Grade HSLA80,
- T9074-BD-GIB-010/0300 Grade HSLA100, and
- T9074-BD-GIB-010/0300 Mod. Grade HSLA115,

except that any cut-to-length plate certified to one of the above specifications, or to a military grade armor specification that references and incorporates one of the above specifications, will not be excluded from the scope if it is also dual- or multiple-certified to any other non-armor specification that otherwise would fall within the scope of this order;

(3) stainless steel plate, containing 10.5 percent or more of chromium by weight and not more than 1.2 percent of carbon by weight;

(4) CTL plate meeting the requirements of ASTM A-829, Grade E 4340 that are over 305 mm in actual thickness;

(5) Alloy forged and rolled CTL plate greater than or equal to 152.4 mm in actual thickness meeting each of the following requirements:

(a) Electric furnace melted, ladle refined & vacuum degassed and having a chemical composition (expressed in weight percentages):

- Carbon 0.23-0.28,
- Silicon 0.05-0.20,
- Manganese 1.20-1.60,
- Nickel not greater than 1.0,
- Sulfur not greater than 0.007,
- Phosphorus not greater than 0.020,
- Chromium 1.0-2.5,
- Molybdenum 0.35-0.80,
- Boron 0.002-0.004,
- Oxygen not greater than 20 ppm,
- Hydrogen not greater than 2 ppm, and
- Nitrogen not greater than 60 ppm;

(b) With a Brinell hardness measured in all parts of the product including mid thickness falling within one of the following ranges:

- (i) 270-300 HBW,
- (ii) 290-320 HBW, or
- (iii) 320-350HBW;

(c) Having cleanliness in accordance with ASTM E45 method A (Thin and Heavy): A not exceeding 1.5, B not exceeding 1.0, C not exceeding 0.5, D not exceeding 1.5; and

(d) Conforming to ASTM A578-S9 ultrasonic testing requirements with acceptance criteria 2 mm flat bottom hole;

(6) Alloy forged and rolled steel CTL plate over 407 mm in actual thickness and meeting the following requirements:

(a) Made from Electric Arc Furnace melted, Ladle refined & vacuum degassed, alloy steel with the following chemical composition (expressed in weight percentages):

- Carbon 0.23-0.28,
- Silicon 0.05-0.15,
- Manganese 1.20-1.50,
- Nickel not greater than 0.4,

- Sulfur not greater than 0.010,
- Phosphorus not greater than 0.020,
- Chromium 1.20-1.50,
- Molybdenum 0.35-0.55,
- Boron 0.002-0.004,
- Oxygen not greater than 20 ppm,
- Hydrogen not greater than 2 ppm, and
- Nitrogen not greater than 60 ppm;

(b) Having cleanliness in accordance with ASTM E45 method A (Thin and Heavy): A not exceeding 1.5, B not exceeding 1.5, C not exceeding 1.0, D not exceeding 1.5;

(c) Having the following mechanical properties:

(i) With a Brinell hardness not more than 237 HBW measured in all parts of the product including mid thickness; and having a Yield Strength of 75ksi min and UTS 95ksi or more, Elongation of 18% or more and Reduction of area 35% or more; having charpy V at -75 degrees F in the longitudinal direction equal or greater than 15 ft. lbs (single value) and equal or greater than 20 ft. lbs (average of 3 specimens) and conforming to the requirements of NACE MR01-75; or

(ii) With a Brinell hardness not less than 240 HBW measured in all parts of the product including mid thickness; and having a Yield Strength of 90 ksi min and UTS 110 ksi or more, Elongation of 15% or more and Reduction of area 30% or more; having charpy V at -40 degrees F in the longitudinal direction equal or greater than 21 ft. lbs (single value) and equal or greater than 31 ft. lbs (average of 3 specimens);

(d) Conforming to ASTM A578-S9 ultrasonic testing requirements with acceptance criteria 3.2 mm flat bottom hole; and

(e) Conforming to magnetic particle inspection in accordance with AMS 2301;

(7) Alloy forged and rolled steel CTL plate over 407 mm in actual thickness and meeting the following requirements:

(a) Made from Electric Arc Furnace melted, ladle refined & vacuum degassed, alloy steel with the following chemical composition (expressed in weight percentages):

- Carbon 0.25-0.30,
- Silicon not greater than 0.25,
- Manganese not greater than 0.50,
- Nickel 3.0-3.5,
- Sulfur not greater than 0.010,
- Phosphorus not greater than 0.020,
- Chromium 1.0-1.5,

- Molybdenum 0.6-0.9,
- Vanadium 0.08 to 0.12
- Boron 0.002-0.004,
- Oxygen not greater than 20 ppm,
- Hydrogen not greater than 2 ppm, and
- Nitrogen not greater than 60 ppm.

(b) Having cleanliness in accordance with ASTM E45 method A (Thin and Heavy): A not exceeding 1.0(t) and 0.5(h), B not exceeding 1.5(t) and 1.0(h), C not exceeding 1.0(t) and 0.5(h), and D not exceeding 1.5(t) and 1.0(h);

(c) Having the following mechanical properties: A Brinell hardness not less than 350 HBW measured in all parts of the product including mid thickness; and having a Yield Strength of 145ksi or more and UTS 160ksi or more, Elongation of 15% or more and Reduction of area 35% or more; having charpy V at -40 degrees F in the transverse direction equal or greater than 20 ft. lbs (single value) and equal or greater than 25 ft. lbs (average of 3 specimens);

(d) Conforming to ASTM A578-S9 ultrasonic testing requirements with acceptance criteria 3.2 mm flat bottom hole; and

(e) Conforming to magnetic particle inspection in accordance with AMS 2301.

Excluded from the scope of the antidumping duty order on cut-to-length plate from the People's Republic of China are any products covered by the existing antidumping duty order on certain cut-to-length carbon steel plate from the People's Republic of China. *See Suspension Agreement on Certain Cut-to-Length Carbon Steel Plate from the People's Republic of China; Termination of Suspension Agreement and Notice of Antidumping Duty Order*, 68 Fed. Reg. 60,081 (Dep't Commerce Oct. 21, 2003), as amended, *Affirmative Final Determination of Circumvention of the Antidumping Duty Order on Certain Cut-to-Length Carbon Steel Plate from the People's Republic of China*, 76 Fed. Reg. 50,996, 50,996-97 (Dep't of Commerce Aug. 17, 2011). On August 17, 2011, the U.S. Department of Commerce found that the order covered all imports of certain cut-to-length carbon steel plate products with 0.0008 percent or more boron, by weight, from China not meeting all of the following requirements: aluminum level of 0.02 percent or greater, by weight; a ratio of 3.4 to 1 or greater, by weight, of titanium to nitrogen; and a hardenability test (*i.e.*, Jominy test) result indicating a boron factor of 1.8 or greater.

The products subject to the order are currently classified in the Harmonized Tariff Schedule of the United States (HTSUS) under item numbers: 7208.40.3030, 7208.40.3060, 7208.51.0030, 7208.51.0045, 7208.51.0060, 7208.52.0000, 7211.13.0000, 7211.14.0030, 7211.14.0045, 7225.40.1110, 7225.40.1180, 7225.40.3005, 7225.40.3050, 7226.20.0000, and 7226.91.5000. The products subject to the order may also enter under the following HTSUS item numbers: 7208.40.6060, 7208.53.0000, 7208.90.0000, 7210.70.3000, 7210.90.9000, 7211.19.1500, 7211.19.2000, 7211.19.4500, 7211.19.6000, 7211.19.7590, 7211.90.0000, 7212.40.1000, 7212.40.5000, 7212.50.0000, 7214.10.0000, 7214.30.0010, 7214.30.0080, 7214.91.0015, 7214.91.0060, 7214.91.0090, 7225.11.0000, 7225.19.0000, 7225.40.5110, 7225.40.5130,

7225.40.5160, 7225.40.7000, 7225.99.0010, 7225.99.0090, 7226.11.1000, 7226.11.9060, 7226.19.1000, 7226.19.9000, 7226.91.0500, 7226.91.1530, 7226.91.1560, 7226.91.2530, 7226.91.2560, 7226.91.7000, 7226.91.8000, and 7226.99.0180.

The HTSUS subheadings above are provided for convenience and customs purposes only. The written description of the scope of the order is dispositive.

IV. DISCUSSION OF THE ISSUES

Comment 1: Whether Commerce Has Legal Authority to Apply *Bona Fides* Sales Analysis in Administrative Reviews

TG Tools Comments:

- There is no codified *bona fide* sales analysis in the legal authority under which Commerce conducts annual reviews.⁵ Commerce conducts annual administrative reviews pursuant to section 751(a)(1) of the Tariff Act of 1930, as amended (the Act), which requires Commerce to conduct a review and there is no intervening *bona fide* sales test.⁶
- The new shipper provisions, section 751(a)(2)(B)(i)(I) of the Act, require that the “exporter/producer did not export merchandise during the period of investigation.” Because TG Tools participated in the investigation, it does not meet that criteria.⁷
- Contrary to Commerce’s claim that, in the absence of a *bona fide* sales test the respondent may benefit from obtaining a low dumping margin by creating fictitious markets in the United States via arm’s length transactions,⁸ the United States Court of International Trade (CIT) has found that there is no such danger.⁹
- The CIT’s observation in *PQ Corp* reflects the fact that the entries subject to this specific review are the only entries that will be liquidated at the rate calculated in this review. The same will occur for different entries subject to each subsequent review.¹⁰
- Rather than relying on a test designed to examine new entrants to a market, Commerce should instead (1) rely on the relevant judicial precedent, such as in *Windmill*, in which Commerce employed a three-factor test rather than a *bona fide* sales analysis, and (2) the plain language of the statute to conduct this review.¹¹

⁵ See TG Tools Case Brief at 2.

⁶ *Id.*

⁷ *Id.* at 3 (citing *Certain Carbon and Alloy Steel Cut-To-Length Plate From the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value*, 82 FR 8510 (January 26, 2017) (*CTL Plate China LTFV*), and accompanying IDM at Comment 1).

⁸ See TG Tools Case Brief at 3 (citing Memorandum, “Administrative Review of the Antidumping Duty Order on Certain Carbon and Alloy Steel Cut-To-Length Plate from the People’s Republic of China; 2018-2019: Preliminary Bona Fide Sales Analysis,” dated March 27, 2020 (*Bona Fides* Memorandum) at 4).

⁹ See TG Tools Case Brief at 3 (citing *PQ Corp. v. United States*, 652 F. Supp. 724, 729 (CIT 1987) (*PQ Corp.*)).

¹⁰ See TG Tools Case Brief at 3.

¹¹ *Id.* at 4 (citing *Windmill Int’l Pte v. United States*, 193 F. Supp. 2d 1303, 1306-1307 (CIT 2002) (*Windmill*)).

Petitioner's Comments:

- Commerce possesses the legal authority to determine whether a respondent's U.S. sale is *bona fide* in the context of an administrative review.¹²
- There is nothing in section 751(a)(1) of the Act that prohibits Commerce from confirming that a respondent's U.S. sale(s) is based on commercially reasonable terms before using that sales price as the basis to calculate the dumping margin.¹³
- As part of its obligation to conduct an administrative review when one is requested pursuant to section 751(a)(1) of the Act, Commerce has previously performed the *bona fide* analysis in administrative reviews on multiple occasions,¹⁴ and the CIT has upheld Commerce's authority to conduct a *bona fides* analysis in the context of an administrative review.¹⁵ Thus, Commerce's approach in the *Preliminary Results* was consistent with the statute and case precedent.¹⁶
- Contrary to TG Tools' claim that it participated in the less-than-fair-value (LTFV) investigation of CTL Plate, TG Tools' participation was limited to an untimely submitted separate rate application that Commerce rejected,¹⁷ ultimately finding that TG Tools was ineligible for a separate rate.¹⁸
- Because TG Tools was not examined as a respondent during the LTFV investigation, its pricing and cost information was not provided nor considered, it has not demonstrated past experience on which Commerce can evaluate its likely commercial behavior and, therefore, applying the *bona fides* analysis to its single U.S. sale is appropriate and necessary.¹⁹
- TG Tools' reliance on *PQ Corp* is misplaced, as TG Tools' claim is contrary to the purpose of Commerce's statutory responsibility to ensure that a respondent's sales that serve as the basis for the dumping calculation are likely to be typical of sales subsequent to the review.²⁰
- Due to its lack of participation during the original investigation, the instant review is the first time that TG Tools is seeking a company-specific cash deposit rate based on its own

¹² See Petitioner Rebuttal Brief at 4 (citing section 751(a)(1) of the Act).

¹³ *Id.*

¹⁴ See Petitioner Rebuttal Brief at 5 (citing *Silicomanganese from India: Final Results of Antidumping Duty Administrative Review; 2013-2014*, 80 FR 75660 (December 3, 2015) (*Silicomanganese India*), and accompanying Issues and Decision Memorandum (IDM) at Issue 1 ("Regardless of whether the review in question is a new-shipper review or administrative review, a U.S. sale must be a *bona fide* commercial transaction to be a basis for a dumping margin, and therefore, we apply the same test in administrative reviews and new-shipper reviews"); and *Stainless Steel Sheet and Strip in Coils from Japan: Final Results of Antidumping Duty Administrative Review*, 75 FR 6631, February 10, 2010, and accompanying IDM at Comment 1 (stating that, if warranted by the record, {Commerce} "may evaluate the *bona fides* of a sale in an administrative review").

¹⁵ See Petitioner Rebuttal Brief at 5 (citing *Evonik Rexim (Nanning) Pharm. Co., v. United States*, 253 F. Supp. 3d 1364, 1370-71 (CIT 2017) (*Evonik Rexim*) (sustaining Commerce's finding in an annual review that an exporter's U.S. sales were not *bona fide*)).

¹⁶ See Petitioner Rebuttal Brief at 5.

¹⁷ *Id.* at 5 (citing *Certain Carbon and Alloy Steel Cut-To-Length Plate From the People's Republic of China: Preliminary Affirmative Determination of Sales at Less Than Fair Value*, 81 FR 79450 (November 14, 2016), and accompanying Preliminary Decision Memorandum (CTL Plate China LTFV PDM) at 4 n.20).

¹⁸ See Petitioner Rebuttal Brief at 6 (citing *CTL Plate China LTFV* IDM at Comment 1).

¹⁹ See Petitioner Rebuttal Brief at 6.

²⁰ *Id.* (citing section 751(a)(2)(B)(iv)(VII) of the Act).

commercial behavior, and therefore, the concern for future activity in the statute applies.²¹

- Regardless of the ultimate liquidation rate for TG Tools' future U.S. sales, it is critical that Commerce ensure that respondents are subject to cash deposit rates upon importation of their merchandise. Nothing precludes TG Tools from making future entries and sales that are commercially reasonable and requesting reviews to establish the appropriate liquidation rate.²²

Commerce's Position: We disagree with TG Tools that Commerce lacks the legal authority to conduct a *bona fides* sales analysis in the context of an administrative review. Under section 751(a)(2)(A) of the Act, Commerce must calculate the normal value, export price, and dumping margin of each entry of subject merchandise. Export price is defined as the "price at which the subject merchandise is first sold (or agreed to be sold)" under section 772(a), but the statute does not provide for what constitutes a sale. Commerce is afforded discretion to provide a reasonable interpretation for what constitutes a sale for purposes of conducting an administrative review. Given the statutory silence with respect to the issue of what constitutes a sale, it is reasonable for Commerce to disregard sales that are not *bona fide* in an effort to calculate a dumping margin that suitably approximates an exporter's or producer's selling practices. Doing so accords with Commerce's statutory purpose under section 731 of the Act of determining whether goods are being sold at less than fair value. Accordingly, the CIT has upheld Commerce's authority to conduct a *bona fides* analysis in the context of an administrative review.²³ Based on that, we continue to find that it is within our legal authority to examine whether TG Tools' single sale in this administrative review was *bona fide* and continue to rely on our *bona fides* sales analysis as a basis for these final results.

In 2015, Congress amended the Act to add section 751(a)(2)(B)(iv). This section requires Commerce to base the dumping margin in a new-shipper review on *bona fide* U.S. sale(s). Although there is no analogous statutory provision requiring that Commerce conduct *bona fides* analyses outside of new-shipper reviews, Commerce has conducted such analyses in administrative reviews as a matter of long-standing practice.²⁴ Further, Commerce's *bona fides*

²¹ See Petitioner Rebuttal Brief at 7 (citing section 751(a)(2)(B)(iv)(VII) of the Act).

²² See Petitioner Rebuttal Brief at 7.

²³ See, e.g., *Evonik Rexim*, 253 F. Supp. 3d at 1370-71.

²⁴ See, e.g., *Titanium Sponge from the Russian Federation; Notice of Final Results of Antidumping Duty Administrative Review*, 62 FR 48601, 48604 (September 16, 1997) (*Titanium Sponge*); *Freshwater Crawfish Tail Meat from the People's Republic of China: Notice of Final Results And Rescission, In Part, of 2004/2005 Antidumping Duty Administrative and New Shipper Reviews*, 72 FR 19174 (April 17, 2007), and accompanying IDM; *Certain Frozen Warmwater Shrimp from the People's Republic of China: Notice of Final Results and Rescission, in Part, of 2004/2006 Antidumping Duty Administrative and New Shipper Reviews*, 72 FR 52049 (September 12, 2007), and accompanying IDM; *Glycine from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review and Preliminary Intent to Rescind, in Part; 2013-2014*, 80 FR 18814 (April 8, 2015), and accompanying PDM at 1 and 3-5, unchanged in *Glycine from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Partial Rescission of Antidumping Duty Administrative Review; 2013-2014*, 80 FR 62027 (October 15, 2015), and accompanying IDM at Comment 5; *Certain Pasta from Turkey: Preliminary Results of Antidumping Duty Administrative Review*, 82 FR 36737 (August 7, 2017), and accompanying PDM at 1-3, unchanged in *Certain Pasta from Turkey: Final Results and Rescission of Antidumping Duty Administrative Review; 2015-2016*, 83 FR 6516 (February 14, 2018), and accompanying IDM at

“totality-of-the-circumstances” approach is consistent in both administrative reviews and new-shipper reviews, and in each type of review Commerce is making the same fair comparison of normal value with a U.S. sale price pursuant to section 773(a) of the Act. Contrary to TG Tools’ argument that it is improper to treat it as a “new shipper,”²⁵ when Congress amended section 751 of the Act, it did not make changes to the provisions governing administrative reviews that would imply an intent to preclude Commerce’s authority to conduct a *bona fides* sales analysis in an administrative review.²⁶ Congress is presumed to be aware of Commerce’s practice when it amended the Act, lending force to the fact that Congress’ amendments do not speak to Commerce’s practice within the context of an administrative review.²⁷ Accordingly, and as prior rulings from this Court have recognized, it is reasonable for Commerce to interpret the statute as authorizing it to disregard transactions it reasonably concludes are not *bona fide* sales.²⁸ While *bona fide* sales analyses always arise in the context of new shipper reviews, for investigations and administrative reviews, if a producer’s or exporter’s transactions involve prices, quantities, or overall circumstances that warrant further examination, Commerce’s practice is to evaluate the *bona fides* of the sale in the context of the investigation or administrative review.²⁹

We further find that the factors listed in section 751(a)(2)(B)(iv) of the Act can be used for guidance in conducting a *bona fides* analysis in an administrative review, even though they are not strictly applicable in an administrative review. In evaluating whether a sale is *bona fide*, Commerce employs a “totality of the circumstances” test.³⁰ In examining the totality of the circumstances, Commerce looks to whether the transaction is “commercially reasonable” or “atypical.”³¹ Atypical or non-typical in this context means unrepresentative of a normal business practice.³² Specifically, in evaluating whether a sale is *bona fide*, Commerce has also looked to section 751(a)(2)(B)(iv) of the Act as guidance for conducting a *bona fides* analysis in

Comment 1; and *Honey From the People’s Republic of China: Preliminary Results and Preliminary Intent To Rescind of Antidumping Duty Administrative Review; 2017–2018*, 84 FR 66374 (December 4, 2019), and accompanying PDM at 3-4, unchanged in *Honey from the People’s Republic of China: Final Results and Rescission of Antidumping Duty Administrative Review; 2017-2018*, 85 FR 45187 (July 27, 2020), and accompanying IDM at Comment 1.

²⁵ Specifically to TG Tools’ argument that it should not be treated as a new shipper because it participated in the original investigation, we note that TG Tools’ participation in the original investigation was limited to an untimely submitted separate rate application that Commerce rejected and found that TG Tools was ineligible for a separate rate (see CTL Plate China LTFV PDM at 4 n.20).

²⁶ See *Novolipetsk Steel Pub. Joint Stock Co. v. United States*, Slip Op. 20-170 (CIT November 30, 2020) (*Novolipetsk*) at 8-13.

²⁷ *Id.* at 10-11.

²⁸ *Id.* at 11.

²⁹ See, e.g., *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People’s Republic of China: Final Results and Partial Rescission of Review; 2017-2018*, 85 FR 9459 (February 19, 2020) (*TRBs China*), and accompanying IDM.

³⁰ See *Tianjin Tiancheng Pharmaceutical Co., Ltd. v. United States*, 366 F. Supp. 2d 1246, 1249-1250 (CIT 2005) (*Tianjin Tiancheng*); see also *Glycine from the People’s Republic of China: Rescission of Antidumping Duty New Shipper Review of Hebei New Donghua Amino Acid Co., Ltd.*, 69 FR 47405, 47406 (August 5, 2004).

³¹ See, e.g., *Freshwater Crawfish Tail Meat from the People’s Republic of China: Notice of Final Results of Antidumping Duty New Shipper Review and Final Rescission of Antidumping Duty New Shipper Review*, 68 FR 1439, 1440 (January 10, 2003), and accompanying IDM at Comment 1.

³² See *American Silicon Technologies v. United States*, 110 F. Supp. 2d 992, 996-98 (CIT 2000) (*American Silicon*).

administrative reviews.³³ Commerce considers: (a) the price of the sale; (b) whether the sale was made in commercial quantities; (c) the timing of the sale; (d) the expenses arising from the transaction; (e) whether the goods were resold in the United States at a profit; (f) whether the transaction was made on an arm's-length basis; and (g) any other factor that Commerce considers to be relevant as to whether the sale at issue is "likely to be typical of those the exporter or producer will make after the completion of the review."³⁴

The CIT has recognized that the aim of Commerce's *bona fide* sales analysis is "to ensure that a producer does not unfairly benefit from an atypical sale to obtain a lower dumping margin than the producer's usual commercial practice would dictate."³⁵ In *Tianjin Tiancheng*, the CIT affirmed Commerce's practice of considering that "any factor which indicates that the sale under consideration is not likely to be typical of those which the producer will make in the future is relevant," and the CIT found that "the weight given to each factor investigated will depend on the circumstances surrounding the sale."³⁶ Further, where an administrative review is based upon a single sale, it is well-established that Commerce carefully scrutinizes single sales because there is only one transaction with which to calculate an antidumping duty (AD) margin and establish a cash deposit rate.³⁷ Here, TG Tools' reliance on *PQ Corp* is misplaced, as TG Tools' claim that the entries subject to this specific review are the only entries that will be liquidated at the rate calculated in this review, is contrary to the purpose of Commerce's statutory responsibility to ensure that a respondent's sales that serve the basis for the dumping calculation are likely to be typical of sales subsequent to the review.³⁸ Indeed, because TG Tools was not examined as a respondent during the LTFV investigation,³⁹ its pricing and cost information was not provided nor considered, it has not demonstrated past experience on which Commerce can evaluate its likely commercial behavior and, therefore, applying the *bona fides* analysis to its single U.S. sale is appropriate and necessary. In sum, Commerce has a long-standing practice of conducting "totality-of-the-circumstances" *bona fides* analyses for a single sale in administrative reviews, not limiting our analyses to the three factors noted in *Windmill* as TG Tools would have us do, and the courts have repeatedly upheld Commerce's authority to make such determinations.⁴⁰ Accordingly, we find that it is within our authority to examine whether TG Tools' single sale in this administrative review was *bona fide*.

Lastly, it is also well-established that, when no *bona-fide* sales were made during the POR, there is no basis to calculate an accurate dumping margin, and it is within Commerce's authority to

³³ See *Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from the Russian Federation: Final Results and Rescission of Antidumping Duty Administrative Review; 2016-2017*, 84 FR 38948 (August 8, 2019), and accompanying IDM at Comment 1.

³⁴ See, e.g., *Tianjin Tiancheng*, 366 F. Supp. 2d at 1250 (citing *American Silicon*, 110 F. Supp. 2d at 992, 995); see also *Hebei New Donghua Amino Acid Co. v. United States*, 29 CIT 603, 374 F. Supp. 2d at 1333, 1342 (CIT 2005) (*New Donghua*).

³⁵ See *Inner Mongolia Jianlong Biochemical Co. v. United States*, 337 F. Supp. 3d 1329, 1338 (CIT 2018) (citing *Huzhou Muyun Wood Co., Ltd. v. United States*, 324 F. Supp. 3d 1364, 1376 (CIT 2018)).

³⁶ See *Tianjin Tiancheng*, 366 F. Supp. 2d at 1250, 1263.

³⁷ See, e.g., *Silicomanganese India* at Issue 1; see also *Tianjin Tiancheng*, 366 F. Supp. 2d at 1249; and *New Donghua*, 374 F. Supp. 2d at 1344.

³⁸ See section 751(a)(2)(B)(iv)(VII) of the Act.

³⁹ See *supra* note 5 (Specifically to TG Tools' argument).

⁴⁰ See, e.g., *Evonik Rexim*, 253 F. Supp. 3d at 1370.

rescind the review.⁴¹ As a result, a finding that the sale at issue is non-*bona fide* must necessarily end a single sale review.⁴² Because Commerce finds no *bona fide* sale to review during the POR, consistent with our practice, we are rescinding this review.

Comment 2: Whether Record Evidence Supports Finding that TG Tools' U.S. Sale was not *Bona Fide*

TG Tools' Comments:

- Commerce made certain factual determinations in its application of the new shipper test to review TG Tools' sale that are inconsistent with the record, and it ignored the fundamental focus of its own *bona fide* sales analysis, whether the sale is unrepresentative of a normal business practice.⁴³
- The facts show that the sales made during this review by TG Tools were consistent with its normal business practices and thus are eligible for inclusion of the calculation of an antidumping duty margin in the context of this review.⁴⁴

Petitioner's Comments:

- Commerce's finding that TG Tools' U.S. sale was not *bona fide* is based on substantial record evidence.⁴⁵

a. Price and Quantity

TG Tools' Comments:

- The price and quantity of TG Tools' sale are consistent with usual commercial practices.
- Commerce does not state that TG Tools' unrelated importer did not pay the reported invoice price, or that the unrelated importer's customer did not pay the subsequent resale price yet concludes that those same prices were unrepresentative of arms-length transactions or otherwise fictitious.
- Although relevant jurisprudence notes that the antidumping statute gives deference to Commerce in administering the antidumping law,⁴⁶ Commerce's conclusion that TG Tools' prices were unrepresentative of arms-length transactions or otherwise fictitious is belied by the record.⁴⁷
- Commerce's inexplicably found that the price and quantity of the sales under review 'call into question' the ability of TG Tools to make future sales at a similar price. However, 'call into question' has no basis in statute or regulation, and future sales are immaterial to the calculation of the dumping margin for the instant review.⁴⁸

⁴¹*Id.*; see also *Titanium Sponge*, 62 FR at 48604.

⁴² See *Tianjin Tiancheng*, 366 F. Supp. 2d at 1249.

⁴³ See TG Tools Case Brief at 4-5, citing *American Silicon*, 110 F. Supp. 2d at 996-98.

⁴⁴ See TG Tools Case Brief at 5.

⁴⁵ See Petitioner Rebuttal Brief at 7.

⁴⁶ See TG Tools Case Brief at 5, citing *Apex Frozen Foods Private Ltd. v. United States*, 862 F.3d 1337, 1347 (Fed. Cir. 2017) (quoting *Fujitsu Gen. Ltd. v. United States*, 88 F.3d 1034, 1039 (Fed. Cir. 1996)).

⁴⁷ See TG Tools Case Brief at 5.

⁴⁸ *Id.* at 5-6 (citing *Altx, Inc. v. United States*, 25 CIT 1100, 1105, 167 F. Supp. 2d 1353, 1361 (CIT 2001) (*Altx*) ("speculation cannot constitute substantial evidence"))).

- Commerce relied on a comparison to data submitted by ArcelorMittal USA (AMUSA) but cites to no record information establishing this link.⁴⁹
- The steel shipped is steel grade H13 with a higher nickel composition which is of higher hardenability and strength for the production of steel molds and, therefore, was so dissimilar to the sales Commerce used to gauge the price and quantity of TG Tools' sales that those items fell outside of the scope of the order.⁵⁰
- Commerce's emphasis on the volume of TG Tools' sales compared to the Paniva data is misplaced, because the volume is completely consistent with TG Tools' reporting of this sale and the case law covering similar annual reviews.⁵¹
- Commerce incorrectly found that the price for TG Tools' sale compared unfavorably to the Panjiva data, despite its concession that the sale was for a custom H13 grade, concluding inconsistent with the record that neither TG Tools nor its unaffiliated importer provided any evidence to support their assertions that the specialty grade carried a higher a price and that the low volume of the transaction also exerted upward pressure on price.⁵²

Petitioner's Comments:

- TG Tools claims that the price and quantity of the U.S. sale are consistent with usual commercial practices but cites to no contrary record evidence to rebut Commerce's findings.⁵³
- While TG Tools complains about Commerce's comparison of TG Tools' sales price to other data points on the record, TG Tools supplied no benchmarking data that supports the company's claim that the sales terms were consistent with usual commercial considerations.⁵⁴
- While TG argues that the steel grade in the import data is dissimilar to the grade of TG Tools' trial sale, Commerce found that it was sufficiently similar for purposes of comparing price and volume.⁵⁵
- TG Tools also misinterprets Commerce's statements regarding the availability of proprietary import data from the U.S. Customs and Border Protection (CBP), when it claimed that the steel grade shipped was so dissimilar to the sales Commerce used to gauge the price and quantity of TG Tools' sales that those items fell outside of the scope of the order.⁵⁶
- Commerce noted that there were other entries in the CBP data of in-scope CTL Plate, but that none of those entries fell under the HTSUS subheading specific to TG Tools' specialty steel.⁵⁷

⁴⁹ See TG Tools Case Brief at 6 (citing *Bona Fides* Memorandum at 5).

⁵⁰ See TG Tools Case Brief at 6 (citing *Bona Fides* Memorandum at 4 (noting that no CBP data covering in-scope Harmonized Tariff Schedule of the United States (HTSUS) codes were available)).

⁵¹ See TG Tools Case Brief at 6 (citing *Bona Fides* Memorandum at 5 (citing *PQ Corp*, 652 F. Supp. at 729)).

⁵² See TG Tools Case Brief at 7 (citing *Bona Fides* Memorandum at 5 (citing TG Tools' section C and importer-specific questionnaire responses)).

⁵³ See Petitioner Rebuttal Brief at 7.

⁵⁴ *Id.* at 8.

⁵⁵ *Id.*

⁵⁶ *Id.* (citing *Bona Fides* Memorandum at 4).

⁵⁷ *Id.*

- TG Tools challenges Commerce’s findings regarding the price and volume of the sale, but it does not make any arguments that undermine Commerce’s findings were unsupported by the record.⁵⁸
- TG Tools confirms that the volume for the sale was the lowest quantity among all the entries in the Panjiva data is indicative of a trial sale but cites no record evidence that the low volume indicates the sale is not *bona fide*.⁵⁹
- TG Tools confirms that the price was high compared to other record data is indicative of a specialty steel grade but cites no other record evidence in support of its contention that the price was consistent with usual commercial terms.⁶⁰
- The benchmarks on the record demonstrate that the price was unusually high, and the volume was unusually low.⁶¹

Commerce’s Position: We disagree with TG Tools’ claim that record evidence demonstrates that TG Tools’ sale was consistent with usual commercial practices and continue to find that the price and quantity of TG Tools’ sale, when taken together with other factors, weigh against finding that the sale is *bona fide*.

For the *Preliminary Results*, we compared TG Tools’ POR sale to Panjiva data submitted on the record by the petitioner, which include imports with similar steel quality to TG Tools’ sale of H13 grade steel, because there are no other entries in the CBP data of merchandise under HTSUS subheadings included in the scope of the order, and the other HTSUS categories in the scope do not cover specialty steel products. As a result of our analysis, we concluded that TG Tools’ sales quantity is significantly lower than the quantities reported for the other entries, while the per unit price is higher than all other entries, and that the low quantity and high price of the sale raise concerns that this sale may not be representative of TG Tools’ future selling practices.

We disagree with TG Tools’ claim that future sales are immaterial to the calculation of the dumping margin for this review. TG Tools relies on *Altx* to suggest that our ‘speculation’ of future sales does not constitute substantial evidence. As we stated in the *Preliminary Results*, the goal of our *bona fide* sales analysis is to ensure that the U.S. price used in the dumping calculation is realistic and indicative of prices at which the respondent will sell the product in the future and that, if Commerce determines that the prices are not based on normal commercial considerations or are atypical of the respondent’s future sales, the sale or sales may be considered to not be *bona fide* for purposes of the antidumping duty law.⁶² Moreover, the CIT affirmed our practice of considering as relevant any factor which indicates that the sale under consideration is not likely to be typical of those which the producer will make in the future.⁶³

TG Tools also claims that we improperly compared its sale of H13 grade steel to the Panjiva data because they are of imports of such dissimilar steel that fall outside the scope of the order.

⁵⁸ See Petitioner Rebuttal Brief at 9.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 10.

⁶² See *Windmill*, 193 F. Supp. 2d at 1312; and *American Silicon*, 110 F. Supp. 2d at 995-96.

⁶³ See *Tianjin Tiancheng*, 366 F. Supp. 2d at 1250.

However, TG Tools did not provide any benchmark price and quantity data to support this claim that prices for its H13 grade steel would necessarily be so dissimilar to the prices for the steel in the Panjiva data that it would render that data unusable for comparison purposes. As we stated in the *Preliminary Results*, because the CBP data does not have any imports under the same HTSUS as the steel in TG Tools' sale that were sufficiently similar to use for a price and quantity comparison, we looked to the only other data on the record, *i.e.*, the Panjiva import data submitted by the petitioner and determined that the steel products included in these data are sufficiently similar for comparison purposes and, thus, the best information on the record to compare to TG Tools' sale.

TG Tools claims that we put undue emphasis on the volume of its sale, arguing that that the low volume is indicative of a trial sale and consistent with case law, citing *PQ Corp*. However, TG Tools does not dispute that the volume for its sale was the lowest quantity among all the entries in the Panjiva data, nor does it cite to any record evidence to counter our finding that the low volume indicates the sale is not *bona fide*. Also, TG Tools does not explain how *PQ Corp* supports its claim.

Likewise, TG Tools does not dispute that the price was high compared to other record data – it only argues that the high price is indicative of a specialty steel grade. And, while it claims that the record demonstrates that all unrelated parties made arms-length transactions, it cites no other record evidence in support of its contention that the price was consistent with usual commercial terms.

Accordingly, we continue to find that the Panjiva import data submitted by the petitioner represent the best available price and quantity benchmark data on the record, and, thus, reasonable to rely upon to evaluate the price and quantity of TG Tools' single trial sale. Further, we continue to find that the information we examined calls into question the ability of TG Tools to make future sales at a similar price and quantity in the United States for the purpose of calculating a dumping margin. The low quantity and high price of TG Tools' sale raise concerns that this sale may not be representative of TG Tools' future selling practices and, therefore, weigh against finding that the sale is *bona fide*.

b. Timing of the Sale

TG Tools' Comments:

- The timing of the sale near the end of the POR does not indicate atypical business practice and is no grounds for rescinding this review.⁶⁴
- Commerce's reliance on *Windmill* is misplaced, as there are few parallels in that case with regard to the timing and freight costs for TG Tools' sale.⁶⁵ There is nothing in TG Tools' sales documentation that suggests that the sale was made for any purpose other than a commercial one.⁶⁶

⁶⁴ See TG Tools Case Brief at 8 (citing *Bona Fides* Memorandum at 6).

⁶⁵ See TG Tools Case Brief at 8 (citing *Bona Fides* Memorandum at 6-7 n.26 (citing *Windmill*, 193 F. Supp. 2d at 1312)).

⁶⁶ See TG Tools Case Brief at 8.

- The timing of the sales negotiations does not support Commerce’s conclusion that the timing of this shipment was designed to frustrate the annual review process.⁶⁷

Petitioner’s Comments:

- TG Tools incorrectly argues that Commerce mistakenly relied on *Windmill* because that case had different facts, *i.e.*, that the steel product there was shipped by air freight on the last day of the POR. Commerce did not consider the type of transportation, because that fact is irrelevant, and the timing of the sale, whether it is specifically on that last day, or another time near the end of the POR, is not by itself a distinguishing fact, only indicative of an atypical business practice, just as Commerce concluded.⁶⁸
- TG Tools’ argument that the timing of this shipment was not designed to frustrate the annual review process does not matter, because intent is irrelevant to Commerce’s analysis.⁶⁹

Commerce’s Position: We disagree with TG Tools’ claim that the timing of a sale near the end of the POR does not indicate atypical business practice and that our reliance on the CIT’s ruling in *Windmill* is misplaced, and continue to find that the timing of TG Tools’ single sale, when taken together with other factors, does not weigh in favor of finding the sale to be *bona fide*.

For the *Preliminary Results*, we found, as in previous reviews, that a sale made at the end of a POR may indicate the sale is not *bona fide*.

TG Tools claims that the timing of the sale does not suggest that the sale was made for any purposes other than a commercial one. However, it provided insufficient evidence as support. Despite our requests for sales information that might have bolstered TG Tools’ claim, it failed to provide the sales documentation pertaining to all of the importer’s sales of subject and non-subject merchandise to the importer’s customer, such as copies of any negotiation records or other documentary evidence confirming that this transaction was not arranged specifically for this review. Thus, without record evidence to the contrary, the timing of TG Tools’ sole sale near the end of the POR weighs against finding that the sale is *bona fide*.

In *Windmill*, the CIT ruled in Commerce’s favor in finding that the sale in the review in question was not *bona fide* based on the totality of the circumstances, including the fact that the respondent’s decision to ship the merchandise by air was found to be in the interest that the merchandise entered the United States before the end of the POR, not due to a commercial need or emergency. In this review, TG Tools did not provide negotiation records or other documentary evidence confirming that this transaction was not arranged specifically for this review that would substantiate its claim that the decision to ship the merchandise near the end of the POR was solely based on commercial terms and not based on the need to enter the merchandise into the United States before the end of the POR. Without such evidence to consider in our analysis, we find it is reasonable to conclude, as we have in previous cases, that

⁶⁷ See TG Tools Case Brief at 8.

⁶⁸ See Petitioner Rebuttal Brief at 12 (citing *Bona Fides* Memorandum at 6).

⁶⁹ See Petitioner Rebuttal Brief at 12.

the late timing of the sale weighs against finding that the sale is *bona fide*.⁷⁰ Thus, contrary to TG Tool’s argument, our reliance on *Windmill* was not focused on the mode of the shipment, but rather the timing of the shipment in relation to the end of the POR.

Accordingly, in this review, we conclude based on record evidence that, while the timing of a sale by itself does not necessarily indicate that a sale is not *bona fide*, the fact that there was only one sale during the whole POR and the merchandise entered near the end of the POR, taken together with other factors including the lack of certain sales information on the record, weigh against finding that the sale is *bona fide*.

c. Profit

TG Tools’ Comments:

- Commerce’s profit analysis that resulted in finding that the profit for TG Tools’ unrelated importer was too high is fundamentally flawed because it focuses on the absence of records it does not need and excludes the trade remedy duties from its calculation on the basis that they are contingent liabilities.⁷¹
- While the CIT has affirmed Commerce’s methodology when it probes “whether the merchandise was resold by the importer at a loss,” here there is no dispute that the importer resold the merchandise at a profit.⁷²
- Commerce declined to consider antidumping and countervailing duty deposits that the importer was required by law to make when it entered the merchandise,⁷³ calling the duties “contingent liability,”⁷⁴ even though TG Tools’ imports are subject to countervailing duties in the amount of 24.04 percent, the Section 232 duties are unlikely to be refunded, and the antidumping duty element of Commerce’s calculation will not drop to zero regardless of the outcome of this review.⁷⁵

Petitioner’s Rebuttal Comments:

- Commerce’s calculation of profit was reasonable and consistent with prior agency decisions.
- Consistent with its practice, Commerce properly excluded antidumping and countervailing duty deposits from the profit analysis calculation because such duties are

⁷⁰ See *New Donghua*, 374 F. Supp. 2d at 1342 (“Commerce’s practice makes clear that it is highly likely to examine objective, verifiable factors to ensure that a sale is not being made to circumvent an antidumping duty order. Thus, a prospective new shipper is on notice that it is unlikely to establish the *bona fides* of a sale merely by claiming to have sold in a manner representative of its future commercial practices”); see also *Novolipetsk*, Slip Op. 20-170 at 16 n.12.

⁷¹ See TG Tools Case Brief at 9 (citing *Bona Fides* Memorandum at 7).

⁷² See TG Tools Case Brief at 9 (citing *Bona Fides* Memorandum at 7 (citing *American Silicon*, 110 F. Supp. 2d at 995)).

⁷³ See TG Tools Case Brief at 9 (citing 19 CFR 141.1(a) (“Duties and the liability for their payment accrue upon imported merchandise on arrival of the importing vessel within a Customs port with the intent then and there to unlade, or at the time of arrival within the Customs territory of the United States if the merchandise arrives otherwise than by vessel, unless otherwise specially provided for by law”)).

⁷⁴ See TG Tools Case Brief at 10 (citing *Bona Fides* Memorandum at 7).

⁷⁵ See TG Tools Case Brief at 10 (citing *Bona Fides* Memorandum at 7 (citing *Certain Carbon and Alloy Steel Cut-to-Length Plate from the People’s Republic of China: Amended Final Results of Countervailing Duty Expedited Review*, 83 FR 42638 (August 23, 2018))).

estimated, contingent liabilities that may be refunded and not actual expenses incurred at the time of entry.⁷⁶

- The *bona fide* analysis of whether the price is commercially valid does not focus solely on the entered value, but rather on the price paid between the importer and its customer.⁷⁷
- The record demonstrates that the price paid between the importer and its customer included an aberrationally high profit, after adjusting for the importer's contingent AD and CVD liabilities that are included in the downstream pricing, that was not in line with commercial reality or representative of future transactions price.⁷⁸

Commerce's Position: We disagree with TG Tools that we focused on records we do not need for our consideration of profit and that we improperly deducted antidumping and countervailing duties from our margin calculation to conclude that the importer resold the merchandise at an excessive profit. Based on our analysis, we continue to find that the record supports a conclusion that the importer resold the merchandise at an excessive profit and, thus, when taken together with other factors, does not weigh in favor of finding the sale to be *bona fide*.

In the *Preliminary Results* we stated that, pursuant to section 751(a)(2)(B)(iv)(V) of the Act, Commerce examines whether the subject merchandise under review was resold in the United States at a profit as part of determining whether the sale under review is *bona fide*. We further stated that reselling profitability is indicative of whether the sale under review is similar to other U.S. sales for the subject merchandise, as well as whether the respondent may be able to sell subject merchandise in the future at similar pricing levels.

Thus, we disagree with TG Tools' argument that simply because the merchandise was sold at a profit indicates that the sale was *bona fide*. While it is true, as the CIT ruled in *American Silicon*, that resale at a loss indicates that a sale may not be *bona fide*, the CIT also made clear that Commerce's determination as to whether a sale is *bona fide* is based on the totality of circumstances.⁷⁹ Indeed, in the instant case, the importer did sell at a profit. However, the fact that there was a profit is not by itself determinative that the sale was *bona fide*. The question we considered was whether resale at an excessive profit is indicative of a *bona fide* sale. To this question, based on record information, we continue to find that it is not.

We instructed TG Tools' importer to provide sales documentation, including the negotiation records, purchase orders, sales invoices, and receipt of payment, pertaining to all of the importer's sales of subject and non-subject merchandise and, while the importer provided the sales contract, invoice and payment documentation, it failed to provide copies of negotiation records or other documentary evidence that would enable Commerce to compare the price and quantity to other commercial transactions between the two parties. Absent this information, the only complete information we had on the record to conduct our analysis is for TG Tools' one sale.

⁷⁶ See Petitioner Rebuttal Brief at 16-17 (citing *Bona Fides* Memorandum at 7 (citing *Polyethylene Terephthalate Film, Sheet, and Strip from India: Final Results of Antidumping Duty New Shipper Review*, 76 FR 30908 (May 27, 2011), and accompanying IDM at Comment 4)).

⁷⁷ See Petitioner Rebuttal Brief at 17.

⁷⁸ *Id.* at 17-18.

⁷⁹ See *American Silicon*, 110 F. Supp. 2d at 996.

For the *Preliminary Results*, we used the information on the record to calculate the profit margin of the importer's resale and deducted the antidumping and countervailing duties the importer had included in its profit calculation. Further, as part of our analysis, we determined that the antidumping and countervailing duties the importer included in its profit calculation are 'contingent liabilities,' because they may later be refunded and, therefore, should not be considered in the commercial price of the sale for purposes of comparing the commercial transaction with other sales or, in this case, ascertaining whether the sale on its own merits is commercially reasonable. Based on the sales information for the one sale, after deducting the contingent liabilities, we find the profit by itself to be excessive, *i.e.*, that the profit is not indicative that the sale under review would be similar to other U.S. sales for the subject merchandise, or that the respondent may be able to sell subject merchandise in the future at similar pricing levels. As such, the excessive profit weighs against finding that the sale is *bona fide*.

d. Other Factors

TG Tools' Comments:

- Commerce's findings that (1) TG Tools only made a single sale, (2) the sale was a trial and (3) the record does not indicate that TG Tools' importer purchased any more specialty H13 grade that remains in TG Tools inventory, do not weigh in favor of rescinding the review.⁸⁰
- Pursuant to *PQ Corp*, the first two issues are no basis for rescinding the review, because in *PQ Corp* the CIT found that a single sale that "was intended to 'provide a predicate for the deposit adjustment'" was *bona fide*.⁸¹ Also, the sale at issue was made by TG Tools at arms-length for a commercial purpose, and Commerce cites no evidence that undermines that conclusion.⁸²
- Commerce notes that TG Tools' exports declined after the POR in support its non-*bona fide* finding, but the absence of additional shipments of the same steel has little bearing on whether the sale at issue was *bona fide*.⁸³
- There is no requirement in the statute that a participant in an annual review ship the same product in subsequent reviews and an exporter is eligible for review if its exports in-scope merchandise.⁸⁴ Also, Commerce failed to evaluate additional factors on the record that had a restraining effect on TG Tools exports, such as import duties.⁸⁵

⁸⁰ See TG Tools Case Brief at 10 (citing *Bona Fides* Memorandum at 9-10).

⁸¹ See TG Tools Case Brief at 11 (citing *PQ Corp*, 652 F. Supp. at 728).

⁸² See TG Tools Case Brief at 11.

⁸³ *Id.*

⁸⁴ *Id.* (citing *Bona Fides* Memorandum at 10 (citing section 751(a) of the Act)).

⁸⁵ See TG Tools Case Brief at 11 (citing Proclamation No. 9705, Adjusting Imports of Steel Into the United States, 83 FR 11625 (March 15, 2018)).

Petitioner's Comments:

- While the existence of a single U.S. sale is not determinative of a non-*bona fide* sale, it is a circumstance that must be “carefully scrutinized to ensure that new shippers do not unfairly benefit from unrepresentative sales.”⁸⁶
- Having only a single sale on the record means that the agency has few transactions from which to draw inferences on TG Tools’ future selling practices and, when this factor is viewed together with the totality of the circumstances, it weighs against finding the sale to be *bona fide*.⁸⁷
- TG Tools does not dispute that its single sale was a trial and, although being a trial sale may not be determinative that the transaction was not *bona fide*, Commerce found in the *Preliminary Results*, as in previous cases, that “this POR sale was a trial sale of a specialty product, which leads us to conclude that this sale is not representative of TG Tools’ typical selling practices for normal grades of subject merchandise.”⁸⁸
- A sample or trial sale is, by definition, not a commercial sale and should not serve as the basis for a cash deposit rate calculation, and there is substantial record evidence to indicate that the terms surrounding this single, trial sample sale are atypical.⁸⁹
- TG Tools argues that the fact that the importer did not purchase any additional specialty grade H13 grade from TG Tools after the POR is irrelevant to whether the sale is *bona fide*, but did not provide evidence contrary to Commerce’s explanation that in the context of prior *bona fides* analyses,⁹⁰ and in this review where it analyzed the record evidence surrounding the circumstances of this particular single sale to explain the unusual nature of TG Tools’ sale to the Importer, it has found that the absence of subsequent sales from the producer/exporter to the importer to be indicative of a non-commercial transaction.⁹¹
- The fact that TG Tools had no subsequent sales of the trial production product to the Importer, coupled with its post-POR sale to another U.S. customer for a H13 steel product with a much lower price and significantly higher quantity, are indicative of a non-*bona fide* POR sale.⁹²

Commerce’s Position: Despite TG Tools’ arguments to the contrary, because TG Tools’ made a single sale during the POR, the sale was a trial sale of a specialty product, and there were no other sales of subject merchandise prior to or subsequent to the sale, we continue to find that these factors, taken together with other factors, do not weigh in favor of finding the sale to be *bona fide*.

⁸⁶ See Petitioner Rebuttal Brief at 19 (citing *Bona Fides* Memorandum at 8 (citing *Tianjin Tiancheng*, 366 F. Supp. 2d at 1263)).

⁸⁷ *Id.*

⁸⁸ See Petitioner Rebuttal Brief at 19-20 (citing *Bona Fides* Memorandum at 8 (citing *TRBs China* IDM at Comment 2 (being “sold on a trial basis” is a factor that “weighs against finding the transaction *bona fide*”))).

⁸⁹ See Petitioner Rebuttal Brief at 20 (citing *Final Determination of Sales at Less Than Fair Value: Certain All-Terrain Vehicles from Japan*, 54 FR 4864 (January 31, 1989) (*ATVs Japan*) at Comment 6 (“{Commerce} will, on occasion, exclude certain U.S. sales from its fair value comparisons when those sales are not representative of the respondent’s selling practices in the U.S. market”)).

⁹⁰ See Petitioner Rebuttal Brief at 20 (citing *Bona Fides* Memorandum at 9 (citing various prior agency decisions)).

⁹¹ See Petitioner Rebuttal Brief at 20-21 (citing *Bona Fides* Memorandum at 10).

⁹² See Petitioner Rebuttal Brief at 21.

As we stated in the *Preliminary Results*, Section 751(a)(2)(B)(iv)(VII) of the Act provides guidance for Commerce to consider any other factors it determines to be relevant as to whether the sale under review is “likely to be typical of those the exporter or producer will make after the completion of the review.”⁹³ And, while a single sale is not inherently commercially unreasonable, the CIT has agreed that single sales must be “carefully scrutinized to ensure that new shippers do not unfairly benefit from unrepresentative sales.”⁹⁴

TG Tools takes issue with our reliance on rulings by the CIT in *Tianjin Tiancheng* (which cites to *American Silicon*) and *New Donghua*, because they concern new-shipper reviews, and instead directs us to *PQ Corp* to support its claim that the fact that TG Tools only had one sale and it was a trial sale are no basis for rescinding the review. While *PQ Corp* does concern a single sale during an administrative review, and Commerce considered the sale to be *bona fide* despite it being the only sale during that POR, we find that it provides little support for TG Tools’ claim. First, we note that TG Tools appears to mischaracterize the CIT’s ruling in *PQ Corp* by quoting that “the court found that a single {sale} that “was intended to ‘provide a predicate for the deposit adjustment’” was *bona fide*.”⁹⁵ Actually, it seems that what the CIT was referring to was the Defendant-Intervenors’ “decision...to make one sale in a commercial quantity to provide a predicate for the deposit adjustment,”⁹⁶ and that, despite (not because of) this information the CIT considered the sale to be *bona fide* because the sale was otherwise an arms-length transaction.⁹⁷ Nevertheless, this reference misses the intent of Commerce’s inquiry, which is not just whether the sale is based on reasonable commercial terms but also whether the sale is representative of future sales of subject merchandise, which we found that it is not. As we stated in the *Preliminary Results*, the existence of a single U.S. sale is not determinative of a *bona fide* sale but having only a single sale on the record means that we have “few transactions from which to draw inferences on TG Tools’ future selling practices.” And, when this factor is viewed together with the totality of the circumstances and other information on the record, we continue to find that TG Tools’ having a single sale during the POR weighs against finding the sale to be *bona fide*.

With regard to the trial nature of TG Tools’ sale, the record clearly indicates that this POR sale was a trial sale of a specialty product, and TG Tools does not dispute this fact. Here, again, TG Tools’ reliance on *PQ Corp* provides little support for this claim, as the CIT’s determination that the sale in question was *bona fide* despite being a single sale ‘made to provide a predicate for the deposit adjustment’ is only relevant in our analysis in this review if there were in fact future sales made by TG Tools, but there were not. In the *Preliminary Results* we found that TG Tools’ trial sale during the POR is not representative of TG Tools’ typical selling practices for normal grades

⁹³ See section 751(a)(2)(B)(iv) of the Act (setting out the factors that Commerce considers to determine whether a sale is *bona fide* in the context of a new shipper review); see also *Tianjin Tiancheng*, 366 F. Supp. 2d at 1250 (citing *American Silicon*, 110 F. Supp. 2d at 992, 995); and *New Donghua*, 374 F. Supp. 2d at 1342 (“Commerce’s practice makes clear that it is highly likely to examine objective, verifiable factors to ensure that a sale is not being made to circumvent an antidumping duty order. Thus, a prospective new shipper is on notice that it is unlikely to establish the *bona fides* of a sale merely by claiming to have sold in a manner representative of its future commercial practices.”))

⁹⁴ See *Tianjin Tiancheng*, 366 F. Supp. 2d, at 1263.

⁹⁵ TG Tools cites to *PQ Corp*, 652 F. Supp. at 728.

⁹⁶ See *PQ Corp*, 652 F. Supp. at 727 (citing Intervenors’ Brief at 5-6).

⁹⁷ *Id.* at 729.

of subject merchandise. This is consistent with Commerce’s findings in prior cases, that being “sold on a trial basis” is a factor that “weighs against finding the transaction *bona fide*,”⁹⁸ and a sample sale is, by definition, not a commercial sale and should not serve as a basis for a cash deposit rate calculation.⁹⁹ For these reasons, we continue to find that the trial nature of the sale weighs against a finding that the sale is *bona fide*.

Finally, we disagree with TG Tools that there being no subsequent sales to the importer of the same H13 grade steel as in its single POR sale is irrelevant as to whether its sale is *bona fide*. As we stated in the *Preliminary Results*, the record indicates that, while TG Tools sold non-subject merchandise after the POR, the record does not indicate that TG Tools sold more of the specialty H13 grade steel that remains in TG Tools inventory since the POR, nor any other subject merchandise. TG Tools does not dispute this fact, and it did not provide evidence contrary to Commerce’s explanation that, in the context of prior *bona fides* analyses that the absence of subsequent sales from the producer/exporter to the importer to be indicative of a non-commercial transaction. Therefore, given that the sale at issue was a trial sale, made on a limited basis, of a specialty product outside of TG Tools’ normal business product line, the production of which required the creation of new production technology, we continue to find that these additional factors weigh against finding that the sale is *bona fide*.

Comment 3: Whether Commerce Should Apply AFA for Importer’s Failure to Provide Requested Information

TG Tools’ Comments:

- Commerce takes exception with the fact that TG Tools’ unrelated importer declined to provide documentation covering sales that fall outside of this review but does not draw any adverse inference or demonstrate how the information provided was insufficient to perform its analysis.¹⁰⁰

Petitioner’s Comments:

- Commerce’s request for additional documentation from the importer to substantiate the U.S. sales price was reasonable.¹⁰¹
- Because TG Tools’ importer did not provide the sales documentation pertaining to all of the importer’s sales of subject and non-subject merchandise to the importer’s customer, such as copies of any negotiation records or other documentary evidence confirming that this transaction was not arranged specifically for this review, Commerce was not able to verify that that the sale was *bona fide*.¹⁰²
- The importer’s failure to provide documents requested by Commerce is grounds for the application of facts available with an adverse inference.¹⁰³

⁹⁸ See, e.g., *TRBs China* IDM at Comment 2.

⁹⁹ See, e.g., *ATVs Japan* at Comment 6 (“{Commerce} will, on occasion, exclude certain U.S. sales from its fair value comparisons when those sales are not representative of the respondent’s selling practices in the U.S. market...”).

¹⁰⁰ See TG Tools Case Brief at 9 (citing *Bona Fides* Memorandum at 7).

¹⁰¹ See Petitioner Rebuttal Brief at 13.

¹⁰² *Id.*

¹⁰³ *Id.* at 14.

- Commerce must apply the facts otherwise available when “necessary information is not available on the record,” or an interested party “withholds information” requested by the Department, “fails to provide” requested information by the applicable deadline, “significantly impedes a proceeding,” or provides information that cannot be verified pursuant to section 782(i) of the Act.¹⁰⁴
- If Commerce determines that the party “has failed to cooperate by not acting to the best of its ability to comply with a request for information,” it “may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available.”¹⁰⁵
- Pursuant to the *Nippon Steel* standard, the importer was obligated and failed to “put forth its maximum effort to provide Commerce with full and complete answers” regarding its operating costs.¹⁰⁶
- Thus, Commerce should conclude that necessary information is not on the record because the importer refused to cooperate and, accordingly, that AFA is appropriate.¹⁰⁷

Commerce’s Position: As discussed above, despite TG Tools’ importer’s failure to provide copies of negotiation records or other documentary evidence that would enable Commerce to compare the price and quantity to other commercial transactions between the two parties, Commerce was able to determine that resale profit was by itself excessive and weighs against finding that the sale is *bona fide*.¹⁰⁸ Accordingly, because our *bona fides* analysis does not depend on the information the importer failed to provide such that we can still determine based on record information whether the sale is *bona fide*, with respect to profit, and generally based on the totality of circumstances pertaining to the sale, we find it unnecessary to consider applying facts available or using an adverse inference.

Comment 4: Surrogate Country and Surrogate Values Selection

TG Tools’ Comments:

- Should Commerce reinstate this review, it should select Turkey as the surrogate country and rely on the values calculated in TG Tools’ filings.¹⁰⁹

¹⁰⁴ See Petitioner Rebuttal Brief at 14 (citing section 776(a) of the Act).

¹⁰⁵ See Petitioner Rebuttal Brief at 14 (citing section 776(b) of the Act).

¹⁰⁶ See Petitioner Rebuttal Brief at 15 (citing *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003) (*Nippon Steel*)).

¹⁰⁷ See Petitioner Rebuttal Brief at 15 (citing *SKF USA Inc. v. United States*, 675 F. Supp. 2d 1264, 1274-75 (Ct. Int’l Trade 2009); *Mueller Comercial de Mexico, S. de R.L. de C.V. v. United States*, 753 F.3d 1227, 1236 (Fed. Cir. 2014); and *Haixing Jingmei Chem. Prods. Sales Co. v. United States*, 335 F. Supp. 3d 1330, 1343 (Ct. Int’l Trade 2018); *Id.* at 1343-44).

¹⁰⁸ See Commerce’s discussion of profit in Comment 2.

¹⁰⁹ See TG Tools Case Brief at 12.

Petitioner's Rebuttal Comments:

- Should Commerce determine that TG Tools' sole POR sale is *bona fide*, Commerce should select Brazil as the surrogate country, not Turkey as TG Tools argues, and rely on Brazilian surrogate values to calculate normal value.¹¹⁰

Commerce's Position: Because we continue to find that TG Tools' single sale during the POR was non-*bona fide* and are rescinding this review, interested parties' arguments concerning the selection of a surrogate country and surrogate values for purposes of calculating a dumping margin are moot.

V. RECOMMENDATION

Based on our analysis of the comments received, we recommend adopting the positions set forth above. If this recommendation is accepted, we will publish the final results of the administrative review in the *Federal Register*.

Agree

Disagree

1/19/2021

X



Signed by: JEFFREY KESSLER

Jeffrey I. Kessler
Assistant Secretary
for Enforcement and Compliance

¹¹⁰ See Petitioner Rebuttal Brief at 22-34 (citing 19 U.S.C. §§ 1677b(c)(4)(A)-(B); Policy Bulletin 04.1: Non-Market Economy Surrogate Country Selection Process (March 1, 2004); Commerce's Memorandum, "List of Surrogate Countries for Antidumping Investigations and Reviews from the People's Republic of China ("China")," dated August 15, 2019 at Attachment 1; and *Jiaying Brother Fastener Co., Ltd. v. United States*, 822 F.3d 1289, 1293 (Fed. Cir. 2016)); see also the petitioner's and TG Tools' various submissions related to surrogate country selection and the calculation of surrogate values.