shipper review of Yancheng Haiteng is September 1, 1998 through February 28, 1999.

Concurrent with publication of this notice, and in accordance with 19 CFR 351.214(e), we will instruct the U.S. Customs Service to allow, at the option of the importer, the posting of a bond or security in lieu of a cash deposit for each entry of the merchandise exported by the company listed above, until the completion of the review.

Interested parties must submit applications for disclosure under administrative protective order in accordance with 19 CFR 351.305 and 351.306.

This initiation and notice are in accordance with section 751(a) of the Act (19 U.S.C. 1675(a)) and 19 CFR 351.214.

Dated: April 30, 1999.

Roland L. MacDonald,

Acting Deputy Assistant Secretary for Import Administration.

[FR Doc. 99–11421 Filed 5–5–99; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–821–809]

Postponement of Final Determination of Antidumping Duty Investigation of Hot-Rolled Flat-Rolled Carbon-Quality Steel From the Russian Federation

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of extension of time limit for final determination of antidumping duty investigation.

SUMMARY: The Department of Commerce (the Department) is extending the time limit of the final determination of the antidumping duty investigation of hot-rolled flat-rolled carbon-quality steel (Hot-Rolled Steel) from the Russian Federation (Russia).

EFFECTIVE DATE: May 6, 1999.

FOR FURTHER INFORMATION CONTACT: Lyn Baranowski or Rick Johnson at (202) 482–3208 or 482–3818, respectively, Office of AD/CVD Enforcement, Group III, Office 9, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, D.C. 20230.

The Applicable Statute

Unless otherwise indicated, all citations to the Tariff Act of 1930 (the Act), as amended are references to the provisions effective January 1, 1995, the effective date of the amendments made to the Act by the Uruguay Round Agreements Act (URAA). In addition, all citations to the Department's regulations are to the regulations at 19 CFR Part 351 (1998).

Postponement of Final Determination and Extension of Provisional Measures

On February 25, 1999, the affirmative preliminary determination was published in this proceeding (*see Notice of Preliminary Determination of Sales at Less Than Fair Value: Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from the Russian Federation*, 64 FR 9312). Pursuant to section 735(a)(2) of the Act, on March 4, 1999, respondent JSC Severstal (Severstal) requested that the Department extend the final determination in this case (19 U.S.C. 1673(a)(2)). Severstal also requested an extension of the provisional measures (i.e., suspension of liquidation) period from four to six months in accordance with the Department's regulations (19 CFR 351.210(e)(2)). Therefore, in accordance with 19 CFR 351.210(e)(2)(ii), because (1) our preliminary determination is affirmative, (2) respondent requesting the postponement represents a significant proportion of exports of the subject merchandise from Russia, and (3) no compelling reasons for denial exist, we are postponing this final determination for 31 days until June 10, 1999 (*see* Memorandum from Joseph Spetrini to Richard Moreland dated April 28, 1999). Suspension of liquidation will be extended accordingly.

This notice of postponement is published pursuant to 19 CFR 351.210(g).

Dated: April 28, 1999.

Richard Moreland,

Acting Assistant Secretary for Import Administration.

[FR Doc. 99–11283 Filed 5–5–99; 8:45 am]

BILLING CODE 3510–DS–M

DEPARTMENT OF COMMERCE

International Trade Administration

[A–588–846]

Notice of Final Determination of Sales at Less Than Fair Value: Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From Japan

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: May 6, 1999.

FOR FURTHER INFORMATION CONTACT: Nithya Nagarajan, John Totaro, LaVonne Jackson, or Keir Whitson, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–4243, (202) 482–1374, (202) 482–0961, and (202) 482–1394, respectively.

The Applicable Statute

Unless otherwise indicated, all citations to the Tariff Act of 1930, as amended (''the Act''), are references to the provisions effective January 1, 1995, the effective date of the amendments made to the Act by the Uruguay Round Agreements Act (''URAA''). In addition, unless otherwise indicated, all citations to the Department's regulations are to the regulations at 19 C.F.R. part 351 (1998).

Final Determination

We determine that hot-rolled, flat-rolled, carbon-quality steel products (''hot-rolled steel'') from Japan is being sold in the United States at less than fair value (''LTFV''), as provided in Section 735 of the Act. The estimated margins are shown in the ''Continuation of Suspension of Liquidation'' section of this notice.

Case History

Since the *Preliminary Determination (see Notice of Preliminary Determination of Sales at Less Than Fair Value: Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Japan*, 64 FR 8291 (Feb. 19, 1999)) (''*Preliminary Determination*''), the following events have occurred:

During February and March 1999, respondents Nippon Steel Corporation (''NSC''), NKK Corporation (''NKK'') and Kawasaki Steel Corporation (''KSC'') submitted responses to the sales and cost supplemental questionnaires issued by the Department. On February 12, 1999, February 25, 1999, and March 3, 1999, petitioners submitted comments regarding the issue of date of sale and the Department's Japan sales and cost verifications. On February 19, 1999, NKK filed an allegation of clerical error and requested the Department to issue an amended preliminary determination. On March 1, 1999, NSC submitted pre-verification changes and new factual information presumably discovered while preparing for the sales verification in Japan. On March 4, 1999, KSC submitted corrections presumably discovered while preparing for sales verification. Similarly, on March 4, 1999, NKK submitted pre-verification changes and new factual information

presumably discovered while preparing for sales verification.

During February and March 1999, we conducted sales and cost verifications of NSC's, NKK's and KSC's responses to the antidumping questionnaire. On March 26, 1999, we issued our sales and cost verification reports for all three responding companies. Petitioners and respondents submitted case briefs on April 12, 1999, and rebuttal briefs on April 19, 1999. On April 21, 1999, the Department held a public hearing. In addition, on April 12, 1999, General Motors Corporation (''GM'') requested a scope exclusion for hot-rolled carbon steel that both meets the standards of SAE J2329 Grade 2 and is of a gauge thinner than 2 mm with a 2.5 percent maximum tolerance. On April 22, 1999, the petitioners requested that certain ASTM A570–50 grade steel be excluded from the investigation. For a more detailed discussion of scope issue, please *see Scope Amendments Memorandum,* dated April 28, 1999.

Scope of Investigation

For purposes of this investigation, the products covered are certain hot-rolled flat-rolled carbon-quality steel products of a rectangular shape, of a width of 0.5 inch or greater, neither clad, plated, nor coated with metal and whether or not painted, varnished, or coated with plastics or other non-metallic substances, in coils (whether or not in successively superimposed layers) regardless of thickness, and in straight lengths, of a thickness less than 4.75 mm and of a width measuring at least 10 times the thickness. Universal mill plate (*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, not in coils and without patterns in relief) of a thickness not less than 4.0 mm is not included within the scope of these investigations.

Specifically included in this scope are vacuum degassed, fully stabilized (commonly referred to as interstitial-free (''IF'')) steels, high strength low alloy (''HSLA'') steels, and the substrate for motor lamination steels. IF steels are recognized as low carbon steels with micro-alloying levels of elements such as titanium and/or niobium added to stabilize carbon and nitrogen elements. HSLA steels are recognized as steels with micro-alloying levels of elements such as chromium, copper, niobium, titanium, vanadium, and molybdenum. The substrate for motor lamination steels contains micro-alloying levels of elements such as silicon and aluminum.

Steel products to be included in the scope of this investigation, regardless of HTSUS definitions, are products in which: (1) iron predominates, by weight, over each of the other contained elements; (2) the carbon content is 2 percent or less, by weight; and (3) none of the elements listed below exceeds the quantity, by weight, respectively indicated:

1.80 percent of manganese, or
1.50 percent of silicon, or
1.00 percent of copper, or
0.50 percent of aluminum, or
1.25 percent of chromium, or
0.30 percent of cobalt, or
0.40 percent of lead, or
1.25 percent of nickel, or
0.30 percent of tungsten, or
0.012 percent of boron, or
0.10 percent of molybdenum, or
0.10 percent of niobium, or
0.41 percent of titanium, or
0.15 percent of vanadium, or
0.15 percent of zirconium.

All products that meet the physical and chemical description provided above are within the scope of this investigation unless otherwise excluded. The following products, by way of example, are outside and/or specifically excluded from the scope of this investigation:

- Alloy hot-rolled steel products in which at least one of the chemical elements exceeds those listed above (including e.g., ASTM specifications A543, A387, A514, A517, and A506).
- SAE/AISI grades of series 2300 and higher.
- Ball bearing steels, as defined in the HTSUS.
- Tool steels, as defined in the HTSUS.
- Silico-manganese (as defined in the HTSUS) or silicon electrical steel with a silicon level exceeding 1.50 percent.
- ASTM specifications A710 and A736.
- USS Abrasion-resistant steels (USS AR 400, USS AR 500).
- Hot-rolled steel coil which meets the following chemical, physical and mechanical specifications:

C	Mn	P	S	Si	Cr	Cu	Ni
0.10–0.14%	0.90% Max ..	0.025% Max	0.005% Max	0.30–0.50%	0.50–0.70%	0.20–0.40%	0.20% Max.

Width = 44.80 inches maximum; Thickness = 0.063 − 0.198 inches;

Yield Strength = 50,000 ksi minimum; Tensile Strength = 70,000 − 88,000 psi.

- Hot-rolled steel coil which meets the following chemical, physical and mechanical specifications:

C	Mn	P	S	Si	Cr	Cu	Ni	Mo
0.10–0.16%	0.70–0.90%	0.025% Max	0.006% Max	0.30–0.50%	0.50–0.70%	0.25% Max ..	0.20% Max ..	0.21% Max

Width = 44.80 inches maximum; Thickness = 0.350 inches maximum;

Yield Strength = 80,000 ksi minimum; Tensile Strength = 105,000 psi Aim.

- Hot-rolled steel coil which meets the following chemical, physical and mechanical specifications:

C	Mn	P	S	Si	Cr	Cu	Ni	V(wt.)	Cb
010.10–0.14%	11.30–1.80%.	10.025% Max.	1.005% Max.	10.30–0.50%.	10.50–0.70%.	10.20–0.40%.	10.20% Max.	010.10 Max.	0.08% Max

Width = 44.80 inches maximum; Thickness = 0.350 inches maximum;

Yield Strength = 80,000 ksi minimum; Tensile Strength = 105,000 psi Aim.

- Hot-rolled steel coil which meets the following chemical, physical and mechanical specifications:

C	Mn	P	S	Si	Cr	Cu	Ni	Nb	Ca	Al
0.15% Max.	1.40% Max	0.025% Max.	0.010% Max.	0.50% Max	1.00% Max	0.50% Max	0.20% Max	0.005% Min.	Treated	0.01–0.07%

Width = 39.37 inches; Thickness = 0.181 inches maximum; Yield Strength = 70,000 psi minimum for thicknesses ≤ 0.148 inches and 65,000 psi minimum for thicknesses >0.148 inches; Tensile Strength = 80,000 psi minimum.

- Hot-rolled dual phase steel, phase-hardened, primarily with a ferritic-martensitic microstructure, contains 0.9 percent up to and including 1.5 percent silicon by weight, further characterized by either (i) tensile strength between 540 N/mm^2 and 640 N/mm^2 and an elongation percentage ≥26 percent for thicknesses of 2 mm and above, or (ii) a tensile strength between 590 N/mm^2 and 690 N/mm^2 and an elongation percentage ≥25 percent for thicknesses of 2mm and above.
- Hot-rolled bearing quality steel, SAE grade 1050, in coils, with an inclusion rating of 1.0 maximum per ASTM E 45, Method A, with excellent surface quality and chemistry restrictions as follows: 0.012 percent maximum phosphorus, 0.015 percent maximum sulfur, and 0.20 percent maximum residuals including 0.15 percent maximum chromium.
- Grade ASTM A570–50 hot-rolled steel sheet in coils or cut lengths, width of 74 inches (nominal, within ASTM tolerances), thickness of 11 gauge (0.119 inch nominal), mill edge and skin passed, with a minimum copper content of 0.20%.

The merchandise subject to these investigations is classified in the Harmonized Tariff Schedule of the United States (''HTSUS'') at subheadings: 7208.10.15.00, 7208.10.30.00, 7208.10.60.00, 7208.25.30.00, 7208.25.60.00, 7208.26.00.30, 7208.26.00.60, 7208.27.00.30, 7208.27.00.60, 7208.36.00.30, 7208.36.00.60, 7208.37.00.30, 7208.37.00.60, 7208.38.00.15, 7208.38.00.30, 7208.38.00.90, 7208.39.00.15, 7208.39.00.30, 7208.39.00.90, 7208.40.60.30, 7208.40.60.60, 7208.53.00.00, 7208.54.00.00, 7208.90.00.00, 7210.70.30.00, 7210.90.90.00, 7211.14.00.30, 7211.14.00.90, 7211.19.15.00, 7211.19.20.00, 7211.19.30.00, 7211.19.45.00, 7211.19.60.00, 7211.19.75.30, 7211.19.75.60, 7211.19.75.90, 7212.40.10.00, 7212.40.50.00, 7212.50.00.00. Certain hot-rolled flat-rolled carbon-quality steel covered by this investigation, including: vacuum degassed, fully stabilized; high strength low alloy; and the substrate for motor lamination steel may also enter under the following tariff numbers: 7225.11.00.00, 7225.19.00.00, 7225.30.30.50, 7225.30.70.00, 7225.40.70.00, 7225.99.00.90, 7226.11.10.00, 7226.11.90.30, 7226.11.90.60, 7226.19.10.00, 7226.19.90.00, 7226.91.50.00, 7226.91.70.00, 7226.91.80.00, and 7226.99.00.00. Although the HTSUS subheadings are provided for convenience and Customs purposes, the written description of the merchandise under investigation is dispositive.

Period of Investigation

The period of investigation (''POI'') is July 1, 1997 through June 30, 1998.

Product Comparisons

In accordance with section 771(16) of the Act, all products produced by the respondents covered by the description in the *Scope of Investigation* section, above, and sold in Japan during the POI are considered to be foreign like products for purposes of determining appropriate product comparisons to U.S. sales. We have relied on eleven characteristics to match U.S. sales of subject merchandise to comparison market sales of the foreign like product: paint, quality, carbon content, strength, thickness, width, coiled or non-coiled, temper rolling, pickling, edge trim, and patterns. These characteristics have been weighted by the Department where appropriate. Where there were no sales of identical merchandise in the home market to compare to U.S. sales, we compared U.S. sales to the next most similar foreign like product on the basis of the characteristics listed in the antidumping questionnaire and reporting instructions.

Changes From the Department's Preliminary Determination

The Department, upon review of the preliminary margin calculation program, found that there were errors associated with the calculation of the difference in merchandise adjustment (DIFMER) in NKK's model match program. The program that we used, failed to calculate the DIFMER adjustment associated with the matching home market CONNUM. Instead, the DIFMER calculation selected in the concordance program was chosen from the last comparison, resulting in the application of an incorrect DIFMER adjustment. For a complete discussion, please see the Department's *Final Determination Analysis Memo,* dated April 28, 1999.

Second, the Department disallowed KSC's home market technical service expenses because these expenses could not be verified. However, we continue to adjust for U.S. technical service expenses. *See KSC Home Market Verification Report,* dated March 26, 1999; *see also KSC Final Analysis Memo,* dated April 28, 1999.

Third, the Department corrected the model match and margin programs for all three companies in calculating packing costs for use in the cost test and constructed value. In the *Preliminary Determination,* the Department inadvertently used a sale specific packing cost for use in the calculation of general and administrative (''G&A'') expenses and interest expenses in both the cost test and constructed value analysis. For the final determination, the Department has revised this section of the program to calculate a weighted-average packing cost per CONNUM for use in these calculations. For a more complete analysis, please see the *Final Determination Analysis Memo,* dated April 28, 1999, for all three responding companies.

Interested Party Comments

Home Market and U.S. Sales

Comment 1: Date of Sale.

NKK

NKK states that the Department should reaffirm its preliminary finding that the invoice date/shipment date is the most appropriate date of sale for NKK. NKK argues that the material terms of sale were not finalized until after shipment for the majority of its U.S. and home market sales as supported by documentation provided during verification. In addition, NKK argues that the Department's regulations and other determinations dictate the use of date of invoice as the date of sale.

NKK argues that its demonstrated sales process clearly indicates that the invoice date/shipment date best reflects the date on which the final material terms of sale were finalized during the period of investigation, and that material terms of sale, i.e. price and quantity, often changed after the order confirmation date. NKK argues that the

Department verified that a significant portion of home market and U.S. sales had significant changes to price and/or quantity during the POI, and therefore the invoice/shipment date is the most appropriate date of sale for NKK's sales of subject merchandise.

Secondly, NKK argues that the Department's regulations indicate a preference for the use of date of invoice as the date of sale where changes from the original order occur on a frequent basis. NKK states that the Department established a presumption that material terms would be considered established on the invoice date after adopting § 351.401(i) of its regulations. NKK also argues that the presumption in favor of invoice date is supported by the language in the preamble to the regulations and that an alternative date of sale will be used only when there is evidence satisfying the Department that the different date better reflects the date on which the exporter or producer establishes the material terms of sale. NKK argues that the regulations therefore place the burden of proof on the party claiming that another date is more appropriate, and that this burden of proof has not been satisfied by record evidence. Rather, the record supports the finding that the material terms of sale are set on the date of shipment/invoice; thus, that date is the most appropriate date of sale.

Petitioners argue that the Department may use a date of sale other than invoice date if it determines that an alternative date more accurately reflects the date on which the material terms of sale are established. Petitioners argue that the documents and information obtained at NKK's verification support the conclusion that the essential terms of sale are set on the order confirmation date and therefore the order confirmation is the appropriate date of sale for this investigation.

Petitioners contend that NKK manufactures product to order and that the principal terms of sale are set at the point the customer places the order. Further, they argue that although the Department examined numerous transactions at verification, the data show that only a minuscule portion of sales had changes to material terms (*i.e.*, price terms). Petitioners argue that, for the majority of sales, price terms did not change between order confirmation date and invoice/shipment date, and that, in instances where changes did occur, they were accounted for after the invoice was issued. Petitioners contend that changes to price terms which occur after invoicing are not an appropriate adjustment for consideration in the Department's date of sale analysis. Petitioners further argue that, in the majority of sales reviewed at verification, the quantities shipped were within shipping tolerances and should therefore not be considered in the date of sale analysis. Because sales where the quantity shipped was outside the applicable delivery tolerances occurred only in a small number of verified transactions, the order confirmation date is the appropriate date of sale. Petitioners further argue that, in *Certain Corrosion-Resistant Carbon Steel Flat Products from Japan: Final Results of Antidumping Duty Administrative Review* (''*Certain Corrosion-Resistant Carbon Steel From Japan*''), 64 FR 12951, 12956–12957 (Mar.16, 1999), the Department used the order confirmation date as the date of sale under similar factual circumstances. Finally, petitioners argue that the Department should use facts available due to the fact that NKK did not report a separate database of sales based on order confirmation date. According to petitioners, the Department requested NKK to provide this information in both its original questionnaire as well as its supplemental questionnaire, and NKK refused to provide the requested information. Therefore, since the record evidence indicates that order confirmation date is the most appropriate date of sale, the Department should assign the highest dumping margin, or the highest rate in the petition as facts available.

NKK rebuts petitioners' arguments that order confirmation date is the date of sale. NKK argues that petitioners are incorrect in arguing that only a few transactions were reviewed at verification for the Department's date of sale analysis. NKK argues that the Department reviewed a large sample of sales and found that over fifty percent of these transactions had changes to material terms. *See NKK Sales Verification Report*, dated March 26, 1999, at 14. NKK argues that, contrary to petitioners' assertion, the frequency of changes for both price and quantity terms is sufficiently large to justify using invoice date as the date of sale. Secondly, NKK argues that petitioners' contention that post-shipment price changes are irrelevant to the date of sale analysis is incorrect. Citing *Diameter Circular Seamless Carbon and Alloy Steel Standard Line and Pressure Pipe from German: Final Results of Antidumping Duty Administrative Review*, 63 FR 13217 (March 18, 1998), NKK argues that the Department stated that it will use shipment date as a proxy date for sales invoice after shipment, not that all post-shipment price changes are to be ignored in the date of sale analysis. Third, NKK argues that the evidence on the record demonstrates that the final price invoiced was not determined until after shipment occurred and this differs from the price stated on the order confirmation. Fourth, NKK contends that each of the cases cited by petitioners in their argument can be distinguished from the facts in the present case. NKK argues that, in each of these cases, the Department used the order confirmation date because there were no changes to the terms of sale after the order date, whereas in the instant case, NKK has proven and the Department has verified that material terms are not final at order confirmation and that material terms changed frequently. These facts, according to NKK, support the conclusion that shipment/invoice date is the appropriate date of sale. Finally, NKK argues that it is inappropriate to apply adverse facts available to NKK. NKK contends that the Department gave NKK the choice as to whether to provide a single sales database using invoice date as the date of sale or to provide both invoice date and order confirmation date databases. NKK contends that it chose to provide a single database and has subsequently proven, through record evidence, that invoice date is the appropriate date of sale. Thus, there is no basis to use facts available.

Petitioners rebut NKK's argument that invoice date is the date on which material terms of sale are set and should be the date of sale. Petitioners reiterate their argument that only a small percentage of home market and U.S. sales had changes to material terms after the order confirmation date. Petitioners continue to argue that changes made after shipment are not an appropriate basis for the Department's date of sale analysis. Petitioners contend that the Department's verification demonstrates that only a few sales had changes to material terms, and state that this confirms that order confirmation date is the appropriate date of sale. Petitioners further contend that, because NKK failed to provide sales databases using order confirmation date as the date of sale, the Department should apply adverse facts available. According to petitioners, NKK did not report all sales where the order was confirmed within the POI, therefore the necessary sales are not on the record. Because NKK failed to report these sales, there is justification for the Department to reject NKK's response and apply facts available.

NSC

NSC argues that the Department should follow its preliminary determination and continue using the date of shipment as the date of sale. NSC argues that the Department verified that the essential terms of sale changed between the initial order and shipment date for a significant portion of home market and U.S. sales. NSC used the date of shipment as a proxy for the date of invoice because the shipment date falls within a short time of the invoice date.

NSC argues that the Department's regulations mandate the use of date of invoice as the date of sale, and that there is a rebuttable presumption that the appropriate date of sale is the invoice date. NSC argues that the presumption can only be overcome by compelling evidence on the record. NSC states that the essential terms of sale for its sales of subject merchandise are not finally established until, and sometimes after, shipment, and that this supports the presumption in favor of invoice date. NSC argues that there is a high standard to be met to overcome this presumption, and that record evidence on the frequency of changes and the potential for change to the essential terms after the initial order support the finding that invoice date is the appropriate date of sale.

NSC argues that the Department verified that material terms of sale changed after the initial order was placed in a significant portion of the sales examined. In addition, respondent argues that the Department verified that, in the Japanese hot-rolled steel industry, terms of sale are not established until the material is shipped to the purchaser. Based on these reasons, NSC argues that the date of shipment/invoice is the most appropriate date of sale as supported by the preference stated in the Department's regulations and record evidence and we should continue using the date of shipment as the date of sale for the final determination.

Petitioners argue that the Department may use a date of sale other than invoice date if it determines that an alternative date more accurately reflects the date on which the material terms of sale are established. Petitioners argue that the documents and information obtained at NSC's verification support the conclusion that the essential terms of sale are set on the order confirmation date and therefore the order confirmation is the appropriate date of sale for this investigation. In sum, petitioners argue that there was not a significant portion of sales for which material terms of sale changed, and that as a result the most appropriate date of sale is the date of order confirmation.

Petitioners argue that NSC only produces merchandise after the customer places the order and that the critical step in determining the material terms of sale is the issuance of the order confirmation. Petitioners further argue that the evidence examined at verification supports the conclusion that only modifications that occur between order confirmation and shipment are relevant to the date of sale analysis, and that modifications which occur after shipment are not relevant to the date of sale because the Department does not examine any date after the date of shipment as a possible date of sale. Petitioners contend that the data examined at verification indicate that only a small portion of home market and U.S. sales have changes to either price or quantity between order confirmation and shipment. Further, they contend that the analysis presented by NSC at verification was incorrect. Petitioners argue that their examination of the record shows that the sales traces examined indicated changes after the date of shipment and are therefore inappropriate to use as a basis for examining the most appropriate date of sale. In sum, the petitioners argue that NSC's claimed date of sale is not supported by record evidence and the Department should use the order confirmation date as the date of sale, as it did in *Certain Corrosion-Resistant Carbon Steel Products from Japan* 64 FR at 12956–57.

Petitioners argue that, should the Department choose to use date of invoice as the date of sale, it should employ a transaction-specific date of sale analysis, isolate those individual transactions for which material terms did not change, and use the order confirmation date as the date of sale for such transactions. In cases where terms of sale did change, the Department could use the date of shipment/invoice as the date of sale.

Petitioners rebut NSC's argument that date of shipment/invoice is the appropriate date of sale. Petitioners argue that the information on the record does not support the conclusion that a significant number of NSC's home market and U.S. sales had changes to material terms after shipment occurred. In fact, petitioners contend that only a small minority of reviewed transactions had changes to material terms sufficient to justify the determination that shipment/invoice date is the appropriate date of sale. In addition, petitioners state that NSC's argument that there are compelling facts on the record to warrant the use of shipment/invoice date as the date of sale creates a new standard unsupported by statutory or case precedent. Further, they claim that the argument that there is a potential for change should also be disregarded as it is based on a misunderstanding of the Department's regulations. Rather, they contend that it would be unreasonable to use invoice date as the date of sale merely because there is a hypothetical potential for post-order modifications. Petitioners conclude that, based on the facts and evidence on the record, the Department should use the order confirmation date or the date of the revised order confirmation as the date of sale.

NSC rebuts petitioners' arguments that order confirmation date is the most appropriate date of sale by reiterating its initial arguments on this topic. In addition, NSC contends that petitioners' analysis of the information on the record is wrong both in fact and in law. NSC argues that petitioners have misread how NSC reports its price adjustments after shipment and how NSC's documents reflect order modifications. NSC rebuts each of petitioners' points using proprietary information which is incapable of adequate public summary. NSC argues that petitioners' claims that order modification is the correct date because changes in the orders prior to shipment are reflected in the order modification and that changes after shipment cannot be considered are wrong. According to NSC, the Department may consider potential for changes both pre- and post-shipment in conducting its date of sale analysis. In fact, NSC argues, the Department's questionnaire instructs them to report the unit price recorded on the invoice for sales shipped and invoiced in whole or in part, which is what NSC reported to the Department.

NSC argues that the Department's regulations create a presumption in favor of date of invoice as the date of sale, a presumption which the petitioners have not overcome through record evidence. NSC argues once again that the significance of potential for change has been supported by Department precedent. Thus, the Department has concluded that simply because the essential terms of sale did not change after the initial contract date, this does not demonstrate that essential terms of sale were not subject to change after this date. *See Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products from Korea: Final Results of Antidumping Duty Administrative Reviews (''Carbon Steel Flat Products from Korea''*), 64 FR 12927, 12935 (March 16, 1999). NSC concludes, that because the terms of NSC's sales of

subject merchandise remain subject to change throughout the sales process, petitioners cannot overcome the presumption in favor of invoice date. Finally, NSC argues that the Department verified that 36 percent of its sales during the POI were in fact modified after the order confirmation was issued. The mere fact that hot-rolled steel products are made-to-order is not conclusive evidence that the parties engage in formal negotiating and contracting procedures that would result in terms of sale which are finally and irrevocably established at the beginning of the sales process. NSC argues that hot-rolled steel is a commodity product that is not sold through a formal negotiation and contracting process. Therefore, petitioners' argument that hot-rolled product is made to order is irrelevant to the date of sale analysis. NSC argues that, based upon the evidence placed on the record, the most appropriate date of sale is the shipment/invoice date.

KSC

Respondent argues that the Department's regulation establishes a presumption that invoice date should be used as the date of sale. Respondent also argues that the Department has consistently applied this rule. Specifically, respondent cites *Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Plate in Coils from South Africa,* 64 FR 15459, 15465 (March, 31, 1999) as evidence that the Department reaffirmed its practice of using the invoice date as the proper date of sale when material terms of sale can change between order and invoice date, even if the changes are not frequent, and the reporting company uses invoice date in its internal records.

Furthermore, KSC asserts that the Department has stated that its preference for invoice date is based on two policy rationales. First, the date on which the terms of sales are normally established is the invoice date. Second, the Department intends that the reporting and verification of information be simplified, resulting in predictable outcomes as well as the efficient use of resources. Additionally, respondent asserts that the Department will use invoice date as the date of sale unless the material terms of sale, as evidence by the record, are established on a different date.

Respondent argues that material changes to the terms of sale, affecting price or quantity, may and do occur between KSC's order confirmation and invoice. As a result, the terms of sale become fixed and finalized on the shipment/invoice date. In certain instances within the home market, price changes may occur even after invoicing. Respondent believes that the frequency of material changes between order confirmation and invoice, as seen during verification, proves that the invoice date should be used as KSC's date of sale because the terms of sale are final only at invoicing (even though the price may change afterward in the home market).

Respondent also argues that invoice date is the date of sale for KSC because, in accordance with the Department's regulations which provide that the date of sales is to be based upon data maintained by the respondent in the ordinary course of business, the books and records of KSC, Kawasho Corporation (''Kawasho'') and Kawasho International USA, Inc. (''Kawasho International'') are based on invoice data. Additionally, using the invoice date as the date of sale results in an efficient use of resources by simplifying reporting and the verification of information. Finally, respondent states that by using the invoice date, the Department allows for predictability in its proceedings.

Petitioners did not comment on KSC's date of sale argument.

Department's Position: We agree with all three respondents (NSC, NKK and KSC) that invoice/shipment date is the correct date of sale for all home market and U.S. sales of subject merchandise for each of the responding companies.

Under our current practice, as codified in the Department's Final Regulations at § 351.401(i), in identifying the date of sale of the subject merchandise, the Department will normally use the date of invoice, as recorded in the producer's records kept in the ordinary course of business. *See Certain Welded Carbon Steel Pipes and Tubes from Thailand: Final Results of Administrative Review,* 63 FR 55578, 55587 (1998) (''*Pipes and Tubes from Thailand*''). However, in some instances, it may not be appropriate to rely on the date of invoice as the date of sale, because the evidence may indicate that the material terms of sale were established on some date other than invoice date. *See Preamble to the Department's Final Regulations* at 19 CFR Part 351 (''Preamble''), 62 FR 27296 (1997). Thus, despite the general presumption that the invoice date constitutes the date of sale, the Department may determine that this is not an appropriate date of sale where the evidence of the respondent's selling practice points to a different date on which the material terms of sale were set.

In this investigation, in response to the original questionnaire, NSC and NKK reported invoice/shipment date as the date of sale in both the U.S. and home markets. KSC reported order confirmation date as the date of sale based on the belief that that is what the Department wanted. However, KSC also provided sales databases using invoice/shipment date as the date of sale, and continued to argue that this would be a more appropriate date of sale. To ascertain whether NSC, NKK and KSC accurately reported the date of sale, the Department included in its January 4, 1999 supplemental questionnaire a request for additional information regarding changes in terms of sale subsequent to order date. In its January 25, 1999 response, NSC, NKK and KSC indicated that there were numerous instances in which terms such as price and quantity changed subsequent to the confirmation of the original orders in the U.S. and home markets. NSC, NKK and KSC cited specific figures for each type of change. For purposes of our Preliminary Determination, we accepted the date of invoice as the date of sale subject to verification. *See Preliminary Determination,* 64 FR at 8294.

At verification, we carefully examined NSC's, NKK's and KSC's selling practices. We found that each company records sales in its financial records by date of invoice/shipment. For the home market, we reviewed several sales observations for which the price and quantity changed subsequent to the original order (*see Home Market Verification Reports,* dated March 26, 1999 for the respective companies). For the U.S. market, we reviewed several instances in which terms of sale changed subsequent to the original order. Based on respondents' representations, and as a result of our examination of each company's selling records kept in the ordinary course of business, we are satisfied that the date of invoice/shipment should be used as the date of sale because it best reflects the date on which material terms of sale were established for NSC's, NKK's and KSC's U.S. and home market sales.

We disagree with the petitioners' claim that, since the terms do not change after the order confirmation date, the order date (or the final change order date) is the most appropriate date of sale for NSC's, NKK's and KSC's U.S. and home market sales. The fact that terms often changed subsequent to the original order, and even after an initial order confirmation, suggests that these terms remained subject to change (whether or not they did change with respect to individual transactions) until as late as the invoice date. For sales that

we reviewed, we found this to be true for material terms of sale such as price and quantity, including quantity changes outside of established tolerances. The Department's decision in *Certain Corrosion-Resistant Carbon Steel Flat Products from Japan*, 64 FR 12951, 12958 (Mar. 16, 1999) should, therefore, not be followed in this case. In that case, the Department found that the material terms of sale were established on the date of the final order confirmation and that there were no material changes thereafter. As stated in the **Federal Register** notice, the Department in that case found that there were no changes between the final revised order confirmation and the shipment/invoice date. In addition, in the Corrosion-Resistant Steel case, there was no discussion on the possibility or frequency of changes between the original order confirmation, any revised order confirmations, the invoice, and changes subsequent to the invoice. The facts of the instant case are distinguishable. In the instant case, pursuant to our findings at verification, the Department determines that there are changes between the original order confirmation date (*i.e*, the date of sale proposed by petitioner), the invoice date (*i.e.*, the date of sale proposed by respondents), and in certain instances changes which occur after the invoice date for a significant number of individual transactions. Each of these facts distinguishes the factual record in the current case from the Department's decision in the Corrosion-Resistant Steel case. Therefore, pursuant to our findings at verification, we have determined that invoice date is the appropriate date of sale for NSC's, NKK's and KSC's sales, as it most accurately represents the date on which the material terms of sale are established.

In addition, the Department has also examined the time lags between order date and invoice date to determine whether it was appropriate to use order date as the date of sale dates. *See Circular Welded Non-Alloy Steel Pipe from the Republic of Korea; Final Results of Antidumping Duty Administrative Review* (''*Steel Pipe from Korea*''), 63 FR 32833, 32835 (June 16, 1998). However, it is important to note that, in *Steel Pipe from Korea*, the Department found that ''{t}he material terms of sale in the United States are set on the contract date and any subsequent changes are usually immaterial in nature or, if material, rarely occur.'' *Id.*, 63 FR at 32836. In contrast, NSC, NKK and KSC each reported that there were numerous instances of changes in terms of sale between the initial order date, and the shipment/invoice date. Therefore, invoice date is the most appropriate date of sale, notwithstanding some time lag between order confirmation and invoice. As noted above, we observed a significant number of such instances at verification where changes did occur between order confirmation and invoice.

We also disagree with petitioners' assertion that NSC's, NKK's and KSC's reported sales information was inaccurate and incomplete. During the course of sales verifications, the Department requested specific documentation from each of the responding companies in support of its claim that the date of invoice should be used as the date of sale. NSC, NKK and KSC complied with the verifiers' request for sales trace documentation, and the Department utilized the purchase order, order confirmation and invoice information provided by each company as part of the basis for its decision on this issue. At verification, the Department also clarified which quantity changes were and were not within tolerance, and used this information in conducting its date of sale analysis.

Finally, we have not accepted petitioners' suggestion that the Department should use a transaction-specific date of sale methodology. While this may be appropriate for products involving only a handful of sales within the period of investigation or review, such an approach would impose a very substantial undue burden on both respondents and the Department in terms of reporting and verification. As explained in the *Preamble* to the Department's regulations, the use of a single date of sale for each respondent makes more efficient use of the Department's resources and enhances the predictability of outcomes. *See* 62 FR at 27348.

Comment 2: Preliminary Determination of Critical Circumstances.

NKK

NKK argues that the Department's preliminary finding of critical circumstances is not supported by the facts on the record. First, NKK states, there is no history of dumping with respect to this product; thus, the Department must find ''knowledge of dumping'' in order to find critical circumstances. In this respect, NKK states, the Department normally relies on company-specific margins of over 25 percent to impute knowledge of dumping. NKK claims that its final margin, if adjusted for the alleged clerical error, will not exceed 25 percent and will therefore not meet the first statutory criterion for finding critical circumstances. NKK argues that although the Department relied on margins alleged in the petition in its preliminary critical circumstances finding, there is no basis for not using company-specific margins in the final critical circumstances determination.

Second, NKK argues that its shipments were not massive during the three months immediately preceding and the three months immediately following the filing of the petition. NKK argues that the Department's longstanding practice is to compare the volume of shipments during the three months preceding the filing of the petition with the volume of shipments in a comparable period following the filing of the petition. The Department deviated from this practice in its preliminary determination as to critical circumstances, comparing instead the December 1997–April 1998 period to the May 1998–September 1998 time period. NKK argues that there is no basis for the use of this time period to support a finding of critical circumstances, and that the evidence on the record does not support a finding that there were massive imports of NKK merchandise during the appropriate comparison period. In addition, NKK argues that the Department's conclusions with respect to importer knowledge of dumping based on press reports and rumors about the possibility of antidumping cases were contradicted by price increases during the same time period. Respondent argues that the Department's reliance on vague news articles and press reports placed on the record prior to the preliminary determination as to critical circumstances was misplaced because these sources did not clearly indicate that it was likely that the domestic industry would file antidumping cases against hot-rolled steel from Japan. NKK concludes that, due to the serious economic consequences a finding of critical circumstances could involve for itself and its customers, the Department should utilize company-specific import data for its final critical circumstances determination. If it does so, NKK claims, it must make a negative finding, because the ''massive shipments'' criterion has not been satisfied.

Petitioners rebut NKK's argument that the Department's preliminary determination of critical circumstances is not supported by the information on the record. Petitioners contend that NKK's argument for use of company-specific shipment data is contrary to the Department's regulations. According to petitioners, the Department must

examine imports into the United States as opposed to shipments, which may or may not correlate to imports during the relevant period. Secondly, petitioners argue that, if the Department were to use shipment data, this information would still not be an accurate basis for analysis as this would be company-specific data, whereas the analysis should focus on total imports from Japan. Because NKK has not cited any authority for its statement that the Department should make a company-specific critical circumstances finding, the Department should affirm its preliminary finding by using total imports from Japan as the basis for its critical circumstances determination. Finally, petitioners argue that NKK and other respondents knew that an antidumping investigation was likely, based upon the articles in the press placed on the record. Thus, petitioners argue, the Department should continue to disregard respondents' argument to the contrary and base its decision on record evidence.

NSC

NSC argues that the statute requires that the Department, if it is finding critical circumstances, must first either find a history of dumping, or impute knowledge of dumping and of material injury by reason of dumped sales. NSC argues that the Department's preliminary finding of critical circumstances was based on inflated margins and was contrary to law. NSC argues that the Department's final determination as to critical circumstances must be supported by evidence on the record.

First, NSC argues that the Department's reliance on allegations from the petition and the use of these allegations to make a preliminary finding of critical circumstances were unacceptable precedent. NSC states that mere allegations in the petition do not provide sufficient support for the Department to impute knowledge based on the magnitude of dumping margins and injury. NSC argues that the statute requires that the Department conduct a factual investigation and determine that there is a reasonable basis to believe or suspect that products are being dumped before making a finding of critical circumstances. In conducting this analysis, respondent argues, the Department has never before relied merely on petition allegations to form a reasonable belief concerning critical circumstances. Because the Department's preliminary determination was based on alleged and unsupported information from the petition, it cannot withstand scrutiny. Therefore, NSC argues, the Department should not find critical circumstances in the final determination.

Second, NSC argues that the Department's preliminary determination of sales at less than fair value was based on adverse inferences with no basis in either fact or law. Specifically, NSC argues that the use of facts available for NSC's home market freight cost and U.S. theoretical weight sales was not supported by record evidence. NSC argues that the Department cannot rely on margins based on improper adverse inferences in imputing knowledge for purposes of its final determination as to critical circumstances.

In rebuttal, petitioners argue that the Department's *Policy Bulletin* dated October 7, 1998 governs the decision reached by the Department. Petitioners note that NSC is incorrect in its assertion that the Department has unlawfully taken a substantive action adverse to it based solely on the information contained in the petition. They note that, under Article 5.3 of the *World Trade Organization's (''WTO'') Agreement on Antidumping* the Department must examine the adequacy of the evidence presented in the petition and whether these allegations are supported by evidence. Second, petitioners argue that the Department should not rely on NSC's statutory construction argument, because as NSC interprets the argument, the Department would have to issue questionnaires, evaluate responses and calculate company-specific margins prior to issuing a preliminary critical circumstances determination. Petitioners contend that there is no legal basis for this argument, because the requirements for a preliminary critical circumstances finding are not the same as those for a preliminary dumping determination. The fact remains, petitioners state, that the primary factor reviewed for a critical circumstances finding is whether there has been a massive increase in imports. Petitioners argue that the existence of massive imports was known at the time the petition was filed. They further argue that, based on this information, the statute leaves it to the Department's discretion to decide what procedures it will follow in determining whether there is reason to believe or suspect that dumping is occurring.

KSC

KSC asserts that the Department's preliminary critical circumstances determination contravened the statute. First, KSC argues that the Department does not have the authority to use a time frame other than the one based upon the date of filing of the petition to determine whether or not there were massive imports. Further, the articles relied upon by the Department to support the use of an earlier-than-usual time frame do not support a conclusion that KSC had reason to believe a case was being filed or likely to be filed. Second, KSC claims that it did not have massive imports during the ''proper time frame.'' Third, KSC claims that the Department violated its normal practice when it relied upon country-specific, rather than company-specific shipment data. Fourth, KSC argues that the Department's preliminary critical circumstances finding should have been negative because the ITC preliminarily determined that there was no present material injury with respect to this product. KSC's arguments with respect to each of these points is discussed in greater detail below.

KSC first argues that neither the statute nor the regulations grant the Department authority to examine a shipment period unrelated to either the filing of the petition or the preliminary determination in measuring ''massive shipments'' for purposes of the critical circumstances determination. According to the Department's regulations, the determination of whether or not there has been a massive increase in imports is normally made based on the period beginning on the date the proceeding begins and ending at least three months later. *See* 19 CFR § 351.216(h) and (i). KSC argues that the Department overstepped its authority by using a time frame disconnected from the date of filing of the petition. KSC further asserts that the use of any comparison time other than period immediately following the filing of the petition is unlawful because it contravenes the purpose of the statutory provision, which (according to the legislative history) is to deter the increase of exports ''during the period between initiation of an investigation and a preliminary determination'' (H. Rep. No. 96–317 at 63 (1979). Thus, KSC argues, the proper comparison is between shipments during the October–December 1998 period and shipments during the July–September 1998 period. KSC also argues that the articles relied upon by the Department to impute knowledge of dumping involve mere speculation, do not specifically refer to hot-rolled steel, and are not grounded in fact. KSC concludes that without a specific allegation with respect to a proceeding against hot rolled steel from Japan, the Department cannot attribute knowledge of a proceeding to KSC in order to provide a basis for use of a

different time frame for its massive imports analysis.

Second, KSC argues that, based on company-specific data of record, it did not have massive imports during the normal time frame provided for in the regulations. Rather, its imports decreased, in both quantity and value terms, during the post-petition October—December 1998 period, as compared to the pre-petition July–September 1998 period. Therefore, KSC argues, the Department should reverse its preliminary finding of critical circumstances.

Third, KSC argues that the Department unlawfully used country-specific data rather than company-specific data in its preliminary finding. KSC argues that the Department failed to request company-specific import data until after the preliminary critical circumstances determination, and the Department's failure to obtain this information unfairly punished KSC by applying an adverse inference even though they were cooperating. KSC argues that the Department must use the company-specific shipment data submitted by KSC for its final determination.

Finally, KSC argues that the Department's preliminary critical circumstances finding was unlawful because, given the ITC's preliminary determination that there was no present material injury, the Department could not reasonably impute knowledge of material injury, which is necessary for a finding of critical circumstances under post-URAA law when there is no history of dumping. KSC argues that a preliminary critical circumstances determination cannot be made by the Department unless the ITC determines that there was actual material injury. *See Preliminary Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon Steel Plate from the Russian Federation,* 62 FR 31967, 31971 (June 11, 1997). KSC states that the Department cannot ignore the ITC injury finding. Thus, KSC argues that the Department should make a negative critical circumstances finding in the final determination.

Petitioners rebut each of KSC's four arguments regarding the Department's preliminary determination of critical circumstances. First, with respect to the Department's choice of a time frame for measuring shipments, petitioners argue that, despite KSC's reference to various legal authorities, the *Statement of Administrative Action* (''*SAA*''), congressional reports, and Department documents, KSC does not explain why the Department's regulation is at issue, or why the Department's actions in this case are not consistent with the authorities cited. Petitioners assert that the Department's action in this case did, in fact, serve to deter an increase in imports during the period following initiation.

Petitioners rebut criticism of the Department's reliance on published articles for selecting an early time frame by pointing out that, although KSC disputed the significance of certain articles considered by the Department in its determination, the articles discussed by KSC in its brief were, with one exception, published after April 1998. Petitioners thus conclude that it is apparent that the Department did not rely on these articles. Petitioners make two points in this respect.

First, petitioners contend, one report included in an exhibit to the petition is sufficient by itself to prove requisite knowledge by KSC. Petitioners cite the report dated April 1998 by CRU Steel Monitor. *See Exhibit 3* of *Petition for the Imposition of Antidumping Duties: Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From Japan,* (September 30, 1998). Petitioners assert that this report, respected within the industry worldwide, discusses concerns actually expressed by Japanese producers.

Second, petitioners argue that, although it is true that the other materials included as part of the petition did not refer specifically to hot-rolled imports from Japan, it is equally true that certain of these reports did refer specifically to the likelihood of antidumping cases being filed against hot-rolled steel imports. Petitioners add that although these reports mentioned Russia, the fact that, during this period, Japan was the second largest hot-rolled import supplier to the U.S. market makes it far-fetched to imagine that Japanese producers, like KSC, would infer that cases would be brought against Russia, the largest importer, but not Japan. Petitioners also contend that KSC is aware that U.S. flat-rolled producers have filed a large number of trade cases over the past two decades and those cases have always been brought against multiple countries.

Petitioners contend that KSC's argument that the Department's use of country-wide (rather than company-specific) import data for purposes of its analysis is an unjustified departure from the Department's normal practice is a moot point because, as KSC concedes, the company-specific data submitted to the Department shows a massive increase in imports by KSC during the period examined.

Finally, petitioners provide two reasons why, in their view, KSC's assertion that the Department was precluded from finding critical circumstances because the ITC did not preliminarily find present material injury in it preliminary injury determination is incorrect. First, petitioners argue that neither the statute nor its legislative history indicates that the Department must find that there is no material injury for purposes of such determination simply because the ITC did not find present material injury. Second, the ITC may find present material injury in its final determination even when it did not make such a finding in its preliminary investigation. Petitioners point out that the ITC, in its opinion, did not actually say that it did not find a reasonable indication of present material injury. Instead, the ITC avoided that issue entirely by moving directly to the threat of injury. Petitioners assert that this opinion is unusual, and that the Department might reasonably wonder whether this is because the ITC was carefully refusing to rule out a finding of present material injury in a final investigation.

Sumitomo Metal Industries

Sumitomo argues that the Department should not find critical circumstances with respect to it in the final determination. Sumitomo argues that the Department chose not to investigate Sumitomo because of the administrative burden to the Department, yet nevertheless applied its preliminary affirmative critical circumstances finding to imports by Sumitomo. Sumitomo argues that, as a cooperative non-selected respondent, it is entitled to a negative critical circumstances finding in the final determination. *See Preliminary Determinations of Critical Circumstances: Brake Drums and Brake Rotors from The People's Republic of China,* 61 FR 55269, 55270 (October 25, 1996). Sumitomo argues that it is the Department's practice not to issue final affirmative critical circumstances with regard to cooperative non-selected companies. For these reasons, Sumitomo argues the Department should find negative critical circumstances for non-mandatory cooperative respondents.

Department's Position: For the reasons discussed below, we continue to find critical circumstances for respondent KSC and ''all other'' respondents. However, in the final determination, we do not find critical circumstances with respect to NSC or NKK.

Section 735(a)(3) of the Act provides that if critical circumstances are alleged, the Department will determine whether: (A)(i) there is a history of dumping and

material injury by reason of dumped imports in the United States or elsewhere of the subject merchandise, or (ii) the person by whom, or for whose account, the merchandise was imported knew or should have known that the exporter was selling the subject merchandise at less than its fair value and that there would be material injury by reason of such sales, and (B) there have been massive imports of the subject merchandise over a relatively short period.

As discussed in the preliminary critical circumstances finding, we are not aware of any antidumping order in any country on hot-rolled steel from Japan, for purposes of this final determination. Therefore, in this final determination we examined whether there was importer knowledge. In determining whether an importer knew or should have known that the exporter was selling hot-rolled steel at less than fair value and thereby causing material injury, the Department normally considers margins of 25 percent or more and a preliminary ITC determination of material injury sufficient to impute knowledge of dumping and the resultant material injury. The Department's final margins for KSC exceeded 25 percent. Therefore, we determine that importers knew or should have known that KSC was dumping the subject merchandise. As to the knowledge of injury from such dumped imports, in the present case, the ITC preliminarily found threat of material injury to the domestic industry due to imports of hot-rolled steel from Japan. Therefore, we also considered other sources of information, including numerous press reports from early to mid-1998 regarding rising imports, falling domestic prices resulting from rising imports and domestic buyers shifting to foreign suppliers. For a full discussion of the evidence on the record *see Final Critical Circumstances Memo,* dated Apr. 28, 1999. Based on this information, we find that importers knew or should have known that there would be material injury from the dumped merchandise.

Because we have found that the first statutory criterion is met with regard to KSC, we must consider the second statutory criterion: whether imports of the merchandise have been massive over a relatively short period. According to 19 CFR § 351.206(h), we consider the following to determine whether imports have been massive over a relatively short period of time: (1) volume and value of the imports; (2) seasonal trends (if applicable); and (3) the share of domestic consumption accounted for by the imports.

When examining volume and value data, the Department typically compares the export volume for equal periods immediately preceding and following the filing of the petition. Under 19 CFR § 351.206(h), unless the imports in the comparison period have increased by at least 15 percent over the imports during the base period, we normally will not consider the imports to have been ''massive.'' In addition, pursuant to 19 CFR § 351.206(i), the Department may use an alternative period if we find that importers, exporters, or producers had reason to believe, at some time prior to the beginning of the proceeding, that a proceeding was likely. In the instant case, to determine whether or not imports of subject merchandise have been massive over a relatively short period for the final determination, we examined each selected respondents' export volumes from May–September 1998, as compared to December 1997–April 1998 and found that imports of hot-rolled steel from Japan increased by more than 100 percent. In this case, petitioners argue that importers, exporters, or producers of Japanese hot-rolled steel had reason to believe that an antidumping proceeding was likely. We find that press reports, particularly in March and April 1998, are sufficient to establish that by the end of April 1998, importers, exporters, or producers knew or should have known that a proceeding was likely concerning hot-rolled products from Japan. *See Critical Circumstances Memo,* dated Apr. 28, 1999. Accordingly, we examined the increase in import volumes from May—September 1998 as compared to December 1997—April 1998 and found that imports of hot rolled steel from Japan increased by more than 100 percent. Based on our analysis, we find that there was a massive increase in imports with respect to KSC.

With regard to ''all others'' (*i.e.,* companies that were not analyzed in this investigation, *e.g.,* Sumitomo), we have reconsidered our Preliminary Determination finding of critical circumstances. For the final determination we conducted the following analysis, based on the experience of the investigated companies, to determine whether a finding of critical circumstances is appropriate with respect to uninvestigated exporters. *See Notice of Final Determination of Sales at Less than Fair Value: Certain Steel Concrete Reinforcing Bars from Turkey,* 62 FR 9737, 9741 (March 4, 1997) (*Rebars from Turkey*). In *Rebars from Turkey,* the Department found critical circumstances for the ''all others'' category because it found critical circumstances for three of the four companies investigated. However, we are concerned that literally applying that approach may produce anomalous results in certain cases. For example, if the ''all others'' rate is below the critical circumstances threshold, we do not believe it would be appropriate to find critical circumstances for the all others category even if we found critical circumstances for a majority of the investigated companies. Therefore, we believe it is appropriate to address both critical circumstances criteria in reaching a determination concerning the ''all others'' category. Thus, we have applied that experience to both criteria. First, in determining whether knowledge of dumping existed, we looked to the ''all-others'' rate, which is based on the weighted-average of the individual rates for the investigated companies. In the instant case, the ''all others'' rate exceeds 25 percent. Thus, we find importers knew or should have known that there was dumping by the all other companies. Similarly, as with respondent KSC, we find that importers knew or should have known that injury from the dumping by all other companies existed based on the ITC's threat finding and the extensive press coverage, from early to mid-1998, of widespread lost sales and falling domestic prices as a result of dumped imports. Second, we have evaluated whether there are ''massive imports'' for the ''all others'' companies in terms of both the imports of the investigated companies and country-specific import data. An evaluation of the company-specific shipment data provided by respondents indicates that all three mandatory respondents had massive imports and that, on average, imports increased by over 50 percent during the comparison period. In addition, where, as in the instant case, the U.S. customs data also permit the Department to analyze overall imports of the product at issue, we will consider whether those data are consistent with a finding of massive imports overall. Again, in the instant case, aggregate imports of hot-rolled steel during the comparison period increased by more than 100 percent. Thus, we find that imports from uninvestigated exporters were massive during the relevant period. Therefore, based on these factors, the Department determines that there are critical circumstances with regard to all other imports of hot-rolled steel from Japan. For a complete discussion of the data examined, see the Department's *Final Critical Circumstances Memo,* dated April 28, 1999.

Comment 3: NKK's Home Market Levels of Trade.

In its case brief submitted to the Department, NKK argues that in the preliminary determination, the Department incorrectly concluded that NKK sells at one level of trade in the home market. NKK asserts that, prior to the Department's preliminary determination, NKK had provided supporting qualitative evidence to confirm that in the home market sales by NKK to unaffiliated trading companies and end-users and sales made by affiliated trading companies take place at two distinct levels of trade.

NKK asserts that section 773(a)(1)(B) of the Act requires the Department to compare prices, as is practicable, at the same level of trade. Furthermore, NKK asserts that the Department's own regulations describe that sales are made at different levels of trade when sales are made at different marketing stages. *See* 19 C.F.R. § 351.412(c)(2). NKK argues that two levels of trade can be, but are not always, based on substantial differences in selling activities. NKK further argues that the Department must determine in its analysis if levels of trade are meaningful. *See Preamble,* 62 FR at 27371.

NKK reminds the Department that in its initial section A questionnaire response it presented three distinct channels of trade in the home market and argued that the first two channels to end users and sales to unaffiliated trading companies, should be consolidated into one level of trade. The other level of trade, sales to affiliated trading companies, is distinct from sales to unaffiliated end-users and trading companies. NKK contends that the Department, in its level of trade analysis memorandum for the preliminary determination, ignored the selling category in which NKK sells merchandise to unaffiliated trading companies. NKK asserts that these sales account for 90 percent of total sales to unaffiliated customers during the period of investigation. NKK believes that this is a significant error.

NKK argues that there is a significant difference between the selling activities of NKK and the selling activities of its affiliated resellers. NKK asserts that while it performs a high degree of selling activities in sales to end-users, this type of sale is a small part of this level of trade. NKK argues that, in general, its selling activities for total sales are smaller than the selling activities of its affiliated resellers. *See Level of Trade Exhibit,* attached to *Verification Report,* dated March 26, 1999. NKK argues that when its end-user sales are compared to its affiliated trading companies' end-user sales, NKK engages in significantly less selling activity related to the development of new users, the assessment of user demand, the financing of steel purchases by end-users, the provision of inventory management and warehousing, and the management of delivery. NKK's affiliated trading companies, on the other hand, engages to a high degree in the aforementioned selling activities.

NKK argues that there is a substantial and meaningful difference between selling activities performed by NKK and those performed by affiliated resellers/trading companies. NKK points out that the Department's own regulations establish that a substantially different selling function results with additional layers of selling activities. *See Preamble,* 62 FR at 27371. NKK asserts that its affiliated trading companies also incur comparatively greater risk as a result of more active and diverse selling activities. NKK, on the other hand, chooses to limit its own risk by selling 93 percent of its merchandise through affiliated trading companies and makes sales directly to end-users only in the case of well-established customers. Finally, NKK argues that its indirect selling expense ratio was significantly less than that of one of its trading companies during the POI. This, according to NKK, is consistent with the preamble to the Department's regulations, and definitively supports the notion that NKK and its affiliated trading companies sell at two distinct levels of trade in the home market. *See Id.*

Petitioners assert that, having found itself unable to quantify pricing differences for the sake of claiming a LOT adjustment, NKK is now claiming that the home market is actually two LOTs, and that U.S. sales should be only matched to the closer level. Petitioners further assert that NKK's argument that the Department's chart, used for comparison of selling activities, is inaccurate should be accorded no weight, since pursuant to § 351.412(c)(2) of the Department's regulations, the ''substantial differences in selling activities are a necessary, but not sufficient, condition for determining that there is a difference in the stage of marketing.'' Finally, petitioners rebut NKK's claims that (1) its affiliate's high degree of performance of selling functions yields a higher level of exposure for them and NKK can thus diffuse risk and that (2) there is a difference in indirect expenses ratios between itself and its trading company by asserting that, whether or not it is true, NKK's first claim is unquantifiable, and the second claim is problematic because the higher level of indirect selling expenses may be typical for a reseller. Therefore, petitioners assert that, as in the *Preliminary Determination,* the Department should continue to deny NKK any LOT adjustment.

Petitioners argue that although NKK claims that it never provided inventory warehousing and management for its sales to unaffiliated trading companies, and rarely provided such services to end-users, the record shows that NKK provided high level delivery management services on sales to unaffiliated trading companies and also contradicts NKK's claim as to inventory warehousing. Therefore, for the 4 ''mill'' functions and 2 of the 5 ''trading company'' functions, (*i.e.,* for 6 out of the 9 categories of selling functions that NKK performs) NKK's selling functions on sales to unaffiliated customers and sales by its trading company to end-users are substantially the same. In light of these facts, petitioners argue that the Department should continue to find one level of trade in the home market.

Department's Position: We do not agree that NKK's home market sales are made at two distinct levels of trade. In accordance with section 773(a)(1)(B)(i) of the Act, to the extent practicable, we determine NV based on sales in the comparison market at the same level of trade (''LOT'') as the EP or CEP transaction. The NV LOT is that of the starting price sales in the comparison market or, when NV is based on CV, that of the sales from which we derive SG&A and profit.

To determine the LOT of a company's sales (whether in the home market or in the U.S. market), we examine stages in the marketing process and selling functions along the chain of distribution between the producer and the unaffiliated customer. *See Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon Steel Plate from South Africa* (''*Certain Cut-to-Length Carbon Steel Plate from South Africa*''), 62 FR 61731 (November 19, 1997).

NKK sells subject merchandise in the home market through two channels of distribution: one channel involves sales by NKK to unaffiliated customers (including both end-users and trading companies); the second channel involves sales by NKK's affiliate to unaffiliated customers. For the preliminary determination, the Department found that NKK's sales to these three types of home market customers involved essentially the same level of selling functions. After a careful analysis of the information on the

record, we continue to find that there was not a substantial difference in the selling functions performed by NKK in making sales to its unaffiliated customers and those associated with sales by NKK's affiliated company to its unaffiliated customers. Therefore, we continue to find that there is one level of trade in the home market.

As discussed in the Department's preliminary *Level of Trade Memo,* dated February 12, 1999, the Department reviewed the selling functions performed with respect for each of the customer categories. As indicated by NKK in its January 19, 1999, supplemental section A response, NKK collapsed sales directly to unaffiliated companies (end-users and others) into one level of trade. In conducting its analysis the Department reviewed the information placed on the record and did not ignore the level of selling activity for sales to unaffiliated trading companies, as evidenced by the inclusion of this category in the *Level of Trade Memo.*

Second, NKK argues that there are substantial differences in the selling activities performed by NKK and the selling activities of its affiliated resellers. In the instant case, in conducting its level of trade analysis, the Department compared the selling functions performed for sales in the home market to the first unaffiliated customer. As evidenced by the discussion in the Department's *Level of Trade Memo* (referenced above), the information on the record indicates that the selling functions and activities performed by NKK on sales to unaffiliated customers as compared to the selling functions and activities performed by both NKK and its affiliate on sales to unaffiliated customers do not vary on a qualitative basis. NKK's argument that there are differences between these selling functions is not supported by the evidence on the record. Once again, in the Department's *Level of Trade Memo* we discussed the level of service provided for each channel of distribution and we found no distinction in the levels of service provided. NKK further argues that there are substantial differences in the amount of selling functions associated with the two groups of sales. However, the Department finds that, while the record indicates some differences in the amount of certain functions performed, these differences are not so substantial as to warrant finding different LOTs on this basis alone. Therefore, because the customer types are the same, the types of selling functions are the same, and there are not substantial differences in the level of functions performed, we continue to find that there is one LOT in the home market.

Comment 4: KSC's CEP Offset.

Petitioners argue that the Department should not grant KSC a CEP offset to the normal value of its home market sales in the final determination since KSC has failed to factually establish its entitlement to a CEP offset. Furthermore, petitioners argue that KSC's statements on the record actually refute its claim for a CEP offset. Petitioners claim that KSC has not established sufficiently that its home market and CEP sales through its affiliates, Kawasho Corporation and Kawasho International, are at different level of trades. For instance, petitioners claim that KSC originally stated in its section A response that it had two levels of trade in the home market and the same two levels of trade in the United States market. Petitioners state that KSC only claimed that its home market and U.S. sales to unaffiliated trading companies were at a less advanced stage in the marketing process than its sales to its affiliates. Petitioners also claim that KSC did not respond to Department inquiries that KSC ''explain why [it] considers the home market level of trade more advanced than the U.S. level of trade to warrant a CEP offset if necessary.''

Petitioners also argue that the fact that all sales to both markets were manufactured to order and were to the same categories of customers indicates that there are no differences in levels of trade between home market and the United States. Finally, petitioners claim that KSC's descriptions of its selling activities and services have been inconsistent and thus unreliable. As a result, petitioners argue that KSC has not met the required burden of proof to factually demonstrate that its home market sales and CEP sales were made at different levels of trade. Thus, the Department should not grant KSC a CEP offset for the final determination.

Respondent contends that the Department's decision to grant KSC a CEP offset is in accordance with law and is supported by substantial evidence on the record. As legal authority, respondent relies upon section 772(a)(7)(B) of the Tariff Act (19 U.S.C. § 1677b(a)(7)(B)) and the SAA at 831. Respondent argues that, contrary to petitioners' assertions, the facts on the record support KSC's claim for a CEP offset. Respondent asserts that petitioners misread KSC's response to the Department's section A questionnaire and that petitioners are incorrect in stating that KSC asserted that there were two levels of trade in the U.S. which correspond exactly to the two levels of trade in the home market. According to the respondent, KSC's section A response explains that there are at least three marketing stages for its CEP sales. In addition, KSC has consistently explained, in its section A, Supplemental section A, and section B responses, that its CEP sales were at a different level of trade than its home market sales through Kawasho. In fact, the respondent states that KSC's home market sales through Kawasho are at a more advanced level of trade than its CEP sales because these home market sales are at a more advanced stage of distribution and farther removed from the factory. Respondent asserts that, throughout the immediate investigation, KSC has supplied the Department with information, in its Supplemental responses and during verification, showing that it has to perform more and different selling activities and services for its home market sales than for its CEP sales. Furthermore, respondent argues that the difference in the number of employees for the different markets confirms that more is required to sell in the home market than to the CEP level of trade. Respondent concludes by stating that since there is no comparable level of trade in the home market, KSC is unable to calculate a trade adjustment for its CEP sales and instead requests the Department to grant a CEP offset pursuant to section 772(a)(7)(B) of the Tariff Act (19 U.S.C. § 1677b(a)(7)(B)) and 19 CFR § 351.412(f).

Department's Position: We disagree with petitioners that KSC's CEP offset should be denied. In accordance with section 773(a)(1)(B)(i) of the Act, to the extent practicable, we determine NV based on sales in the comparison market at the same level of trade (''LOT'') as the EP or CEP transaction. The NV LOT is that of the starting price sales in the comparison market or, when NV is based on CV, that of the sales from which we derive SG&A and profit. For CEP sales, the Department makes its analysis at the level of the constructed export sale from the exporter to the affiliated importer.

Because of the statutory mandate to take level of trade differences into consideration, the Department is required to conduct a LOT analysis in every case, regardless of whether or not a respondent has requested a LOT adjustment or a CEP offset for a given group of sales. To determine whether NV sales are at a different LOT than EP or CEP sales, we examine stages in the marketing process and selling functions along the chain of distribution between the producer and the unaffiliated customer. If the comparison market sales are at a different LOT, and the

difference affects price comparability, as manifested in a pattern of consistent price differences between the sales on which NV is based and comparison market sales at the LOT of the export transaction, we make a LOT adjustment under section 773(a)(7)(A) of the Act. Finally, for CEP sales, if the NV level is more remote from the factory than the CEP level and there is no basis for determining whether the differences in the LOTs between the NV and the CEP sales affects price comparability, we adjust NV under section 773(A)(7)(B) of the Act (the CEP offset provision). *See Certain Cut-to-Length Carbon Steel Plate from South Africa,* 62 FR at 61731.

In the *Preliminary Determination,* the Department made a CEP offset adjustment to the normal value of KSC's sales that were compared to CEP sales in the United States, because the Department preliminarily found that all of KSC's home market sales were made at levels of trade different from and more advanced than the level of trade of KSC's CEP sales in the United States, and there is no basis for determining whether the differences in the LOTs between the NV and the CEP sales affects price comparability. *See Level of Trade Memo,* dated February 12, 1999. In particular, the Department found that KSC performed fewer and different selling functions in connection with CEP sales to Kawasho International and Kawasho Corporation than in connection with home market sales to its unaffiliated customers. For example, the Department found that KSC provided a high level of warehousing, processing, freight arrangement, and payment collection services in the home market, but did not provide the same level of services on its CEP sales to the United States. Further, the Department found that it was not possible to quantify a LOT adjustment based on the available data. The fact that KSC originally identified a different LOT pattern is not determinative. As explained above, the Department conducts its own LOT analysis, rather than merely accepting the assertions of the parties. Similarly, just as sales to a different customer category is insufficient, by itself, to establish a different level of trade, all sales to the same customer category are not necessarily sales made at the same level of trade. *See Preamble* to the Department's regulations, 62 FR at 27371. Finally, the Department is satisfied that it has sufficient reliable information to reach a decision as to the levels of trade at which KSC and its affiliates sell subject merchandise. Furthermore, the Department verified the data used in making this analysis. *See Verification Report,* dated March 26, 1999. Thus, after further examination of the record, the Department will continue to make a CEP offset because the facts on the record indicate that KSC's CEP level of trade is different from and less advanced than KSC's home market levels of trade and that the data of record do not permit it to, instead, make a LOT adjustment based on the effect of the LOT difference on price comparability.

Comment 5: Overruns.

NKK asserts that the Department should consider its sales of overruns in its calculation of home market price because such sales meet the Department's criteria for sales in the ordinary course of trade. NKK argues that (1) its invoice coding system identifies sales as overruns; (2) its overruns are sold for the same uses as ordinary production, and unlike non-prime merchandise, the specific product characteristics are maintained and used to determine whether overruns meet a customer's needs, and there is no physical difference between overruns and ordinary production; and (3) the number of customers purchasing overruns and the volume of overruns purchased are similar to ordinary sales according to the Department's overrun methodology.

Petitioners, in rebuttal, argue that the Department properly excluded the overruns in its preliminary determination margin calculation. Furthermore, petitioners argue that application of the Department's own standards for determining whether overrun sales are in the ordinary course of trade supports the Department's decision to exclude overruns from its margin calculation. *See, e.g., Circular Welded Non-Alloy Steel Pipe from the Republic of Korea; Preliminary Results of Antidumping Duty Administrative Review,* 62 FR 64559, 64561 (December 8, 1997) referencing, *Laclede Steel Co.* v. *United States,* 18 CIT 965, (1995); *Carbon Steel Flat Products from Korea,* 64 FR at 12941–42. Petitioners argue that, by the Department's standards, NKK's overrun sales are outside the ordinary course of trade based on the ratio of overrun sales to home market sales, the number of overrun customers in relation to the total number of customers, the average price of overrun sales compared to commercial production sales, the relative profitability of overrun sales, and the quantity of overrun sales compared to the total quantity of commercial sales. Petitioners claim that no one factor among these standards is dispositive, and, finally, that the Department has excluded and should continue to exclude overruns in its margin calculation.

Department's Position: We agree with petitioners that overruns should continue to be excluded from the Department's final analysis. After an examination of the record, the Department has determined that NKK's overrun sales are sold at a lower price, sold in smaller quantities overall and sold to fewer customers than product that is not overruns. Second, based on the results of verification, where the Department examined overrun sales, we determined that these sales are made only after they cannot be applied to other sales and after a significant time lag follows production as compared to other sales in the normal course of business. The Department concedes that NKK's overruns are sold as prime merchandise; however, this sole factor does not enable these sales to be considered in the ordinary course of trade. Third, the Department found that there were sufficient matches to non-overrun prime merchandise sold in the ordinary course of trade, which is the Department's preference in determining matches between U.S. sales and home market sales. Based on these factors, the Department continues to exclude overrun sales from its analysis.

Comment 6: Department's Arm's Length Test.

NKK argues that the Department should use a different arm's length test than the ''99.5 percent'' test that it normally uses and used in the preliminary determination. The Department's current policy is to treat home market sales prices to an affiliated customer as having been made at ''arm's length'' (and therefore useable in the normal value calculation) if prices to that affiliated purchaser are, on average, at least 99.5 percent of the prices charged to unaffiliated purchasers. *See Preamble,* 62 FR at 27355. NKK states that the Department has not codified its ''99.5 percent'' arm's length test methodology, and therefore suggests what it believes to be a more accurate arm's length test. NKK claims that both generally and on the fact of this case, the Department's current test produces distorted results. NKK argues that there is no factual basis on which to conclude that sales to one of its affiliated trading companies were not made at arm's length prices.

NKK describes two variations of the test used in past dumping investigations and argues that both variations are methodologically flawed. Specifically, NKK argues that the current arm's length test methodology is flawed because the application of a single fixed

ratio (''99.5 percent'') to CONNUM-specific or weighted-average related/unrelated customer price ratios distorts commercial reality by not taking into account actual pricing practices. NKK references several types of situations in which it argues the current test produces anomalous results.

NKK also proposes a new approach involving several changes to its current test. First, NKK asserts that the Department should abandon its methodology of creating an ''overall customer percent-ratio aggregation'' and, instead, base its arm's length test on CONNUM-specific sales data. In short, NKK argues that the arm's length test should be applied on a CONNUM-specific basis, rather than a customer-specific basis. Second, NKK argues that, instead of using an ''inflexible and mechanical'' 99.5% of the mean for a benchmark to determine arm's length sales, the Department should instead adopt a test based on standard deviations. Such a test, according to NKK, would address the variability and magnitude of pricing data. Specifically, when the mean price for the CONNUM sold to the related customer is within one standard deviation of the mean price to the unrelated customer, the Department should consider that sales of that CONNUM to that customer are at arm's length.

NKK argues that its proposed test would not be difficult to apply, and includes proposed SAS programming. Finally, NKK asserts that if the Department adopts an arm's length analysis methodology that applies a standard-deviation test on a CONNUM-specific basis, the record will show that NKK's sales to affiliated trading companies were, in fact, at arm's length.

Petitioners, in rebuttal, argue that there is no reason for the Department to abandon its current arm's length test. Specifically, petitioners argue that the Department has considerable discretion in determining when to exclude related party sales in the calculation of normal value. *See, e.g., Usinor Sacilor* v. *United States*, 872 F. Supp. 1000, 1004 (CIT 1994). Furthermore, petitioners argue that the courts will uphold the Department's arm's length test unless respondents can prove that the test is unreasonable and distorts price comparability. *See SSAB Svenskt Stal AB* v. *Bethlehem Steel Corporation*, 976 F. Supp. 1027, 1030–1031 (CIT 1997); *Micron Technology Inc.* v. *United Tests*, 893 F. Supp. 21, 38 (CIT 1995). Petitioners argue that the burden of persuasion, with respect to the theory that the Department's arm's length test distorts price comparability, falls on the respondent. *See NEC Home Electronics Ltd.* v. *United States*, 54 F. 3d 736, 744 (Fed. Cir. 1995).

Petitioners specifically reject NKK's proposed arm's length test. Petitioners argue that NKK's proposed alternative test is based entirely on the idea of using standard deviations to account for pricing variability. Petitioners, citing statistical authorities, assert that the application of a mean/standard deviation analysis only works when there is a symmetrical, bell-shaped frequency distribution, and claim that NKK's data sets do not fit this model. Petitioners reject the accuracy of the sample scenarios that NKK advances in its case brief. For example, petitioners argue that one of NKK's case brief scenarios misrepresents the facts of a standard deviation-based analysis to the extent that NKK does not establish the standard deviation for unrelated prices. Petitioners assert that NKK's proposed arm's length test is over-inclusive, and statistically inaccurate; therefore, they argue, it should be dismissed by the Department.

Department's Position: The Department has not adopted NKK's proposed arm's length test for purposes of this investigation. As NKK has acknowledged, determining whether home market sales made to affiliated parties are made at arm's length is a complex process which the Department considered in some detail during the most recent round of regulatory revisions. At that time, the Department decided that it would not codify the current test, but would continue to apply it unless and until it developed a new method, in which case the new methodology would be described and announced in a policy bulletin. *See Preamble*, 62 FR at 27355. The Department's ''99.5 percent'' arm's length test methodology is well established and the CIT has repeatedly sustained the methodology. *See Micron Technology Inc.* v. *U.S.*, 893 F Supp. 21 (CIT 1995) and *Torrington Co.* v. *United States*, 960 F. Supp. 339 (CIT 1997).

An agency's interpretation of the statute it administers must be accorded substantial weight. Thus, the Department's well-established practice can be sustained as long as it is ''sufficiently reasonable.'' *See American Lamb Co.* v. *United States*, 785 F.2d 994, 1001 (Fed. Cir. 1986). In *Usinor Sacilor* v. *United States*, 872 F. Supp. at 1004, the Court of International Trade stated that it would uphold the Department's ''99.5 percent'' test unless it was shown to be unreasonable. While NKK has proposed an alternative methodology based on a statistical approach, it has not demonstrated that the current methodology is unreasonable. The CIT has already rejected the idea that the ''99.5 percent'' test is unreasonable because it does not take into account price variance. *See Usinor Sacilor* v. *United States*, 872 F. Supp. at 1004.

With respect to NKK's concern of applying the arm's-length test on a customer basis, we note that the question underlying the arm's-length test is whether affiliation between the seller and the customer has (in general) affected pricing. Because affiliation is the result of relationships between firms, the focus of the arm's-length test is the customer, not a particular product. For this reason, the Department makes one up-or-down call on pricing to an affiliated customer: either there is arm's-length pricing or there is not. However, under NKK's proposed connum-by-connum approach, affiliation could be found to matter for some connums, but not for others, even though the customer in both cases is the same. To support it's proposal, in exhibit B to it's submission dated April 12, 1999, NKK claims that the sales to an affiliated customer, NKK Trading of certain CONNUMs were considered not to be at arm's length prices although the prices for over 50% of those sales exceeded the mean price to the unaffiliated customers for these connums. However, the relatively small share of total sales to NKK Trading for which these connums account is perfectly consistent with the Department's finding that NKK's affiliation with NKK Trading has in general affected price.

Additionally, NKK presents several theoretical situations under the Department's current approach, where NKK claims that sales could be excluded for reasons unrelated to affiliation. In particular, NKK argues that a statistical approach would reduce the likelihood of testing error when pricing to affiliated and unaffiliated customers is the same (i.e., the error of finding that affiliation has affected prices when, in fact, it has not). However, NKK does not address the concern that, by lowering the threshold for accepting affiliated party sales under their statistical approach from the Department's current standard, NKK's test would increase the likelihood of testing error when pricing to affiliated and unaffiliated customers is not the same (i.e., the error of finding that affiliation has not affected price when, in fact, it has). Given this concern with NKK's proposed approach, the Department continues to believe that the ''99.5 percent'' test imposes a reasonable requirement on affiliated-party prices:

on average, they essentially must be as high as prices to unaffiliated parties.

Comment 7: NSC's Affiliated Freight Costs.

NSC argues that the Department should allow all of NSC's home market inland freight expenses for the final determination because the Department verified that NSC procures inland freight services at arm's length prices, and that NSC had properly reported these expenses.

NSC argues that, under the antidumping law, the Department shall reduce the normal value price by the costs incurred to bring the subject merchandise from the original place of shipment to the place of delivery to the purchaser in order to achieve an undistorted fair value comparison. *See* section 772(c)(2)(A); SAA at 4040. NSC argues that the Department has allowed respondents to deduct the full expense of inland freight services provided by affiliates unless the Department cannot establish that the services were not purchased in an arm's length transaction. *See Notice of Final Determinations of Sales at Less than Fair Value: Certain Hot-Rolled, Cold-Rolled, and Corrosion Resistant Carbon Steel Flat Products and Certain Cut-to-Length Carbon Steel Plate from France,* 58 FR 37125, 37132 (1993); *Certain Cold Rolled Carbon Steel Flat Products from Korea: Final Results of Antidumping Duty Administrative Review,* 63 FR 781, 788 (January 7, 1998); *Steel Pipe from Korea,* 63 FR at 32,839; *see also Gray Portland Cement and Clinker from Mexico: Final Results,* 63 FR 12764, 12780 (1998).

NSC states that it ''confirmed'' prior to verification that these services from affiliates were purchased at arm's length prices by providing freight charts and explaining that it paid the same rates to affiliates and unaffiliates. NSC argues that the Department verified that NSC paid arm's length prices to affiliated and non-affiliated freight suppliers, and that NSC reported its inland freight charges accurately. *See Verification Report* at 14–15, dated March 26, 1999. NSC concludes that, therefore, the Department must make a deduction for NSC's home market inland freight expenses when calculating normal value for the final determination.

Department's Position: We agree with NSC. The Department has allowed a deduction for home market freight expenses because NSC reported its freight expenses in accordance with Departmental methodology and the expenses were verifiable. While NSC's responses to the Department's questionnaires did not demonstrate that NSC had procured inland freight services from affiliates at arm's length prices, at verification, we examined contracts and payment documentation which demonstrated that NSC's reported inland freight charges were accurate and non-distortive. *See Verification Report* at 15, dated March 26, 1999. Therefore, in the final determination, we have utilized NSC's reported home market freight expenses in the calculation of normal value.

Comment 8: NKK's Home Market Freight Costs.

Petitioners assert that, according to NKK, the company does not track actual delivery charges on an individual shipment basis; thus, it calculated its reported movement costs in the home market based on the way in which a particular product was most likely transported. Petitioners note that NKK, late in the process, disclosed that the reported delivery terms, for 19 percent of its transactions, were incorrect. In addition, NKK also revealed that a computer programming error resulted in the wrong method of transportation being reported for a full 13 percent of its home market sales. Petitioners argue that, in light of the numerous errors in NKK's reporting of movement expenses, NKK has failed to demonstrate that (1) its method for allocating its home market movement expenses does not cause inaccuracies or distortion and (2) it is entitled to an adjustment for movement expenses in the home market. Therefore, petitioners assert that, at minimum, the Department should deny NKK's reported adjustments for movement expenses for certain specific sales.

NKK asserts that it reported, in its original and supplemental questionnaire responses, that it does not retain transaction specific movement expenses. Instead, using its monthly summaries, NKK determined an average per-ton movement expense for each category of transportation, as well as by each method of transportation.

In addition, NKK argues, that pursuant to the Department's practice, a week before verification NKK submitted new revised databases. The Department accepted and verified the accuracy of the method for allocating these rates to specific transactions, and tested the reported movement expenses in 45 sample sales transactions. No discrepancies were found. Furthermore, NKK asserts that, contrary to what petitioners alleged in both in their pre-verification comments and briefs, the Department verified that the sales terms code did match the claim of a movement expense. Therefore, NKK's asserts that its methodology was reliable and accurate. NKK has successfully demonstrated its entitlement to an adjustment for movement expenses in the home market, and evidence on the record proves that petitioners' claims have no basis.

Department's Position: We agree with NKK and have allowed a deduction for freight expenses for home market sales of subject merchandise because the reported expenses are in accordance with Departmental methodology, are consistent with the company's accounting practices, and were substantiated at verification. *See Verification Report,* dated March 26, 1999. NKK has reported home market freight in accordance with its accounting system and provided the data on a product, transportation-type and destination-specific basis. Based on its findings at verification, the Department determined that respondent's reported freight costs for home market sales of hot-rolled steel are not distortive, and provide a reasonable estimate of actual transaction-specific freight expenses. Therefore, we are granting NKK a home market freight adjustment for sales of subject merchandise.

Comment 9: NSC's U.S. Sales.

Petitioners contend that certain of NSC's U.S. sales, those made through an affiliated U.S. reseller and reported as export price (''EP'') sales, are constructed export price (''CEP'') sales and that adverse facts available should be applied to these sales. Petitioners state that NSC was not forthright with its explanation of the U.S. reseller's functions in the sales process, as the Department found that the reseller performed many more functions than were originally outlined in the questionnaire responses. More specifically, petitioners believe that the findings at verification demonstrate the involvement of the reseller in the negotiation of the substantive terms of sales, such as prices. Furthermore, petitioners assert that NSC's claim that the reseller was merely a processor of information and a communication link is untenable. In addition, petitioners argue that because NSC failed to report ''significant facts'' regarding the reseller's role in the sales process the Department should use facts available. Petitioners contend that NSC withheld information from the Department, failed to provide information in a timely manner and impeded the proceeding. Lastly, petitioners have requested that the Department use the highest calculated margin for NSC's U.S. sales as facts available.

NSC argues that verification confirmed the facts underlying the Department's preliminary decision that

NSC's U.S. sales were properly characterized as EP sales. NSC states that the sales meet criteria for EP sales established in *Mitsubishi Heavy Indus., Inc.* v. *United States,* 15 F.Supp. 2d 807, 812 (CIT 1998) (citing *PQ Corp.* v. *United States,* 652 F.Supp. 724, 731 (CIT 1987), and affirmed in *AK Steel Corp.* v. *United States,* No. 97–05–00865, 1998 WL 846764, at *6 (CIT 1998).

NSC argues that if a transaction meets these criteria, the Department will treat the sales as EP because the routine selling functions of the manufacturer have been relocated geographically from the selling country to the United States. *See Koenig & Bauer-Albert AG* v. *United States,* 15 F. Supp. 2d 834, 352 (CIT 1998). NSC adds that, in such circumstances, the EP sales are in effect made directly to the unrelated buyer because the U.S. affiliate has no independent function. The remainder of NSC's argument cannot be recreated in a public summary.

Petitioners rebut NSC's contention that the Department should not use adverse inferences with regard to NSC's sales made through its affiliated U.S. reseller. The petitioners cite to the Department's *Verification Report* which shows that the U.S. reseller negotiated terms of sale with customers. Petitioners further argue that NSC's arguments ignore the U.S. reseller's role as verified by the Department. Additionally, petitioners state that due to the reseller's role in the ''negotiations and base price proposals'' the sales should be deemed CEP. Furthermore, petitioners contend that because NSC did not describe the full range of the reseller's role and the Department consequently does not have all of the information necessary with which to calculate a margin for CEP sales, the Department should find adverse inferences and use the highest calculated margin for these sales.

Petitioners argue that the Department finds that CEP treatment is justified where a U.S. affiliate plays a significant role in soliciting business and maintaining customer contacts, or participates in the negotiation of sales price to the extent that it is more than a processor of sales-related documentation or a communications link. *See Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products from Korea: Final Results of Antidumping Duty Administrative Reviews,* 63 FR 13170, 13172 (March 18, 1998). Petitioners argue that, contrary to NSC's assertions, the facts in this case justify classifying certain of NSC's sales as CEP.

Petitioners also note that where the U.S. affiliate acts as the first and only point of contact for the U.S. unaffiliated customer, or that it played the primary role in generating the sale by bringing the customer to the foreign producer, the Department has found that the affiliate's role in the sales process is significant. *See Stainless Steel Plate in Coils from the Republic of Korea,* 64 FR 15444, 15453 (March, 31, 1999); *see also Notice of Final Determination of Sales at Less Than Fair Value: Extruded Rubber Thread from Malaysia: Final Results of Antidumping Duty Administrative Review,* 64 FR 12967, 12971 (March 16, 1999); *Carbon Steel Flat Products from Korea,* 64 FR at 12927. Petitioner also argues that the Department has found that where the U.S. affiliate participates in negotiations, its role is elevated beyond a processor of documentation or a communications link. Petitioner argues this is true even where the U.S. affiliate negotiates along with the foreign producer (*Small Diameter Circular Seamless Carbon and Alloy Steel Standard Line and Pressure Pipe from Germany: Preliminary Results of Antidumping Duty Administrative Review,* 62 FR 47446, 47448 (September 15, 1997), reserved the right to approve all orders, *id.* or limited the affiliate's ability to negotiate prices within certain ranges, *Cut-to-Length Carbon Steel Plate from Belgium: Preliminary Results of Antidumping Duty Administrative Review,* 62 FR 48213, 48214–15 (1997); *Certain Cut-to-Length Carbon Steel Plate from Germany: Final Results of Antidumping Duty Administrative Review,* 62 FR 18390, 18391–92 (1997)). Petitioners argue that where the U.S. affiliate's role is not incidental or ancillary, CEP treatment is appropriate. *See Industrial Nitrocellulose from the United Kingdom: Final Results of Antidumping Duty Administrative Review,* 64 FR 6609, 6611 (February 10, 1999). Petitioners cite the U.S. verification report in support of their argument that CEP is appropriate for certain of NSC's U.S. sales, and argue that application of facts available is justified as well, based NSC's failure to provide complete information on these circumstances.

In its rebuttal, NSC argues that the Department should continue to treat NSC's sales through its affiliated U.S. reseller as EP sales. NSC contends that the affiliated U.S. reseller acted as a communication link between the affiliated Japanese reseller and the U.S. customer. NSC states that the U.S. reseller acted ''only as a processor of sales-related documentation and a communication link with the unrelated U.S. buyer.'' *See Mitsubishi Heavy Indus., Ltd.* v. *United States,* 15 F. Supp. 2d 807, 812 (CIT 1998). Furthermore, NSC argues that the U.S. reseller was in constant communication with the Japanese reseller and that messages during the sales negotiations document that the U.S. reseller had no authority to make decisions without the consent of the Japanese reseller. NSC contends that the U.S. reseller acted as a communication link, which is a role that U.S. affiliates may play in EP sales. *See AK Steel Corporation* v. *United States,* 34 F. Supp. 2d 756 (CIT 1998); *see also NSC U.S. Verification Memorandum,* dated March 26, 1999, at Exhibit 4. In sum, NSC argues that at no point did the affiliated U.S. reseller make any decisions with regard to the terms of sale without first consulting the Japanese reseller. Finally, NSC contends that if the U.S. reseller had authority to negotiate terms of sale the documented correspondence between the U.S. and Japanese resellers would not have occurred. Thus, the U.S. reseller was simply a conduit for communication.

Department's Position: We disagree with petitioners that NSC's U.S. sales should be treated as CEP sales. The statute defines export price as the price at which the subject merchandise is first sold (or offered for sale) to an unaffiliated purchaser before the date of import by the exporter outside the United States. In contrast, CEP is the price at which the subject merchandise is first sold (or offered for sale), before or after the date of import, in the United States by or for the account of the exporter or by a seller affiliated with the exporter to an unaffiliated purchaser. Thus, sales made prior to import can be either EP or CEP, with the former being sold by the exporter or producer outside the United States and the latter being sold by someone in the United States who is selling for the account of the exporter or is affiliated with the exporter. In cases in which both the exporter and a U.S. affiliate or a party in the United States acting on the exporter's behalf are involved in the sales transaction, a case-by-case determination must be made, based on the facts associated with the transactions at issue, to determine whether such sales are properly characterized as EP or CEP sales. Normally, when a party in the United States is involved in the sale to the first unaffiliated customer, the sales are properly treated as CEP sales. However, the Department has a long history of recognizing so-called ''indirect EP sales,'' which are sales made by an exporter, with the party in the United States performing only certain ancillary

functions that support the sales process. To determine whether sales are properly classified as EP in such cases the Department examines three criteria: whether (1) the merchandise is not inventoried by the importer, (2) the sale is made through a customary commercial channel for sales of this merchandise, and (3) the affiliated importer acts only as a processor of sales-related documents and as a communications link with the exporter. *See, e.g., Du Pont*, 841 F. Supp. at 1248–50; *AK Steel*, 1998 WL 846764 at *6. Only when all three criteria are met does the Department treat the sales as EP sales. As the Court explained in *AK Steel*, this test is simply a means to determine whether a sale at issue is in essence between the exporter and the unaffiliated buyer, in which case the EP rules apply, or whether the role of the affiliate has sufficient substance that the CEP rules apply. *Id.*

In this case, NSC's small U.S. office merely assisted NSC and its affiliated Japanese trading company in making the sales in question. With respect to the first prong of the indirect EP test, the merchandise at issue was shipped directly from the manufacturer to the unaffiliated U.S. customer without being introduced into the physical inventory of NSC's U.S. affiliate. With respect to the second prong, this pattern of direct shipment is a customary commercial channel for sales of such merchandise in the industry, and there is no indication that the sales between the parties involved represented any departure from the customary commercial patterns. As for the third prong, information obtained by the Department at verification confirmed NSC's claims that its U.S. affiliate's role was that of a processor of sales-related documents and as a communications link with the exporter.

The gravamen of petitioner's claim that these sales should be classified as CEP sales appears to be the fact that the affiliate is involved in the negotiation process. However, the sales-related documents we examined at verification indicated that the affiliate's role in the sales negotiation process is properly characterized as ancillary to the role of NSC and an affiliated trading company in Japan. *See U.S. Sales Verification Report*, dated March 26, 1999. The primary function of the U.S. affiliate in negotiation was conveying offers and counter-offers between the customer on the one hand, and NSC and the Japanese trading company on the other—in other words, serving as a ''communications link'' between the parties involved in making the decisions with respect to these sales. Contrary to petitioners' assertions, the U.S. affiliate cannot be said to have participated in any real sense in the negotiation of the sales at issue.

Verification also confirmed the accuracy of information NSC provided on the record with respect to its performance of other support functions related to these U.S. sales, including conveying an initial offer to bid, issuing certain sales documentation, and assisting in arranging the transport of the merchandise from Japan to the customer. The affiliate also pays U.S. import duties and certain transportation expenses (wharfage, brokerage, barge/demurrage, stevedoring, and trucking expenses) on these sales, receives payment from the customer and receives a commission on the sale. *See NSC U.S. Verification Report* at 2–4, dated March 26, 1999. These are all functions that have previously been found to be compatible with a finding that the sales involved are EP sales. In addition, the Court of International Trade has held that the fact that a U.S. subsidiary receives a commission for providing such services is not incompatible with a finding that the sales are EP sales. *See Outokumpu Copper Rolled Products AB* v. *United States* (''*Outokumpu*''), 829 F. Supp. 1371, 1378–80 (CIT 1993). Thus, the facts of record, taken as a whole and considered in context, demonstrate that these sales are essentially sales between NSC's affiliated Japanese trading company and the unaffiliated U.S. customer, with certain routine sales support functions carried out by the U.S. affiliate. Therefore, we find that the facts on the record demonstrate that the sales at issue meet the well-established criteria for indirect EP sales.

In addition, we note that these sales constitute such a minute portion of NSC's U.S. sales that, even if the Department had accepted petitioners' argument both that they should be considered CEP sales and that the Department should apply an adverse margin to these sales, the impact on NSC's margin, if any, would have been negligible.

Comment 10: NSC's U.S. Sales Prices.

Petitioners contend that the Department should use the gross unit U.S. price in dollars which appears on the invoice, and not a converted net price in yen as the basis for its U.S. price calculations. NSC reported the gross unit price for its U.S. sales in dollars, and this value appears on the invoice, even though NSC's customers ultimately pay for the merchandise in yen based on a nine day forward exchange rate. NSC reported the price paid in yen minus a trading company discount as NETPRTCU. Petitioners claim that the Department converted the net yen value to dollars on the date of shipment, and state that this approach is improper. Petitioners rely upon *Ferrosilicon from Brazil: Amended Final Results of Antidumping Duty Administrative Review* (''*Ferrosilicon from Brazil*''), 62 FR 54085, 54086 (1997), where the Department amended its final results in order to use the U.S. dollar-denominated gross unit price, and on *Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Wire Rod from Japan*, 63 FR 40434, 40446–7 (1998), where the Department also used a gross unit price in dollars.

Department's Position: The Department disagrees that we should use the gross unit U.S. price in dollars which appears on the invoice and not the converted price in yen. The yen value on the invoice is the value which is invoiced and paid by NSC's customers. For every U.S. sale, and other export sales, NSC records the dollar value, the yen value, and the exchange rate used to convert the dollar to yen, and then tracks the yen invoice value through to their accounts receivable. Petitioners' argument is that the Department should avoid unnecessary conversion where possible. The Department verified that the yen value on the invoice is converted using the yen to dollar exchange rate on the ninth day after shipment. This conversion is pursuant to the terms of sale agreed upon by the parties at the time of the order confirmation. Therefore, for purposes of NSC's normal accounting records, the yen value posted in the normal course of business is the converted dollar value effective on the date of shipment, using the methodology discussed above. In reporting U.S. sales to the Department, NSC directly reported the yen value from the invoice as recorded in the normal course of business. As a result, the Department used the yen value from the invoice as the starting point in its calculation of U.S. price.

Petitioners' reliance on the two administrative cases cited is misplaced. The *Ferrosilicon from Brazil* case, unlike this case, involved a forward exchange rate agreement. Thus, section 773A(a) of the Act required that foreign currencies be converted into U.S. dollars based on the exchange rate specified in the forward exchange rate agreement. Instead, the Department, due to the erroneous impression that it did not have dollar-denominated prices on record, ''mistakenly converted the U.S. sales prices reported in Brazilian currency to U.S. dollars on the date of sale.'' 62 FR at 54086. Because the

Brazilian currency gross unit amount which appeared on the commercial invoice corresponded to the dollar-denominated price as of the date of conversion pursuant to the forward exchange agreement, converting that Brazilian currency value to U.S. dollars was an exchange rate error. Because the dollar value reported to the Department already corresponded to the dollar equivalent of the amount to be paid in Brazilian currency on the proper day for making that currency exchange, the Department used the submitted dollar value.

The Japanese wire rod case involved a situation similar to *Ferrosilicon from Brazil*. In that case, the Department stated that the invoice listed a gross unit price only in dollars, the conversion factor associated with the forward exchange agreement, the amount corresponding to a commission (or ''discount'') paid to the Japanese trading company to which Nippon (*i.e.*, NSC in the instant case) sold, and a net price in yen that results after that ''discount'' was deducted. 63 FR at 40447. As instructed in the questionnaire, Nippon had reported the gross unit price on the invoice (which was in dollars), and the Department had used this price as the starting price in its preliminary calculations. *Id.* Petitioners urged that, because payment was made in yen, rather than in dollars, the Department should disregard Nippon's data and use facts available. *Id.* In the final determination, the Department continued to use the reported dollar gross price because Nippon, as requested, had provided the price on the invoice. *Id.* In addition, the Department had verified that Nippon received the yen-denominated amount corresponding to that dollar amount, converted at the forward exchange rate reflected on the invoice, minus the trading company's ''discount.'' *Id.* In other words, once the discount was taken into consideration (as it would necessarily be regardless of which currency was used), the dollar amount exactly corresponded to the net yen amount petitioners complained had not been used in the first place.

Based on the facts of the instant case, the Department has used the yen value reported on the invoice as the starting point for the calculation of U.S. price.

Comment 11: NSC's Arm's Length Analysis.

Petitioners argue that the Department should apply the arm's length test to resales made by NSC's affiliated customer to other NSC affiliates. On January 4, 1999, the Department requested that NSC add a field to its sales database indicating the relation of the end-user to NSC for sales made through one of NSC's affiliated resellers. Citing lack of time, NSC responded by providing the Department with a list of the affiliated reseller's customers who were also affiliated with NSC, instead of updating the database. Therefore, petitioners request that the Department apply the arm's length test to the subsequent sales by NSC's affiliated reseller, where applicable.

Department's Position: The Department disagrees with petitioners. The Department's regulations state that, if an exporter or producer sold the foreign like product to an affiliated party, it may calculate normal value based on such sales if it determines that the price is comparable to the price at which the exporter or producer sold the foreign like product to a person who is not affiliated with the seller. *See* 19 C.F.R. § 351.403(c). It is the Department's normal practice to run the arm's length test on home market sales made by the producer to an affiliated company to determine whether the prices for such sales are comparable to prices charged to unrelated parties. In the instant case, the Department conducted its normal arm's length analysis and found that NSC's sales to the affiliated reseller at issue failed the arm's length test. Therefore, our preference is to use the downstream sales if available. Based upon the information placed on the record, we find no basis for departing from the Department's normal practice in this regard.

As the Department has stated in the *Preamble* to its regulations, ''[t]he purpose of an arm's length test is to eliminate prices that are distorted.'' *See* 62 FR at 27356. Once a non-distorted price has been identified in a given series of transactions for use as normal value, ''the Department does not believe it is necessary or appropriate to require the reporting of downstream sales in all instances.'' *See Id.* The approach proposed by petitioners, which would require routine reporting of all downstream data for home market sales to affiliates, so that the arm's length test could be conducted at multiple levels, would be both burdensome and unnecessary. Thus, for the final determination, when a sale by NSC to an affiliated party passed the arm's length test, we did not conduct further tests to determine whether the sales by that affiliate were also made at arm's length.

Comment 12: NSC's Home Market Downstream Sales.

NSC argues that the Department should continue to find that NSC need not report any further downstream sales. As it did in the *Preliminary Determination*, NSC contends that the process of acquiring the necessary information for the still unreported downstream sales would be overly burdensome due to the manual effort involved, and the affiliated reseller's limited retention of paper documents. Furthermore, NSC has continued to work to report the downstream sales. At verification, NSC demonstrated that the task of reporting the outstanding downstream sales would be overly burdensome, and, in some cases, impossible. In addition, NSC cites to the Department's regulations at 19 C.F.R. § 351.403(d), which state that in some cases the Department will not require the reporting of all downstream sales if the outstanding sales ''account for less than five percent of the total value (or quantity) of the exporter's or producer's sales of the foreign like product * * *'' As NSC's unreported downstream sales meet this Departmental requirement, NSC requests that the Department not change its *Preliminary Determination* regarding this issue. Petitioners did not comment on NSC's argument in their rebuttal briefs.

Department's Position: We agree with NSC that certain downstream sales should continue to be disregarded in the final determination. Pursuant to § 351.403 of the Department's regulations, the Department does not normally require the reporting of downstream sales if total sales of the foreign like product by a firm to all affiliated customers account for five percent or less of the firm's total sales of the foreign like product. In general, the Department does not believe it necessary or appropriate to require the reporting of downstream sales in all instances. Questions concerning the reporting of downstream sales are complicated, and the resolution of such questions depends on a number of considerations, including the nature of the merchandise sold to and by the affiliate, the volume of sales to the affiliate, the levels of trade involved, and whether sales to affiliates were made at arm's length. In addition, the Department normally will not require the respondent to report the affiliate's downstream sales unless the sales to the affiliate fail the arm's length test. The Department believes that imposing the burden of reporting small numbers of downstream sales often is not warranted, and that the accuracy of determinations generally is not compromised by the absence of such sales.

In the instant case, NSC requested that it be excused from reporting a small percentage of home market downstream

sales due to overwhelming burdens in obtaining the information and the fact that these downstream sales will not constitute appropriate matches for their U.S. sales of subject merchandise. Furthermore, the Department examined these sales at verification and confirmed that these sales will not constitute appropriate matches for U.S. sales. *See NSC Home Market Verification Report*, dated March 26, 1999. After examining the data placed on the record, the Department has determined that there are sufficient matches of sales in the home market and that the downstream sales in question account for less than three percent of each firm's total home market sales of subject merchandise. For purposes of this final determination, the Department is disregarding this small percentage of downstream sales.

Comment 13: Request for Written Opinion/ Ex Parte Communications.

NSC argues that, pursuant to section 782(g) of the Tariff Act (19 U.S.C. § 1677m(g)), and in accordance with the SAA at 814, the Department must inform all parties of the essential facts under consideration before making a final determination, and give all parties sufficient time to defend their interests. *See Bethlehem Steel Corp.* v. *United States*, 27 F. Supp. 2d 201, 207–08 (CIT 1998); Michael Y. Chung, *U.S. Antidumping Laws: A Look at the New Legislation*, 20 N.C.J. Int'l L. & Com. Reg. 495, 525 (1995). NSC states that the Court of International Trade has held that the Department cannot rely on information on which the parties have not been given an opportunity to comment. *See Wieland-Werke AG* v. *United States*, 4 F. Supp. 2d 1207 (CIT 1998). NSC argues that this requirement is necessary to provide due process and a fair judgement. NSC charges that the Department has not provided NSC with all information relevant to this investigation, and thus appears to be about to make a final determination which does not afford NSC the right to defend itself or respond to that information. In particular, NSC notes that the Department has not placed on the record the factual or legal bases for its decision not to verify NSC's theoretical-actual weight conversion factor. NSC states that the Department has not responded to its letters on this issue and has not placed on the record an ex-parte memorandum with respect to the meeting between NSC's representatives and Deputy Assistant Secretary Spetrini at which this issue was discussed.

NSC argues that the Department's failure to explain its basis for not verifying the conversion factor violates section 782(g) of the Tariff Act (19 U.S.C. § 1677m(g)) and Article 6.9 of the *Antidumping Agreement* (referring to informing parties of the essential facts under consideration, so that they may defend their interests), as well as § 351.307(c) of the Department's regulations and Article 6.7 of the *Antidumping Agreement* (which relate to reporting on the results of verification). NSC argues that the Department has refused to provide this information, that this refusal was illegal, and that it has prejudiced NSC's ability to defend its interests and affected its due process rights. In this respect, NSC relies upon the SAA at 814, and *Clifford* v. *United States*, 136 F.3d 144, 149 (D.C. Cir. 1998). NSC states that the Department's actions raise the specter of government officials secretly prejudging this matter, and not allowing NSC to respond or defend its interests. *See NEC Corp.* v. *United States*, 151 F.3d 1361, 1374 (Fed. Cir. 1998). NSC concludes that, for these reasons, the Department's decision on theoretical weight cannot stand.

NSC also cites the statutory requirement that the agency document ex-parte communications on the official record. *See* section 777(a)(3) of the Tariff Act (19 U.S.C. § 1677f(a)(3)); *see also Gilmore Steel Corp.* v. *United States*, 585 F. Supp. 670, 679 (CIT 1984). The Department is required to include notice of these communications in the official record of the case for judicial review. NSC states that, in addition, in order to allow interested parties to comment on information submitted by other parties during such meetings, *see* 19 C.F.R. § 351.301(c)(1), information communicated during ex-parte meetings must be placed on the record.

NSC states that the Department has ''chosen secrecy over transparency'' by not placing on the official record memoranda memorializing any ex-parte meetings between petitioner or other interested parties and members of the Administration concerning issues presented during this proceeding, and cites press reports alleging the occurrence of several meetings relating to this case. NSC adds that the Department also did not respond to NSC's letters requesting that ex-parte memoranda be placed on the record. NSC argues that the Department is thus in violation of section 777(a)(3) of the Tariff Act (19 U.S.C. § 1677f(a)(3)) and 19 C.F.R. § 351.104. NSC claims that, coupled with the violations of Article 6.9 and 19 U.S.C. § 1677m(g) described above, the Department's actions in this respect threaten the fairness and integrity of the entire proceeding. Petitioners did not comment on NSC's request in their rebuttal briefs.

Department's Position: We disagree with NSC's assertion that the Department has not provided NSC with all information relied upon in the investigation, in particular information relating to the Department's decision regarding NSC's sales made on a theoretical weight basis. At the time that the Department made the decision not to verify the theoretical-to-actual weight conversion factor, the Department explained to NSC's counsel the basis for the Department's actions. In addition, the Department issued a letter dated April 12, 1999, explaining the reason for rejecting the submitted conversion factors. The factual and legal bases for the Department's decision regarding these sales are also discussed in Comment 29, ''Use of Facts Available for NSC's Theoretical Weight Sales.''

The Department, pursuant to section 777f(a)(3) of the Act has placed all ex parte communications on the official record of the case and they are available to interested parties in room B–099 of the main Department of Commerce building. The only ex parte communications relating to NSC's sales made on a theoretical weight basis were communications with representatives of NSC. Therefore, NSC was not prejudiced by any delay in recording those communications for the record. In addition, as reflected in the memos summarizing ex parte communications, all ex parte communications with petitioners' counsel involved no new information and all information discussed was on the record.

The Department disagrees with NSC that it was not informed of the essential facts and did not have sufficient time to defend its interests. NSC, like other parties in this proceeding, has availed itself of the myriad opportunities to participate actively in the antidumping investigation by submitting information and argument and by commenting on information and argument placed upon the record. NSC has done so in meetings with the Department, in written briefs, and during the hearing conducted in this proceeding. In particular, NSC devoted over 40 pages of its case brief to arguing the actual/theoretical weight issue and argued the issue again at the hearing. Thus, NSC, like all other parties, has been given ample time to analyze and comment upon the essential facts under consideration, and to preserve its rights to appeal the decisions of the Department.

Cost of Production

NSC

Comment 14: NSC's Costs for Particular CONNUMs.

Petitioners argue that the Department should use adverse facts available for any U.S. sales that are matched to control numbers (''CONNUMs'') for which NSC failed to report product-specific cost. Petitioners state that the Department requested NSC to provide product-specific cost for all CONNUMs, including those that, in NSC's view, were not likely to be matched to U.S. sales. By refusing to provide the information, the petitioners assert, NSC has significantly impeded the investigation by failing to cooperate to the best of its ability. Petitioners maintain that the statute mandates use of facts available in several circumstances, including when a respondent withholds requested information or ''fails to provide such information by the deadlines for submission of the information.'' Section 776(a)(2)(A) and 776(b) of the Act authorize the Department to use an adverse inference where the respondent has ''not acted to the best of its ability to comply with a request for information.'' As further support for their position, petitioners cite *Certain Welded Carbon Steel Pipes and Tubes from Thailand: Final Results of Antidumping Duty Administrative Review*, 62 FR 53808, 53819–20 (October 16, 1997), in which the Department determined that an adverse inference was warranted because the company being reviewed failed to act to the best of its ability and did not comply with the Department's request.

In addition, petitioners contend that adverse facts available should be applied to 19 CONNUMs for which the Department found certain problems at verification. For these CONNUMs, costs were reported on a product-specific basis and on a CAPS code basis, but were then weight-averaged across a ''mix of products.'' According to petitioners, the evidence shows the respondent did not act to the best of its ability in reporting these costs, and an adverse inference should be used in applying facts available to ensure that the respondent will not be rewarded for its failure to supply the necessary information. Thus, for the final determination, whenever a U.S. sale is matched to a home market CONNUM for which product-specific costs were not reported, the Department should apply the highest calculated margin as facts available.

NSC argues that petitioners' suggestion that the Department should use adverse facts available for the products for which costs were reported on a broad product group average (*i.e.*, CAPS code specific basis) is unwarranted. NSC contends that it has cooperated as far as possible given the accelerated timeframe and fully explained its inability to report all costs on a product-specific basis. Moreover, NSC asserts that under section 782(e) of the Tariff Act (19 U.S.C. § 1677m(e)), the Department is required to consider respondents' information, even if it is not submitted by the deadlines or in the form requested. NSC claims, however, that the information submitted was timely, complete and verified, and thus the Department has no basis for the use of facts available or adverse facts available.

Further, NSC asserts that if facts available is warranted, an adverse inference should not be applied because the information on the record does not establish that NSC failed to act to the best of its ability throughout the investigation. In support of its position NSC cities 62 FR 27340, where the Department explained that it will consider whether ''practical difficulties'' contributed to a respondent's inability to supply requested information. Accordingly, the Department has no grounds to apply facts available with adverse inferences.

In addition, NSC argues that if the Department decides an adverse inference is proper, applying the highest calculated margin is aberrant and not consistent with the law or the Department's past practice. According to NSC, the Department's well-established policy limits it to the highest non-aberrant margin. *See Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Wire Rod From Italy*, 63 FR 40422, 40428 (1998). Further, NSC contends that a margin is not always the most appropriate means of substituting missing information. Thus, NSC asserts, should the Department choose to apply an adverse inference in selecting facts available, it should consider using information on the record related to the missing data, as opposed to using a punitively high margin.

Department's Position: We agree with petitioners that adverse facts available should be applied to any U.S. sales which are matched to CONNUMs for which the product-specific costs have not been provided. As noted in the comments from the petitioners, section 776(a) of the Act provides that, if an interested party withholds information that has been requested by the Department, fails to provide such information in a timely manner or in the form or manner requested, significantly impedes a proceeding under the antidumping statute, or provides information which cannot be verified, the Department shall use, subject to section 782 (d) and (e), facts otherwise available in reaching the applicable determination. In this investigation, on more than one occasion, the Department requested that NSC provide product-specific cost data for all U.S. and home market sales of subject merchandise. However, NSC failed to provide this information for certain CONNUMs. As noted in the cost verification report, the Department found nineteen CONNUMs where the mix of products within the CONNUM included both product-specific costs and costs reported on a broader product group cost, which means that the reported costs for these CONNUMs are not product-specific. Since NSC failed to provide the necessary information in the form and manner requested, and in some instances the submitted information was found to be inaccurate, we conclude that pursuant to section 776(a) of the Act, use of facts otherwise available is appropriate.

Moreover, section 776(b) of the Act, provides that an adverse inference may be used when an interested party has failed to cooperate by not acting to the best of its ability to comply with requests for information. As discussed above, even though we asked twice, NSC failed to comply with our requests for product-specific information. The information necessary to compute CONNUM specific costs for the products in question was available in NSC's books and records (as evidenced by the existence of similar data used to report product-specific costs for the products sold to the United States). NSC, however, simply elected not to report CONNUM-specific costs for these products because they believed these products would not be used as matches in the antidumping margin. Thus, for the final determination, we applied the highest calculated margin to any U.S. sales which is matched to home market CONNUMs for which the product-specific cost data was not reported.

Comment 15: NSC's Corrections to U.S. CONNUM Database Presented at Verification.

At verification, NSC submitted, as a minor correction, data showing that certain CONNUMs had been reported incorrectly due to an improper conversion from millimeters to inches. This resulted in the creation of a small number of new U.S. CONNUMs. According to petitioners, the Department should use adverse facts available for these CONNUMs in

calculating the margin for the final determination, because NSC failed to supply cost information for the new CONNUMs.

NSC rebuts petitioners argument and states that the costs for the new CONNUMs are reported in *Verification* exhibit B.1 and 15, and also included in the revised cost file NSC submitted at the Department's request on April 14, 1999. NSC asserts that it did not fail to report product costs for the minor corrections submitted at verification. NSC contends that full costs for all U.S. CONNUMs, including all of the new CONNUMs related to the minor corrections were included in the cost verification exhibits and in a cost file subsequently requested by the Department.

Department's Position: We disagree with petitioners. At verification, NSC provided a worksheet which showed the product-specific cost for the new CONNUMs created due to the minor correction. In addition, on April 14, 1999, the Department requested and received a revised COP and CV tape which reflects the minor corrections presented at verification.

Comment 16: NSC's Electricity Purchases.

The petitioners argue that the Department should not use transfer prices to value transactions between NSC and its affiliated suppliers of electricity. Instead, petitioners assert that, in dealing with transactions between affiliated suppliers under section 773(f)(2) and (3) of the Act, it is the Department's practice to value major inputs, like electricity, at the higher of the transfer price, market price or actual cost of production. Further, petitioners contend that there is nothing on the record to warrant changing the Department's an established practice. According to petitioners, NSC's claim that the price differential between the affiliated and unaffiliated suppliers is due to the different levels of distribution is baseless. Petitioners assert that the record shows there is no ''wholesale market'' for electricity in Japan.

In addition, petitioners dispute NSC's claims that the financial performances of the affiliated and unaffiliated suppliers are relevant as to whether the market price exceeds transfer price. Further, petitioners contend that financial analyses are not a function of prices charged to an affiliated company. Therefore, NSC is overlooking the purpose of the arm's length test— to guarantee a price that reflects the market value. Thus, for the final determination, the petitioners contend that the Department should adjust the transfer price to reflect the higher market price.

NSC contends that the Department should not adjust the price it paid to its affiliated electric power cooperatives (''co-ops''). According to NSC, a simple comparison between the rates paid to their affiliated suppliers and those paid to their unaffiliated suppliers (*i.e.*, regional electric companies) is meaningless. NSC argues that the electricity supplied by the affiliated and unaffiliated suppliers involves different segments of the electricity market. Specifically, the co-ops are wholesalers, whereas the regional companies are retailers. In addition, respondent asserts that it demonstrated at verification, through financial analysis, that the co-ops are not selling electricity at unreasonably low rates for wholesalers of electric power as compared to the unaffiliated regional electric companies. NSC further points out that if co-ops were to adjust their prices to equal the retail market price, the result would be an unrealistically high rate of return on assets. Thus, NSC claims it would be inappropriate for the Department to make any adjustment to its reported electricity costs.

Department's Position: While we disagree with petitioners that NSC's electricity purchases from its affiliated suppliers represent a major input in this case, we agree that the reported cost of electricity purchased from its affiliates should be adjusted to a market price (*i.e.*, arm's length price) in accordance with section 773(f)(2) of the Act.

We disagree with NSC's argument that section 773(f)(2) of the Act requires the Department to take into account whether NSC's affiliated and unaffiliated suppliers of electricity are at different levels of distribution, and if they are, to refuse to compare the prices charged by each the two groups of suppliers. Even if these suppliers do operate at different levels of distribution, the customer (*i.e.*, NSC) in all instances, is at the same level. Section 773(f)(2) of the Act focuses on whether the arms-length comparison reflects comparable merchandise and whether the transaction occurred in the market under consideration. It does not focus on the nature or circumstances of the supplier. In this instance, both NSC's affiliated and unaffiliated electricity suppliers provided the identical input to NSC. Purchases of electricity from its affiliated and unaffiliated suppliers occurred in Japan, the market under consideration.

We also disagree with NSC that a comparative return on asset analysis is indicative of whether transactions between affiliates occurred at market prices. The structure and efficiency of an entity is unique to that entity's operations. We agree that those characteristics do impact the profitability of an entity; however, we disagree that it is indicative of whether the selling practices in a particular market are necessarily at arm's-length prices. Accordingly, for the final determination, we adjusted NSC's electricity purchases from affiliates to reflect the prices charged by its unaffiliated suppliers.

Comment 17: NSC's Exchange Gains and Losses.

The petitioners argue that NSC failed to provide requested information as to the types of transactions that gave rise to reported foreign exchange gains and losses. The petitioners claim that NSC is able to segregate its foreign exchange gains and losses and contend that NSC's chart of accounts provides evidence that the means to do so were readily available. The petitioners note that this information was necessary because the Department treats exchange gains and losses differently depending on their source.

The petitioners state that, since NSC failed to comply with the Department's request to the best of its ability, the Department should draw an adverse inference and conclude that the entire amount of the transaction exchange gain is related to accounts receivable and thus should be disallowed. In addition, the petitioners argue that the Department should draw the adverse inference that the entire amount of exchange losses is related to accounts payable and should therefore be included in the cost of manufacturing.

NSC contends that in reporting foreign exchange gains and losses, it acted to the best of its ability and petitioners claim that an adverse inference should be applied is without merit. Although NSC notes that its chart of accounts divides exchange gains and losses into certain categories, in practice those accounts are not used. NSC asserts that it does not maintain transaction-specific data on foreign exchange gains and losses. Accordingly, NSC argues that reclassifying the information to meet the Department's request would be overwhelming. Thus, NSC asserts that it acted to the best of its ability and there is nothing on the record to suggest that it could have reported the requested information. Further, NSC argues that the Department should continue to exclude the portion of the exchange losses unrelated to the cost of production of hot-rolled steel.

Department's Position: While we disagree with the petitioners that we found evidence indicating that NSC had the means to segregate its foreign exchange gains and losses, we agree that

the foreign exchange gains should be excluded and certain foreign exchange losses included in the calculation of the G&A expense ratio. It is the Department's normal practice to distinguish between foreign exchange gains and losses from sales transactions and exchange gains and losses from other types of transactions. *See, e.g., Final Determination of Sales at Less Than Fair Value: Steel Wire Rod From Trinidad & Tobago*, 63 FR 9177, 9181 (February 24, 1998). The Department normally does not include exchange gains and losses generated from accounts receivable. Since NSC failed to provide any documentation showing that the foreign exchange gains should be included as an offset to the G&A expenses, we do not consider it appropriate to allow the gains as an offset to reported costs. In addition, with the exception of the exchange losses associated with or incurred by to divisions unrelated to steelmaking, NSC failed to provide any substantiation that the foreign exchange losses should be excluded. We therefore adjusted NSC's G&A expense ratio to exclude the foreign exchange gains and include certain foreign exchange losses.

Comment 18: NSC's G&A Expenses.

The petitioners argue that the Department should recalculate NSC's G&A expense ratio to include all appropriate expenses, including certain expenses the nature of which constitutes business proprietary information. The petitioners contend that the expenses at issue, which are discussed in more detail in the proprietary version of their case brief, relate to the company as a whole, and that NSC should not be permitted to exclude the portions of those expenses that relate to non-steel divisions.

In addition, the petitioners argue that there is no reason to believe that the poor performance of the Japanese economy affected any NSC division differently than any other division and that NSC failed to support this claim. The petitioners therefore believe that economic conditions are irrelevant to the issue at hand and provide no basis for excluding certain expenses from the G&A calculation.

NSC argues that its calculation of general and administrative expenses properly allocates company-wide costs to the production of hot-rolled steel. Specifically, NSC states that non-operating and special profits and losses are properly allocated to the production of hot-rolled steel using steel division cost of sales in the denominator, and that all exclusions from the calculation relate to gains and losses of non-steel divisions. NSC asserts that its non-operating and special profits and losses differ from general and administrative expenses as they arise from specific events and are not related to the operations of the company as a whole. NSC contends that the Department has excluded such special gains and losses from the cost calculation in the past and cites *Stainless Steel Wire Rod from Italy*, 63 FR at 40430 in support of its argument.

NSC argues that certain expenses at issue that were excluded from the G&A calculation are accurately classified as special losses and that the exclusion of these expenses should be retained. NSC contends that these expenses are related to ongoing restructuring and are determined by economic conditions at each separate division of the company. Accordingly, NSC argues that such expenses are not related to the company as a whole, but instead are specifically tied to each division, and there is no reason to allocate a portion of the proprietary expense associated with or pertaining to a separate division to the G&A expenses of the steel division. Further, NSC asserts that it demonstrated at verification that its allocation methodology actually excluded fewer costs than were incurred by non-steel divisions.

Department's Position: We agree with petitioners that the total amount of the proprietary expenses should be included in the G&A expense calculation. We find no reason to conclude that NSC's normal accounting treatment of not including this proprietary item as a cost of manufacturing, in accordance with its home country Generally Accepted Accounting Principles (''GAAP''), is unreasonable or distortive. In fact, there is virtually no difference in the amount of these proprietary expenses allocated to subject merchandise whether they are treated as G&A or as a cost of manufacturing. We consider these expenses to relate to the general operations of the company as a whole and as such consider it appropriate to allocate them on a company-wide basis as a percentage of unconsolidated cost sales.

Comment 19: NSC's Blast Furnace Costs.

The petitioners argue that, for the final determination, the Department should eliminate an offset for a reversal of a reserve for the repair of blast furnaces. According to petitioners, the Department's practice is to disallow the reversal of a charge taken in a prior year because it would distort the current year's costs. Petitioners note that, for instance, in *Certain Cut-to-Length Carbon Steel Plate from Germany: Final Results of Antidumping Duty Administrative Review*, 61 FR 13834, 13837 (March 26, 1996), the Department disallowed a reduction in current year production costs by the reversal of prior year operating expense accruals and write downs of equipment and inventory. Petitioners further claim that, although a reversal of a prior period charge is in accordance with Generally Accepted Accounting Principles (''GAAP''), the adjustment is considered improper for the antidumping analysis because it bears no relation to the cost of production during the current year.

Department's Position: We agree with the petitioners that an offset to G&A expenses for a reversal of a reserve for repairs of the blast furnace should be disallowed. It has been the Department's practice to disallow reductions to current year production costs by the reversal of prior year operating expense accruals. The subsequent year's reversal of these estimated costs does not represent revenue or reduced operating costs in the year of the reversal. Rather, they represent a correction of an estimate which was made in a prior year. While reversals of accruals are in accordance with GAAP, the Department relies on GAAP provided that it does not result in distorted per unit costs. In this investigation, we find it inappropriate to reduce the actual production costs incurred in the current year by excess reserves recognized in prior years.

Comment 20: NSC's Reconciliation Adjustment.

NSC argues that the Department incorrectly excluded NSC's reconciliation adjustment from its reported COP and CV data in the preliminary determination. NSC argues that its reconciliation adjustment corrects for differences between total reported costs and total actual costs incurred, and that failure to include the adjustment would result in a reported cost of manufacture that does not reconcile with NSC's accounting records. NSC thus concludes that the Department should include the reported reconciliation adjustment in its final determination.

Petitioners argue that the Department properly excluded the reconciliation adjustment in its *Preliminary Determination* because the quantities used to derive the adjustment were not on the same basis. Petitioner contends that while the overall differences may be very small for product groups, the particular quantity differences for specific products within groups are significant. The petitioners therefore refute NSC's claim that the difference is insignificant and contend that inclusion

of the reconciliation adjustment would distort product costs at the individual CONNUM level. In addition, the petitioner states that the reconciliation pertains only to quantity differences and is not related to per unit cost. The petitioner thus concludes that since the reconciliation adjustment does not represent an element of cost, no corresponding adjustment to the cost of manufacturing should be made.

Department's Position: We agree with the respondent that the reconciliation adjustment should be included in the COP and CV data files for the final determination. At verification, we determined that the reconciliation adjustment is based on differences between costs in NSC's normal books and records and product-specific cost reported to the Department. NSC maintains costs in the normal course of business at a more aggregate level than required by the Department; therefore, NSC used a reporting methodology which differed in some respects from its normal cost accounting system. As a result of deriving the reported costs, there were small differences between the reported product-specific cost and NSC's cost of manufacturing subject merchandise. Since the reconciliation adjustment reconciles the reported cost to the cost of manufacturing as recorded in its financial accounting system, for the final determination we have included the adjustment.

NKK

Comment 21: NKK's Overall Cost Methodology.

Petitioners argue that NKK's reporting methodology should be rejected because it is fundamentally flawed and results in costs that are significantly understated. Petitioners assert that NKK's methodology distorts costs because it relies on a base group that is not reflective of the actual production levels of subject merchandise at the individual manufacturing facilities and, therefore, does not properly reflect plant efficiencies; it relies on a single variance for all product groups, rather than more detailed variances; and, it relies on the cost extras from only one facility. (*See* Comments below for a detailed discussion of each of these three allegations.) Petitioners argue that the effect of these flaws is not quantifiable and the necessary information to correct these deficiencies is not on the record.

Moreover, petitioners argue that NKK withheld information requested by the Department that would have enabled the Department to correct these deficiencies and, therefore, has not acted to the best of its ability. First, petitioners assert that NKK did not provide variances by budget group when requested to do so by the Department. Second, petitioners argue that NKK did not provide cost extras for the second facility, even though there are significant differences in cost between plants. Third, petitioners argue that the selected base product is not, as claimed by NKK, representative of the overall production of the subject merchandise.

Therefore, petitioners assert that the Department must resort to total adverse facts available. If, however, the Department does not resort to total adverse facts available, then it argues that the Department should draw an adverse inference in selecting an alternative remedy to address the significant distortions.

NKK asserts that the Department verified that in the aggregate it reported all its costs and the issue is not whether NKK provided weighted average costs but the reasonableness of NKK's particular weighting methodology. NKK argues that petitioners' concerns regarding the reported variance are unwarranted because NKK developed the most specific variance it could for the hot-rolled steel operations. NKK argues that its use of Fukuyama's cost extras was reasonable because it developed the most reasonable product specific costs it could and had no choice but to work with the information which it maintains in the normal course of business. NKK also argues that the Department tested the reasonableness of NKK's reported values for cost extras during verification and noted no problems. NKK contends that there is no basis for using adverse facts available as petitioners request because it has been fully cooperative in all phases of this investigation. NKK contends that an alternative methodology can be based on verified information on the record and should not be based on adverse facts available.

Department Position: We disagree with petitioners that we should reject NKK's reported costs and use, instead, adverse facts available. While we agree that NKK's methodology improperly weights costs, because the selected base product does not adequately represent the range of subject merchandise produced at each plant, we find that this problem is correctable. (*See* Comment below.) We disagree with petitioners that NKK's reported variance or its cost extra methodology distort the reported costs. (*See* Comments below.) We note that the variance used by NKK was for the specific base product group and took into account the specific cost centers those products passed through during production. We also note that the absence on the record of cost extras specific to the second facility does not impugn NKK's methodology, since NKK adjusted the cost extras associated with the other facility by the difference between the weighted average base product groups of both facilities and the pinpoint product.

Moreover, we do not agree with petitioners that NKK did not act to the best of their ability in reporting costs. First, record evidence allows the Department to reasonably adjust for the improper weighting of costs (*i.e.*, to account for the cost differences between plants). Second, as noted above, NKK did not use one plant-wide variance, but calculated a variance for the specific base product group and took into account the specific cost centers those products passed through during production. Third, although NKK did not provide the requested information concerning each individual base group's variance, the Department was able to verify NKK's assertion as to the level of difficulty in preparing such variances. We also note that the selected base product group accounted for a significant portion of the U.S. and home market products, and that the information is not necessary in order to correct the flaws identified in NKK's response. Finally, the Department did not request that NKK provide cost extras for the second facility, nor did it determine that the presence of such data would have significantly altered the results, since the first facility's cost extras were adjusted by the difference in the pinpoint product and the weighted average base costs of both facilities. Therefore, we have relied on NKK's reported costs except for certain adjustments to account for the improper weight averaging of the cost of the two manufacturing facilities to account for plant efficiency.

Comment 22: NKK's Weighted-Average Costs.

Petitioners argue that NKK's response methodology for weighting the cost of the two manufacturing facilities which produced the subject merchandise significantly understates the cost of manufacturing (''COM''). Petitioners maintain that the Department's questionnaire states that the respondent must report COP and CV based on the weighted average cost incurred at all facilities and that NKK's methodology does not properly account for the actual production levels at the two facilities.

Petitioners also note that the Department's questionnaire specifically stated that, if NKK did not believe it could respond to the Department's request in the form requested, it was to notify the Department in writing before

it submitted the response. Accordingly, petitioners contend that at no time did NKK submit a letter asking permission to use a single selected product as the starting point instead of providing all of its product groups. Moreover, petitioners argue that NKK has acknowledged that it could have reported a certain number of additional product groups and account for the majority of U.S. sales during the POI but did not do so. Petitioners argue that NKK's failure to report accurate costs for these additional product groups means that the cost of corresponding home market sales that are matched to U.S. sales are inaccurate.

According to petitioners, the production of the ''pinpoint'' product (used by NKK to differentiate the cost of the base product group's cost to product specific cost) is not representative of the production of all of the base product groups at each production facility.

In support of their position, petitioners note that in *Carbon Steel Flat Products from Korea*, 64 FR at 12945, the Department rejected respondent's cost submission upon finding that the reported costs were understated. Petitioners argue that the Department concluded that the respondent could have reported information on a CONNUM-specific basis, but failed to do so. The Department rejected the submitted cost in that case and applied adverse facts available. Petitioners assert that NKK had the ability to report costs in a manner that reflected the actual product mix of the two works but that it disregarded the Department's instructions and used a distortive weighting methodology. Thus, petitioners contend that NKK's response should be rejected.

Petitioners contend that NKK's proposed adjustment does not result in reported costs that reflect the actual cost of certain product groups other than NKK's selected product group. Instead, petitioners argue that NKK's adjustment simply applies the base cost of the selected product group to the production quantities of the other product groups. Thus, petitioners contend that applying the correct production mix to the wrong cost does not remedy flaws in NKK's reporting.

NKK argues that its allocation methodology is reasonable. NKK asserts that its initial response showed that the relative weighting of costs between the Fukuyama and Keihin works was based on a subset of the total production quantity. In addition NKK argues that it clarified the reasons for choosing the particular product as the starting point for development of the actual costs in a supplemental response. NKK argues that the particular product chosen as the starting point corresponds most closely with the ''pinpoint'' product used in calculating the cost extras and that it represents the overwhelming majority of the U.S. sales. Further, NKK asserts that it was not practical to develop a different weighting for each of the subject merchandise product groups. NKK claims that due to time constraints it would have been impossible to extract each of the variances that related to the production flow of each of the different product groups and, therefore, once it had gone through the exercise for the selected group it was necessary and accurate enough to use this group for the weighting.

According to NKK, the correction to the weighting between the Fukuyama and Keihin works the Department contemplates in the cost verification report would be less accurate and less reasonable than NKK's methodology. NKK asserts that its methodology does not understate costs, and that this is clear because the total cost reconciled within a small difference. Thus, NKK argues that increasing the reported costs would constitute a serious distortion.

NKK contends that while its methodology is less precise for a portion of the subject merchandise, its method is more appropriate for the particular product group which represents the majority of the home market data that match to U.S. sales. Further, NKK claims that the remaining portion of the database is small and its methodology actually overstates the cost for some product categories. In addition, NKK argues that there were certain product groups which were only produced at Fukuyama and that the methodology NKK used actually overstates cost for these product groups. Thus, NKK states that using the overall aggregate weighting methodology mentioned in the Department's *Cost Verification Report* would result in an even greater distortion of costs.

NKK argues that, if the Department rejects NKK's methodology, the Department should adjust the weighting factors of the four key product groups. Using information on the record to allocate the production of these groups, NKK argues, the Department should increase the cost for two of the product groups and reduce the cost for the other two product groups. According to NKK, a single adjustment is too crude and adjustments for all product groups would be unduly burdensome and impractical.

NKK argues that petitioners mischaracterize the Department's decision in *Carbon Steel Flat Products from Korea*. NKK points out that the Department in fact rejected petitioners' call for total adverse facts available in that case and simply adjusted the reported costs with respect to the methodological issue as to weighting. NKK contends that the situation in this case is identical. In this case, NKK argues, the Department can accept its approach as reasonable, adjust the costs for product groups other than the selected product group on a product by product basis, or adjust the reported costs for the overall relative weighting.

Department's Position: While we agree with petitioners that NKK's submission methodology inappropriately weighted production at each of its two facilities, by using a single product group's production mix to weight all product groups, we disagree that the entire response should be rejected. While we do not have on the record CONNUM-specific production quantities for each facility, we do have information to allow the Department to re-weight NKK's production costs on a product-group specific basis to more properly reflect the actual production quantities at the facilities. A product group weighted average, between the two plants, is a reasonable approximation of our preferred method, as opposed to using a mix for a single product group for all subject merchandise.

NKK's reporting methodology first computed an average base cost for what it identified as a representative product for use as the starting point for the reported costs. The average base cost was computed using its budgeted cost system which is maintained in the normal course of business. NKK increased or decreased the average base cost depending on the relationship of each specific product to the base product using its standard management costing system. The selected product groups budgeted costs for the three periods covering the POI for each plant (six in total) were used to compute the POI weighted average cost of manufacturing for the base product. The six different budgeted costs were weight averaged based on actual production quantities of the selected product group at each plant during each budgeted cost calculation period during the POI. As a result, all CONNUMs for submission purposes reflect the production mix between the two plants for this selected product rather than the production mix of each of the subject merchandise product groups. We disagree with NKK that this methodology is the most reasonable given the information on the record because we found significant

differences in the product mix between the plants.

We disagree with petitioners that NKK's proposed adjustment applies a corrected production mix to the wrong cost. The weighting issue between the two plants does not impair the base cost plus extra methodology used to report product-specific costs. The relative cost differences between the pinpoint product and each of the other products NKK reported are not impacted by this issue.

Also, the *Carbon Steel Flat Products from Korea* case cited by petitioners does not support the use of adverse facts available in this case. In that case, the Department found that the respondent did not act to the best of its ability because the respondent repeatedly did not supply the requested information and during verification we found that the information existed.

Comment 23: NKK's Reported Cost Variances.

Petitioners contend that NKK's use of a single variance for all product groups is distortive and must be rejected. Petitioners assert that consistent with the Department's long standing practice of requiring variances at the most specific level, the Department directed NKK to report variances for each product group. Petitioners argue that the overall steel division variance is not a reliable substitute for the product group-specific variances requested by the Department, noting the difference in variances for each of the manufacturing facilities. Petitioners estimated the variances for a product group other than the NKK-selected product group and assert that neither the overall steel division variance nor the selected product group variance can substitute for the individual product group variances.

Petitioners argue that in *Antifriction Bearing (Other than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews,* (''*Antifriction Bearings*'') 60 FR 10900, 10928 (1995), the Department rejected respondent's use of plant-wide variances instead of more specific variances because it resulted in unreasonable cost shifting between products. Petitioners contend that, in this case, NKK's proposal to use the variance for the entire steel division, which incorporates more than one plant, is distortive. Petitioners contend that NKK's use of either the selected product group or the steel division variance leads to unreasonable cost shifting. Petitioners allege that NKK had the ability to report product group-specific variances but refused to do so.

NKK argues that the Department reviewed the variance calculation in detail at verification and noted no particular problems in the cost verification report with respect to the variance calculation or methodology. NKK contends that the Department reconciled the reported costs to the overall cost in the accounting records and that if there were any serious distortions one would have expected to find discrepancies in the reconciliation exercise.

NKK asserts that it could not have reported product-group-specific variances as petitioners contend. NKK claims that the variances it tracks in the ordinary course of business have no detail that would allow it to calculate separate variances, for example, for high carbon hot-rolled steel and for regular carbon hot-rolled steel. NKK contends that there is no need to do so and that it does not do so in the ordinary course of trade.

NKK asserts that it developed the most specific variance that it could for the hot rolled steel operations. NKK contends that it extracted those variances associated with the production stages leading up to finished hot-rolled steel. NKK claims that its comparison of this variance to the overall steel division variance simply shows that the disparity in variances among different steel products is relatively small and that this should be no surprise since the largest portion of the variance for both hot-rolled and downstream products usually occurs at the upstream production stages. NKK asserts that petitioners' argument about variances for different subject product groups ignores the facts on the record. NKK notes that petitioners' argument concludes that there are substantial differences between NKK's selected product group and the petitioners' example product group, when in fact the only difference is pickling. NKK claims that it is not plausible that the variances at the pickling stage alone could double the size of the overall variance.

Department's Position: We disagree with petitioners that NKK's application of variances is distortive and have continued to rely on NKK's submitted variances for the final determination. The Department's practice calls for respondents to report the most specific level of variances kept in their normal books and records. NKK, however, does not normally accumulate and allocate variances at the product group level. For the response, NKK determined variances by cost center for the production stages (*e.g.,* hot strip mill) at each of the manufacturing facilities through which the vast majority of the subject merchandise passes. NKK allocated the other variances it normally records across all products. In this case, NKK's variance methodology appears to reasonably reflect the variances applicable to the subject merchandise. Unlike the variances in *Antifriction Bearings,* NKK's reported variances are on a more specific level than the division-wide basis questioned in *Antifriction Bearings.* In addition, in *Antifriction Bearings,* the Department noted that the company did in fact maintain variances at a more detailed level than division-wide. Accordingly, we do not consider it appropriate to adjust NKK's reported variance amounts.

Comment 24: NKK's Reported Cost Extras.

Petitioners argue that NKK's use of Fukuyama's cost extras to develop the reported costs was not reasonable because they do not represent costs at the other facility.

NKK argues that it developed the most reasonable product specific costs that it could and had no choice but to work with information in its normal accounting system and those materials which it has in the ordinary course of business. NKK contends that the Department spent a great deal of time at the verification exploring the cost extras and testing the reasonableness of the only cost extras that NKK has in the ordinary course of business.

For a full discussion of this issue see the Department's April 28, 1999 Memorandum to Neal Halper, Acting Director, Office of Accounting, *Cost of production (''COP'') and constructed value (''CV'') Calculation Memorandum for Final Determination,* (''Final NKK Cost Calculation Memorandum'').

Department's Position: We agree with NKK that the use of Fukuyama cost extras by NKK is appropriate. NKK used the information it kept in the ordinary course of business to calculate product specific costs required by the Department. We did not request that NKK provide cost extras for the second facility, nor did we determine that the presence of such data would have significantly altered the results, since the first facility's cost extras accounted for the relative difference in costs due to technical specification differences between the pinpoint product and all other products. This relative difference was applied to a base cost that already incorporated cost differences between the two facilities. We also note that the cost extras were adjusted to reflect the costs at both facilities. For a full

discussion of this issue, see the Department's April 28, 1999 *Final NKK Cost Calculation Memorandum*. We have not made any adjustments to NKK's cost extras.

Comment 25: NKK's G&A Expenses.

NKK argues that the Department should not calculate G&A expenses on a company-wide basis, but should use NKK's steel division G&A. NKK argues that the Department's questionnaire does not require a company-wide G&A rate. NKK asserts that it normally assigns G&A expense to the relevant division that incurred the expense. NKK contends that expenses incurred in other divisions, which have nothing to do with the steel production, should not be attributed to the steel division and that head office expenses which relate to the overall operations are normally allocated to each division. NKK argues that the questionnaire allows for some flexibility in responses, depending on how a company incurs and records G&A expenses, and does not mandate a fixed approach to G&A expense reporting.

NKK contends that using its division-specific G&A expense kept in the normal course of business is consistent with the Department's prior practice. Citing the *Final Determination of Sales at Less Than Fair Value: Furfuryl Alcohol From South Africa* (''*Furfuryl Alcohol From South Africa*''), 60 FR 22550, 22556 (May 8, 1995), NKK alleges that the Department focused on respondent's approach in the normal course of business. In that case, NKK asserts, the Department noted that the respondent was able to demonstrate that some G&A expenses were directly related to non-subject merchandise and that the Department excluded these unrelated G&A expenses from the G&A ratio. NKK contends that its G&A methodology is based on the same premise that only relevant expenses should be included in the G&A.

NKK also cites the *Notice of Final Determination of Sales at Less Than Fair Value: Fresh Atlantic Salmon from Chile*, 63 FR 31411, 31433 (June 9, 1998) (''*Fresh Atlantic Salmon from Chile*''), to support the argument that the Department followed the respondent's normal business practices. In that case, the respondent argued that the Department should use the reported G&A expense, which included expenses associated with an affiliated company. NKK notes that the Department rejected this approach and used only those expenses related to the responding salmon company, as recorded in the respondent's normal books and records. NKK argues that its approach is consistent with this decision, and states that the fact that business units are organized as divisions rather than ''legally separate'' affiliated companies should not matter. NKK contends that it makes no sense to ignore existing distinctions in G&A expenses between steel production and other business activities and that the narrowest category recorded in the respondent's accounting records should be used.

Petitioners argue that it is the Department's long-standing practice to calculate G&A expenses using a company's audited, unconsolidated financial statements. As support for their position, petitioners cited the *Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Round Wire from Canada* (''*Stainless Steel Round Wire from Canada*''), 64 FR 17324, 17333 (April 9, 1999) and several other cases in which the Department followed this long-standing practice.

Petitioners contend that the *Fresh Atlantic Salmon from Chile* case cited by NKK is not consistent with NKK's argument that G&A expenses of other divisions should be excluded from respondents' G&A. Petitioners argue that the Department's determination in that case was to exclude expenses incurred by an affiliate and use the respondent's audited, unconsolidated financial statements.

Department's Position: We disagree with NKK that G&A expenses should be based on NKK's Steel Division G&A rather than on company-wide G&A. G&A expenses by their nature are indirect expenses incurred by the company as a whole. If they directly related to one process or product, they would more appropriately be considered manufacturing costs. NKK provided no specific reasons as to why its normal method of allocation of G&A to different divisions is more reasonable than the Department's normal method. It is the Department's consistent practice to calculate G&A expenses based on the producing company as a whole and not on a divisional or product-specific basis. *See Stainless Steel Round Wire from Canada; Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Wire Rod from Sweden*, 63 FR 40449, 40459 (July 29, 1998) and *Fresh Atlantic Salmon from Chile*, 63 FR at 31433. This approach recognizes the general nature of these expenses and the fact that they relate to the company as a whole and is consistent with GAAP treatment of such period costs. The Department's methodology also avoids any distortions that may result if, for business reasons, greater amounts of company-wide general expenses are allocated disproportionally between divisions. We consistently apply this methodology, unless the respondent provides case-specific facts that clearly support a departure from our normal practice of allocating company-wide G&A expenses over company-wide cost of sales. This approach is both reasonable and predictable. To allow a respondent to choose between the Department's normal method and an alternative method simply because one method results in a lower rate, would be a results oriented approach.

The Department's calculation of G&A expenses in the *Furfuryl Alcohol from South Africa* case was specific to the facts of that case. As noted above, we believe that the facts of this case warrant continuing to follow the Department's long-standing practice of calculating G&A expenses on a company-wide basis.

In the *Fresh Atlantic Salmon from Chile* case cited by NKK, we followed our normal practice of calculating the G&A expense rate based on the respondent's unconsolidated operations. The determination in that case was to exclude an affiliated company's G&A not to exclude G&A expenses of a different division as being unrelated to producing the subject merchandise. Moreover, we disagree with NKK's assertion that there is no distinction between a division and a stand alone affiliated company. Divisions may exist in name only or may have some autonomy, but they are controlled by the greater company. Affiliated companies are separate legal entities and as such require complete administration structures. In this case, NKK's divisions are not separate entities but merely separate business units within a single corporation. Thus, we have calculated G&A expenses based on NKK's unconsolidated company-wide G&A for the final determination.

Comment 26: NKK's Blast Furnace Costs.

NKK argues that the Department improperly included the loss from a blast furnace accident in G&A. NKK asserts that, consistent with prior Department practice, the Department should exclude the blast furnace losses as an extraordinary expense. NKK contends that this accident meets the standard for extraordinary treatment affirmed by the Court of International Trade in *Floral Trade Council of Davis, California* v. *United States*, (''*Floral Trade Council*'') 16 CIT 1014, 1016–17 (CIT 1992), because an accident such as this is ''unusual in nature and infrequent in occurrence.''

NKK argues that the blast furnace accident was ''unusual in nature'' because record evidence demonstrates that NKK has never had a blast furnace

accident in its history. NKK claims that, in past cases where the Department has excluded extraordinary expenses from the cost of production, an unforeseen and abnormal event occurred which was beyond management's control. NKK cited the following cases for the Department's practice with regard to the frequency with which the event occurred: *Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Wire Rod from Taiwan,* 63 FR 40462 (July 29, 1998), *Notice of Final Determination of Sales at Less Than Fair Value: Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, From Japan,* 61 FR 38139, 38153 (July 23, 1996) and *Final Determination of Sales at Less Than Fair Value: Fresh Cut Roses from Ecuador,* 60 FR 7019, 7038 (February 6, 1995). NKK argues that the blast furnace accident was unforeseen and beyond its control; otherwise it would have performed the necessary repairs to prevent the accident from occurring.

NKK argues that the blast furnace accident was also ''infrequent in occurrence.'' NKK contends that the Court explained in *Floral Trade Council* that ''an event is ''infrequent in occurrence'' if it is not reasonably expected to recur in the foreseeable future.'' NKK asserts that these are the facts in this case because NKK has never before had a blast furnace accident.

NKK also claimed that it properly treated the blast furnace accident as a non-operating expense in its audited financial statements. NKK argues that the Department's standard practice is to use costs as they are reported in the respondent's financial statements. NKK argues that it reported the losses resulting from the blast furnace accident as non-operating expenses in the financial statements that were completed and audited before the initiation of this antidumping investigation. NKK contends that its treatment of the blast furnace accident as a non-operating expense was in accordance with standard Japanese GAAP.

Petitioners argue that the Department correctly included certain losses related to the blast furnace accident in NKK's G&A. Petitioners assert that these losses do not qualify as extraordinary expenses. Petitioners contend that a breakdown in the blast furnace is not unusual in nature because it is not highly abnormal, unrelated nor incidentally related, to the manufacture of steel. Petitioners argue that only in rare situations will an event occur that meets both the ''infrequent in occurrence'' and ''unusual in nature'' criteria. Petitioners cited *Notice of Final Determination of Sales at Less Than Fair Value: Certain Preserved Mushrooms from India,* 63 FR 72246 (December 31, 1998) and *Notice of Final Determination of Final Determination of Sales at Less Than Fair Value: Static Random Access Memory Semiconductors from Taiwan,* (''*SRAMS from Taiwan*''), 63 FR 8909 (February 23, 1998) to demonstrate the type of events the Department determined were not unusual in nature. Petitioners contend that while blast furnace accidents may be infrequent, they are by no means ''unusual'' in occurrences in the steel industry. Therefore, petitioners argue that the Department should include the losses related to the blast furnace accident in NKK's G&A expenses.

Department's Position: We disagree with NKK that the loss from the blast furnace accident should be treated as an extraordinary expense. As noted in Floral Trade Council, an extraordinary event is both ''unusual in nature and infrequent in occurrence.'' NKK argues that the blast furnace accident was unusual in nature and infrequent in occurrence because this was the first blast furnace accident in NKK history. We disagree with NKK's assertion that this accident is unusual in nature. Like other steel producers, NKK performs regular maintenance and repairs of its blast furnaces in hopes of preventing accidents and loss of operation. While NKK may not have experienced a blast furnace accident in the past, industrial accidents are neither unusual nor unforeseen for steel producers. Furthermore, as NKK itself notes, it classified the loss due to the blast furnace accident in its audited financial statements as a non-operating expense and not an extraordinary loss. As in the Department's determination in the *SRAMS from Taiwan,* we have included the loss incurred as a result of the blast furnace accident in the G&A expenses for the final determination.

KSC

Comment 27: KSC's Affiliated Input Costs.

Petitioners argue that the Department should adjust KSC's reported materials costs for iron ore and coal purchased from affiliated parties at below-market prices. Petitioners note that KSC purchased iron ore and coal from affiliated and non-affiliated parties during the period of investigation (''POI'') and that, on average, the price paid to affiliated parties for these inputs was lower than the price paid to non-affiliated parties. Petitioners argue that section 773(f) (2) and (3) of the Act require such purchases to be valued at the higher of market prices, transfer price or the affiliated supplier's cost of production. Petitioners note that documentation provided by KSC demonstrates that its affiliated supplier's transfer price was lower than the market price paid to unaffiliated trading companies for the same materials. Petitioners also note that none of the schedules submitted by KSC makes references to any price differentiation by grade or time of purchase. Petitioners assert that it is the respondent's burden to show whether any adjustments to the transfer price or market price are necessary before a comparison may be made and cites to Department precedent in *Certain Corrosion-Resistant Carbon Steel Flat Products and Certain Cut-to-Length Carbon Steel Plate from Canada: Final Results of Antidumping Duty Administrative Reviews and Determination To Revoke in Part,* 64 FR 2173, 2181–82 (January 13, 1999) (''*Steel from Canada*''). Since KSC has failed to meet this burden, petitioners argue, the Department must increase the affiliated supplier's transfer price to reflect the market value of iron ore and coal.

KSC argues that the Department should reject petitioners' request to adjust KSC's purchase price of iron ore and coal inputs through an affiliated party. KSC claims that the Department's verification report and the petitioners' analysis do not reflect the fact that there are price differences between various grades and types of iron ore and coal, and that its purchases were made at different times over the course of the POI. If these grade and timing differences are considered, KSC argues, then the price paid to the affiliated suppliers is virtually the same as that paid to the non-affiliated suppliers. KSC claims that since it does not purchase all types of iron ore and coal in consistent proportions from both affiliated and non-affiliated parties, the overall POI-average price does not provide for a valid comparison. KSC asserts that a cost verification exhibit offers a breakdown of input prices by commodity code, which demonstrates that prices paid to affiliated suppliers and unaffiliated suppliers are virtually the same when compared by grade. KSC notes that in many instances the price charged by the affiliated supplier is higher than the price charged by an unaffiliated supplier, while in other cases it is lower. KSC also claims that the Department's sample comparisons of identical grades on nearly the same date show nearly identical prices being

charged by affiliated and unaffiliated suppliers. KSC argues that this comparison confirms that the overall average prices of all grades over the entire year was not a valid indicator of arm's length pricing between KSC and its affiliated supplier.

Department Position: We agree with petitioners. KSC submitted a schedule which demonstrates that, on average, its POI purchases of iron ore and coal from affiliated parties were made at lower prices than its purchases from non-affiliated parties. KSC did not submit sufficient information to support its contention that timing differences and grade differences have an impact on the comparison of iron ore and coal prices and, therefore, we were not able to perform a more detailed analysis. At verification we reviewed a list of iron ore and coal prices by commodity code and noted, as KSC acknowledges, that the prices from affiliated suppliers were often lower than prices charged by unaffiliated suppliers. Since there is sufficient evidence on the record that purchases from affiliated parties were made at below-market prices, we believe that a comparison of the POI average prices is appropriate and does not distort our analysis. Therefore, in accordance with section 773(f)(2) of the Act, we have adjusted the cost of materials to reflect the market values of iron ore and coal, based on the prices charged by unaffiliated suppliers.

Comment 28: KSC's G&A Expenses.

In reporting G&A expenses, KSC argues that it properly excluded its expenses for special retirement expenses and losses on the sale of fixed assets used for production of non-subject merchandise. KSC notes that the special retirement expenses are one-time severance payments to transferred employees. KSC states that these expenses are incurred in more than one year to the extent that downsizing of operations is not completed in a single year, but the expense is a one-time event for the particular employees transferred during a particular year. KSC claims that since these expenses are not related to the current production of the company and are considered an extraordinary expense under Japanese GAAP, they should be excluded from G&A expenses. With regard to the losses on sale of fixed assets, KSC cites to *Fresh Atlantic Salmon From Chile,* 63 FR at 31436, in which the Department noted that losses on the sale of fixed assets are not included in G&A expenses when the assets in question are tied to the production of non-subject merchandise. KSC also cites the following cases as examples of Department practice on this issue: *Brass Sheet and Strip from Canada; Final Results of Antidumping Duty Administrative Review,* 61 FR 46618, 46619–20 (September 4, 1996); *Certain Hot-Rolled Lead and Bismuth Carbon Steel Flat Products From the United Kingdom; Final Results of Antidumping Duty Administrative Review,* 60 FR 44009, 44012 (August 24, 1995) (''Lead and Bismuth''), *Final Determination of Sales at Less Than Fair Value: Furfuryl Alcohol From South Africa,* 60 FR 22550, 22556 (1995) (''Furfuryl Alcohol''), *Final Determination of Sales at Less Than Fair Value: Certain Carbon and Alloy Steel Wire Rod from Canada,* 59 FR 18791, 18795 (April 20, 1994) (''Steel Wire Rod''). KSC asserts that these cases provide examples of instances where the Department has recognized that expenses relating exclusively to the production of non-subject merchandise should not be included in the G&A expenses of subject merchandise. In the instant case, KSC claims that the Department should exclude the losses referred to above because they relate to assets which were used solely for the production of non-subject merchandise.

Petitioners argue that the Department normally calculates G&A expenses based on the respondent's unconsolidated operations, which include the operations of each of the respondent's divisions. *See, e.g., Notice of Final Determination of Sales at Less Than Fair Value—Stainless Steel Round Wire from Canada,* 64 FR 17324, 17333 (April 9, 1999). Petitioners also assert that KSC has not established on the record that the losses on the sale of fixed assets relate solely or exclusively to the production of non-subject merchandise. With regard to the expenses on special retirement payments, petitioners argue that expenses relating to the termination, transfer or early retirement of employees in a downsizing event are neither unusual nor infrequent for the steel industry, and therefore cannot be classified as extraordinary expenses. Petitioners add that the fact that KSC incurred special retirement expenses in 1996, 1997 and 1998 is further evidence that these expenses are not extraordinary under U.S. GAAP, and therefore should be included in the calculation of KSC's G&A expense rate.

Department's Position: We agree with petitioners and, as in the preliminary determination, we have included the special retirement and losses on sales of fixed assets in our calculation of KSC's G&A expense rate. The expenses for special retirement are severance costs that are recorded as part of KSC's ongoing downsizing operations. The Department's normal practice is to include severance costs in a company's G&A expenses. *See, e.g., Notice of Preliminary Determination of Sales at Less Than Fair Value: Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Brazil,* 64 FR 8299, 8305–8306 (February 19, 1999) and *Notice of Final Results and Partial Rescission of Antidumping Duty Administrative Review: Certain Pasta From Turkey,* 63 FR 68429, 68434 (December 11, 1998). We noted at verification that these downsizing activities have resulted in recurring expenses for KSC. The fact that the process may extend over multiple years does not preclude the use of current period expenses. KSC has recognized in its audited financial statements the expense related to the current fiscal year, and it is this period cost which we have included in KSC's G&A expenses. Also, even though the classification of these amounts as extraordinary expenses under Japanese GAAP. The Department does allow for the exclusion of extraordinary expenses under certain circumstances, but these severance amounts do not fall into this category. The Department normally will exclude costs considered extraordinary, provided that they are both unusual in nature and infrequent in occurrence. These expenses for special retirement cannot be considered infrequent in occurrence since they have been a recurring cost for KSC and, therefore, should be included in G&A expenses along with other period costs. *See Silicomanganese From Brazil: Preliminary Results of Antidumping Administrative Review,* 62 FR 1320, 1322 (January 9, 1997).

With regard to the losses on sale of fixed assets, we verified that the assets in question relate to the production of non-subject merchandise. However, it is our practice to calculate G&A expenses using the operations of the company as a whole. *See, e.g., Brass Sheet and Strip* at 46619, *Circular Welded Non-Alloy Steel Pipe and Tube From Mexico: Final Results of Antidumping Duty Administrative Review,* 63 FR 33041, 33050 (June 17, 1998). As we stated in the original questionnaire issued to KSC, ''G&A expenses are those period expenses which relate indirectly to the general production operations of the company rather than directly to the production process for the subject merchandise* * *'' Therefore, any income or expense incurred through KSC's disposition of fixed assets should be included in the G&A expense rate, regardless of whether they are used purely for the production of subject merchandise or non-subject

merchandise. This policy was established in *Final Determination of Sales at Less Than Fair Value: New Minivans from Japan*, 57 FR 21937, 21943 (May 26, 1992) (''Minivans''). In that case, the Department stated, ''we generally consider disposal of fixed assets to be a normal part of a company's operations and have included, therefore, any gains or losses generated by these transactions in the cost of production calculation.'' (emphasis added) This is consistent with our treatment of miscellaneous expenses in *U.S. Steel Group et al* v. *United States*, 998 F. Supp. 1151, 1153–54 (CIT 1998). We note also that KSC incurred losses on sale of fixed assets related to the production of subject merchandise and these losses were included in G&A expenses and allocated over the cost of all products that KSC produced.

In the *Fresh Atlantic Salmon from Chile* case cited by KSC, the issue was whether or not to treat temporary shutdown costs as period costs, or G&A expenses, that would normally be allocated over the cost of all products. The Department determined that the facilities in question were only idle for a brief period of time and therefore the costs associated with the temporary shutdown should not be treated as G&A expenses. Rather, the costs of operating the facility were charged directly to the cost of manufacturing for the non-subject products produced in the facility. The Department did not, as KSC implies, specifically exclude the shutdown costs from the G&A expense calculation because the facility did not produce subject merchandise. KSC's reliance on to *Brass Sheet and Strip* and *Steel Wire Rod* is similarly misplaced. The issue in these cases was whether to include in a respondent's G&A expenses certain costs that were incurred by a parent company or a subsidiary. The cites are not on point since the instant case involves equipment that was owned by KSC itself and, as noted above, the Department calculates G&A expenses based on the operations of the respondent, as a whole. Expense incurred by a parent company, or any other affiliated company, are only included in the G&A expense calculation to the extent of the support provided by the parent or affiliated company. KSC's reliance to *Lead and Bismuth* is also misplaced, since the respondent in that case closed an entire facility that only produced non-subject merchandise and then excluded these closure costs from the G&A expense rate calculation. In the instant case, KSC simply disposed of assets and, as noted above in *Minivans*, the Department's policy is to include in G&A all gains or losses generated by such disposals. The respondent in *Furfuryl Alcohol* calculated separate G&A expense rates by division and a company-wide G&A expense rate for G&A expenses that related to the operations of the company as a whole. Here, KSC submitted a single G&A expense rate for the entire company and only included its losses on sale of fixed assets related to subject merchandise. It would not be appropriate or reasonable to allocate these losses over the cost of producing all products, while specifically excluding losses on sale of fixed assets used for non-subject production. Since the sale of fixed assets is a general activity of the company, and not specifically related to production, we have allocated all losses on the sale of fixed assets over the cost of producing all products.

Facts Available

Comment 29: Use of Facts Available for NSC's Theoretical Weight U.S. Sales.

NSC characterizes as an inadvertent mistake the fact that, in its response to the initial questionnaire, NSC stated that a theoretical weight to actual weight conversion factor could not be supplied because coils sold on a theoretical basis are never weighed. Respondent states that it believed this statement to be true at the time of filing. NSC argues that it corrected this error within the Department's time limits for submitting new information. In the alternative, NSC argues that the conversion data it presented constitutes a minor correction. Thus, the Department should have accepted the information under the minor corrections rule. NSC states that the Department never rejected the filings containing the corrections as untimely, and therefore abused its discretion by refusing to verify this information and by applying adverse facts available to the affected sales. NSC also argues that to reject the information now would severely prejudice NSC's rights, that this information meets the criteria set forth in section 782(e) of the Tariff Act and, thus, that the Department must consider this information in calculating a margin for NSC. Finally, NSC argues that the Department incorrectly applied an adverse inference in the preliminary determination regarding the theoretical-actual conversion factor, because it did not first find that NSC had not acted to the best of its ability to provide this information to the Department. To the contrary, NSC argues its responses to the Department's requests for information establish a pattern of cooperation and accuracy.

NSC further states that it was placed under extreme time pressures in attempting to comply with the Department's accelerated schedule in this investigation, and that this contributed to NSC's failure to identify the mistake regarding the weight conversion factor.

NSC states that it realized in preparing for verification that all hot-rolled coils are weighed during the production process, and that these actual weight data are recorded at the production facilities. NSC adds that the production databases do not overlap with the sales databases at NSC's headquarters. NSC stated it obtained the actual weight information, calculated a conversion factor and submitted this information to the Department on February 22, 1999, prior to both the cost and sales verifications. NSC also states that it filed additional information on this subject on March 1, 1999.

NSC disagrees with the Department's statement in the *Preliminary Determination* (February 19, 1999) that NSC had ''refused'' to provide a conversion factor. NSC argues that this statement baselessly implies that NSC intentionally withheld information, whereas, it claims, the record shows that NSC cooperated fully but committed an inadvertent error in its initial questionnaire response.

NSC states that the Department took no action to remove the conversion factor from the record, and included in the verification agenda an instruction that NSC explain how its production and sales systems capture actual weight. NSC alleges that at verification, ''Department representatives repeatedly assured NSC that the theoretical weight conversion factor would be verified. Those assurances notwithstanding, NSC claims, the Department abruptly informed it approximately two hours before the end of verification that ''Washington'' had directed that the conversion factor not be verified. The Department also refused to allow NSC's representatives to even explain the background of its initial mistake. The reasons for those decisions have never been disclosed on the record and the verification report was silent on theoretical weight.'' *NSC Brief* at 16. NSC concludes that the Department's failure to verify this issue was unwarranted and unexplained.

NSC further argues that (1) its correction was submitted more than seven days prior to verification, (2) the conversion factor is not a substantial revision to NSC's response, but is similar to the type of corrections

allowed by the Department on the first day of or during verification and (3) the Department had adequate time to analyze the conversion factor prior to verification.

NSC cites § 351.301(b)(1) of the Department's regulations, which states that in an investigation, the time limit for submitting factual information is no later than seven days before the commencement of verification. NSC argues that it is the Department's practice to allow respondents to amend questionnaire responses to correct limited errors within this period, and to verify the accuracy of this information at verification, and use the corrected data. *See, e.g., Porcelain-on-Steel Cooking Ware from the People's Republic of China; Final Results of Administrative Review,* 62 FR 32757, 32,759 (June 17, 1997); *Notice of Final Determination of Sales at Less than Fair Value: Certain Partial-Extension Steel Drawer Slides from the People's Republic of China,* 60 FR 54472 (October 24, 1995); *Notice of Determination of Sales at Not Less than Fair Value: Stainless Steel Bar from Italy,* 59 FR 66921, 66926 (December 28, 1994). *See also Final Determination of Sales at less than Fair Value: Certain Corrosion-Resistant Carbon Steel Flat Products from Australia,* 58 FR 37079, 37081 (July 9, 1993). NSC acknowledges that the Department has rejected timely submissions which are substantial revisions of previously submitted data or attempts to respond to a questionnaire for the first time. *See, e.g., Koenig & Bauer-Albert AG* v. *United States,* 15 F. Supp. 2d 834, 847 n.6 (CIT 1998); *Final Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Steel From the People's Republic of China,* 62 FR 61964, 61987 (November 20, 1997). NSC argues, however, that because submitting its conversion factor is not comparable to submitting a substantial quantity of new information, and because it answered the questionnaire (albeit incorrectly as to this point) within the questionnaire deadline, it properly corrected its response by submitting the correction within the terms of the seven-day rule.

NSC argues that the Department accepts minor corrections even when the correcting submissions are untimely filed. *See Bowe-Passat* v. *United States,* 17 CIT 335, 337–8 (1993). NSC asserts that it is the Department's practice to allow respondents to make minor revisions to or to supplement questionnaire responses after the preliminary determination, both prior to and during verification. *See, e.g., Final Determination of Sales at Less than Fair Value: Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany,* 54 FR 18992, 19034 (May 3, 1989); *Notice of Final Determination of Sales at Less than Fair Value: Certain Pasta from Italy,* 61 FR 30326, 30352 (June 15, 1996); *Notice of Final Determination of Sales at Less than Fair Value: Certain Cut-to Length Carbon Steel Plate from the Russian Federation,* 62 FR 61787, 61789 (November 19, 1997); *Notice of Final Determination of Sales at Less than Fair Value: Certain Freshwater Crawfish Tail Meat from The People's Republic of China,* 62 FR 41347, 41356 (August 1, 1997); *Usinor Sacilor* v. *United States,* 872 F. Supp. 1000, 1008 (CIT 1994). NSC argues that the Department has allowed this type of revision where the correction is limited and the corrected information is submitted early enough to allow adequate time for the Department to analyze the revision. NSC argues that its correction, which affects only a limited number of its U.S. sales, qualifies as a minor correction.

NSC states that the timing of its correcting submissions allowed the Department and petitioner adequate time to review its changes. *See Brother Indus. Ltd.* v. *United States,* 771 F. Supp. 374, 383–84 (CIT 1991); *Final Determination of Sales at Less than Fair Value; Steel Wire Rope from Korea,* 58 FR 11029, 11031 (February 23, 1993); *Antidumping: Circular Welded Carbon Steel Pipes and Tubes from Thailand; Final Determination of Sales at Less than Fair Value,* 51 FR 3384, 3386 (January 27, 1986).

NSC states, furthermore, that its conversion factor is so simple that there was no analysis that the Department or petitioners could have performed on it, and therefore the petitioner suffered no disadvantage or prejudice from NSC's submission of the conversion factor prior to verification. NSC adds that it would not have been difficult for the Department to incorporate the factor into the margin calculation. NSC also argues that use of its conversion factor, rather than use of facts available, contributes to the accuracy of the record on which the margin is calculated—a goal of the antidumping statute. *See Rhone-Poulenc, Inc.* v. *United States,* 899 F.2d 1185, 1191 (Fed. Cir. 1990).

NSC argues that, if the Department believed that the submissions containing its conversion factor were untimely, the Department was required under § 351.301(c) and 351.302.(d) of its regulations to reject and return the submissions to NSC with written notice stating the reason for the return. *See Koenig & Bauer-Albert AG* v. *United States,* 15 F. Supp. 2d at 847 n.6 (CIT 1998); *Kerr-McGee Chem. Corp.* v. *United States,* 955 F. Supp. 1466, 1469–70 (CIT 1997); *Usinor Sacilor* v. *United States,* 872 F. Supp. 1000, 1007 (CIT 1994); *Gray Portland Cement and Clinker from Mexico; Final Results of Antidumping Duty Administrative Review,* 64 FR 13148, 13153 (March 17, 1999); *Final Determination of Sales at Less than Fair Value: Certain Cut-to-Length Steel Plate from the People's Republic of China,* 62 FR 61964, 61985 (November 20, 1997). Because these submissions were on the record at the time of verification, NSC states that the Department could not refuse to verify the conversion factor. NSC also states that the Department would prejudice the rights of parties by removing information from the record without following the procedures established in the regulations, since the record serves as the basis for the parties' arguments before the Department or in a subsequent appeal. *See Kerr-McGee Chem. Corp.* v. *United States,* 955 F. Supp. 1466, 1472 (CIT 1997).

NSC also notes that the Department has broad discretion in choosing to accept untimely filed information onto the record, and thus the parties must rely on the Department's notice of rejection to determine the status of each submission. *See Bowe-Passat* v. *United States,* 17 CIT at 338 (1993). Thus, NSC argues that to reject the information now would deprive it of the opportunity to respond to the Department's rationale for rejecting the submission, and to demonstrate that the conversion factor could have been easily derived, which will prejudice NSC by leading to the continued use of facts available.

NSC argues that if, notwithstanding the above arguments, the Department wishes to resort to use of the facts available as to this issue, pursuant to section 776(a)(2)(B) of the Act (19 U.S.C. § 1677e(a)(2)(B)), because NSC did not submit its conversion factor within the questionnaire deadlines, the Department must also consider the provisions of 782(e) of the Tariff Act (19 U.S.C. § 1677m(e)). *See* 19 U.S.C. § 1677(e)(a)(2)(B); *Borden, Inc.* v. *United States* (''*Borden*''), 4 F. Supp. 2d 1221, 1244–45 (CIT 1998). NSC argues that the conversion factor submission meets the criteria set forth in § 1677m(e) (*i.e.,* it is complete, capable of being verified, capable of being used without undue difficulty, provided by NSC acting to the best of its ability, and submitted within the deadline established for its submission) and thus is appropriate for use in the final determination.

NSC argues that its submission was timely because ''in the context of § 1677m(e)(1), the 'deadline' cannot be

interpreted as the due date for the initial or supplemental questionnaires because such an interpretation would nullify the express reference to § 1677m(e) in § 1677e(a)(2)(B).'' *NSC Brief* at 31. NSC argues that untimely information can still be considered for a final determination, provided that it meets the requirements set out in § 1677m(e). NSC states that the reference to a ''deadline'' in § 1677m(e) should be interpreted as compliance with the seven-day rule or the minor error rule, and thus NSC's conversion factor should be used in the final determination.

The Department, according to NSC, may rely on information it does not examine at verification. *See Floral Trade Council* v. *United States,* 822 F. Supp. 766, 722 (CIT 1993); *Micron Tech., Inc.* v. *United States,* 117 F.3d 1386, 1396 (Fed. Cir. 1997); *Certain Cut-to-Length Carbon Steel Plate from Germany: Final Results of Antidumping Duty Administrative Review,* 61 FR 13834, 13840 (1996). Moreover, NSC argues, there is no reason to doubt the accuracy of its conversion factors given the accuracy of other NSC information demonstrated at verification.

NSC argues that, in the *Preliminary Determination,* the Department did not make the requisite finding under section 776(b) of the Tariff Act (19 U.S.C. § 1677e(b)) and 19 C.F.R. § 351.308.(a) that NSC had failed to cooperate to the best of its ability; instead, it found only that NSC had not provided the conversion factor requested. Therefore, NSC argues, the Department was not justified in using an adverse inference in selecting facts available to apply to the affected sales. *See Ferro Union, Inc.* v. *United States,* Ct. No. 97–11–01973, Slip Op. 99–27, 1999 CIT LEXIS 24, at *54 (March 23, 1999); *D&L Supply Co.* v. *United States,* Ct. No. 92–06–00424, Slip Op. 98–81, 1998 CIT LEXIS 79, at *4 (June 22, 1998). *See also Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products from Korea: Final Results of Antidumping Duty Administrative Reviews,* 64 FR 12927, 12947 (Mar. 16, 1999). NSC states that this two-part process the Department must undertake before using an adverse inference differs from the Department's former BIA standard under prior law. *See Antidumping Duties; Countervailing Duties: Proposed Rule,* 61 FR 7308, 7327 (1996).

NSC argues that the Department may only apply an adverse inference if the Department determines that a party's failure to provide information is ''deliberate.'' *See Preamble to Proposed Rule,* 61 FR at 7328; *Borden Inc.* v. *United States,* 4 F. Supp. 2d at 25 (CIT 1998); *Ferro Union Inc.* v. *United States,* 1999 CIT LEXIS 24, at *7. NSC states that the Department refused to verify the circumstances surrounding NSC's failure to provide the actual weight data, although NSC sought to have it do so. NSC contends that the Department cannot prevent inclusion on the record of information relating to whether its initial failure to provide these data was deliberate, and then conclude that it was unwilling to provide the data. *See Usinor Sacilor* v. *United States,* 872 F. Supp. 1000, 1007 (CIT 1994).

NSC also states that the record as a whole evidences its extraordinary level of cooperation. NSC states that the Department cannot hold NSC to the ''standard of perfection'' that it appears to have applied in the preliminary determination (*see NTN Bearings Corp.* v. *United States,* 74 F.3d 1204, 1208 (Fed. Cir. 1995)), and that the selection of adverse facts available was improper given the minor adjustment in data involved (see Usinor Sacilor v. *United States,* 872 F. Supp. 1000,1007 (CIT 1994)). NSC argues that the Department should not treat a respondent that simply errs the same way it treats a respondent that refuses to reply to part or all of a questionnaire.

NSC argues that the rate assigned to it in the *Preliminary Determination* was punitive, and that antidumping law prohibits imposing punitive duties, calling instead for remedial measures. *See NTN Bearings Corp.* v. *United States,* 74 F.3d 1204, 1208 (Fed. Cir. 1995). For this reason, NSC contends, in choosing the ''facts available,'' the Department must, at a minimum, select margins that are ''nonaberrant,'' and not abnormal. *See National Steel Corp.* v. *United States* (''*National Steel I*''), 870 F. Supp. 1130, 1134–37 (CIT 1994). NSC argues that it is a Department policy upheld by the court that a margin used as facts available must correspond to a substantial commercial quantity of a respondent's sales that fall within the mainstream of that respondent's sales. *See National Steel Corp* v. *United States* (''National Steel III''), 929 F. Supp. 1577, 1579–80 (CIT 1996). NSC argues that the margin the Department used in the *Preliminary Determination* for the sales affected by this issue was the highest possible, and that therefore it is ''aberrant.'' Finally, NSC argues that the extent of increase in the total margin as a result of this issue constitutes an impermissible penalty.

Petitioners argue that NSC's case brief and letters submitted after the *Preliminary Determination* regarding the theoretical-actual weight conversion factor amount to admissions that NSC did not act to the best of its ability in responding to the Department's questionnaires and did not provide information in a timely manner. Petitioners point out that NSC stated that in preparing its responses, it failed to check the records at the manufacturing facilities, despite two Department requests for information maintained there. Petitioners argue that NSC's failure to cooperate to the best of its ability warrants using adverse inferences.

Petitioners stated that NSC's arguments that its post-*Preliminary Determination* submissions regarding the conversions factor were timely under the seven-day rule ignore 19 CFR § 351.301(c)(2), which authorizes the Department to set time limits for questionnaire responses, and 19 CFR § 351.302(d), which authorizes the Department to return untimely filed questionnaire responses. Petitioners note that the Department cited § 351.302(d) in its supplemental questionnaire issued on January 4, 1999. Petitioners contend that, under 19 CFR § 351.301(c)(2), the seven-day rule does not apply in these circumstances.

Petitioners state that, because NSC indicated that it would not and could not provide this data, and because the Department did not request it again, the time for submitting new information other than specific corrections had passed. For these reasons, petitioners argue that the Department was authorized to use facts available. *See Cut-to-Length Steel from the People's Republic of China,* 62 FR 61964, 61987 (November 20, 1997) (''*Steel from China*'').

Petitioners state that the cases cited by NSC at pages 17 and 18 of its case brief are off point, because the respondents in those cases sought to correct minor errors prior to verification. Petitioners argue that, in the instant case, NSC is seeking to present new information which contradicts earlier statements that the information did not exist. Petitioners argue that *Steel from China,* also cited in NSC's brief, is on point, in that the Department rejected information a respondent had previously failed to provide in a questionnaire response.

Petitioners also argues that even under the seven-day rule, the conversion submission was untimely filed. Petitioners then argue that NSC's three post-*Preliminary Determination* submissions reveal that NSC did not make a reasonable inquiry to obtain the weight conversion information in response to the Department's questionnaires. For this reason, petitioners argue that NSC's case brief argument regarding the Department's

failure to verify the information it submitted after the preliminary determination is out of place and without merit. Finally, petitioners argue that NSC incorrectly characterized its submission of the conversion information as a minor correction. Petitioners state that NSC's submission attempted to supply new information it had previously characterized as unattainable and nonexistent. This type of information, petitioners argue, is not eligible for untimely admission. Petitioners argue that the Department acted correctly and should continue to use adverse inferences in the final results.

Petitioners argue that all NSC information relating to the weight conversion factor was submitted after the questionnaire deadlines and was therefore untimely filed. Petitioners argue that under section 776(a)(2) of the Tariff Act (19 U.S.C. § 1677e(a)(2)), the Department was justified in rejecting this information and applying facts available. Petitioners add that the statute mandates the use of facts available in these circumstances, and that to refrain from using facts available would run contrary to the intent of the law, which is to encourage compliance with the Department's questionnaires. *See SAA* at 868.

Petitioners also argue that NSC's claim that the Department improperly rejected its weight conversion factor is without merit. Petitioners state that, contrary to NSC's position, the seven-day rule does not apply to the correlation submissions, since it does not serve to extend the established deadlines for responses to the Department's questionnaires. *See* 19 C.F.R. § 351.301(b) and (c). The information NSC attempted to submit, petitioners argue, was the subject of a specific request in a Department questionnaire and was not provided by the deadline set in that questionnaire.

Petitioners also rebut NSC's argument that its weight conversion information was properly submitted as a minor correction. Petitioners state that NSC's submission does not meet the standard for minor corrections established in *Titanium Sponge from the Russian Federation,* 61 FR 58525, 58531 (November 15, 1996). According to petitioners, the information NSC submitted was not a correction to anything, but was instead information supplied for the first time after being repeatedly withheld.

Petitioners state that NSC improperly relied on section 782(e) of the Act (19 U.S.C. § 1677m(e)) (the Department ''shall not decline to consider information that is submitted by an interested party'') because NSC did not submit its weight conversion information within the deadlines established in the Department's questionnaires, and failed to act to the best of its ability to comply with the Department's requirements for supplying this information. *See Borden,* 4 F. Supp. 2d at 1245. Petitioners note that NSC stated in its original questionnaire response that, despite the Department's request, the factor was unnecessary, and stated in its supplemental questionnaire response that it could not calculate a factor, when in fact the required information was within its records. Petitioners also point to NSC's statement that the conversion factor was ''hardly the most pressing issue for NSC's staff'' when preparing its response. *See NSC Brief* at 13. Petitioners conclude that the requirements of section 782(e) are not met because, if NSC had acted to the best of its ability, the information would have been timely filed and NSC would not have presented inaccurate explanations for its failure to provide this information.

Petitioners reject as irrelevant NSC's claims that its weight conversion information should be accepted because its failure to provide the data when they were originally requested was inadvertent. Petitioners state that the statute does not require the Department to determine whether a reporting failure is in good faith, and that the Department cannot excuse inaccurate responses on the grounds of ''honest mistake.'' Petitioners argue that this would undermine the Department's ability to gather information. Petitioners state that the Department's rejection of NSC's responses regarding the conversion factor as untimely was warranted under the statute and the Department's practice.

Petitioners argue that the Department properly applied adverse facts available because NSC failed to provide information under its possession and control to the Department in a timely manner. These circumstances, petitioners contend, show that NSC did not act to the best of its ability in preparing this aspect of its questionnaire response. *See Borden,* 4 F. Supp. 2d at 1246; *Ferro Union* 1999 CIT LEXIS 24, at * 55. Petitioner notes that, contrary to NSC's inference in its case brief, affirmative evidence of bad faith is not required before the Department can make an adverse inference. *See Preamble,* 62 FR at 27340.

Further, petitioners reject NSC's argument that the Department should be precluded from making an adverse inference because much of NSC's other information was timely submitted and verified. Petitioners state that use of partial facts available is appropriate in these circumstances. Petitioners state that NSC has pointed to no justification for its claim that the adverse facts available margin applied to NSC's U.S. theoretical weight sales was aberrant, and that this may constitute the best information available. *See National Steel I,* 870 F. Supp. at 1136; *accord National Steel Corporation* v. *United States* (''*National Steel II*''), 913 F. Supp. at 596–597; *see also Stainless Steel Sheet and Strip in Coils from Mexico,* 64 FR 124, 128 (January 4, 1999). The facts available margin, petitioners claim, was based on NSC mainstream sales made under customary selling practices.

Finally, petitioners state that NSC was incorrect when it argued that its only act of non-cooperation was to make a mistake in its answer. Petitioners argue that NSC repeatedly withheld information within its control, and issued statements as to why this information was not provided which were shown to be untrue.

Department's Position: We agree with petitioners that the Department should continue to apply adverse facts available with respect to NSC's U.S. sales which are based on theoretical weight. Section 776(a)(2) of the Act provides that if an interested party: (A) withholds information that has been requested by the Department; (B) fails to provide such information in a timely manner or in the form or manner requested; (C) significantly impedes a proceeding under the antidumping statute; or (D) provides such information but the information cannot be verified, as provided in section 782(i), the Department shall, subject to subsection 782(d), use facts otherwise available in reaching the applicable determination. Section 776(b) of the Act further provides that adverse inferences may be used where an interested party has failed to cooperate by not acting to the best of its ability to comply with the Department's requests for information. *See also, SAA* at 870.

NSC reported most of its U.S. and home market sales on an actual weight basis, with the exception of a small percentage of U.S. and home market sales. The Department requested conversion factors for these transactions in its original and supplemental questionnaires. Section 351.301(b)(1) of the Department's regulations provides generally that, in an investigation, factual information can be submitted up to seven days prior to verification. However, section 351.301(c)(2) states that ''[n]otwithstanding paragraph (b)'',

when requesting information pursuant to a questionnaire, the Department will specify the deadlines by which time the information is to be provided by the parties. Thus, NSC is incorrect in asserting that the requested conversion data is timely because it was submitted within the general deadline in section 351.301(b)(1). Any information submitted after the deadline specified in the questionnaire is untimely, regardless of whether the general deadline in section 351.301(b)(1) has passed.

In the instant case, NSC failed to submit the requested information by December 21, 1998 (the deadline for the original section B and C questionnaire responses), nor did it provide this information by January 25, 1999 (the deadline for submission of information requested in the section B and C supplemental questionnaire). Despite repeated requests for this information, NSC did not provide the requested data until March 1, 1999 (nearly 3 months after the initial questionnaire deadline).

NSC also argues that the conversion data falls within the Department's practice of accepting ''minor corrections'' to questionnaire responses after the response deadline has passed, provided the Department has the information in time to verify it. However, a minor correction is normally a correction to information that was timely submitted. In this case, NSC did not timely submit the conversion data that it subsequently sought to correct. NSC's only response was that the data did not exist. While NSC characterizes that statement as a correctable minor error, we disagree. The evidence indicates that the requested information was routinely maintained by NSC in the normal course of business, but that obtaining it was simply not a priority. Regardless of who specifically knew about this information, the sales department or the production department, the data existed and could have easily been obtained. The fact that NSC was able to provide this information shortly after the preliminary determination also supports the conclusion that it could have done so within the time requested. Moreover, it is impossible for the Department to determine whether NSC's claims of inadvertent error are valid or merely self-serving. Thus, they are insufficient to rebut the evidence establishing that the requested information was readily available.

Furthermore, timely, accurate conversion information is necessary to the margin calculation and can have a significant impact. In recognition of steel industry practices, the Department routinely requests respondents in proceedings involving steel to provide either the actual and theoretical weights of the transactions in both markets, or in the alternative, to provide conversion factors to ensure apples to apples comparisons on the same weight basis. *See Preliminary Determination of Sales at Less Than Fair Value: Circular Welded Non-Alloy Steel Pipe from Brazil*, 57 FR 17883, 17884 (April 28, 1992). The need for timely filed, verifiable actual weights or conversion factors is particularly acute with flat rolled steel products in coils, including those at issue. Assuming that the coils meet the specifications of the ordered product, the actual width and the actual thickness of the coils will vary within the allowed tolerances, but the lengths of the coils are not specified in the available sales-related documentation. Therefore, the total actual weight of the coils sold in transactions denominated in theoretical weight can vary by a significant, but unknown amount, as the actual dimensions of the coils cannot be determined. Accordingly, the resulting unit values that would be used in the Department's price-to-price comparisons could also vary by a significant, but unknown amount. The Court of International Trade has addressed the issue, upholding the Department's decision to apply best information available when a theoretical-to-actual conversion factor could not be verified. *See Persico Pizzamiglio, S.A.* v. *United States*, 18 CIT 299, 305 (CIT 1994).

Because NSC's conversion data was untimely and did not constitute a minor correction, the Department informed NSC at verification that it would not accept the theoretical to actual weight conversion factors and returned the data on April 12, 1999. Section 351.302(d) of the Department's regulations provides that the Department will not retain in the record information that is untimely or unsolicited. 19 C.F.R. § 351.302(d)(2). The fact that the Department did not reject this information prior to verification did not prejudice NSC. Many decisions are made between the preliminary and final determinations, including, in some instances, the rejection of submissions. While the Department must explain the basis for those decisions in its final determination, it is under no obligation to do so before then. As evidenced by NSC's case brief and the hearing transcript, the company was well aware of the issue and has had ample opportunity to defend its interests. See also Department's response to Comment 13, ''Ex Parte Communications'', above.

Section 776 of the Act states that, if a party fails to provide information by the established deadline, the Department shall, subject to section 782(d), use the facts otherwise available. See also 19 C.F.R. 351.301(c)(2)(ii) (''failure to submit requested information in the requested manner by the date specified may result in use of facts available under section 776 of the Act and section 351.308.''). Section 782(d) of the Act provides that, subject to 782(e), the Department may disregard a deficient response. NSC argues that the Department should have used the conversion factor data because it meets the criteria of section 782(e), *i.e.*, it is complete, capable of being verified, capable of being used without undue difficulty, provided by NSC acting to the best of its ability, and submitted within the deadline established for its submission. We find this argument unpersuasive. The provision of the statute relied upon by NSC sets forth the circumstances under which the Department will consider information provided by a respondent, even though it may be deficient in some respects. For example, if the freight information in a timely questionnaire response is missing or cannot be used, the Department will not reject the entire response; it will consider the remaining information, provided that it is verified. There is simply no support for NSC's argument that this provision is essentially an exception to rejecting information that is submitted after the established deadline. To the contrary, the first criterion in this provision is that ''the information is submitted by the deadline established for its submission.'' As noted above, NSC's conversion data was not submitted by the deadline established in the questionnaire. Therefore, it does not meet the criteria of section 782(e) and the use of facts available for theoretical weight sales is warranted.

Because NSC failed to timely provide requested information, in accordance with section 776 of the Act, the Department has made its determination with respect to the theoretical weight sales on the basis of the facts available. Further, the Department finds that NSC, by not submitting a theoretical weight conversion factor it could have provided when originally requested until well after the time for response had passed, failed to cooperate by not acting to the best of its ability. NSC's claims that it could provide a conversion factor in March of 1999, but was unable to derive such a factor when the questionnaire responses were due, does not withstand scrutiny. Although NSC argues that it lacked the data necessary to calculate a conversion factor, as required by section

782(c)(1) of the Act, it should have proposed to the Department the sort of conversion factor it ultimately did calculate, explaining why a more accurate one might not be practicable. Instead, NSC merely dismissed the Department's repeated requests. As noted above, the data requested was routinely maintained by NSC in the normal course of business. It was readily available and would not have been burdensome to produce in a timely manner. Moreover, NSC had other information to use in providing a conversion factor. Nevertheless, NSC did not provide the information until well after the established deadline. As noted above, NSC's claims of inadvertent error are insufficient to overcome these basic facts. The fact that NSC ultimately did provide such a factor is proof that it could have done so much earlier. Thus, because NSC failed to timely provide the requested conversion data, it has ''failed to cooperate by not acting to the best of its ability to comply with an information request.'' Therefore, in accordance with section 776(b) of the Act, the Department is authorized, to use an adverse inference in choosing the facts otherwise available.

We have considered, but rejected, the suggestion made by NSC that the Department use a theoretical-to-actual conversion factor from another source as facts available. Because of the potential differences in theoretical-to-actual variances among producers and for different flat rolled products, particularly those sold in coils, we cannot determine that an alternative theoretical-to-actual conversion factor would be appropriate in this situation. Therefore, we have used a facts available margin for these sales.

In selecting a facts available margin, we sought a margin that is sufficiently adverse so as to effectuate the statutory purposes of the adverse facts available rule, which is to induce respondents to provide the Department with complete and accurate information in a timely manner. We also sought a margin that is indicative of NSC's customary selling practices and is rationally related to the transactions to which the adverse facts available are being applied. To that end, we selected margins from individual sales of CONNUMs that involved substantial commercial quantities and fell within the mainstream of NSC's transactions. Thus, as adverse facts available, we have calculated an average of the highest calculated sale-specific margins for each of the CONNUMs involved in the theoretical weight sales; that is, we used margins from sales of the same CONNUMs with actual weight sales for which we had all necessary information to calculate a margin. Finally, we found nothing on the record to indicate that the transactions that we selected were not conducted in a normal manner.

Comment 30: Use of Facts Available for NKK's Theoretical Weight Sales.

NKK argues that the Department should reverse its decision to reject the submitted prices for all of its home market sales sold on a theoretical weight basis and to apply adverse facts available to these sales. NKK claims that (1) its failure to provide conversion factors for these sales prior to the preliminary determination was based on a legitimate misunderstanding of what the Department desired, (2) upon learning what the Department desired, NKK promptly submitted the requested conversion factors and (3) the Department fully verified the calculation of the conversion factors.

NKK first explains that its failure to provide the conversion factor requested by the Department was based on a legitimate misunderstanding of what the Department required. NKK asserts that, in its original questionnaire, the Department asked NKK to specify, for each and every transaction, whether the quantity sold was based on actual weight or some other basis, and if more than one weight was reported, to provide the conversion factor to arrive at a uniform quantity measure. NKK responded by stating that providing such conversion factor was either impracticable or impossible, because it did not weigh the coils sold on a theoretical basis, and therefore did not have the actual weights for these sales. NKK states that when, in its supplemental questionnaire, the Department requested that NKK provide the conversion factor that it ''used'' to arrive at a uniform quantity measure, NKK assumed that the Department had misunderstood NKK's initial response, so it repeated its rationale for not providing a conversion factor. After NKK complained that it was wrongly penalized in the *Preliminary Determination,* the Department pointed to KSC's ability to respond to the same question. NKK states that KSC had provided not a conversion factor, but a more accurate estimate of the actual weight, and states that if the Department had clarified earlier that this was what it wanted, it could have complied earlier.

Finally, NKK asserts that after it had a clearer understanding of what the Department required, it was able to prepare a conversion factor (on a basis involving proprietary information) which could be used to calculate a more accurate estimate of the weight for the theoretical weight sales. NKK provided this factor one week before verification and argues that, pursuant to § 351.301(b)(1) of the Department's regulations, this was within the established time limits. In addition, NKK argues that the Department was able to verify fully all submitted information. Therefore, NKK argues, the Department cannot rely on section 776 of the Act to apply facts available, since none of the criteria in that provision apply in this case.

Petitioners, on the other hand, argue that, in the *Final Determination,* the Department should reject the theoretical-to-actual weight conversion factor provided by NKK in its February 22, 1999 filing, and should apply adverse facts available to NKK's theoretical weight transactions. Petitioners assert that the Department asked NKK to provide a theoretical-to-actual weight conversion factor in the Department's initial and supplemental section B questionnaires. Thus, petitioners argue, the Department made two clear requests for a theoretical-to-actual weight conversion factor, which it needed in order to calculate CONNUM-specific DIFMERs and costs. According to petitioners, NKK twice refused to provide the conversion and, by choosing to provide the conversion factor only after the Department had applied adverse facts available to NKK's theoretical weight transactions, demonstrated a clear intent to not comply with the Department's request. This refusal to comply, in the opinion of petitioners, warrants the application of adverse facts available pursuant to section 776 of the Tariff Act (19 U.S.C. § 1677e).

Petitioners argue that the Department should not allow NKK to selectively choose what information the company will provide the Department. They characterize NKK's refusal to provide a theoretical-to-actual weight conversion until adverse facts available had been applied in the preliminary determination as ''cherry picking'' and assert that in antidumping investigations the Department, not the respondent, should decide what information is required to ensure the integrity of the process. *See Ansaldo Componenti, S.p.A.* v. *United States,* 628 F. Supp. 198, 205 (CIT 1986); *see also Olympic Adhesives, Inc.* v. *United States,* 899 F. 2d 1565, 1572 (Fed. Cir. 1990).

In its rebuttal brief, NKK reiterates that it did not ''refuse'' to comply; instead it misunderstood the Department's request for a theoretical weight conversion factor. NKK stresses

that it maintained that it could not calculate the actual differences between the theoretical and actual weight of its coils because, unlike the merchandise of another respondent, NKK's theoretical weight sales were not, in fact, weighed. *See Olympic Adhesives,* 899 F. 2d at 1573 (Fed. Cir. 1990) (it is not a refusal to provide requested information when a respondent answers that such information is not available). NKK rebuts petitioners' assertion that NKK did not comply with the Department's request for a theoretical weight conversion factor and, furthermore, rebuts petitioners claim that NKK did not cooperate to the best of its ability.

NKK argues that once it understood the Department's request, it provided the appropriate theoretical weight conversion factor. NKK argues that because actual weight was not available for its theoretical weight sales and because it communicated this fact to the Department, it did not provide the requested data as it believed that this data was not available. *See Olympic Adhesives,* 899 F. 2d at 1573. NKK further argues that the conversion factor does not calculate the actual weight. NKK admits that it filed its conversion factor after the original and supplemental questionnaire deadlines but asserts that, ultimately, the conversion factor was filed with the Department seven days prior to verification. NKK asserts that the Department's own regulations establish this as the latest date on which factual information is due. *See* 19 C.F.R. § 351.301(b)(1).

NKK in its rebuttal brief, argues that the Department routinely accepts untimely information when circumstances of a particular case warrant the need to accept untimely filings. *See Bowe-Passat* v. *United States,* 17 CIT at 337–38. NKK further argues that if certain conditions are met, the Department cannot legally decline to consider certain information, even if the information does not meet all of the Department's requirements. NKK argues that its case meets the necessary legal criteria and, thus, its theoretical weight conversion factor should be considered by the Department. *See* section 782(e) of the Act. Specifically, NKK argues in its rebuttal brief that ''first, the conversion factor was submitted before the latest deadline for submission of factual information; second, the conversion factor can be and was verified; third, NKK fully explained how the conversion factor was arrived upon and is therefore a reliable basis on which to reach an applicable determination; fourth, NKK provided the factor as soon as it understood the Department's specific request; and fifth, the application of NKK's conversion factor is easily accomplished in the Department's programming.'' In summary, NKK argues that there is no reasonable basis on which the Department can reject its theoretical weight conversion factor.

Petitioners rebut NKK's argument that NKK acted to the best of its ability. Petitioners argue that NKK failed to respond to the Department's specific requests for an actual to theoretical weight conversion factor. Petitioners argue that the Department should therefore draw an adverse inference in selecting adverse facts available for NKK's theoretical weight transactions. *See* section 776(b) of the Act (19 U.S.C. § 1677e(b)). Petitioners assert that the Department, in its final determination, should continue to apply adverse facts available to NKK's theoretical weight sales because NKK should not be allowed to benefit through its failure to comply with the Department's requests. *See* SAA at 868, 896 (1994).

Department's Position: We agree with petitioners that the Department should continue to apply adverse facts available for NKK's home market theoretical weight sales. Section 776(a)(2) of the Act provides that, if an interested party: (A) withholds information that has been requested by the Department; (B) fails to provide such information in a timely manner or in the form or manner requested; (C) significantly impedes a proceeding under the antidumping statute; or (D) provides such information but the information cannot be verified, as provided in section 782(i), the Department shall, subject to subsection 782(d), use facts otherwise available in reaching the applicable determination. Further, section 776(b) of the Act provides that adverse inferences may be used where an interested party has failed to cooperate by not acting to the best of its ability to comply with the Department's requests for information. *See* also SAA at 870.

NKK reported all its U.S. and home market sales on an actual weight basis, with the exception of less than one percent of home market sales. Although the Department requested conversion factors for these transactions, NKK refused to provide conversion factors for these sales within the deadline established in the questionnaire. Rather, it submitted these factors on February 22, 1999, almost 2 months after the deadline for the original questionnaire response and one month after the deadline for the supplemental questionnaire response. Because the Department requested these conversion factors in questionnaires with earlier deadlines, and these data were not submitted in accordance with those deadlines, the conversion factors submitted on February 22, 1999, constituted untimely submitted information within the meaning of 19 C.F.R. § 351.301(c)(2)(ii). Because these data were required to be provided in NKK's questionnaire responses, the more general provision upon which NKK relies in stating that the factors were timely provided (*i.e.,* 19 C.F.R. § 351.301(b)(1)) does not apply. Because NKK's conversion factor data were not timely submitted, the Department rejected these factors in a letter dated April 12, 1999. The Department, therefore, has not considered these data or retained them in the official record of the proceeding. *See* 19 C.F.R. § 351.302(d)(1). The Department does not agree with NKK's assertion that these data were verified. Rather, at verification the Department specifically informed NKK and its counsel that the Department would not accept the conversion factor and would specifically instruct NKK to submit this information on the record if the Department determined that it was timely. However, any arguments as to the accuracy of these data are moot because the data in question are no longer part of the record before the Department.

Because NKK failed to timely provide requested information, in accordance with section 776 of the Act, the Department has made its determination with respect to the theoretical weight sales on the basis of the facts available. Further, the Department finds that NKK, by not submitting a theoretical weight conversion factor it could have provided when originally requested until well after the time for response had passed, failed to cooperate by not acting to the best of its ability. NKK's claims that it could calculate a conversion factor in February of 1999, but was unable to derive such a factor when the questionnaire responses were due, does not withstand scrutiny. Although NKK argues that it did not understand what the Department wanted when it originally requested a ''conversion factor'', although this was not stated at the time, and that it lacked the data necessary to calculate one, as required by section 782(c)(1) of the Act, it should have proposed to the Department the sort of conversion factor it ultimately did calculate, explaining why a more accurate one might not be practicable. Instead, NKK merely dismissed the Department's repeated requests. The fact that NKK ultimately did provide such a factor is the proof that they could have

done so much earlier. Thus, because NKK failed to timely provide the requested conversion data, it has ''failed to cooperate by not acting to the best of its ability to comply with an information request.'' Therefore, in accordance with section 776(b) of the Act, the Department is authorized, to use an adverse inference in choosing the facts otherwise available.

The only NKK sales affected by this failure to provide data were home market sales. Therefore, as adverse facts available we assigned the highest calculated adjusted price (NV) for any CONNUM to the relevant transactions.

Comment 31: Use of Facts Available for KSC's U.S. Sales Through CSI.

KSC asserts that the Department erred both by including in its margin calculation sales made through its U.S. affiliate California Steel Industries (''CSI'') and in using adverse facts available in connection with those sales. Sumitomo Metal Industries, Ltd. (''SMI''), a non-selected respondent whose margin will be affected by KSC's margin, also urges that the Department should not use adverse facts available for KSC's sales to CSI, arguing that the fact that CSI is a petitioner shows that KSC cannot ''control'' CSI, and is not, therefore, responsible for CSI's refusal to provide data requested by the Department.

With respect to the first point, KSC argues that the Department should have based the margins for its CSI sales on sales made to unaffiliated companies, in accordance with § 772(e) of the Act (the ''Special Rule for Merchandise With Value Added After Importation''). With respect to the second point, KSC argues that, if The Department does calculate a margin based on the CSI sales, it should not treat CSI's refusal to provide the requested data as a lack of cooperation on the part of KSC. Therefore, KSC argues, The Department should not apply adverse facts available to the KSC's CSI sales.

Decision Not To Apply the ''Special Rule''

Respondent contends that the Department's application of adverse facts available in its *Preliminary Determination* was unlawful because the subject merchandise from KSC which is further processed by CSI qualifies for the simplified reporting provision or ''special rule for merchandise with value added after importation'' contained in the statute at 19 U.S.C. § 1677a(e)(1). The purpose of this provision, according to the *SAA,* is to give the Department a ''simpler and more effective method for determining export price'' in situations where the value added after importation to the United States is likely to exceed substantially the value of the subject merchandise.'' *See SAA* at 825. As explained in the SAA, this level is reached when ''value added in the United States is estimated to be substantially more than half the price of the merchandise as sold in the United States.'' *See Id.*

Respondent states that 19 C.F.R. § 351.402(c)(2) provides that the Department will ''normally determine that the value added in the United States by the affiliated person is likely to exceed substantially the value of the subject merchandise if the [Department] estimates the value added to be at least 65 percent of the price charged to the first unaffiliated purchaser for the merchandise as sold in the United States.'' Respondent states that the use of terms such as ''normally'' and ''estimates'' indicates that the 65 percent test is not a bright line rule. Respondent cites *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Component Thereof, From Japan,* 63 FR 37344 (1998), as evidence that the Department has applied the special rule without requiring the value added to be more than 65 percent. CSI added substantial value to the subject merchandise it obtained from KSC, contends the respondent, because the value added by CSI represents more than half of the price charged to the first unaffiliated customer buying galvanized steel and is ''on the cusp'' of being over half the price charged for cold-rolled steel and pipe. Respondent concludes that the significant value added by CSI, combined with the provision's purpose of simplifying the Department's determination, should permit the application of the special rule. Therefore, KSC urges, the Department should use the weighted average margin of other sales of identical subject merchandise sold by KSC for the volume of hot-rolled steel sold to CSI in making its determination.

Use of Adverse Facts Available for the CSI Sales

Respondent's overall conclusion that the Department's application of adverse facts available as to the CSI sales is unsupported by law or fact is based on five broad arguments.

First, respondent states that the Department cannot draw an adverse inference unless it has found that a party did not act to the best of its ability in responding to the Department's information requests. Respondent argues that, in determining whether a party acted to the best of its ability, the Department considers, among other things, the accuracy and completeness of the information submitted, and whether the party has hindered the calculation of accurate dumping margins. As a result of the *Uruguay Round Agreements Act* (''URAA''), respondent asserts, the Department cannot apply an adverse inference without first making factual findings on the record to support any conclusion that a party failed to act to the best of its ability. *See Preamble,* 62 FR at 27340. Furthermore, the Court of International Trade decisions in *Borden, Inc.* v. *United States,* 4 F. Supp. 2d 1221 (1998) (''Borden'') and *Ferro Union, Inc.* v. *United States* (''*Ferro Union*''), Ct. No. 97–11–01973, Slip Op. 99–27 (March 23, 1999), 1999 CIT LEXIS 24, at *54 , hold that the Department must base any finding that a respondent failed to cooperate on record evidence, not on the mere absence of information on the record. Therefore, respondent concludes that the Department must either correct its preliminary decision to apply an adverse inference to these sales or provide a factual basis for its conclusion that KSC did not act to the best of its ability.

KSC's second argument is that the administrative record for this case establishes beyond question that KSC acted to the best of its ability. *See Preamble,* 62 FR at 27341 (the Department will make determinations regarding a respondent's acting to the best of its ability on a fact-and case-specific basis); *see also, NEC Home Electronics, Ltd.* v. *United States,* 54 F. 3d 736, 742 (Fed. Cir. 1995); *Atlantic Sugar, Ltd.* v. *United States,* 744 F. 2d 1556, 1559 (Fed. Cir. 1984) (The Department's determinations must be based on a complete and objective evaluation of the actual evidence on record). Respondent contends that all the evidence in the instant case demonstrates that KSC acted to the best of its ability, with no implication that KSC was uncooperative or that KSC impeded the investigation. Specifically, KSC claims that the record shows that it: (1) made repeated written and oral requests urging CSI to cooperate in providing the data The Department had requested, (2) offered to provide CSI with assistance in furnishing this data to The Department, (3) offered CSI the option of reporting proprietary information it did not want to reveal to KSC directly to the Department, and (4) submitted a voluminous amount of information during the course of the investigation and answered all

questions posed by the Department at verification, including those relating to the CSI issue. Thus, KSC concludes that the absence of data on the CSI sales should be attributed to the non-cooperation of CSI, but not of KSC.

KSC's third point is that its extensive cooperation prohibits use of the most adverse facts available, even if the Department should find that it did not meet the ''best of its ability'' standard, because KSC ''substantially cooperated'' in this investigation. *See Roller Chain, Other Than Bicycle from Japan: Final Results and Partial Recission of Antidumping Duty Administrative Review,* 63 FR 63,674 (1998); *Certain Cut-to-Length Carbon Steel Plate from Sweden,* 62 FR 46,947, 46,948 (1997); *Final Results of Review of Antidumping Duty Administrative Review of Certain Pasta from Italy,* 61 FR 30326, 30329 (1996) (the Department's normal practice is to refrain from applying the most adverse inference possible in calculating a margin when a party has been cooperative).

Respondent also refers to the previous distinction between cooperative and uncooperative parties under the Department's pre-URAA two-tiered Best Information Available (''BIA'') methodology. Under this methodology, the most adverse BIA was reserved only for parties that refused to provide requested information, not those parties that were cooperative and made every effort to obtain and provide information requested by the Department. Respondent contends that, even under the pre-URAA law, the Department would have been prohibited from applying an adverse inference against KSC in the instant case. Respondent states that the Department's failure to follow its own practice as to KSC in this case ''constitutes abusive agency action'' and that it is incomprehensible and unjustifiable for the Department to ignore KSC's immense efforts to comply with the Department's requests for information.

KSC's fourth argument is that the Department's application of an adverse inference based on the ''erroneous presumption'' that, because they are affiliated KSC has sufficient ''control'' over CSI to compel that company to provide the requested data disregards the contrary evidence on record. Thereby, KSC argues, The Department violates both the antidumping statute and the Constitution. Respondent asserts that the Department's decision to apply adverse facts available was based on the erroneous assumption that KSC has operational or legal control over CSI and, as a result, could have obtained the requested information from CSI. Respondent does not dispute that KSC and CSI are affiliated parties, as defined by the statute, and agrees that normally it is reasonable to presume that closely affiliated parties have access to each other's documents and employees. What is illegal, KSC contends, is that the Department has refused to take into consideration the record evidence rebutting such a presumption in this case. KSC also claims that the Department's application of the affiliation definition in this manner raises federal due process concerns.

Respondent points out that 19 U.S.C. § 1677(33) provides that one party is deemed to ''control'' another party when the first party is ''legally or operationally in a position to exercise restraint or direction over the other person.'' Respondent argues that, although it is reasonable to presume that if parties are related under the statute they are in the best position to obtain information from each other, the judicial precedents supporting this proposition do not also support the Department's application of a non-rebuttable presumption that this is the case. Thus, KSC argues, the Department may not ignore evidence on the record that demonstrates that the parties do *not* have access to each other's documents or employees. *See Koyo Seiko Co.* v. *United States,* 92 F. 3d 1162 (Fed. Cir. 1996); *Helmerich & Payne, Inc.* v. *United States* (''*Helmerich*''), 24 F. Supp. 2d 304 (CIT 1998); *Usinor Sacilor* v. *United States* (''*Usinor*''), 907 F. Supp. 426, 428–29 (CIT 1995); *Koyo Seiko Co.* v. *United States,* 905 F. Supp. 1112 (CIT 1995); *Holmes Prods. Corp* v. *United States,* 795 F. Supp. 1205, 1206–07 (CIT 1992).

Respondent argues that, in *Helmerich,* although the Court upheld the Department's decision to apply the facts available in that pre-URAA case in which the respondent twice failed to complete the questionnaire, it made a point of noting that it would have reached a different decision under the post-URAA law. In *Usinor,* respondent asserts, the Court had held that the Department should not have applied severely adverse BIA when missing data were beyond the control of the respondent; on remand, the Department agreed that the respondent could not realistically have collected the required data from its related subsidiaries. Respondent notes that, in the *Preamble* to its ''facts available'' regulation (19 C.F.R. § 351.308), the Department acknowledged that it agreed with the substance of an argument that where a respondent has made a good-faith effort to obtain information from an affiliate, failure of the affiliate to provide the information should not give rise to an adverse inference. *See* 62 FR at 2341. Thus, the Department stated that it would continue to determine the application of adverse inferences on a fact- and case-specific basis.

KSC asserts that the federal courts have been vigilant in rejecting claims that related corporate entities necessarily have access to each other's data. KSC argues that, in this respect, the federal courts have looked to other factors such as whether the requested documents were available during the regular course of business and whether the two parties operated as a single business unit. *See Cooper Industries, Inc.* v. *British Aerospace,* Inc., 102 F.R.D. 918, 919–20 (S.D.N.Y. 1984); *Camden Iron & Metal, Inc.,* v. *Marubeni Am. Corp.,* 138 F.R.D 438, 442 (D.N.J. 1991); *see also Glaxo, Inc.* v. *Boehringer Ingelhaim* Corp., 40 U.S.P.Q. 2d (BNA) 1848, 1850, 1851 n.4 (D.Conn. 1996) (the mere fact that documents are in the possession of a joint venturer does not automatically establish ''control'' over them). Respondent claims that the evidence on record demonstrates that KSC did not have the ability to obtain the requested information from CSI and that the Department learned during verification that, because of the structure and past practice of the joint venture, it was impossible for KSC to impose its will upon CSI. The fact that CSI is a petitioner (as well as a respondent) in this case is, according to KSC, the best evidence that KSC does not have operational control over CSI.

Respondent argues that any action by a federal agency that is taken in total disregard of the administrative record raises due process concerns. *See NEC Corp.* v. *United States,* 151 F. 3d 1361, 1370 (Fed. Cir. 1998) *cert. denied,* 119 S. Ct. 1029 (1999) (if application of an excessive dumping margin as a result of an adverse inference deprives importers of significant property interests, a cognizable due process claim under the Fifth Amendment of the Constitution will exist); *see also Techsnabexport, Ltd.* v. *United States,* 795 F. Supp. 428, 435–36 (CIT 1992) and cases cited therein.

Respondent asserts that the Supreme Court has established a three-part test to determine what procedures are required to comport with due process. This test balances the competing rights and interests at issue. *See Mathews* v. *Eldridge,* 424 U.S. 319, 334 (1976). If a statute is found to involve an ''irrebuttable presumption,'' the focus of this balance shifts to whether ''the presumption is not necessarily or universally true in fact,'' and whether ''the government has available a

'reasonable alternative means of making the crucial determination.'" *See Rogers* v. *United States*, 575 F. Supp. 4, 9–10 (D. Mont. 1982); *Vlandis* v. *Kline*, 412 U.S. 441, 452 (1973) *Universal Restoration, Inc.* v. *United States*, 798 F. 2d 1400, 1406 (Fed. Cir. 1986). Respondent contends that the Department's application of adverse facts available against KSC in the instant case based on the refusal of an ''adverse affiliate'' to provide information requested by the Department amounts to a denial of due process rights by improperly raising an irrebuttable presumption. Respondent argues that the facts on the record show that it is not ''universally true'' that a respondent can control the actions of its affiliate, particularly when the affiliate is a petitioner in the case. *See Steven M.* v. *Gilhool*, 700 F. Supp. 261, 264–65 (E.D.P. 1988) (irrebuttable presumption can only survive if it is universally true). In this case, respondent argues, the Department has a reasonable alternative to an irrebuttable presumption available. The facts on record enable it to determine whether KSC actually does ''control'' CSI, rather than presuming such control exists.

KSC's fifth and final point is that the Department's decision to use the most adverse facts available contradicts important policy considerations underlying the antidumping law. One purpose of the adverse inference provision is to ensure that parties do not obtain a more favorable result by not cooperating in an agency proceeding. In this case, however, if the Department applies the adverse inference, CSI, the uncooperative petitioner, will benefit from refusing to provide information as a result of increased antidumping duties assessed on competing imports, whereas KSC, which has been a cooperative respondent, will be penalized by a significantly increased margin. Respondent contends that it is arguable that KSC would have been in a better position if it had refused to cooperate altogether, given that the highest margin alleged in the petition was lower than the margin calculated by the Department for KSC in its preliminary determination.

Finally, respondent claims that CSI, by controlling what information the Department has available for calculating a margin, has ''usurped the investigatory role'' assigned to the Department by defining the scope of the record. *See Allied-Signal Co. Aerospace* v. *United States*, 996 F.2d 1185, 1191 (Fed. Cir. 1993). Respondent concludes that the Department cannot allow any party, including a petitioner, to benefit from an attempt to control the results of the administrative process through its own unresponsiveness.

In their rebuttal, petitioners allege that the Department's application of adverse facts available for KSC's sales through its affiliate CSI is warranted by the facts and the law, and should not be modified in the Department's final determination. Petitioners' rebuttal argument is based on two points. First, they argue, the Department's decision to apply adverse facts available is appropriate under § 776 of the Act. Petitioners argue that KSC failed to act to the best of its ability by not responding to Section E of the Department's questionnaire regarding CSI's further manufactured sales. KSC's claim that, based on the record, the Department can find only CSI to be uncooperative, and its claim that the Department's decision to apply adverse facts available is unlawful because it is based on the presumption that KSC has operational or legal control over CSI, lack merit. According to the petitioners, the factual basis underlying the Department's decision to apply adverse facts available is supported in the record and provides adequate justification for the decision. Petitioners state that the Department has determined that it will consider an affiliated party's non-compliance with the Department's requests ''as an omission imputable to the respondent'' which merits the application of adverse facts available. *See Silicomanganese From Brazil*, 62 FR 37869, 37873 (1997) (''*Silicomanganese From Brazil* '') and *Roller Chain, Other Than Bicycle, From Japan*, 61 FR 64328, 64329 (1996). Due to KSC's significant ownership interest, CSI is undisputedly affiliated with KSC. As a result, petitioners argue, KSC had the burden of obtaining the requested information and providing it to the Department without regard to any alleged lack of cooperation from CSI. Therefore, the omission of CSI's further manufactured sales information is imputed to KSC and subjects KSC to the application of adverse facts available.

Petitioners cite *Silicomanganese From Brazil* and *Koyo Seiko Co., Ltd.* v. *United States*, 92 F. 3d 1166 (Fed. Cir. 1996) as evidence that the respondent, in order to be excused from submitting requested information in the possession of the affiliate, bears the burden of demonstrating that it does not have control over and cannot compel an affiliated party to submit such information. Petitioners also cite *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished From the People's Republic of China*, 63 FR 63842, 63857 (1998) and *Silicomanganese From Brazil* as evidence that the Department will apply adverse facts available when a respondent fails to meet its burden of demonstrating that it cannot obtain requested information in the possession of another party. According to petitioners, KSC failed to meet its burden to establish in that it acted in the best of its ability to obtain the requested information from CSI and that it could not have exerted control over CSI to obtain the information. Petitioners conclude that, despite CSI's Shareholders' Agreement, which shows that KSC had the right and the powers to exert such control, KSC did not attempt to exercise any of these rights and powers.

Petitioners support this conclusion by arguing that KSC failed to have its representatives on CSI's Board of Directors call a board meeting to address the lack of cooperation received by KSC from CSI, that the lack of cooperation was not discussed during a regular quarterly CSI board meeting, that during verification KSC officials acknowledged that this issue was not discussed among the joint venture partners, and more significantly, nothing on the record shows that KSC made any efforts to enforce its right under the Shareholders' Agreement. Petitioners argue that KSC should have exerted control over CSI and states that the fact that CSI is a petitioner in the immediate investigation does not establish that KSC lacked control over CSI. Petitioners also argue that KSC has not substantiated on the record its claims that CSI's officers refused to cooperate in responding to the Department's requests. The three letters from CSI's CEO placed on the record by KSC, according to petitioners, do not constitute refusals by CSI to provide the requested information. Petitioners cite letters dated October 29, 1998, November 6, 1998 and December 14, 1998 as evidence for this conclusion. Petitioners point out that KSC's counsel claimed for the first time during verification that, in response to CSI's concern regarding the disclosure of highly sensitive information as evidenced in these letters, KSC's counsel offered to compile a response maintaining the confidentiality of the CSI's information, but that the offer was rejected by CSI. Petitioners argue that there is no evidence of such an offer by KSC counsel in the letters provided for the record or in KSC's responses to the Department's supplemental questionnaires. Because KSC failed to substantiate and establish that it acted to the best of its ability in regard to CSI's further manufactured sales, petitioner

conclude that the Department's decision to apply adverse facts available is justified and the Department should continue to use adverse facts available in its final determination.

Petitioners' second point is that the Department's choice of facts available represents a valid exercise of its discretion and is consistent with the statutory purpose of applying adverse fact available. Petitioners disagree that KSC's cooperation in other aspects of the investigation prohibits the use of adverse facts available and that this remedy contravenes the purpose underlying the use of adverse inferences. Petitioners cite § 776(b) of the Act which discusses the information the Department may rely on in selecting adverse facts available and the discretion afforded to the Department in the application of adverse facts available. Petitioners contend that the Department's analysis in employing adverse facts available for KSC's sales through CSI in the its *Preliminary Determination* was in complete accordance with the Department's practice. *See Stainless Steel Wire Rod From Italy,* 63 FR 40422, 40428 (1998). Petitioners also cite *National Steel I,* 870 F. Supp. at 1136 and *Certain Welded Carbon Steel Pipes and Tubes from Thailand,* 62 FR 53808, 53820–53821 (1997) as evidence that, even assuming that KSC was substantially cooperative, the Department had broad discretion to select a level of adverse facts available that appropriately addressed KSC's failure to respond to the Department's Section E questionnaire for its sales through CSI. In response to KSC's claims that the remedy violates the purpose of the underlying use of adverse inferences, petitioner argue that this remedy of applying adverse facts available will serve to induce respondents to use all reasonably available means to exercise control over their affiliates in order to ensure that complete and accurate reporting of data is made to the Department for the calculation of accurate dumping margins. In conclusion, petitioner state that the Department, in its final determination, should adhere to its decision to apply adverse facts available.

Substantial Value Added

Petitioners contend that KSC's argument that it should not have been required to report further manufacturing information because CSI added substantial value to KSC's subject merchandise is devoid of merit. *See* § 772(e) of the Act (19 U.S.C. § 1677a(e)); *SAA* at 825; and 19 C.F.R. § 351.402(c)(2). Petitioners contend that, based on average purchase prices and reselling prices set forth by KSC in its November 10, 1998 letter to the Department, CSI's sales of further manufactured merchandise, which include cold-rolled steel, corrosion-resistant steel and pipe, do not meet the 65 percent threshold outlined in the Department's regulations. Petitioners argue that KSC's claim that the 65 percent test should not be seen as a ''bright-line rule'' must be rejected because the Department has stated that the 65 percent rule is, in fact, a ''bright-line test.'' *See Preamble,* 62 FR at 27352. Even if KSC could satisfy the Department's test, petitioners argue that the special rule would not excuse KSC's failure to report CSI's further manufacturing information requested by the Department because the special rule is intended to relieve administrative burden, not excuse the reporting of required data. Petitioners contend that, in this case, the Department's calculations would not have been burdensome given that CSI's further manufacturing consisted predominantly of one or two additional processes. Petitioners conclude that, even if the 65 percent threshold had been met, it is likely that the Department would have used the actual further manufacturing data rather than one of the alternatives permitted by the statute. Accordingly, state petitioners, there is no justification for KSC's failure to respond to the Department's Section E questionnaire and as a result, the Department's application of adverse facts available remains appropriate.

Department's Position: We disagree with KSC with respect to the use of the ''special rule'' and with KSC and Sumitomo with respect to the Department's decision to use adverse facts available for the CSI sales.

Decision Not To Apply the ''Special Rule''

As KSC has implicitly acknowledged, the extent to which CSI adds value to KSC merchandise through further processing does not meet the Department's normal 65 percent standard even for the further manufactured products with the highest level of value added. Furthermore, for products further manufactured into cold-rolled steel and pipe, the value added is less than half of the price charged to CSI's unaffiliated customer and a small amount of KSC's subject merchandise is resold by CSI ''as is,'' with no value added at all.

Although the 65 percent benchmark is not an inflexible rule, it does provide useful guidance as to when it is no longer appropriate to consider certain sales in determining a producer's margin. The degree of value added by CSI simply does not reach this threshold, especially in view of the fact that the CSI sales represent a very significant portion of KSC's total U.S. sales. It would not be appropriate to abandon the Department's normal practice in this case for a much vaguer standard whereby the Department would obtain proxy values for sales through any affiliate whose value added could be considered ''substantial.'' Thus, the Department properly has not applied the ''special rule'' of section 772(e) of the Act to the CSI sales.

Use of Adverse Facts Available for the CSI Sales

It is undisputed that KSC's sales of subject merchandise through its affiliate CSI are constructed export price (''CEP'') sales. Therefore, the statute requires that the U.S. price of these sales for margin calculation purposes be calculated by using CSI's price to the first unaffiliated U.S. customer and adjusted, pursuant to section 772(c) and (d) of the Act, to account for certain expenses incurred by CSI and KSC. These adjustments include, but are not limited to, the costs associated with further manufacturing performed by CSI prior to its sale to the unaffiliated customer. In essence, for purposes of the CEP calculation, the statute treats the exporter and the U.S. affiliate collectively, rather than independently, regardless of whether the exporter controls the affiliate. Accordingly, KSC's argument that it does not ''control'' CSI is misplaced and irrelevant.

Because the statute requires that the Department base its margin calculations for the CSI sales on record information concerning the CSI sales themselves, the Department required that KSC and CSI, collectively, provide the necessary price and cost data for KSC's U.S. sales through CSI. It is also undisputed that KSC and CSI failed to provide this necessary information. Because the information possessed by a U.S. affiliate such as CSI is essential to the dumping determination, the antidumping law is thwarted if the affiliate refuses to provide the necessary information.

Section 776(a) of the Act requires that the Department use facts otherwise available when necessary information is not on the record, or an interested party withholds requested information, fails to provide such information in a timely manner, significantly impedes a proceeding, or provides information that cannot be verified. As the necessary information with respect to these sales is not on the record, the Department

must use the facts otherwise available in calculating the margins for the CSI sales.

Section 776(b) of the Act authorizes the Department to use an adverse inference in determining the facts otherwise available whenever an interested party has failed to cooperate with the Department by not acting to the best of its ability to comply with requests for information. KSC and CSI have neither provided the data on CSI's sales, as requested by the Department, nor demonstrated to the Department's satisfaction that this is not possible. Therefore, the Department finds that KSC and CSI have failed to cooperate by not acting to the best of their ability to comply with the Department's requests for information with respect to the CSI sales. Therefore, we have used an adverse inference in selecting the facts available with respect to the CSI sales.

Allowing a producer and its U.S. affiliate to decline to provide U.S. cost and sales data on a large portion of their U.S. sales would create considerable opportunities for such parties to mask future sales at less than fair value through the U.S. affiliate. The fact that the affiliate is a petitioner does not allay such concerns. Thus, this fact does not constitute an exception to the principle that the Department may make an adverse inference with respect to sales for which data is not provided unless the foreign exporter and its U.S. affiliate have acted to the best of their ability to provide such data.

While it is clear that KSC and CSI collectively have not acted to the best of their ability, we also disagree with KSC's claim that it alone acted to the best of its ability. At verification, the Department investigated this claim. *See KSC Verification Report at* 20–23. After careful consideration of all of the evidence on record, the Department finds that KSC did not act to the best of its ability with respect to the requested CSI data.

CSI is a joint venture between KSC and a large Brazilian mining operation, Companhia Valle do Rio Doce (''CVRD''). Through their respective U.S. affiliates, KSC and CVRD each own 50 percent of CSI. KSC's claim that it acted to the best of its ability with respect to this issue rests on its assertion that it was powerless to compel CSI to provide the Department with this data, given that CSI, as a petitioner in this case, refused to cooperate. Some of the most important evidence contradicting KSC on this issue, including information pertaining to the board and the Shareholders' Agreement, constitutes business proprietary information, and are discussed only in our proprietary *Analysis Memorandum*, which is hereby incorporated by reference. Generally, however, the record shows that, although KSC could have been much more active in obtaining the cooperation of CSI in this investigation, it limited its efforts to merely requesting the required data and otherwise took a ''hands-off'' approach with respect to CSI's alleged decision not to provide this data. For example, KSC officials stated that KSC did not instruct its members of the CSI board to address the issue, did not invoke the Shareholder's Agreement, and did not discuss this issue with its joint venture partner. This does not reach the ''best efforts'' threshold embodied in § 776(b). Furthermore, the fact that KSC has provided a great deal of information and has substantially cooperated with respect to other issues does not relieve it of the requirement to act to the best of its ability to provide the requested CSI information. With respect to the CSI sales, KSC has provided only minimal volume and value information and has not acted to the best of its ability to obtain further information. Thus, as to the missing CSI data, it cannot be said that KSC was fully cooperative and made every effort to obtain and provide the information requested by the Department. Therefore, even though full cooperation by KSC alone would not constrain the Department from using adverse facts available specifically with respect to the CSI sales, we do not agree with KSC's argument that it has ''substantially cooperated'' during this investigation.

As indicated above, the Department has based its decision to use adverse facts available on its finding that KSC and CSI collectively did not act to the best of their ability with respect to the CSI data, not, as KSC claims, on any ''presumption'' that solely because the two companies are ''affiliated'' within the meaning of the statute, KSC necessarily has sufficient control to compel CSI to provide this data. As KSC has noted, the Department makes such decisions on a case-specific basis, using the totality of the record evidence. *See Preamble,* 62 FR at 27341. That is what the Department has done in this case. The Department provided KSC with extensive opportunities, prior to and at verification, to explain and document its efforts to obtain the necessary data, and has considered all of this data in making its determination. While the Department has considered that the record supports KSC's claim that it did make some effort to obtain the data and that CSI's management rebuffed these efforts, the record also shows that KSC essentially acquiesced in CSI's decision not to provide this data. Given KSC's relationship with this 50/50 joint venture, as detailed in the *Home Market Sales Verification Report,* dated March 26, 1999, this did not constitute making its best efforts to obtain the data. Because the Department did not rely upon any ''irrebuttable presumption'' of control arising out of the statutory definition of affiliation in reaching this determination, KSC's arguments based on this theory, including its due process argument, have no merit with respect to this case.

Finally, KSC's claim that use of an adverse inference in this case will contradict the Department's policy of not rewarding uncooperative parties is likewise incorrect. As KSC notes, one purpose of an adverse inference is to ensure that parties do not obtain a more favorable result by not cooperating. However, KSC misconstrues this to mean that the Department can or should somehow take into account the effect of a dumping margin on other business interests of an interested party. We disagree. In applying an adverse inference, the Department can only reasonably ensure that the dumping margin determined for the subject merchandise is not less than the actual margin we would have found had the parties cooperated. We cannot reasonably predict or weigh the multitude of effects this might or might not have on the parties involved. In this case, we can only ensure that KSC and CSI do not obtain a more favorable dumping margin on subject merchandise. As an affiliated importer and/or seller of KSC's subject merchandise, CSI will be affected by any margin assigned to KSC's exports of this merchandise. Neither KSC nor CSI will be rewarded with more favorable dumping margins. Any benefit accruing to CSI from its non-cooperation will flow not from its role as an affiliate-respondent, but from its role as a U.S. producer of non-subject merchandise. Furthermore, KSC, as a 50 percent shareholder in CSI, will share in any such benefit. In addition, we note that it is not the use of the adverse inference which allows KSC's U.S. affiliate to restrict the scope of data on the record—it is CSI's decision to withhold that data and KSC's decision to acquiesce in this posture. Neither KSC nor CSI should be relieved of the obligation to report data on sales through CSI in this or future proceedings. Thus, while KSC's business relationships may involve certain internal conflicts of interest, the use of an adverse inference in determining the dumping margins on CSI sales does not contradict the Department's policies.

For the final determination, the Department has used as adverse facts available the second highest calculated margin for an individual CONNUM. Although no party commented on the rate chosen as facts available in the preliminary determination, we have reexamined our choice for this final determination. In the preliminary determination, we used as the facts available margin the highest margin by CONNUM. However, upon reexamining that decision, we find that the margin chosen was not sufficiently within the mainstream of KSC's sales in that the rate was derived from sales of a product that accounted for a very small portion of KSC's total sales as well as the highest rate by CONNUM. In selecting the facts available margin for the final determination, we sought a margin that is sufficiently adverse so as to effectuate the statutory purposes of the adverse facts available rule to induce respondents to provide the Department with complete and accurate information in a timely manner. We also sought a margin that is indicative of KSC's customary selling practices and is rationally related to the transactions to which the adverse facts available are being applied. To that end, we selected a margin for a CONNUM that involved substantial commercial quantities and thus fell within the mainstream of KSC's transactions based on quantity. Finally, we found nothing on the record to indicate that the sales that we selected were not transacted in a normal manner.

Changes to the Department's SAS Computer Programming

Comment 32: NKK's Clerical Error Allegation.

NKK requests that the Department correct a ministerial error in the Department's preliminary calculation of NKK's dumping margin. NKK states that, in accordance with the Department's instructions, it reported all values in its U.S. and home market databases in the currency in which these values were incurred. NKK therefore reported all selling expenses in Japanese yen. NKK states that the Department, in its margin calculation program, intended to convert reported home market and U.S. price and expense amounts to U.S. dollars before determining NKK's sales-specific and weighted-average dumping margin. However, NKK concludes, the Department failed to convert U.S. direct and indirect expenses from Japanese yen to U.S. dollars when calculating the actual dumping margin.

Specifically, NKK asserts that the Department, in calculating foreign unit price in U.S. dollars (FUPDOL), did not apply the appropriate exchange rate. NKK states that when the Department calculates FUPDOL in an exporter price calculation, U.S. direct and indirect expenses are not deducted from U.S. price in the calculation of net U.S. price (NETPRIU). Thus, U.S. direct and indirect expenses, through a commission offset adjustment, are added to normal value when calculating FUPDOL. However, in calculating NKK's preliminary dumping margin, the Department did not convert U.S. direct and indirect expenses prior to the FUPDOL calculation and, as a result, yen expenses were mistakenly added to a dollar unit value in calculating FUPDOL. NKK provided suggested computer programming language for use in correcting this error. Petitioners have not commented on this issue in their rebuttal brief.

Department's Position: The Department agrees that this was an error, and has corrected the yen to dollar exchange rate conversion error in its final determination. Pursuant to § 351.224 of the Department's regulations, the effective date of this correction will be 30 days after the filing of the alleged clerical error.

Comment 33: Changes to NKK's Preliminary Margin Calculation.

Petitioners assert that the Department should correct three ministerial errors in the arm's length and model match programs used in calculating NKK's dumping margin. First, petitioners state that the Department should add the variable OVERRUNH to the KEEP statement for home market sales at line 786 of the model match program. Second, petitioners argue that The Department should revise line 98 (pertaining to the arm's length test) in the manner indicated in its case brief. Finally, petitioners argue that the Department should revise line 863 of the model match program in the manner indicated in its case brief. Petitioners provided suggested computer programming language to implement these corrections. NKK did not rebut petitioners' allegation in their rebuttal brief.

Department's Position: The Department agrees with petitioners and has made the appropriate changes to the arm's length program, model match program and margin calculation program.

Comment 34: Changes to NSC's Preliminary Margin Calculation Program.

NSC argues that the Department erred by including the sales to which it had assigned a facts available margin in its calculations of the margins for NSC's ''mainstream'' sales. NSC contends that these sales should have been excluded from the calculation once the facts available margins were assigned. Petitioners argue that the Department should reject NSC's argument and follow its established practice of determining the overall weighted average percent margin across all CONNUMS by using the value (U.S. price by CONNUM quantity by CONNUM), not just the quantity. Petitioners argue that unless this value is used in the calculation, the impact of facts available will be diminished.

Secondly, NSC argues that because the Department matches prime products to prime products, and because there were no U.S. sales of non-prime merchandise, sales of non-prime merchandise were effectively eliminated from the preliminary results margin calculation program. However, NSC states, the Department erred by combining home market sales of prime and non-prime merchandise in the same CONNUM to calculate the percentage of sales above and below the cost of production. NSC argues that this creates a distorting error in the determination of whether sales of a particular CONNUM were made below cost. Thus, NSC argues, the preliminary margin determination is contrary to the Department's policy of conducting separate cost tests on prime and non-prime products. *See Notice of Final Determination of Sales at Less than Fair Value: Stainless Steel Plate in Coils (''SSPC'') from the Republic of Korea,* 64 FR 15444, 15455 (March 31, 1999); *Notice of Final Results of Antidumping Duty Administrative Review: Certain Cold-Rolled Carbon Steel Flat Products from the Netherlands,* 61 FR 48465, 48466 (September 13, 1996). Petitioners have not commented on this argument.

Department's Position: The Department agrees that prime and non-prime merchandise should not be combined to determine whether sales fell above or below cost. As noted by NSC, it is the Department's longstanding policy to conduct separate cost tests for prime and non-prime materials. Therefore, for the final determination, the Department has excluded non-prime merchandise from its analysis.

However, the Department agrees with petitioners reasoning as to why some sales should be used in the calculation of the overall margin and continues to use the same analysis it did in the preliminary determination.

Continuation of Suspension of Liquidation

In accordance with section 735(c)(1)(B) of the Act, we are directing the Customs Service to continue to

suspend liquidation of all entries of subject merchandise from Japan that were entered, or withdrawn from warehouse, for consumption on or after November 21, 1998 (90 days prior to the date of publication of the *Preliminary Determination* in the **Federal Register**) for KSC and those companies which fall under the ''all-others'' rate. In addition, we will continue to suspend liquidation of all entries of subject merchandise from Japan that were entered, or withdrawn from warehouse, for consumption on or after February 19, 1999 (the date of publication of the Department's preliminary determination) for NSC and NKK. We shall refund cash deposits and release bonds for NSC and NKK for the period between November 21, 1998 and February 19, 1999 (i.e., the critical circumstances period). The Customs Service shall continue to require a cash deposit or posting of a bond equal to the estimated amount by which the normal value exceeds the U.S. price as shown below. These suspension of liquidation instructions will remain in effect until further notice. The weighted-average dumping margins are as follows:

Company	Margins (percent)
Nippon Steel Corporation	19.65
NKK Corporation	17.86
Kawasaki Steel Corporation	67.14
All Others	29.30

ITC Notification

In accordance with section 735(d) of the Act, we have notified the International Trade Commission (''ITC'') of our determination. Because our final determination is affirmative, the ITC will, within 45 days, determine whether these imports are materially injuring, or threatening material injury to, the U.S. industry. If the ITC determines that material injury, or threat of material injury does not exist, the proceeding will be terminated and all securities posted will be refunded or canceled. If the ITC determines that such injury does exist, the Department will issue an antidumping duty order directing Customs officials to assess antidumping duties on all imports of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the effective date of the suspension of liquidation.

This determination is issued and published in accordance with sections 735(d) and 777(i)(1) of the Act.

Dated: April 28, 1999.

Richard W. Moreland,

Acting Assistant Secretary for Import Administration.

[FR Doc. 99–11286 Filed 5–5–99; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–201–817]

Oil Country Tubular Goods from Mexico; Antidumping Duty Administrative Review; Extension of Time Limit

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of extension of time limit for preliminary determination in antidumping duty administrative review of oil country tubular goods from Mexico.

SUMMARY: The Department of Commerce (the Department) is extending the time limit for the preliminary results of the administrative review of the antidumping duty order on oil country tubular goods from Mexico. This review covers the period August 1, 1997 through July 31, 1998.

EFFECTIVE DATE: May 6, 1999.

FOR FURTHER INFORMATION CONTACT: John Drury or Linda Ludwig, Office of AD/CVD Enforcement, Group III, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone (202) 482–0195 or 482–3833, respectively.

SUPPLEMENTARY INFORMATION: Because it is not practicable to complete this review within the time limits mandated by the Tariff Act of 1930, as amended, the Department is extending the time limit for completion of the preliminary results until August 31, 1999, in accordance with section 751(a)(3)(A) of the Tariff Act of 1930, as amended by the Uruguay Round Agreements Act of 1994 (19 U.S.C. § 1675 (a)(3)(A)). *See* memorandum to Robert S. LaRussa from Joseph A. Spetrini regarding the extension of the case deadline, xxxxxx, 1999.

Dated: April 26, 1999.

Joseph A. Spetrini,

Deputy Assistant Secretary, Enforcement Group III.

[FR Doc. 99–11424 Filed 5–5–99; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[C–201–810]

Certain Cut-to-Length Carbon Steel Plate From Mexico: Postponement of Preliminary Results of Countervailing Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of extension of time limits for preliminary results of countervailing duty administrative review.

SUMMARY: The Department of Commerce (Department) is extending by no longer than 120 days the time limit of the preliminary results of the administrative review of the countervailing duty order on certain cut-to-length carbon steel plate from Mexico, covering the period January 1, 1997, through December 31, 1997, since it is not practicable to complete this review within the time limits mandated by the Tariff Act of 1930, as amended (19 U.S.C. 1675 (a)(3)(A)).

EFFECTIVE DATE: May 6, 1999.

FOR FURTHER INFORMATION CONTACT: Dana Mermelstein or Eric Greynolds, Office of CVD/AD Enforcement VI, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230; telephone (202) 482–0984 and 482–6071, respectively.

SUPPLEMENTARY INFORMATION:

Applicable Statute

Unless otherwise indicated, all citations to the statute are references to the provisions of the Tariff Act of 1930, as amended by the Uruguay Round Agreements Act (URAA) effective January 1, 1995 (the Act). In addition, unless otherwise indicated, all citations to the Department's regulations are to the regulations as codified at 19 CFR Part 351 (April 1998).

Background

On September 29, 1998, the Department initiated an administrative review of the countervailing duty order on certain cut-to-length carbon steel plate from Mexico, covering the period January 1, 1997, through December 31, 1997 (63 FR 51893). In our notice of initiation, we stated our intention to issue the final results of this review no later than August 31, 1999. The preliminary results of review are