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July 16, 2002

MEMORANDUM TO: Faryar Shirzad
Assistant Secretary
for Import Administration

FROM: Bernard T. Carreau
Deputy Assistant Secretary
for Import Administration, Group II

SUBJECT: Issues and Decision Memorandum for the Administrative Review of Certain Cased Pencils from the People's Republic of China; Final Results

Summary

We have analyzed the comments and rebuttal comments of interested parties in the administrative review of certain cased pencils from the People's Republic of China (PRC). As a result of our analysis, we have made changes, including corrections of certain inadvertent clerical errors in the preliminary margin calculations. We recommend that you approve the positions we have developed in the Discussion of the Issues section of this memorandum for these final results.

Below is the complete list of issues in this administrative review for which we received comments and rebuttal comments from parties:

Comment 1: Whether to Rescind the Review with Respect to Guangdong/Three Star
Comment 2: The Appropriate Surrogate Values for Semi-Finished Pencils
Comment 3: Whether China First Pencil Co., Ltd's Erasers Should be Valued Based on Purchases
Comment 4: Whether Indian Surrogate Values for Erasers, Cores, Glue, and Lacquer are Aberrational
Comment 5: The Appropriate Surrogate Source for Financial Ratios
Comment 6 Ministerial Error in Orient International Holding Shanghai Foreign Trade Co., Ltd.'s (OIHSFTC'S) Margin Calculation
Comment 7: Whether India is the Appropriate Principal Surrogate Market Economy Country
Comment 8: The Appropriate Surrogate Source for Logs and Slats
Comment 9: The Appropriate China-Wide Rate
Comment 10: Use of Partial Adverse Facts Available with Respect to OIHSFTC's Uncooperative Producers

Comment 11: Verification Discrepancies - Kaiyuan/Laizhou
Comment 12: Whether CFP and Three Star Should be Treated as a Single Entity for Antidumping Purposes

Background

On January 30, 2001, the Department of Commerce (the Department) published the preliminary results of the antidumping duty administrative review of certain cased pencils from the PRC. See Certain Cased Pencils from the People's Republic of China; Preliminary Results and Rescission in Part of Antidumping Duty Administrative Review, 67 FR 2402 (January 17, 2002) (Preliminary Results). The period of review (POR) is December 1, 1999 through November 30, 2000. We gave interested parties an opportunity to comment on the Preliminary Results. On June 4, 2002, respondent Kaiyuan Group Corporation (Kaiyuan) submitted a case brief. On June 6, 2002, respondents OIHSFTC, China First Pencil Co., Ltd. (CFP), Guangdong Stationery and Sporting Goods Import and Export Co., Ltd. (Guangdong), and Three Star Stationery Industry Co., Ltd. (Three Star) submitted case briefs. On June 6, 2002, California Cedar Products Company (CalCedar) and Tianjin Custom Wood Processing Co., Ltd. (TCW), both interested parties in this antidumping duty review, submitted a joint case brief. On June 6, 2002, the Pencil Section of the Writing Instrument Manufacturers Association (WIMA), a trade association composed of domestic pencil producers, and Sanford Corporation, Dixon-Ticonderoga Corporation, Tennessee Pencil Company, Musgrave Pencil Company, Moon Products, Inc., General Pencil Company, and Aakron Rule, Inc., domestic manufacturers of pencils, (collectively, petitioners), submitted a case brief. On June 12, 2002, the aforementioned interested parties, with the exception of Kaiyuan, submitted rebuttal briefs. The Department did not receive any requests for a public hearing.

Discussion of the Issues

Comment 1: Whether to Rescind the Review with Respect to Guangdong/Three Star

According to CFP, OIHSFTC, Guangdong and Three Star, the Department correctly determined in the Preliminary Results that the review of Guangdong's sales of Three Star-produced merchandise is inappropriate and should not be continued. See Preliminary Results. Respondents note that the Department verified that all of Guangdong's sales of pencils to the United States were of Three Star-produced pencils and they argue that a review of Guangdong's sales of Three Star-produced pencils is not only unnecessary in light of the fact that pencils exported by this chain are excluded from the scope of the antidumping duty order, but it is unlawful as well. Respondents further claim that the Department verified that Three Star had no exports to the United States other than those through Guangdong (Three Star Verification Report at 4 ("We noted no direct sales to U.S. customers.")). Respondents argue that in the absence of any exports by Three Star on its own account directly to the United States, and given that all of Guangdong's exports were supplied by Three Star (an excluded sales chain), there is nothing for the Department to review. Therefore, respondents conclude that the Department should reaffirm its position in the Preliminary Results and rescind the review of Guangdong/Three Star.

Petitioners did not comment on this issue.

Department's Position:

We disagree with respondents. Since the preliminary results in this review, evidence has been placed on the record regarding the relationship between CFP and Three Star which supports treating these two entities as a single entity for purposes of our antidumping analysis. See Department's Position to Comment 12. Because we find the CFP/Three Star entity to be distinct from the Three Star entity in the Three Star/Guangdong sales chain that was excluded from the antidumping duty order, we are no longer excluding the Three Star/Guangdong sales chain from the order. Thus, we have not rescinded this review with respect to Guangdong. We will instruct U.S. Customs to begin suspending liquidation of entries of pencils identified as produced by Three Star and exported by Guangdong effective as of the date of publication of this notice. All merchandise exported by Guangdong will be subject to cash deposit requirements at the PRC-wide rate.

With respect to Three Star, we note that although Three Star did not ship subject merchandise directly to the United States during the POR, we are treating CFP and Three Star as a single entity for purposes of assigning an antidumping duty rate, and thus we have not rescinded the review with respect to Three Star. We will assign the CFP/Three Star entity the antidumping duty rate calculated for CFP in this review.

Comment 2: The Appropriate Surrogate Values for Semi-Finished Pencils

During the POR, New Century performed certain finishing operations on finished and semi-finished pencils that it purchased from Changshu (e.g., adding decorations and foil, etc). New Century then sold the finished pencils to OIHSFTC for export to the United States. In the Preliminary Results, the Department treated the semi-finished pencils as a material input and valued them using Indian import item number 9609.10.00, "pencils and crayons with leads enclosed in a rigid sheath," from the import data from the Monthly Statistics of the Foreign Trade of India (MSFTI) for the period January 2000 through December 2000. OIHSFTC argues the Department's valuation methodology is incorrect because 1) the Department should have valued the finished pencils using both Changshu and New Century's factors of production (FOP), and 2) the Indian import statistics used to value the "raw pencils" or semi-finished pencils relate to finished pencils.

In ignoring Changshu's FOP, respondent contends, the Department has ignored the fact that both New Century and Changshu were involved in an operation that constituted a continuous production process. In addition, respondent asserts that the Department ignored the fact that each of these producers are essentially OIHSFTC's contractors. OIHSFTC explains that it controlled the production flow at all times and required that New Century incorporate Changshu's semi-finished pencil stock into the finished product. Moreover, OIHSFTC characterizes Changshu as

New Century's subcontractor and notes that according to 19 CFR 351.401(h) of the Department's regulations "the Secretary will not consider a toller or subcontractor to be a manufacturer or producer where the toller or subcontractor does not acquire ownership, and does not control the relevant sale, of the subject merchandise or foreign like product." Respondent notes that it is the seller who controls the sale to the U.S. customers and New Century is the only other party who ever owns the "subject merchandise."

Respondent points out that the facts here are nearly identical to the facts presented in Manganese Metal from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 66 Fed. Reg. 15076 (March 15, 2001) (Manganese Metal). In that case the Department faced a situation where the producers of the finished product, manganese metal powder, procured the semi-finished product, manganese metal flake, from a metal flake producer. In order to value the flake input (equivalent to the semi-finished pencil in this case), the Department multiplied the total direct cost of the producer of the flake by the unit consumption of flake as reported by the powder producers. See the public version of the calculation memorandum for Manganese Metal, at Comment 3. Respondent argues that the same methodology should be applied here where the facts are virtually indistinguishable.

Moreover, OIHSFTC claims that the valuation methodology used by the Department in the Preliminary Results significantly overstates normal value because the Indian import statistics are values for finished pencils, in addition to semi-finished pencils, and thus the Department has double-counted the finishing inputs used by New Century. Respondent notes that semi-finished and finished pencils are not classified in separate tariff categories. Further, respondent claims that there is very little trade in semi-finished pencils throughout the world, and thus virtually all pencil imports into India (if not all such imports) are of finished pencils.

Petitioners argue that the manufacturer of the finished products exported by OIHSFTC to the United States is New Century; therefore, the Department correctly valued the input that New Century obtained from Changshu. Further, petitioners argue that Changshu is not a toller or subcontractor to either New Century or OIHSFTC, but is merely New Century's supplier of a factor of production used in manufacturing subject merchandise.

Petitioners assert that OIHSFTC's citation to Manganese Metal for the proposition that the raw materials supplier's FOP should be used is off the mark. Although the rationale for the approach taken in Manganese Metal was not explained, according to petitioners, it appears the finished product was made almost exclusively from manganese metal flake with only minor other additives, making the latter the article for which FOP were relevant. Petitioners note that it also appears that, in Manganese Metal, surrogate value information for flake, the material purchased by the producer of subject merchandise, was not available, but that the surrogate information for the materials used in making flake was available. Petitioners contend that the relationship between Changshu and New Century differs from the relationships of the parties in Manganese Metal, and that a surrogate value for this material input – semi-finished and finished pencils – is readily available.

Lastly, petitioners claim that OIHSFTC concedes that "raw pencils" are included in Harmonized Tariff System (HTS) number 9609.10, the tariff category used by the Department to determine the surrogate value of the semi-finished pencils obtained by New Century in CFP's and OIHSFTC's combined June 6, 2002 case brief at page 5. Petitioners contend that because this HTS number covers the identical item for which a value is sought, the Department correctly used it in the Preliminary Results. See Final Results of the Antidumping Duty Administrative Review of Potassium Permanganate from the People's Republic of China, 66 Fed. Reg. 46775 (Sept. 7, 2001), and accompanying Issues and Decision Memorandum, at Comment 16 (Potassium Permanganate Decision Memorandum).

Department's Position:

We agree with respondent, in part, in that we valued New Century's pencil inputs obtained from Changshu using Changshu's reported FOP values. Section 773 (c)(1) of the Tariff Act of 1930, as amended (the Act), notes that "if the subject merchandise is exported from a nonmarket economy country ... the administering authority shall determine the normal value of the subject merchandise on the basis of the value of the factors of production utilized in producing the merchandise ... ." Section 771(25) of the Act defines subject merchandise as "the class or kind of merchandise that is within the scope of an investigation, a review, a suspension agreement, an order ... ." In this case, the scope of the review includes "cased pencils of any shape or dimension which are writing and/or drawing instruments that feature cores of graphite or other materials, encased in wood and/or man-made materials whether or not decorated and whether or not tipped (e.g., with erasers, etc.) in any fashion and either sharpened or unsharpened." Although a detailed description of the semi-finished pencils produced by Changshu cannot be provided here because it is proprietary, a detailed description of these pencils is on the record and they fall within the scope of the order. Therefore, by definition, they are subject merchandise. Thus, pursuant to section 773(c)(1) of the Act, it is appropriate to value this merchandise using Changshu's FOP. Moreover, because New Century performs finishing operations on this merchandise before it sells it to OIHSFTC for resale to customers in the United States, we find it appropriate to include New Century's FOP in the build-up of normal value and have done so in these final results of review.

Comment 3: Whether CFP's Erasers Should be Valued Based on Purchases

CFP argues that regardless of the surrogate value used for eraser valuation, the Department should use the price it actually paid to market economy suppliers to value the erasers it used to produce subject merchandise. Respondent notes that in the Preliminary Results, the Department inadvertently failed to use the market economy cost it incurred for these items. Respondent points out that the Department verified virtually all of its purchases of erasers from Taiwan, confirming that they were from a market economy supplier and were paid for in U.S. dollars. See CFP Verification Report at 15 and public Verification Exhibit 19.

Petitioners did not comment on this issue.

Department's Position:

We agree with respondent. Section 351.408(c)(1) of the Department's regulations notes that "where a factor is purchased from a market economy supplier and paid for in a market economy currency, the Secretary normally will use the price paid to the market economy supplier {to value the factor}. In those instances where a portion of the factor is purchased from a market economy supplier and the remainder from a nonmarket economy supplier, the Secretary normally will value the factor using the price paid to the market economy supplier." Furthermore, in determining whether it is appropriate to value a particular factor of production using market economy prices when not all of the factor was purchased from a market economy, the Department considers, among other things, whether the quantity purchased is meaningful such that the "price paid is a reliable market economy value for the input." See Shakeproof Assembly Components Division of Illinois Tool Works, Inc., v. United States, 203 F. Supp. 2d 486, 492 (CIT 2000)(Shakeproof); see, also, Final Determination of Sales at Less Than Fair Value: Certain Automotive Replacement Glass Windshields From The People's Republic of China,67 FR 6482 (February 12, 2002)(Windshields from China), and accompanying Issues and Decision Memorandum, at Comment 32 (where the Department stated that " Xinyi's market economy purchases of molding are not significant, and therefore, for the final determination, we continue to determine that Xinyi's molding input should be valued using a surrogate value and not using its actual purchase price from a market economy supplier."). Because we have found the quantity of erasers purchased by CFP from a market economy supplier in U.S. dollars to be meaningful, we have used the purchase price paid by CFP to value erasers in these final results.

Comment 4: Whether Indian Surrogate Values for Erasers, Cores, Glue, and Lacquer are Aberrational

OIHSFTC and CFP argue that the Department has substantial evidence on the record demonstrating that the surrogate values used in the Preliminary Results to value erasers, cores, and glue are aberrational.

With respect to erasers, respondents argue against continuing to value erasers using the data from the MSFTI because the data are 1) skewed by the basket nature of the tariff category, 2) statistically and commercially insignificant, and 3) demonstrably aberrational. Respondents point out that there is only one Indian import category for erasers and thus, this category includes everything from the simple, mass-produced rubber erasers, like those used in the Chinese producers' pencil production, to specialized erasers. Respondents contend that specialized erasers include those used by artists working in special media and those used by professional architects and engineers who require erasers with unique characteristics and different component materials which impart the special qualities required. Therefore, respondents argue that it would be inappropriate to use this category noting that the Department has acknowledged the need and desirability of selecting surrogate value data that are as product-specific as possible in valuing a particular factor of production. See Final Determination of Certain Sebacic Acid From the People's Republic of China, 59 Fed. Reg. 28053, 28058 (May 31, 1994) (Sebacic Acid).

Moreover, respondents argue that the Indian import data for erasers are statistically and commercially insignificant and should not be used. Respondents assert that the MSFTI data, excluding the erasers with Chinese origin (which are excluded from the calculation of the surrogate unit value), comprise a mere 5,266 kgs. over the course of the entire calendar year 2000. By contrast, the Indonesian import statistics for the same tariff category and year reflect imports of 3,637,900 kgs. or 690 times the Indian import volumes. Thus, respondents maintain that the MSFTI value for erasers used in the Preliminary Results (286.839 Rs/kg. or nearly 6.42 USD/kg.) is demonstrably aberrational.

Additionally, respondents note that they placed purchase invoices on the record from two different sources for purchases of erasers totaling 21,943 kgs. (more than four times the Indian import volumes), and 110,732 kgs. (more than 21 times the Indian import data), respectively. Respondents note that these invoices, dated within the POR, for erasers purchased from two different Taiwanese producers (one who sold erasers to a Philippine company and one who sold erasers to CFP) show the value of standard-size erasers to range from 1.53 USD/kg. to 1.57 USD/kg. Thus, respondents assert that the Department should reject the MSFTI data in favor of the actual eraser prices on the record, see New Shipper Review of Heavy Forged Hand Tools from the People's Republic of China, 66 Fed. Reg. 54503 (Oct. 29, 2001)(Hand Tools), and accompanying Issues and Decision Memorandum, at Comment 1 ("we do not believe that a value that differs significantly from both the Indian and U.S. average import values for the same input during reasonably contemporaneous time periods, based upon relatively low quantities of merchandise, is a representative or reliable value to use as a surrogate value in our calculations."). However, respondents state that if the Department chooses to ignore the highly credible prices paid by the Philippine purchaser, at the very least the unreliability of the MSFTI data must lead the Department to use the prices paid by CFP for market economy erasers for all respondents in this case. See Final Determination of Sales at Less Than Fair Value: Certain Non-Frozen Apple Juice Concentrate from the People's Republic of China, 65 Fed. Reg. 19873 (April 13, 2000) (Apple Juice), and accompanying Issues and Decision Memorandum at Comment 6 (wherein the Department stated that "absent reliable surrogate values and consistent with our practice, for those producers which did not purchase aseptic bags from a market economy supplier, we have applied an average of the prices other respondents paid to purchase aseptic bags from a market economy supplier."); see, also, Notice of Final Determination of Sales at Less Than Fair Value: Bicycles from the People's Republic of China, 61 Fed. Reg. 19026, 19030 (April 30, 1996)(Bicycles).

With respect to cores, respondents argue against continuing to value cores using MSFTI data because the data are 1) not product-specific, 2) statistically insignificant, and 3) demonstrably aberrational. Respondents claim that on its face, using the same tariff category to value both black and color cores is inappropriate when even the values for black cores vary greatly depending on the use for which they are made. Also, respondents allege that the quantity of black and color core imports from the MSFTI data, 1,872 kgs, are statistically insignificant when compared to Indonesian import data of 34,484 kgs. (18 times the volume of the Indian import statistics) and the price quotes they place on the record for 17,600 kgs of black cores and 16,884

kgs of color cores (each in excess of nine times the Indian import volume). Respondents contend that it is important to consider these volumes in determining the reasonableness of the available data. Further, respondents maintain that the MSFTI value for cores used in the Preliminary Results (7.62 USD/kg.) is demonstrably aberrational. Respondents note that they provided an Indian producer's price list and a price quote from an Indonesian supplier which show that the average cost of black and color cores range from 1.09 USD/kg. to 1.90 USD/kg. (with black core prices ranging from 0.215 USD/gross to 0.35 USD/gross and color core prices ranging from 0.72 USD/gross to 0.80 USD/gross). Moreover, respondents contend that these prices are supported by the average value of Indian black and color cores imported into Indonesia, 1.54 USD/kg. Thus, respondents contend that for the final results the Department should value cores using the submitted prices which corroborate one another and are supported by Indonesian import statistics.

In addition, interested parties CalCedar and TCW assert that the Indian import data used by the Department to value black and color cores in the Preliminary Results are inappropriate because the data are for imports of both black and color cores, and color cores tend to be significantly more expensive than black cores. Thus, CalCedar and TCW state that the Indian import data exaggerates the cost of black cores. Furthermore, Cal Cedar and TCW contend that variations in the weight and price of the various types of cores that may be included in the Indian import data could result in an inaccurate and distortive value for a respondent's black cores. Specifically, the interested parties note that if the Indian import data includes cores that are more expensive but lighter than regular black pencil cores (e.g., mechanical pencil leads), these cores will account for a significant portion of the total value of the Indian import category but a much smaller portion of the total weight of the imported cores. This scenario will markedly increase the overall average cost per kilogram of the cores. According to the interested parties, applying such an average cost per kilogram to a respondent who might employ black cores that are heavier and less expensive than, for example, mechanical pencil leads will significantly distort the true value of the respondent's black cores. Therefore, CalCedar and TCW argue that the Department should give preference to surrogate data that either 1) provide cost per kg. figures for the specific sort of pencil core employed by a given respondent, or 2) provide costs of pencil cores per gross to ensure that the methodology used by the Department is based on the best available information and establishes antidumping margins as accurately as possible (see section 773(c)(1) of the Act, (the Department values FOP using the "best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by the administering authority"); see, also, Notice of Final Determination of Sales at Less Than Fair Value: Silicomanganese from Kazakhstan, 67 FR 15535 (April 2, 2002), and accompanying Issues and Decision Memorandum, at Comment 1 (the Department can exercise discretion in selecting surrogate values for the FOP by disregarding aberrational or distortive surrogate values for individual FOP)).

With respect to glue, OIHSFTC and CFP maintain that the MSFTI data used in the Preliminary Results should be rejected because the data are 1) statistically and commercially insignificant, and 2) demonstrably aberrational. Respondents allege that the quantity of glue imports from the

MSFTI data, 29,402 kgs., which represents imports over only a five month period, are statistically and commercially insignificant when compared to Indonesian imports of glue in excess of 3,000,000 kgs. (100 times greater than the volume of Indian imports). Moreover, respondents claim that the unit price of glue used in the Preliminary Results, 2.76 USD/kg. is aberrational when compared to the average unit price derived from Indonesian import statistics, 0.81 USD/kg., and the weighted-average price of 1.10 USD/kg. on invoices from a Philippine producer who sold Rakoll brand glue to a pencil producer in the Philippines. Respondents maintain that the Indonesian import data are 1) contemporaneous with the POR; 2) cover the same import category used by the Department in the Preliminary Results; 3) reflect a significant volume of imports; and, 4) are supported by the invoice prices on the record. Thus, respondents urge the Department to value glue using the Indonesian import data.

In conclusion, respondents claim that regardless of the country selected as the "surrogate," the Department must give due consideration to the fact that the Indian data are not product-specific, represent extremely low quantities, and differ significantly from at least two other separate and independent sources that corroborate one another. Respondents point out that it is the Department's practice to weigh all of the relevant characteristics of the surrogate value information on a case-by-case basis to determine the best available data for valuing FOP. See Final Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon Steel Plate from the PRC, 62 Fed. Reg 61964, 61987 (Nov. 20, 1997) (Comment 29), where the Department noted that "{i}t is important to emphasize, however, that our overarching mandate is to select the 'best' available data (see 19 U.S.C. 1677b(c)(1)), which involves weighing all of the relevant characteristics of the data rather than relying on one or two absolute 'rules'; see also, Certain Cased Pencils from the PRC; Final Determination of Sales at Less Than Fair Value, 59 Fed. Reg. 55625, 55633 (Nov. 8, 1994) (stating "although we have selected India as the appropriate surrogate country in this investigation, this does not mean that we are required to use those Indian factor values that we find to be aberrational . . . ").

Petitioners urge the Department to continue using MSFTI data to value erasers, cores, glue and lacquer because the MSFTI data are completely contemporaneous with the POR and include imports for the relevant tariff classifications of significant value from several exporting countries and are thus representative of a range of prices. Petitioners note that the Department prefers to select surrogate values that are 1) for products as similar as possible to the input being valued; 2) contemporaneous with the POR; and, 3) representative of a range of prices in effect during the POR. See Potassium Permanganate Decision Memorandum. Petitioners point out that the MSFTI tariff classifications used by the Department for erasers, cores, and glue cover the exact material for which a surrogate valuation is required (i.e., rubber erasers, glue, and pencil leads, black and colored). In addition, petitioners note that no interested party has disputed the tariff classifications used to calculate surrogate values for the Preliminary Results. Petitioners maintain that the interested parties' accusations that the Indian tariff category for erasers may include "special" items and that the category for cores covers primarily high-cost cores for mechanical pencils is without factual support. Further, petitioners contend that the tariff category used for erasers is not a "basket" category as claimed by respondents but rather is an *eo nomine*

tariff provision that identifies the specific item covered by name and by definition excludes extraneous articles. Petitioners maintain that the new shipper review of hand tools which was cited by respondents supports using MSFTI data to value erasers because in that case the Department relied on a basket tariff category that included articles other than tool handles to value such handles, whereas here the tariff category covers only the material to be valued, rubber erasers. Finally, petitioners point out that in Sebacic Acid, another case cited by respondents, the Department relied on MSFTI data because it was specific to the factor of production actually used by the Chinese producers. Similarly, petitioners claim that in this review, the MSFTI data are for the material that is actually used in Chinese pencil production, i.e., rubber erasers.

Additionally, petitioners refute respondents claim that the MSFTI data are commercially insignificant or aberrational. Petitioners note that the MSFTI data include transactions from multiple countries over the course of twelve months. With respect to erasers, petitioners argue that the two sets of invoices provided by respondents do not demonstrate that the MSFTI data for rubber erasers imported into India are aberrational in terms of the Indian market (the relevant market for surrogate valuation purposes), because the invoices are from only two producers, in a single, non-surrogate country. Petitioners continue that in Hand Tools, the Department's "aberrational" price analysis involved comparison of the value of imports from one country against those from other countries in order to evaluate whether that single country's data should be excluded from the MSFTI totals. Petitioners note that the Department did not compare MSFTI data against idiosyncratic single-transaction prices in countries other than India in its analysis in Hand Tools, and thus did not adopt the methodology put forth by respondents in this review. Similarly, petitioners claim that Apple Juice is unavailing because in that case the Department declined to use MSFTI data that did not reflect the cost of the material, whereas in this review, there is no reason to doubt that MSFTI data concerning rubber erasers reflect the cost of rubber erasers.

With respect to cores, petitioners contend that there is no indication that any sales to India (or any other surrogate country) ever occurred pursuant to the terms of the Indian price list or the Indonesian price quote for cores. Moreover, petitioners contend that the Indian price list is for export from India, and thus inapplicable to determining prices in India, while the Indonesian quote is for shipments to the United States, and thus says nothing about prices in India. Finally, petitioners note that the Indian price list is undated while the Indonesian price quote is dated January 10, 2002, which is outside the POR.

With respect to glue, petitioners allege that respondents' argument overlooks the broader coverage of MSFTI data available on the record now compared with that available in the Preliminary Results. Further, petitioners contend that respondents fail to provide any rationale for why they consider the volume of imports recorded in the MSFTI data for glue to be "exceedingly small" and point out that respondents attempt to reject this data covering imports of 140 metric tons of glue using invoices totaling 1.8 metric tons in volume. Also, petitioners argue that respondents failed to demonstrate that the Philippine invoice prices are representative of prices in India (or the Philippines for that matter). Thus, petitioners assert that the respondents

failed to substantiate that there is any deficiency in the MSFTI data for glue that would warrant abandoning the MSFTI values in favor of data covering the same tariff item in a country other than the designated surrogate.

Also, petitioners contend that the Department should not rely upon the price quotes provided by respondents because they are the type of single-source information that the Department considers to be inferior to such published nationwide materials as the MSFTI data and there is nothing to indicate that the price quotes are indicative of the average prices in India during the POR. See Notice of Final Determination of Sales at Less Than Fair Value: Silicomanganese from Kazakhstan, 67 FR 15535 (April 2, 2002), and accompanying Issues and Decision Memorandum (Silicomanganese Decision Memo); also, see Potassium Permanganate Decision Memorandum at Comment 15. Petitioners find the determinations relied upon by respondents to support using these price quotes to be unavailing. Specifically, petitioners assert that the single producer price quotes provided by respondents for cores are completely unlike the Chemical Weekly data used in Sulfanilic Acid: they are not published, they are not nationwide, they are not contemporaneous with the POR (the Indian price list is not even dated); they are export prices; and they are not representative of a range of prices in effect during the POR, and in fact are only price quotes, not actual sales prices, as is the data from Chemical Weekly. Moreover, petitioners state that in Sulfanilic Acid, the Department used price quotes for transactions in India, whereas the price quotes in this review are for transactions outside of India. Petitioners continue that in Manganese Metal, the Department's analysis focused solely on which of several price quotes should be used, rather than whether a price quote is preferable to MSFTI or similar published, nationwide statistical data reflecting numerous transactions. Therefore, petitioners contend that the circumstances in this review are different from those in Sulfanilic Acid and Manganese Metal and do not support respondents' argument that the Department should rely upon private price quotes rather than MSFTI data.

Further, petitioners contend that the unpublished price information for erasers, cores, glue, and lacquer, which was supplied to the respondents by Mr. Rolland Thompson the president of a Philippine pencil producer, does not satisfy the Department's preferences. First, Mr. Thompson's data are not representative of prices throughout the POR: the eraser transactions occurred in May and July 2000; the pencil leads price quote is undated; the glue transactions took place in January, July and October 2000; and, the lacquer transactions took place in February and October 2000. Second, Mr. Thompson's data are from single vendors and thus not representative of a range of prices. Third, Mr. Thompson's Philippine data are for small quantities of materials. Fourth, the Department prefers to use information from a single surrogate country to value FOP and suitable Indian values are on the record to follow this practice. Finally, petitioners note that Mr. Thompson is also an owner of a major U.S. pencil importer, Simmons Rennolds Associates, an importer of subject merchandise from Kaiyuan, a respondent in this review. Therefore, according to petitioners, Mr. Thompson has a clear financial interest in this proceeding. Petitioners note that in Crawfish Tail Meat from The People's Republic of China; Notice of Final Results of the Antidumping Duty Administrative Review and Final Partial Rescission of Antidumping Duty Administrative Review, 67 FR 19546 (April 22, 2002)(Crawfish from China),

and accompanying Issues and Decision Memorandum, the Department rejected privately-prepared data that was "potentially distorted by the influence and/or special interests of any private sector parties."

Respondents disagree with petitioners' observation that the invoices for erasers, cores, glue and lacquer which were supplied by Mr. Thompson should be disregarded. Respondents assert that whatever the interest of Mr. Thompson, the values for inputs that he supplied are corroborated by other independent sources. Moreover, respondents point out that there are multiple single producer values for some of the materials, thus obviating any concern regarding the use of single producer data.

Lastly, while respondents expressed concerns that the Department valued lacquer in the Preliminary Results using MSFTI data for only a five-month period, respondents note that petitioners have placed on the record MSFTI data for the remainder of calendar year 2000 and now both respondents and petitioners urge the Department to value lacquer in the final results using this data.

Department's Position:

We agree with respondents, in part. As the Court of International Trade (CIT) has noted "accuracy is the touchstone of the antidumping statute. See Rhone Poulenc, Inc. v. United States, 899 F.2d 1185, 1191 (CIT 1990). Therefore the Department "has an obligation to review all data and then determine what constitutes the best information available or, alternatively, to explain why a particular data set is not methodologically reliable." See Olympia Industrial, Inc. v. United States, 7 F. Supp. 2d 997, 1001(CIT) (April 17, 1998). In determining whether data are unreliable, the Department's practice is "to disregard small-quantity import data when the per-unit value is substantially different from the per-unit values of the larger quantity imports of that product from other countries." See Shakeproof. Also, in determining whether certain import data are unreliable, the Department has compared the data in question to other market values on the record (e.g., U.S. import statistics or import statistics from other potential surrogate countries). See Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles from the PRC; Final Results of Antidumping Duty Administrative Review, 60 FR 49251, 49253 (September 22, 1995).

Following the Department's practice, we examined the Indian import statistics to determine whether there were low-volume imports from certain countries with per-unit values substantially different from the per-unit values of the higher quantity imports of that product from other countries. For each of the factors in question, we found that low-volume Indian imports with significantly different per-unit prices existed for imports from certain countries, and therefore, we excluded these imports from our calculation of the weighted-average Indian import value. Further, consistent with the Department's practice, in addition to disregarding import values from NME counties, we excluded from our calculations imports from countries which the Department has determined maintain broadly available, non-industry specific export subsidies which may

benefit all exporters to all export markets (i.e., imports from South Korea, Thailand, and Indonesia). See Windshields from China.

For those producers that did not purchase erasers from a market economy, we conducted the following analysis. After making the above adjustments to our surrogate value calculation for erasers, we derived a weighted-average Indian import value of 9.06 USD/kg. The weighted-average Indonesian import value for erasers is 0.40 USD/kg. while the weighted-average price paid by CFP to its Taiwanese eraser supplier is 1.53 USD/kg. Thus, the average Indian import value varies significantly from the other average eraser values on the record (over 490 percent greater than the Taiwanese value and over 2,100 percent greater than the Indonesian value). This variation calls into question the reliability of the average Indian value, particularly since the Taiwanese price is a verified market economy price for the exact eraser used by one of the respondents and the types of eraser used by respondents during the POR do not significantly differ. Therefore, because we find the average Indian import value to be unreliable, we valued erasers for all respondents, other than CFP, (see Comment 3) using the average Indonesian import value.

Contrary to respondents' suggestion, we have not valued all producers' erasers using the price CFP paid for erasers because the Indonesian value for erasers is not unreliable. Section 773 (c) of the Act directs the Department to value FOP, to the extent possible, based on the values of such factors in a comparable surrogate market economy country (or countries).
The Department normally uses one respondent's market economy purchases to value another respondent's factors as a last resort when no other reasonable values are available. See Windshields from China, and the accompanying Issues and Decision Memorandum at Comment 8. Such is not the case here. Therefore, for those producers that did not purchase erasers from a market economy, we are valuing erasers using Indonesian import values.

Regarding black and color cores, after making the adjustments noted above, we derived weighted average Indian and Indonesian import values of 7.69 USD/kg. and 6.47 USD/kg., respectively. Although the volume of cores imported into Indonesia during the 2000 calendar year is substantially greater than that imported into India during the POR, we do not find Indian imports of over 3,400 kgs. of pencil leads from seven different market economy countries to be insignificant. We note that the weighted-average Indian import price does not substantially vary from the weighted-average Indonesian import price. Furthermore, we have not considered the Indian price quotes placed on the record by respondents because the Indian price quotes are undated, are export prices, and it is not clear that any sales were made pursuant to these quotes. Also, we have not considered the Indonesian price quotes placed on the record because the quotes are for sales to the United States rather than for sales within a potential surrogate country, and they are dated outside the POR. Moreover, the price quotes for cores, as well as the invoices for glue discussed below, were placed on the record by a party affiliated with a U.S. importer of subject merchandise. For these reasons, and the fact that the Department did not verify this information to value cores and glue as it did respondents' eraser prices, we have not used it in the final results of this review. Finally, while the Department prefers to use surrogate values for

inputs as close as possible to the input being valued, with respect to cores, there are no acceptable data on the record which would allow the Department to value the specific type of core used by a particular respondent. Indian and Indonesian import statistics each only include a category for black and color cores together without providing any more details regarding the types of cores being imported. Thus, we have valued black and color cores used in the production of subject merchandise based on Indian import statistics adjusted as discussed above, which we find to be the best available information on the record.

With respect to glue, after making the adjustments noted above, we derived weighted-average Indian and Indonesian import values of 2.45 USD/kg. and 0.79 USD/kg., respectively. While there is a noticeable variation between these two average prices, as mentioned above we examined the Indian import statistics and excluded from our average price calculation low-volume Indian imports from certain countries with significantly different per-unit prices. Also, we do not find Indian imports of over 64,882 kgs. of glue from nine different market economy countries to be insignificant. Thus, because the Indian import statistics for glue are for a product as specific as possible to the input being valued, cover imports during a period contemporaneous with the POR, are representative of a range of prices in effect during the POR, and have not been found to be aberrational, we have continued to use these statistics to value glue.

Finally, we are in agreement with both respondents and petitioners with respect to using Indian import statistics to value lacquer.

Comment 5: The Appropriate Surrogate Source for Financial Ratios

CFP and OIHSFTC contend that for the final results, the Department should base surrogate overhead, selling general and administrative (SG&A) expenses and profit on the company specific data they provided rather than the overly broad, nonspecific financial data from the *"Reserve Bank of India Bulletin*, *Finances of Large Public Limited Companies, 1999-2000*" (RBI), which was used in the Preliminary Results. Respondents note that they provided the financial statements of Rollatainers Limited (Rollatainers), an Indian producer of paperboard products and Asia Wood International Corporation (Asia Wood), a Philippine wood products producer. According to respondents, the financial statements of these two companies provide surrogate financial data superior to the RBI data used in the Preliminary Results because 1) both financial statements are contemporaneous with (or nearly contemporaneous with) the POR; 2) both financial statements are for small to medium sized companies more like the size of the producers involved in this review than any of the 855 large Indian public companies whose financial data is compiled in the RBI bulletin; and, 3) these financial statements are for producers of comparable merchandise, falling in the same industrial sector as the Chinese producers involved in this case.

Respondents note that section 351.408(c)(4) of the Department's regulations provides: "For manufacturing overhead, general expenses, and profit, the Secretary normally will use non-proprietary information gathered from producers of identical or comparable merchandise in the

surrogate country." While respondents acknowledge that Rollatainers and Asia Wood do not produce identical merchandise to that of respondents, they note that the statute does not define "significant" or "comparable" and the Department has identified comparable merchandise on the basis of similarities in production factors and factor intensities in past cases. See, e.g., Pure Magnesium in Granular Form from the PRC, 66 FR 49345 (Sept. 27, 2001), and accompanying Issues and Decision Memorandum at Comment 3 (Pure Magnesium Decision Memorandum).

Respondents argue that Asia Wood is in the same manufacturing sector as a producer of pencils, uses many of the same production factors as pencil producers, and is the closest industrial sector-match to a producer of wood pencils of all the data available to the Department. Although Asia Wood is located in the Philippines, respondents note that the Department's Office of Policy has identified the Philippines as a potential surrogate country in this case and the Department uses surrogate data from more than one country if suitable information from the primary surrogate country is not available. See, generally, Folding Metal Tables and Chairs from the PRC, 67 Fed. Reg. 20090 (Apr. 24, 2002), and accompanying Issues and Decision Memorandum, at Comment 9 (Folding Tables Decision Memorandum); see, also, Memorandum From Jeff May, Director, Office of Policy, to Holly Kuga, Senior Office Director, AD/CVD Enforcement, dated July 30, 2001, which is on file in the Central Records Unit (CRU)-Public File (Surrogate Country Memorandum).

With respect to Rollatainers, respondents contend that even though it produces a less comparable product than Asia Wood, its products are far more comparable to pencils than those of companies represented in the RBI data. Respondents believe the Department erred in the Preliminary Results by declining to use Rollatainers' financial information solely on the grounds that the company experienced a loss. According to respondents, for the Department to reject more specific data, representative of the financial experience of a company in the same industrial sector as respondents, on the basis of a results-oriented approach like this is unreasonable. Respondents argue that if the representative experience of a surrogate producer yields low-profit or unprofitable operations, that is the experience of the relevant surrogate producer and there is no good reason to ignore that actual experience. While respondents recognize that the Department's preference is to value factory overhead, SG&A, and profit using a single source, they note that in past cases, where the preferred financial statements do not reflect a profit for a given period, the Department has used an alternative source for profit. See, e.g., Pure Magnesium in Granular Form from the PRC, 66 FR 49345 (Sept. 27, 2001), and accompanying Issues and Decision Memorandum at Comment 3 (Pure Magnesium Decision Memorandum); see, also, Silicomanganese from Brazil, Final Results of Antidumping Administrative Review, 62 FR 37877-37878 (July 15, 1997). In this case, respondents argue that the Department could use the Rollatainers data and incorporate the profit rate from Asia Wood as the most producer-specific data available.

Respondents argue that the RBI data, which were compiled based on the financial results of 855 of some of the largest public companies in India, is anything but reflective of the experience of producers of identical or comparable merchandise in the surrogate country. According to

respondents the Department has, in the past, clearly expressed its preference for "producer- or industry-specific data for overhead, SG&A and profit," and has stated that financial ratios obtained from actual companies, even if the company does not produce the subject merchandise, are preferable to data from the RBI. See Notice of Final Determination of Sales at Less Than Fair Value: Creatine Monohydrate From the People's Republic of China, 64 Fed. Reg. 71104, 71107 (Dec. 20, 1999); see, also, Heavy Forged Hand Tools from the People's Republic of China, 66 Fed. Reg. 48026 (Sept. 17, 2001), and accompanying Issues and Decision Memorandum at Comment 18 (Hand Tools Decision Memo). Thus, respondents maintain that there is little choice available to the Department but to reject the overly broad RBI data proffered by petitioners and used in the Preliminary Results.

Petitioners agree that the Department's practice is to base overhead, SG&A and profit on financial data from producers of merchandise identical or comparable to that under review (see 19 CFR 351.408(c)(4); see, also, Hand Tools Decision Memo at Comment 18); however, petitioners argue that neither paperboard nor furniture is comparable, much less identical, to pencils (petitioners maintain that Asia Wood is a Philippine trader of furniture, cabinets and the like). To illuminate their argument, petitioners question whether it is possible to write with paperboard or furniture, or manufacture a paper box or household window from pencils. Petitioners contend that in Hand Tools, the Department rejected the far less ludicrous position that steel manufacturers made a product comparable to steel hand tools. Id. Similarly, petitioners conclude, the use of financial data for paperboard and furniture manufacturers is inappropriate to determine factory overhead, SG&A, and profit for pencil manufacturers.

Petitioners contend that when information concerning manufacturers of identical or comparable merchandise is unavailable, the Department has obtained financial data from the RBI. Id.; see, also, Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles from the PRC; Preliminary Results and Preliminary Partial Rescission of Antidumping Duty Administrative Review, Notice of Intent Not to Revoke in Part and Extension of Final Results of Review, 67 FR 10123 (March 6, 2002); see also, Potassium Permanganate from the PRC: Preliminary Results of Antidumping New Shipper Review, 67 FR 303 (January 3, 2001). Thus, petitioners conclude that the RBI data relied on in the Preliminary Results to value factory overhead, SG&A, and profit continue to be the best available information for this purpose.

Department's Position:

We agree with respondents, in part. The Department prefers to value overhead, SG&A and profit using data from producers of identical or comparable merchandise located in a single surrogate country provided that the surrogate data are not distorted or otherwise unreliable. See, e.g., Persulfates from the PRC: Final Results of Antidumping Administrative Review, 66 FR 42628 (August 14, 2001), and accompanying Issues and Decisions Memorandum, at Comment 5 (Persulfates Decision Memorandum); see, also, Pure Magnesium Decision Memorandum at Comment 3; see, also, Hand Tools Decision Memo at Comment 18; see, also,19 CFR 351.408(c)(4). While the statute does not define "comparable merchandise," in selecting

surrogate values for overhead, SG&A and profit, the Department has considered whether products have similar physical characteristics, end uses, and production processes. When evaluating production processes, the Department has taken into account the complexity and duration of the processes and the types of equipment used in production. See Glycine from the PRC: Final Results of New Shipper Administrative Review, 66 FR 8383 (January 31, 2001), and accompanying Issues and Decision Memorandum at Comment 7; see, also, Notice of Final Determination of Sales at Less Than Fair Value: Beryllium Metal and High Beryllium Alloys From the Republic of Kazakstan, 62 FR 2648, 2651 (January 17, 1997). Finally, we note that in selecting surrogate financial data, the Department prefers not to solely use the financial statement of a company with losses to calculate surrogate financial ratios. See, Notice of Final Determination of Sales at Less Than Fair Value: Steel Concrete Reinforcing Bars from Moldova, 66 FR 33525 (June 22, 2001), and accompanying Issues and Decision Memorandum, at Comment 3.

Rollatainers' financial statements show a loss. In market economy cases, the Department has disregarded financial statements showing a loss for purposes of calculating the profit component of constructed value under section 773(e)(2) of the Act. See Certain Fresh Cut Flowers from Ecuador: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review, 64 FR 18878 (April 16, 1999). This same principle is reasonably applied in NME cases in order to derive an "element of profit" as intended by the Statement of Administrative Action (SAA) accompanying the URAA. See SAA at 839; see, also, Notice of Final Determination of Sales at Less Than Fair Value: Steel Concrete Reinforcing Bars from the PRC, 66 FR 33522 (June 22, 2001), and accompanying Issues and Decision Memorandum, at Comment 8.

Moreover, it is not appropriate to use the factory overhead and SG&A from Rollatainers, and the profit from Asia Wood, as suggested by respondents. There is no information on the record demonstrating that Asia Wood and Rollatainers have comparable production processes much less produce identical or comparable products. Moreover, these two companies are based in different countries – the Philippines and India. The circumstances in Pure Magnesium to which respondents cite are different from those in the instant review. In Pure Magnesium, the Department found it was appropriate to use the financial statements of four Indian aluminum producers in the surrogate country as an alternative source of profit because the most comparable product to magnesium is aluminum. We have made no such finding in this case. Additionally, in selecting the surrogate values for factory overhead and profit in pure magnesium from Russia, the Department noted that "{b}ecause a company's profit is a function of its total expenses, we find that using Billiton's ... factory overhead, while using Zincor's data for SG&A, would result in our applying a profit ratio that would bear little or no relationship to the overhead or SG&A ratios." See Notice of Final Determination of Sales at Not Less Than Fair Value: Pure Magnesium From the Russian Federation, 66 FR 49347 (September 27, 2001) and accompanying Issues and Decision Memorandum, at Comment 1. Thus, we have not valued factory overhead or SG&A expenses using Rollatainer's financial data.

Therefore, we turned to the financial data of Asia Wood and the RBI companies to find the best

information available (on the record) for valuing overhead, SG&A expenses and profit. As noted by the parties to this review, the companies whose financial data are on the record do not produce merchandise identical to pencils. Moreover, none of these companies produce products with the same physical characteristics or end uses as pencils. Further, there is no description of the production processes employed by Asia Wood or the RBI companies.

With respect to Asia Wood, the notes to the company's financial statements indicate that the company's primary purpose is to: "engage in, operate, conduct and maintain the business of manufacturing, importing, buying, selling or otherwise dealing in at wholesale or retail all sorts and kinds of woodworks, crafts, products, such as but not limited to furniture, cabinets, doors, windows, gates, handicrafts and the like." There is no information on the record regarding the percentage of Asia Wood's operations that is dedicated to manufacturing, the manufacturing processes employed, the types of raw materials purchased, or even which of the listed products Asia Wood manufactures, rather than purchases.

With respect to the RBI data used in the Preliminary Results, we only know the types of products produced by the industry groups whose data are included in the RBI statistics. Those products/services include tea, sugar, textiles, motor vehicles, electrical machinery and appliances, metal products, chemicals, cement, rubber, paper, construction, information technology, electricity, and diversified companies. However, most of the RBI data comes from engineering companies (companies producing motor vehicles, electrical machinery and appliances, and metal products) and chemical companies. We do not have industry sector-specific RBI data for an industry more comparable to pencil production.

Although we have no description of the production processes employed by these potential surrogate sources, the information on the record does allow us to make the following observation regarding these processes. Asia Wood's products are relatively simple in design when compared to those of the majority of the RBI companies (e.g., cabinets, doors and handicrafts versus automobiles and electrical machinery). Products with less demanding designs generally involve a less complex production process. The level of complexity of the production process is one of the factors the Department has considered in selecting surrogate overhead and profit values. In this case, we find it appropriate to conclude that, with respect to the level of complexity, the process required to produce cabinets, doors and handicrafts is more comparable to the process required to produce pencils than that required to produce automobiles, electrical machinery, chemicals, etc.

Based on the foregoing, we determine that it is reasonable to base respondents' factory overhead, SG&A, and profit on Asia Wood's financial data.

Comment 6: Ministerial Error in OIHSFTC'S Margin Calculation

OIHSFTC contends that the Department should correct its inadvertent failure to include two of OIHSFTC's producers in the calculation of the company's dumping margin.

Petitioners did not comment on this issue.

Department's Position:

We agree with respondent and have made this correction in the program used to calculate the dumping margin for OIHSFTC.

Comment 7: Whether India is the Appropriate Principal Surrogate Market Economy Country

Petitioners urge the Department to continue to use India as the surrogate market economy country in the final results. According to petitioners, India is the appropriate surrogate country because the Department found it to be comparable to China in terms of economic development and a significant producer of pencils. Furthermore, petitioners point out that there is a nearly full set of Indian import data available in the MSFTI (which is published and publically available) covering the entire POR with which to determine surrogate values for the FOP used in making pencils. In addition, petitioners claim that the Department has used India as the surrogate country in almost all antidumping proceedings involving the PRC. Moreover, petitioners maintain that the record contains inadequate data from the surrogate countries suggested by respondents to warrant their use in this review.

CFP and OIHSFTC argue that the choice of India as the principal surrogate country in an NME case should not blindly lead to the use of unreliable data that produce demonstrably absurd results. Respondents claim that while there is Indonesian surrogate data on the record for only 25 of the 69 FOP, the Indonesian data is nonetheless better in quality because the Indian surrogate data available for virtually every significant factor of production are aberrational, unreliable, and non-specific.

Department's Position:

We agree with petitioners. We continue to find India to be the appropriate surrogate country in this review. In making this determination, we evaluated, pursuant to section 773(c)(4) of the Act, whether India is (1) at a level of economic development comparable to the PRC; and, (2) a significant producer of merchandise comparable to subject merchandise. Regarding the first criterion, we find that India is at an economic level comparable to the PRC. See Surrogate Country Memorandum. Regarding the second criterion, record evidence indicates that India is a significant producer of comparable merchandise. See memorandum to the File from Paul Stolz dated June 6, 2002. For our response to respondents' argument that Indian data for virtually each significant input are aberrational, unreliable and non-specific, please see the Department's position to Comment 4 in this memorandum.

Comment 8: The Appropriate Surrogate Source for Logs and Slats

Petitioners contend that administrative and judicial precedent supports continued use of American basswood prices as a surrogate value for the lindenwood slats used by the Chinese pencil producers. Petitioners claim that there are no prices available for Chinese lindenwood slats in any of the designated surrogate countries and lindenwood and basswood are the exact same genus of wood and are virtually identical. In addition, petitioners note that published American basswood prices covering the full POR are available. According to petitioner, the prices for jelutong and albasia wood, which were suggested as possible surrogate values for wood by respondents, are for a type of tropical softwood not used by the Chinese pencil producers reporting information in this review. Moreover, petitioners maintain that these are single transaction, company-specific prices that are not generally acceptable to the Department. Furthermore, petitioners note that in the original investigation, CFP, OIHSFTC and the other participating Chinese respondents advocated the use of American basswood to value Chinese lindenwood. Additionally, petitioners point out that in the investigation the Department rejected the use of jelutong wood because it is a tropical softwood while Chinese lindenwood is a temperate hardwood. Also, petitioners note that in the investigation the Department stated that although both woods are used to make pencils, they are not comparable in quality and value. Furthermore, petitioners note that in Writing Instrument Manufacturers Association, Pencil Section v. United States, (Slip Op. 97-151 (CIT) (November 13, 1997)) the CIT stated that it found "that Commerce acted within the primary objective of determining the most accurate dumping margins by using U.S. basswood to value Chinese lindenwood.... All evidence provided to the Court cites the most similar wood to Chinese lindenwood to be U.S. basswood." Petitioners state that respondents have presented no evidence to show that albasia wood is similar to Chinese lindenwood or that it is suitable for pencil production.

Apart from issues related to the genus of wood, petitioners state that the contracts offered by respondents to value wood are inadequate indicators of the surrogate value for wood. Specifically, petitioners claim that the albasia contract is deficient because there is no evidence that the contract was bona fide, consummated, or that it reflects market prices. In addition, petitioners claim that; 1) the contract is the only contract issued by the seller for the covered product; 2) the contract does not specify the grade of the wood or whether the wood is green or dried; 3) the contract is dated outside the POR; 5) the contract price cannot be corroborated by reference to published information; and, 6) the albasia price diverges considerably from the published American basswood prices submitted by petitioners. Moreover, petitioners claim that the jelutong contract is deficient because 1) there is no evidence that it reflects market prices; 2) the contract price cannot be corroborated by reference to published information; 3) it covers a small volume of slats sold in a single transaction during one month of the POR; 6) the jelutong price diverges considerably from the published American basswood prices submitted by petitioners; and, 7) the contract was provided by Mr. Thompson, who, as described above, has a financial stake in the outcome of this review.

Petitioners state that the Department properly followed judicially-approved precedent by looking to American basswood prices for the surrogate value of wood in the Preliminary Results of this review, and, in the interest of accuracy, fairness and predictability, should continue to do so for

the final results. Petitioners note that American basswood lumber prices were used in the original investigation and remand determination, and the lumber-to-slat conversion methodology was adopted in the remand determination following exhaustive commentary by interested parties. Petitioners state that the reasons given by the Department for using American basswood in the past remain valid today. Those reasons are: 1) American basswood is nearly identical to Chinese lindenwood; 2) the prices of albasia and jelutong are not comparable to those of basswood; and, 3) there is no non-U.S. source of information concerning basswood prices.

In addition, petitioners maintain that the Department properly accounted for the grade of wood and wood loss in the Preliminary Results.[1] Specifically, petitioners state that it is appropriate for the Department to use the average price of the basswood grades most similar to grades 1, 2, and 3 of Chinese lindenwood where there was insufficient information regarding the grades of slats used in producing subject merchandise. Moreover, petitioners note that respondents have not contested the Department's correlation of U.S. and Chinese lumber grades. Therefore, petitioners state that the Department should apply the same methodology for the final results. Further, petitioners maintain that the Department properly used the published "National Hardwood Lumber Association Standard Grades" (NHLA Standards) to calculate the yield loss incurred in processing lumber into slats. In support of the use of this yield loss, petitioners note that while Chinese producers may be able to use small slats cut from lumber, in no case can they use the defective portions of the lumber.

However, petitioners state that 4/4 lumber is not the appropriate size of lumber to use to value pencils slats. Petitioners argue that the Department should rely on the value of lumber closest in size to that from which the Chinese producers actually cut slats. Although 4/4 (one inch) lumber is closest in size to slats, pencil blocks from which slats are cut are closer in size to 9/4 (2 and 1/4 inch) lumber. Petitioners note that OIHSFTC's and CFP's witness, Mr. Thompson, indicated that even 8/4 and 9/4 lumber is too small to be used to produce slats. Petitioners argue that in the final results, the Department should use the prices for 9/4 lumber, the thickest piece of lumber for which prices are available, to value pencil slats.

Respondents did not comment on this issue.

Department's Position:

We agree with petitioners, in part. Consistent with the Remand Determination: Writing Instrument Manufacturers Association, Pencil Section, et al. V. United States (March 26, 1996) (Remand Determination), we valued Chinese lindenwood slats using American basswood prices and accounted for wood grades as described in petitioners' comments above and in the Preliminary Results. In addition, for the final results we accounted for yield loss as we did in the

[1] Because there were no values for pencil slats on the record, the Department valued the slats purchased by PRC producers based on the value of 4/4 lumber and the quantity of slats that can be produced from that lumber (adjusted to account for wood loss).

preliminary results. However, we continued to value Chinese lindenwood using 4/4 American basswood lumber prices, because based on the evidence on the record, 4/4 lumber is closest to the Chinese lindenwood slats respondents used in the production of subject merchandise.

Petitioners' argument for using 9/4 lumber prices is similar to the argument advanced by petitioners in the Remand Determination. In that determination, petitioners requested that the Department value wood using prices for 12/4 lumber rather than 4/4 lumber because, pencil slat production in the United States commences with 12/4 and 16/4 lumber, and 4/4 lumber "has not been cut to the requisite length, thickness and width for the slat-making procedure." See Remand Determination, at 10. In that proceeding, the Department rejected petitioners' request noting that "we are using that surrogate product which most closely resembles the product actually used by China First {i.e., 4/4 lumber}." See Remand Determination, at 11. Similarly, in this review, we valued slats using 4/4 lumber prices because this size of lumber is closest in thickness to that which was actually purchased by respondents (the evidence on the record of this review indicates that the slats purchased by respondents measure 1/4 of an inch in thickness and American basswood lumber is cut and sold in a variety of thicknesses including 4/4 wood which is one inch thick).

Comment 9: The Appropriate China-Wide Rate

In the Preliminary Results of this review, as adverse facts available (AFA), the Department assigned a rate to the PRC-wide entity equal to the highest rate from any prior segment of this proceeding. However, the preliminary margin calculated for Kaiyuan was greater than the rate assigned to the PRC-wide entity. As explained below, petitioners believe this constituted an unwarranted departure from the Department's normal practice.

Petitioners note that numerous Chinese Exporters identified in the notice of initiation of this review failed to participate in the review proceedings. See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part, 66 FR 8378 (January 31, 2001) (Initiation). Petitioners further point out that other Chinese exporters that were not named in the Initiation have failed to participate and that none of these non-participating firms has demonstrated its eligibility for a separate antidumping duty rate. Petitioners explain that the Initiation stated, "{i}f one of the above named companies does not qualify for a separate rate, all other exporters of certain cased pencils from the PRC who have not qualified for a separate rate are deemed to be covered by this review as part of the single PRC entity of which the named exporters are a part." Thus, petitioners conclude, neither the exporters named in the Initiation nor those that were not named in the Initiation have qualified for a separate rate, and thus they are part of the "PRC entity" and subject to this review. Petitioners argue that, in such situations, the Department has concluded that the "PRC entity" was uncooperative, and determined an antidumping duty margin for it based on total AFA. See Notice of Preliminary Determination of Sales at Less than Fair Value: Folding Metal Tables and Chairs from the PRC, 66 FR 60185, 60189-90 (December 3, 2001) (Folding Tables and Chairs). Petitioners contend that in an antidumping duty administrative review involving the PRC this

approach warrants assigning the highest margin determined in the review or any prior segment of the proceeding. See Huaiyin Foreign Trade Corp. v. United States Department of Commerce, Slip Op. 02-42 (CIT, April 30, 2002) at 10-11. Petitioners conclude that because there are no extraordinary circumstances present in this review that would warrant departure from this practice, the Department should reverse the approach taken in the Preliminary Results and assign the "PRC entity" the highest rate determined in this review or any prior segment of this proceeding.

Respondents did not comment on this issue.

Department's Position:

We agree with petitioners. In the Preliminary Results of this review, we stated the following:

> Finally, we advised these parties that since we had not received their responses, we were required by section 776(a)(2)(B) of the Act to rely on facts available in our determination ... . For non-responding parties that received the Department's questionnaire but failed to respond, including Anhui, CNLIP and JP, the Department is applying adverse facts available. Section 776(b) of the Act authorizes the Department to use adverse facts available whenever it finds that 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. Because these firms to whom we sent questionnaires did not respond, we preliminarily determine that these entities did not act to the best of their abilities to comply with our requests. Moreover, we have determined that these firms are not eligible for separate rate status. Therefore, they are all being treated as part of the PRC-wide entity. Pursuant to section 776(b) of the Act, we are relying on adverse facts available to determine the margins for the PRC-wide entity. Specifically, for adverse facts available for the PRC-wide entity, we have applied the highest rate from any prior segment of this proceeding, 53.65 percent, which is the current PRC-wide rate.

See Preliminary Results, 67 FR 2402, 2406-2407.

However section 776(b)(4) of the Act permits the Department to use as AFA "any information placed on the record" thus, in selecting an adverse facts available rate for the PRC-wide entity, the Department's practice is to assign the highest rate from any segment of the proceeding, including the current segment. See Sigma Corp. v. U.S., 117 F. 3d 1401, 1411 (July 7, 1997) (noting Commerce has a "long-standing practice of assigning to respondents who fail to cooperate with Commerce's investigation the highest margin calculated for any party in the less-than-fair-value investigation or in any administrative review"); also see Sparklers from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 65 FR 43293, 43294 (July 13, 2000) (where the Department assigned the PRC-wide entity "the highest rate from this or any previous segment of the proceeding."). Thus, in keeping with the Department's practice, for the final results of this review we have assigned the PRC-wide entity the higher of the highest rate determined in this review or any prior segment of this proceeding.

Comment 10: Use of Partial Adverse Facts Available with Respect to OIHSFTC's Uncooperative Producers

Some of the factories that supplied OIHSFTC with pencils during the POR refused to report their FOP. Petitioners argue that the antidumping margin on OIHSFTC's sales of pencils made by these factories should be determined using AFA.

OIHSFTC argues that it made good-faith efforts to obtain the cooperation of the producers in question; consequently, AFA is inappropriate. According to OIHSFTC, when producers are uncooperative the Department's "practice is to require convincing evidence from exporters claiming that their suppliers cannot supply requested factors of production information." See Notice of Final Determination of Sales at Less Than Fair Value: Creatine Monohydrate From the People's Republic of China, 64 FR 71104, 71108 (December 20, 1999). OIHSFTC points out that the Department's verifiers examined several pieces of correspondence between OIHSFTC and its uncooperative producers which documented OIHSFTC's efforts to gain these producers' cooperation. See Verification Exhibit 25. Moreover, OIHSFTC notes that it has no affiliation with these uncooperative producers. According to OIHSFTC, in determining whether an interested party has acted to the best of its ability to obtain cost data from its affiliate regarding a major input, the Department has considered the nature of the affiliation. See Notice of Final Determination of Sales at Less Than Fair Value: Certain Polyester Staple Fiber From the Republic of Korea, 65 FR 16880 (March 30, 2000) (Certain Polyester Staple Fiber) (the Department did not apply AFA in this case because there was evidence the respondent attempted to obtain the cost information from its affiliate but no evidence that the respondent had a controlling interest or influence over the affiliate). Further, OIHSFTC notes that the courts have consistently held that a company cannot be penalized for failing to provide information that it does not have. See Allied-Signal Aerospace Co. v. United States, 996 F.2d 1185 (Fed.Cir. 1994)(Allied-Signal); also see Olympic Adhesives, Inc. v. United States, 899 F.2d 1565 (Fed. Cir. 1990)(Olympic Adhesives, Inc.). Therefore, OIHSFTC contends that the use of AFA would be overly punitive because OIHSFTC has fully cooperated in this review. Also, OIHSFTC points out that the sales in question account for a small percentage of OIHSFTC's total U.S. sales during the POR. Moreover, OIHSFTC states that the Department never inquired further regarding OIHSFTC's disclosures concerning these uncooperative producers. Finally, OIHSFTC asserts that, pursuant to section 351.308(a) of the Department's regulations, the Department must find that the interested party has impeded the investigation in order to use an adverse inference and such is not the case here.

Department's Position:

We agree with petitioners. In order for the Department to fulfill its obligation to calculate dumping margins as accurately as possible, it is essential that respondents provide the Department with accurate, complete, and verifiable information. In striving to obtain this information, the Department has discretion to modify its reporting requirements when an interested party explains why it is unable to submit the information in the requested form and

manner and suggests alternative reporting forms. However, if the necessary information is not on the record, section 776(a)(1) of the Act provides for the use of facts available. Moreover if an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information, the Department may apply adverse inferences where the use of facts available is appropriate See section 776(b) of the Act. In Olympic Adhesives, Inc., the CIT recognized the Department's discretion to use adverse inferences as an investigative tool by noting that "the ITA cannot be left merely to the largesse of the parties at their discretion to supply the ITA with the information. This is particularly the case when the ITA is attempting to obtain information to conduct statutorily mandated administrative reviews because unlike the ITC, the ITA has no subpoena power." See Olympic Adhesives, Inc., 899 . 2d 1565, 1571. In determining whether adverse inferences are appropriate, the Department must evaluate whether an interested parties' actions indicate it failed to cooperate to the best of its ability to supply the requested information. Section 771(9) of the Act defines an interested party as "a foreign manufacturer, producer, or exporter ... of subject merchandise ... ." Because the producers in question are interested parties within the meaning of section 776(b) of the Act, and they are the parties who failed to supply the requested information, we believe it is appropriate to consider their actions in this matter when determining whether it is appropriate to apply an adverse inference with respect to the our use of partial facts available.

Section 782(c)(1) of the Act provides that if an interested party "promptly after receiving a request from the administering authority or the Commission for information, notifies the administering authority or the Commission (as the case may be) that such party is unable to submit the information requested in the requested form and manner, together with a full explanation and suggested alternative forms in which such party is able to submit the information, the administering authority or the Commission (as the case may be) shall consider the ability of the interested party to submit the information in the requested form and manner and may modify such requirements to the extent necessary to avoid imposing an unreasonable burden on that party." As noted by OIHSFTC, the record in this review contains correspondence between OIHSFTC and the uncooperative producers in which OIHSFTC requested the necessary FOP information and the producers conveyed their intention not to participate in the review. Only two of the uncooperative producers provided any explanation as to why they would not participate in this review, noting that they could not afford the lawyer's charge. One of the uncooperative producers stated that it would not participate, but did not provide any further explanation. One uncooperative producer did not indicate to OIHSFTC whether it would participate or not. Thus, only a portion of the non-participating producers offered any reason whatsoever as to why they were not providing the requested information and neither of the non-participating producers, nor OIHSFTC, suggested alternatives which may have indicated they were making their best efforts to cooperate (e.g., participation on a *pro se* basis). Given these facts, we have concluded that these producers have failed to cooperate by not acting to the best of their ability to comply with a request for information and thus an adverse inference is warranted.

This position is consistent with that taken by the Department in Ferrovanadium and Nitrided Vanadium From the Russian Federation: Notice of Final Results of Antidumping Duty

Administrative Review, 62 FR 65656, 65658 (December 15, 1997) (Ferrovanadium and Nitrided Vanadium), and in the Notice of Final Determination of Sales at Less Than Fair Value: Creatine Monohydrate From the People's Republic of China, 64 FR 71104, 71108 (December 20, 1999) (Creatine Monohydrate). In Ferrovanadium and Nitrided Vanadium, the Department stated that "by failing to respond Chusovoy {the producer} is an interested party which has not cooperated to the best of its ability under section 776 (b) of the Act. Therefore, we have continued to use an adverse inference in selecting from the facts available to determine the margins for Galt's sales of Chusovoy-produced merchandise ...". Further, in Creatine Monohydrate, the Department noted that "suppliers to respondent exporters are interested parties, and their failure to provide factors information prevents the Department from calculating accurate dumping margins." Moreover, the Department noted that "{i}n the case of Freemen {one of the respondents}, even if it is true that the supplier in question refused to provide the necessary information, it is not acceptable for a producer to withhold such information. As there is no acceptable explanation on the record for the supplier's failure to provide factor of production information, an adverse inference in applying facts available is warranted due to the *supplier's* failure to act to the best of its ability" (emphasis added).

The instant situation is distinguishable from that found in Certain Polyester Staple Fiber. In that case, the Department found no basis to conclude that the interested party, Samyang (the respondent), "has failed to act to the best of its ability in trying to obtain the COP data from its affiliate." See accompanying Issues and Decision Memorandum, at Comment 6. In contrast, the record in this review indicates that the interested parties at issue here, the uncooperative producers, failed to act to the best of their ability to comply with a request for information. These interested party producers never offered to supply even a limited amount of the requested information nor did they suggest any alternatives which might satisfy the Department's requirements.

In addition, OIHSFTC's reliance on Allied-Signal and Olympic Adhesives, Inc. is misplaced. Those cases involve situations where the interested party could not supply the requested information. In Allied-Signal the Court noted that "SNFA failed to provide a complete response to the requested information because it was unable to, not because it refused to." Olympic Adhesives, Inc., involves a respondent which did not provide the requested data because such data never existed. Here, the interested party producers decided not to supply the requested information which they maintained and which was within their control.

Finally, we disagree with OIHSFTC's claim that section 351.308(a) of the Department's regulations requires the Department to find that an interested party has impeded the proceeding before it may use an adverse inference. Whether or not an interested party has significantly impeded a proceeding is one of the criteria examined in determining whether the use of facts available is appropriate. See section 776(a)(2)(C) of the Act. Section 351.308 (a) of the Department's regulations mirrors the language regarding adverse inferences found in section 776 (b) of the Act by noting that "{i}f the Secretary finds that an interested party "has failed to cooperate by not acting to the best of its ability to comply with a request for information," the

Secretary may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available."

In making an adverse inference, section 776(b) of the Act states that the Department may rely upon information derived from (1) the petition, (2) the final determination in the investigation under this title, (3) any previous review under section 751 or determination under section 753, or (4) any other information placed on the record. As partial adverse facts available, we have assigned the highest margin calculated for any of OIHSFTC's sales, to its sales of subject merchandise manufactured by the uncooperative producers. In deciding upon an adverse partial facts available rate, we have taken into account the fact that the quantity of U.S. sales affected by the missing FOP information is not substantial. We believe that this margin will create the proper deterrent to non-cooperation with the Department in future reviews and serve as a reasonable estimate of OIHSFTC's dumping margin on these sales. With respect to selecting an adverse facts available rate, the CIT noted in F. lli. de Cecco di Filippo Fara S. Martino S.p.A. v. United States, 216 F. 3d 1027 (June 16, 2000)(F. lli. de Cecco) that the purpose of section 776(b) of the Act "is to provide respondents with an incentive to cooperate, not to impose punitive, aberrational, or uncorroborated margins." In F. lli. de Cecco, the CIT went on to state that "it is clear from Congress's imposition of the corroboration requirement in {section 776(c) of the Act} that it intended for an adverse facts available rate to be a reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to non-compliance."

Comment 11: Verification Discrepancies - Kaiyuan/Laizhou

During the verification of Kaiyuan's responses, the Department found that respondent could not support the per-unit consumption quantities reported for erasers and ferrules and failed to report one U.S. sale. With respect to the unreported U.S. sale, Kaiyuan asserts that this was an unintentional error caused by misfiling the documents for this sale in the correspondence file rather than the U.S. sales file. According to Kaiyuan, its failure to report this sale was an error that did not involve intentional efforts to deceive the Department. Moreover, Kaiyuan notes that this sale constituted a small percentage of the total value of its reported U.S. sales. With respect to its producer's failure to support eraser and ferrule consumption quantities, Kaiyuan notes that at the close of the year 2000, after the accounts had been audited but before the request for review, the records needed to support the reported consumption figures were destroyed. Kaiyuan states that the management and employees of Kaiyuan's producer, Laizhou, are from a remote farming village and are not skilled in western management requirements. Further, Kaiyuan points out that the erasers and ferrules were consumed during the POR, December 1, 1999 through November 30, 2000, and the verification did not take place until February, 2002. Finally, Kaiyuan states that most of the pencils it sold to the United States during the POR did not consist of pencils with erasers and ferrules. Thus, Kaiyuan maintains that it should not be faulted for its producer's failure to keep records regarding eraser and ferrule usage for a small quantity of pencils that were sold to the United States over a year before the verification took place.

Petitioners did not comment on this issue.

Department's Position:

For the following reasons, we agree with respondent that the use of adverse facts available with respect to these verification discrepancies is not warranted:

Section 776(a) of the Act, provides that, if (1) necessary information is not available on the record, or (2) 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 subject to section 782(c)(1) and (e) of the Act; (C) significantly impedes a proceeding under the antidumping statute; or (D) provides such information but the information cannot be verified, the Department shall, subject to subsection 782(d) of the Act, use facts otherwise available in reaching the applicable determination.

Section 782(d) of the Act provides that, if the Department determines that a response to a request for information does not comply with the request, the Department will inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person the opportunity to remedy or explain the deficiency. If that person submits further information that continues to be unsatisfactory, or this information is not submitted within the applicable time limits, the Department may, subject to section 782(e), disregard all or part of the original and subsequent responses, as appropriate. Section 782(e) of the Act states that the Department shall not decline to consider information deemed "deficient" under section 782(d) if: (1) the information is submitted by the established deadline; (2) the information can be verified; (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination; (4) the interested party has demonstrated that it acted to the best of its ability; and (5) the information can be used without undue difficulties.

Once the Department determines that the use of facts available is warranted, section 776(b) of the Act further permits the Department to apply an adverse inference if it makes the additional finding that "an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information." To examine whether the respondent "cooperated" by "acting to the best of its ability" under section 776(b) of the Act, the Department considers, inter alia, the accuracy and completeness of submitted information and whether the respondent has hindered the calculation of accurate dumping margins. See, e.g., Certain Welded Carbon Steel Pipes and Tubes From Thailand: Final Results of Antidumping Duty Administrative Review, 62 FR 53808, 53819-53820 (October 16, 1997). In determining whether a party has cooperated to the best of its ability, "Commerce must necessarily draw some inferences from a pattern of behavior." See Borden, Inc. v. United States, Slip Op. 98-167, 22 C.I.T. 1153,1998 WL 895890 (CIT 1998) at 1. See, also, SAA, H.R. Doc. 103-316 at 870 (1994).

Regarding the unreported U.S. sale, we note that Kaiyuan reported this sale in its initial

questionnaire response, but, in preparing for the verification, it removed this sale from the "corrected" sales list. At verification, the Department found the invoice for this sale while reviewing Kaiyuan's correspondence files and verified the information originally reported for the sale. Because Kaiyuan originally reported this sale in a timely fashion and has not significantly impeded this proceeding, and the Department verified all the information for this sale, we have not used the facts otherwise available in calculating the margins for any of Kaiyuan's U.S. sales.

With respect to ferrule and eraser consumption, at verification, company officials indicated that they did not have the warehouse records needed to support the consumption quantities reported for these two FOP. Thus, pursuant to section 776(a)(2)(D) of the Act, we find the application of partial facts available is appropriate.

However, we find that the use of adverse inferences is not warranted in this situation because the record does not indicate that either Kaiyuan or its producer, Laizhou, failed to cooperate by not acting to the best of their abilities to comply with a request for information. During the course of this review, Kaiyuan and Laizhou responded in a timely fashion to both the Department's questionnaire and supplemental questionnaires and participated fully in the verification. The Department was able to verify all of the information reported by Kaiyuan and Laizhou and, except for the consumption quantities of erasers and ferrules, we noted only minor discrepancies. In some cases, it may be appropriate to apply adverse inferences where a respondent cannot provide data which the Department requires to conduct a verification, however, given the level of cooperation on the part of this respondent and the insignificant quantity of U.S. sales affected by the missing data, we do not conclude that Kaiyuan or Laizhou failed to cooperate by not acting to the best of their abilities to comply with requests for information by the Department. Thus, we are not making adverse inferences in selecting the facts available on which to base the consumption quantity of erasers and ferrules. As facts available we have used the simple average of all of the eraser and ferrule consumption rates reported by OIHSFTC and CFP.

Comment 12: Whether CFP and Three Star Should be Treated as a Single Entity for Antidumping Purposes

In April 2002 petitioners submitted for the record a document issued in January 1997 by Shanghai Light Industry Holding Group (SLI) requiring CFP and Three Star to merge. The document is entitled the "Order of Shanghai Light Industry Holding (Group), Order # (1997) 005" (order 005), and addresses CFP and Shanghai Pen & Pencil Company. According to petitioners, the order directs CFP to absorb Three Star's capital and form a group company that includes Three Star. In addition, CFP is to manage Three Star, coordinating its sales and purchases, during this period of capital reorganization. Petitioners argue that this information should have been submitted to the Department in the last administrative review of this proceeding and notes that the order contradicts the denials by both CFP and Three Star that CFP has management or ownership control over Three Star.

Petitioners urge that CFP's complaints about petitioners' timing for submission of order 005 should not divert the Department's attention from the substantive issues surrounding CFP's relationship with Three Star, or from the fact that CFP itself should have submitted this order for the record a long time ago. Petitioners point out that order 005 was issued to CFP and Three Star in 1997, and that both of these parties have had copies in their possession since then. While relevant to the antidumping proceeding, these two companies failed to submit SLI's directive for the record on several occasions during two administrative reviews despite specific requests from the Department in questionnaires, supplemental questionnaires and during verification for information and documents relating to CFP's relationship with Three Star. Petitioners state that they correctly inferred that the Department's team had been denied access to certain of SLI's records during verification because those records contained material that contradicted CFP's statements regarding its affiliation with Three Star. Petitioners claim that because SLI was not responsive to the Department's requests in this respect, petitioners obtained order 005 and placed it on the record of this review. Similarly in August 2000 and February 2001 petitioners note that it submitted documents relating to the CFP-Three Star relationship which it had discovered in Chinese government archives. These documents were also directly germane to the relationship between CFP and Three Star, but once again CFP failed to provide them.

Petitioners maintain that CFP's stated reason for not having submitted order 005 - that the Department never asked that CFP submit any documents or information that brought the SLI order to its attention - is not credible. Petitioners contend that order 005 is directly relevant to the relationship between CFP and Three Star and that this document should have come to CFP's attention earlier when petitioners submitted a document issued by SLI on the same date as order 005 appointing Mr. Hu Shu Gang legal representative of Three Star. In petitioners' view, CFP had this information in its possession and actively misled the Department about it over the course of two years and two reviews. Thus, any delay regarding the submission of this information is the responsibility of CFP as any such delay could have been avoided if CFP had "come clean" with these facts in the first place.

Petitioners further argue that order 005 is an unambiguous and valid directive. As the owner of Three Star and owner of 33% of CFP's shares, SLI had the authority to order the merger of these two companies and direct the formation of the CFP group. Petitioners contend that SLI exercised similar authority over CFP when it acceded to CFP's request that its President, Mr. Hu Shu Gang, be removed from his concurrent position as President of Three Star. Moreover, petitioners point out that CFP has presented no evidence that the order was revoked, not authentic, or misinterpreted. To counter the claim that the order is only advisory in nature, petitioners cite to certain proprietary official documents which characterize order 005 as a decision, not an opinion. In addition, petitioners contend that the fact that CFP and Three Star have separate business licenses does not prove that they are not a merged entity. Petitioners reference proprietary information with respect to CFP's organization and its relationship to one of its subsidiaries.

Petitioners also discuss documents it put on the record of the 1998-1999 administrative review in this proceeding, which petitioners argue demonstrated an apparent ownership relationship

between CFP and Three Star. While the Department did not agree at that time, the petitioners have placed these documents on the record of the instant review and have asked the Department to reevaluate these records in light of order 005. Petitioners are convinced that the documents in this context demonstrate the ownership relationship between CFP and Three Star. Petitioners note that order 005 and SLI's appointment of Hu Shu Gang as Three Star's legal representative were both dated January 21, 1997. Petitioners argue that the two documents, read together, show that Mr. Hu was appointed to both positions assume responsibility over the entire merged company. In addition, petitioners contend that CFP's appointment of Mr. Huang Zhen-Min as President of Three Star and coincident dismissal of Mr. Hu from that position is consistent with the terms of the merger order which states at paragraph 3 that "all the management people of Shanghai Three Star Stationery Industry Co., Ltd. will be managed by China First Pencil Co. Ltd." Petitioners assert that this exercise of authority undermines respondent's contention that order 005 was an opinion and never put into effect. Moreover, petitioners argue that its submission of an excerpt from Three Star's 1999 annual report indicating that CFP held the entire 20 million yuan investment in Three Star is consistent with paragraph 1 of order 005 which states that "China First should absorb all capital of Shanghai Three Star Stationery Industry Co., Ltd."

Petitioners also provided photographs from the 89th China Stationery Commodity Fair (the Fair) held during May 2002 which petitioners argue demonstrate that CFP and Three Star conduct joint marketing operations. Petitioners maintain that these photographs, and other data placed on the record from the prior review segment, rebut assertions by CFP that it did not comply with order 005, that it had not coordinated or assumed control of Three Star's sales and that CFP had not formed a group company with Three Star. Petitioners claim that the photographs clearly show that Chung Hwa Pencil United Sales Co. (Chung Hwa), which is owned and/or controlled by SLI, and Three Star shared booth no. 2A421. Petitioners note that the Fair's visitor guide also lists booth 2A421 for both Chung Hwa and Three Star. Furthermore, petitioners claim that the sign over the booth prominently indicates that the booth is for "China First Pencil Group." Petitioners argue that CFP was represented at the Fair by Chung Hwa, CFP's exclusive distributor/marketer of CFP pencils in China outside the Shanghai area. Finally, petitioners claim that both CFP and Three Star pencils were jointly displayed at this booth.

In light of the record evidence, petitioners ask the Department to treat Three Star and China First as a single producer of cased pencils and consider all pencils produced by this combined entity subject to the antidumping duty order on pencils from the PRC.

CFP and Three Star responded to petitioners' new information by stating that CFP has no investment or any other kind of interest in Three Star and claiming that petitioners are diverting attention to a non-issue. Nonetheless, the companies placed on the record of this review certain of their questionnaire responses and briefs from the prior review of this order. CFP asserts that it demonstrated through its financial statements that it has no interest in Three Star and that during verification of the documents of CFP and Three Star, the Department found no indication of this relationship. More specifically, CFP argues that it is inappropriate for the Department to consider events and documents from outside the POR in its analysis for the current POR, that

CFP did not mislead the Department, and that even if the Department considers CFP and Three Star to be affiliated, there is no basis upon which to treat them as a single respondent. Furthermore, even if the Department considers these companies a single respondent, Three Star's data are irrelevant to this review.

CFP contends that petitioners' allegations that CFP and Three Star are affiliated and the Department's consideration of them improperly expand the scope of this review. CFP asserts that order 005 was issued by SLI in 1997, the Fair photographs of booth 2A421 were taken in May 2002, and that the 1996 and 1997 financial statements of CFP submitted to the Department at its request are irrelevant to a determination of CFP's antidumping margin for the review period, December 1, 1999 through November 30, 2000.

CFP states that it did not withhold documents or mislead the Department regarding the relationship between CFP and Three Star by not submitting order 005 and other documents submitted by petitioners in August 2000 and February 2001. CFP argues that order 005 did not result in a merger. Therefore, the order is not responsive to the Department's request that CFP identify any affiliation it had with Three Star. CFP maintains that it does not own or hold capital in Three Star, that CFP and Three Star are not partners and that CFP and Three Star have no control over each other. Furthermore, CFP claims that it was forthcoming regarding SLI's ownership of CFP shares and SLI's ownership interest in Three Star in its very first filing in this administrative review. In addition, CFP contends that order 005 and the August 2000 and February 2001 filings were of documents related to periods outside the POR, were not necessarily of the type ever requested by the Department and were not the types of documents ordinarily submitted in response to antidumping questionnaires. Moreover, CFP argues that as the Department concluded in the 1998-1999 review, the August 2000 and February 2001 documents do not support a finding of affiliation between CFP and Three Star. In addition, CFP asserts that affiliation is a meaningless concept with respect to a nonmarket economy antidumping analysis because such analysis begins with the presumption that exporters of subject merchandise are affiliated. Moreover, CFP notes that although petitioners claim it should have submitted order 005 "a long time ago" (Pet Affil. Br. At 3), petitioners never identified when, where or how such a document was requested.

With respect to the photographs submitted by petitioners to the Department purporting to show CFP and Three Star engaged in joint marketing efforts at the Fair, CFP states that it was not a participant in this Fair. Rather, CFP's exclusive sales agent for China (outside of the Shanghai area), Chung Hwa, was a participant. CFP claims that the company references on the booth captured by the photographs are to Chung Hwa. Furthermore, CFP contends that Chung Hwa and Three Star did not share booths (they each had two booths in a common exhibition area with one entrance); their booths were separately staffed and operated but were next to one another. CFP explains that the Fair directory listed Three Star and Chung Hwa at the same location because Three Star missed the deadline for applying for a booth and purchased space from Chung Hwa. Nevertheless, Three Star and Chung Hwa had separate contracts with the Fair promoter. Moreover, CFP claims that the authenticity of the photographs is suspect because they were taken

from misleading angles and not head-on.

CFP further contends that there is no affiliation between CFP and Three Star and that CFP and Three Star never merged. CFP notes that the Department did not find affiliation in the 1998-1999 review and order 005 and the photographs of the Fair presented in this review by petitioners do not support a finding of affiliation. CFP claims that order 005 was not binding on CFP and was never implemented. In addition, CFP asserts that the photographs of the Fair do not show joint operations by CFP and Three Star as discussed above. Moreover, CFP contends that audited financial statements do not lie and that CFP's extensive audited financial statements do not list Three Star as an affiliate of CFP. CFP maintains that if CFP had made any investment in Three Star, acquired Three Star assets or had otherwise merged with Three Star, one of the two auditors that reviewed CFP's financial statements would have reported and documented such a relationship in CFP's financial statements.

Additionally, CFP claims that although SLI issued order 005, SLI's status as CFP's largest shareholder does not give it the authority to order the business decisions of CFP. CFP contends that SLI's order cannot circumvent PRC company law or CFP's articles of incorporation, which require that special resolutions, including those regarding mergers, be approved by its board of directors and more than two thirds of the voting rights of the shareholders. In addition, the articles of incorporation require that a merger must be prepared and planned by the board of directors, which is accountable to the shareholders' general meeting. Furthermore, respondent claims that the PRC State Assets Regulations (SAR) limit SLI's activities and authority with respect to its oversight of state-owned shares of CFP. CFP contends that the SAR maintain separation between the ownership and the operations rights of the enterprise, allow CFP to handle its property independently, and prohibit SLI from intervening in CFP's operational rights.

CFP claims that even if the Department considers CFP and Three Star to be affiliated, there is no basis upon which to collapse them as a single respondent. CFP notes that when assessing whether to collapse affiliated producers of the same product, the Department applies the terms of 19 CFR 351.401(f). However, CFP contends that there is strong evidence in this case that CFP and Three Star operate as distinct entities obviating the ability of {one} company to manipulate the other's prices and production decisions.

Moreover, CFP claims that "collapsing" two affiliated parties is the exception, not the rule. CFP cites antifriction bearings where the Department stated:

> It is the Department's general practice not to collapse related parties except in relatively unusual situations, where the type and degree of relationship is so significant that we find that there is strong possibility of price manipulation. The Department has refused to collapse firms in situations where the facts suggest that such a possibility does not exist. (AFBs, 54 FR 19089).

CFP contends that a company's liability under the antidumping law should be based on the company's own pricing decisions, not those of an affiliated party. CFP cites Certain Iron Construction Castings from Canada, 55 FR 460, which states that in deciding whether

companies operated as distinct entities, "... the Department has examined the ability of a company to manipulate its affiliate's prices, and to affect its production decisions." CFP states that the Court of International Trade approved this practice in Nihon Cement Co. v. United States in which the court noted the Department's general practice not to collapse related parties. Furthermore, CFP cites FAG Kugelfischer George Schafer KgaA v. United States in which the court reversed the Department's decision to collapse two sister companies because the Department focused on potential rather than actual influence of the parent company over its subsidiaries.

CFP states that it acknowledges that the nature of the collapsing analysis is case-specific and that the Department need not find that all the factors favor collapsing; however, CFP claims that the Department must find more than a mere possibility of price and/or production manipulation. CFP states that the regulations require a significant potential for manipulation of price or production.

CFP claims that the possibility of price manipulation between CFP and Three Star is non-existent because Three Star does not engage in market-based pricing to the United States because it manufactures merchandise for Guangdong, an unrelated company that sells to the United States. CFP contends that it competes with Three Star and if it had control over Three Star, CFP would benefit by prohibiting Three Star from selling to Guangdong to preserve the U.S. market for itself. In addition, CFP notes that its commercial dealings with Three Star are minimal and are not significant enough to warrant collapsing.

Finally, CFP contends that even if CFP and Three Star are affiliated, and even if they are collapsed, Three Star's data are irrelevant to this review. CFP claims that the Department's questionnaire requested that CFP report the FOP for subject merchandise. CFP produced all of the subject merchandise it exported to the United States. CFP reported the FOP actually consumed in the production of the subject merchandise. Since Three Star did not produce subject merchandise exported to the United States by CFP, Three Star's FOP are entirely irrelevant for purposes of any dumping analysis applicable to the facts of this case.

Department’s Position:

In the prior administrative review involving CFP and Three Star, the Department determined that the record evidence did not sufficiently support petitioners’ argument that Three Star no longer qualifies as the producer identified in the excluded Three Star/Guangdong transaction chain. However, the Department also stated that it would revisit this issue if additional evidence regarding CFP’s and Three Star’s relationship was presented in a future review. We note that many of the documents that address the relationship between these two companies from the prior segment of the proceeding have been placed on the record of this review. In addition, petitioners supplied additional evidence that they argue demonstrates an apparent amalgamation of CFP and Three Star. We have reevaluated the record documents in this review in light of petitioners’ new information, and, as we discuss below, find that the record evidence and the manner in which it

was uncovered justify treating these two companies as a single respondent for purposes of our antidumping analysis.

Individual dumping margins are automatically assigned to exporters in market economy country cases. However, antidumping cases involving nonmarket economies are unique because the centralized pricing and production decisions of these countries make internal prices and costs "inherently suspect." As CFP and Three Star observe, in proceedings involving nonmarket economy countries, the Department begins with the presumption that all companies within the country are subject to government control and thus should be assigned a single antidumping duty deposit rate. Nevertheless, the Department has agreed to issue separate rates to exporters in a nonmarket economy country if individual exporters can demonstrate that their export activities are independent of government control and each other. To make this demonstration with respect to the government, exporters must pass the Department's separate rates test. Passing the separate rates test does not mean we have found nonmarket economy exporters to be unaffiliated. It simply acknowledges a level of independence from the government in the company's export activities.

The statute and the regulations do not provide explicit guidance on how to analyze relationships between companies located in a nonmarket economy country. The Department addresses such relationships on a case-by-case basis. The interested parties in this case have constructed a number of their arguments regarding the relationship and the appropriate export treatment of CFP and Three Star using the Department's regulatory framework for collapsing affiliated parties. However, this regulatory framework is difficult to apply in an economy where all companies within the country are presumed to be subject to government control. Consequently, in nonmarket economy cases, the Department focuses on whether the operations of exporting companies are intertwined sufficiently to warrant combining the entities for purposes of issuing to this "combined" group a separate antidumping duty rate. While the regulatory framework for collapsing affiliated producers is instructive in conducting this analysis in nonmarket economy cases, it is not *per se* a collapsing analysis under the regulation.

Consistent with the above, we have reviewed CFP and Three Star to see if their operations were sufficiently intertwined to warrant issuing to these two entities combined a single rate for antidumping purposes. We note that in finding Three Star and CFP sufficiently intertwined to warrant assigning the combined entity a separate rate, we are also finding that Three Star's sales through Guangdong are no longer excluded from the order. These determinations reflect the fact that, based on the evidence, Three Star is effectively part of CFP, and at least does not operate as a separate entity. Consequently, the potential for manipulation between these two entities is significant.

During the last administrative review, the Department stated with respect to SLI's ownership of CFP and Three Star that SLI is a state-owned enterprise which manages state-owned property as it is privatized. As a consequence we did not find SLI's relationship with these two companies significantly different from the relationship between the government and respondents that is

presumed in all nonmarket economy cases and therefore, did not consider it a basis in and of itself to treat these two companies as a single entity. Although there was conflicting data regarding ownership in this review, we acknowledged record information indicating that Three Star was a subsidiary of SLI[11] and that SLI was Three Star's sole investor and managing authority. In contrast, petitioners provided Three Star's annual yearbook report to the government authorities which identified CFP as the owner of Three Star, a statement that CFP and Three Star claimed was erroneous. Petitioners also provided data indicating that CFP had a contract to assume "indirect advising responsibility" for Three Star. See the Memorandum To the File From Paul Stolz, Proprietary Information Relating to the CFP-Three Star Relationship, dated concurrently with this Issues and Decision Memorandum (Proprietary Information Memorandum) at Item 1. However this responsibility was narrow, limited to safety, sanitation and yearbook issues. As explained by CFP, because of this activity, its internal newspaper characterized Three Star as a CFP subsidiary or department. In addition, we had conflicting information and claims regarding the movement of managers between CFP and Three Star.

Against this backdrop, during the current administrative review, petitioners placed on the record SLI order 005, issued in January 1997, directing CFP to merge with Three Star, absorb all the capital of Three Star, and form a group company that would include Three Star. In addition, SLI ordered CFP during this capital reorganization to manage Three Star and coordinate its sales and purchases. SLI also specified that all sales and purchases would be taken over by CFP in the future. CFP and Three Star claim that this merger did not take place and that there is no relationship between them, but they present no evidence to show that this order was revoked, is not authentic, is advisory in nature or has been misinterpreted. Moreover, the degree of interaction between these two companies is far greater than we previously believed and the form this interaction takes corresponds very closely to order 005 as it was issued by SLI, indicating that the order may have been effectively implemented.

The merger order makes reference to a period of capital re-organization. Beginning in the year of the merger order, CFP made a series of loans to Three Star. In light of the merger order, the timing and circumstances surrounding these loans, which is proprietary information, call into question CFP's claims that it is Three Star's fierce competitor. See Proprietary Information Memorandum at Item 2. In fact the circumstances surrounding these loans seem to indicate that CFP was providing working capital to Three Star to support its operations which gives effect to the merger order's purpose of "increasing the ability of competition of the pencil industry in {the} Shanghai area..."

The merger order also notes that CFP will have the "leadership position to enact the program of capital reorganization of the two factories," relegating Three Star to a subordinate role. Evidence of CFP exercising a leadership role with respect to Three Star concerns Three Star's financial statements. CFP is responsible for reviewing Three Star's financial statements and in fact stamps these statements with its company seal. This appears to be at the very least an unusual

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[11] Shanghai Light Industry Holding (Group) Co. (SLI) is an arm of the Shanghai municipal government charged with maintaining and increasing the value of state-owned assets in the process of privatization. SLI, as trustee, owns 100 percent of Three Star and 33 percent of CFP.

arrangement between competitors and is more consistent with the leadership role envisioned for CFP in the merger order. Moreover, although contested by respondents, we have documents on the record which state that Three Star is owned by CFP. Three Star's 1999 accounting report (which includes Three Star's income statement and balance sheet bearing both CFP's and Three Star's corporate seals) lists CFP as Three Star's sole investor/shareholder and characterizes Three Star as CFP's subsidiary. This leadership role is also demonstrated by the nature of CFP's contract to perform indirect advisory functions with respect to Three Star concerning safety, culture, sanitation and yearbook issues.

As discussed above, order 005 specifies that Three Star will be managed by CFP. In the last administrative review, the Department rejected petitioners' argument that the president of CFP had been appointed concurrently as Three Star's legal representative/president. However, as this appointment took place the same day as order 005, CFP's president appears to have been assuming responsibility for the companies that were to be merged. This explains why the Department did not find the president drawing a salary from Three Star. His salary from CFP covered his oversight role for both companies. Moreover, although CFP claims they did not allow this appointment to take place, documents indicate that the president retained this position from January 1997 until December 1997. Furthermore, when the president was removed from this position another CFP manager, the president and chairman of CFP's subsidiary, Great Wall, was appointed by CFP to be the legal representative of Three Star and remains in that position to date.

Moreover, evidence on the record indicates that CFP changed its name from China First Pencil Co., Ltd. to China First Pencil Group Co., Ltd.. See the Memorandum To the File From Paul Stolz, Extel Cards Database Information dated June 6, 2002. This information also indicates that the China First Pencil Group Co., Ltd. name was still in effect in April 1999. For additional details See Proprietary Information Memorandum at Item 3. This is clearly consistent with the directive in order 005 that CFP merge with Three Star and establish a group company. Also noteworthy is the internet page that petitioners submitted showing that Three Star's address is the same as that of CFP, except for the floor number. Furthermore, the newspaper, whether CFP's paper or an association paper as CFP claimed in the prior administrative review, clearly treats Three Star as a subsidiary/department of CFP.

Petitioners also submitted in this review trade fair photographs which petitioners argue demonstrate that CFP and Three Star conducted joint marketing operations. This, once again, is relevant to order 005 and the directive specifying that all the sales and purchases of Three Star be taken over by CFP. The petitioners' photographs show that Three Star and CFP's exclusive domestic distributor shared a booth at a trade show in Beijing. Especially noteworthy is the fact that above the single entrance to this booth is a prominent sign that announces the booth is for products of "China First Pencil Group," adding further to the impression that order 005 has been implemented and rebutting CFP's statements that it has not formed a group and coordinated or assumed control of Three Star's sales. These photographs call into question respondents' claims that they are fierce competitors.

Respondents claim that it is inappropriate for the Department to consider documents and events from outside the POR. Although our analysis is generally restricted to consideration of information relating directly to the POR, in this instance, documents and events outside the POR relate directly to the evolution of CFP's relationship with Three Star prior to the POR and to its relationship to Three Star during the POR. Although order 005 was issued in 1997, the record does not indicate that it was ever revoked. Therefore, it is directly relevant to the POR. In addition, the photographs taken subsequent to the POR indicate that the group formed in response to the order is still in existence to this date.

CFP's assertion that SLI lacked the authority to order the business decisions of CFP is belied by CFP's actions in response to order 005 described above. Moreover, we do not find credible respondents' statements that they did not withhold documents or mislead the Department. The question of the relationship between China First and Three Star was explicitly raised by petitioners as early as May 2000. The Department has pursued this issue through questionnaires and verification visits during the course of two administrative reviews. CFP's indirect management agreement with Three Star and SLI order 005 are documents that respondents had in their possession. These matters are germane to the relationship issue and respondents failed to report them to the Department. Moreover petitioners submitted a number of documents concerning the appointment and movement of managers between Three Star and CFP. All these documents were issued within close proximity to one another. Therefore it does not appear plausible that all these documents could be overlooked by a respondent that was making a good faith effort to respond to the Department's inquiries on a central case issue while at the same time actively rebutting evidence the petitioners had uncovered and submitted for the record. In fact, CFP failed to identify certain aspects of its relationship with Three Star despite explicit requests by the Department for such information (e.g., CFP failed to identify its indirect management role over Three Star despite the Department's question, "Does/did China First formally or informally influence or control Three Star with respect to .... other operations of Three Star?") These oversights significantly altered the conduct of this review, call into question the assertions CFP and Three Star have made regarding their relationship, and influenced our assessment of the record evidence.

CFP argues that even if the Department considers CFP and Three Star to be affiliated, there is no basis upon which to collapse them and even if they were collapsed, Three Star's data is irrelevant to this review. As we explained above, we have determined that Three Star and CFP are sufficiently intertwined to warrant assigning the combined entity a separate rate. While Three Star's data does not affect our analysis of CFP's exports in this review, we find that Three Star's sales through Guangdong are no longer excluded from the order and Guangdong's pencils sales are subject to the PRC-wide rate.

Recommendation

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

Agree_____ Disagree_____ Let's Discuss_____

_____

Faryar Shirzad
Assistant Secretary
for Import Administration

_____

(Date)