68 FR 13264, March 19, 2003

A-570-504
AR: 08/01/2000-07/31/2001
PUBLIC DOCUMENT
DAS III (7): BLR, MEH, SCG

MEMORANDUM TO: Joseph A. Spetrini
Acting Assistant Secretary
for Import Administration

FROM: Barbara E. Tillman
Acting Deputy Assistant Secretary
for Import Administration, Group III

SUBJECT: Issues and Decision Memorandum for Final Results of Antidumping Duty Administrative Review of Petroleum Wax Candles from the People's Republic of China

Summary

We have analyzed the comments and rebuttal comments of interested parties in the administrative review of the antidumping duty order covering Petroleum Wax Candles from the People's Republic of China (PRC), covering the period August 1, 2000 through July 31, 2001. As a result of our analysis, we have changed the margin. We recommend that you approve the positions we have developed in the "Discussion of the Issues" section of this memorandum. Below is the complete list of the issues in this administrative review for which we received comments by parties.

1. Cooperation
2. U.S. Verification
3. Production Data
4. New Shipper Review Rate
5. APO Application

Background

Since the issuance of the preliminary results of review (see Notice of Preliminary Results of Antidumping Administrative Review: Petroleum Wax Candles From the People's Republic of China, 67 FR 57384 (September 10, 2002) (Preliminary Results)), the following events have occurred. On October 4, 2002, Dongguan Fay Candle Co., Ltd. (Fay Candle), a PRC producer and exporter of subject merchandise, and its U.S. importers TIJID, Inc. (TIJID) (d/b/a DIJIT Inc.) and Palm Beach

Home Accents, Inc. (Palm Beach) (collectively, "respondents") requested an extension of the due date for the case and rebuttal briefs and any hearing requests. On October 17, 2002, the Department extended the case brief and hearing request due date to November 25, 2002, and the rebuttal brief due date to December 9, 2002. On November 20, 2002, the Department extended the due date for the final results of this review (67 FR 70055). On November 21, 2002, respondents requested a hearing. On November 25, 2002, the Department received timely written case briefs from respondents and petitioner. On December 4, 2002, we received a request from petitioner to extend the December 9, 2002 rebuttal brief deadline to December 16, 2002. On December 5, 2002, respondents in this review requested the same extension. On December 6, 2002, we notified all of the interested parties in this review, that, pursuant to both the petitioner's and respondents' extension requests, we would be extending the deadline for all interested parties for submission of rebuttal briefs until December 16, 2002. On December 16, 2002, we received a request from petitioner to extend this rebuttal brief deadline to December 18, 2002, which we granted for all interested parties. On December 18, 2002, the Department received timely rebuttal comments from respondents and petitioner. On February 3, 2003, a public hearing was held in this proceeding. We have now completed this administrative review in accordance with section 751 of the Act.

Discussion of Issues

Comment 1: Cooperation

Respondents state that the statute limits the Department's discretion to apply adverse facts available (AFA) to circumstances in which a "party failed to cooperate by not acting to the best of its ability." Section 776(b) of the Act. Respondents note that the law requires that the Department articulate why it concluded that respondents failed to act to the best of their ability and explain why the missing information is significant to the review. In support of its argument, respondents cite to the following cases: Pac. Giant, Inc. v. United States, 223 F. Supp. 2d 1336, 1342 (CIT Aug. 6, 2002) (Pac Giant); Ferro Union, Inc. v. United States, 44 F. Supp. 2d 1310, 1329 (CIT 1999) (Ferro Union); Mannesmannrohren-Werke AG v. United States, 77 F. Supp. 2d 1302 (CIT 1999) (Mannesmannrohren).

According to respondents, the Court of International Trade (CIT) held that the Department may resort to AFA based on the totality of facts that establish "a pattern of unresponsiveness." In support of its argument, respondents cite to Nippon Steel Corp. v. United States, 146 F. Supp. 2d 835, 841 (CIT 2001) (Nippon Steel II) and Borden, Inc. v. United States, 22 Ct. Int'l Trade 1153 (1998) (Borden). Respondents also cite to Nippon Steel II to demonstrate that the Department considers various factors that "strongly indicating a specific intent on the part of the respondent to evade the Department's requests for information." See Nippon Steel II, 146 F. Supp. 2d at 840. Moreover, respondents contend that, in Nippon Steel II, the CIT held that the Department may not apply "a pure 'ability to

comply' standard" because "a completely errorless investigation is simply not a reasonable expectation." See Nippon Steel II, 146 F. Supp. 2d at 841 n.10. Respondents note that, as the CIT instructed in Nippon Steel II, " [e]ven the most diligent respondents will make mistakes, and Commerce must devise a non-arbitrary way of distinguishing among errors." See id.

Respondents contend that they cooperated with the Department to the best of their ability. They state that they requested and participated in the administrative review voluntarily. Respondents also argue that they produced voluminous submissions within the narrow time frame of the review, notwithstanding that it was their first experience with the antidumping administrative review process. According to respondents, their efforts in compiling all data requested in this review have been herculean given that Fay Candle is a small Chinese candle company that began operations in 1999.

Respondents argue that, according to the holding in Borden, the Department must consider their pattern of behavior in deciding whether to draw an adverse inference. See Borden, 22 CIT 1153. Respondents hold that this is not a case in which deficiencies in a party's responses to the Department's requests for information point to a pattern of consistent behavior lacking best efforts throughout the review process, such as occurred in Pac. Giant, 223 F. Supp. 2d at 1342. Rather, according to respondents, the record shows that they consistently cooperated to the best of their ability, submitting information in response to the Department's continuing questions.

Respondents state that the Department is obliged to substantiate its findings that respondents failed to cooperate to the best of their ability, citing the following in support of its argument: Fujian Mach. & Equip. Imp. & Exp. Corp. v. United States, 178 F. Supp. 2d 1305, 1332 (CIT 2001) (Fujian Mach); Ferro Union, 44 F. Supp. 2d. at 1331; and Mannesmannrohren, 77 F. Supp. 2d at 1317. Respondents contend that the Department must show that their conduct throughout the review establishes "a pattern of unresponsiveness" or otherwise indicates "a specific intent...to evade the Department's request for information," as discussed in Nippon Steel II, 146 F. Supp. 2d at 840. According to respondents, there is no such showing here since this is not the case. Respondents argue that the Department's resolve to resort to AFA amounts to an unreasonable practice, which the CIT expressly criticized in Bowe-Passat v. United States, 17 CIT 335, 343 (CIT 1993) (Bowe-Passat), as a "predatory 'gotcha' policy [that] does not promote cooperation or accuracy or reasonable disclosure by cooperating parties intended to result in realistic dumping determinations."

Petitioner states that the Department's reliance on facts available in the preliminary results of this review is appropriate pursuant to section 776(a)(2) of the Act. In addition, the petitioner contends that the Department properly made the finding that respondents failed to cooperate by not acting to the best of their ability throughout the entire review. Petitioner notes that section 776(b) of the Act provides that, if the Department finds that an interested party has failed to cooperate to the best of its ability to comply with a request for information, the Department may use an inference that is adverse to the interests of that party. See Section 776(b) of the Act.

Petitioner argues that respondents' unclear and incomplete answers to the questionnaires throughout this review prevented the Department from conducting a meaningful verification. According to petitioner, respondents' withholding of the untimely-filed information until the first day of verification in the PRC made it impossible for the Department to analyze the new responses, issue necessary supplemental questionnaires, receive responses to the supplemental questionnaires, and conduct verification within the statutory time limits. In support of its contention, petitioner cites to Seattle Mariner Fishing Supply Co. v. United States, 679 F. Supp. 1119, 1127 (CIT 1988).

Petitioner notes that the untimely submission by respondents on July 22, 2002 (the first day of verification) was not a clarification or minor correction; instead, it was substantial new factual information, which was properly rejected by the Department. Petitioner states that the respondent's late factual information was filed long after the deadline for factual information provided in 19 C.F.R. § 351.301(b)(2). Petitioner cites Reiner Brach GmbH & Co. KG v. United States, 206 F. Supp.2d 1323 (CIT 2002) (Reiner Brach), in support of its contention that where respondents, as in this case, attempt to submit substantial new information during verification, which has been "inadvertently omitted" in earlier responses, the Department has consistently refused to accept the information because it is untimely. See id. at 1326. Petitioner cites to Certain Hot-rolled Carbon Steel Flat Products From Ukraine: Notice of Final Determination of Sales at Less Than Fair Value, 66 FR 50401 (Oct. 3, 2002) (Ukraine HR), in which respondent had been given numerous opportunities to provide the information earlier in the proceeding as the Department had granted three extensions of time to respond to requests for information. Similiarly, petitioner argues that the Department gave respondents a final opportunity to clarify production and scrap sales as late as July 18, 2002, or two business days before the start of the PRC verification, where respondents provided in their response that there was "no discrepancy," in production quantity or scrap sales. See Department's July 11, 2002 Third Supplemental Questionnaire and Fay Candle's July 18, 2002 Third Supplemental Questionnaire Response.

Petitioner also claims that respondents offered no explanation as to why they were unable to comply with the established deadlines. According to petitioner, the Department in Ukraine HR noted that accepting untimely-filed submissions would not amount to accepting "mere clarification" of data, but rather it would replace data previously provided, which would necessitate additional analysis. See Ukraine HR, 66 FR 50401. Therefore, the Department stated that it was unreasonable to expect the Department to accept and consider this information at such a late date. See id. Petitioner maintains that the Department noted that its decision to reject the untimely-filed submission in Ukraine HR was consistent with its practice of returning untimely-filed responses. See id.

Petitioner states that another example of respondents' uncooperative behavior involves the allegation of affiliation between Fay Candle, the Chinese producer/exporter, and two of the U.S. importers of candles. Petitioner notes that respondents claim affiliation, but all of the facts on the record are contradicting. Petitioner maintains that the Department properly asked for an export price (EP) sales listing in its first supplemental questionnaire dated March 27, 2002. Petitioner notes that Fay Candle outright refused to provide this information. Petitioner further notes that, in its second supplemental

questionnaire of June 14, 2002, the Department repeated that it had asked for EP sales information, that Fay Candle had not provided this information, and warned that a decision by the Department to go EP would put Fay Candle in a difficult position. Petitioner holds that Fay Candle again ignored the request for EP information.

Petitioner contends that another example of respondents' uncooperative behavior regards the issue of scope i.e., which candles produced and sold by Fay Candle are within the scope of the Order and which candles are outside the scope of the Order. Petitioner notes that Fay Candle claimed from the beginning an ignorance of scope issues. Despite the fact that counsel for Fay Candle has participated in scope reviews under the Order, has been closely monitoring the Order and other reviews, and has been preparing to file for an administrative review for several years. Petitioner states that, when the Department asked in detail about scope issues in the first supplemental questionnaire, Fay Candle dismissed the question with the statement that "all candles reported by Fay Candle are assumed to be within the scope of the order." See Fay Candle's April 17, 2002 Supplemental Response at 12. Petitioner notes that when the Department requested in the second supplemental questionnaire that Fay Candle actually answer the question, Fay Candle then found a number of candle types that were not within the scope of the Order and should not have been included in its response. Petitioner argues that the very documentation that Fay Candle provided with this response showed that it still had not identified all of the out-of-scope candles it was actually selling. Petitioner also maintains that, at verification, Fay Candle provided yet a third version of its "out of scope" candles sales. Petitioner points out that it was not given this third version until mid-way through verification, thus, preventing any ability to comment prior to verification.

Respondents argue that the application of AFA to calculate their margin is lawful only if the record evidence demonstrates that they "failed to cooperate by not acting to the best of their ability to comply with a request for information." See Section 776(b) of the Act. They state that the Department may resort to AFA based on a totality of facts that establish "a pattern of unresponsiveness." See Nippon Steel II, 146 F. Supp. at 840. Respondents note that they requested and participated in the administrative review voluntarily, and cooperated with the Department to the best of their ability throughout the review. Respondents claim that there is no evidence showing a lack of best efforts, much less a pattern of unresponsiveness, on the their part. They contend that the Department made no finding of such a pattern, citing to the Department's preliminary results of the review. See Preliminary Results. Therefore, respondents maintain that the petitioner's allegations that respondents failed to cooperate are wholly unsupported and contrary to the record evidence.

Respondents claim that they cooperated with the Department to the best of their ability. They hold that they requested this administrative review because their data indicated that their dumping margin was significantly lower than the PRC-wide rate of 54.21 percent. Respondents maintain that they had every incentive to cooperate with the Department. According to respondents, they overcame enormous difficulties in assembling and producing data generated from two manual paper-based record-keeping systems. They note that the record of this proceeding, including the Department's preliminary results, is

devoid of any evidence pointing to inaccuracies or incompleteness of their responses, as alleged by petitioner. Respondents further note that, although the Department never made a finding that they did not cooperate at any phase of the review prior to the cancellation of the U.S. verification, petitioner claims that respondents "manipulated this proceeding" and "obstruct [ed] the Department's efforts to obtain the information" throughout the review. See Petitioner's Case Brief at 4.

According to respondents, petitioner claims that their alleged uncooperativeness during the review is exemplified by: (1) the Department's issuance of supplemental questionnaires to respondent's initial responses; (2) respondents' requests for extensions of time to complete questionnaire responses; and (3) respondents' responses to the Department's requests for information on affiliation and scope. See id at 13-15. Respondents state that the issuance of supplementary questionnaires is a routine practice in antidumping investigations and reviews of antidumping orders, not an indication of a lack of cooperation on the part of the responding party. Respondents note that, as the Department's antidumping manual provides, "{a} review of just about any case file will normally uncover a number of requests for further information," and " [t]he first and most common vehicle used to request additional information is a supplemental questionnaire," citing the Department's Antidumping Manual, Ch. 4 at 16.

With regard to the task of data collection, respondents state that they requested several extensions pursuant to the Department's regulations and note that the Department routinely receives and grants such requests in accordance with the regulations. Respondents cite 19 C.F.R. § 351.302(b) and the Antidumping Manual, Ch. 4 at 18, in support of their contention. Respondents hold that they always met extended deadlines approved by the Department. Respondents argue that their requests for extensions of time to respond to questionnaires were consistent with their best efforts to provide accurate and complete responses to the Department's requests for information.

Respondents maintain that, although petitioner argues that they failed to respond to the Department's questions concerning affiliation and scope, the Department made no such findings, either in the course of the review or in its preliminary results. According to respondents, as per affiliation, petitioner claims that they simply refused to supply an EP database requested by the Department. They argue that, in fact, however, they filed multiple submissions responding to the Department's request, explaining why the provision of an EP database was unnecessary. See Respondent's Case Brief at 7-8. Respondents claim that the Department considered this issue at verification, and the Department's personnel verified their submissions concerning this specific issue during the verification in China, as evidenced in the Department's Verification Report at 2-4 & Exhibit 16. Respondents maintain that the issue of the out-of-scope candles produced by Fay Candle was examined at the China verification, and the Department's personnel examined the models reported as outside the scope and there is no evidence suggesting that their responses regarding scope were inaccurate. See Administrative Review of Petroleum Wax Candles from the People's Republic of China, Letter from Sally C. Gannon to respondents (Aug. 2, 2002).

Petitioner claims that, throughout this review, respondents have attempted to manipulate and obstruct the Department's entire investigation. Petitioner notes that respondents argue that the record shows that they cooperated to the best of their abilities and that this is not a case in which their deficiencies point to pattern of unresponsiveness. According to petitioner, respondents argue in their case brief that the Department "*must* consider respondents' pattern of behavior in deciding whether to draw an adverse inference." See Respondents' Case Brief at 5. Petitioner notes that respondents cite to Nippon Steel II in support of their argument that the Department must show a "pattern of unresponsiveness" before resorting to adverse facts available. See Petitioner's Rebuttal Brief at 9. Petitioner contends that respondents misstate the holding in Nippon Steel II. Petitioner argues that the CIT has not held that a pattern of unresponsiveness is required in order to use adverse inferences under section 776(b) of the Act, citing also to Borden, 22 CIT 1153. Petitioner maintains that, while the Court found in Nippon Steel II that a pattern of behavior may necessitate the drawing of adverse inferences, it did not hold that the Department "must consider" a pattern to find that a respondent failed to cooperate to the best of its ability. See Petitioner's Rebuttal Brief at 9.

Petitioner argues that the record leaves no doubt that a pattern of unresponsiveness exists in this review. According to petitioner, in this review, respondents belatedly attempted to submit substantial new factual information at verification. Petitioner notes that Fay Candle had been given the opportunity to present these major revisions prior to verification. Moreover, petitioner points to respondents' third supplemental questionnaire, in which the Department specifically asked questions about Fay Candle's production figures, as well as Fay Candle's scrap sales figures. Petitioner remarks that, as a prime example of the Department's fairness toward respondents, Fay Candle was permitted until July 18, 2002 to submit any comments, changes, or corrections to the production data, despite petitioner's strong objection. Petitioner states that, in Fay Candle's July 18, 2002 response to the Department's third supplemental questionnaire, Fay Candle responded that there was "no discrepancy" in the data thus far submitted, despite questions about the discrepancies and the opportunity given to Fay Candle to correct errors in the production figures. See Respondents' Responses to Third Supplemental Questionnaire (July 18, 2002).

According to petitioner, Fay Candle refused to provide the EP sales information the Department requested in the first and second supplemental questionnaires, referring to the requests as superfluous and unwarranted. See Respondents' April 17, 2002 Supplemental Response at 12. Petitioner states that this information was crucial to this review because respondents allege they are affiliated and, therefore, the U.S. sales price should be based on CEP, not EP. Petitioner claims that the Department has repeatedly requested EP sales information, even going so far as issuing a warning that use of facts available may be required because Fay Candle refused to provide the requested EP information.

According to petitioner, respondents claimed an ignorance of scope issues and included in their U.S. sales, provided in response to the Section C questionnaire, candles that were obviously out-of-scope. Petitioner notes that, only through the series of supplemental questionnaires did respondents: 1) admit the inclusion of out-of-scope candles, 2) attempt to identify such candles, for the Department, and 3)

revise the list of such candles several times. Petitioner notes that the "final" list of out-of-scope candles was not even provided until verification.

Department's Position:

We continue to find that, in accordance with section 776(a)(2)(D) of the Act, the use of facts available for respondents is appropriate for these final results of review because respondents' decision not to allow the Department to conduct an on-site U.S. verification prevented necessary information from being verified as provided in section 782(i), a condition specifically listed in section 776(a)(2)(D) as mandating the use of facts available. Further, section 776(b) provides that the Department may use an inference that is adverse to the interests of a party that "has failed to cooperate by not acting to the best of its ability to comply with the request for information." Respondents' refusal to allow the U.S. verification to take place seriously impeded the Department's ability to complete its analysis in this administrative review and leads to our conclusion that respondents failed to cooperate by not acting to the best of their ability in this review. We, therefore, continue to find that an adverse inference under section 776(b) is warranted for these final results of review.

More specifically, on July 26, 2002, at the PRC verification, the Department returned production quantity data submitted by respondents at the beginning of the verification because we determined that this information was untimely submitted, and halted the remainder of the verification. See "Memorandum Regarding Administrative Review of Petroleum Wax Candles from the Peoples Republic of China (PRC) (A-570-504): PRC Verification," to The File, through Sally C. Gannon, from Mark Hoadley, Brett Royce, and Jessica Burdick (August 30, 2002) (Verification Report) and "Memorandum Regarding 2000/2001 Administrative Review on Candles from the People {sic} Republic of China: Telephone Call Regarding Verification," for The File, from Sally C. Gannon (August 2, 2002). The following week, the Department informed respondents that it would proceed with the U.S. portion of the verification, and the Department and respondents agreed on August 12 through 15, 2002, as acceptable dates for this verification. See "Memorandum Regarding 2000/2001 Administrative Review on Candles from the People {sic} Republic of China (A-570-504): Telephone Call Regarding Verification & Rejection of New Factual Information," to The File, through Sally C. Gannon, from Jessica Burdick (July 31, 2002).

On August 9, 2002, one business day before the start of the U.S. verification, respondents' counsel informed the Department via telephone that respondents had made a decision not to proceed with the U.S. verification. See "Memorandum Regarding 2000/2001 Administrative Review on Candles from the People {sic} Republic of China (A-570-504): Telephone Call Regarding Verification," to The File, from Sally C. Gannon (August 9, 2002 Verification Memo). In this telephone call, the Department official expressed "concern about [respondents'] decision in light of the fact that the Department had decided to proceed with the U.S. verification." Id. Respondents followed up this telephone call with a

letter informing the Department of their decision. In this letter, respondents explained the reasons behind their decision, as follows:

> Despite the company's strenuous efforts to submit to the Department a complete and accurate questionnaire response throughout this review, the Department's actions of walking out of the China verification and rejecting/returning the verification exhibits containing correction of production quantity fatally undermined the company's ability to obtain a fair calculation of its antidumping margin, which the company knows to be significantly below the 54.21 percent 'all others' rate. In light of the Department's administration of this review, the company sees no point in proceeding with verification of its US affiliate.

See August 9, 2002 Letter from respondents to the Secretary of Commerce.

Despite the reasons enumerated in respondents' August 9, 2002 letter to the Department, the Department finds respondents' decision not to proceed with the U.S. verification puzzling in light of the series of events that took place during, and subsequent to, the PRC verification. During the time that the PRC verification took place, the Department carefully considered the new and untimely information submitted by respondents and determined to return the information and halt the verification (on the last day). After further review of the record existing up to that point in time and a review of precedent concerning rejection of untimely new factual information, the Department decided to proceed with the U.S. verification and duly informed respondents. See "Memorandum Regarding 2000/2001 Administrative Review on Candles from the People Republic of China: Telephone Call Regarding Verification & Rejection of New Factual Information," to The File, through Sally C. Gannon, from Jessica Burdick (July 31, 2002). New dates for the U.S. verification were then negotiated and agreed upon with respondents. A U.S. verification outline had already been provided to respondents. See "Letter Regarding Administrative Review of Petroleum Wax Candles from the People's Republic of China," to TIJID, Inc. et al. from Sally Gannon (July 12, 2002). It was only one business day prior to the start of the U.S. verification that respondents chose to inform the Department that they would not agree to proceed with the verification. See August 9, 2002 Verification Memo. Respondents did not request that the dates for verification be rescheduled, that the Department reconsider any elements of the outline we had provided, or otherwise ask that the Department assist them in overcoming any obstacles to complying with the verification. Moreover, they did not express their concerns that proceeding with verification would be "pointless" until they submitted their letter stating they would no longer cooperate. Respondents did not attempt to contact the Department regarding these concerns. For that matter, the Department had no way of knowing why exactly respondents had concluded that proceeding with the review was "pointless" or what we could do to address their concerns. Indeed, while respondents argue that the Department had a "gotcha" policy, the very fact that the Department decided to proceed with U.S. verification demonstrates that the Department had not already made a decision or prejudged the outcome of the review. The Department finds respondents' course of action at this juncture of the administrative review to be unusual and unwarranted.

The U.S. sales verification is integral to our calculation because, without performing the U.S. sales verification, we were unable to complete the sales reconciliation as well as verification of total quantity and value, which are principle elements of the overall verification of respondents' questionnaire responses, not to mention the per-sale information regarding the price, quantity, and expenses of each sale. In addition, because verification of much information in China was inextricably linked with information available in the United States, respondents refusal to allow the U.S. portion of verification denied the Department the opportunity to verify not only the accuracy of all U.S. sales information submitted by respondents, but much of the information obtained in China. See Preliminary Results. Further, the Department was unable to completely investigate respondents' affiliation claim, for which key elements would have needed to have been verified in the United States; this directly affects the Department's treatment of U.S. sales, i.e., whether on an EP or CEP basis. Therefore, as a result of respondents' decision to cancel the U.S. verification, the Department was denied the opportunity to verify fully the accuracy of information submitted by respondents, thereby making their responses unreliable for purposes of calculating dumping margins.

Finally, it is our conclusion that respondents' are misinterpreting several opinions of the CIT. While the CIT has stated that the Department should find a pattern demonstrating a lack of cooperation, we believe this is in keeping with its opinions requiring the Department not to base its decision to apply an adverse inference on minor, unintentional deficiencies or "non-perfect" responses. As just described, however, not allowing the Department to verify a response is not a minor deficiency and was not unintentional in this case. Verification is at the heart of ensuring reliable responses, and refusing to allow the Department to verify an entire sales response, even if just once, given the Department's efforts to cooperate with respondents in rescheduling the U.S. verification, produces, by the deliberate act of respondents, a significant deficiency. By cancelling the U.S. sales verification, we determine that respondents failed to cooperate to the best of their ability, and as such, the use of adverse facts available is appropriate under section 776(b).

Therefore, we are applying an adverse facts available rate of 65.02 percent, which is a calculated rate from the recent new shipper review, to respondents' sales. Refer to Comment 4 below for a discussion of why we have determined that this rate is most appropriate.

Comment 2: U.S. Verification

According to respondents, the preliminary results indicate that the Department based the AFA rate solely on their cancellation of the U.S. portion of the verification. See Preliminary Results, 67 at 57385. Respondents argue that, without more, the Department's conclusion is not supported by substantial evidence, and the Department should not adopt it in its final determination.

Respondents claim that they cancelled the U.S. portion of verification because they believed that it would have been futile to proceed. Respondents contend that their cancellation of a futile verification is not evidence of a lack of cooperation under the circumstances. According to respondents, the Department had terminated the China verification because they had omitted 1 of 96 production sheets.

See id. In preparation for verification, respondents claim, they discovered the error and voluntarily submitted corrected production data prior to the beginning of verification so that the Department could verify the corrected data. Respondents note that the Department received, and proceeded to verify, the corrected data and other data over the next four days. Respondents then state that, on what was scheduled to be the last day of verification, the Department terminated the verification and returned to them the corrected production data and related documentation and work sheets. Respondents refer to the Verification Report at 1-2 to support their contention. According to respondents, the Department claimed that the corrected production data did not constitute a minor correction because it represented about a quarter of production. See Preliminary Results, 67 at 57385. Respondents maintain the Department could have kept the information and held open the possibility that it would use the data or at least consider arguments to use the data, but it did not do so.

Respondents note that, on July 26, 2002, upon terminating the China verification, the Department advised them that the Florida verification was on "indefinite hold." According to respondents, five days later the Department asked to immediately schedule a Florida verification. Respondents hold that the Department did not state how the information from the Florida verification might be used in the absence of the China verification data. In addition, respondents state the Department did not notify them that, in the event that they decided not to go forward with the Florida verification, an AFA rate would apply.

According to respondents, they realized that, since the Department returned the data in China, the Department would not calculate a margin using actual data. In support of this contention, respondents cite Steel Concrete Reinforcing Bars from Poland, Indonesia, and Ukraine: Preliminary Determination of Sales at Less Than Fair Value, 66 FR 8343 (January 30, 2001).

According to petitioner, respondents' final act of non-cooperation, their refusal to allow the U.S. verification requires the use of total adverse facts available. On July 31, 2002, the Department informed respondents that it would proceed with the U.S. portion of the verification. Citing the Preliminary Results, 67 at 57385, petitioner notes that the Department and respondents agreed on August 12 through 15, 2002 as the dates for this verification. Petitioner states that, on August 9, 2002, respondents informed the Department of their decision not to participate in the U.S. verification. See id. Petitioner contends that respondents did not raise an objection to the dates for the verification, nor did they ask that the verification be rescheduled, but rather "simply stated that they would not proceed with the verification." See id. Petitioner points out that the Department explained in its Preliminary Results the significance to the investigation of respondents' failure to cooperate by stating:

> Since the Respondents cancelled the U.S. sales verification, the Department cannot rely on Respondents' questionnaire responses to calculate a dumping margin for Fay. The U.S. sales verification is integral to our calculation because, without performing the U.S. sales verification, we are unable to complete the sales reconciliation, as well as verification of total quantity and value, which are principle elements of the overall verification of Respondents' questionnaire responses.

See id. Petitioner holds that the Department found that information from the verification in China is inextricably linked with the information unverified in the United States, citing to the following:

> For example, the Department was able to verify several factors used in the production of candles; that information, however, is not usable if the Department is unable to verify which products were actually sold in the United States, a step in the verification process that would have taken place in the United States if verification had been allowed. Moreover, personnel at Fay stated that some items in the factors of production portion of the response would have to be verified, at least in part, in the United States. For example, they stated that additional documents we requested to confirm the amounts of dyes, fragrances, packaging and hang tags used in production were kept in Florida. In addition, as noted above, by not performing the U.S. sales verification, we were unable to complete the sales reconciliation as well as verification of total quantity and value, which are principle elements of the overall verification of respondents' questionnaire responses.

See id.

Petitioner states, as discussed above in Comment 1, that section 776(a)(2) of the Act requires the Department to use facts otherwise available where information submitted cannot be verified. Petitioner claims that respondents' decision to not allow the Department to conduct the U.S. verification left the Department with no alternative but to use facts otherwise available in reaching its determination. Petitioner cites to section 776(b) of the Act, which allows the Department to use an inference that is adverse to the interests of a party that "has failed to cooperate by not acting to the best of its ability to comply with the request for information." See 19 C.F.R. § 351.308(c). Petitioner argues that respondents' willful cancellation of verification and their reckless disregard for their statutory obligations compels the application of adverse facts, citing Nippon Steel Corporation v. United States, 2000 Ct. Intl. Trade LEXIS 139, 118 F. Supp. 2d 1366 (2000).

Petitioner contends that the only reason that respondents would take the drastic step of refusing verification is to prevent the Department from finding information that would be extremely detrimental to their case. Petitioner notes that the Statement of Administrative Action accompanying URAA provides that the Department may employ an adverse inference "to insure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully." See Statement of Administrative Action, accompanying H.R. Rep. No. 103-316 Vol. 1 at 870. Petitioner claims that respondents have left the Department in a position where all that it can do is use an adverse inference in calculating the dumping margin in this case. Petitioner states that the Department, here, has clearly articulated the reasons for its conclusion that respondents had been purposefully uncooperative and why the failure to participate in verification of the U.S. sales data is significant to the investigation.

Respondents argue that they did not cancel the U.S. verification to prevent the Department from finding information that would be extremely detrimental to their case, as alleged by petitioner. Respondents also claim that petitioner also is wrong in asserting that their decision not to proceed with the U.S. verification automatically leads to the conclusion that they failed to cooperate to the best of their ability.

According to respondents, given the Department's rejection of their corrected production quantity data, return of critical exhibits, and premature termination of the Chinese verification, they concluded that the Department would not use the factors of production data submitted by respondents, and that proceeding further would be futile. They contend that there is no information on the record to the contrary.

Respondents argue that the cancellation of a futile verification should not result in the imposition of AFA. Respondents claim that the Department set the bar at an unreasonably high standard for a small, paper-based Chinese candle company to meet. Respondents further explain that, when they could not meet that impossible standard, the Department latched on to an inadvertent error, halted the verification, and applied the "predatory 'gotcha' policy {that} does not promote cooperation or accuracy or reasonable disclosure by cooperating parties intended to result in realistic dumping determinations," as criticized by the CIT in Bowe-Passat, 17 CIT at 343. Respondents state that there is no pattern establishing a lack of cooperation, and given the facts in this proceeding, they cooperated to the best of their ability.

According to petitioner, respondents, for the first-time in their case brief, claimed that they cancelled the U.S. portion of verification because they believed it would have been "futile" to proceed. Petitioner notes that respondents' concern was not articulated to the Department at the time they cancelled the U.S. verification. They remark that record evidence shows that respondents have offered no explanation for cancelling verification. Citing the Preliminary Results, 67 at 57385, petitioner states that the Department and respondents mutually agreed to begin U.S. verification on August 12, 2002, but, on August 9, 2002, respondents informed the Department via telephone and letter submission, that they were not going to proceed with the U.S. portion of the verification. Petitioner maintains that respondents did not express their feelings of "futility" or offer any explanation for cancelling the U.S. verification.

Petitioner claims that respondents' "futility" argument is discredited by respondents assertion in their case brief that the Department could have calculated their margin based on the originally submitted data. See Respondents' Case Brief at 1, 4, 16 and 29. Petitioner notes that respondents contend in their case brief that their "uncorrected response was verifiable and not so incomplete that it could not serve as a reliable basis for the Department's determinations." See Petitioner's Rebuttal Brief at 13 (citing Respondents' Case Brief at 16). Petitioner asks, " [i]f this is true, then why would respondents believe that verification of U.S. sales data was futile?" See id.

According to petitioner, if the Department had been able to verify the U.S. sales data, then it may have used partial facts available. Petitioner contends, that by cancelling the verification, respondents left the Department with little choice under the statute and regulations but to apply total adverse facts available. They hold that, because respondents cancelled the U.S. sales verification, the Department cannot rely on the questionnaire responses to calculate a dumping margin. Petitioner maintains that, without performing the U.S. verification, the Department is unable to verify principal elements of respondents' questionnaire responses.

Petitioner further states that the Department was able to verify some information in China, but it was unable to complete verification of the related U.S. information. They maintain that, according to the Preliminary Results, 67 at 57385, the Department verified certain factors of production for candles in China, but it was unable to verify that those candles were sold in the United States. Petitioner argues that, when information submitted in a questionnaire response is unverifiable because respondents will not allow verification, the Department is authorized by statute to use "facts available," and to apply an adverse inference because respondents failed to
cooperate to the best of their ability. In support of its argument, petitioner refers to sections 776(a)(2) and 776(b) of the Act, and Gourmet Equipment Corp. v. United States, 2000 WL 977369 (CIT July 6, 2000).

Petitioner refutes respondents' claim that the Department did not inform them how the information from the U.S. verification might be used in the absence of the Chinese data, or that adverse facts may be used. Petitioner argues that, despite respondents' contentions, the Department informed respondents at least twice that the lack of response may result in the Department's proceeding with appraisement based on facts available, citing to the Department's second and third supplemental questionnaire letters. Petitioner holds that the Department is under no obligation to inform uncooperative respondents of all legal consequences for failing to cooperate, citing Acciai Speciali Terni S.p.A. v. United States, 142 F. Supp. 2d 969, 1007 (CIT 2001) (Acciai), in support.

According to petitioner, the real reason respondents refused U.S. verification was the likelihood of failing verification and receiving a dumping margin even higher than the 95.22 percent rate assigned by the Department in the preliminary results. Petitioner advances several theories as to what financial data might not have been reconcilable and what other facts might not have been confirmed at verification.

Department's Position:

In response to Comment 1, above, we have explained why we determine that respondents' refusal to allow us to conduct a U.S. verification is sufficient grounds for applying adverse facts available. Respondents' additional arguments, essentially stating that under some circumstances, when a respondent determines that it is being treated poorly, it should have the right to opt out of verification, i.e., to opt out of a responsibility to prove the accuracy of the information it has provided, are not persuasive.

Whether the Department appropriately halted the PRC verification is irrelevant to our decision to apply adverse facts available. If respondents believed this decision was made incorrectly, they should have proceeded with the review, allowed the Department to render its preliminary results in light of verification findings, and argued either in comments on verification reports or in case briefs for a means of addressing the items remaining unverified. Simply refusing to cooperate further is not a means by which disagreements with Department positions can be resolved in a manner allowing an accurate margin calculation. If the Department determines that it has erred in its treatment of a respondent, it still

must be assured that it has accurate, reliable data to use in its calculations. Respondents method of reacting to what it perceived as a poor decision made this assurance impossible.

Respondents also argue that it is unfair for the Department to apply adverse facts available in this situation because we did not warn them that this would be the outcome of refusing verification. The Department is not persuaded by this argument that it has incorrectly applied adverse facts available. We stated in our verification outlines and questionnaire cover letters that unverified items would be subject to facts available. See, e.g., "Letter Regarding 2000-01 Administrative Review of Petroleum Wax Candles from the People's Republic of China (PRC)," to Dongguan Fay Candle Co., Ltd. from Sally Gannon (July 11. 2002) (PRC Verification Outline), and Letter to Dongguan Fay Candle Co., Ltd. from Sally C. Gannon (November 10, 2001) (the initial questionnaire). The fact that the application of adverse facts available was a possible consequence of refusing verification must have been apparent to respondents, given the language of the Act cited above, given the standard language in our verification outlines and questionnaire cover letters, and given that the Department has frequently applied adverse facts available in the past to respondents who have refused verification. See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Ferrovanadium from the Republic of South Africa, 67 FR 71136 (November 29, 2002).

Finally, we note that refusing verification was not the only "deficiency" in respondents participation in this review. The discovery of new production data very late in the review, presented to us on the first day of verification, calls into question the care in which the response was prepared, as discussed below in Comment 3 in the "Department's Position."

Comment 3: Production Data

According to respondents, the omission of one production order out of 96 production orders in its records resulted from an inadvertent clerical error made by a clerk. Respondents hold that the statute, section 782(d) of the Act, as explained by the CIT in Coalition for the Preservation of Am. Brake Drum & Rotor Aftermarket Mfrs. v. United States, 44 F. Supp. 2d 229, 236 (CIT 1999) (Coalition), "allows for the submission of new information at verification in order to 'remedy or explain' a deficiency." According to respondents, section 782(d) of the Act was enacted as part of the Uruguay Round Agreements Act (URAA) (see Pub. L. No. 103-465, 108 Stat. 4809 (1994)) to implement portions of the Article 6.8 and Annex II of the Agreement on Implementation of Article VI of General Agreement on Tariffs and Trade 1994 (AD Agreement). See Respondents' Case Brief at 11. Respondents claim that the Department's outright rejection of respondents' corrections of the production quantity data contravenes the AD Agreement.

Citing the Final Affirmative Countervailing Duty Determination: Stainless Steel Sheet and Strip in Coils from France, 64 FR 30,774, 30,778 (June 8, 1999) (SSSS from France), respondents state that the Department can "accept new information at verification when 'the information makes minor revisions to information on the record or . . . the information corroborates, supports, or clarifies information already

on the record.'" As such, respondents maintain that the submission of the corrected production quantity data satisfies both the minor revision and corroboration requirements.

Respondents reiterate that the subject correction is minor because it pertained to a single production order out of 96 in its records. According to respondents, the Department claims that, since the production accounted for about a quarter of total production, it is not minor. Respondents argue that the Department may not conclude that the error committed was minor or major based solely on the error's "value,"citing Tatung Co. v. United States, 18 CIT 1137, 1141 (CIT 1994). Respondents note that, as the CIT admonished in that case, a determination of whether an error is minor or serious does not turn on "the value of the errors as percentage of total U.S. sales [here, production quantity] . . . ." Id. In contrast, "the issue is the nature of the errors and their effect on the validity of the submission." Id. Here, according to respondents, the error was clerical in nature and had no effect on the validity of the submission.

Respondents contend that the correction of total production quantity clarifies and supports the information already on the record. They claim it corroborates the accuracy of the total scrap loss and scrap loss variance data. According to respondents, petitioner claimed in its July 10, 2002 and July 19, 2002 submissions to the Department that this data was overstated, and the corrected production data corroborated their accuracy.

Respondents argue further that the Department should have accepted the correction. Respondents claim that the only evidence on the record supports a finding that the original omission of the production order was inadvertent. Furthermore, respondents contend that there is no evidence that the omission of the production order in question was deliberate or not inadvertent, citing the Final Determination of Sales at Less Than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products from Indonesia, 66 FR 49,628 (Sept. 28, 2001). Respondents maintain that the inclusion of the production data would have reduced the dumping margin (a larger production figure in the denominator would reduce per-unit costs), so they had nothing to gain by omitting the data. According to respondents, this is not a case in which continuous errors made by a party throughout a review effectively prevented the Department from verifying and using that party's information in the calculation of the dumping margin, as was found in Roller Chain, Other Than Bicycles, from Japan: Final Results & Partial Rescission of Antidumping Duty Administrative Review, 63 FR 63671, 63674-75 (Nov. 16, 1998). Respondents further contend that the corrected production quantity data were verifiable. Respondents note that the Department personnel in China accepted the corrected data and proceeded with the verification until they received instructions from headquarters to terminate the verification. Respondents argue that the reason they had not noticed the production error is because the Department omitted in its questionnaire a standard question requiring reconciliation of quantity and value of production. They further claim there is no evidence on the record indicating that a disclosure of a single production order at the commencement of the verification in any way undermined the validity of their data submitted throughout the review, or that it impeded the progress of the verification.

According to respondents, the Department's rejection of the corrected production quantity data in this case stands in contrast to its practice of accepting verifiable corrections prior to or during the

verification as long as the data are easily verifiable. Respondents cite Certain Pasta from Italy: Verification of the Cost of Production and Constructed Value Data 5, Memorandum from Laurens van Houten through Neal Halper to Christian B. Marsh, (Aug. 21, 1998) (Pasta Verification Report), in support of their contention. Respondents state that, among its findings in the Pasta Verification Report in that case, the Department stated that it "tied the total product-specific quantities as recorded in the POR summary inventory movement ledgers to the revised production quantity figures submitted with the first day corrections." Respondents note that the Department successfully verified the revised production quantity data in that case. Respondents claim that, here, although the Department personnel virtually completed the verification of their corrected response, the Department nevertheless halted the remainder of the China verification, rejected the revised production quantity data, and stopped short of examining the reported factor inputs of labor and wicks, for which the Department had requested documentation.

Respondents contend that, in Coalition, the CIT upheld the Department's acceptance of information submitted at verification on grounds that "in every instance in which the Department encountered errors, the Department was able to verify the correct information," and "in the end, the errors were corrected and the data were verified." See Coalition, 44 F. Supp. 2d at 237. They state that, by rejecting respondents easily verifiable revised production quantity data, the Department contradicted the CIT and its own precedent, citing to Acciai, 142 F. Supp. 2d at 1007. Respondents maintain that this constitutes an abuse of discretion because, as articulated by the CIT in Nippon Steel II, 146 F. Supp. 2d at 842 (quoting Atl. Sugar, Ltd. v. United States, 744 F.2d 1556, 1560 (Fed. Cir. 1984)), the Department "has not been given power that can be 'wielded' arbitrarily as an 'informal club.'" They argue that the Department may not act "arbitrarily as to when it forgives respondents and when it penalizes them," as the CIT stated in Nippon Steel II (citing Olympic Adhesives, Inc. v. United States, 899 F.2d 1565, 1572 (Fed. Cir. 1990)).

Petitioner argues that, on July 22, 2002 (the first day of verification in China), Fay Candle gave new information to the Department that dramatically changed portions of their Section D response. According to petitioner, Fay Candle did not provide any explanation as to why this information was just then being submitted. Petitioner notes that, under 19 C.F.R. § 351.302(d), the Department is required to return untimely filed material to respondents, and, consistent with this regulation, the Department properly rejected the untimely submission from respondents in this review. In support of its assertion, petitioner cites Stainless Steel Bar From India; Final Results of Antidumping Duty Administrative Review and New Shipper Review, 64 FR 13774 (March 22, 1999). Petitioner holds that the Department may not consider untimely filed new factual information, and the Department must not use factual information that the Secretary returns to the submitter. See 19 C.F.R. § 351.104(a)(2). Petitioner maintains that respondents were aware of these requirements, as they had previously requested seven extensions of deadlines for submitting factual information.

According to petitioner, the subject revisions constituted substantial and important new factual information that the Department by regulation and practice should, and did, reject. Petitioner refers to Stainless Steel Sheet and Strip in Coils From Italy: Notice of Final Determination of Sales at Less Than Fair Value, 64 FR 30750, 30757 (June 8, 1999), in support of its argument. Petitioner argues that

these major changes raised serious issues as to the basis and validity of data already reported by respondents. Further, petitioner notes that, by waiting until the first day of verification, respondents prevented petitioner and the Department from being able to thoroughly analyze and comment on the new information prior to verification.

Petitioner further argues that, late on the first day of verification, Fay Candle announced to the Department that its POR candle production was not as previously claimed throughout the review, but was now claimed to include an additional previously unreported amount. Petitioner refers to Verification Report at 1. Petitioner states that Fay Candle announced that it had suddenly found more production than the quantity on which it had based its entire set of previous responses. Petitioner claims that no explanation was provided as to Fay Candle's discovery of this increase in production or as to why this information, previously requested in the Department's initial and third supplemental questionnaire, was only then being provided.

Petitioner cites to Reiner Brach, 206 F. Supp. 2d at 1326, in which the respondent attempted to submit previously unreported home market sales data during verification, which it had "inadvertently omitted" in earlier responses. Petitioner notes that the Department in that case, refused to accept the information, as it constituted substantial new information and, therefore, was untimely. Petitioner holds that, as in the instant case, the Department had previously requested the information that respondent sought to provide in the midst of verification. Petitioner states that, additionally, the Department found in Reiner Brach that respondent had in its records the requested data and was capable of providing it but failed to do so; therefore, it applied adverse inferences in choosing among total facts otherwise available. According to petitioner, the CIT found the Department's refusal to accept substantial new factual information submitted after the deadline was supported by substantial evidence and otherwise in accordance with law. Petitioner maintains that the CIT found a pattern of behavior in Reiner Brach, similar to that in the instant case, which justified the Department's decision to use adverse inferences.

Petitioner notes that the Department gave Fay Candle opportunities to make corrections or revisions to its production data prior to verification. Petitioner holds that, despite ample opportunity, Fay Candle failed to do so. Petitioner contends that, in the Department's third supplemental questionnaire of July 11, 2002, or 11 days prior to the start of verification, the Department specifically asked questions about Fay Candle's production figures, their scrap sales figures, and the scrap ratio reported in the original Section D response. Petitioner states that, in spite of petitioner's opposition, the Department granted an extended deadline for Fay Candle's response until July 18, 2002. According to petitioner, in Fay Candle's July 18, 2002 response (provided by Fay Candle to the Department only two business days before verification), Fay Candle answered the Department's production and scrap figures questions by stating that there was "no discrepancy."

Petitioner claims that the Department was exceptionally generous in permitting last minute information and revisions from respondents. Petitioner further argues that the submission of new factual information, i.e., the new production figure, not only undercuts the information previously reported in the response to Section D, but it also undercuts the U.S. sales response as well. Petitioner questions the difference between production quantity and U.S. sales volume. See Petitioner's Case Brief at 10.

According to petitioner, in Certain Hot-rolled Carbon Steel Flat Products From Taiwan, 66 FR 49618 (Sept. 28, 2001) (Taiwan HR), the respondent was given three opportunities by the Department to correct certain deficiencies in the record regarding missing product characteristics and downstream sales. In that case, because respondent failed to do so, the Department cancelled the sales and cost verifications. Petitioner notes that the Department stated in Taiwan HR that the late submissions would have constituted such a major revision to existing information as to qualify as a completely new response, which would require it to analyze the new information, allow an opportunity for comments from interested parties, issue additional supplemental questionnaires, and then conduct cost and sales verification.

According to respondents, petitioner's argument that they purposefully withheld production quantity data until verification in an "attempt to manipulate the process" is unsupported and unreasonable. See Respondents' Rebuttal Brief at 9. Respondents claim that they discovered the error during preparation for verification and voluntarily submitted corrected production data prior to the beginning of verification so that the Department could verify the corrected data, referring to their Service of Corrections Letter Submitted at Commencement of Verification (July 23, 2002). Respondents state that, contrary to petitioner's claim, they provided a written explanation of the reasons for the omission to the Department, and the submission was duly served on petitioner. They hold that the omission was inadvertent and argue that there is no evidence otherwise.

Respondents note that petitioner claims that the revised production quantity data submitted at verification must be rejected because they constitute "major changes rais [ing] serious issues as to the basis and validity of data already reported by Fay." See Respondents' Rebuttal Brief at 9-10. Despite the petitioner's claim, respondents hold that the revision was a minor correction resulting from a clerical error during manual transcription of the data. Respondents cite to Certain Hot-Rolled Carbon Steel Flat Products from Indonesia, 66 FR 49628 (Sept. 28, 2001), for support that inadvertent errors resulting from manually inputting data, are minor corrections. Respondents maintain that the fact that a single production sheet turned out to correspond to approximately a quarter of the total production was incidental. Respondents argue that petitioner's argument that the error was not minor based solely on the error's "value" is incorrect. They state, that under CIT precedent, a determination of whether an error is minor or serious does not turn on "the value of the errors as percentage of total U.S. sales {here, production quantity}. . . ," citing to Tatung Co., 18 CIT at 1141. As the CIT emphasized in Tatung Co. "the issue is the nature of the errors and their effect on the validity of the submission." See id.

Respondents argue that the revised production quantity data clearly corroborate information already on the record. They claim that, in particular, the data confirms the accuracy of the reported total scrap loss and scrap loss variance that petitioner challenged as overstated and otherwise inaccurate, in respondents' Additional Deficiency Comments and Verifications Suggestions Letter, from petitioner to Secretary Donald Evans, U.S. Dep't of Commerce (July 19, 2002) and petitioner's Comments Regarding Verification Letter from petitioner to Secretary Donald Evans, U.S. Dep't of Commerce (July 10, 2002). According to respondents, petitioner nevertheless argues that the revised production quantity data undermines the validity of the information previously reported.

Respondents maintain that they reported the quantity of production and quantity of U.S. sales accurately, holding that neither the verification report, nor any other evidence on the record, suggests otherwise. Respondents cite the Verification Report at 9, in support of their contention. Respondents hold that, for this reason, petitioner is wrong in claiming that the corrected production quantity data undermine the evidence already on the record. Respondents note that it is the Department's practice is to "accept new information at verification when 'the information makes minor revisions to information on the record or . . . the information corroborates, supports, or clarifies information already on the record,'" citing the Final Affirmative Countervailing Duty Determination in Stainless Steel Sheet and Strip in Coils from France, 64 FR 30774, 30788 (June 8, 1999). The corrected production quantity data satisfy both the minor revision and corroboration requirements, according to respondents.

Respondents hold that the revised production quantity data were easily verifiable and, indeed, that the Department substantially verified the data during the China verification. They state that petitioner ignores that the Department has interpreted the antidumping regulations to permit itself broad discretion to accept verifiable corrections, even if the submissions are technically untimely, citing in support, Bowe-Passat, 17 CIT at 337-38. Respondents note that, consistent with its statutory mandate and the policy promoting accuracy in the calculation of any antidumping margin, citing Rubberflex Sdn. Bhd. V. United States, 59 F. Supp. 2d 1338, 1346 (CIT 1999), the Department has permitted respondents to supplement or correct responses shortly before or at verification in a series of administrative decisions discussed in respondents' case brief. See Respondents' Case Brief at 14-16. Just like in all those cases, and contrary to petitioner's claims, the submission of the corrected production quantity data at the beginning of verification did not prejudice the Department's or petitioner's ability to review the information. The Department not only had the time to review and analyze the corrected data, but it in fact did so during the four-day long China verification. Respondents cite Brother Indus., Ltd. v. United States, 771 F. Supp. 374, 383-84 (CIT 1991), where the CIT found that "timeliness relates to the ITA's ability to comprehend information before rendering a determination." Respondents also note that petitioner had the opportunity to comment and, in fact, submitted extensive comments on the corrected production quantity data, referring to petitioner's July 24, 2002 and July 30, 2002 submissions to the Department.

According to respondents, the acceptance of the corrected production quantity data that were easily verifiable, and substantially verified by the Department's personnel, would have been consistent with the CIT's and Department's own precedent. See Respondents' Case Brief at 14-16. Respondents state that case law cited by petitioner is clearly distinguishable. They state that, in Reiner Brach, the CIT upheld the Department's rejection of previously omitted data submitted by the respondent at verification. However, in that case, the Department found that it did not have sufficient time to review and analyze the data, even if it extended the deadline for final determination for 60 days and issued a supplemental questionnaire to allow submission of the omitted information. See Reiner Brach, 206 F. Supp. 2d at 1334. Respondents maintain that, here, the Department never claimed that it would not have sufficient time to review and verify the corrected production quantity data; indeed, the Department's personnel virtually completed the verification of the data before the verification was halted on the final scheduled day with just a few hours to go.

Respondents state that the Department's rejection of the untimely submitted data and its ultimate resort to AFA in Certain Hot-Rolled Steel Flat Products from Ukraine , 66 FR 50401 (Oct. 3, 2001) (Ukraine Final) and Certain Hot-Rolled Carbon Steel Flat Products from Taiwan , 66 FR 49618 (Sept. 28, 2001) (Taiwan Final), both cited by petitioner, involved vastly different factual scenarios. They note that, in the former, the respondent's responses were so deficient and inconsistent throughout the investigation that the Department decided not to verify the information submitted at all "because of its incompleteness." See Ukraine Final, 66 FR at 50402. Respondents further hold that, in the latter, the Department cancelled verification because, even though respondents were given ample opportunity to supplement or correct their responses, "they failed to adequately remedy or explain deficiencies in earlier responses." See Taiwan Final, 66 FR at 49618. Respondents maintain that, in contrast to this review, the decisions cited by petitioner involved respondents engaged in a pattern of unresponsiveness throughout the investigation. With regard to the petitioner's assertion of a "pattern," respondents contend that the Department never made such a finding.

According to petitioner, respondents argument that the additional production data were "minor revisions" because the additional data pertained to a single order, is false. Petitioner notes that respondents cite Tatung Co., 18 CIT at 1143, claiming that it supports respondents' argument that the Department may not conclude an error is minor or major based on the error's value. Petitioner holds that respondents correctly noted that the Court in Tatung Co. stated that the issue is not "the value of the errors as a percentage of total U.S. sales," or the number of instances of errors, but rather, the issue at hand is the "nature of the errors and their effect on the validity of the submission." See id. at 1141. Petitioner contends that respondents' untimely-filed information is significant to the review. They state that the "new" production data reported by Fay Candle on July 21 are of such a magnitude as to change significantly Fay Candle's Section D response. Petitioner argues that the introduction of the untimely filed information altered the factor usage of all chemical materials, which was tied directly to the POR production quantity. Petitioner holds that these chemical materials account for the vast majority of the material cost of candle production. They claim that the material costs of candle production, in turn, account for a large portion of the total cost of production of candles. Thus, a predominant portion of the total cost of production of subject merchandise depended directly on the figure for the total POR quantity of production, which became contentious at verification.

According to petitioner, there is no evidence on the record to prove that respondents inadvertently omitted new production data. See Petitioner's Rebuttal Brief at 20. According to petitioner, respondents' clerical error explanation, provided for the first time in its case brief, is nothing more than post-hoc rationalization offered by new counsel. Petitioner argues that, in reviewing underlying documents to answer the original questionnaire and three supplementary questionnaires, it is impossible that respondents did not discover that they were omitting this huge amount of production. Petitioner cites Florex v. United States, 705 F. Supp. 582, 588 (CIT 1989), in support of its argument.

Petitioner contends that respondents' assertion that the inclusion of the data would have reduced the dumping margin is questionable at best. Petitioner argues that, because the U.S. sales verification was purposefully cancelled by Fay Candle, it is uncertain what other errors may have been discovered.

Petitioner believes that, had U.S. verification taken place, a dumping margin higher than 95.22 percent would have been found.

Petitioner argues that, despite respondents' claims, the new production data were not easily verifiable. They claim that the increase in production data directly affected important material factors of production and other information in respondents' questionnaire responses that would have to be verified. Petitioner holds that the late submission on the first day of verification, did not provide the Department or petitioner adequate time to review, analyze and comment on the new data. Petitioner maintains that the late submission was such a major revision to existing information as to qualify as a completely new response, which would require the Department to analyze new information, allow an opportunity for comments from interested parties, issue additional supplemental questionnaires, and then conduct cost and sales verifications. Petitioner cites to Taiwan Final, 66 FR at 49618, in support. Petitioner states that, given the time constraints, it is unreasonable to expect the Department to have accepted and considered this information at such a late date.

With regard to respondent's statement that, " [t]he reason respondents did not notice the production error is because the Department omitted a question in the questionnaire, which required reconciliation of quantity and value," petitioner states that no example of, or citation for, this supposedly missing "standard question" is provided by respondents. See Petitioner's Case Brief at 24. According to petitioner, one does not need instruction to report actual data accurately, nor does one need instruction to reconcile submitted data internally. They state that, as respondents know, the process of verification by the Department and participation by parties is largely one long exercise in reconciling figures. Petitioner holds that the Department gave respondents a specific opportunity to look at these very production figures prior to verification and, upon review, respondents reported no discrepancies or problems with the production data.

Petitioner claims that, for first time, respondents attribute their difficulty in providing the untimely submission to the fact that Fay Candle is a small business that manually inputs the information requested by the Department. Petitioner points out that, in this very review, Fay Candle requested and was granted seven extensions of time to respond to the Department's requests. They note that at no time did Fay Candle inform the Department that its small size or limited resources prevented it from fully cooperating in the review. Petitioner supports its arguments by citing to Pacific Giant, 223 F. Supp. 2d. 1336, where the CIT did not agree with respondent that the small size of respondent's company disabled it from complying with the Department's requests for information.

Petitioner remarks that respondents allege throughout their case brief that the Department applied a "predatory gotcha policy" in rejecting the new production figures and terminating verification in China. Petitioner states that it was respondents who engaged in a predatory "gotcha" policy against petitioner and the Department by responding inaccurately, untimely, or not at all to many of the Department's legitimate and specific inquiries. According to petitioner, respondents did not even provide petitioner with the "new" production figures until late Tuesday, July 23, 2002 (the day after the information was provided to the Department verifiers) in hopes of preventing petitioner's timely review, analysis and objection to the new information.

Petitioner notes that respondents argue that the Department contradicted its own precedent in rejecting Fay Candle's new production figures. They state that respondents cite to a verification report in Certain Pasta From Italy, 64 FR at 6615. Petitioner argues that a verification report in a entirely separate case is not citable as Department precedent and is not binding on the Department. Additionally, the Department's final determination in Pasta from Italy did not discuss the issue of an untimely submission, according to petitioner.

Petitioner states that respondents cite Coalition as support of their contention that new information may be submitted at verification. Petitioner argues that, in Coalition, the Department allowed respondents to correct and supplement minor errors before and during verification because the revisions were not extensive and, unlike in the instant case, there was no basis to conclude that these errors affected the overall integrity of the questionnaire responses. Petitioner remarks that an example of the minor corrections allowed by the Department in Coalition was a 16 cents differential in a particular invoice. They claim that none of the errors corrected in Coalition involved a substantial increase in production figures. See Coalition, 44 F. Supp. 2d at 236. According to petitioner, the Court in Coalition upheld the Department's refusal to accept new information submitted by plaintiff citing to 19 C.F.R. §353.31(a)(1)(i). See id. Petitioner notes that the Court stated that the Department's "policy of setting time limits on the submission of factual information is reasonable because Commerce 'clearly cannot complete its work unless it is able at some point to freeze the record and make calculations and findings based on that fixed and certain body of information.'" See Coalition, 44 F. Supp. 2d. at 239, citing Gulf States Tube Division of Quanex Corp. v. United States, 981 F. Supp. 630, 653 (CIT 1997).

Petitioner states that respondents cite to Acciai as precedent for accepting Fay Candle's untimely submission. Petitioner argues that, in Acciai, 142 F. Supp. 2d. 969, the Court upheld the Department's rejection of a supplier's database and respondent's belated attempts to introduce new U.S. sales data that had been omitted from its questionnaire responses. Petitioner also points out that the Court found that use of AFA was supported by substantial evidence where the Department had provided notice of the deficiency and issued two supplemental questionnaires requesting corrected information. According to petitioner, the Court stated in Acciai that the "failure to report significant amounts of import data, such as U.S. sales data, indicates a lack of best efforts, unless there are extenuating circumstances that explain the failure." See Acciai, 142 F. Supp. 2d. at 992. In Acciai, the increase in U.S. sales was not submitted until three days prior to the start of verification. See id. at. 987. Petitioner remarks that, as in this case, no explanation was provided in Acciai for the late submission of new data.

Department's Position: We disagree with respondents that we incorrectly rejected the production data presented at verification. At the center of respondents contention are three arguments: 1) the new production data was minor as it constituted only one out of 96 production orders; 2) the new production data was not so intermingled with the rest of the response as to call into question the accuracy of the rest of the response, but, in fact, its introduction at verification actually served to confirm the accuracy of other data on the record, such as scrap generation; and, 3) the new production data could be easily verified.

While the new production order might constitute only one out of 96 production orders, it accounted for a very large percentage of respondents' production. While it is possible to believe that the omission of one order out of 96 might be the result of a simple, understandable error in preparing a questionnaire response, the fact that respondents did not notice the effect of an omission of such magnitude on their response calls into question the care they took in preparing that response. In other words, while the oversight of one order is understandable, given the very large production quantity accounted for by that order, it should have been apparent to respondents that the figures they were reporting to the Department were inaccurate, even if the reason for the inaccuracy was not immediately apparent to them; i.e., they should have noticed that the production volume they reported was much too low and that the factors they were reporting were much too high. Thus, the new production data was not minor in any sense of the word. It was significant both in its magnitude and because it places other elements of the response into question.

Perhaps the new data could have been verified, but it was, contrary to what respondents note, never accepted. The data was never accepted on any basis, conditional, temporary, or otherwise. In fact, the verification team made clear to Fay Candle personnel and their counsel that the data would not be accepted until the matter could be further discussed with Department officials in Washington. Upon further consideration, the Department determined that it was not the type of "correction" that was acceptable. See Verification Report at 1-2. Furthermore, the verification outline itself made clear that new information should not be submitted at verification and that only minor corrections were acceptable. See PRC Verification Outline.

Finally, both the Department and petitioner should have had the opportunity to examine the large production quantity involved in the new order before verification. Both may have wanted to raise questions, for example, involving new factors not previously reported and the reconciliation of the total production quantity with the total sales quantity.

The fact that respondents argue the initial omission of the data from their response was inadvertent and that they had nothing to gain from intentionally omitting the data is irrelevant. Our decision is not made on any conclusions regarding respondents' intentions.

We also do not understand respondents' argument that the omission of the production order was somehow the Department's fault, because we did not, according to respondents, include a standard question in our questionnaire, which, if we had, might have led to their discovery of their error in attempting to answer it. It is not the Department's responsibility to ask respondents to double check their work in order to avoid making errors. Nevertheless, it is important to note that we asked several questions in supplemental questionnaires concerning factor calculations (see "Letter Regarding Supplemental Questionnaire Response," to Dongguan Fay Candle Co., Ltd. from Sally C. Gannon (July 11, 2002) (question 6)) and scrap losses (see "Letter Regarding Supplemental Questionnaire Response," to Dongguan Fay Candle Co., Ltd. from Sally C. Gannon (July 11, 2002) (question 2)), which seemed relatively large compared to the total production quantity reported to us before verification. Indeed, as petitioner notes, the last of these questionnaires, asking questions pertaining to scrap issues in relation to total production reported, was issued 11 days before verification, and on July

18, 2002, only four days before verification, respondents reported no discrepancies in their data. In answering these questions, respondents should have become aware of the inaccuracy of the total production quantity figure reported.

Comment 4: New Shipper Review Rate

Respondents cite 776(c) of Act, which requires the Department to corroborate its choice of margin based on AFA. According to respondents, Congress imposed the corroboration requirement as part of the URAA (see Pub. L. No. 103-465, 108 Stat. 4809 (1994)) to conform to the requirements the AD Agreement. See AD Agreement, Annex II at paragraph 7. Respondents argue that the legislative history of the URAA clearly sets forth the principle that even adverse rates must be probative, and not merely punitive, citing to the Statement of Administrative Action, H.R. Doc. No. 103-316, at 870 (1994) (SAA).

Respondents argue that the corroboration requirement mandates that an AFA rate be a reasonably accurate estimate of their actual rate; the Department may not select an unreasonably high rate without any relationship to respondents' actual dumping rate. Respondents cite F.Lii de Cecco di Filipo Fara S. Martino S.p.A. v. United States, 216 F.3d 1027, 1032 (Fed. Cir. 2000) (F.Lii de Cecco), in support of their contention. Respondents assert that the purpose of section 776(b) is to provide respondents with an incentive to cooperate, not to impose punitive, aberrational, or uncorroborated margins. Furthermore, respondents argue 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. See Respondents' Case Brief at 17.

Respondents contend that the 95.22 percent margin the Department selected as Fay Candle's AFA margin bears no relationship to its actual margin because the circumstances of the new shipper review were different than the circumstances of the current review. First, respondents claim that the Department based its AFA margin on a single sale made by Shanghai New Star Im/Ex Co., Ltd.(New Star), in a sixth-month period from August 1, 2000 through January 31, 2001, whereas respondents in this review made over 65,000 sales during the one-year POR. See Notice of Preliminary Results of Antidumping Duty New Shipper Review: Petroleum Wax Candles from the People's Republic of China, 67 FR 3478, 3479 (Jan. 24, 2002).

Respondents argue that one sale cannot, under these circumstances, be a proper basis for the application of an AFA. According to respondents, the Federal Circuit has in the past rejected the use of data based on few sales under the "best information" standard on grounds that they were unrepresentative, citing Rhone Poulenc, Inc. v. United States, 899 F. 2d 1185, 1888 (Fed. Cir. 1990).

Second, respondents then argue that New Star is a trading company importing and exporting a variety of products, whereas Fay Candle is a candle producer. According to respondents, Fay Candle is a high-volume producer of subject merchandise; it manufactures a variety of candles and supplies them to

its alleged affiliated U.S. importers. Respondents state that, due to these different business operations, Fay Candle's and New Star's cost and price structures bear no relationship to each other. Therefore, New Star's prices and costs could not provide a reasonable basis for calculating respondents' margin.

Third, respondents claim that Fay Candle has been exporting candles to the United States since it was established in 1999. Respondents note that, in contrast, New Star, the new shipper, had never made a subject export sale to the United States. According to respondents, New Star almost certainly incurred start-up costs that an established exporter does not incur, which has the effect of increasing U.S. expenses and thereby increasing the dumping margin.

Finally, respondents claim that the Department based Fay Candle's AFA rate on New Star's sale to an unaffiliated entity. They hold that the Department's denial of the affiliate status to the U.S. buyer in the new shipper review apparently raised the resulting margin significantly. Respondents contend that, in contrast, Fay Candle supplied subject merchandise to, what they believe are, affiliated U.S. importers. Therefore, they believe that the margin based on New Star's sale to an unaffiliated party bears no relationship to respondents' actual margin.

According to respondents, the Department should have applied the 54.21 percent PRC-wide rate as the AFA rate. Respondents argue that the 54.21 percent rate is the highest rate available on the record that meets the legal criteria for selecting AFA. They claim that it is sufficiently adverse because it does not allow respondents to benefit from their decision not to proceed with the U.S. verification, citing the Notice of Preliminary Results of Antidumping Duty Administrative Review and Partial Rescission of Review: Petroleum Wax Candles From the People's Republic of China, 65 FR 54224, 54226 (Sept. 7, 2000). Respondents state that, since they requested the review, the 54.21 percent rate would serve as a sufficient deterrent for non-compliance.

Respondents claim that the 54.21 percent margin has been the only margin used since the original 1986 antidumping investigation until the new shipper review in question. Moreover, they note that the Department applied this margin as an AFA margin in the most recent review of the antidumping order on candles from China. See Id. Respondents state that the law compels the same result here because the Department may not select an extraordinarily high rate that focuses only on inducing the exporter to cooperate, and ignore "the interest in selecting a rate that has some relationship to commercial practices in the particular industry." Respondents point to D & L Supply Co. v. United States, 113 F.3d 1220, 1221 & 1224 (Fed. Cir. 1997) (D & L Supply), in support of this argument. Respondents cite H.F.C. Co. v. United States, 916 F.2d 689, 701 (Fed. Cir. 1990), in which the CIT admonished that reliance on one sale as evidence of a pattern "is comparable to finding one bad apple and concluding all in the bushel are spoiled."

Respondents cite the Federal Circuit, which explained in F.Lii de Cecco, 216 F.3d at 1032, that "Congress tempered deterrent value with the corroboration requirement . . . to prevent the petition rate (or other adverse inference rate), when unreasonable, from prevailing and to block any temptation by Commerce to overreach reality in seeking to maximize deterrence." Therefore, according to respondents, the Department may not impose punitive margins that are not representative of

respondents' sales as AFA. Respondents cite D & L Supply, 113 F.3d at 1221-24, in support of its contention. Respondents argue that the imposition of the 54.21 percent margin currently applicable to all exporters of subject merchandise but New Star would have been sufficiently adverse. Respondents note that the Department's statutory mandate is to calculate the dumping margin as accurately as possible, citing Rubberflex Sdn. Bhd. v. United States, 59 F. Supp. 2d 1338, 1346 (CIT 1999) (Rubberflex).

According to petitioner, when a respondent does not cooperate, the Department assigns the highest rate from any segment of a proceeding as total AFA. Respondents cite Heveafil SDN.BHD v. United States, 2001 WL 194986 (CIT 2001), in support of its contention. Petitioner notes that the Federal Circuit, in a recent decision, Ta Chen Stainless Steel Pipe, Inc v. United States, noted that " [i]n the case of uncooperative respondents, the discretion granted by statute appears to be particularly great, allowing Commerce to select among an enumeration of secondary sources as a basis for its adverse factual inferences." Ta Chen Stainless Steel Pipe, Inc v. United States, 2002 U.S. App. LEXIS 15421 (Fed. Cir. 2002). Petitioner notes that, if the respondent fails to provide the Department with requested information, "it is within the Department's discretion to presume the highest prior margin reflects the current margins." See id.

Petitioner states that the highest rate from a previous segment of the proceeding would be the rate determined in the new shipper review concluded on June 18, 2002. See Petroleum Wax Candles from the People's Republic of China: Notice of Final Results of New Shipper Review, 67 FR 41395, 41396 (June 18, 2002). In accordance with its regulations, petitioner holds that the Department properly applied the calculated margin of 95.22 percent as determined in the new shipper review. Petitioner argues that it is not necessary to question the reliability of a margin from a prior segment of the proceeding (see 19 C.F.R. 351.308(c)(1)(iii)), and there is nothing unusual in the circumstances of the new shipper review to question its relevance. Petitioner notes that, therefore, the Department determined that:

> The New Shipper rate is in accordance with section 776(c)'s requirement that secondary information be corroborated, i.e., that it have probative value: the information used in the new shipper review to determine this margin was fully verified and subject to the comments of both respondents and petitioner throughout the review. Thus, it is based on the verified sales and production data of the respondents in that review, as well as on the most appropriate surrogate value information available to the Department, chosen from submissions by the parties in that review as well as information gathered by the Department itself. Moreover, as there is no information on the record of this review, that demonstrates that this rate is not appropriately used as facts available for respondents, we determine that this rate has probative value.

See Preliminary Results, 67 at 57386.

Petitioner claims that the rate from the new shipper review is based on calculated, verified results and, therefore, there is no need for further corroboration. Petitioner also contends that the Department's use of the new shipper review rate of 95.22 percent is compelled by respondents' lack of cooperation to

the best of their ability and is necessary to ensure that respondents do not obtain a more favorable result by failing to cooperate, rather than by fully cooperating.

Respondents dispute petitioner's argument that the new shipper rate is an appropriate AFA rate in this case because it is the highest margin from a previous segment of the proceeding. See Respondents' Rebuttal Brief at 16. Respondents note that the Department may not use the highest rate available from any segment of the proceeding without justifying its exercise of discretion. Respondents cite F.Lii de Cecco, 216 F.3d at 1032, which they state unequivocally prohibits the use of punitive, aberrant, or uncorroborated margins as AFA.

Respondents argue that the Department may not impose punitive AFA margins without a relationship to respondents' actual dumping rate. See F.Lii de Cecco, 216 F.3d at 1032. Respondents state that the 95.22 percent margin the Department selected as the AFA margin bears no relationship to their actual margin because it is based on a single sale made by a trading company to an unaffiliated entity.

Respondents contend that the new shipper rate also is unlawful because, in setting that rate, the Department abused its discretion, violated due process, and acted in disregard of the law by denying them the opportunity to meaningfully participate in the new shipper review. Respondents argue that they had no opportunity to defend their interests by commenting on surrogate value information and other common issues because the Department wrongfully denied respondents' counsel an administrative protective order (APO) in the new shipper review. As such, respondents maintain that the Department's use of the new shipper review rate as AFA is contrary to law and manifestly unfair, and they urge the Department to calculate respondents' margin based on respondents' data submitted throughout the review, or alternatively, to apply the 54.21 percent margin as AFA.

Respondents maintain that, if the Department applies AFA, it should use the 54.21 percent PRC-wide rate. Respondents note that the Department applied this margin as an AFA margin in a recent review of the antidumping order on candles from China, in which 18 of 21 respondents did not even respond to the Department's questionnaires, citing Notice of Preliminary Results of Antidumping Duty Administrative Review & Partial Rescission of Review: Petroleum Wax Candles from the People's Republic of China, 65 FR 54,224 (Sept. 7, 2000) and Petroleum Wax Candles from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 66 FR 14,545 (Mar. 13, 2001). They state that, as discussed in respondents' case brief, it is the highest rate available on the record that meets the legal criteria for selecting AFA. See Respondents' Case Brief at 20-22. According to respondents, since they requested the review seeking to obtain a lower antidumping margin than the PRC-wide rate, the 54.21 percent margin would serve as a sufficient deterrent for non-compliance, without being unduly punitive.

In response to respondents' argument that the 95.22 percent margin bears no relationship to their actual margin and is, therefore, unreasonable and punitive in nature, petitioner notes that respondents failed to cooperate with the Department in this administrative review. As a result, petitioner contends that the Department was left no other avenue other than to employ AFA in determining respondents' margin.

Petitioner argues that the 95.22 percent margin from the most recent segment of the proceeding is reasonable and is not punitive in nature.

Petitioner states that respondents' attempt to cry foul at the imposition of this margin stems only from the fact that respondents seemingly assumed that they would receive the PRC-wide rate of 54.21 percent, regardless of whether they cooperated with the Department in this administrative review. Petitioner notes that, only now, upon realizing that the Department could select another margin based upon "adverse facts that [would] create the proper deterrent to non-cooperation with its investigations," do respondents object to the Department's use of adverse facts to determine the proper and reasonable margin. See Petitioner's Case Brief at 30-31. Petitioner maintains that granting respondents' request to re-evaluate and re-select the rate would set a bad precedent for future administrative reviews.

Petitioner states that the antidumping statute gives the Department great discretion in making antidumping determinations, citing Smith-Corona v. United States, 713 F.2d 1568, 1571 (Fed. Cir. 1983). They contend that, when respondents are uncooperative, the Department may use information from a previous review, such as the new shipper review, as a basis for its adverse factual inferences. See section 776(b)(3) of the Act. Petitioner notes that, in making these adverse factual inferences, the Department may assign the uncooperative respondent the highest rate from any segment of a proceeding (including a new shipper review) so that respondent will not benefit from its lack of cooperation and to provide an incentive to cooperate in future reviews.

Petitioner claims that respondents' argument with regards to using the 54.21 percent margin is flawed. Petitioner notes that the fact that the Department has used a particular dumping margin in the past does not constrain the Department to using that margin now, citing Heveafil SDN.BHD v. United States, 2001 WL 194986, *5 (CIT 2001). Further, petitioner claims that the 95.22 percent rate from the new shipper review was not in effect at the time of the previous administrative review. They point out that, had it been in effect at that time, the Department would have used it instead of the only available previous rate of 54.21 percent. Petitioner comments that nothing in the record suggests that respondents in the previous administrative review or the new shipper review so egregiously failed to cooperate with the Department, as did respondents in this review. Petitioner further states that, if the Department were to apply the 54.21 percent AFA rate to respondents, the Department would be setting a bad precedent for future administrative reviews. They argue that a party in future administrative reviews could easily determine that there is little or no incentive to cooperate with the Department, if it becomes unlikely that the respondent will receive a significantly better dumping margin.

Regarding respondents' arguments that the 95.22 percent margin bears no relationship to their actual margin, and as such, is unreasonable and punitive in nature. Petitioner states that the Department applied an AFA margin based upon the extent of respondents' conduct and the facts that were available to the Department after respondents submitted substantial and important new factual information following commencement of the verification and after respondents cancelled the U.S. portion of the verification. Petitioner notes that respondents claim that the 95.22 percent margin is unreasonable and punitive because it cannot be corroborated and bears no relationship to their actual

margin. See Petitioner's Case Brief at 30. According to petitioner, respondents cite F.Lii de Cecco, 216 F.3d at 1032, which states, in part, that the Department cannot "impose punitive, aberrational, or uncorroborated margins" when choosing to apply an "adverse facts available rate." Petitioner agrees with this general statement. However, petitioner notes that, in F.Lii de Cecco, the Federal Circuit found that the margin imposed by the Department was "punitive, aberrational, and uncorroborated" because the Department "concede [d]" that the "extremely high dumping margin" it imposed "was uncorroborated in its original determination" and that the margin had been "'thoroughly discredited'" because "other …producers, similar to [plaintiff], whose U.S. prices were among the highest, were found to have lower anti-dumping margins" than the margin imposed by the Department. See F.Lii de Cecco, 216 F.3d at 1032. Petitioner argues that this administrative review presents a different situation. Petitioner notes that the margin calculated by the Department in the new shipper review was based upon a Chinese exporter who, like respondents, was deemed to be free from *de jure* or *de facto* government control. Petitioner contends that the margin was based upon U.S. price and Chinese factors of production data, as well as other information, which were fully verified in China and in the United States. Petitioner concludes that these facts do not indicate that the Department calculated an uncorroborated margin or applied a "thoroughly discredited" margin to respondents.

Petitioner contends that respondents rely on American Silicon Technologies v. United States, 110 F. Supp. 2d 992 (CIT 2000) (American Silicon) and Ferro Union, 44 F. Supp. 2d 1310, to support their argument that the 95.22 percent margin applied by the Department is uncorroborated, unreasonable, and irrelevant to respondents' margin. However, petitioner claims that these cases do not apply to the facts at hand. It states that, in American Silicon, 110 F. Supp. 2d at 1001, the CIT determined that the margin imposed by the Department was unreliable and irrelevant to the plaintiff since the margin was based on a review and sales that occurred nearly six years prior to the review at issue. Petitioner holds that, in Ferro Union, 44 F. Supp. 2d at 1335, the CIT found the margin to be unreliable and irrelevant to the respondent since the margin was calculated for another producer eight years prior to the period of review at issue and the Department had other margins at its disposal which had been calculated for the respondent in more recent administrative reviews. According to petitioner, upon review, American Silicon and Ferro Union serve only to bolster the Department's application of the 95.22 percent AFA margin. Petitioner argues that the 95.22 percent margin imposed by the Department in this administrative review is based upon a review that occurred within this calendar year. Petitioner stresses that no respondents have undergone a separate, more recent review on which the Department could base its AFA margin. Petitioner notes that, under such circumstances, it is difficult to see how American Silicon is helpful to respondents' case. Petitioner argues that if further evidence of the reasonableness of the Department's decision is necessary, one need only compare how and when the two rates were calculated.

Petitioner maintains that the 54.21 percent PRC-wide rate, which respondents suggest is the "highest rate available on the record that meets the legal criteria for selecting AFA," was calculated 16 years ago in the original investigation. Petitioner's Case Brief at 36. Petitioner states that the foreign market value was calculated on the basis of the f.o.b. unit value of U.S. imports of candles from Malaysia, adjusted by the cost of boxes supplied by purchasers of the PRC candles, citing Petroleum Wax Candles from the People's Republic of China: Final Determination of Sales at Less than Fair Value, 51

FR 25086 (July 10, 1986). Petitioner contends that the U.S. price was the C&F or CIF purchase price (now referred to as the export price, or EP), with deductions for ocean freight and marine insurance. Petitioner notes that no deduction was made for inland freight due to lack of information on factory-to-port distances or freight rates in the surrogate country. Petitioner remarks that all of the subject merchandise from China was sold by state-run trading companies to unrelated purchasers prior to their importation into the United States.

According to petitioner, the 95.22 percent AFA rate was calculated this year as part of a recent review. Petitioner holds that the margin was based on U.S. price and Chinese factors of production data, as well as other information that were fully verified in China and in the United States. The normal value was based on comprehensive surrogate factor value information developed from India, the most-used and accepted surrogate country for Chinese non-market economy (NME) antidumping cases. The subject merchandise was unambiguously within the scope of the order. The reviewed company, as mentioned previously, was a Chinese exporter deemed not subject to *de jure* or *de facto* government control.

Petitioner states that respondents cite National Steel Corp. v. United States, 870 F. Supp. 1130 (CIT 1994) (National Steel) for the purpose of articulating that the Department should have selected a margin indicative of respondents' actual sales. Petitioner notes that, in National Steel, the Department was able to consider at least some of respondents' sales data because the Department conducted and completed verification of sales data, even though respondents failed to provide some factual information. See National Steel, 870 F. Supp. at 1333. Petitioner argues that in the instant case, unlike National Steel, the Department was unable to complete the verification of sales data because of respondents decision not to proceed with the U.S. verification.

Petitioner refutes respondents' argument that the 95.22 percent rate was unreasonable because it was based on one sale investigated in the new shipper review concluded earlier this year. Petitioner notes that New Star insisted that its one sale be reviewed, and the Department, as it does in all such circumstances, accepted this one sale as sufficient by conducting a review and establishing a bona fide dumping margin for purposes of duty assessment and the future duty deposit rate. Petitioner claims that the dumping margin was fully representative of New Star's sales because the rate covered 100 percent of all sales of subject merchandise. Further, petitioner addresses respondents' claim that the "CIT has in the past rejected the use of data based on few sales under the 'best information' standard on grounds that they were unrepresentative." See Petitioner's Rebuttal Brief at 38. Petitioner maintains that the 95.22 percent margin set in the new shipper review was based on 100 percent of New Star's sales, using a full set of facts, data, and information that were fully vetted and verified. Petitioner states that the same cannot be said of the instant review, where respondents' own lack of cooperation led the Department to rely on adverse factual inferences and apply an AFA rate.
According to petitioner, the precedent cited by respondents, Rhone Poulenc, Inc. v. United States, 899 F.2d 1185 (Fed. Cir. 1990) (Rhone Poulenc), was superseded by the Uruguay Round and related changes in U.S. law and Department practice. Petitioner remarks that respondents are not able to provide examples of precedent where only one sale was involved and had any bearing on the accuracy, probity, validity, and legality of any dumping margin calculated in a review. Petitioner states that it was

disingenuous for respondents to suggest that a margin rate established in another review, which was based on only a few sales, is not appropriate as AFA in this review, when the Department has no verified U.S. sales to rely upon in this administrative review due to respondents refusal to permit any U.S. sales verification.

Regarding respondents' attempt to distinguish themselves from New Star, a Chinese trading company, by stating that Fay Candle is a Chinese candle producer, not a trading company, petitioner argues that this distinction has no relevance in the application of AFA in a case such as this because respondents simply refused to allow any U.S. sales verification. Petitioner further contends that all of respondents' alleged "evidence" of these facts are not part of this record.

Petitioner notes that, even if company-type were relevant, Fay Candle undertakes the same functions as New Star in terms of export selling functions, citing Fay Candle's Section A Questionnaire Response (December 26, 2001) at Exhibit 1. Petitioner holds that these functions and the costs related thereto are no different than those undertaken by a trading company such as New Star.

Petitioner notes that respondents raise a concern that New Star had not previously sold candles to the United States and, therefore, incurred start-up costs that would increase the margin of dumping. Petitioner states that the public record in the new shipper review clearly stated that New Star is an established trading company and assumed no start-up costs. They further note that, if New Star were a "new shipper," and had incurred additional start-up costs, such costs would have acted to lower the margin because New Star would have raised the price of its candles in the United States to cover such theoretical start-up costs.

According to petitioner, respondents believe that the 95.22 percent AFA rate is inappropriate because the producer/exporter in the new shipper review was not affiliated with the U.S. importer, while in this administrative review, they allege an affiliation. Petitioner remarks that this point is not relevant to Department's application of the 95.22 percent rate in this administrative review. Petitioner notes that affiliation between Fay Candle and the U.S. companies that imported the vast majority of subject merchandise has not been established. Petitioner states that, because the Department found enough evidence to disprove affiliation, it requested EP sales data from Fay Candle. Petitioner reiterates that Fay Candle blatantly refused to provide any EP sales. Petitioner argues that it is disingenuous, at best, for respondents to complain about the AFA 95.22 percent rate on the basis of the affiliation issue, when this very issue was never addressed by the Department because respondents avoided any verification of evidence related to this issue.

Department's Position: We disagree with respondents that the new shipper rate bears no relationship to their margin because of distinct facts in the new shipper review—namely, that the new shipper review involved only one sale, a trading company, and an unaffiliated U.S. importer. We note, first of all, that it is not appropriate to reject an AFA rate based on the dissimilarities between the U.S. sales transactions in the case from which the margin is taken and the instant case, because respondents did not allow us to verify their U.S. sales transactions. We simply are unable to determine, because of

respondents' actions, whether the sales in the new shipper and this case are or are not similar or dissimilar. For example, we are unable to determine whether Fay Candle is affiliated with its U.S. importer. Respondents' claim that the new shipper rate is inappropriate because we denied them APO access is discussed in Comment 5.

The Department has wide discretion in selecting the number that it can apply as AFA. The Department's discretion is limited in that, when using secondary information, the Department must determine, to the extent practicable, that the AFA rate has probative value.

While we cannot compare the sales in the new shipper review with those in respondents' review, we note that the Department has in the past rejected rates for use as AFA rates where the Department has determined the rates selected as AFA were inappropriate. For example, in Fresh Cut Flowers from Mexico: Final Results of Antidumping Duty Administrative Review, 61 FR 6812, 6814 (Feb. 22, 1996), the Department applied the second highest available margin to non-responding companies as "best information available," because we determined that the highest calculated margin was based on skewed cost of production data. In Final Determination of Sales at Less Than Fair Value: Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From Japan, 64 FR 24329, 24369 (May 6, 1999) (Japan Hot-Rolled LTFV), in applying adverse partial facts available to unreported sales, we reversed our decision in the preliminary determination to use the highest available margin because the margin chosen was not sufficiently within the mainstream.

The 95.22 percent margin was calculated for a new shipper, a trading company, whose single sale, albeit of more than one product, during the new shipper POR was also its first sale ever to the United States. Because of the substantial difference between the two margins calculated in the new shipper review (and weight-averaged into the 95.22 percent margin) and the unusual facts surrounding the new shipper's one sale, the Department has determined that the application of the new shipper's weighted-average margin would be inappropriate. The wide range of the two margins weight averaged together in the new shipper review, given the nature of the new shipper as a start-up with very low sales volumes, and given other unusual proprietary facts surrounding the sale, has led us to find that it is inappropriate to use the higher of these two margins. Moreover, while the rate we have chosen (65.02 percent) is higher than the single PRC-wide rate that has been applied for the past 16 years (54.21 percent) under this order, it is still more in line with the 54.21 percent PRC-wide rate which was also based on facts available. The higher rate we have excluded is more than double that previous rate, confirming our conclusion that it is the product of circumstances not germane to this analysis. Our analysis of why the high margin and the weighted-average margin are inappropriate relies, in part, on business-proprietary information. Therefore, see "Memorandum Regarding Administrative Review of Petroleum Wax Candles from the People's Republic of China (PRC) (A-570-504): Proprietary Information Regarding Adverse Facts Available Rate," to Barbara E. Tillman, through Sally C. Gannon, from Mark Hoadley (March 10, 2003) (AFA Memo) for a full discussion of the issue.[1]

[1]All relevant calculation documentation from the new shipper review has been placed on the record of this review. See "Memorandum Regarding Final Results of Antidumping Duty Administrative Review of Petroleum Wax Candles from the People's Republic of China (PRC)," to The File, through

We emphasize that we are not establishing a per se rule against using rates established in new shipper reviews as adverse facts available (as should be apparent from the fact that we are still using a rate from the new shipper review). We are excluding the high rate from this new shipper review because of the substantial difference between that rate and the other individual rate determined and because the circumstances of this particular new shipper review lead us to conclude that that difference is the result of circumstances not germane to this analysis. See AFA Memo and Decision Memorandum (Comment 4).

In addition to examining the adverse facts available margin applied to determine whether it is appropriate, we have also in the past determined to choose margins that are sufficiently adverse to encourage full cooperation in future reviews. See Japan Hot-Rolled LTFV, 64 FR at 24369, and Final Determination of Sales at Less Than Fair Value: Stainless Steel Wire Rod From Italy), 63 FR 40422, 40428 (July 29, 1998). We find the rate we have chosen, 65.02 percent, is sufficiently adverse to encourage compliance in the future. The new shipper review is the only segment of this proceeding which has resulted in a calculated rate based on information submitted by a respondent. Because the AFA rate we have chosen is a calculated rate from the new shipper review, we conclude that it is an appropriate reflection of the amount by which PRC exporters are dumping in the United States. Therefore, future respondents should not view the AFA rate as preferable to their actual dumping rates, i.e., as an underestimate of their own magnitude of dumping, and should in general find it an inducement to cooperate with the Department in calculating their own rates.

Comment 5: APO Application

The respondent's state that they filed an application for an APO in the new shipper review on January 14, 2002, in order to receive company-specific data that is necessary for meaningful participation in an administrative review. However, the Department denied respondents' APO application. According to respondents, the Department inexplicably delayed acting on its January 14, 2002 APO application, claiming that the Department did not inform respondents that there was a problem with the application until April 29, 2002, and then finally notifying respondents in writing on May 15, 2002, four months after the application was filed, that respondents APO application was denied. Respondents point to the New Shipper Review of Petroleum Wax Candles from the People's Republic of China, Letter from Ann M. Sebastian to respondents (May 15, 2002) to support their argument. Respondents contend that the Department's delay in responding to respondents' APO application is a violation of the statute, the regulations, and its own practice. According to respondents, section 777(c)(1)(C) of the Act requires that the Department grant or deny an APO application not later than 14 days or 30 days if another party objects or if the information is voluminous. Respondents point out that New Star did not object to respondents' APO application, nor was the APO application voluminous; therefore, the Department had only 14 days, or until January 28, 2002, in which to make a determination about respondents' APO application. Respondents note that, by not denying their APO application until May 15, 2002, the Department missed the statutory deadline by three and one-half months.

Sally C. Gannon, from Brett Royce (March 10, 2003).

Furthermore, respondents point out that 19 C.F.R. § 351.305(c) states that the Department will normally grant APO access within five days of receipt of the application, unless there is a question of eligibility, in which the Department has up to 30 days after receipt of the application by which to decide whether to grant the application, citing the Antidumping Manual, Ch. 3 at 12, in support of their contention. Respondents note that it took the Department four months to make a determination concerning their APO application.

According to respondents, the Department's delay in responding to their application was highly prejudicial to Fay Candle, it not only denied them the ability to have access to APO materials, but also made it impossible to meaningfully comment on the factors used to establish the rate that was ultimately imposed on respondents as an AFA margin. Respondents cite D & L Supply, 693 F. Supp. at 1183, in support of its argument. Respondents maintain that they would have challenged the bona fides of New Star's first and only U.S. sale, the characterization of New Star's relationship with its U.S. importer as "unaffiliated," and would have commented on the selection of Indian data, and the various surrogate factor costs that were used.

In addition to delaying the decision regarding respondents' APO application, respondents also argue that the Department instituted a new requirement specifically calling for the applicant to submit an affirmative statement that the applicant intends to submit factual information or legal arguments, a sentence that respondents had not included in its APO application. Respondents cite Interested Party/Party to the Proceeding Status of Dongguan Fay Co., Ltd.; TIJID, INC.; and Palm Beach Home Accents Inc. in the New Shipper Review of Petroleum Wax Candles from the People's Republic of China for the Period of August 1, 2000 through January 31, 2001, Memorandum from Javier Barrientos to Barbara E. Tillman Through Sally C. Gannon, U.S. Department of Commerce, at 4 (May 13, 2002). Respondents argue that this new requirement was not in accordance with Congress's desire that access to APO materials be granted "routinely," citing S. Rep. No. 103-412, at 107-08 (1994), in support of their argument. Respondents state that the Department said the regulations provide that a "party to the proceeding" is an "interested party that actively participates through written submissions of factual information or written argument, in a segment of a proceeding," citing to 19 C.F.R. § 351.102(b). Respondents note that the Department never previously imposed such a requirement and that the statute requires only that an APO applicant identify oneself as an "interested party" and that the applicant describe "in general terms" the information it requests and the reasons for the request, citing to 19 U.S.C. § 1677f (c)(1)(A). Respondents argue that they met these requirements, citing to a Letter from Respondents to Ann Sebastian, U.S. Dep't of Commerce, accompanying Respondents' APO application 2 (Jan. 14, 2002) (Jan. 14 APO Application Letter).

Respondents further contend that the section of the regulation dealing with APO access states that an APO application must "identify the applicant and the segment of the proceeding involved, state the basis for eligibility of the applicant for access to business proprietary information, and state the agreement of the applicant to be bound by the administrative protective order," all requirements that respondents feel they met, citing to 19 C.F.R. § 351.305(b)(2), and Jan. 14 APO Application Letter. Respondents argue that the regulation does not indicate that an applicant must make an affirmative statement that it will participate through factual and legal submissions, citing to the Antidumping Manual,

Ch. 3 at 11-12. Respondents also state that the Department's standard APO application Form ITA 367-5.98, does not indicate anywhere that an applicant must specifically identify itself as a "party to the proceeding" rather than an "interested party."

Respondents note that the Department has a long administrative practice of approving APO applications similar to that of respondents in a timely manner. They also state that the Department may not alter this administrative practice without providing a reasoned explanation as to why it has done so, citing Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 42 (1983). Finally, respondents point out that the Department allowed New Star access to APO information in Fay Candle's administrative review, but not vice versa.

According to petitioner, respondents were never a party to the new shipper review proceedings, having never submitted any written submissions of factual information or written argument; therefore, the Department was correct in denying their APO application, as required by 19 C.F.R. § 351.102(b). And, petitioner argues that, after the Department denied respondents' APO application, they did not attempt to participate in the review by submitting factual information or written argument. Thus, petitioner maintains that, because respondents never participated in or attempted to participate in the new shipper review, respondents could never have been classified as a "party to the proceeding."

According to petitioner, respondents state that the Department "instituted a new requirement specifically calling for [respondents] to submit an affirmative statement that the [respondents] intend [ed] to submit factual information or legal arguments." See Petitioner's Rebuttal Brief at 43-44. Petitioner holds that respondents are faulting the Department for questioning their veracity in stating that they were "parties to the proceeding" in respondents' APO application when the facts demonstrate that respondents were not "parties to the proceeding." Petitioner notes that respondents argue "neither the statute, the regulations, nor the standard APO application form requires" that the applicant affirmatively "specify that it would participate through written submissions of factual information of written argument." See id at 44.

Petitioner claims that respondents fail to address two fundamental points: the prerequisite to even submit the standard APO application is that the party submitting the application be a party to the proceeding from which the party is requesting confidential information, and the Department did not "alter its administrative practice" when it asked respondents to certify that they fit the statutory definition of "parties to the proceeding" in the new shipper review, once the Department determined that respondents were not "parties to the proceeding," citing to 19 C.F.R. § 352.305 and Petitioner's Rebuttal Brief at 44-45. According to petitioner, the Department requested an affirmative statement from respondents. Petitioner cites the Department Denial Letter at 3-4 (May 13, 2002) (Denial Letter).

Petitioner notes the Department stated in its Denial Letter that it granted New Star's APO application in the administrative review because New Star affirmatively stated that, should an issue be raised in the current administrative review that could impact us, we fully expect that we would participate in the

administrative review through written submissions of factual argument or written argument. With regard to respondents' new shipper review APO application, petitioner argues that the Department acted in the same manner to determine whether to grant respondents' APO application. However, petitioner contends that respondents submitted their APO application asserting that they were parties to the new shipper review, when this was not true, citing APO Application–New Shipper Review (January 14, 2002). Petitioner notes that they objected to respondents' application, stating that they were not parties to the proceeding, citing Objection to Application for Administrative Protective Order (January 16, 2002).

According to petitioner, the Department requested that respondents reply to petitioner's objection and, instead of certifying that they would engage in activity that would make them parties to the new shipper review, respondents chose to argue that they were parties to the new shipper review by virtue of their involvement in this administrative review. Petitioner cites the Denial Letter at 3-4, in support of its contention. Petitioner states that, with no evidence that respondents had actively participated or intended to actively participate in the new shipper review, the Department correctly denied respondents' application.

According to petitioner, respondents claim that the Department's "delay of four months deprived respondents of access to APO materials … and deprived respondents of the opportunity to comment meaningfully on the factors used to establish the [new shipper] rate." See Petitioner's Rebuttal Brief at 50. Petitioner argues that the fact that respondents did not have access to proprietary business information submitted in the new shipper review did not prevent them from actively participating in the new shipper review because they still had access to all the public information and records submitted during the review, citing General Electric Co. v. United States, 802 F. Supp. 474 (CIT 1992). Petitioner further argues that respondents were able to use publicly available information to meaningfully participate in the new shipper review and assert arguments to protect their perceived interests in the Department's determination of the new shipper review rate. Petitioner points out that respondents' claim that not having the APO deprived them of the opportunity to comment meaningfully on the factors used to establish the rate, but that respondents had access to the factors of production data provided by petitioner in a public submission to the Department and still failed to challenge any of the factors of production.

Petitioner maintains that respondents also claim that they would have challenged the bona fides of New Star's first and only U.S. sale, would have advocated the termination of the new shipper review, would have challenged the characterization of New Star's relationship with its U.S. importer as "unaffiliated," and would have commented on the selection of India data and the various surrogate factor costs submitted by petitioner. Petitioner argues that, based on the public versions of submissions in the new shipper review, respondents had the opportunity to submit such arguments, but failed to do so. Furthermore, concerning the selection of surrogate factors, petitioner argues that respondents could have commented on the recommendations of petitioner, as well as submitted their own recommendations on surrogate factors. However, petitioner once again points out that respondents chose not to participate in the new shipper review.

Finally, petitioner argues that respondents are attempting to rectify for the fact that they failed to timely appeal the Department's denial of their APO application immediately following the Department's action during the new shipper review, citing 28 U.S.C. § 2636(f). According to petitioner, since respondents were required to raise this issue at an earlier date, and are now barred from litigating this issue before the CIT and the Department, they should not be permitted to raise this issue in this administrative review.

Department's Position:

Whether the Department properly denied respondents' APO application in a new shipper review is not an issue in this administrative review. A new shipper review and an administrative review are each separately judicially reviewable segments of a proceeding. See 19 CFR 351.102 (definition of segments). Respondents could have sought judicial review of the Department's denial of an APO in the new shipper review; they did not.

Recommendation

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

_____ _____

Agree Disagree

_____

Joseph A. Spetrini
Acting Assistant Secretary
for Import Administration

_____

Date