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Admin Review 2009-10
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MEMORANDUM TO: Ronald K. Lorentzen
Deputy Assistant Secretary
for Import Administration

FROM: Christian Marsh
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Final Results in the Administrative Review of Certain Preserved Mushrooms from the People's Republic of China

SUMMARY:

We have analyzed the comments and rebuttal comments of interested parties in the final results of the 2009-10 administrative review of the antidumping duty order covering certain preserved mushrooms from the People's Republic of China (PRC). As a result of our analysis, we have made changes from the Preliminary Results[1] in the margin calculations. We recommend that you approve the positions described in the "Discussion of Issues" section of this Issues and Decision Memorandum.

Listed below is the complete list of the issues in this administrative review from which we received comments from interested parties.

I. List of Comments

Comment 1: Surrogate Value for Fresh Mushrooms
Comment 2: Surrogate Value for Cow Manure
Comment 3: Ministerial Errors with Respect to International Freight
Comment 4: Surrogate Value for International Freight
Comment 5: Computation of Domestic Inland Freight
Comment 6: Surrogate Value for Natural Gas
Comment 7: Whether to Apply Adverse Facts Available to Certain of Jisheng's U.S. Sales
Comment 8: Whether to Apply Adverse Facts Available for Certain of Jisheng's Sales for Which Jisheng Reported No Packing Costs
Comment 9: Whether the Department's Failure to Consider Jisheng's February 2011 Submission in the Preliminary Results was Improper and Not Supported by Law

[1] See Certain Preserved Mushrooms From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review, Rescission in Part, and Intent To Rescind in Part, 76 FR 12704 (March 8, 2011) (Preliminary Results).

Comment 10: Casing Soil Usage
Comment 11: Surrogate Value of Lime
Comment 12: Surrogate Value of Steam Coal
Comment 13: Surrogate Value of Mushroom Spawn
Comment 14: Zeroing
Comment 15: Error of Normal Value Calculation by Different Unit of Measurements
Comment 16: Calculating Cost of Metal Lid
Comment 17: Calculation of Land Rent

II. Background

On March 8, 2011, the Department published the preliminary results of this administrative review of the antidumping duty order on certain preserved mushrooms from the PRC. See Certain Preserved Mushrooms From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review, Rescission in Part, and Intent to Rescind in Part, 76 FR 12704 (March 8, 2011).

The review covers twenty-three manufacturers/exporters of subject merchandise. We analyzed Blue Field, Jisheng, and XITIC as mandatory respondents. In these final results of the review we are rescinding the review with respect to five companies that, based on the record, we determined had no shipments of subject merchandise during the period of review (POR). Four other companies filed separate rate certifications. Of the eleven remaining companies, some qualified for a separate-rate status, and others did not. Of the latter, they will continue to be, or will revert to being, part of the PRC-wide entity.

We received case briefs from Monterrey Mushrooms, Inc. (petitioners), Guangxi Jisheng Foods, Inc. (Jisheng), and Xiamen International Trade & Industrial Co., Ltd. (XITIC), and rebuttal briefs from petitioners, XITIC, and Blue Field (Sichuan) Food Industrial Co., Ltd. (Blue Field).

III. Discussion of Interested Party Comments

Comment 1: Surrogate Value for Fresh Mushrooms

Petitioners argue the Department erred in the preliminary results by valuing fresh mushrooms using a surrogate value derived from the 2006-07 financial statement of Agro Dutch Industries Limited (Agro Dutch), an Indian producer of canned mushrooms. That value was Rs. 14.69/kg., which we inflated to a POR price of Rs. 17.02/kg. Petitioners give numerous reasons why Agro Dutch's value is inadequate.

As an initial matter, petitioners argue that in selecting a surrogate value, the Department considers whether the information is publicly available, product-specific, representative of a broad market average, contemporaneous to the period of review (POR), and free of taxes and import duties. Petitioners argue that the Agro Dutch data were company-specific, and not representative of a broad market average, are not contemporaneous because they pre-dated the POR by two years, and are insufficiently product-specific because the vast majority of Agro

Dutch's sales were of canned mushrooms rather than fresh mushrooms. Thus, according to petitioners, the Agro Dutch data do not qualify as the best available information for the surrogate value of fresh mushrooms.

Secondly, petitioners argue that Agro Dutch's reported sales of fresh mushrooms do not represent normal fresh mushroom trade in India, nor do they accurately represent market value. Petitioners base this argument on the nature of Agro Dutch's operations. Specifically, Agro Dutch is focused entirely on the production and sale of canned mushrooms. As a result, it consumes internally the fresh mushrooms it self-produces. The volume of fresh mushrooms Agro Dutch sells is thus very small, accounting for only 0.052 percent of its total fresh mushroom production. Petitioners assert this volume represents the liquidation of fresh mushrooms Agro Dutch could not process or sell in normal wholesale distribution, and which it sold therefore at "fire-sale" prices.

Petitioners state that this judgment regarding Agro Dutch's sale of fresh mushrooms is corroborated by information in the 2009-10 financial statement of Flex Foods Limited (Flex Foods), another Indian producer of canned mushrooms. According to petitioners, the Flex Foods financial statement indicates, "when there is a glut in the market, the price of mushroom falls down to Rs.20-30/Kg but as the demand increases or there is shortage of mushrooms in the market the price rises up to Rs.60-70/Kg." See Memorandum from Fred Baker and Scott Hoefke to The File, dated February 28, 2011, Subject "Surrogate Values Source Documents," at Exhibit 4, page 5. Because the inflated value derived from Agro Dutch's 2006-07 financial statement was Rs. 17.02 /kilogram, which is below the lowest price of Rs. 20/kilogram in the Flex Foods statement, petitioners assert this is indicative of Agro Dutch's sales prices being neither representative of normal fresh mushroom trade in India, nor an accurate representation of market value. See Memorandum from Scott Hoefke and Fred Baker to The File, Subject "Surrogate Values for the Preliminary Results of Review of Certain Preserved Mushrooms from the People's Republic of China," dated February 28, 2011 (Surrogate Values Memorandum) at 7.

Third, petitioners similarly argue that the Rs. 14.69/kilogram selling price derived from Agro Dutch's 2006-07 financial statement is below Agro Dutch's cost of production (COP) and, therefore, inappropriate to select as a surrogate value. Petitioners base this assertion on a computation of Agro Dutch's COP that petitioners performed derived from cost data contained in Agro Dutch's financial statement. See submission from Kelley Drye & Warren LLP, Before the International Trade Administration of the U.S. Department of Commerce, Subject: "Certain Preserved Mushrooms from the People's Republic of China," dated April 8, 2011 (petitioners' case brief) at Exhibit 1. Petitioners' computation shows a per-unit COP of Rs. 18.31/kilogram, which is higher than Agro Dutch's indicated selling price of Rs.14.69/kilogram. Furthermore, Agro Dutch's profit for the 2006-07 period, as shown on its financial statement, is 14.13 percent. Thus, its constructed value for 2006-07 would be Rs. 20.89/kilogram. Petitioners conclude, therefore, that its COP calculation underscores the distortive nature of Agro Dutch's small and sporadic distress sale prices for fresh mushrooms.

Petitioners state that rather than continuing to use the inflated Rs. 17.02/kilogram price indicated on Agro Dutch's 2006-07 financial statement, the Department should instead use a price of Rs.

80/kilogram as reported by the Indian Directorate for Mushroom Research (DMR) of the Indian Counsel of Agricultural Research (ICAR) in the October 2009 publication entitled "Mushrooms for a Healthy and Wealthy Life." Petitioners placed this document, as well as sources corroborating the prices contained in the DMR's report, on the record in submissions dated November 22, 2010 and March 28, 2011.

Petitioners state that numerous factors substantiate the reliability and credibility of this price and the authors who wrote the report. First, the price is specifically associated in the report with "white button mushrooms," as is the corresponding discussion in the report of the growing, harvesting, and marketing of such white button mushrooms. Furthermore, petitioners have provided various documents establishing the bona fides of the DMR, including pages from the website of the ICAR, the DMR's 2009 annual report, and its 2009 and 2010 annual newsletters. Regarding the latter documents, petitioners state that the 2009 and 2010 newsletters substantiate that the DMR performed consulting work in evaluating the economic feasibility of white button mushroom projects accounting for 184 metric tons of capacity. Petitioners state that if the DMR's experts did not know the true market value of India's fresh white button mushrooms (which, as stated above, they give as Rs. 80/kilogram) or the true cost of production (which they give as ranging from Rs. 35/kilogram to Rs. 50/kilogram), they could not provide such feasibility input across India nationally.

Moreover, petitioners argue they also submitted other information to the record that corroborates the Rs. 80/kilogram price. This other information includes:

- An article published in The Tribune of India on May 19, 2009 entitled "Button mushroom Comes to Kinnaur," which states that Kinnaur farmers were able to sell white button mushrooms "in the wholesale markets" at Rs. 100/kilogram. See Letter from Kelley Drye & Warren to Secretary of Commerce, Re: "Eleventh Administrative Review of the Antidumping Duty Order on Certain Preserved Mushrooms from the People's Republic of China: Petitioner's Submission of Surrogate Values for the Factors of Production For Purposes of the Final Results," dated March 28, 2011 (petitioners' March 28, 2011, submission) at Exhibit 7.
- A commercial offer for sale of white button mushrooms at Rs. 95/kilogram posted on www.agricultureinformation.com, a major food e-portal for Indian farmers. See petitioners' March 28, 2011, submission at Exhibit 8. Petitioners note the posting shows it received an affirmative reply from two retail outlets in India.
- An article dated March 21, 2011, published by the Global Press Institute that quotes an Indian mushroom farmer as saying she sells button mushrooms at Rs. 80/kilogram in the local market. See petitioners' March 28, 2011, submission at Exhibit 9. Petitioners comment that even though the article post-dates the POR, it reflects the development of a realistic and stable level of pricing in the mushroom market in India (including during the POR), consistent with the national, POR-specific value reported by the DMR.
- An article from the September 2009 issue of the periodical Leisa India which says that button mushrooms are selling at retail at Rs. 200/kilogram. Petitioners state that this figure provides a benchmark corroborating that the wholesale prices of Rs. 80, 95, and 100 (described above) represent the wholesale supplier distribution price that a mushroom canner would pay to

obtain bulk quantities of fresh mushrooms for processing into preserved mushrooms in cans and jars.

Based on all of the fresh mushroom prices on the record, petitioners conclude that the price reported by Agro Dutch is anomalous and an outlier. In contrast, petitioners argue, the DMR figure is corroborated by several sources, many of which are contemporaneous with the POR.

Furthermore, petitioners also argue that the DMR figure is far more likely to be tax exclusive than is the Agro Dutch figure. With respect to the POR market quotes petitioners supplied (including the DMR) quote), petitioners ask the Department to take administrative notice of Indian market pricing from prior cases, which showed that the convention in India is to quote prices net of central sales tax or value-added tax. In contrast, the Agro Dutch fresh mushroom value represents the recorded value; Agro Dutch's profit and loss statement show that all domestic sales incurred Rs. 8,353,139 in excise taxes, indicating that the Agro Dutch fresh mushroom sales value likely includes taxes. Furthermore, Agro Dutch's financial statement does not include any information that would allow the Department to adjust the value to make it net of taxes.

For the above reasons petitioners conclude that the Department should use either the DMR value of Rs. 80/kilogram or some combination of POR-specific wholesale market values documented by petitioners, to value fresh mushrooms for the final results.

XITIC argues the Department should continue to rely on the fresh mushroom value recorded on Agro Dutch's 2006-07 financial statement as the best available information. XITIC notes first that of all the surrogate value information on the record, the Agro Dutch data are the only surrogate value that is based on a large number of actual sales transactions occurring over a long period of time. It was based upon fresh mushrooms sales of 14,700 kilograms with a sales value of Rs. 216,000. Second, the reported quantity and value of fresh mushrooms is recorded on Agro Dutch's audited financial statement, and thus has been reviewed by certified public accountants for accuracy. Third, the reported average unit price of Rs.14.69/kilogram is consistent with Agro Dutch's average unit sales value for fresh mushrooms calculated for the 2005-06 period, which is Rs. 16.58/kilogram, and with the average unit sales value for fresh mushrooms reported in Agro Dutch's 2009-10 annual report, which is Rs. 12.13/kilogram.

In contrast, XITIC argues, the Rs. 80/kilogram proposed by petitioners is based on a generalized estimate of price levels contained in a DMR report, and is not based on any actual recorded transactions or annualized sales quantities and sales values. As such, it cannot be considered superior to the Agro Dutch data, which are derived from the revenue received from actual sales transactions for fresh mushrooms sold within a specified period.

With respect to petitioners' characterization of Agro Dutch's sales as "the liquidation of fresh mushrooms that it could not process or sell … but rather was forced to sell at fire sale prices," XITIC argues this statement is purely self-serving and conjectural, and is unaccompanied by any citation to the administrative record.

With respect to petitioners' argument that Agro Dutch's fresh mushroom sales were below cost, XITIC says petitioners' calculation is fraught with difficulties. First, the costs used for spawn and cow dung in the petitioners' COP calculation were not obtained from the 2006-07 financial statement, but were calculated on the basis of their relative value to wheat straw as derived from Agro Dutch's 2004-05 financial statement. This dubious methodology, XITIC asserts, tracks the cost of wheat straw rather than the costs of cow dung or spawn.

Second, petitioners calculated company-wide ratios for depreciation, manufacturing expenses, salaries, administrative expenses, financial expenses, etc., and simply applied them to petitioners' own calculated costs for growing materials. Inherently, XITIC states, this methodology yields inaccurate results because it incorrectly assumes that Agro Dutch incurred expenses equally among all of its units. By their nature, XITIC argues, the growing of fresh mushrooms, the processing of fresh mushrooms, the manufacture of cans, the canning of fresh mushrooms, and the packaging, sale, and distribution of preserved mushrooms do not share the same cost structure.

Third, the largest cost component added by petitioners, accounting for over 50 percent of added costs, related to "production costs." XITIC states that attributing this magnitude of production costs to an agricultural product is especially distortive, and is the likely reason for petitioners' development of such a high fresh mushrooms production cost.

In sum, XITIC states the Department should not give any credence to petitioners' unsubstantiated allegation that Agro Dutch's fresh mushroom sales data are unreliable and reflective of below-cost sales.

With respect to petitioners' use of Flex Foods' financial statement, XITIC asserts that petitioners have misread the pricing discussion, and that the pricing discussion actually corroborates the Agro Dutch data. The Flex Food pricing discussion says that when there is a glut in the market (i.e., during peak mushroom harvesting season), the price of mushrooms falls to Rs. 20-30/kilogram. Flex Food further notes that "this problem gets aggravated during peak production months." Thus, XITIC states, Agro Dutch's sales of fresh mushrooms at a 2009-10 value of Rs. 17.02 /kilogram is within three rupees of, and is thus consistent with, Flex Foods' discussion of fresh mushroom prices during peak production periods. On the other hand, XITIC argues, the Rs. 80/kilogram DMR price is more than ten rupees higher than the highest price range (Rs. 60-70/kilogram) discussed in the Flex Foods financial statement. Moreover, according to XITIC, this high range is in effect only when there are shortages in the market.

Regarding the documentation petitioners put on the record that supposedly corroborates the Rs. 80/kilogram DMR price, XITIC says that none of the prices indicated in these documents are reflective of commercial prices of fresh mushrooms used to make preserved mushrooms. Specifically, XITIC makes the following points:

- With respect to the posting on the website www.agricultureinformation.com that offered to sell mushrooms at Rs. 95/kilogram, XITIC says that the two inquiries to which petitioners referred are both from the same person. Moreover, the thread states that the site editor

removed the inquiries from the site as they were not sent from a site member. Furthermore, the site further states, "The thread has not received any replies for a month. It has been automatically closed as a result." Consequently, XITIC argues, petitioners' own exhibit establishes that no sale was transacted at that price, and there were no takers at the offered price.

- With respect to the three articles from the local Indian press covering new cultivation of white button mushrooms with prices of Rs. 100/kilogram, Rs. 80/kilogram, and Rs. 200/kilogram, XITIC argues that these prices are merely descriptions of price levels and are not based on actual sales transactions over time. Moreover, these sales by farmers to local markets or restaurants, and do not reflect prices of mushrooms purchased by canners and processors.

XITIC concludes that the surrogate value for fresh mushrooms derived from the Agro Dutch 2006-07 financial statement continues to be the best available information on the record as none of the information submitted by petitioners reflects the average unit value of actual sales transactions within a specific period.

Blue Field and Jisheng did not comment on this issue.

Department's Position:

We agree with petitioners that the data from the Agro Dutch financial statement are not the best available information on the record with which to value fresh mushrooms, but we have nonetheless chosen not to follow petitioners' suggestion to value fresh mushrooms with the value from the DMR report.

When calculating a non-market economy (NME) respondent's normal value (NV), the Department is directed to value factors of production (FOP) based on the best available information regarding the values of such factors in a surrogate market economy country or countries determined to be appropriate. See Section 773(c)(1) of the Act of 1930, as amended (the Act). Because the statute does not define what is meant by the "best available information," the Department is afforded wide discretion in its selection of a surrogate value. See Nation Ford Chem. Co. v. United States, 166 F.3d 1373, 1377 (Fed. Cir. 1999). Accordingly, the Department has established a preference for surrogate values which are publicly-available, product-specific, representative of broad market average prices, contemporaneous with the period of review, and free of taxes and import duties. See, e.g., Certain Steel Nails from the People's Republic of China: Final Results of the First Antidumping Duty Administrative Review, 76 FR 16379 (March 23, 2011), and accompanying Issues and Decision Memorandum at Comment 4. Because there is no hierarchy among these criteria, the Department must weigh each of these factors in light of product- and case-specific information in a particular review. See, e.g., Freshwater Crawfish Tail Meat from the People's Republic of China: Notice of Final Results of Antidumping Duty Administrative Review, and Final Partial Rescission of Antidumping Duty Administrative Review, 67 FR 19546 (April 22, 2002) and accompanying Issues and Decision Memorandum at "Surrogate Value Information – Introduction.").

Even though, as XITIC has argued, the Agro Dutch prices may be above cost, petitioners are correct that the Agro Dutch data are now two years old, and may not be as representative of a variety of market conditions as are other data on the record (discussed below). Moreover, we do not agree with XITIC that the Agro Dutch data are the only surrogate value on the record that are based on a large number of sales transactions occurring over a long period of time. While the Agro Dutch financial statement gives a volume and value of fresh mushroom sales, it does not say how many transactions are reflected in that volume and value. Even though XITIC is correct that the Agro Dutch financial statement provides the only data on the record that give fresh mushroom sales volume and value figures, in weighing this factor along with other considerations, as noted above, the Department finds that the Agro Dutch statement is not the best available information on the record of this review for valuing fresh mushrooms.

In reviewing the record, we find there are data on the record superior to the Agro Dutch financial statement with respect to the valuation of fresh mushrooms. Specifically, the Flex Foods' 2009-10 financial statement states, "When there is a glut in the market, the price of mushroom falls down to Rs.20-30/Kg but as the demand increases or there is shortage of mushrooms in the market the price rises up to Rs.60-70/Kg." This statement indicates that the values in the Flex Foods financial statement reflect a variety of market conditions affecting the price of fresh mushrooms.

We do not agree with XITIC that the petitioners have misread the pricing discussion on the Flex Food financial statement. The relevant section of Flex Foods' financial statement says:

> Where there is a glut in the market the price of mushroom falls down to Rs.20-30/Kg but as the demand increases or there is shortage of mushrooms in the market the price rises up to Rs.60-70/Kg. Thus there is always an uncertainty in market prices of mushrooms which reduces the amount of net profit and this discourages the mushroom growers. This problem gets aggravated during peak production months, also because there is no minimum support price from the Govt. even in states with good number of mushroom farmers.

See Flex Food's 2009-10 financial statement at 5. We do not interpret the above paragraph (as does XITIC) to imply that prices ever fall below Rs.20/kilogram, but only that there is increased uncertainty as to market prices during peak production months. We do not agree therefore with XITIC that the Flex Food financial statement substantiates the Rs. 17.02/kilogram figure on Agro Dutch's financial statement.

Therefore, because we find the Rs. 14.60/kilogram price reported on Agro Dutch's financial statement to be non-contemporaneous with the POR and because there is another valuation source which appears more reflective of a variety of market conditions under which fresh mushrooms are sold in India, we have determined not to rely on the Agro Dutch financial statement for purposes of valuing fresh mushrooms in these final results.

However, we also do not find the data on the DMR report to be the best available information for purposes of valuing fresh mushrooms. The DMR report gives no explanation of how the DMR

(which is not itself a mushroom producer or seller) calculated the reported Rs. 80/kilogram selling price. Furthermore, the narrative of this report, in describing the production process, says, "Soil particles and mycelia strands sticking to the base of stalk are removed carefully and fruit bodies are cleaned with a soft cloth and washed in DTA solution (0.125 g/l of water) before sending them for marketing." We are uncertain that these procedures are performed for the fresh mushrooms which mushroom canners purchase, or whether they are performed by producers of subject merchandise in the PRC, and whether this production process introduces additional costs not incurred by producers of the subject merchandise.

We also find that the four articles petitioners have placed on the record to corroborate the Rs. 80/kilogram figure in the DMR report are not conclusive concerning the representativeness of these data. Specifically:

- The article from The Tribune of India gives a price of Rs.100/kilogram, but it describes it as "a good price." Thus, it may not be the broad market average price we are seeking.
- The www.agricultureinformation.com website gives a price of Rs. 95/kilogram, but also mentions, "Price is negotiable."
- The price of Rs. 80/kilogram given on the Global Price Institute is outside the POR.
- The article in the September 2009 periodical Leisa India gives a price of Rs. 200/kilogram, but says it is for the retail market.

Thus, based on the totality of the record, we find that the price in the DMR report is not the best available information on the record of this review for purposes of valuing fresh mushrooms.

In light of the Department's concerns outlined above regarding both the Agro Dutch price data and the price data in the DMR report, we find the best available information on the record to value fresh mushrooms is the Flex Foods data. Flex Foods is, as previously stated, an Indian producer of preserved mushrooms. Furthermore, by giving high and low prices, the price range is representative of a variety of market conditions affecting the price of fresh mushrooms in India. Moreover, on the same page as the price data (p. 5) there is a sub-heading under the general heading "Opportunities" that cites "button mushrooms." Therefore, we have determined the Flex Food data are specific to button mushrooms, and thus to the merchandise under consideration. Additionally, the data come from a financial statement that is both publicly available and contemporaneous with the POR.

The price data (quoted above) on Flex Foods' financial statement give a lower-bound price of Rs. 20/kilogram (when there is a glut in the market) and a upper-bound price of Rs. 70/kilogram (as demand increases or there is a shortage of production). We are unable to determine from the information on the record which (if either) of these two conditions may have prevailed in India during the POR, or for how long. Therefore, for these final results of review we have determined that it is appropriate to use the average of the upper-bound and lower-bound prices to value fresh mushrooms. That price is Rs. 45/kilogram.

Comment 2: Surrogate Value for Cow Manure

Petitioners argue the Department erred in the preliminary results by valuing cow manure using a value taken from the 2004-05 financial statement of Agro Dutch. Petitioners state that the value used was non-contemporaneous and company-specific, rather than contemporaneous with the POR and representative of a broad market average.

Petitioners argue the Department should instead value cow manure using one or more of the contemporaneous surrogate values for fertilizer placed on the record of this administrative review. Specifically, petitioners first suggest the Department utilize the POR value for Indian imports under Harmonized Tariff Schedule (HTS) 3101.00, the HTS number that covers animal fertilizer. Although it is a basket category, according to petitioners, the Department has stated in many proceedings that it prefers the quality and reliability of official Indian import data, even if using those data means using a less-specific basket tariff classification. Thus, petitioners state, in Honey from the PRC, the Department stated:

> While the Department recognizes that that HS code is a basket category for plastic containers, the Department finds that the WTA {World Trade Atlas} Indian import statistics reasonably represent plastic containers that may be used in the packaging of honey… Thus, without specific record evidence that the WTA data are distorted, the Department finds that the WTA data are a quality source as they are reliable and contemporaneous.

See Honey from the People's Republic of China: Rescission and Final Results of Antidumping Duty New Shipper Reviews, 71 FR 58579 (October 4, 2006), and accompanying Issues and Decision Memorandum at Comment 2.

Petitioners argue that alternatively, the Department should value cow manure using a sales offer for cow manure (which petitioners placed on the record) from the website www.tradercity.com. It shows an average price of Rs. 50/kilogram. Petitioners argue that this value is specific to dry cow manure, expressed on a weight basis, contemporaneous to the POR, and is exclusive of freight and duties. See petitioners' March 28, 2011, submission at Exhibit 2. Petitioners state that both this value and the value from HTS 3101.00 would be superior to the outdated value from Agro Dutch's 2004-05 financial statement.

As a third alternative, petitioners suggest the Department consider averaging the Indian import data (which are reflective of a broad market average) with the www.tradercity.com data (which are product-specific) to derive the best available information for the surrogate value of manure. They state that in prior cases where the Department has two sources on the record that are representative of the price and each adds a unique aspect of probative value, the Department has used the average of the import and domestic price. See Synthetic Indigo From the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 68 FR 53711, 53712 (September 12, 2003).

Furthermore, petitioners argue the Department's methodology in the preliminary results involved using an incorrect volume-to-weight conversion factor. Specifically, they argue the conversion factor used in the preliminary results (5.37 kilograms of dry cow manure per cubic foot) was from a source that does not indicate the density of the cow manure it was referencing. Petitioners request the Department take administrative notice of a conversion factor of six pounds of manure per cubic foot published by the University of Montana.

Furthermore, petitioners argue that the absence of any information on the record concerning the actual moisture content (i.e., the density) of the manure consumed either by respondents or that of the company that was the source of the surrogate value makes it impossible to calculate accurately the volume of manure accounted for by the weight of the manure the respondents reported. For this reason, petitioners argue, the only objective manner by which the Department can value the respondents' manure consumption (which respondents reported on a weight basis) is to apply a value already expressed in terms of weight. Petitioners conclude therefore that, in order to avoid conversion inaccuracies, the Department should use one of the contemporaneous manure surrogate values that petitioners submitted for the record.

Blue Field and XITIC argue that the Department correctly selected the 2004-05 Agro Dutch financial statement as the surrogate value for cow manure, and that it should not use the Indian import statistics for HTS 3101.00 as suggested by petitioners. They argue that, as with the Indian import statistic for HTS 3102.9090 ("Other Mineral or Chemical Fertilizers"), the Department should reject these import statistics as insufficiently product-specific to cow manure. Furthermore, Blue Field argues that this HTS number refers to mineral and chemical fertilizers, and the record establishes that during the POR Blue Field used cow manure as its fertilizer, and not any mineral or chemical fertilizer.

Furthermore, Blue Field and XITIC argue that for three reasons the petitioners' proposed surrogate value of $50/kilogram cannot be used. First, it is only an offer for sale, not a final transaction price. Because an offer is normally far higher than the price eventually settled upon by the buyer and seller, respondents contend, using the $50/kilogram price would overstate the cost of the input. Second, the internet posting specifically states that the targeted countries are "Russia, Saudi Arabia, and Kuwait." Thus, Blue Field and XITIC argue, using this value would violate Departmental practice because the Department does not use export prices for surrogate value purposes as such prices are not reflective of prices within India. Third, the internet posting shows that the cow manure offered is in dry powdered form, and is thus highly processed, and is also packaged and sold in large quantities. There is no record evidence, Blue Field and XITIC argue, that these characteristics apply to the cow manure they use in the production of subject merchandise.

With respect to the conversion ratio, XITIC argues the Department should use the ratio 11.34 kilograms/cubic foot. XITIC states that this is a conversion ratio for dry cow manure which it obtained from the website of Reade Advanced Materials.

Department's Position:

We agree with petitioners that the absence of information on the record regarding the moisture content of the manure referenced on Agro Dutch's 2004-05 financial statement (the source of the surrogate value) adversely affects our ability to determine accurately the correct volume-to-weight conversion factor for purposes of calculating a surrogate value. Thus, both the 5.37 kilograms/cubic foot conversion factor (used in prior reviews) and the 11.34 kilogram/cubic foot conversion factor (suggested by XITIC) introduce some level of speculation into the calculation. However, we do not believe that either of the two surrogate value alternatives petitioner has suggested is viable. The data from the website www.tradercity.com represent a price for an export sale from India, and thus do not qualify as a surrogate value under our NME methodology. Moreover, HTS 3101.00 is a broad category, the exact contents of which are unknown. Our preference is to use, where possible, data that are specific to the input.

For these final results of review we have valued cow manure using datum from the article "Fresh Water Fish Farming" posted in May 2009 on the website DARE, which is a media platform for the Indian Entrepreneur and the Entrepreneurial Ecosystem. The article provides a price for cow manure on a weight basis, and thus involves no conversion factor. The source of the datum in the article is India's National Bank for Agriculture and Rural Development (NABARD). We have used this datum because it is contemporaneous to the POR, specific to the input, and publicly available. Furthermore, because NABARD has offices all across India, we believe the datum contained in the report is likely representative of a broad market average. See Memorandum from Scott Hoefke to The File, Subject "Analysis of Data Submitted by Blue Field (Sichuan) Food Industrial Co., Ltd. (Blue Field) in the Final Results of Administrative Review of the Antidumping Duty Order on Preserved Mushrooms from the People's Republic of China (PRC)," dated September 6, 2011 (Blue Field Final Results Analysis Memorandum) and Memorandum from Scott Hoefke to The File, Subject "Analysis of Data Submitted by Xiamen International Trade & Industrial Co., Ltd. (XITIC) in the Final Results of Administrative Review of the Antidumping Duty Order on Preserved Mushrooms from the People's Republic of China (PRC)," dated September 6, 2011 (XITIC Final Results Analysis Memorandum) for more information.

Comment 3: Ministerial Errors with Respect to Jisheng's Ocean Freight

Petitioners argue the Department made three ministerial errors in its preliminary results calculations with respect to Jisheng's ocean freight. First, petitioners state that the Department made the ocean freight adjustment only for Jisheng's U.S. sales sold under a particular terms of sale (terms are proprietary) and not for its other types of sales for which an ocean freight adjustment is also appropriate.

Second, petitioners argue that the Department incorrectly applied the Descartes Systems Group (Descartes) freight charge that it used as the surrogate value. The Descartes data show a charge of $126 for ocean freight without any explanation of the unit of measure to which this base applies. In the preliminary results the Department allocated the $126 over the drained weight of each sale (QTY1U). Petitioners argue that subsequent to the Department's issuance of the

preliminary results they put on the record information showing that Descartes' $126 charge represents the charge to haul 1,000 kilograms. See petitioners' March 28, 2011 submission at Exhibit 11. Therefore, petitioners state, to remedy this clerical error, instead of calculating the per-unit cost using the formula $126/QTY1U, the Department should calculate the per-unit cost using the formula $126/1,000.

Third, petitioners argue the Department erred by applying the international freight charge to the drained weight of the shipped product, rather than the packed weight. Petitioners state the Department recently addressed this issue in Natural Bristle Paint Brushes and Brush Heads From the People's Republic of China. The summary of the argument, followed by the Department's position, is as follows:

> Petitioner counters that, if the Department determined that it made a ministerial error in its calculation of inland freight, then the Department should not adopt Founder's proposed correction because Founder's proposed correction would fail to account for the **packed weight of each brush**. Petitioner argues that the cost of inland freight **should be based on packed weight because the brushes are shipped from the factory to the port in packaged form**. Thus, petitioner contends that the Department should add the per-unit weights of poly-bats, boxes, and cartons to the weight of each brush before calculating a weight-based, per-unit inland freight cost.
>
> * * *
>
> We agree with Founder that we calculated the cost of inland freight on a per-kilogram basis, rather than on a per-piece basis… **In addition, we agree with petitioner that Founder's methodology fails to account for the packed weight of each brush**. Therefore, we have added the per-unit weights of poly-bags, boxes, and cartons to the weight of the individual brush to base the cost of inland freight on packed weights.

See Natural Bristle Paint Brushes and Brush Heads From the People's Republic of China: Amended Final Results of Antidumping Duty Administrative Review, 65 FR 55941 (September 15, 2000) (emphasis added).

However, petitioners state that one complication with using the packed weight is that Jisheng did not report packed weight correctly on its sales listing (e.g., Jisheng frequently reported a packed weight that is less than the net drained weight, which is a physical impossibility). Therefore, petitioners state that the Department should construct the packed weight by using a ratio, the numerator of which is the packed total weight (QTY2U) and the denominator of which is the net drained weight (QTY1U). Petitioners state that using such a ratio is a normative method. See Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China: Final Results of 2000-2001 Administrative Review, Partial Rescission of Review, and Determination to Revoke Order, in Part, 67 FR 68990 (November 14, 2002), and accompanying Issues and Decision Memorandum at Comment 16 (TRBs from the PRC).

No parties submitted rebuttal comments on this issue.

Department's Position:

We agree with petitioners that we incorrectly applied the international freight adjustment to only the portion of Jisheng's sales sold under particular terms of sale, and that we should instead have made the adjustment for all of Jisheng's sales. We have corrected this error in the final results of review.

With respect to our having allegedly used an incorrect denominator in our calculation of international freight, this issue is moot in these final results of review as we used a different surrogate value for international freight than the one used in the preliminary results of review. See Comment 4 (below).

We also agree with petitioners that the international freight cost should be applied to the packed weight of the shipment rather than the drained weight because the cost was incurred on packed weight. We have made this change in these final results of review.

Comment 4: Surrogate Value for Jisheng's Ocean Freight

As noted in comment 3 (above), petitioners argue that the Descartes value the Department used as the surrogate value for international freight in the preliminary results is only the base rate for ocean freight, and therefore is not representative of an all-inclusive ocean freight charge. Petitioners state that the Department should instead use data from the website of the freight forwarder Maersk Line (Maersk), which petitioners supplied in their March 28, 2011 submission. The Maersk data are superior to the Descartes data, petitioners state, because in addition to basic ocean freight, the also include the necessary loading, bunker, equipment, and port charges.

Furthermore, petitioners state that they were not able to subscribe to the Descartes system at the website, and are still awaiting news from the company if fee-based services are available for quotes without an actual shipping arrangement. In contrast, Maersk quotes are not only publicly available, but are free of charge. Therefore, petitioners conclude, the Maersk quote is more complete, more accurate, and more properly a publicly available surrogate value than the Descartes base rate.

No parties submitted rebuttal comments on this issue.

Department's Position:

After the Preliminary Results, the Department reexamined the Descartes surrogate value it had used, and determined that it was not the best available information to serve as the surrogate value for ocean freight because it was a value for "{Chinese} port-to- {U.S. customer's} door" service. See Surrogate Values Memorandum at Exhibit 10, where the abbreviation "OD" stands for "ocean port to {customer's} door." Thus, because it constitutes transportation costs to the

customer's door, and not only to the U.S. port, it includes both ocean freight and U.S. inland freight. Therefore, because the Department made a separate adjustment for U.S. inland freight to the U.S. customer in the Preliminary Results, this value double counted inland freight costs. For these final results of review, the Department used a surrogate value for "yard-to-yard" service that does not include any U.S. inland freight costs. This value is calculated on a "cost-per-container" basis, rather than on a weight basis as was the "port-to-door" surrogate value used in the Preliminary Results. Because petitioners' allegation that the surrogate value used in the Preliminary Results was not all-inclusive of charges was predicated on the value being charged on a weight basis (see petitioners' March 28, 2011, submission at Exhibit 11), it is not applicable to the value used in these final results.

With respect to petitioners' argument that the Department should value international freight using the Maersk data petitioners submitted to the record on March 28, 2011, we disagree. The documentation petitioners submitted from Maersk shows that some of the elements of the rate are valid only until June or July 2009. See petitioners' March 28, 2011, submission at Exhibit 12. Conversely, the Descartes data the Department used in these final results is the average of prices from each of the four quarters of the POR, and therefore is more representative of prices throughout the entire POR. Moreover, we do not agree with petitioners' suggestion that the Maersk data are more suitable because they can be obtained without a fee. If a publisher makes information available to the public we consider it to be publicly available even if a fee is required to obtain it. See Laminated Woven Sacks From the People's Republic of China: Final Affirmative Countervailing Duty Determination and Final Affirmative Determination, in Part, of Critical Circumstances, 73 FR 35639 (June 24, 2008), and accompanying Issues and Decision Memorandum at Comment 15.

Comment 5: Computation of Domestic Inland Freight

Petitioners argue that for all three respondents the Department should compute domestic inland freight (including freight by rail, truck, and barge) based on packed weight, rather than drained weight. (Petitioners call this charge "foreign inland freight" in their case brief.) They argue this is a reasonable methodology because freight rates apply to the total weight of goods shipped, and not simply the content weight of the goods themselves. Petitioners state that this methodology has been the Department's practice in cases involving surrogate freight valuation. See TRBs from the PRC and accompanying Decision Memorandum at Comment 19.

No parties submitted rebuttal comments on this issue.

Department's Position:

We agree with petitioners. In these final results of review we have calculated inland freight based on the packed weight, rather than the drained weight.

Comment 6: Surrogate Value for Natural Gas

Petitioners argue that the Department should use a more contemporaneous surrogate value for natural gas in the final results than it used in the preliminary results. In the preliminary results the Department used the 2002 Gas Authority of India's (GAIL) nominal gas tariff. Petitioners recommend the Department use a value from GAIL's 2009-10 annual report, which is contemporaneous with the POR, and which they placed on the record in their November 22, 2010 surrogate values submission at Exhibit 35. They note further that in other proceedings the Department has relied on GAIL's financial statements to value natural gas. See Certain Activated Carbon From the People's Republic of China: Notice of Preliminary Results of the Antidumping Duty Administrative Review and Extension of Time Limits for the Final Results, 74 FR 21317 (May 7, 2009) (in which the Department used GAIL's 2007-08 annual report to value natural gas) and Seamless Refined Copper Pipe and Tube from the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination, 75 FR 26716, 26724 (May 12, 2010) (in which the Department used GAIL's 2008-09 annual report to value natural gas).

No parties submitted rebuttal comments on this issue.

Department's Position:

We agree with petitioners. In these final results of review we have valued natural gas using data from GAIL's 2009-10 annual report, rather than its 2002 annual report, because they are contemporaneous with the POR.

Comment 7: Whether to Apply Adverse Facts Available to Certain of Jisheng's U.S. sales.

Jisheng argues the Department erred by applying partial adverse facts available (AFA) to its U.S. sales for which the Department preliminarily determined that Jisheng had not reported FOP data. The Department stated in its preliminary results:

> Jisheng included several products in the reported U.S. sales listing in its response to section C of the questionnaire for which it failed to provide any factors of production in its response to section D. See Jisheng's July 8, 2010 Section C and D questionnaire response. In subsequent supplemental questionnaires the Department requested that Jisheng revise its FOP database so as to include a control number (CONNUM) for each CONNUM represented on its U.S. sales listing. See August 13, 2010, supplemental questionnaire at 6 (question 23a) and November 3, 2010, supplemental questionnaire at 4 (question 5a). However, Jisheng did not remedy or explain its deficient responses. See Jisheng's September 13, 2010, submission at Exhibits SC-1 and SD-1, November 18, 2010, submission at Exhibits SS1 and SS2, and January 21, 2011, submission at Exhibits SSS-1, SSS-2, SSS-3, and SSS-4. Consequently, we preliminarily determine that partial facts available is warranted because necessary information is not on the record and because Jisheng (1) withheld information requested by the Department; and (2) failed to provide the requested

> information by the applicable deadlines or in the form and manner requested. See section 776(a)(1), and (a)(2)(A) and (B) of the Act. Moreover, by never alleging that it was unable to provide the information, and by failing to provide usable information by the applicable deadlines, we find that the conditions of section 782(c)(1) and (e), to which section 776(a)(2)(B) is subject, have not been satisfied. In addition, we determine that Jisheng has not cooperated to the best of its ability by repeatedly failing to provide the requested FOP data, despite numerous opportunities to do so. Accordingly, an adverse inference in using facts available under section 776(b) of the Act is warranted for Jisheng with regard to this specific information. For the CONNUMs for which Jisheng has not provided factor information we have applied, as AFA, the highest NV for any CONNUM in Jisheng's database submitted on the record of this administrative review.

Jisheng argues that the use of AFA was not warranted because the Department provided no valid evidence that necessary information is not on the record, or that Jisheng either (1) withheld information requested by the Department; or (2) failed to provide the requested information by the applicable deadlines or in the form and manner requested. Furthermore, Jisheng states, the Department may use an adverse inference in applying facts available only when a party has failed to cooperate by not acting to the best of its ability to comply with a request for information. See section 1677e(b) of the Act. According to Jisheng, such is not the case here.

Jisheng asserts that, contrary to the Department's statement (above) that, "Jisheng did not remedy or explain its deficient responses," Jisheng submitted complete revisions to its sales and FOP databases in its supplemental questionnaire responses. Moreover, the FOP database it submitted with its September 10, 2010 supplemental questionnaire response,[2] its November 16, 2010 supplemental questionnaire response,[3] and its February 22, 2011 voluntary submission[4] included data for all of the CONNUMs for which the Department preliminarily determined that Jisheng had not submitted FOP data. Therefore, Jisheng argues, the "conditions of section 782(c)(1) and (e)" (which the Department cited in its discussion of its reasons for using AFA on Jisheng (above)) are not relevant.

Furthermore, Jisheng states, when the Department asked questions in its supplemental questionnaires about particular CONNUMs, Jisheng submitted complete answers. Jisheng concludes therefore that the Department is incorrect in stating that Jisheng did not remedy or explain its deficient responses. Jisheng states all of the necessary information for the

[2] See Letter from Lee & Xiao to AD/CVD Operations, Re: "Certain Preserved Mushrooms from the People's Republic of China Administrative Review," dated September 10, 2010 (Jisheng's September 10, 2010 supplemental questionnaire response).

[3] See Letter from Lee & Xiao to AD/CVD Operations, Re: "Certain Preserved Mushrooms from the People's Republic of China Administrative Review," dated November 16, 2010 (Jisheng's November 16, 2010 supplemental questionnaire response).

[4] See Letter from Lee & Xiao to AD/CVD Operations, Re: "Certain Preserved Mushrooms from the People's Republic of China Administrative Review," dated February 22, 2010 (Jisheng's February 22, 2010 submission).

CONNUMs at issue is on the record. Thus, Jisheng asserts that given that the Department's sole basis for the application of AFA to the CONNUMs at issue was its mistaken belief that FOP data for those CONNUMs were not on the record, the Department has articulated no basis for applying facts available to these CONNUMs.

Furthermore, Jisheng asserts that it has cooperated fully with the Department. Its efforts to cooperate included submitting revised FOP databases requested in three supplemental questionnaires, and submitting a voluntary revised submission in response to comments the petitioners submitted on February 9, 2011. Jisheng states these efforts went above and beyond what is typically expected of a respondent, in no small part because of imprecise or otherwise confusing language in the Department's questionnaires. Moreover, in its third and final supplemental questionnaire to Jisheng, the Department made no comments indicating that FOP data for any of the CONNUMs at issue were missing or in any way deficient. Jisheng argues that if the Department does discover any clerical errors in Jisheng's data, the Department should be mindful that such errors "are by their nature not errors in judgment but merely inadvertencies. While the parties must exercise care in their submissions, it is unreasonable to require perfection." See NTN Corp. v. United States, 74 F.3d 1204 (Fed. Cir. 1995).

Petitioner argues the Department acted properly in applying partial AFA to Jisheng's U.S. sales. They argue that the record makes clear that Jisheng repeatedly submitted FOP that were incomplete and inaccurate, and that Jisheng's claim that its February 22, 2011 submission contained complete and accurate data is plainly incorrect. In fact, petitioners argue, none of Jisheng's submitted FOP databases, whether viewed individually or in the aggregate, provide complete and accurate data with which to match FOP to each unique CONNUM in the U.S. sales database.

Petitioners further argue that the judicial precedent makes clear that it is the respondent, and the respondent alone, that is responsible for preparing and submitting accurate databases. See, e.g., Ta Chen Stainless Steel Pipe, Inc. v. United States, 298 F.3d 1330, 1336 (Fed. Cir. 2002) ("Ta Chen bore the burden of creating an accurate record"); Zenith Elecs. Corp. v. United States, 988 F.2d 1573, 1583 (Fed. Cir. 1993) ("The burden of production{belongs} to the party in possession of the necessary information"). The administrative record makes clear, petitioners argue, that here Jisheng failed to meet that burden in these proceedings.

Furthermore, petitioners state that Jisheng's case brief raises a secondary argument by asserting that the Department may "discover clerical errors in Jisheng's data." Petitioners state this argument undermines Jisheng's first argument that there are no errors in its database. Moreover, petitioners state that Jisheng does not even offer what such errors might be, much less offer a suggestion as to how the Department could remedy such errors by using facts available without an adverse inference. Petitioners further state Jisheng's analysis on this point is also self-contradictory. Specifically, Jisheng claims the revisions it submitted in its February 22, 2011, submission result in the most complete and accurate data, but also states that data for the CONNUMs at issue can be found in its September 10, 2010, submission. Petitioners argue in reply that actually neither of these submissions contains FOP records for the CONNUMs at

issue. Moreover, neither of those submissions have accurate FOP data for any CONNUMs corresponding to the instructions of the Department.

Additionally, petitioners argue that Jisheng's February 22, 2011, submission did not resolve any of the remaining deficiencies in Jisheng's data, but only compounded them. In its February submission, Jisheng unilaterally introduced significant methodological changes in which it: (a) admitted that its staff had not completed "even a fraction" of the calculations required to obtain POR specific and control-number specific data; and (b) proffered, without any prior approval by the Department, new FOP data "using the actual cost in the packing stage, and an average canning cost of the POR and the prior year."

To complicate matters still further, petitioners argue, a comparison of Jisheng's February 22, 2011, FOP database with its January 21, 2011 database shows that Jisheng changed, without explanation, some of the data for two of the CONNUMs as compared to the data for those CONNUMs from its prior submissions.

Department's Position:

We disagree with Jisheng that the Department should not continue to use partial AFA for the CONNUMs at issue. Pursuant to section 776(a) of the Act, the Department is directed to base its determination on facts available if necessary information is not available on the record, or an interested party: (A) withholds information requested by the Department; (B) fails to provide such information by the applicable deadline or in the form or manner requested, subject to section 782(c)(1) and (e) of the Act; (C) significantly impedes a proceeding; or (D) provides such information but the information cannot be verified as provided in section 782(i) of the Act. Pursuant to section 776(b) of the Act, an adverse inference is warranted if the Department finds that an interested party has failed to cooperate to the best of its abilities with the Department's requests for information. Such an adverse inference may be drawn from information derived from the petition, a final determination in the less-than-fair-value investigation, a previous review, or any other information placed on the record.

The CONNUMs at issue are identified in the preliminary results analysis memorandum dated February 28, 2011. Contrary to Jisheng's assertions, FOP data for these CONNUMs are not contained in its November 16, 2010, supplemental questionnaire response, its January 21, 2011, supplemental questionnaire response[5] (the combination of which the Department used in calculating Jisheng's margin for the preliminary results), or its February 22, 2011, submission. See Jisheng's November 16, 2010, supplemental questionnaire response, at Exhibit SS-2, its January 19, 2011, supplemental questionnaire response at Exhibits SSS-2, SSS-3, and SSS-4, and its February 22, 2011, submission at Attachment B.

[5] See Letter from Lee & Xiao to AD/CVD Operations, Re: "Certain Preserved Mushrooms from the People's Republic of China Administrative Review," dated January 21, 2011 (Jisheng's January 21, 2011 supplemental questionnaire response)

Three times in this proceeding the Department put Jisheng on notice that FOP data were required for every CONNUM for which it made U.S. sales during the POR. See May 18, 2010, questionnaire[6] at D-6, August 13, 2010, supplemental questionnaire[7] at 6, and November 3, 2010, supplemental questionnaire[8] at 4. Despite these three separate notices, Jisheng, as indicated above, did not submit data for the CONNUMs at issue. While clerical errors may sometimes constitute "mere inadvertencies," as Jisheng has argued, we find the total omission of all FOP data for particular CONNUMs does not constitute a clerical error. Furthermore, had there been any confusion on Jisheng's part about the meaning of any of our requests for information (i.e., if the language was "confusing or imprecise"), Jisheng could easily have contacted the Department. Each questionnaire and supplemental questionnaire the Department issued stated exactly which Department officials to contact with any questions; Jisheng never did so.

Therefore, in the absence of FOP information for the CONNUMs at issue, we determine in these final results, as we did in the Preliminary Results, that partial facts available is warranted because necessary information is not on the record and because Jisheng (1) withheld information requested by the Department; and (2) failed to provide the requested information by the applicable deadlines or in the form and manner requested. See Sections 776(a)(1), and (a)(2)(A) and (B) of the Act. Furthermore, we also determine that an adverse inference is warranted under section 776(b) of the Act with respect to the CONNUMs at issue because by failing to submit FOP data for these CONNUMs, Jisheng did not act to the best of its ability with respect to our requests for information.

Therefore, in these final results of review, as in the Preliminary Results of review, for all CONNUMs for which Jisheng submitted no FOP data, we have applied, as AFA, the highest normal value for any CONNUM in Jisheng's database submitted on the record of this administrative review.

Comment 8: Whether to Apply Adverse Facts Available for Certain of Jisheng's Sales for Which Jisheng Reported No Packing Costs

Jisheng argues the Department erred in its preliminary results by using AFA for three CONNUMs for which Jisheng did not submit packing factor values. In the preliminary results, Jisheng states, the Department found that Jisheng's FOP database did not include packing usage factors for all CONNUMs, that Jisheng never explained why it was unable to provide the

[6] See Letter from U.S. Department of Commerce to Guangxi Jisheng Foods, Inc., Re: "Certain Preserved Mushrooms from the People's Republic of China," dated May 18, 2010 (May 18, 2010 questionnaire).

[7] See Letter from U.S. Department of Commerce to Guangxi Jisheng Foods, Inc., Re: "Antidumping Duty Administrative Review of Certain Preserved Mushrooms from the People's Republic of China: First Supplemental Questionnaire, Section A, C, & D," dated August 13, 2010 (August 13, 2010, supplemental questionnaire).

[8] See Letter from U.S. Department of Commerce to Guangxi Jisheng Foods, Inc., Re: "Antidumping Duty Administrative Review of Certain Preserved Mushrooms from the People's Republic of China: First Supplemental Questionnaire, Section A, C, & D," dated November 3, 2010 (November 3, 2010, supplemental questionnaire).

requested information, that Jisheng failed to provide usable information by the applicable deadlines, and that Jisheng therefore has not cooperated to the best of its ability. Jisheng asserts that the Department is mistaken with respect to every one of these assertions.

Jisheng states that it faced considerable difficulties in responding by the due date to the Department's January 10, 2011, supplemental questionnaire in which the Department requested packing usage rates for some CONNUMs for the year prior to the POR. Nevertheless, citing to its February 22, 2011 submission, Jisheng states that it fully explained the efforts it took to report packing usage factors, as well as how it calculated the usage factors it reported on a CONNUM-specific basis. Jisheng asserts there is nothing on the record to indicate that its reported FOP data with respect to the packing usage rates reported for the three CONNUMs at issue are not verifiable. Jisheng states that its efforts indicate that it cooperated to the best of its ability to comply with the Department's request for information. Furthermore, given that the Department's sole basis for the application of AFA to the CONNUMs at issue was its mistaken belief that packing usage data for those CONNUMs were not on the record, the Department has articulated no valid reason for applying AFA to the CONNUMs at issue.

Given the above facts, Jisheng asserts there is no "pattern of behavior" indicating a failure to cooperate, as required for the application of adverse facts available, citing Borden, Inc., v. United States, 22 CIT 1153, 1154 (1998) (Borden). Considering the record as a whole, the timing of the Department's notice to Jisheng concerning its need to submit packing usage data for the twelve months prior to the POR, as well as the efforts represented by Jisheng's January 19, 2011, and February 22, 2011 submissions, no reasonable person, in the sense described in Slater Steels, could possibly conclude that Jisheng did not cooperate to the best of its ability in attempting to comply with the Department's requests for information with respect to the packing usage data at issue. See Slater Steels Corp. v. United States, 29 C.I.T. 1260 (2005)(Slater Steels).

Nevertheless, Jisheng argues, if, for whatever reason, the Department decides not to use the packing usage factor data submitted by Jisheng, it still should not apply adverse facts available with respect to the CONNUMs at issue, given that a respondent's failure to provide complete information by itself does not justify the use of adverse facts available. See Ferro Union, Inc. v. United States, 44 F.Supp. 2d 1310, 1329 (CIT 1999) (Ferro Union).

Petitioners argue the Department should continue to apply partial adverse facts available to products for which Jisheng failed to provide packing information. They argue that the calculation methodology Jisheng used in calculating the packing data Jisheng submitted in its February 22, 2011, submission was not in accordance with the Department's prior instructions. Furthermore, Jisheng's February 22, 2011 submission was untimely. Petitioners argue that Jisheng's submission of untimely information that is not in accordance with the methodology provided by the Department reflects a continuation of Jisheng's pattern of not cooperating to the best of its ability, thus justifying the Department's continuation of partial AFA in the final results.

Department's Position:

We disagree with Jisheng that the use of partial AFA is not warranted for CONNUMs for which Jisheng did not submit packing costs. As an initial matter, this issue actually affects only one CONNUM in these final results. Based on our review of the record, we agree with Jisheng that it did not sell in the United States one of the three CONNUMs at issue during the POR. Therefore, for this CONNUM, we find that the issue of applying an adverse inference is moot. For the second CONNUM, as explained further below in response to Comment 9, the Department has determined that it is appropriate to use the data Jisheng submitted in its February 22, 2011, submission. Finally, for the third CONNUM, we find that applying facts available with an adverse inference is appropriate because, despite our requests for information, no packing cost data for this CONNUM are on the record, contrary to Jisheng's claims.

In Jisheng's November 16, 2010, submission, for reasons not susceptible to public summary, Jisheng reported no packing usage factors for one of the three CONNUMs at issue. Therefore, in a January 10, 2010, supplemental questionnaire, the Department requested that Jisheng submit packing usage factors for this CONNUM for the year prior to the POR. The Department also instructed Jisheng that if it had trouble complying with this request for information it should immediately contact Department officials. See January 10, 2010, supplemental questionnaire at 5. Jisheng's January 21, 2011, submission did not contain packing usage factors for this CONNUM, nor did Jisheng contact the Department about having trouble complying with the request for information. Furthermore, in its February 22, 2011, submission, Jisheng, contrary to the assertions in its case brief, did not submit packing data for this CONNUM.

Given the above fact pattern, we determine in these final results, as we did in the Preliminary Results, that the application of partial facts available is warranted for this CONNUM, because necessary information is not on the record and because Jisheng (1) withheld information requested by the Department; and (2) failed to provide the requested information by the applicable deadlines or in the form and manner requested. See Sections 776(a)(1), and (a)(2)(A) and (B) of the Act. In addition, by failing to provide the requested FOP data, we find that Jisheng has not cooperated to the best of its ability. Accordingly, an adverse inference in using facts available under section 776(b) of the Act is warranted for Jisheng with regard to this specific information.

With respect to Jisheng's argument that it has not exhibited a "pattern of behavior" indicating a failure to cooperate, as required by Borden for the application of adverse facts available, we disagree. While Jisheng has provided much information to the Department, and quite possibly expended great effort in providing it, Jisheng has not provided the specific information at issue here or explained why it was unable to do so pursuant to section 782(c)(1) of the Act. Furthermore, we believe that the total absence of the information at issue despite the Department's repeated requests for it, constitutes sufficient evidence that Jisheng has not acted to the best of its ability with respect to these requests, and that this evidence is such that "a reasonable mind might accept as adequate to support a conclusion," as required by Slater Steels.

Finally, the instant case is distinguishable from Ferro Union because in Ferro Union the respondent had provided only incomplete information regarding its affiliations. Here, for the packing costs of the CONNUM at issue, there is a complete absence of information.

Therefore, as in the Preliminary Results, for the CONNUM for which Jisheng has not provided factor information we have applied, as AFA, the highest packing usage factors for any CONNUM in Jisheng's database submitted on the record of this administrative review.

Comment 9: Whether the Department's Failure to Consider Jisheng's February 2011 Submission in the Preliminary Results was Improper and Not Supported by Law

Jisheng argues the Department acted improperly and in a manner not supported by law in declining to use its February 22, 2011 submission in its preliminary results, while giving full consideration to the petitioners' February 9, 2011 submission. (Petitioners alleged in their February 9, 2011 submission that there were deficiencies in Jisheng's November 18, 2010, and January 19, 2011, submissions.) Jisheng states that in its February 22, 2011, letter it put forth its best effort in preparing and submitting another revised FOP database, and explained in detail why it believed that the methodology it used in compiling the FOP database was complete, accurate, and usable. Jisheng argues that not using the submission in its preliminary results runs counter to the requirements of Olympia Industrial Inc. v. United States, which provides that the Department's conclusions must be "supported by the record as a whole." See Olympia Indus, Inc. v. United States, 744 F.2d 1556, 1563 (Fed. Cir. 1984). Jisheng states the Department's consideration of petitioners' February 9, 2011 letter, without equal consideration of Jisheng's February 22, 2011 submission, represents an arbitrarily selective use of information from the record. Thus, the Department's conclusions in the preliminary results are the product of an arbitrary analysis in violation of 5 U.S.C. § 706(2).

Petitioners argue that Jisheng's claim that the Department acted improperly by failing to use the data it prepared is without merit. First, different statutory and regulatory requirements apply to respondents and petitioners. It is the respondent who has the responsibility for creating an accurate record, and may be subject to the application of adverse facts available to the extent the respondent fails to act to the best of its ability to create an accurate record. See e.g., NTN Bearing Corp. of America v. United States, 997 F.2d 1453, 1458 (Fed. Cir. 1993). Furthermore, petitioners were not introducing new factual information in its February 9, 2011, submission, nor unilaterally changing reporting methodologies for the respondents. They were only attempting to make sense of the multiple gaps and contradictions in Jisheng's filings. Moreover, the Department did not simply implement petitioners' suggested modifications, but constructed an FOP database from Jisheng's response using a different series of partial facts available based on its own analysis, some with and some without an adverse inference.

Petitioners argue that in Nippon Steel v. United States, the U.S. Court of Appeals for the Federal Circuit held that while Commerce may not draw an adverse inference merely from a failure to respond, it may draw an adverse inference in circumstances in which it is

> "reasonable for Commerce to expect that more forthcoming responses should have been made; i.e., under circumstances in which it is reasonable to conclude that less than full cooperation has been shown… {t}he statutory trigger for Commerce's consideration of an adverse inference is simply a failure to cooperate to the best of respondent's ability, regardless of motivation or intent."

See Nippon Steel v. United States, 337 F.3d 1373, 1383 (Fed. Cir. 2003). In determining whether Jisheng has acted to the best of its ability in responding to its requests for information, Commerce must assess whether Jisheng "has put forth its maximum efforts to provide Commerce with full and complete answers to all inquiries in an investigation." Id. at 1382. This standard "does not require perfection," but does not "condone inattentiveness, carelessness, or inadequate record keeping." Id. Petitioners argue that Jisheng's inability to provide complete and accurate FOP data bases was clearly the result of a not inconsiderable degree of inattentiveness and/or carelessness on its part.

Department's Position:

The Department received Jisheng's February 22, 2011, submission six calendar days prior to the due date of the Preliminary Results. Our decision not to use it in the Preliminary Results was neither "arbitrarily selective" (as Jisheng alleges) nor in violation of 5 U.S.C. § 706(2).[9] Rather, our decision not to use Jisheng's February 22, 2011, submission reflected only the pragmatic consideration that there was not enough time to analyze it and still meet the statutory deadline for the preliminary results of review.

Petitioners are correct that their February 9, 2011, submission did not constitute a submission of new information, and that Jisheng's February 22, 2011, submission did, pursuant to 19 CFR 351.301(b)(2). Nevertheless, because the Department did not return the new information to Jisheng prior to the due date for submission of case briefs, and Jisheng and petitioners relied on this submission in preparing their case and rebuttal briefs, we have determined that it would be unduly prejudicial to now reject the submission as untimely. Because the Department has the discretion to extend the time limits for filing factual information, we have determined that it is appropriate under these circumstances to retain Jisheng's February 22, 2011, submission on the record of this administrative review. See 19 CFR 351.301(d)(1). With the time that has lapsed since publication of the Preliminary Results, we have been able to analyze it.

The methodology Jisheng used in preparing the FOP data it submitted with its February 22, 2011, submission is partially at variance with the Department's normal methodology. Jisheng stated that it used, "an actual cost in the packing stage, and an average canning cost of the POR and the prior year." See Jisheng's February 22, 2011, submission at 4. From reviewing the worksheets Jisheng submitted, it is evident Jisheng meant "usage volume," rather than "cost" in this description.

[9] Furthermore, the Department finds that 5 U.S.C. § 706(2) applies to a reviewing court, not an administering authority.

With respect to Jisheng's reported canning methodology, the Department's normal methodology is to use usage volumes over the POR, and not over a two-year period as Jisheng has done. As Jisheng has not articulated any reason why deviating from that methodology is an improvement over the Department's standard methodology, we have not utilized the usage volume Jisheng reported in its February 22, 2011, submission with respect to canning. Furthermore, we note, as indicated above, that the CONNUMs for which Jisheng had previously reported no usage factors, and for which the Department used AFA in the Preliminary Results, are also not reported in Jisheng's February 22, 2011, submission.

Jisheng's reported packing methodology, however, is in accordance with the Department's standard methodology. However, as indicated above in Comment 8, only one of the three CONNUMs for which the Department used AFA for packing usage volumes in the preliminary results is included in Jisheng's February 22, 2011, submission. In these final results the Department has used those reported usage volumes for that CONNUM. As indicated above in Comment 8, for one of the other three CONNUMs Jisheng had no U.S. sales during the POR, and therefore the issue is moot with respect to that CONNUM. For one of the other three CONNUMs Jisheng reported no packing data. For this CONNUM the Department used AFA for packing usage in the final results, as it did in the preliminary results. We used the highest packing usage factors that Jisheng reported for any CONNUM. See Jisheng final results analysis memorandum for details.

Comment 10: Casing Soil Usage

Petitioners argue that for Blue Field and XITIC the Department should adjust its calculation of normal value to include a surrogate value for casing soil. Petitioner indicates that, in prior segments of the mushrooms proceeding, the Department had accounted for casing soil and in the current review the Department requested casing soil usage factors. Petitioners further argue that since Blue Field reported its consumption of casing soil in the production of subject merchandise the Department should use it for the purposes of the final results.

Petitioners further argue in regard to XITIC that the Department should apply partial AFA for casing soil. Petitioners point out that XITIC has failed repeatedly to provide information regarding its consumption of casing soil. Petitioners cite the Information and Decision Memorandum of the 2003/2004 administrative review of certain preserved mushrooms from the PRC, where the Department stated that soil constituted raw material, and was assigned a surrogate value. Therefore, the Department should apply partial AFA to XITIC and calculate XITIC's casing soil volume as 1/8 of the value of straw, manure, and fertilizer reported by XITIC. The 1/8 ratio is derived from approximate soil depth dimensions petitioner submitted for mushroom beds in its August 30, 2010, submission.

XITIC argues that the Department properly did not include an FOP for casing soil in the preliminary results. Specifically, XITIC notes that, in its July 13, 2010, submission, it reported that the only reported raw material input used in the production stage was spawn. They further argue that a minimal amount of soil was used, and that it was taken from the land surrounding the production facility, and therefore was not purchased. Therefore, under 19 CFR 351.413, the

Department was correct to disregard an insignificant adjustment. XITIC further argues that the Department's use of an imputed land rent factor of production already includes the value of the soil obtained from the land. XITIC also argues it did not fail to provide the information the Department requested as the petitioner claims.

Blue Field argues that the Department correctly declined to value Blue Field's use of soil. It argues that under 19 CFR 351.413 the Department is permitted to disregard insignificant adjustments. Blue Field further argues that the Department's use of imputed land rent factor of production includes the value of soil obtained from that land.

Department's Position:

We disagree with petitioners that the Department in prior reviews "has consistently valued casing soil consumption as a factor of production." In some prior reviews, as petitioners have noted, the Department has assigned a value to casing soil. Nevertheless, in more recent reviews the Department has not assigned a value to casing soil. See, e.g., Certain Preserved Mushrooms From the People's Republic of China: Final Results and Final Rescission in Part, of Antidumping Duty New Shipper Reviews, 76 FR 16604, (March 24, 2011); Certain Preserved Mushrooms From the People's Republic of China: Final Results of Antidumping Duty New Shipper Review, 74 FR 65520 (December 10, 2009); Certain Preserved Mushrooms from the People's Republic of China: Final Results of Antidumping Duty New Shipper Review, 73 FR 75083 (December 10, 2008). In these final results of review we have followed this more recent practice. There is evidence on the record that neither Blue Field nor XITIC purchase soil separately from the land rental. Evidence also indicates that in growing mushrooms Blue Field and XITIC use only the soil on the land they rent. See Blue Field's October 14, 2010, submission at 2 and XITIC's October 28, 2010, submission at 5. Therefore, because we have valued land rental as a separate adjustment, we determine we have fully accounted for the costs of all soil usage, and that to value soil as a separate input would constitute double counting. Therefore in these final results of review, as in the Preliminary Results, we have not assigned a value to casing soil.

Comment 11: Surrogate Value of Lime

XITIC argues that the Department should use a different surrogate value of lime (HTS 2836.50, "Calcium Carbonate") than the one used in the preliminary results (HTS 2522.20, "Slaked Lime") because the input used by XITIC in its production of subject merchandise is actually calcium carbonate. XITIC had initially reported in its July 12, 2010, response an FOP it labeled as simply "lime." However, XITIC states that in its November 22, 2010, surrogate value submission, where it suggested a surrogate value for the input, it listed the input as "lime," and put the term "calcium carbonate" in parentheses next to it. The company also provided the period-wide imports for HTS 2836.50, and calculated an adjusted average unit value for it. It further argues that in their March 28, 2011 submission, it supplied a Wikipedia.org entry for the term "lime," which provides a definition of agricultural lime as being calcium carbonate. Additionally, XITIC points out that Blue Field also reported a surrogate value of calcium carbonate, which the Department valued in the preliminary results using HTS 2836.50.

No other party commented on this issue.

Department's Position:

The Department disagrees with XITIC, because the information on the record does not support its argument. Attachment 1 of XITIC's March 28, 2011, submission is a printout of Wikipedia's definition of the term "lime," which included multiple definitions of the word lime including the fruit. However, the printout does not show any citations to any outside source to support the definition that XITIC is here arguing. Since XITIC's submission has no citations that the Department can use to trace the root definitions of the entries, the validity of the entries is in doubt and therefore unreliable and unusable to establish the propriety of selecting a particular surrogate value.

Furthermore, the responsibility is on the respondent to provide the Department with the most accurate information possible to ensure the Department is able to accurately calculate a normal value. In this instance, the term "lime" is generic, has multiple usages, and can be used to describe any treatment to soils with a calcium compound. The Department cannot rely on information that is ambiguous in meaning and could refer to numerous viable surrogate values for FOPs. Additionally, information on the record does not support XITIC's argument that the ambiguously worded FOP "lime" fits the definition of calcium carbonate, which lacks the term lime, better than slaked lime, which does include the term lime. If XITIC used calcium carbonate it should have specifically so stated in its questionnaire responses, as Blue Field did, and not leave it to a term that has multiple meanings. Therefore, in these final results of review we have continued to use HTS 2522.20 to value XITIC's reported lime input.

Comment 12: Surrogate Value of Steam Coal

XITIC argues that the Department should use a surrogate value from Coal India Limited (CIL) because XITIC reported the useful heat value (UHV) and the grade of its coal. XITIC further argues that, in Activated Carbon from China, the Department used data from CIL as a surrogate value instead of data from the Global Trade Atlas (GTA) when the respondent provided the grade and UHV. See Activated Carbon from China, Polyester Staple Fiber from China, Chlorinated Isocyanurates from China, 75 FR 70208 (November 17, 2010).

No other interested party commented on this issue.

Department's Position:

The Department agrees with XITIC that information from CIL should be used instead of less product-specific GTA data. Since XITIC provided the UHV and grade, we valued steam coal in these final results using information from CIL, as this is consistent with our practice of selecting a surrogate value which is product-specific to a particular input.

Comment 13: Surrogate Value of Mushroom Spawn

XITIC argues for the purpose of the final results, the Department should use a surrogate value for mushroom spawn derived from the annual reports of Agro Dutch (2004-2005) and Himalaya International (2007-2008), instead of GTA Indian import statistics. XITIC states that the GTA data include all types of mushroom spawn and are not specific to the white button mushroom spawn used by XITIC to produce the subject merchandise. XITIC further states the mushroom spawn values derived from Agro Dutch and Himalaya International relate to the cultivation of white button mushrooms, of which they are known producers. XITIC also points out that even though the Agro Dutch and Himalaya International annual reports are not contemporaneous to the POR, the Department used other non-contemporaneous surrogate values and inflated the value using the wholesale price index as published by the International Monetary Fund.

Petitioners argue the Department should reject XITIC's argument, and continue to use the GTA data. The petitioners state that the values proposed by XITIC are not contemporaneous and would be inferior relative to the tax-free, national value reflected by the Indian import statistics. Petitioners also state information submitted by XITIC undermines the quality and applicability of company-specific spawn prices because "the non-availability of quality spawn is a common problem of large mushroom growers." See XITIC's November 22, 2010, Surrogate Value Letter, Attachment 5 at 5. Petitioners argue that Flex Foods, Agro Dutch, and Himalaya International are among the largest mushrooms producers in India, and this problem would clearly affect these producers. Therefore, these companies' data for spawn do not reflect the high-quality spawn XITIC indicated affects mushroom yield.

Department's Position:

The Department agrees with the petitioners. It is the Department's policy to consider five factors when determining whether a potential surrogate value represents the best available information. Specifically, the Department prefers surrogate values which are: publicly available; product-specific; representative of broad market average prices; contemporaneous with the POR; and free of taxes and import duties. We find the surrogate values suggested by XITIC are not representative of broad market averages, free of taxes and import duties, or contemporaneous with the POR.

We further agree with the Petitioners regarding the common problem of the availability of quality spawn for large mushroom growers. Due to the size and nature of Flex Foods, Agro Dutch, and Himalaya, they would be affected by the shortage of quality spawn and would most likely have to use lower quality spawn. Such usage of lower quality spawn would not be reflective of the high quality spawn indicated by XITIC. Therefore, in these final results, as in the Preliminary Results, the Department valued mushroom spawn using GTA data.

Comment 14: Zeroing

XITIC argues that the Department should calculate its margin without the use of the "zeroing methodology," under which individual sales with a negative margin are assigned a margin of

zero in the weight-average calculation. XITIC cites the recent decision by the Federal Circuit, Dongbu Steel Co., Ltd. v. United States, ___Fed. Cir. 3d ___. Appeal No. 2010-1271 (Fed. Cir. March 31, 2011) in which the Federal Circuit rejected the Department's interpretation of 19 U.S.C. 1677(35)(A). XITIC also points out that the Department, in response to numerous decisions by the WTO Appellate Body, has proposed regulations that would terminate the practice of zeroing in administrative reviews. See Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings, 75 FR 81533 (December 28, 2010) (Proposed Calculation Methodology).

Petitioners argue the Department should continue to apply its long-established zeroing methodology to calculate antidumping margins in the final results. Petitioners state that the Department has considered, and consistently rejected, the arguments and general authorities presented in XITIC's case brief. They further argue that it is not the responsibility of the agency to interpret and apply the WTO agreements or decisions of its dispute settlement bodies. Under 19 U.S.C. 3533(g), WTO rulings will be adopted only after careful and deliberate evaluation by Congress and the affected agency. Therefore, any potential changes to regulations should not be applied in mere anticipation of such an action.

Department's Position:

We have not changed our calculation of the weighted-average dumping margin, as suggested by the XITIC, in these final results.

Section 771(35)(A) of the Act defines "dumping margin" as the "amount by which the normal value exceeds the {export price (EP)} or {constructed export price (CEP)} of the subject merchandise" (emphasis added). Outside the context of antidumping investigations involving average-to-average comparisons, the Department interprets this statutory definition to mean that a dumping margin exists only when NV is greater than EP or CEP. We disagree with the respondents that the Department's zeroing practice is an inappropriate interpretation of the Act. Because no dumping margins exist with respect to sales where NV is equal to or less than EP or CEP, the Department will not permit these non-dumped sales to offset the amount of dumping found with respect to other sales. The Federal Circuit has held that this is a reasonable interpretation of section 771(35) of the Act. See, e.g., The Timken Company v. United States v. Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A., and NTN Bearing Corporation of America, American NTN Bearing Manufacturing Corporation, NTN Bower Corporation, NTN Corporation, NSK Ltd., and NSK Corporation, 354 F.3d 1334, 1342 (Fed. Cir. 2004) (Timken); and Corus Staal BV and Corus Steel USA Inc., v. Department of Commerce and United States Steel Corporation and National Steel Corporation, Bethlehem Steel Corporation, Steel Dynamics, Inc., Ipsco Steel Inc., Gallatin Steel Company, and Nucor Corporation, 395 F.3d 1343, 1347-49 (Fed. Cir. 2005) (Corus I).

Section 771(35)(B) of the Act defines weighted-average dumping margin as "the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer." The Department applies this section by aggregating all individual dumping margins,

each of which is determined by the amount by which NV exceeds EP or CEP, and dividing this amount by the value of all sales. The use of the term "aggregate dumping margins" in section 771(35)(B) of the Act is consistent with the Department's interpretation of the singular "dumping margin" in section 771(35)(A) of the Act as applied on a comparison-specific level and not on an aggregate basis. At no stage of the process is the amount by which EP or CEP exceeds the NV permitted to offset or cancel the dumping margins found on other sales.

This does not mean that non-dumped transactions are disregarded in calculating the weighted-average dumping margin. It is important to note that the weighted-average margin will reflect any non-dumped transactions examined during the POR; the value of such sales is included in the denominator of the weighted-average dumping margin, while no dumping amount for non-dumped transactions is included in the numerator. Thus, a greater amount of non-dumped transactions results in a lower weighted-average margin.

The Federal Circuit explained in Timken that denial of offsets is a "reasonable statutory interpretation given that it legitimately combats the problem of masked dumping, wherein certain profitable sales serve to mask sales at less than fair value." See Timken, 354 F.3d at 1342. As reflected in that opinion, the issue of so-called masked dumping was part of the policy reason for interpreting the statute in the manner chosen by the Department. No U.S. court has required the Department to demonstrate "masked dumping" before it is entitled to invoke this interpretation of the statute and deny offsets to dumped sales. See, e.g., Timken, 354 F.3d at 1343; see also NSK Ltd. v. United States, 510 F.3d 1375, 1379-80 (Fed. Cir. 2007).

In 2007, the Department implemented a modification of its calculation of weighted-average dumping margins when using average-to-average comparisons in antidumping investigations. See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation, 71 FR 77722 (December 27, 2006) (Zeroing Notice). With this modification, the Department's interpretation of the statute with respect to non-dumped comparisons was changed within the limited context of investigations using average-to-average comparisons. Adoption of the modification pursuant to the procedure set forth in section 123(g) of the Uruguay Round Agreements Act was specifically limited to address adverse WTO findings made in the context of antidumping investigations using average-to-average comparisons. The Department's interpretation of the statute was unchanged in other contexts.

It is reasonable for the Department to interpret the same ambiguous language differently when using different comparison methodologies in different contexts. In particular, the use of the word "exceeds" in section 771(35)(A) of the Act can reasonably be interpreted in the context of an antidumping investigation to permit negative average-to-average comparison results to offset or reduce the amount of the aggregate dumping margins used in the numerator of the weighted-average dumping margin as defined in section 771(35)(B) of the Act. The average-to-average comparison methodology typically applied in antidumping duty investigations averages together high and low prices for directly comparable merchandise prior to making the comparison. This means that the determination of dumping necessarily is not made for individual sales, but rather at an "on average" level for the comparison. For this reason, the offsetting methodology adopted in the limited context of investigations using average-to-average comparisons is a reasonable

manner of aggregating the comparison results produced by this comparison method. Thus, with respect to how negative comparison results are to be regarded under section 771(35)(A) of the Act, and treated in the calculation of the weighted average dumping margin under section 771(35)(B) of the Act, it is reasonable for the Department to consider whether the comparison result in question is product of an average-to-average comparison or an average-to-transaction comparison.

In U.S. Steel, the Federal Circuit considered the reasonableness of the Department's interpretation not to apply zeroing in the context of investigations using average-to-average comparisons, while continuing to apply zeroing in the context of investigations using average-to-transaction comparisons pursuant to the provision at section 777A(d)(1)(B) of the Act.[10] Specifically, in U.S. Steel, the Federal Circuit was faced with the argument that, if zeroing was never applied in investigations, then the average-to-transaction comparison methodology would be redundant because it would yield the same result as the average-to-average comparison methodology. The Court acknowledged that the Department intended to continue to use zeroing in connection with the average-to-transaction comparison method in the context of those investigations where the facts suggest that masked dumping may be occurring. U.S. Steel at 1363. The Court then affirmed as reasonable Commerce's application of its modified average-to-average comparison methodology in investigations in light of Commerce's stated intent to continue zeroing in other contexts. Id.

In addition, the Federal Circuit recently upheld, as a reasonable interpretation of ambiguous statutory language, the Department's continued application of "zeroing" in the context of an administrative review completed after the implementation of the Zeroing Notice. See SKF USA INC., SKF France S.A., SKF Aerospace France S.A.S., SKF GmbH, and SKF Industrie S.p.A., v. United States, and Timken U.S. Corporation, 630 F.3d 1365 (Fed. Cir. 2011) (SKF). In that case, the Department had explained that the changed interpretation of the ambiguous statutory language was limited to the context of investigations using average-to-average comparisons and was made pursuant to statutory authority for implementing an adverse WTO report. We find that our determination in this administrative review is consistent with the Federal Circuit's recent decision in SKF.

Furthermore, in Corus I, the Federal Circuit acknowledged the difference between antidumping duty investigations and administrative reviews, and held that section 771(35) of the Act was just as ambiguous with respect to both proceedings, such that the Department was permitted, but not required, to use zeroing in antidumping duty investigations. See Corus I, 395 F. 3d at 1347. That is, the Court explained that the holding in Timken – that zeroing is neither required nor precluded in administrative reviews – applies to antidumping duty investigations as well. Thus, Corus I does not preclude the use of zeroing in one context and not the other.

We disagree with XITIC's argument that the Federal Circuit's recent decision in Dongbu requires the Department to change its methodology in this administrative review. The holding of Dongbu, and the recent decision in JTEKT Corporation v. US, 2010-1516, -1518 (Fed. Cir. June

[10] See U.S. Steel Corp., v. United States., 621 F.3d 1351 (Fed. Cir. 2010).

29, 2011) (JTEKT), was limited to finding that the Department had not adequately explained the different interpretations of section 771(35) of the Act in the context of investigations versus administrative reviews, but the Federal Circuit did not hold that these differing interpretations were contrary to law. Importantly, the panels in neither Dongbu nor JTEKT overturned prior Federal Circuit decisions affirming zeroing in administrative reviews, including SKF, which we discuss above, in which the Court affirmed zeroing in administrative reviews notwithstanding the Department's determination to no longer use zeroing in certain investigations. Unlike the determinations examined in Dongbu and JTEKT, the Department here is providing additional explanation for its changed interpretation of the statute subsequent to the Final Modification for Antidumping Investigations – whereby we interpret section 771(35) of the Act differently for certain investigations (when using average-to-average comparisons) and administrative reviews. See, i.e., Zeroing Notice, 71 FR at 77722; and Antidumping Proceedings: Calculation of the Weighted – Average Dumping Margin During an Antidumping Investigation; Change in Effective Date of Final Modification, 72 FR 3783 (Jun. 26, 2007) (collectively, Final Modification for Antidumping Investigations). For all these reasons, we find that our determination is consistent with the holdings in Dongbu, JTEKT, U.S. Steel, and SKF.

Regarding XITIC's general reference to "numerous decisions of the WTO Appellate Body," finding the denial of offsets by the United States to be inconsistent with the Antidumping Agreement, we note that the Federal Circuit has held that WTO reports are without effect under U.S. law, "unless and until such a {report} has been adopted pursuant to the specified statutory scheme" established in the URAA. See Corus I, 395 F.3d at 1347-49; accord Corus Staal BV v. United States and United States Steel Corporation, 502 F.3d 1370, 1375 (Fed. Cir. 2007) (Corus II); and NSK, 510 F.3d 1375. As is clear from the discretionary nature of this scheme, Congress did not intend for WTO reports to automatically trump the exercise of the Department's discretion in applying the statute. See 19 U.S.C. 3538(b)(4) (implementation of WTO reports is discretionary). Moreover, as part of the URAA process, Congress has provided a procedure through which the Department may change a regulation or practice in response to WTO reports. See 19 U.S.C. 3533(g); and Zeroing Notice, 71 FR at 77722.

Finally, with respect to XITIC's argument that we should adopt the Proposed Calculation Methodology in this review, we disagree that there is a basis for changing the Department's approach of calculating weighted-average dumping margins in the instant administrative review. Proposed regulations by their very nature are not binding on an agency. See Viraj Forgings Ltd., v. United States, 206 F. Supp. 2d 1288, 1293 (CIT 2002) (rejecting plaintiff's reliance on a proposed rule as basis for receiving a zero margin). The Proposed Calculation Methodology is only a proposal that remains subject to review of comments from the public and statutory consultation requirements involving Congressional committees, among others. See section 123(g)(1) of the URAA. It does not provide legal rights or expectations for parties in this administrative review. The Proposed Calculation Methodology further makes clear that, in terms of timing, any changes in methodology will be prospective only, and "will be applicable in . . . all {administrative} reviews pending before the Department for which a preliminary result is issued more than 60 business days after the date of publication of the Department's Final Rule and Final Modification." Proposed Calculation Methodology, 75 FR at 82535. Additionally, the Proposed Calculation Methodology would not apply to the present administrative review because normally, "{a} final rule or other modification . . . may not go into effect before the end of the

60-day period beginning on the date which consultations {between the Trade Representative, heads of the relevant departments or agencies, and appropriate Congressional committees}. . . begin." See Section 123(g)(2) of the URAA. Because the final results in this administrative review will be completed prior to the effective date of the final rule, any change in the treatment of non-dumped sales pursuant to the Proposed Calculation Methodology (if implemented) would not apply to this review.

Accordingly, and consistent with the Department's interpretation of the Act described above, in the event that any of the export transactions examined in this review are found to exceed NV, the amount by which the price exceeds NV will not offset the dumping found in respect of other transactions.

Comment 15: Error of Normal Value Calculation by Different Unit of Measurements

Blue Field argues the Department did not make a necessary adjustment on the unit of measurements for factor input and export price, which are different in Blue Field's FOP and sales databases, in its preliminary results. Blue Field points out that it reported its FOP database on a one-can or a one-jar basis, and its gross prices on a per-kilogram basis. Blue Field states that the correct calculation for cost of manufacturing should be first allocating each consumption rate over the unit drained weight of each can or jar of specific product to derive the input consumption per kilogram of finished goods, and then multiplying such ratios with the selected surrogate value to derive the normal value per kilogram of finished goods.

Petitioners concur with Blue Field.

Department's Position:

The Department agrees with Blue Field and petitioners, and has adjusted the calculation accordingly.

Comment 16: Calculating Cost of Metal Lid

Blue Field argues that the Department should not calculate the cost of metal lid for tin can products. Blue Field states that tin cans are made using tinplate sheets and are not purchased separately. The company further states that in its October 14, 2010, submission it stated "the metal lids are only for sealing the glass jars."

Blue Field also stated that the calculation error including the factor of lids for all products occurs because of its US sales database. Blue Field claims it inadvertently listed the input of metal lids as a part of packing material in those line items that are tin can products in its sales listing. The company further claims it put sufficient information on the administrative record that it does not need did not consume any metal lids for its tin canned products.

Petitioners argue that the Department should continue use the factor "LID" for all products as reported by Blue Field's database, but as an element of direct materials (DIRMAT). However,

the petitioners state that if the Department determines "LID" should only be applied to glass jars it should still be required as part of DIRMAT for glass jars.

Department's Position:

The Department agrees with the petitioner that "LID" should be part of DIRMAT for glass jars and has adjusted the program accordingly. The Department also agrees with Blue Field that lids should not be included in the calculation of tin cans. This determination is supported by the statement Blue Field made in its October 14, 2010, submission that "the metal lids are only for sealing the glass jars." We have revised the programming accordingly.

Comment 17: Calculation of Land Rent

Blue Field argues that it misreported the amount of land leased for its mushroom growing production by reporting the figure on the leasing agreement, instead of the area just used for cultivation. The company argues that the error is obvious when compared to the reported value by XITIC. Blue Field argues that it and XITIC have adopted a similar mushroom growing process as evident by information on the administrative record. Blue Field suggests the Department should exercise administrative discretion to adjust land lease area by either using the actual area of the leased mushroom sheds as utilized or the land value ratio reported by the other respondents who have adopted a similar mushroom growing process.

Blue Field alternatively suggests the Department could easily correct the error by using information placed on the record. Blue Field states that the mushroom growing handbook provides that the production capacity is about 3800-4600 kilograms of fresh mushrooms per square meter and the compost fee ratio for growing mushroom is 40 kilograms for each 400 square meters of mushroom growing shed. Therefore, the Department could derive the average cultivated area using the land ratios that were previously listed.

Petitioner argues that the data reported by Blue Field cannot constitute an error on the part of the Department. Therefore, the Department should reject its claim and continue to rely on the information reported by Blue Field.

Blue Field also argues that the Department made a calculation error in the land rent. The error stems from dividing the total cultivated area by the total produced mushrooms. Blue Field says that number listed on page 2 of the Preliminary Analysis Memo for Blue Field should be revised to reflect the proper quotient from the numbers they provided.

Department's Position:

Regarding the misreported figures, the Department agrees with the petitioner. It is the responsibility of respondents to provide the most accurate information possible that is free from errors.

Regarding the calculation error alleged by Blue Field, the error Blue Field points to on page 2 of the preliminary results analysis memorandum was merely a typographical error in the Department's narrative description of the computations. In the actual computer calculations we used the correct figure. See Exhibit 1 of the Blue Field Preliminary Results Analysis

Memorandum and Exhibit 1 of the Blue Field Final Results Analysis Memorandum. Therefore, no changes were necessary to the programming for these final results.

Recommendation

Based on our analysis of the comments received, we recommend adopting the above positions. If these recommendations are accepted, we will publish the final results of review and the final margin in the Federal Register.

Agree _____ Disagree _____

_____
Ronald K. Lorentzen
Deputy Assistant Secretary
for Import Administration

_____
Date