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November 8, 2011

MEMORANDUM TO: Paul Piquado
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 of the Administrative Review of Chlorinated Isocyanurates from the People's Republic of China

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SUMMARY:

We have analyzed the case and rebuttal briefs of interested parties in the antidumping duty administrative review of chlorinated isocyanurates (chlorinated isos) from the People's Republic of China (PRC). The period of review (POR) is June 1, 2009, through May 31, 2010. As a result of our analysis, we have made changes, including corrections of certain inadvertent programming and ministerial errors, in the margin calculation. We recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum. Below is the complete list of the issues for which we received comments and rebuttal comments by the parties.

Comment 1: Respondent Selection
Comment 2: Kangtai's New Shipper Review Rate is not Representative of its Current Behavior
Comment 3: Jiheng's Prior Administrative Review Rate is not Representative of the Current Behavior of Arch China and Zhucheng
Comment 4: Exclusion of De Minimis Rates from Consideration as Separate Rates for Non-Reviewed Companies
Comment 5: Use of Multiple Separate Rates
Comment 6: Calculation of Entered Value
Comment 7: Calculation of Inland Freight
Comment 8: Per-Unit Assessment Rate in Draft Liquidation Instructions
Comment 9: Zeroing Methodology in Reviews
Comment 10: Kangtai's New Factual Submission Should Not Have Been Rejected

BACKGROUND:

On July 11, 2011, the Department of Commerce (Department) published its preliminary results of review of the antidumping duty order on chlorinated isos from the PRC.[1] The Department notified parties that it had clarified its separate rate methodology for non-reviewed companies on August 30, 2011.[2] We stated it is our policy to use the average of the most contemporaneous positive antidumping margins as the separate rate applied to non-reviewed cooperative respondents. In the Separate Rate Memorandum, we also notified parties of the rates we intended to apply in the final results, based on the clarified methodology, to the three non-reviewed, cooperative respondents in this review: Arch Chemicals (China) Co., Ltd. (Arch China), Juancheng Kangtai Chemical Co., Ltd. (Kangtai), and Zhucheng Taisheng Chemical Co., Ltd. (Zhucheng). We stated we intended to apply the rate of 2.66 percent to Arch China and Zhucheng, and the rate of 20.54 percent to Kangtai. The rate of 2.66 percent is the rate calculated in the most recently completed administrative review for Hebei Jiheng Chemical Company Ltd. (Jiheng), the sole mandatory respondent in that review as well as in the current review. The rate of 20.54 percent is Kangtai's own rate from its new shipper review (NSR), completed in 2009. In the Separate Rate Memorandum, we concluded it was appropriate to apply Kangtai's NSR rate as its separate rate because the POR for its NSR overlapped with the POR for the most recently completed administrative review, and thus was a contemporaneous rate. On September 9, 2011, the Department received case briefs from Jiheng, Kangtai, Zhucheng, and Clearon Corporation and Occidental Chemical Corporation (Petitioners). Kangtai also submitted new factual information on September 9, 2011,[3] which the Department rejected as untimely on September 16, 2011.[4] On September 19, 2011, the Department received rebuttal briefs from Arch China, Kangtai, Zhucheng, and Petitioners.

DISCUSSION OF THE ISSUES:

Comment 1: Respondent Selection

Kangtai's Arguments

- Under recent court decisions the Department is legally obligated to review more than one company, regardless of the Department's resources and workload.[5]
- In light of these court decisions, the Department should reverse its decision not to review Kangtai as a mandatory respondent.
- In the alternative, Kangtai requests to be selected as a voluntary respondent, noting it

[1] See Chlorinated Isocyanurates from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review, 76 FR 40689 (July 11, 2011) (Preliminary Results).

[2] See Memorandum to Barbara E. Tillman, Director, AD/CVD Operations, Office 6, "Rate for Non-Selected Companies," dated August 30, 2011 (Separate Rate Memorandum).

[3] See Letter from Juancheng Kangtai Chemical Co., Ltd., "Certain Chlorinated Isocyanurates from the People's Republic of China Rebuttal of New Facts by Juancheng Kangtai," dated September 9, 2011 (Kangtai New Facts Submission).

[4] See Letter to Juancheng Kangtai Chemical Co., Ltd. from Mark Hoadley, Program Manager, Office 6, "2009-2010 Administrative Review of the Antidumping Duty Order on Chlorinated Isocyanurates from the People's Republic of China," dated September 16, 2011 (New Facts Rejection Letter).

[5] Citing Zhejiang Native Produce & Animal By-Products Import & Export Corp. v. United States, 637 F. Supp. 2d 1260, 1262-1264 (CIT 2009) (Zhejiang) and Carpenter Tech. Corp. v. United States, 662 F. Supp. 2d 1337, 1342 (CIT 2009) (Carpenter).

submitted complete questionnaire responses in accordance with the deadlines the Department established for Jiheng, the sole mandatory respondent chosen in this review.

Petitioners' Arguments

- Petitioners agree with Kangtai that based on recent court decisions the Department is required to review more than one mandatory respondent; they claim that, barring unusual circumstances, there has been only one other instance in the past four years where the Department reviewed just one respondent when reviews were requested for more than two respondents.
- The Department's practice of not relying on unsubstantiated voluntary data submissions is appropriate. Citing a 2008 investigation, Petitioners argue that under section 782(i) of the Tariff Act of 1930, as amended (the Act), the Department is required to verify all data on which it relies in making a final determination.
- The data submitted by Kangtai has not been verified nor subject to any degree of scrutiny, and should therefore not be used to calculate an individual dumping margin in accordance with the Department's practice and precedents.

Department's Position: At the outset of the current review (2009-2010), the Department considered the court decisions cited by Kangtai in the Respondent Selection Memorandum and determined it was still appropriate to take administrative resources into consideration in choosing respondents.[6] Reviewing a company individually requires a thorough examination of transaction-specific sales data and all factors of production for each product sold to the United States. Given that the products exported by each respondent may be produced by one or more separate firms, the examination of sales data and factors of production potentially requires analyzing several different companies per each respondent selected and, therefore, several sets of financial records and other pertinent information. Supplemental questionnaires must be issued that are specific to each company examined, including both the exporter respondent and all associated producers (if separate). Likewise, onsite verifications, if necessary, must be conducted at the sales and production facilities of each company examined, including both the exporter respondent and all associated producers. Without adequate resources, the Department would have to reduce the depth of its analysis, which could result in a reduction of the number of supplemental questionnaires issued, extensions granted, and non-mandatory verifications conducted. Such reductions could result in the Department's inability to calculate sufficiently accurate dumping margins. In this case, in particular, it was necessary to employ an entirely new wage rate analysis, issue two rounds of supplemental questionnaires, find surrogate values for hydrogen and chlorine, which are not traded at significant volumes internationally and thus are more difficult to value, and obtain suitable financial statements to use as sources of surrogate values for overhead, general and administrative expenses, and profit. All of this new information had to be placed on the record for comment, and the comments then had to be analyzed.

In addition, we note that the cases cited by Kangtai and Petitioners, Zhejiang and Carpenter, were both dismissed after remand, thus judgment was not entered in those cases. More

[6] See Memorandum to Wendy Frankel, Director, Office 8, AD/CVD Operations, Import Administration, "Administrative Review of the 2009-2010 Antidumping Duty Order on Chlorinated Isocyanurates from the People's Republic of China: Respondent Selection," dated August 31, 2010 (Respondent Selection Memorandum) at 4.

importantly, in Carpenter, although we determined on remand to choose two of the remaining six companies to comply with the U.S. Court of International Trade's (CIT) directive, the Department devoted eight pages of its remand to maintaining its position that "it is reasonable for the Department to define 'large' with reference to its resources," in contrast to the CIT's reasoning in Zhejiang and Carpenter. Because the case was dismissed, the CIT did not address these new arguments. We also noted in our remand redetermination that "it would be unreasonable to select four companies to respond when the workload is such that only two companies can be adequately analyzed. The Department would be required to find the time to examine four, with the same resources, by reducing the depth of its analysis, which could result in reducing the number of supplemental questionnaires it issues, the extensions it can grant, and the non-mandatory verifications it conducts." We concluded by devoting several pages to explaining various constraints on the Department's resources. Thus, despite the two rulings cited by parties, the Department continues to take resources into consideration in this and other reviews. Therefore, given the resource restraints discussed in the Respondent Selection Memorandum, we believe we properly limited this review to Jiheng, and have reviewed no additional respondents for these final results.

Given our analysis of the number of respondents we can reasonably review under the circumstances in this case, we cannot review Kangtai as a voluntary respondent; therefore there is no issue concerning the use of Kangtai's non-verified data.

Comment 2: Kangtai's New Shipper Review Rate is not Representative of its Current Behavior

Kangtai's Arguments

- Kangtai was incorrectly assigned its NSR rate as its separate rate in the Preliminary Results, and should be assigned Jiheng's de minimis rate from the current review, or Jiheng's rate of 2.66 percent from the prior review (2008-2009), instead.
- In calculating the NSR rate, the Department used a financial statement from an Indian company, which, after the NSR was completed, was found to have received a countervailable subsidy, and the financial statement was therefore disregarded in subsequent reviews. The NSR rate is therefore no longer reliable or relevant.
- Kangtai's NSR was based on one sale occurring between June and November 2008, while Jiheng's 2008-2009 review was based on sales that occurred between June 2008 and May 2009, making Jiheng a better proxy for sales activities within the current review.

Petitioners' Arguments

- The Department's preliminary rate selection for Kangtai is a contemporaneous rate reflecting Kangtai's actual behavior, better capturing its probable dumping in the current review.
- Kangtai had the opportunity to appeal the NSR results, but never chose to do so, and should not be given the opportunity to do so now. The issue of rejecting the financial statements in question is still under judicial review, and thus it would be imprudent for the Department to revisit this issue as it relates to Kangtai now.
- Kangtai's request to re-open a completed review would go against a fundamental principle, which was established in a recent review of orange juice from Brazil, that once a review is complete, the results are final. Opening completed segments based

on issues raised in subsequent proceedings would eliminate the finality of reviews, and the Department's proceedings would become uncontrollable.

Department's Position: As noted above, on August 30, 2011, the Department issued a memorandum clarifying the methodology used to select rates for non-reviewed companies when the mandatory respondent receives a de minimis rate.[7] As part of its clarification, the Department noted that "if any such non-selected company had its own calculated rate that is contemporaneous with or more recent than such prior determined rates, the Department has applied such individual rate to the non-selected company in the review in question."[8] The Department found that Kangtai's NSR was contemporaneous, and thus assigned Kangtai its NSR rate as its separate rate for the current review.

We agree that we should not apply Kangtai's own new shipper rate of 20.54 percent as its separate rate for these final results. As Kangtai claims, the Department concluded in the previous administrative review for 2008-2009 that the financial statement used to calculate surrogate financial ratios for Kangtai, which Petitioners argued we should use again for the 2008-2009 administrative review, should not be used because the Department found they indicated that the company received countervailable subsidies potentially distorting the financial ratios. In addition, there were other usable financial statements on the record without indication that countervailable subsidies were received.[9] We noted that the financial statement, which was for Indian chemical producer Aditya Birla Chemicals (India) Ltd. (Aditya), indicated Aditya had received benefits under subsidy programs previously countervailed by the Department. Thus, we concluded the Aditya financial statement should be excluded from our calculations. Therefore, given the Department's finding regarding a critical element of the NSR, we conclude that the rate from that NSR is not the most appropriate rate to use as a separate rate for Kangtai. Therefore, we are applying Jiheng's rate from the prior administrative review, 2.66 percent, as Kangtai's separate rate for these final results. This is the same rate being applied to Arch China and Zhucheng for the reasons stated in the Separate Rate Memorandum and in response to the comments below.

We do not agree with Petitioners that rejecting the NSR rate is inadmissible under the principle of administrative finality. We are not reopening our decision in the NSR and we are not reversing any actions we took as a consequence of the final results of that review (e.g., instructions to U.S. Customs and Border Protection (CBP)). No party sued on the final results of the NSR. Therefore, the NSR decision is final. Instead, we are recognizing, solely within the context of this current administrative review, an aspect of the NSR rate that indicates it is not the most appropriate rate for separate rate respondents. Likewise, we disagree that Kangtai lost its right to object to the use of the NSR rate in this administrative review because of its decision not to pursue litigation after the NSR. These are two separate decisions based on two separate records that result in two separate actions by the Department. Kangtai's right to object to decisions in this review has nothing to do with the remedies it did or did not pursue in the NSR.

[7] See Separate Rate Memorandum.
[8] See id.
[9] Chlorinated Isocyanurates From the People's Republic of China: Final Results of 2008-2009 Antidumping Duty Administrative Review, 75 FR 70212 (November 17, 2010) (2008-2009 Final Results) and accompanying Issues and Decision Memorandum at Comment 3.

While Petitioner is correct that Kangtai might still have had a positive margin in the NSR even if the Aditya financial statement had not been used, the fact is that the NSR rate is rendered an inadequate proxy for a separate rate in this review because of the use of that financial statement. Finally, we do not believe it is relevant that the decision to exclude the financial statement is currently under litigation. The litigation is pursuant to Petitioners' objection to the exclusion of the financial statement. The Department continues to maintain in that ongoing litigation that the financial statement was properly excluded. Pursuant to the statute, the Department's determinations govern unless and until overturned by the courts. No court has yet overturned the Department's finding that the financial statement at issue provides inappropriate proxies for financial ratios for the non-market economy (NME) normal value (NV) calculation. Furthermore, while the Department may change its findings from one review to the next based on new facts, new law or new interpretations of the law, no new arguments or facts have been placed on the record of this review which have convinced the Department to change its finding regarding the Aditya financial statement.

Comment 3: Jiheng's Prior Administrative Review Rate is not Representative of the Current Behavior of Arch China and Zhucheng

Petitioners' Arguments

- The Department should consider other rates on the record as separate rates for Zhucheng and Arch China that would more reasonably reflect the potential dumping margins for Zhucheng and Arch China.
- Jiheng's rate from the previous administrative review is not reflective of the potential dumping margins for these two non-reviewed respondent's because:
    - Unlike Jiheng, Zhucheng and Arch China are not fully integrated producers of chlorinated isos (past segments demonstrate a strong correlation between greater levels of integration and lower antidumping margins);
    - Zhucheng and Arch China have vastly different experiences in the U.S. market and with U.S. customers than does Jiheng;
    - Jiheng's participation in all previous segments of this order make it a very experienced respondent that has adopted practices allowing it to minimize its potential antidumping duty liabilities.
- The Department should select as a separate rate for Zhucheng and Arch China either Kangtai's NSR rate or an average of the rates calculated in previous segments of this order, which would reflect a variety of production integration levels and sales patterns.

Arch China's Arguments

- Arch China only exported merchandise produced by Jiheng. Therefore, Petitioners' concern regarding Jiheng's level of integration is inapplicable to Arch China.

Zhucheng's Arguments

- Since nothing on the record indicates Zhucheng's level of integration, or implies that different experiences in the U.S. market have a substantial impact on potential margins, assigning a rate based on Kangtai's NSR data (which Petitioners agree has never been verified) is not reasonable.
- Numerous NSRs, whose respondents have not previously participated in an

antidumping proceeding, receive de minimis rates upon review, demonstrating that new shippers are capable of adopting pricing policies that result in de minimis rates just as experienced respondents.

- Petitioners' suggestions for separate rates all involve information from prior reviews, and thus are not reflective of dumping activity in the current review period.

Kangtai's Arguments

- Petitioners' references to production methods and sales patterns are irrelevant; financial ratios are the prime factor effecting rates.
- Given the importance of financial ratios to the margin, the fact that the NSR relied on a financial statement later discredited outweighs any relevance to be found in production methods and sales patterns in selecting a separate rate.
- Market participation by mandatory respondents will always be more significant than that of separate rate respondents because mandatory respondents are selected based on their high volume of exports; yet the Act clearly contemplates basing "all others" rates on the margins of mandatory respondents.
- If Petitioners are correct that experienced respondents are likely to obtain zero or de minimis margins by adapting their behavior, then it is reasonable to assume Kangtai's actual dumping during the POR would also reflect such modified behavior, given that the preliminary results of its NSR were issued before the beginning of this review period.

Department's Position: The Department will continue to assign Jiheng's previous review rate to Arch China and Zhucheng as their separate rate. In addition, as noted above, we are also assigning this same rate to Kangtai. Therefore, because we are not using Kangtai's NSR rate, issues concerning the NSR rate's reliability are moot. While Petitioners are correct that Jiheng has enjoyed lower margins in the past than other respondents, it would be a leap in logic to assume that the reason is because Jiheng's production process is fully integrated or because of its longer, high volume sales experience in the United States. It could simply be the result of Jiheng not undertaking the same strategic pricing decisions that were made by the other companies that have been chosen as respondents over the course of this order. Moreover, it requires another unwarranted conclusion to determine that the facts Petitioners rely on regarding Arch China, Kangtai, and Zhucheng, which are from prior segments, were still true during the POR. We have no information on the record of this review regarding the production processes of Arch China and Zhucheng, and only the unexamined and unverified voluntary responses of Kangtai. It is possible that all three of these respondents may have changed their production processes and sales patterns since the previous segments and that now they have production processes and sales patterns similar to that of Jiheng; therefore the record of this review does not support a finding of significant differences in production processes to justify different treatment of the non-selected cooperating respondents.

Likewise, while Jiheng, aided by its experience in antidumping proceedings, may have adapted its pricing policies to obtain zero and de minimis margins, Petitioners have provided no reason to assume that the non-reviewed separate rate companies could not also have adapted their pricing policies to some extent. The Department simply does not know how many years of experience shipping under an antidumping order are needed before prices can be adapted to NV; perhaps for some companies in some industries adaptation might take years, and for other companies in other

industries adaptation might happen right away. What we do know is that nearly all segments of this proceeding demonstrate a history of some positive dumping. Jiheng's prior rate represents the latest indication of such positive dumping activity, and is thus a reasonable estimate of the dumping undertaken by the three separate rate respondents.

Even if Petitioners had successfully demonstrated Jiheng's prior review rate is, in some respects, irrelevant to the other three respondents, they have not demonstrated why the defects with using Jiheng's rate are more serious than the defects involved in using their proposed alternatives. As one example, Kangtai is correct in noting that the financial statement relied on by the Department in its NSR is no longer used for surrogate financial ratios. As another example, the rates calculated in older segments of the order are less contemporaneous with the current POR than the prior POR, and are thus less likely to reflect current levels of dumping.

Finally, we agree with Kangtai's response to Petitioners' argument that Jiheng's longer, high volume sales experience makes it a poor proxy for the dumping behavior of other respondents. The Act provides at section 777A(c)(2)(B) that the Department will limit its examination of respondents to exporters and producers accounting for the largest volume of the subject merchandise, when it is not possible to examine all exporters and producers individually. Since the largest exporters and producers are likely also to be the exporters and producers with the most significant sales experience, the Act's requirement that we select the largest exporters and producers (when respondent selection is necessary) suggests that the Act contemplates that those companies with a larger sales experience make a reasonable proxy for "all others," and thus, by analogy, also for separate rate companies.

Given that we disagree with Petitioners' argument that Jiheng's rate from the prior review of 2.66 percent is not an appropriate separate rate for the three non-reviewed respondents, it is not necessary to address their rebuttal comments on this issue.

Comment 4: Exclusion of De Minimis Rates from Consideration as Separate Rates for Non-Reviewed Companies

Kangtai's Arguments

- Past cases demonstrate that excluding de minimis margins from the separate rate options for non-reviewed companies is not an established practice,[10] and the CIT has ruled that the Department cannot "categorically exclude" zero and de minimis rates as a reasonable method for "determining rates for companies not individually investigated."[11]
- Its voluntary questionnaire response supports the conclusion that a de minimis rate would be appropriate as its separate rate.

Zhucheng's Arguments

- Mandatory respondents are presumed to be representative of all respondents and the

[10] Citing Brake Rotors From the People's Republic of China: Final Results of 2006-2007 Administrative and New Shipper Reviews and Partial Rescission of 2006-2007 Administrative Review, 73 FR 32678 (June 10, 2008) and accompanying Issues and Decision Memorandum at Comment 1 (Brake Rotors).

[11] Citing Amanda Foods (Vietnam) Ltd. v. United States, Slip Op. 2011-39, 2011 Ct. Intl. Trade LEXIS 37 at 12 (CIT Apr. 14, 2011) (Amanda Foods).

Department needs to reference substantial evidence on the record when it chooses to ignore the zero or de minimis margin of a mandatory respondent.

- Amanda Foods and Brake Rotors require that the Department assign the average of the zero and de minimis rates calculated for individually reviewed mandatory respondents to cooperative separate rate respondents.

Petitioners' Arguments

- The underlying facts in this review are clearly different from those facing the CIT in the Amanda Foods decision in several ways:
  - The Department has not published a final rate of zero or de minimis over the course of this order, indicating that the chlorinated isos industry has not changed its pricing behavior under the dumping order.
  - There are several above de minimis rates for the Department to choose from in selecting separate rates, including rates determined after the order went into effect and dumping behavior possibly changed as a result.
- Brake Rotors also does not apply because no record evidence indicates that the chlorinated isos industry is "homogenous," an essential finding regarding the industry in Brake Rotors.

Department's Position: The Department continues to find that section 735(c)(5)(B) of the Act, which addresses the calculation of all others rates, should be used as guidance when determining separate rates in reviews of NME orders. The Department's general practice is to assign to eligible separate rate companies an average of the most recently calculated rates on the record, excluding zero and de minimis rates, and rates calculated entirely on an adverse facts available basis. The conditions laid out in the cases cited by Kangtai and Zhucheng, both involving remands in which the Department was instructed to depart from its standard practice, are not present in the instant case. Thus there is no basis for a departure from our standard practice in this review.

In Amanda Foods, the Department assigned de minimis rates to the eligible separate rate companies only after determining that they had pricing patterns similar to those of the mandatory respondents that had received the de minimis rates:

> … because the Q&V data indicated that the count-size specific U.S. sales of the separate rate respondents were in line with the mandatory respondents' count-size specific weighted-average normal values, the Department inferred that the separate rate companies' pricing behavior was not out of line with the behavior of the mandatory respondents, who were found not to be dumping.[12]

Moreover, in Amanda Foods, all calculated rates since the investigation were zero or de minimis. Since all calculated rates since the investigation were zero or de minimis, the CIT was concerned that the Department was not assigning a rate based on the most relevant and reliable information. The Department re-opened the record and, after issuing a questionnaire, determined that the pricing behavior of the industry had changed since imposition of the order, such that the industry was no longer dumping and assigning the "all-others rate" to the separate rate respondents was

[12] See Amanda Foods at 11.

no longer appropriate. After reaching these determinations, the Department assigned the mandatory respondents' de minimis rate to the separate rate companies. By contrast, this review was the first time the Department calculated a zero or de minimis rate for any mandatory respondent (excluding preliminary rates). The rates calculated over the history of this order indicate that dumping has continued to occur since the order was established. Specifically, the rates calculated in every review since the imposition of the order are 20.10, 0.90, 54.86, 20.16, 20.54, and 2.66 percent.[13]

In addition, in Amanda Foods the CIT was concerned that the Department was using a rate from the investigation, reflecting sales that occurred before the antidumping duty order was in effect and, thus, before respondents had possibly changed their behavior as a result. By contrast, the rate we have selected for all three separate rates companies (2.66 percent) is from the prior review, not the investigation. Thus we are selecting a rate that was established more than three years after the antidumping order was put in place.

Brake Rotors likewise is not relevant. In Brake Rotors, the Department argued that a reasonable method to determine separate rates must be made on a case-by-case basis, and that

> …we believe {respondents} to be fairly homogenous and the history of this case shows that until the 8th Administrative Review (where we began limiting the selection of companies reviewed), the preponderance of margins calculated were zero or de minimis. For this reason, we believe that it is appropriate, based on the above rationale (homogeneity of the industry and history of margins), to assign these non-selected respondents that are eligible for a separate rate a margin based on the weighted average of the two rates calculated for the two mandatory respondents (i.e., zero and de minimis).[14]

There is no evidence on the record of this review to allow the Department to determine if the chlorinated isos industry in the PRC is homogenous.[15] (Indeed, the only statement or information we have about the homogeneity/heterogeneity of the industry is Petitioners' unsupported claim that vast differences in margins result from the different integration levels of the respondents, as discussed and rejected by the Department in our response to Comment 3 above.) Even if the Department were to somehow determine the degree of homogeneity of the chlorinated isos industry in the PRC, most of the margins in this order are decidedly well above zero or de minimis.

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[13] See Amended Final Results of Antidumping Duty Administrative Review: Chlorinated Isocyanurates from the People's Republic of China, 73 FR 9091 (February 19, 2008); Amended Final Results of Antidumping Duty Administrative Review: Chlorinated Isocyanurates from the People's Republic of China, 73 FR 62249 (October 20, 2008); Chlorinated Isocyanurates from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 74 FR 66087 (December 14, 2009); Chlorinated Isocyanurates From the People's Republic of China: Final Results of June 2008 Through November 2008 Semi-Annual New Shipper Review, 74 FR 68575, 68576 (December 28, 2009); 2008-2009 Final Results.

[14] See Brake Rotors at Comment 1.

[15] In fact, to the extent there is evidence regarding the homogeneity of the industry, it indicates the industry is not homogenous. See Memorandum to Mark Hoadley, Program Manager, AD/CVD Operations, Office 6, "Analysis for the Final Results of the 2009-2010 Administrative Review of the Antidumping Duty Order on Chlorinated Isocyanurates from the People's Republic of China: Hebei Jiheng Chemical Company Ltd." dated November 8, 2011 (Analysis Memorandum), at Attachment 3, for a discussion of relevant business proprietary information.

As in other recent reviews, the Department continues to find that when mandatory respondents receive a zero or de minimis rate, the separate rate companies will be assigned the most recently calculated positive rate available from a previous segment of the order unless the history of the proceeding indicates that all the relevant interested parties are consistently not dumping.[16]

Comment 5: Use of Multiple Separate Rates

Kangtai's Arguments

- The Department applied multiple rates to the companies that qualified for separate rates, contrary to section 735(c)(5)(A) of Act, which implies that only one "all-others" rate should be calculated for all qualified companies. By analogy, the Department must determine only one separate rate for all qualified companies.

Petitioners' Arguments

- Section 735(c)(5)(A) of the Act only applies to investigations; in reviews, there is no specific section of the Act that dictates how the Department determines all-others rates or, by implication, separate rates.
- Unlike in investigations, in reviews, the Department often has specific information from previous proceedings which it can reference in order to determine respondent-specific separate rates.
- In the Separate Rate Memorandum, the Department clarified its methodology for non-selected companies, which included the possibility of multiple separate rates.

Department's Position: As discussed above, the Department has determined to apply the rate of 2.66 percent to all three separate rate respondents for reasons unrelated to this comment. Thus, this issue has become moot.

Comment 6: Calculation of Entered Value

Jiheng's Arguments

- The Department failed to account for the value of certain materials in constructing an entered value for Jiheng. Specifically, the Department did not account for materials for which Jiheng receives separate reimbursement from its customers (i.e., separate from the reimbursement for the chlorinated isos itself) and materials which are provided to Jiheng by its customers free of charge.
- This omission is inconsistent with the Department's calculations in previous segments of this proceeding and results in an overestimate of Jiheng's per-unit assessment rate.

Department's Position: After reviewing the case history, the Department is adjusting the constructed entered value to include the value of these materials, consistent with the prior administrative review.[17] These values, although not reflected in the price Jiheng charges its customers, are for materials included in the shipments entered into the United States, and thus

[16] See Administrative Review of Certain Frozen Warmwater Shrimp From the People's Republic of China: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 76 FR 51940 (August 19, 2011).
[17] See 2008-2009 Final Results.

are included in the entry value declared to CBP.[18] Therefore, in order to make the constructed entered values reflect the value of the subject merchandise, we have added the value of these materials to the invoice price Jiheng billed its customers. The total of these materials and the invoice price equals the value reported to CBP by Jiheng that will be used for assessment purposes.

Comment 7: Calculation of Inland Freight

Jiheng's Arguments

- Jiheng reported factors for various packing/packaging materials in kilograms.
- The surrogate value for inland freight was calculated on a per-metric ton basis.
- The Department applied the surrogate value for freight to all input materials, including packing/packaging materials, thus overstating the cost of inland freight for these materials.

Department's Position: The Department reviewed Jiheng's October 25, 2010 section D questionnaire response, and agrees that several types of materials listed under "Packing" are reported in kilograms. Likewise, Jiheng is correct that the surrogate value for inland freight is calculated on a per-metric ton basis. Thus, we inadvertently overstated the cost of inland freight for these materials. We have corrected this error in our final results calculations.[19]

During the review of the section D response, the Department also noticed that wooden pallets were measured in pieces, not kilograms. Based on record evidence, the Department was able to convert wooden pallets from pieces to kilograms, thus converting it to a basis consistent with the inland freight surrogate value.[20]

Comment 8: Per-Unit Assessment Rate in Draft Liquidation Instructions

Jiheng's Arguments

- The Department reduced the quantity of certain sales to account for returned merchandise. The Department incorrectly used the adjusted quantity that was net of returned merchandise to calculate a per-unit assessment rate.

Department's Position: In the Preliminary Results, the Department excluded a portion of a shipment from our margin calculations because it replaced a portion of a sale reviewed in the previous POR.[21] Because this merchandise replaces a portion of a sale and entry already reviewed and suspended in the previous POR, it would be inappropriate to include this replacement merchandise in our margin calculations in this review. To do so would be to calculate a dumping margin for the same sale in two different reviews. However, because this replacement merchandise entered during this POR, our per unit assessment rate must include the quantity of this replacement merchandise in the denominator of the assessment rate calculation.

[18] See Analysis Memorandum at 4 and Attachment 2.
[19] See Analysis Memorandum at 2-3.
[20] See id.
[21] The entire quantity of the sale previously reviewed was used to calculate the per-unit assessment rate for the previous POR. While liquidation for the previous POR is currently enjoined because of litigation, the entire quantity of the sale will eventually be liquidated along with all other sales suspended for the previous POR.

Therefore, while we continue to exclude this replacement merchandise from our margin calculations for this review, we have included the quantity of this replacement merchandise in the denominator of the assessment rate for the related importer.[22]

Comment 9: Zeroing Methodology in Reviews

Jiheng's Arguments

- If the Department had not used its zeroing methodology in this review, Jiheng's average margin would have been negative.
- Recent court decisions have found that the Department has not provided substantial justification for why different methodologies are used in investigations and reviews.[23]
- There are no justifications for two interpretations of the same statutory language.

Petitioners' Arguments

- The Department changed its zeroing methodology with regard to investigations. The zeroing methodology is consistent with the Department's longstanding practice in reviews.
- In Dongbu the court did not reverse its decision upholding the Department's methodology. The court remanded the case because the Department did not adequately explain its differing interpretations of the Act, not because differing interpretations were contrary to law.
- The Department continues to reject all arguments against its zeroing methodology in reviews, including in two determinations published within the same week that rebuttal briefs were due in this review.

Department's Position: We have not changed our calculation of the weighted-average dumping margin, as suggested by Jiheng, 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 or constructed export price 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 export price (EP) or constructed export price (CEP). We disagree with the respondent 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 Court of Appeals for the Federal Circuit (CAFC) has held that this is a reasonable interpretation of section 771(35) of the Act.[24]

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

[22] See Analysis Memorandum at Attachment 2.
[23] Citing Dongbu Steel Co., Ltd. v. United States, 635 F.3d 1363, 1371-1372 (CAFC 2011) (Dongbu) and JTEKT Corporation v. United States, 642 F.3d 1378, 1384 (CAFC 2011) (JTEKT).
[24] See, e.g., Timken Co. v. United States, 354 F.3d 1334, 1342 (CAFC 2004) (Timken); and Corus Staal BV v. United States, 395 F.3d 1343, 1347-1349 (CAFC 2005) (Corus I).

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 all 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 CAFC 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."[25] 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 interpreted 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.[26]

In 2007, the Department implemented a modification of its calculation of weighted-average dumping margins when using average-to-average comparisons in antidumping investigations.[27] 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

[25] See Timken, 354 F.3d at 1343.
[26] See, e.g., Timken, 354 F.3d at 1343; Corus I, 395 F.3d at 1343; Corus Staal BV v. United States, 502 F.3d 1370, 1375 (CAFC 2007); and NSK Ltd. v. United States, 510 F.3d 1375 (CAFC 2007).
[27] See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification, 71 FR 77722 (December 27, 2006) (Final Modification in Investigations).

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 the product of an average-to-average comparison in an investigation, or an average-to-transaction comparison in an administrative review.

The CAFC has 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.[28] In U.S. Steel, the CAFC 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.[29] The court then affirmed as reasonable the Department's application of its modified average-to-average comparison methodology in investigations in light of the Department's stated intent to continue zeroing in other contexts.[30]

In addition, the CAFC 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 Final Modification in Investigations.[31] 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 to apply zeroing for average-to-transaction comparisons in this administrative review is consistent with the CAFC's recent decision in SKF.

Furthermore, in Corus I, the CAFC 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.[32] 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.

Moreover, the CAFC's recent decision in another case does not require the Department to change its methodology in this administrative review.[33] The holding of Dongbu, and the more recent decision in JTEKT, was limited to finding that the Department had not adequately

[28] See U.S. Steel Corp., v. United States, 621 F. 3d 1351 (CAFC 2010) (U.S. Steel).
[29] See U.S. Steel, 621 F.3d at 1363.
[30] See id.
[31] See SKF USA Inc. v. United States, 630 F.3d 1365 (CAFC 2011) (SKF).
[32] See Corus I, 395 F.3d at 1347.
[33] See Dongbu.

explained the different interpretations of section 771(35) of the Act in the context of investigations versus administrative reviews, but the CAFC did not hold that these differing interpretations were contrary to law. Importantly, the panels in neither Dongbu nor JTEKT overturned prior CAFC 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 in Investigations[34] whereby we interpret section 771(35) of the Act differently for certain investigations (when using average-to-average comparisons) and administrative reviews. For all these reasons, we find that the final results of our review is consistent with the long string of CAFC holdings in Dongbu, JTEKT, U.S. Steel, SKF, Timken, and Corus I.

Comment 10: Kangtai's New Factual Submission Should Not Have Been Rejected

Kangtai's Arguments

- The Department must reconsider the rejection of Kangtai's September 9, 2011 new factual submission.[35]
- The Department's Separate Rate Memorandum announced an intent to change the Preliminary Results; thus Kangtai should have been allowed ten days to submit rebuttal comments and information.
- Even though its separate rate did not change in the Separate Rate Memorandum, the Department reviewed the laws and facts regarding separate rates and presented new information which Kangtai was entitled to rebut.
- Regardless of whether or not the Department accepts the submission, there is ample evidence on the record that demonstrates Kangtai is entitled to de minimis rate as its separate rate. The Department should fully review all data on the record in order to ascertain a fair and reasonable rate for Kangtai.

Department's Position: The Department properly rejected Kangtai's untimely submission of new factual information. As stated at the time of the rejection, Kangtai's submission does not fall under the exception to the deadline for submission of new factual information which is to rebut, clarify, or correct any new factual information. The Separate Rate Memorandum did not change Kangtai's separate rate. Thus there was no new information in that memorandum that is relevant to Kangtai to rebut; Kangtai's submission seeks to submit new information to support the claim that Kangtai likely did not dump during the POR based on the untimely new information and its timely voluntarily submitted data. However, Kangtai was on notice that the Department was not selecting Kangtai as a mandatory respondent shortly after the initiation of this review, and Kangtai thus became aware it would be receiving a separate rate rather than a rate calculated based on its own data. Kangtai was clearly aware of this situation because it submitted a full questionnaire response to attain the status of a potential voluntary respondent.

[34] See Final Modification in Investigations, 71 FR at 77722; and Antidumping Proceedings: Calculation of the Weighted - Average Dumping Margins in Antidumping Investigations: Change in Effective Date of Final Modification, 72 FR 3783 (January 26, 2007).

[35] See Kangtai New Facts Submission; see also New Facts Rejection Letter.

Any additional information concerning the calculation of a margin using Kangtai's data could have been submitted then or before the deadline for submission of new factual information had passed. Therefore, because Kangtai was on notice about this issue and had the opportunity to address it before the deadline for submission of new factual information had passed but failed to do so, the Department properly rejected the submission because the data was untimely submitted.

RECOMMENDATION:

Based on our analysis of the comments received, we recommend adopting all of the above positions. If accepted, we will publish the final results of review and the final dumping margins in the Federal Register.

AGREE_____ DISAGREE_____

_____
Paul Piquado
Assistant Secretary
for Import Administration

_____
Date