



A-570-985

POR: 07/1/2014 – 06/30/2015

Public Document

E&C/IV: PO

DATE: February 13, 2017

MEMORANDUM TO: Ronald K. Lorentzen
Acting Assistant Secretary
for Enforcement and Compliance

FROM: Gary Taverman
Associate Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Xanthan Gum from the People's Republic of China: Issues and
Decision Memorandum for the Final Results of the Second
Antidumping Duty Administrative Review

SUMMARY

The Department of Commerce (“the Department”) analyzed comments submitted by interested parties regarding the *Preliminary Results*¹ in this second administrative review of the antidumping duty order on xanthan gum from the People's Republic of China (“PRC”). Following our analysis of the comments received, we have made no changes to the *Preliminary Results*. We recommend that you approve the positions described in the “Discussion of the Issues” section of this memorandum. Below is a complete list of the issues for which we have received comments from the interested parties:

Comment 1: Application of Adverse Facts Available for Deosen and AHA
Comment 2: Separate Rate Status of AHA
Comment 3: Separate Rate Margin Calculation
Comment 4: Separate Rate Status of IMJ
Comment 5: Separate Rate Status of Shanghai Smart
Comment 6: Adjustment of the Sodium Hypochlorite Surrogate Value
Comment 7: Surrogate Value for Ocean Freight
Comment 8: Surrogate Value for Electricity
Comment 9: New Factual Information in Deosen/AHA's Case Brief

¹ See *Xanthan Gum from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review, Preliminary Determination of No Shipments, and Preliminary Partial Rescission of Antidumping Duty Administrative Review*; 2014-2015, 81 FR 54045 (August 15, 2016) (“*Preliminary Results*”) and accompanying preliminary decision memorandum.

BACKGROUND

The Department published the *Preliminary Results* on August 15, 2016, in accordance with section 751(a)(1)(B) of the Tariff Act of 1930, as amended (“the Act”).² In accordance with 19 CFR 351.309(c)(1)(ii), we invited interested parties to comment on the *Preliminary Results*. On September 14, 2016, CP Kelco U.S. Inc. (“Petitioner”), Inner Mongolia Jianlong Biochemical Co., Ltd. (“IMJ”), and Deosen Biochemical Co., Ltd, Deosen Biochemical (Ordos) Co., Ltd. and Deosen USA Inc. (collectively, “Deosen”) and A.H.A. International Co., Ltd (“AHA”) (collectively, “Deosen/AHA”) requested a hearing.³ On September 14, 2016, Petitioner, Archer Daniels Midland Company (“ADM”), IMJ, Shanghai Smart Chemicals, Co., Ltd. (“Shanghai Smart”) and on November 21, 2016, Deosen/AHA filed case briefs.⁴ On September 26, 2016, Neimenggu Fufeng Biotechnologies Co., Ltd. (aka Inner Mongolia Fufeng Biotechnologies Co., Ltd.)/Shandong Fufeng Fermentation Co., Ltd./Xinjiang Fufeng Biotechnologies Co., Ltd. (“Fufeng”), Petitioner, ADM, and on October 17, 2016, Shanghai Smart filed rebuttal briefs.⁵ On December 7, 2016, January 10, 2017, and January 25, 2017, the Department extended the deadline for the final results of this administrative review. The final results of this review are currently due on February 13, 2017.⁶ On December 14, 2016, the Department held the requested hearing.⁷

SCOPE OF THE ORDER

The scope of this order covers dry xanthan gum, whether or not coated or blended with other products. Further, xanthan gum is included in this order regardless of physical form, including, but not limited to, solutions, slurries, dry powders of any particle size, or unground fiber.

² See *Preliminary Results*.

³ See Letter from Deosen/AHA, to the Department re: “Xanthan Gum from China: Request for Hearing,” dated September 14, 2016; see Letter from Petitioner to the Department, re: “Xanthan Gum from the People’s Republic of China: Petitioner’s Request for Public and Closed Hearing,” dated September 14, 2016; see also Letter from IMJ to the Department, re, “Xanthan Gum from the People’s Republic of China: Hearing Attendance,” dated September 14, 2016.

⁴ See Letter from Petitioner to the Department, re: “Xanthan Gum from the People’s Republic of China: CP Kelco U.S., Inc.’s Case Brief,” dated September 14, 2016 (“Petitioner Brief”); see Letter from IMJ to the Department, re: “Xanthan Gum from the People’s Republic of China: Case Brief,” dated September 14, 2016 (“IMJ Brief”); see Letter from ADM to the Department, re: “Xanthan Gum from The People’s Republic of China – Re: Case Brief,” dated September 14, 2016 (“ADM Brief”); see Letter from Shanghai Smart to the Department, re: “Xanthan Gum from the People’s Republic of China: Shanghai Smart Comments on the Calculation of the Separate Company Rates in the Post-Preliminary Results of the 1st Review and the Preliminary Results of the 2nd Administrative Review,” dated September 14, 2016 October 14, 2016 (“Shanghai Smart Brief”); see also Letter from Deosen/AHA to the Department, re: “Xanthan Gum from China: Case Brief,” dated November 21, 2016 (“Deosen/AHA Brief”). Although Deosen/AHA initially filed its case brief on September 14, 2016, it was subsequently rejected on October 14, 2016 (see Comment 9 below) and refiled on November 21, 2016.

⁵ See letter from Fufeng to the Department, re: “Fufeng’s Rebuttal Brief in the Administrative Review of Antidumping Order on Xanthan Gum from the People’s Republic of China,” dated September 26, 2016 (“Fufeng Rebuttal Brief”); see Letter from Petitioner to the Department, re: “Xanthan Gum from the People’s Republic of China: CP Kelco U.S., Inc.’s Rebuttal Brief in Response to Inner Mongolia Jianlong Biochemical Co., Ltd. Case Brief,” dated September 26, 2016 (“Petitioner’s IMJ Rebuttal Brief”); See Letter from Petitioner to the Department, Re: “Xanthan Gum from the People’s Republic of China: CP Kelco U.S., Inc.’s Rebuttal Brief in Response to Deosen Biochemical Co. Ltd., Deosen Biochemical (Ordos) Ltd., Deosen USA Inc., and A.H.A. International Co., Ltd. Case Brief,” dated September 26, 2016 (“Petitioner’s Deosen/AHA Rebuttal Brief”); see Letter from ADM to

Xanthan gum that has been blended with other product(s) is included in this scope when the resulting mix contains 15 percent or more of xanthan gum by dry weight. Other products with which xanthan gum may be blended include, but are not limited to, sugars, minerals, and salts.

Xanthan gum is a polysaccharide produced by aerobic fermentation of *Xanthomonas campestris*. The chemical structure of the repeating pentasaccharide monomer unit consists of a backbone of two P-1,4-D-Glucose monosaccharide units, the second with a trisaccharide side chain consisting of P-D-Mannose-(1,4)- P-DGlucuronic acid-(1,2) -a-D-Mannose monosaccharide units. The terminal mannose may be pyruvylated and the internal mannose unit may be acetylated.

Merchandise covered by the scope of this order is classified in the Harmonized Tariff Schedule (“HTS”) of the United States at subheading 3913.90.20. This tariff classification is provided for convenience and customs purposes; however, the written description of the scope is dispositive.

DISCUSSION OF THE ISSUES

Comment 1: Application of Adverse Facts Available for Deosen and AHA

Deosen/AHA

- The Department must not base Deosen’s and AHA’s dumping margin on total adverse facts available (“AFA”) and, at minimum, must assign Deosen and AHA a separate rate because: (1) there are prices on the record that can be used to calculate the companies’ dumping margin; (2) Deosen and AHA did not impede the review by providing inconsistent facts; and (3) Deosen and AHA did not withhold requested information. Accordingly, the statute does not permit the Department to use AFA. Further, there is no prohibition against producers and exporters arranging their business to qualify for a lower cash deposit rate, this was mischaracterized by the Department as a scheme. The statute only permits the Department to apply AFA as necessary, and to the extent it is used it

the Department, re: “Xanthan Gum From The People’s Republic of China – Re: Rebuttal Brief,” dated September 26, 2016 (“ADM Rebuttal Brief”); see also Letter from Shanghai Smart to the Department, re: “Xanthan Gum from the People’s Republic of China, 2nd Administrative Review; Submission of Smart Chemicals’ Revised Rebuttal Brief,” dated October 17, 2016 (“Shanghai Smart Rebuttal Brief”) Although Shanghai Smart initially filed its rebuttal brief on September 26, 2016, it was subsequently rejected on October 14, 2016. Shanghai Smart refiled its rebuttal brief on October 17, 2016.

⁶ See Memorandum to Christian Marsh Deputy Assistant Secretary for Antidumping and Countervailing Duties, re: 2014-2015 Antidumping Duty Administrative Review of Xanthan Gum from the People’s Republic of China: Extension of deadline for Final Results of Antidumping Duty Administrative Review,” dated December 8, 2016. See also Memorandum to Gary Taverman, Associate Deputy Assistant Secretary, re: “2014-15 Antidumping Duty Administrative Review of Xanthan Gum from the People’s Republic of China: Extension of Deadline for Final Results of Antidumping Duty Administrative Review,” dated January 10, 2017. See also Memorandum to Gary Taverman, Associate Deputy Assistant Secretary, re: “2014-15 Antidumping Duty Administrative Review of Xanthan Gum from the People’s Republic of China: Extension of Deadline for Final Results of Antidumping Duty Administrative Review,” dated January 25, 2017

⁷ See Closed Hearing in the Manner of the Administrative Review of the Antidumping Duty Order on Xanthan Gum from the People’s Republic of China,” dated December 14, 2016.

must be limited in this case to determining AHA's role in the transactions whether it was an agent or a principle.⁸

- First, the business arrangement between AHA and Deosen to reduce the cash deposits paid is irrelevant with respect to determining a dumping margin for these companies, as the amount of the cash deposit is not an adjustment in the calculation of the U.S. price or normal value.⁹ If the deposit was too low, interest will be assessed on additional dumping duties owed.¹⁰ This business arrangement did not significantly impede this review, as “a reviewed exporter will have each of its producers’ information reviewed, thus alleviating the concern of ‘funneling.’”¹¹
- Notwithstanding the foregoing, the record contains arm’s-length prices that were set by Deosen with unaffiliated U.S. purchasers that are unaffected by the alleged scheme to reduce the cash deposits.¹² Deosen’s calculation of the U.S. price is consistent with the Department’s practice. When an exporter is not “one of the essential parties” to the sale of subject merchandise to the United States, the Department has chosen to focus on the party that is the “price discriminator”, *i.e.*, the party that is “in a position to set the U.S. price of subject merchandise that enters into the United States.”¹³ As noted above, such prices are on the record and should be used to calculate U.S. price.
- The importers of Deosen’s merchandise used the correct cash deposit rate. The Department misread the language of the Order¹⁴ when it stated that to use the Deosen – AHA deposit rate, AHA must be the exporter *and* set the price (or be the reseller). The seller is irrelevant as to the cash deposit rate, as the deposit rate is based on the producer-exporter combination. Under Chinese Law, Deosen was the producer and AHA the exporter.
- If the Department was concerned with the business arrangement and alleged inconsistencies, it could have conducted verification, which Deosen agreed to, but the Department never conducted.
- Second, the Department erroneously determined that Deosen and AHA significantly impeded the review by providing inconsistent facts. Whether or not there is a legal sale and transfer of title to AHA is not decided by which party determines resale terms such as price.¹⁵ AHA received the merchandise from Deosen, issued a sales invoice to customers, declared the exports, claimed the value-added tax rebate, and collected payment from customers based on resales arranged by Deosen. In that sense, there are no

⁸ See Deosen/AHA Brief at 4, referencing 19 U.S.C. 1677e(a).

⁹ See Deosen/AHA Brief at 5, referencing 19 USC 1677a(c)(2)(A).

¹⁰ *Id.*, referencing 19 USC §1677g.

¹¹ See Deosen/AHA Brief at 6, referencing *Certain Activated Carbon from the People’s Republic of China: Final Results and Partial Rescission of Second Antidumping Duty Administrative Review*, 75 FR 70208 (November 17, 2010) and accompanying Issues and Decision Memorandum (“IDM”) at Comment 1.

¹² *Id.* at 6.

¹³ See Deosen/AHA Brief at 7, referencing *Freshwater Crawfish Tail Meat from the People’s Republic of China: Final Results of Antidumping Duty Administrative Review and Rescission of Review in Part*, 77 FR 21529 (April 10, 2012) (“*Crawfish Tail Meat from the PRC*”) and accompanying IDM at Comment 1.

¹⁴ See also *Xanthan Gum from the People’s Republic of China: Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order*, 78 FR 43143 (July 19, 2013) (“*Xanthan Gum Amended Final Determination*”) and (“Order”).

¹⁵ See Deosen/AHA Brief at 14, referencing Uniform Commercial Code at Part1, 2-106 (UCC 2002) (“A “sales” consists in the passing of title from the seller to the buyer for a price.”).

inconsistencies between AHA being a typical trading company (as indicated with respect to a changed circumstances review (“CCR”) request in this proceeding) and acting as an agent under the Export Service Agreement (“ESA”) (which was provided in this review).

- While the Department concluded that there are contradictory statements on the record as to whether AHA is free to sell Deosen’s subject merchandise to customers of its choosing, any “contradictions” are readily resolved by consideration of the transaction under review.
- Transactions pursuant to the ESA allow AHA to sell only to Deosen’s customers at pre-agreed prices. AHA’s books and records show that AHA was not precluded from exporting subject merchandise produced by other producers or from selling subject merchandise to other U.S. importers.
- Also, if there are any inconsistencies in information reported in two different segments of this proceeding, that does not make information reported in this review inaccurate. Rather, the Department should rely on the information reported in this review which it may verify at its option. Moreover, there is no overlap in time between the period covered by the CCR segment requested in this proceeding and the period covered by this review. Hence, the alleged inconsistencies are not possible.
- Third, Deosen and AHA did not withhold information from the Department. Deosen fully responded to all requests for information. The Department alleges that the ESA was requested numerous times in this review; however, an examination of the specific language of those alleged “requests” indicates otherwise. The ESA was only requested once, in March 2016.
- The Department claims that the ESA should have been provided in response to Section A of its questionnaire.¹⁶ However, Question 4.c. in Section A of the questionnaire requests documents generated in the sales process for a sample sale. The ESA was not a document generated in the sales process for the sample sale.¹⁷ Rather, it is a framework document governing the relationship between two Chinese parties prior to actual exports to the United States. Further, a close-ended definitive list of requested documents was included and did not include a general contract between the parties. Deosen and AHA have explained this relationship in detail. The ESA merely confirms the explanations that were given. If the Department’s broad interpretation of the scope of the question were true, then Deosen’s contracts with freight forwarders, customs brokers, *etc.*, would all become responsive documents – therefore, Deosen acted reasonably in not providing this document.
- Likewise, the Department’s subsequent supplemental questionnaires did not request any agreement between Deosen and AHA. It was not until the Department issued its first supplemental questionnaire after deferral of the final results of the first antidumping duty administrative review in March 2016 that the Department asked about the date “when

¹⁶ See Deosen/AHA Brief at 16, referencing Memorandum to Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, from Abdelali Elouaradia, Director, Office IV, regarding “Xanthan Gum from the People’s Republic of China; Application of Adverse Facts Available to Deosen Biochemical Ltd. /Deosen Biochemical (Ordos) Ltd. and A.H.A. International Co., Ltd.,” dated August 5, 2016 (“Prelim AFA Memorandum”) at 8.

¹⁷ See Deosen/AHA Brief at 17, referencing Section A of the Department’s AD questionnaire at question 4.c. (February 26, 2015).

Deosen and AHA reached the agreement for Deosen to sell through AHA to the U.S.” and requested “any documentation you may have to support your response,” to which Deosen promptly responded and provided the ESA.¹⁸

- Failure to provide the ESA was mostly a harmless error and a timing issue that did not delay or prejudice the proceeding and did not change the Department’s findings in its AR1 preliminary determination.¹⁹ It is arbitrary and capricious for the Department to use AFA for the alleged untimely submission of one document. Even though the ESA was not immediately provided, Deosen accurately stated the facts as to the role of AHA.
- The additional facts on the record of this review do not change or contradict the factual basis of the results of the Department’s preliminary determination in the first antidumping duty administrative review in this proceeding, where it recognized that the record contains sales information untainted and usable to calculate U.S. prices and a dumping margin for Deosen.²⁰
- The record contains usable transaction information that is not tainted by the alleged Deosen-AHA scheme; therefore, the Department can properly calculate a dumping margin.
- The Department failed to address why information that was clear and sufficient for the preliminary results of the first antidumping duty administrative review has become inconsistent such that total AFA is now warranted. Additionally, the legal authority of the Department to collect facts after the statutory date of the final results of the first antidumping duty administrative review (facts placed on the record in this review), especially if the Department bases its decisions on those facts, is questionable and Deosen challenges that authority.
- Lastly, use of the Deosen-AHA cash deposit rate for the sales at issue was correct. The Department misread the language of the order by finding that the Deosen-AHA deposit rate requires AHA to be the exporter and set the price of the sales (or requires AHA to be the reseller). The identity of the seller is irrelevant when it comes to determining the correct deposit rate based on the plain language of the order. Given that Deosen’s subject merchandise was exported by AHA, it was properly imported into the United States under the case number for the Deosen-AHA combination rate. The use of this rate is the one legally required to be used and was used in this review based on the advice of counsel.²¹

¹⁸ See Deosen/AHA Brief at 17-18, referencing the Letter to Deosen and AHA, “Xanthan Gum from the People’s Republic of China: Supplemental Questionnaire,” dated March 4, 2016.

¹⁹ See *Xanthan Gum from the People’s Republic of China: Preliminary Results of Antidumping Duty Administrative Review and Preliminary Determination of No Shipments; 2013–2014*, 80 FR 47464 (August 7, 2015) (“*Preliminary Results*”); see also Memorandum from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Ronald K. Lorentzen, Acting Assistant Secretary for Enforcement and Compliance, regarding “Decision Memorandum for the Preliminary Results of the Antidumping Duty Administrative Review of Xanthan Gum from the People’s Republic of China,” dated July 31, 2015 (“*Preliminary Decision Memorandum*”).

²⁰ See Deosen/AHA Brief at 6, referencing Memorandum to Ronald K. Lorentzen, Acting Assistant Secretary for Enforcement and Compliance, “Decision Memorandum for the Preliminary Results of the Antidumping Duty First Antidumping Duty Administrative Review of Xanthan Gum from the People’s Republic of China,” dated July 31, 2015, (“AR1 Preliminary Decision Memorandum”) at 13.

²¹ See Deosen/AHA Brief at 8, referencing Deosen’s and AHA’s April 29, 2016, Response to Second Deferral

Petitioner

- The Department consistently applies a “totality of the circumstances” test in administrative reviews to make a *bona fides* determination.²²
- The Department “cannot base its *bona fide* sale analysis on a respondent’s assertion as to what is commercially reasonable, but must conduct an objective analysis of the facts.”²³
- In evaluating the *bona fides* of sales, the Department is permitted to exclude certain sales when they are unrepresentative or extremely distortive.²⁴
- In the preliminary results of this review, the Department recognized that sales funneled through AHA pursuant to a business arrangement to reduce the cash deposit rate paid were not “legitimate” sales and that “[b]y artificially constructing Deosen’s sales transactions through AHA, the record does not contain usable sales information with which to calculate a dumping margin.”²⁵
- Thus, AHA’s sales were artificially constructed in order to lower cash deposits payable upon entry and are not *bona fide* sales.
- Deosen and AHA mistakenly assert that the question before the Department is whether AHA was a reseller (and thus had reviewable sales) or whether AHA was acting as an agent on behalf of Deosen. This is not the question. The question is whether sales that have been artificially constructed to avoid the proper cash deposit payment can be considered *bona fide* sales.
- Nowhere in Deosen’s and AHA’s case brief do they address the Department’s preliminary findings in this review (that the sales through AHA are not *bona fide* sales) with any argument or evidence that is relevant to this review.
- Deosen and AHA repeatedly cite the preliminary results of the first antidumping duty administrative review in this proceeding noting that in those results the Department found Deosen’s sales useable for calculating a dumping margin. Deosen and AHA fail to explain why the preliminary results of the first antidumping duty administrative review (the prior segment in this proceeding), and evidence on the record of that prior segment (which is not on the record of this segment), are relevant.
- The Department’s findings that Deosen’s sales involving AHA were “...not part of a legitimate sales process...,” that these sales have “...artificial prices...” and that “...the

Supplemental questionnaire at 11.

²² See Petitioner’s Rebuttal Br. at 4, referencing *Silicomanganese from India: Final Results of Antidumping Duty Administrative Review*, 80 FR 75660 (December 3, 2015), and accompanying IDM at 4 (citations omitted); *Windmill Int’l Pte v. United States*, 193 F. Supp. 2d 1303, 1312 (Ct. Int’l Trade 2002) (finding that a *bona fide* analysis to determine whether a sale should be excluded is within the Department’s discretion).

²³ See Petitioner’s Rebuttal Br. at 4, referencing, e.g., *Freshwater Crawfish Tail Meat from the People’s Republic of China; Notice of Final Results of Antidumping Duty New Shipper Review, and Final Rescission of Antidumping Duty New Shipper Review*, 68 FR 1439 (January 10, 2007).

²⁴ See Petitioner’s Rebuttal Br. at 6, referencing *Fresh Garlic from the People’s Republic of China: Final Results and Partial Rescission of the 18th Antidumping Duty Administrative Review; 2011–2012*, 79 FR 36721 (June 30, 2014) and accompanying IDM at Comment 18; *Windmill Int’l Pte v. United States*, 193 F. Supp. 2d at 1307 (Ct. Int’l Trade 2002); *FAG U.K. Ltd. v. United States*, 945 F. Supp. 260, 265 (Ct. Int’l Trade 1996).

²⁵ See Petitioner’s Rebuttal Br. at 7, referencing Prelim AFA Memorandum at 7; see also *Certain Activated Carbon from the People’s Republic of China: Final Results of Antidumping Duty Administrative Review; 2013–2014*; 80 FR 61172 (October 9, 2015) (“*Activated Carbon from the PRC 2013–2014*”) and accompanying IDM at Comment 1.

record does not contain usable sales information with which to calculate a dumping margin” is a declaration that Deosen’s sales through AHA were not *bona-fide* commercial sales.²⁶

- The evidence on the record of this review shows Deosen’s sales through AHA are not *bona fide* sales. In fact, Deosen noted that while it “does believe there are legitimate sales to AHA ... {it} understands that the Department may reach a different determination based on these fully presented facts.”²⁷
- Deosen and AHA argue that since they both provided the Department with useable data for calculating a dumping margin, the Department merely needs to decide whether to use the data provided by AHA or the data provided by Deosen in its calculations. This is not correct. First, AHA declined to provide a response to section C of the Department’s questionnaire, so there is no sales database on the record for AHA.²⁸ Second, Deosen and AHA provided conflicting information regarding the amount of the commission that AHA collects on sales to Deosen’s customers. This conflicting information would introduce unacceptable distortions into any dumping margin calculation for Deosen. The Department cannot determine, based on multiple submissions made by Deosen and AHA regarding AHA’s commission, exactly what amount should be used in calculating Deosen’s dumping margin.
- Additionally, Deosen and AHA withheld evidence regarding the sales process in an attempt to conceal the fact that AHA’s sales were not *bona fide* sales. The Department issued a supplemental questionnaire to Deosen in which it directly requested all agreements between Deosen and AHA. Deosen and AHA provided no response to this request.²⁹ This was the fourth opportunity that Deosen and AHA had to provide a central document regarding their relationship, the ESA. The ESA should have been supplied with Deosen’s and AHA’s responses to Sections A and C of the questionnaire.³⁰ Thus, the record does not show that Deosen and AHA acted to the best of their abilities to provide requested information.
- Yet, Deosen and AHA claim that they fully responded to all of the Department’s requests, and once the Department requested the ESA for the first time in March 2016, they promptly provided the ESA. Deosen and AHA are mistaken.

²⁶ See Petitioner’s Rebuttal Br. at 8, referencing Prelim AFA Memorandum at 7; *see also Activated Carbon from the PRC 2013–2014* at and accompanying IDM at Comment 1.

²⁷ See Petitioner’s Rebuttal Br. at 9, referencing Deosen AR1 Submissions at Attachment II, p.14.

²⁸ See Petitioner’s Rebuttal Br. at 10, referencing submission from Deosen entitled, “Xanthan Gum from China; Sections C and D Response of A.H.A. International Co., Ltd.,” dated November 30, 2015.

²⁹ See Petitioner’s Rebuttal Br. at 16, referencing Letter from Deosen to the Department, regarding “Xanthan Gum from China: Deosen’s Response to Section A Supplemental Questionnaire,” dated January 14, 2016 (“Deosen Supplemental Section A Response”) at 2-3.

³⁰ See Petitioner’s Rebuttal Br. at 16, referencing Letter from AHA to the Department, regarding “Xanthan Gum from China: Section A Response of A.H.A. International Co., Ltd.,” dated November 23, 2015 (“AHA’s November 23, 2015 Section A Response”) at 16–17 (question A.4.c); *see also* Letter from Deosen to the Department, regarding “Xanthan Gum from China: Deosen’s Response to Section A Questionnaire,” dated December 9, 2015 (“Deosen’s December 9, 2015 Section A Response”) at 18-19 (question A.4.c); *see also* Letter from Deosen, “Xanthan Gum from China: Deosen’s Response to Section C Questionnaire,” dated December 30, 2015 (“Deosen Section C Questionnaire Response”) at 24–25 (Field Number 31.0: Commissions); *see also* Deosen Supplemental Section A Response at 2–3.

- The March 2016 request to which they refer was made in the first antidumping duty administrative review. The ESA is on the record of this review only because the Department specifically instructed Deosen and AHA to place it on the record of this review.³¹ Responding to the Department’s specific instruction to place the ESA on the record from the prior segment does not demonstrate that Deosen and AHA acted to the best of their abilities.
- By certifying to directly contradictory statements regarding their sales, Deosen and AHA did not fulfill their burden of creating a complete and accurate record in this proceeding. Consistent with section 776 (a) and (b) of the Act, when necessary information is not available on the record and a party failed to cooperate by not acting to the best of its ability to comply with a request for information, which, as noted above, is true with respect to Deosen and AHA in this review, the Department must rely on facts available with adverse inferences.³²
- The Court of International Trade (“CIT”) explained that “{w}hen a respondent fails to respond to Commerce’s requests and the information it requested is material to the investigation, this court previously found such behavior to be unreasonable and the use of AFA appropriate.”³³ The U.S. Court of Appeals for the Federal Circuit (“CAFC”) has stated that “the statutory mandate that a respondent act to ‘the best of its ability’ requires the respondent to do that maximum it is able to do.”³⁴
- Use of total AFA is warranted as Deosen’s and AHA’s actions in this review call into question the fundamental veracity of all of their submissions. By withholding their ESA, which was responsive to questions in Section A and Section C of the Department’s questionnaire and a supplemental questionnaire, Deosen and AHA prevented the Department from gaining a full understanding of the sales process used for a significant volume of the sales of subject merchandise during the period of review (“POR”) and thus the application of total AFA is warranted.
- The Department has previously stated that when, “the Department comes into possession of information which appears to indicate that relevant information may have been fabricated for purposes of the investigation and that such information may well not be accurate, not only is that particular information unacceptable, all information submitted by that respondent must be viewed as suspect and unusable.”³⁵
- The CIT has supported the Department’s decision to apply total AFA in instances when a respondent has attempted to withhold or alter sales and production documents.³⁶ Consequently, the Department should apply total AFA when assigning a dumping margin to Deosen.

³¹ See Petitioner’s Rebuttal Br. at 17, referencing Deosen AR1 Submissions at Attachment I, Exhibit 7.

³² See Petitioner’s Rebuttal Br. at 14-15, referencing *Circular Welded Carbon Quality Steel Line Pipe from the People’s Republic of China: Final Affirmative Countervailing Duty Determination*, 73 FR 70961 (November 24, 2008) and accompanying IDM.

³³ See Petitioner’s Rebuttal Br. at 15, referencing *Chia Far Indus. Factory Co., Ltd.*, 28 CIT 1337, 1362 (Ct. Int’l Trade 2004).

³⁴ See Petitioner’s Rebuttal Br. at 15, referencing *Nippon Steel Corp. v. U.S.*, 337 F.3d 1373, 1382 (Fed. Cir. 2003).

³⁵ See Petitioner’s Rebuttal Br. at 17, referencing *Sulfanilic Acid from the People’s Republic of Hungary*, 58 FR 8256 (February 12, 1993).

³⁶ See Petitioner’s Rebuttal Br. at 17-18, referencing *Qingdao Taifa Group Co., Ltd. v. United States*, 637 F. Supp. 2d 1231, 1240 (Ct. Int’l Trade 2009).

Department's Position: Section 776(a) of the Act provides that, subject to section 782(d) of the Act, the Department shall apply "facts otherwise available" if: (1) necessary information is not on the record; or (2) an interested party or any other person (A) withholds information that has been requested, (B) fails to provide information within the deadlines established, or in the form and manner requested by the Department, subject to subsections (c)(1) and (e) of section 782 of the Act, (C) significantly impedes a proceeding, or (D) provides information that cannot be verified as provided by section 782(i) of the Act.³⁷

Where the Department determines that a response to a request for information does not comply with the request, section 782(d) of the Act provides that the Department will so inform the party submitting the response and will, to the extent practicable, provide that party an opportunity to remedy or explain the deficiency. If the party fails to remedy or satisfactorily explain the deficiency within the applicable time limits, subject to section 782(e) of the Act, the Department may disregard all or part of the original and subsequent responses, as appropriate.

Section 776(b) of the Act provides that the Department may use an adverse inference in applying the facts otherwise available when a party has failed to cooperate by not acting to the best of its ability to comply with a request for information. In applying an adverse inference pursuant to section 776(b), and under new section 776(d)(3) of the Act, as added by the TPEA, the Department is not required to determine, or make any adjustments to, a weighted average dumping margin based on any assumptions about information an interested party would have provided if the interested party had complied with the request for information. Section 776(b)(2) states that an adverse inference may include reliance on information derived from the petition, the final determination from the investigation, a previous administrative review, or other information placed on the record. In addition, the SAA explains that the Department may employ an adverse inference "to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully."³⁸ Further, affirmative evidence of bad faith on the part of a respondent is not required before the Department may make an adverse inference.³⁹ It is the Department's practice to consider, in employing adverse inferences, the

³⁷ On June 29, 2015, the President of the United States signed into law the Trade Preferences Extension Act of 2015, which made numerous amendments to the AD and CVD law, including amendments to sections 776(b) and 776(c) of the Act and the addition of section 776(d) of the Act. *See Trade Preferences Extension Act of 2015*, Pub. L. No. 114-27, 129 Stat. 362 (June 29, 2015) ("TPEA"). The 2015 law does not specify dates of application for those amendments. On August 6, 2015, the Department published an interpretative rule, in which it announced the applicability dates for each amendment to the Act, except for amendments to section 771(7) of the Act, which relate to determinations of material injury by the ITC. *See Dates of Application of Amendments to the Antidumping and Countervailing Duty Laws Made by the Trade Preferences Extension Act of 2015*, 80 FR 46793 (August 6, 2015). The amendments to section 776 of the Act are applicable to all determinations made on or after August 6, 2015. Therefore, the amendments apply to this investigation.

³⁸ *See Statement of Administrative Action Accompanying the Uruguay Round Agreements Act*, H.R. Rep. 103-316, Vol. 1, 103d Cong. at 870 (1994), as reprinted in 1994 U.S.C.C.A.N. 4040, 4199 ("SAA").

³⁹ *See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Circular Seamless Stainless Steel Hollow Products from Japan*, 65 FR 42985 (July 12, 2000); *see also Antidumping Duties, Countervailing Duties*, 62 FR 27296, 27340 (May 19, 1997) ("Preamble"); *see also Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382-83 (CAFC 2003) ("Nippon Steel")

extent to which a party may benefit from its own lack of cooperation.⁴⁰ The TPEA makes clear that when selecting an adverse facts available margin, the Department is not required to estimate what the dumping margin would have been if the interested party failing to cooperate had cooperated or to demonstrate that the dumping margin reflects an “alleged commercial reality” of the interested party.

In *Nippon Steel*, the CAFC noted that while the statute does not provide an express definition of the “failure to act to the best of its ability” standard, the ordinary meaning of “best” is “ones maximum effort,” as in “do your best.”⁴¹ Thus, according to the CAFC, the statutory mandate that a respondent act to the “best of its ability” requires the respondent to “do the maximum it is able to do.”⁴² The CAFC indicated that inadequate responses to an agency’s inquiries would suffice to find that a respondent did not act to the best of its ability.⁴³ While the CAFC noted that the “best of its ability” standard “does not require perfection and recognizes that mistakes sometimes occur, it does not condone inattentiveness, carelessness, or inadequate record keeping.”⁴⁴ The “best of its ability” standard requires a respondent to, among other things, “have familiarity with all of the records it maintains,” and “conduct prompt, careful, and comprehensive investigations of all relevant records that refer or relate to the imports in question to the full extent of” its ability to do so.⁴⁵

We continue to find that the application of facts available, with adverse inferences, is appropriate in this case, pursuant to sections 776(a)(1), 776(a)(2)(A) and (C), and 776(b) of the Act. The record demonstrates that Deosen and AHA significantly impeded the proceeding by engaging in a scheme to avoid the applicable cash deposit rate, resulting in necessary information not being available on the record to calculate an accurate dumping margin.⁴⁶ Also, they withheld necessary information from the record that had been requested by the Department and provided inconsistent information. Specifically, they failed to provide, when requested, copies of each type of sales agreement for U.S. sales, all sales-related documentation generated in the sales process, and copies of “any contractual agreement” between Deosen and AHA. Moreover, Deosen and AHA failed to cooperate by not acting to the best of their ability because they did not put forth their maximum effort to provide the Department with full and complete answers to the Department’s requests. These companies submitted misleading information regarding their sales arrangement, and were not forthcoming with key aspects of their relationship, thus not complying with the “best of its ability” standard. Accordingly, we are continuing to apply facts otherwise available with an adverse inference to Deosen and AHA for these final results.⁴⁷

⁴⁰ See, e.g., *Steel Threaded Rod from Thailand: Preliminary Determination of Sales at Less Than Fair Value and Affirmative Preliminary Determination of Critical Circumstances*, 78 FR 79670 (December 31, 2013), and accompanying Preliminary Decision Memorandum at page 4, unchanged in *Steel Threaded Rod from Thailand: Final Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances*, 79 FR 14476 (March 14, 2014).

⁴¹ See *Nippon Steel*, 337 F.3d at 1382-83.

⁴² *Id.* at 1382.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ See sections 776(a)(1) and 776(a)(2)(A) and (C) of the Act.

⁴⁷ For additional details regarding our decision to apply adverse facts available, see Prelim AFA Memorandum; see also Section A of the Department’s AD questionnaire, at questions 4.b. and 4.c.

Central to this decision are Deosen's and AHA's actions to structure sales of Deosen's subject merchandise in such a way to avoid payment of the applicable antidumping duty cash deposits at the appropriate rate. In Deosen's and AHA's July 19, 2016, submission, wherein the Department directed Deosen to place certain submissions from the prior review on the record of this review,⁴⁸ Deosen and AHA acknowledged that, following the Department's January 10, 2013, preliminary determination in the less-than-fair-value (LTFV) investigation of this proceeding, Deosen and AHA reached an agreement for Deosen to sell subject merchandise through AHA to Deosen's U.S. customers.⁴⁹ Deosen and AHA reported that they began structuring Deosen's sales to be sold through AHA in order to use the cash deposit rate assigned for the producer-exporter combination of Deosen-AHA, which was lower than the cash deposit rate assigned to the producer-exporter combination of Deosen-Deosen.⁵⁰ Deosen and AHA stated:

...the deposit rate for merchandise exported by AHA produced by Deosen was less than the deposit rate for merchandise exported by Deosen itself. Accordingly, the cost of selling in the United States was higher if Deosen continued exporting from China compared to if Deosen sold to AHA and AHA exported to the U.S.⁵¹

Deosen and AHA also reported in their supplemental questionnaire responses that Deosen began selling subject merchandise through AHA to Deosen's U.S. customers, explaining that the rationale behind this decision was to "provide more cash flow" and "reduce the cash outflows by the importers."⁵² Deosen and AHA referenced the cash deposit rates assigned to the producer-exporter combinations of Deosen-Deosen and Deosen-AHA in the LTFV preliminary determination, stating that these different cash deposit rates "allowed AHA and Deosen to arrange the transactions to use the lower Deosen-AHA combination rate which reduced cash deposits required when importing Deosen's merchandise from China."⁵³

While Deosen and AHA represented to U.S. Customs and Border Protection ("CBP") that Deosen's U.S. sales of subject merchandise were AHA's sales, thereby benefitting from the

⁴⁸ See Submission from Deosen and AHA to the Department, regarding "Xanthan Gum from China: Response to Request for Submissions," dated July 19, 2016 ("Deosen-AHA July 19, 2016 Submission") at Attachments I and II.

⁴⁹ See Deosen-AHA July 19, 2016 Submission at Attachment I, 6-7.

⁵⁰ *Id.* The cash deposit rate assigned in the LTFV preliminary determination to the producer-exporter combination of Deosen-AHA was 74.67 percent, and the rate assigned to the producer-exporter combination of Deosen-Deosen was 127.65 percent. These cash deposit rates changed to 70.61 percent for Deosen-AHA and 128.32 percent for Deosen-Deosen in the LTFV amended final determination. In addition, the cash deposit rate assigned to the PRC-wide entity in both the preliminary and final determinations was 154.07 percent. See *Xanthan Gum from the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 78 FR 2252 (January 10, 2013) ("*Xanthan Gum Preliminary Determination*"); see also *Xanthan Gum Amended Final Determination*.

⁵¹ See Deosen-AHA July 19, 2016 Submission at Attachment I, 6-7; see also Memorandum from Krisha Hill to the File, Re: "Proprietary Information for Final Results of the 2014-2015 Antidumping Duty Administrative Review of Xanthan Gum from the People's Republic of China," dated concurrently with this memorandum ("BPI Memorandum") at Note 1

⁵² *Id.* at Attachment I, 7-8.

⁵³ *Id.*

lower cash deposit applicable to the producer-exporter combination of Deosen-AHA,⁵⁴ the ESAs related to these sales demonstrate that these were actually sales made and controlled by Deosen.⁵⁵ Additionally, Deosen and AHA have acknowledged that AHA played no role in determining the customer or the terms of sale, including the sales quantity or price.⁵⁶

Deosen and AHA claim that the Deosen-AHA cash deposit rate was the appropriate cash deposit rate for the sales at issue because this is the cash deposit rate that is applicable to the exporter of record. However, the record shows that Deosen was the price setter for the sales of subject merchandise which entered under the AHA cash deposit rate.⁵⁷ The Department has stated that “where the cash deposit is not the cash-deposit rate of the seller (the price discriminator), it is not the proper cash deposit ‘required at the time of entry’ under U.S. law or the Department’s regulations.”⁵⁸ As we stated above the ESA suggests that AHA was not a “reseller” of subject merchandise, but instead that Deosen was the seller.⁵⁹ Thus, the AHA-Deosen cash deposit rate was not the correct cash deposit rate for the transactions at issue.⁶⁰ Furthermore, accepting Deosen’s contention that it used the appropriate cash deposit rate for transactions involving AHA would contravene the Department’s determination of the cash deposit rate specifically applicable to Deosen as the price discriminator and render such a determination ineffectual, because Deosen might then use the cash deposit rate of its choosing by entering into an ESA with any company whose cash deposit rate it wished to use.

CBP has also determined that Deosen’s cash deposit rate is the appropriate rate to apply to entries of subject merchandise that Deosen made through this scheme. In their July 19, 2016, submission, Deosen and AHA provided copies of documents issued by CBP investigators relating to CBP’s investigation, which support the Department’s determination.⁶¹ Deosen’s and AHA’s actions involve a significant volume of sales during this POR and a meaningful difference between the amount of AD cash deposits that were paid and the amount that should have been in paid if the appropriate cash deposit rate had been applied.⁶²

Application of facts available and adverse facts available is appropriate in this case because Deosen and AHA significantly impeded this proceeding by engaging in the scheme described above to avoid the applicable cash deposit rate, resulting in necessary information not being available on the record.⁶³ We find that the prices reported to the Department for Deosen’s sales through AHA are unreliable for calculating an accurate dumping margin, as the sales have been subject to manipulation by Deosen and AHA. Specifically, through its business arrangement, Deosen and AHA manipulated the sales, which impacted sales prices through, at a minimum,

⁵⁴ See Deosen-AHA July 19, 2016 Submission at Attachment I, Exhibit 10.

⁵⁵ See BPI Memorandum at Note 2.

⁵⁶ See AHA’s November 23, 2015 Section A Response at 8; *see also* Deosen’s December 9, 2015 Section A Response at 10.

⁵⁷ See Deosen-AHA July 19, 2016 Submission at Attachment I, Exhibit 7.

⁵⁸ See *Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties*, 68 FR 23954 (May 6, 2003).

⁵⁹ See BPI Memorandum at Note 3.

⁶⁰ See Prelim AFA Memorandum.

⁶¹ See BPI Memorandum at Note 4.

⁶² See Deosen-AHA July 19, 2016 Submission at Attachment II, 2-3.

⁶³ See section 776(a)(1), 776(a)(2)(C) and 776(b) of the Act.

any mark-up that AHA received for its role in the sales, as well as the cash deposit required upon importation, as described in more detail below.

Deosen and AHA contest the Department's determination that their business arrangement to reduce the cash deposits paid significantly impeded the integrity of this review, because they contend it is irrelevant with respect to determining a dumping margin for these companies as the amount of the cash deposit is not an adjustment in the calculation of the U.S. price or normal value. However, even if the amount of the cash deposit is not an adjustment in the calculation of the U.S. price, the record indicates that this business arrangement affected the U.S. prices set by Deosen.

Based on BPI on the record of this review, we have determined that Deosen USA took into account costs and market conditions in setting the prices of U.S. sales of subject merchandise.⁶⁴ According to Deosen, the business arrangement to reduce the cash deposits paid affected the cost of selling products in the United States.⁶⁵ As noted above, Deosen and AHA acknowledged that the "cost of selling in the United States was higher if Deosen continued exporting from China compared to if Deosen sold to AHA and AHA exported to the U.S."⁶⁶ Moreover, this business arrangement appears to have affected the cost of working capital, given that Deosen and AHA reported that the rationale behind this business arrangement was to "provide more cash flow" and "reduce the cash outflows by the importers."⁶⁷ Reductions in the costs of selling products, increases in cash flow, and reductions in cash outflows by importers, including Deosen USA, represent factors that can influence the price of products. Additionally, market conditions were one factor which Deosen considered in setting prices.⁶⁸ A reduction in the cash deposit required from customers when importing subject merchandise is like a market condition to the extent it could affect the price such customers were willing to pay for subject merchandise.⁶⁹

Consequently, the business arrangement to reduce the cash deposits paid is not irrelevant with respect to determining a dumping margin because it could have an effect on U.S. prices and Deosen withheld information about the entirety of this arrangement from the record of the review until it submitted the ESA. The only sales prices to U.S. customers that we have on the record for Deosen's transactions through AHA are the prices on AHA's invoices to the U.S. customers, which are artificial prices set pursuant to a sales process that we do not consider legitimate for antidumping duty purposes, but was instead controlled and made by Deosen but reported as sales invoiced by AHA to avoid the appropriate case deposit rate.⁷⁰ After considering the totality of record evidence, we have determined that it is not appropriate to use these prices in calculating a dumping margin because they are artificial prices which, in turn, may not accurately reflect the level of dumping.

⁶⁴ See BPI Memorandum at Note 5.

⁶⁵ See Deosen-AHA July 19, 2016 Submission at Attachment I 6-7.

⁶⁶ See *id.*

⁶⁷ *Id.* at 7-8.

⁶⁸ See Deosen's December 9, 2015 Section A Response at 10.

⁶⁹ See BPI Memorandum at Note 6.

⁷⁰ See Deosen-AHA July 19, 2016 Submission at Attachment I, Exhibits 5 and 6.

By failing to cooperate, notwithstanding the Department's request for relevant information, by not providing detailed information about the business arrangement in response to the Department's questionnaire and supplemental questionnaires, Deosen and AHA have denied the Department the opportunity to understand their relationship in the early stages of this instant review.⁷¹ Moreover, based on that information that was originally withheld, the Department finds Deosen and AHA have engaged in a scheme to evade application of the appropriate cash deposit rate. Thus, the price information Deosen and AHA have reported is tainted by this scheme because the prices are artificially constructed and do not provide a reliable basis upon which to calculate a dumping rate.

We disagree with Deosen's and AHA's assertion that the record contains other usable sales for calculating a dumping margin, namely sales from Deosen to unaffiliated U.S. customers that did not involve AHA. Based on the significance and volume of the unusable sales, the Department cannot rely on sales that did not involve AHA as the basis for calculating a dumping margin for Deosen.⁷² Moreover, because of Deosen's and AHA's actions in concealing the nature of their sales process, the Department has no basis to rely on Deosen's limited sales to another customer. The Court of International Trade ("CIT") has noted that the quantity of a respondent's sales to a customer when compared with the quantity of the respondent's imports of subject merchandise into the United States, "...does seem to be a legitimate factor for the Department to consider in deciding how adverse the inference should be." The CIT further stated that, "if the missing information is important, and a large volume of that information is missing, it is logical to draw a more adverse inference because that would further the goal of creating an incentive for respondents to provide the information."⁷³ As an example, in *Stainless Steel Bar from Spain*, the Department applied total adverse facts available to the respondent because the respondent did not act to the best of its ability in reporting certain information, and failed consistently to address certain critical elements for which the Department sought clarification or explanation in order to alleviate concerns regarding the accuracy and reliability of the respondent's reported information.⁷⁴ For the foregoing reasons, the Department finds the sales made to the other customers to be unusable as a basis for calculating a dumping margin for Deosen.⁷⁵

⁷¹ See generally Deosen-AHA July 19, 2016 Submission. The Department issued its questionnaire to AHA and Deosen on September 29, 2015 and November 13, 2015, respectively; however, the ESA was not submitted until approximately eight to 10 months later on July 19, 2016).

⁷² See BPI Memorandum at Note 7.

⁷³ See *Kawasaki Steel Corp. v. United States*, 110 F. Supp. 2d 1029, 1041-42, 24 CIT 684 697-98 (2000), referencing the SAA, accompanying H.R. Rep. No. 103-826(I), at 870, reprinted in 1994 U.S.C.C.A.N. 3773, 4199 ("Where a party has not cooperated, Commerce . . . may employ adverse inferences about the missing information to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.").

⁷⁴ See *Stainless Steel Bar from Spain: Final Results of Antidumping Duty Administrative Review*, 72 FR 42395 (August 2, 2007) and accompanying IDM at Comment 1.

⁷⁵ See *Qingdao Taifa Group Co., Ltd. v. United States*, 637 F. Supp. 2d 1231, 1239-40 (2009) (finding that where the respondent had "attempted to withhold or alter sales and production documents," and "avoid producing the requested documents" at a verification, its actions "significantly impeded Commerce's investigation" and that the Department "properly concluded that the information that {the respondent} provided was 'incomplete and unreliable' and that no information on the record could be used to calculate an accurate dumping margin for {the respondent}. Commerce could therefore disregard all of the information {the respondent} provided, apply AFA to all of the facts relevant to calculating {the respondent's} dumping margin, and apply a substitute rate."), citing *Shanghai Taoen Int'l Trading Co. v. United States*, 360 F. Supp. 2d 1339, 1348 n.13, 29 Ct. Int'l Trade 189 (CIT 2005).

Additionally, the evidence shows that Deosen/AHA withheld information requested by the Department. In particular, Deosen and AHA withheld the ESA when responding to Section A of the antidumping duty questionnaire and subsequent supplemental questionnaires.⁷⁶ Neither the sales documents submitted by Deosen, nor the sales documents submitted by AHA in response to the Department's Section A questionnaire included copies or any acknowledgement of the ESAs in place between AHA and Deosen.⁷⁷ Deosen and AHA only submitted the ESA after the Department requested Deosen to place certain information from the prior review on the record of this review.⁷⁸

Moreover, as background, it is important to note that this review was not first time that the Department requested documentation regarding the sales process involving Deosen and AHA. The record of this review contains statements from Deosen and AHA, which were originally submitted to the record of another segment of this proceeding (a CCR), concerning the sales process and relationship between Deosen and AHA which were later contradicted by the ESA specifically requested by the Department in the instant review.⁷⁹ The Department requested in this previous segment of the proceeding that Deosen and AHA "explain whether Deosen or Deosen USA has had any contractual arrangements or agreements with AHA... since January 10, 2013," and, if so, to provide documentation.⁸⁰ Deosen and AHA responded that Deosen and Deosen USA had entered into sales contracts with AHA since January 10, 2013, and that "the nature of these contracts are typical of any sales contract, which set forth the terms and conditions of sale."⁸¹ Deosen and AHA claimed that "there is simply nothing exceptional about these contracts that differs from any other sales contract," and "there are no other relevant arrangements or agreements."⁸² However, in this previous CCR segment Deosen and AHA again provided only their sales contracts for an individual sale in response to the Department's supplemental questionnaire, and did not identify or provide the ESAs, even though these agreements were in place at the time of this supplemental questionnaire response and would have been directly responsive to the Department's request for "any contractual arrangements or agreements" between Deosen and AHA.⁸³ Thus, there is a history of the Department seeking detailed information regarding Deosen's and AHA's business arrangement such that Deosen and AHA had multiple opportunities to provide full information regarding the nature of their

⁷⁶ See Prelim AFA Memorandum.

⁷⁷ See Deosen's December 9, 2015 Section A Response at 9 and Exhibit A-17; *see also* AHA's November 23, 2015 Section A Response at 17 and Exhibit A.4.c.

⁷⁸ See Letter from the Department to Deosen, regarding "Xanthan Gum from the People's Republic of China: Request for Submissions," dated July 8, 2016.

⁷⁹ See Letter from Petitioner to the Department, regarding "Xanthan Gum from the People's Republic of China: Petitioner's Factual Information to Rebut, Clarify, or Correct the October 9, 2015 Questionnaire Response of Deosen Biochemical and AHA International," dated October 19, 2015 ("Petitioner October 19, 2015 Submission") at Exhibit I, 200, containing questionnaire responses and submissions generated in connection with Petitioner's February 25, 2014 request for initiation of a Changed Circumstances Review. The Department found insufficient evidence to support initiation of the Changed Circumstances Review, but forwarded the questionnaire responses and submissions to CBP.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ See BPI Memorandum at Note 8.

relationship, including the ESA. Despite that history, including the prior antidumping duty administrative review where Deosen's and AHA's business arrangement was an issue, in this review they did not provide all documentation regarding that relationship, even though the Department requested such documentation.

Specifically, as noted above, the ESA should have been provided in response to the Department's Section A questionnaire and Section A supplemental questionnaire. We disagree with Deosen's and AHA's claim that they did not withhold the ESA from the Department for the reasons explained below. In response to Section A of the questionnaire, Deosen reported that "{w}e provide at Exhibit A-17 a sample sales documentation for a sale from Deosen Zibo to AHA, and then to Deosen USA. The first document is a contract between AHA and Deosen Zibo which sets the price and quality of the purchase."⁸⁴ If Deosen believed that this contract between itself and AHA was relevant and responsive to the questionnaire, it is not reasonable to conclude that the ESA contract between Deosen and AHA regarding such sales was irrelevant.

Question 4.c. in the Department's Section A questionnaire requests that respondents:

Describe your agreement(s) for sales in the United States (*e.g.*, long-term purchase contract, short-term purchase contract, purchase order, order confirmation).
Provide a copy of each type of agreement and all sales related documentation generated in the sales process (including the purchase order, internal and external order confirmation, invoice, shipping and export documentation and Customs entry documentation) for a sample sale in the U.S. market during the POR.

Deosen argues that question 4.c. in Section A of the antidumping duty questionnaire requests documents generated in the sales process for a sale and that it did not provide the ESA because the ESA is not a document generated in the sales process for the particular sale for which it supplied documentation. As an initial matter, question 4.c. not only requests copies of documents generated in the sale process, but requests that respondents describe their "agreement(s) for sales in the United States" and "{p}rovide a copy of each type of agreement...." The ESA is clearly an agreement that relates to sales in the United States and should have been provided in response to this question. Moreover, in response to question 4.c. in its Section A questionnaire response, Deosen provided sales documentation, other than the ESA (*e.g.*, invoices, purchase orders, sales contracts, certificates of analysis, payment documentation) for a sale that went through AHA.⁸⁵ The ESA, however, is the governing agreement for "sales" involving Deosen and AHA and should have also been provided in response to this question. Additionally, the lists of documents in question 4.c are illustrative lists (note use of "*e.g.*" and the word "including") and are not meant to limit a respondent's response; nor can they be read to provide a basis for a respondent to exclude an important document, such as the ESA which outlines the core terms of the sales agreement between Deosen and AHA.

Additionally, the Department issued a supplemental questionnaire to Deosen in which it directly requested all agreements between the companies, to which Deosen and AHA provided no response. Specifically, in the Department's December 30, 2015 Section A supplemental

⁸⁴ See Deosen's December 9, 2015 Section A Response at 9.

⁸⁵ See Deosen's December 9, 2015 Section A Response at Exhibit A-17.

questionnaire, the Department requested that Deosen provide a detailed description of certain negotiations, as well as copies of any contractual agreements and any other supporting documentation.”⁸⁶ Deosen did not provide any narrative response to this question or submit any documentation.⁸⁷ Deosen and AHA failed to submit the ESAs in response to the Department’s questionnaire and supplemental questionnaire in this administrative review, even though the ESAs were in effect for a significant portion of the current POR, and the questionnaires asked the parties to submit sales documents of this type.⁸⁸ In fact, the ESAs were not submitted to the record of this administrative review until the Department specifically requested that Deosen and AHA re-submit their questionnaire responses from the first antidumping duty administrative review of this proceeding on the record of the current review.⁸⁹

Contrary to Deosen’s claims, the ESA does not merely confirm the explanations of the relationship given in the questionnaire response but provides the Department with specific details regarding the arrangement between AHA and Deosen which clearly show just how limited AHA’s role was in the sales that Deosen reported as AHA’s.⁹⁰ The ESA demonstrated that the sales were made and controlled by Deosen. Furthermore, Deosen and AHA have acknowledged that AHA played no role in determining the customer or the terms of sale. Failure to submit the ESA early in this review was not a harmless error or timing issue, but a failure to act to the best of Deosen’s and AHA’s ability to provide clearly relevant documentation and information that had been requested by the Department and a failure which undermined the integrity of, and significantly impeded, the Department’s proceedings.

Moreover, Deosen reported to the Department inconsistent information regarding its relationship with AHA and its transactions involving AHA. These inconsistencies do not only involve information submitted in two different segments of this proceeding, as claimed by Deosen and AHA. For example, the Department’s Section A questionnaire asked that respondents explain how they “determined the ultimate customer or market for the products sold through resellers,” and to “provide written sales contracts or sales terms with these resellers.”⁹¹ In response to Section A of the Department’s questionnaire, Deosen’s description of the sales process appears to indicate that AHA purchased and resold the subject merchandise, which normally are characteristics of a reseller.⁹² However, when asked in a supplemental questionnaire to clarify the nature of AHA’s role in the sales process, specifically whether AHA was a reseller, Deosen reported that it “does not consider AHA as a reseller.”⁹³ Furthermore, in response to Section A of the Department’s questionnaire, Deosen reported that “AHA shipped the merchandise according to the specific arrangement and terms of sales between Deosen ... or Deosen USA and

⁸⁶ See Letter from the Department to Deosen, regarding “Xanthan Gum from the People’s Republic of China: Section A Supplemental Questionnaire,” dated December 30, 2015, (“Deosen Section A Supplemental Questionnaire”) at 3; see also BPI Memorandum at Note 9.

⁸⁷ See Deosen Supplemental Section A Response at 4.

⁸⁸ See Deosen-AHA July 19, 2016 Submission at Attachment I, 9-10 and Exhibit 7.

⁸⁹ *Id.*

⁹⁰ See Prelim AFA Memorandum.

⁹¹ See Section A of the Department’s original AD questionnaire, at question 4.b.

⁹² See BPI Memorandum at Note 10.

⁹³ See Deosen Supplemental Section A Response at 3.

these customers.”⁹⁴ Deosen also reported certain “Other expenses” in its response to Section C of the questionnaire.⁹⁵ Yet in that same response to Section C of the questionnaire, Deosen reported no commission expenses associated with its U.S. sales, noting that “Deosen did not engage ... any sales agent.”⁹⁶ Each of these examples involves facts that were kept from the Department or were contradicted, but which must be clearly understood in order to determine the nature of the sales process and the identity of the proper respondent (*i.e.*, the party that sets the terms of sale such as price) for antidumping duty purposes.

Furthermore, we disagree with Deosen’s and AHA’s contention that any inconsistencies in the record simply revolve around confusion as to the question of whether AHA was a reseller or agent for Deosen. The inconsistencies involve more than that. The inconsistencies in this review relate to information that goes to the essence of the arrangement between Deosen and AHA that was implemented to reduce the cash deposits paid. The record, particularly the ESA, demonstrates that the relationship between AHA and Deosen was an arrangement that would allow Deosen to use AHA as an “exporter” in order for Deosen to obtain a lower cash deposit rate. The record does not indicate that AHA was a reseller that had the right to do as it wished with respect to the subject merchandise that it “purchased” from Deosen in accordance with the ESA, nor does the record indicate that AHA represented Deosen in commercial transactions with third-parties. Rather, the ESA indicates that AHA’s role was to be the “official” exporter of the merchandise.⁹⁷ Further, Deosen and AHA have acknowledged that AHA played no role in determining the customer or the terms of sale, including the sales quantity or price⁹⁸, and that “AHA has no right to dispose of the merchandise purchased from Deosen in ways other than what was contemplated in the sales agreement ... AHA is expected to sell the merchandise to Deosen’s designated customers.”⁹⁹ The ESA is even titled as an “Export Service Agreement.” The reason for the Export Service Agreement, as Deosen and AHA acknowledged, was to reduce the dumping duty cash deposit on Deosen’s merchandise.¹⁰⁰

Upon review of the ESA, which Deosen and AHA placed on the record of this administrative review on July 19, 2016, per the Department’s request, the Department finds that the ESA is not a purchase-sales agreement governing purchases and resales of subject merchandise. Rather the ESA spells out a limited role for AHA in the transactions, a role essentially of that of a paper processor using its sales invoices for Deosen’s transactions with Deosen’s ultimate customers.¹⁰¹ Furthermore, many of the other terms of the ESA go toward limiting AHA’s obligations and responsibilities with respect to the sales.¹⁰²

The ESA shows that the relationship between Deosen and AHA was more akin to a situation where one company simply sells its invoices to another company in order to obtain that

⁹⁴ See Deosen’s December 9, 2015 Section A Response at 8-9.

⁹⁵ See Deosen Section C Questionnaire Response at 25; *see also* BPI Memorandum at Note 11.

⁹⁶ See Deosen Section C Questionnaire Response at 25.

⁹⁷ See Prelim AFA Memorandum at 6.

⁹⁸ See Deosen-AHA July 19, 2016 Submission at Attachment II, 10-12; *see also* BPI Memorandum at Note 12.

⁹⁹ *Id.* at 10.

¹⁰⁰ See Deosen-AHA July 19, 2016 Submission at Attachment I, 7-8.

¹⁰¹ See BPI Memorandum at Note 13.

¹⁰² See BPI Memorandum at Note 14.

company's cash deposit rate.¹⁰³ These facts lead the Department to find that Deosen's "sales" to AHA and AHA's "sales" to Deosen's U.S. customers did not involve a legitimate sales process, as claimed by Deosen and AHA, but instead were sales made and controlled by Deosen using AHA's invoices. Further, these facts put the reported pricing information in context, such that the reported information is no longer reliable to calculate an appropriate dumping margin.

Deosen argues that the Department could have conducted verification to address the alleged inconsistencies as well as Deosen's and AHA's business arrangement. However, the Department did not find a reason to verify the relationship between these parties in light of Deosen's provision of record information indicating, and acknowledgment that it engaged in, a scheme to have its subject merchandise enter the United States at a cash deposit rate that is lower than its cash deposit rate.¹⁰⁴

The CIT has noted that, "Commerce is obligated to calculate antidumping margins in the most accurate way possible. To this end, the respondent must provide Commerce with the most accurate, credible, verifiable information. Ultimately, the burden of creating an adequate record lies with the respondents."¹⁰⁵ Deosen and AHA did not fulfill their burden of creating a complete and accurate record in this proceeding because they withheld the ESA from the Department in their Section A responses and thus did not provide a full picture of the nature of their relationship. Further, the CAFC has stated that "the statutory mandate that a respondent act to 'the best of its ability' requires the respondent to do the maximum it is able to do" which includes putting "forth its maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation."¹⁰⁶ Additionally, the CIT explained, "{w}hen a respondent fails to respond to Commerce's requests and the information requested is material to the investigation, this court previously found such behavior to be unreasonable and the use of AFA appropriate."¹⁰⁷ As described above, Deosen and AHA have failed to cooperate by not acting to the best of their abilities to comply with requests for information.¹⁰⁸

Also, Deosen's and AHA's argument regarding the Department's change in position from the preliminary results of the prior antidumping duty administrative review is not appropriate to consider in the final results of this review, which is a different segment of the proceeding with a different administrative record. Specifically, Deosen and AHA argue that the Department has not explained why information that was clear and sufficient for calculating a dumping margin for

¹⁰³ See *Certain Preserved Mushrooms from the People's Republic of China: Final Results and Partial Rescission of the New Shipper Review and Final Results and Partial Rescission of the Third Antidumping Duty Administrative Review*, 68 FR 41304 (July 11, 2003) ("Preserved Mushrooms from the PRC") and corresponding IDM at Comment 1; see also *Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles from the People's Republic of China: Final Results of the Expedited Fourth Sunset Review of the Antidumping Duty Orders*, 81 FR 78777 (November 9, 2016) and corresponding IDM at Comment 1, referencing *Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles from the People's Republic of China: Final Results of Antidumping Duty Administrative Reviews, and Final Rescission and Partial Rescission of Antidumping Duty Administrative Reviews*, 71 FR 54269 (September 14, 2006) ("Hand Tools (14th Review)") and accompanying IDM at Comment 1.

¹⁰⁴ See Deosen-AHA July 19, 2016 Submission at Attachment I, 7-8.

¹⁰⁵ See *Chia Far Indus. Factory Co., Ltd. v. U.S.*, 28 CIT 1337, 1354-55, 343 F. Supp. 2d 1344, 1362 (2004) (internal citations omitted) ("*Chia Far Indus. Factory Co. Ltd.*").

¹⁰⁶ See *Nippon Steel Corp. v. U.S.*, 337 F.3d 1373, 1382 (Fed. Cir. 2003).

¹⁰⁷ See *Chia Far Indus. Factory Co., Ltd.*, 28 CIT at 1356, 343 F. Supp. 2d at 1364.

¹⁰⁸ See section 776(b) of the Act.

the preliminary results of the prior antidumping duty administrative review has now become unclear and inconsistent. Each review stands on its own and the Department's determination in these final results is based on the information on the record of this review.

While Deosen and AHA challenge the Department's legal authority to collect and use factual information after the statutory deadline for completing the final results of a review, this argument is not applicable to this review because all factual information obtained in this review, including the ESA, was obtained before the preliminary results of the instant review. Furthermore, even if certain factual information submitted in this review was initially submitted after the statutory deadline for completing the final results of the prior review, it would not be appropriate to ignore such information which provides a complete picture of the business arrangement between Deosen and AHA and calls into question the integrity of the sales data which was to be used to calculate a dumping margin.

Based on the foregoing, pursuant to sections 776(a)(1), 776(a)(2)(A) and (C) and 776(b) of the Act, we continue to find that Deosen and AHA withheld information and significantly impeded the proceeding, failed to cooperate by not acting to the best of their abilities, and that necessary information to calculate an accurate dumping margin is not available on the record of this administrative review.¹⁰⁹ As outlined above, the prices reported to the Department for Deosen's sales through AHA are unreliable for calculating an accurate dumping margin, as the sales process has been structured by Deosen and AHA to avoid the proper cash deposit rate. Therefore, we have determined that it is appropriate to base the dumping margins for Deosen and AHA on total AFA.

Petitioner also argues that the Department cannot calculate a dumping margin for Deosen based on conflicting information regarding AHA's commission. However, because the Department has already determined that Deosen's and AHA's sales scheme renders the sales unusable for determining an accurate dumping margin, we have not addressed Petitioner's concerns regarding the inconsistent reporting of the commission expense.

Comment 2: Separate Rate Status of AHA

Deosen/AHA

- The CIT explained that a separate rate analysis is separate and distinct from the use of an AFA rate for a mandatory respondent for its failure to fully cooperate and provide all requested information.¹¹⁰
- The Department's determination that a party is not entitled to a separate rate must be because its separate rate information is unreliable.¹¹¹ When the Department fails to make a finding that a respondent's separate rate response was inaccurate or deficient, the Department's denial of a separate rate is unsupported by substantial evidence.¹¹² The

¹⁰⁹ See sections 776(a)(1), 776(a)(2)(A) and (C), and 776(b) of the Act.

¹¹⁰ See Deosen/AHA Brief at 25, citing *Yantai Xinke Steel Structure Co. v. United States*, Slip Op. 12-95, 2012 WL 2930182, at 14 (CIT July 18, 2012) ("*Yantai Xinke*") and *Shenzhen Xinboda Industrial Co., Ltd. v. United States*, Slip-Op. 16-74, 2012 WL 2930182 at 14 (CIT July 18, 2012) ("*Shenzhen Xinboda Industrial Co., Ltd.*").

¹¹¹ See Deosen/AHA Brief at 25, referencing *Gerber Food (Yunnan) Co. v. United States*, 29 CIT 753, 771-72, 387 F. Supp. 2d 1270, 1287 (2005).

¹¹² See Deosen/AHA Brief at 26, referencing *Yantai Xinke*, 2012 WL 2930182 at 14.

Department did not assign Deosen and AHA a separate rate solely because the Department claimed they failed to cooperate fully and impeded the investigation with respect to their questionnaire responses as to U.S. sales.

- The Courts have ruled that the Department must make independent findings based on substantial evidence on the record that the respondent's separate rate information was deficient; the Department may not impute deficiencies related to a questionnaire response to the separate rate response.¹¹³
- The alleged unreliability of the questionnaire response did not impact the information in the separate rate response. The claimed basis for AFA does not relate to corporate ownership and control, but to Deosen's alleged failure to timely respond to the request for information on its relationship with a trading company.

Petitioner

- Under the Department's practice, a company's eligibility for separate rate status requires reviewable entries from the company during the relevant POR.¹¹⁴ AHA is urging the Department to use the very sales the Department found "...should not be used in our analysis" to justify granting AHA separate rate status. If the sales made by AHA are unsuitable for the use in the antidumping analysis, they cannot be used as the basis for justifying AHA's eligibility for separate rate status.¹¹⁵
- AHA made no *bona fide* commercial sales during the POR. The Department "has discretion in employing a methodology to exclude sales from the United States price that are unrepresentative or distortive, non-*bona fide* ones."¹¹⁶ It is the Department's long-standing practice in cases where a respondent has no reviewable sales to rescind the review as to that respondent. The Department must rescind this review as to AHA.¹¹⁷

Department's Position: AHA received a separate rate in the *Preliminary Results* because the Department preliminarily found that AHA met the requirements of *Silicone Carbide* and

¹¹³ See Deosen/AHA Brief at 26, referencing *Yantai Xinke*, 2012 WL 2930182 at 14 and generally, *Shenzhen Xinboda Industrial Co., Ltd.*

¹¹⁴ See Pet.'s Rebuttal Br. at 12-13, referencing *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Final Results of Antidumping Duty Administrative Review, 2011-2012*, 78 FR 56211 (September 12, 2013) ("*2011-2012 Shrimp from Vietnam*") and accompanying IDM at Comment 11 ("a company that did not export subject merchandise to the United States during the relevant period is likewise not eligible for a separate rate, because it has no reviewable POR entries and, thus, is not subject to the review (including the determination of a separate rate status);" and *Policy Bulletin 5.1: Separate-Rates Practice and Application of Combination Rates in Antidumping Investigations Involving Non-Market Economy Countries*, (April 5, 2005), available at <http://enforcement.trade.gov/policy/bull05-1.pdf>. ("because {a company} has no reviewable period of review entries {it} is not subject to the review (including the determination of separate rate status).").

¹¹⁵ See Pet.'s Rebuttal Br. at 13, referencing the Prelim AFA Memorandum at at 7.

¹¹⁶ See Pet.'s Rebuttal Br. at 13, referencing *Windmill Int'l Pte v. United States*, 193 F. Supp. 2d 1303, 1312 (Ct. Int'l Trade 2002) ("*Windmill*"); see also *Fresh Garlic* at 1336 (November 30, 2015) ("Commerce's refusal to conduct an administrative review is supported by substantial evidence" where the respondent had no *bona fide* sales during the POR as determined by a concurrent new shipper review).

¹¹⁷ See Pet.'s Rebuttal Br. at 13, referencing *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Final Results of Antidumping Duty Administrative Review, 2013-2014*, 80 FR 55328 (September 5, 2015) ("*2013-2014 Shrimp from Vietnam*") and accompanying IDM at Comment 12; see also *Solid Fertilizer Grade Ammonium Nitrate from the Russian Federation: Notice of Rescission of Antidumping Duty Administrative Review*, 77 FR 65532 (October 29, 2012) ("*Ammonium Nitrate from Russia*") and accompanying IDM at Comment 2.

Sparklers for demonstrating an absence of *de facto* and *de jure* of government control.¹¹⁸ Specifically, AHA responded to the separate rate portion of Section A of the AD questionnaire and provided evidence of both *de jure* and *de facto* absence of government control.¹¹⁹ Record evidence indicates that AHA and Deosen entered into a business arrangement intended specifically to orchestrate sales to the U.S. market and avoid antidumping duty cash deposits at the appropriate rate.¹²⁰ The agreement establishing their business arrangement does not indicate that the PRC government set the terms of that business agreement or the terms of the sales pursuant to that agreement. Also, AHA submitted information which the Department has determined demonstrates an absence of *de facto* and *de jure* government control. The record contains no other information indicating that AHA was subject to government control or involvement. Moreover, parties are not challenging whether AHA demonstrated an absence of both *de jure* and *de facto* government control.

Rather, Petitioner contends that AHA did not make a single *bona fide* sale of subject merchandise during the POR and that eligibility for a separate rate depends upon having reviewable entries during the POR. In the absence of reviewable sales, Petitioner contends that AHA cannot demonstrate its eligibility for a separate rate and the review of AHA must be rescinded.

While Petitioner contends that this review must be rescinded with respect to AHA because AHA had no reviewable sales during the POR, the facts here are distinguishable from the determinations Petitioner cites. In those determinations, the Department rescinded a review with respect to a respondent that reported that it had no sales, shipments or entries during the POR. Here, AHA did not report that it had no sales, shipments or entries during the POR. Rather, AHA reported that it had sales, and there were entries of subject merchandise during the POR that are subject to this review, and these entries were made under AHA's antidumping duty case number.¹²¹ Indeed, Deosen and AHA reported having structured sales to use the cash deposit rate assigned for the producer-exporter combination of Deosen-AHA.¹²² Accordingly, for purposes of this review, the Department is attributing the behavior being examined in connection with these sales to both Deosen and AHA, collectively. This is not a case similar to those cited by Petitioner, where there simply were no reported transactions involving the shipment of subject merchandise associated with the respondent during the POR. In *2011-2012 Shrimp From Vietnam*, the company at issue was denied a separate rate because it "did not ship its product directly to the United States in POR7 ... "(also, the company did not file a separate rate application).¹²³ In *2013-2014 Shrimp From Vietnam*, the Department found that the company at issue, "Camimex Corp. did not provide evidence of a sale, export, or entry by Camimex Corp. to

¹¹⁸ See *Final Determination of Sales at Less Than Fair Value: Sparklers from the People's Republic of China*, 56 FR 20588 (May 6, 1991) (*Sparklers*); see also *Final Determination of Sales at Less Than Fair Value: Silicon Carbide from the People's Republic of China*, 59 FR 22585 (May 2, 1994) (*Silicon Carbide*).

¹¹⁹ See the "Separate Rates" section of AHA's November 23, 2015 Section A Response.

¹²⁰ See Deosen-AHA July 19, 2016 Submission at Attachment I, Exhibit 7, and Attachment II, 8.

¹²¹ See Deosen-AHA July 19, 2016 Submission at Attachment I at 11; see also AHA's November 23, 2015 Section A Response at Exhibit A.4.c.

¹²² See Deosen-AHA July 19, 2016 Submission at Attachment I, 6-7.

¹²³ See *2011-2012 Shrimp from Vietnam* and accompanying IDM at Comment 11.

the United States during the period” (thus, it was not entitled to a separate rate).¹²⁴ In *Ammonium Nitrate from Russia*, the Department found that “{n}either respondent had an entry of subject merchandise during the POR. Therefore, we recommend finding that there were no reviewable transactions in this segment of the proceeding.”¹²⁵ Here, AHA engaged in a scheme where entries of subject merchandise entered under its case number to obtain the lower Deosen (producer) – AHA (exporter) combination rate rather than the rate that would have applied had the entries come in under the Deosen (producer) – Deosen (exporter) rate.¹²⁶ It would not be appropriate simply to rescind the review with respect to AHA, ignore AHA’s role in the scheme to assist Deosen in avoiding the proper antidumping duty cash deposit rates, and treat AHA in the same manner as a company that simply had no shipments of subject merchandise during the POR.

Moreover, the facts in this review differ from those typically present in new shipper reviews, where the Department rescinds the review due to a lack of *bona fide* sales. As an initial matter, section 751(a)(2)(B)(iv) of the Act instructs that a weighted-average dumping margin determined for a new shipper must be based solely on *bona fide* U.S. sales, making rescission of a new shipper review appropriate where a new shipper lacks *bona fide* sales. It would not be appropriate to establish a dumping margin and cash deposit rate for the new shipper based on transactions that are atypical and that do not reflect the new shipper’s usual commercial practices.¹²⁷ Furthermore, when the Department rescinds a new shipper review, it leaves the new shipper in the same position as if there had been no review; the new shipper’s entry is generally liquidated as entered and the cash deposit rate in effect for the new shipper (which, a non-market economy (“NME”) context, would normally be the NME-wide rate) continues to apply to the new shipper.¹²⁸ However, this review involves more than simply finding atypical transactions such as might be found in a new shipper review that is subsequently rescinded because of such non *bona fide* transactions. As explained in the Department’s position to Comment 1, AHA’s actions being examined in this review involve a scheme to avoid the appropriate cash deposit rate. AHA withheld information, significantly impeded this proceeding by engaging in a scheme to avoid application of the appropriate AD cash deposit rates, and failed to cooperate by not

¹²⁴ See *2013-2014 Shrimp from Vietnam* and accompanying IDM at Comment 12.

¹²⁵ See *Ammonium Nitrate from Russia* and accompanying IDM at Comment 2.

¹²⁶ See Deosen-AHA July 19, 2016 Submission at Attachment I, 6-7; see also Prelim AFA Memorandum at 7.

¹²⁷ See *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People’s Republic of China: Rescission of Antidumping Duty New Shipper Review; 2013-2014*, 80 FR 55090 (September 14, 2015) (“DMEGC”) noting “{f}or the foregoing reasons, the Department finds that DMEGC’s sale is a non-*bona fide* sale and that this sale does not provide a reasonable or reliable basis for calculating a dumping margin. Because this non-*bona fide* sale was DMEGC’s only sale of subject merchandise during the POR, the Department is rescinding this NSR.” See also *Hebei New Donghua Amino Acid Co., Ltd. v. United States*, 374 F. Supp. 2d 1333, 1342 (Ct. Int’l Trade 2005) stating that “{i}n accordance with the goal of ensuring a realistic U.S. price figure, it is reasonable that Commerce uses the *bona fide* sale test to exclude sales that are ‘not typical of normal commercial transactions in the industry.’”

¹²⁸ See DMEGC 80 FR 55090, 55091 stating that “{a} the Department is rescinding this NSR, we have not calculated a company-specific dumping margin for DMEGC. DMEGC remains part of the PRC-wide entity and, accordingly, its entries will be assessed at the PRC-wide rate. ... Because we did not calculate a dumping margin for DMEGC or grant DMEGC a separate rate in this review, DMEGC continues to be part of the PRC-wide entity. The cash deposit rate for the PRC-wide entity is 238.95 percent. These cash deposit requirements shall remain in effect until further notice.

acting to the best of its ability to comply with a request for information.¹²⁹ Where a respondent withholds information, significantly impedes a proceeding, and fails to cooperate by not acting to the best of its ability to comply with a request for information, the statute provides for the application of AFA, rather than for rescinding the review and leaving the respondent in the same position as if there had been no review.¹³⁰

The cases relied upon by Petitioner in arguing to rescind this review with respect to AHA, such as *Hebei* and *Windmill*, did not involve findings that the respondents in the underlying proceedings withheld information, significantly impeded the proceedings, and failed to cooperate by not acting to the best of their ability to comply with requests for information. Nor were there any findings in those proceedings that the respondents engaged in activities to avoid the application of the applicable cash deposit or assessment rate. Thus, those cases do not speak to the situation here. Rather, in the present review, we are facing a scheme similar to the one faced by the Department in *Hand Tools (14th Review)*. In *Hand Tools (14th Review)*, the Department stated:

. . . the Department continues to find that facts available are appropriate, under section 776(a)(2)(C) of the Act, as Huarong, TMC, and Iron Bull significantly impeded this proceeding. The Department also continues to find that in selecting from among the facts available, pursuant to section 776(b) of the Act, an adverse inference is warranted because the Department has determined that Huarong, TMC, and Iron Bull failed to cooperate by not acting to the best of their ability to comply with our requests for information. Specifically, for these companies, an adverse inference is warranted because they: (1) continually misrepresented the true nature of their principal/“agent” relationships during the POR by portraying their “agent” sales scheme as a *bona fide* arrangement; (2) participated in an “agent” sales scheme in order to avoid payment of the appropriate cash deposit and assessment rate and circumvent the antidumping duty order; and (3) undermined our ability to issue instructions to CBP to assess accurate antidumping duties.¹³¹

Furthermore, in *Hand Tools (14th Review)*, the Department noted:

The record evidence gathered by the Department demonstrates that the “agent” sales arrangement resulted in an incorrect, lower cash deposit being collected at the time of entry. Accordingly, the Department finds that Huarong's, TMC's, and Iron Bull's respective “agent” sales schemes would have, absent corrective action, undermined the Department's ability to issue correct and effective instructions to CBP to impose accurate cash deposit and assessment rates, since such arrangements result in the misidentification of the true exporter when the shipments enter the U.S. market. . . . The “agent” sales schemes undertaken by Respondents . . . {allowed} the importer (via an invoice from the “agent”) to

¹²⁹ See section 776(b) of the Act.

¹³⁰ *Id.* See also section 776(b) of the Act.

¹³¹ See *Hand Tools (14th Review)* and corresponding IDM at Comment 1.

inform CBP that one party is the exporter while another party is reported as the exporter to the Department.¹³²

Likewise, we have determined that the application of AFA to AHA is the appropriate course of action here (see Comment 1). The Department has discretion to administer the law in a manner that prevents evasion of the order.¹³³ Moreover, as the CIT noted in *Tung Mung*, citing *Mitsubishi Electric*, the Department has a responsibility to apply its law in a manner that prevents the evasion of antidumping duties:

The ITA has been vested with authority to administer the antidumping laws in accordance with the legislative intent. To this end, the ITA has a certain amount of discretion [to act] ... with the purpose in mind of preventing the intentional evasion or circumvention of the antidumping duty law. *Mitsubishi Elec. Corp. v. United States*, 12 C.I.T. 1025, 1046, 700 F. Supp. 538, 555 (1988), aff'd 898 F.2d 1577 (Fed. Cir. 1990).

Therefore, we do not find it appropriate in this segment of the proceeding to ignore AHA's actions that we examined for the POR and rescind the review, leaving AHA in the same position as if there were no review, maintaining the cash deposit rate that was assigned to the Deosen-AHA combination in the final determination of the investigation, which could result in avoidance of payment of proper AD cash deposits.¹³⁴ This is also consistent with the Department's practice to ensure "that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully."¹³⁵

For these final results, we continue to find that AHA is eligible for separate rate status.

Comment 3: Separate Rate Margin Calculation

Background:

In the *Preliminary Results*, the Department determined that CP Kelco (Shandong) Biological Company Limited ("CP Kelco (Shandong)") and Shanghai Smart established their separate rate eligibility. The Department preliminarily calculated a weighted-average dumping margin for Fufeng of zero percent¹³⁶ and assigned Deosen/AHA a dumping margin based entirely on facts available.¹³⁷ The Department assigned the separate rate respondents a dumping margin equal to

¹³² *Id.*

¹³³ See *Tung Mung Development v. United States*, 219 F. Supp. 2d 1333, 1343 (CIT 2002), ("*Tung Mung*"), affirmed in *Tung Mung Dev. Co. v. United States*, 354 F.3d 1371 (Fed. Cir. 2004).

¹³⁴ See *Preserved Mushrooms from the PRC* and accompanying IDM at Comment 1 ("Thus, in light of record evidence of material misrepresentations by Green Fresh {the "agent" which provided invoices to Gerber} as noted above and the potential for future misconduct, we believe the assignment of a cash deposit and assessment rate equal to the PRC-wide rate of 198.63 percent is appropriate as adverse facts available. ... The Department considers the assignment of this rate to Green Fresh sufficient to encourage it to cooperate with the Department in future reviews, and to ensure that Green Fresh does not participate in other schemes to evade the antidumping duty law and payment of appropriate cash deposit rates in the future.").

¹³⁵ *Id.*

¹³⁶ See *Preliminary Results* at 81 FR 54046.

¹³⁷ See *Preliminary Results* at 81 FR 54046.

a simple average of the dumping margin assigned to Fufeng and the dumping margin assigned to Deosen/AHA. Specifically, the Department assigned the separate rate respondents a dumping margin of 77.04 percent.

Shanghai Smart:

- The application of a 77.04 percent separate rate dumping margin to Shanghai Smart is both unreasonable and unsupported by substantial evidence in the administrative record.
- Under section 735(c)(5)(A) of the Act, the separate rate dumping margin for a cooperative non-mandatory respondent is normally an amount equal to the weighted average of the estimated weighted average dumping margins established for exporters and producers individually examined, excluding any zero percent and *de minimis* dumping margins, and any dumping margins determined entirely on the basis of facts available (“FA”).
- However, pursuant to section 735(c)(5)(B) of the Act, in instances when the dumping margins for all individually examined respondents are zero, *de minimis* or based entirely on FA, the Department “may use any reasonable method to establish the estimated all-others rate for exporters and producers not individually examined, including averaging the estimated weighted average dumping margins determined for the exporters and producers individually investigated.” Further the legislative history provides that if the methodology “is not feasible, or it results in an average that would not be reflective of potential dumping margins for non-investigated exporters or producer, Commerce may use other reasonable methods.”¹³⁸
- Although the statute may contemplate the Department’s use of a simple average of a *de minimis* dumping margin and a dumping margin based solely on AFA to calculate the separate rate dumping margin, the Courts have required the Department to use a methodology whose application is reasonable under the circumstances of the case.¹³⁹ In *Bestpak*, the Court rejected the Department’s calculation of a separate rate dumping margin which was based on a simple average of a zero percent dumping margin and an AFA China-wide rate, finding that it did not reflect economic reality, was unjustifiably high, may amount to being punitive, and was not permitted by the statute.¹⁴⁰
- The Department may not assign to respondents an unreasonably high dumping margin having no relationship to the respondent’s actual dumping margin.¹⁴¹ The assigned

¹³⁸ See Letter from Shanghai Smart to the Department, regarding Xanthan Gum from the People's Republic of China; Shanghai Smart Comments on the Calculation of the Separate Company Rates in the Post-Preliminary Results of the 1st Review and the Preliminary Results of the 2nd Administrative Review,” dated September 14, 2016 (“Shanghai Smart’s Br.”) at 5, referencing Uruguay Round Agreements Act, SAA, H.R. Doc. No. 103-316 at 873 (1994).

¹³⁹ See Shanghai Smart’s Br. at 5, referencing *Thai Pineapple Canning Indus. Corp. v. United States*, 273 F.3d 1077, 1085 (CAFC 2001).

¹⁴⁰ See Shanghai Smart’s Br. at 6 and 9, referencing *Yangzhou Bestpak Gifts & Crafts Co., Ltd. v. United States*, 716 F.3d 1372, 1378, 1379, 1380 (“*Bestpak*”).

¹⁴¹ See *Gallant Ocean (Thail.) Co. v. United States*, 602 F.3d 1319, 1323 (CAFC 2010).

dumping margin must reflect the commercial reality of the respondent¹⁴² and be a reasonably accurate estimate of actual dumping rates.¹⁴³

- The absence of an explanation of why the Department applied a simple average of the AFA and zero margin is insufficient to sustain a final determination.¹⁴⁴
- The Department's simple average calculation is unreasonable because it bears no relationship to Shanghai Smart's actual pricing practices and is not reflective of its economic reality. There is no information on the record of this review that ties the calculated separate rate dumping margin to Shanghai Smart's actual dumping margin.
- Pursuant to *Bestpak*, an average of a high AFA dumping margin and a zero percent calculated dumping margin undercuts the reasonableness of the separate rate dumping margin because it is punitive.¹⁴⁵ Deosen's and AHA's AFA rate is not a calculated dumping margin, but a statutory dumping margin imposed due to their actions. The AFA dumping margin, therefore, is not representative of fully cooperative respondents, like Shanghai Smart.
- AFA is used to elicit compliance from uncooperative respondents. Shanghai Smart fully cooperated with the Department in this review. Courts have found that there is "no basis in the statute for penalizing cooperative uninvestigated respondents due solely to the presence of non-cooperative investigated respondents who receive a dumping margin based on AFA."¹⁴⁶ Thus, it is not appropriate for the Department to include Deosen's and AHA's AFA rate in the calculation of the separate rate dumping margin, because this rate is being applied to a company that fully participated in the review. If the Department were to continue to use the AFA rate in calculating the separate rate dumping margin, it would be assigning a punitive dumping margin to a fully cooperative respondent.
- Although the statute permits the possibility of including an AFA rate in the calculation of a separate rate dumping margin, the Courts have determined that the inclusion of an AFA rate in the calculation of a separate company's dumping margin was not reasonable in a number of circumstances. In *Baroque Timber*, the CIT found the application of AFA in a separate rate margin calculation unreasonable because there wasn't evidence of dumping by the separate rate companies, the Department failed to connect the AFA margin and the separate rate companies' pricing practices, and it failed to determine rates that bear a relationship to respondents' economic reality. The Court explained that the Department cannot use an AFA rate in calculating the separate rate dumping margin for cooperating parties without an explanation.¹⁴⁷ In *Changzhou Wujin*, the CIT noted that when the Department applies an AFA dumping margin to a mandatory respondent and assigns separate rate respondents a dumping margin that includes the AFA rate, the

¹⁴² See Shanghai Smart's Br. at 5-6 referencing, *Bestpak*, 716 F.3d 1372, 1380 (CAFC 2013) and *Changzhou Wujin Fine Chem. Factory Co., Ltd. v. United States*, 701 F.3d 1367, 1379 (Fed. Cir. 2012) ("*Changzhou Wujin*").

¹⁴³ See Shanghai Smart's Br. at 55, referencing, *Gallant Ocean*, 602 F.3d at 1324.

¹⁴⁴ See Shanghai Smart's Br. at 5-6, referencing *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962) and *Bestpak*, 716 F.3d at 13778.

¹⁴⁵ See Shanghai Smart's Br. at 12, referencing *Bestpak*, 716 F.3d at 1380.

¹⁴⁶ See Shanghai Smart's Br. at 8, referencing *Amanda Foods (Vietnam) Ltd. v. United States*, 647 F. Supp. 2d 1368, 1381 (CIT 2009) ("*Amanda Foods*") and *Yantai Oriental Juice Co. v. United States*, 27 CIT 477, 487 (2003) ("*Yantai*").

¹⁴⁷ See *Baroque Timber Industries (Zhongshan) Company, Limited, v. United States*, 971 F Supp. 2d 1333, 1343-45 (CIT 2014) ("*Baroque Timber*").

Department “must explain why its approach is a ‘reasonable method’ of calculating a separate rate, in light of the alternatives available, and with the recognition of the fact that the separate rate dumping margin calculation will affect cooperating respondents” and that “applying an adverse rate to cooperating respondents undercuts the cooperation — promoting goal of the AFA statute.”¹⁴⁸ The Court concluded that Commerce acted in an “arbitrary and capricious manner” when it selected a methodology “that would have the most adverse effect on cooperating voluntary respondents, in a situation where there was no need or justification for deterrence.”¹⁴⁹

- Hence, the Department must provide a detailed explanation of its calculations of the separate rate dumping margin. In order for an antidumping duty determination to be reasonable as applied, the Department must articulate a rational connection between the facts found and the choice made.¹⁵⁰ The Department's simple average methodology resulted in the calculation of a punitive margin that had the most adverse effect on Shanghai Smart, even though it had fully cooperated with the Department's administrative review.
- The increase in the separate rate dumping margin from 71.71 percent in the investigation in this proceeding to 77.04 percent in this review is incongruous given the fact that Fufeng’s dumping margin has declined from 15.09 percent in the investigation to zero percent in this administrative review. This calculated amount is punitive and not permitted under the statute.¹⁵¹
- The Department should assign Shanghai Smart a zero percent dumping margin based on Fufeng’s zero percent dumping margin. Fufeng is the only company for which the Department has calculated a weighted average dumping margin in the first and second administrative reviews in this proceeding. Therefore, its dumping margins are necessarily representative of the dumping margins of all exporters with exports during those periods and, under the statute, the Department may rely entirely on Fufeng’s rate and this reliance is reasonable.¹⁵² Deosen’s AFA rate is not a calculated margin but a statutory margin imposed due to its failure to cooperate.
- The 77.04 percent dumping margin assigned to separate rate respondents is far in excess of Fufeng’s zero percent dumping margin, which, as noted above, is the only calculated rate in this review. Deosen’s 5.14 percent margin calculated in the *Preliminary Results* before the application of AFA to Deosen, shows a decrease of over 95 percent in the margin since the investigation. Fufeng’s margin has also decreased 100 percent, to zero from 15.09 percent, since the investigation.
- While the expected method under the statute is to calculate the separate rate dumping margin based upon the average of the *de minimis* and the AFA dumping margins, the statute expressly authorizes the Department to use any reasonable method. The Department is not compelled to use the expected methodology, which does not reflect

¹⁴⁸ See *Changzhou Wujin*, 701 F.3d 1367, 1378-79 (CAFC 2012).

¹⁴⁹ *Id.*

¹⁵⁰ See *Burlington Truck Lines, Inc. v. United States*, 731 U.S. 156, 168 (1962).

¹⁵¹ See Shanghai Smart’s Br. at 11, referencing *F.lli De Cecco di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000).

¹⁵² See Shanghai Smart’s Br. at 15, referencing *Baroque Timber*, 971 F. Supp. 2d at 1344 and 19 U.S.C. 19 U.S.C. § 1677f-1(c)(2); 19 U.S.C. § 1673d(c)(5)(B) and Uruguay Round Agreements Act SAA, at 873.

Shanghai Smart's actual dumping margin. Therefore, the Department should base the separate rate dumping margin solely on Fufeng's zero percent dumping margin.

- In *Changzhou Wujin*, *Baroque Timber*, and *Bestpak*, the Department was reluctant to issue a separate rate dumping margin of zero percent in investigations because all of the separate rate companies would be excluded from those orders. In this instance, the Department has already established the AD order for xanthan gum from the PRC and assigning a zero percent dumping margin to the separate rate respondents only affects a small number of exporters who have participated in this review. Therefore, the impact of assigning a zero percent dumping margin to separate rate companies is limited to the assessment rates during this POR and the future dumping duty cash deposit rates.

CP Kelco U.S., Inc.

- The Department should not calculate a dumping margin for the separate rate companies by averaging Deosen's and AHA's AFA dumping margin with Fufeng's zero percent dumping margin, because the resulting dumping margin is punitive and not indicative of CP Kelco (Shandong)'s commercial reality. Instead, the Department should assign the separate rate respondents the dumping margin calculated for Fufeng because it is the only dumping margin indicative of the pricing of xanthan gum during this administrative review.
- Under section 735(c)(5)(A) of the Act, the Department calculates the dumping duty rate for non-individually examined separate rate companies by weight averaging the dumping margins for the individually examined respondents, excluding *de minimis* and zero percent dumping margins or dumping margins based on AFA. When dumping margins for individually examined respondents are zero percent or based entirely on AFA, the Department may use any reasonable method to establish the dumping margin for non-individually examined separate rate respondents, including averaging the dumping margins for the individually examined respondents.¹⁵³
- In *Bestpak*, the CAFC held that using a dumping margin that was half of the PRC-wide rate was unjustifiably high and was punitive.¹⁵⁴ The CAFC also held that the Department's calculation of a separate rate dumping margin must be tied to the separate rate respondent's actual dumping margin, must reflect the separate rate companies' commercial reality.¹⁵⁵ In this review, the dumping margin of 154.07 percent which the Department assigned to Deosen and AHA is the highest dumping margin alleged in the petition and, thus, it is not tied to any sales data or any calculated dumping margin. Unlike AHA and Deosen, because CP Kelco (Shandong) has complied to the best of its ability and submitted a complete voluntary questionnaire response, there is, accordingly, no basis for the Department to use any portion of the AFA rate to calculate CP Kelco (Shandong)'s separate rate.
- In *Albemarle*, the CAFC held that when assigning separate rate dumping margins, the Department cannot rely on dumping margins from a previous period but instead must

¹⁵³ See Letter from CP Kelco U.S., Inc. ("CP Kelco, U.S.") to the Department, regarding "Xanthan Gum from the People's Republic of China: CP Kelco U.S., Inc.'s Supplemental Case Brief," dated September 14, 2016 ("CP Kelco U.S.' Supp. Br.") at 2, referencing section 735(c)(5)(B) of the Act.

¹⁵⁴ See CP Kelco U.S.' Supp. Br. at 2-3, referencing *Bestpak*, 716 F.3d at 1379-80.

¹⁵⁵ *Id.*

attempt to use the most current information available in selecting the separate rate dumping margin, and the Department cannot do so here as there is data on the record to determine if CP Kelco (Shandong)'s pricing behavior matches Fufeng in the voluntary response and comparative average unit values ("AUVs").¹⁵⁶

- Fufeng's zero percent calculated dumping margin is the only dumping margin on the record of this review that meets the statutory and judicial requirements for use as the separate rate dumping margin unless the Department individually calculates a margin for CP Kelco (Shandong). The AUVs of CP Kelco (Shandong)'s sales of subject merchandise, as reported in its voluntary questionnaire responses, compare favorably to those of Fufeng. Therefore, it is appropriate to apply Fufeng's dumping margin to CP Kelco (Shandong) as a separate rate respondent.
- In *TRBs*, the Department assigned the separate rate respondents a dumping margin of zero percent when one mandatory respondent received a zero percent dumping margin and the other mandatory respondent received the PRC-wide entity rate, which was based on AFA. This is the same situation here.¹⁵⁷
- Assigning a simple average of Fufeng and Deosen's and AHA's dumping margins as the separate rate dumping margin is punitive. CP Kelco (Shandong) has cooperated to the best of its ability in this review and there is no basis for the Department to use an AFA rate in calculating a separate rate dumping margin for CP Kelco (Shandong). Moreover, the disparity in the volume of sales of the companies' whose dumping margins form the basis for the separate rate dumping margin calculation shows that using a simple average is distortive. This is another reason that the Department should not rely on this calculation to derive the dumping margin for companies to which it granted separate rate status.
- The Department should not calculate the rate for the separate rate companies by using a simple average of Deosen/AHA's AFA dumping margin with Fufeng's zero percent margin because the resulting margin is punitive and not indicative of the commercial reality for CP Kelco (Shandong) because the amount of merchandise sold by Fufeng and Deosen varies greatly.

ADM

- The dumping margin for the separate rate respondents should be the simple average of Fufeng's zero percent dumping margin and Deosen's and AHA's AFA dumping margin. Although Shanghai Smart and CP Kelco U.S. argue that the separate rate dumping margin should be based solely on the zero percent dumping margin calculated for Fufeng, this methodology would contravene the statute and should be rejected.
- The statute provides that the all-others rate shall be an amount equal to the weighted average of the estimated dumping margins established for exporters and producers individually examined excluding any zero percent and *de minimis* dumping margins and

¹⁵⁶ See CP Kelco U.S.' Supp. Br. at 3 and 6, referencing *Albemarle Corp. & Subsidiaries v. United States*, 821 F.3d 1345, 1357 (Fed. Cir.2016) ("*Albemarle*").

¹⁵⁷ See CP Kelco U.S.' Supp. Br. at 5, *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China: Preliminary Results, Partial Rescission of Antidumping Duty Administrative Review, and Preliminary Rescission of New Shipper Review; 2014-2015*, 81 FR 45455 (July 14, 2016) ("*TRBs*") and accompanying PDM at 9.

any dumping margins determined entirely under FA. Further, that when the estimated dumping margins are all zero, *de minimis*, or AFA, the Department may use any reasonable method to calculate the all-others rate for companies not individually investigated.¹⁵⁸

- The SAA clarifies that “the expected method” in such cases will be to use the average of the dumping margins (whether zero percent, *de minimis* or AFA) for all exporters and producers individually examined, unless “this method is not feasible, or results in an average that would not be reasonably reflective of potential dumping margins for non-individually examined exporters or producers.”¹⁵⁹
- Because all of the individually examined respondents in this review received dumping margins that were either zero (*i.e.*, Fufeng) or based on total AFA (*i.e.*, Deosen and AHA), the separate rate dumping margin must be based on the ‘expected method,’ which provides for averaging the weighted average dumping margins determined for the exporters and producers individually examined. The Department should adhere to the expected method in this case.
- CP Kelco U.S. and Shanghai Smart cite various cases rejecting separate rate dumping margins calculated pursuant to section 735(c)(5)(B) of the Act, where the Department failed to show how each of those dumping margins reasonably reflected the dumping by non-individually examined exporters and producers. However, in each of the cases that CP Kelco U.S. and Shanghai Smart cite, the methodology used to determine the separate rate dumping margin departed from the expected method and resulted in a high separate rate – even though each of the individually examined producers and exporters had zero percent or *de minimis* dumping margins.¹⁶⁰
- In *Albemarle*, the CAFC explained that the Department is limited in its discretion to depart from the ‘expected method,’ and that the Department may use other reasonable methods, but only if the Department reasonably concludes that the expected method is not feasible or would not be reasonably reflective of the potential dumping margins.¹⁶¹ Here, the Department did not depart from the ‘expected method’ and there is no reason for the Department to demonstrate that the rate calculated under that method is not reasonably reflective of the dumping margins for CP Kelco (Shandong) and Shanghai Smart.

¹⁵⁸ See Letter from ADM to the Department, regarding “Xanthan Gum From The People's Republic of China - Re: Supplemental Rebuttal Brief,” dated September 26, 2016 (“ADM’s Rebuttal Supp. Br.”) at 2 referencing sections 735(c)(5)(A)-(B) of the Act.

¹⁵⁹ See ADM’s Rebuttal Supp. Br. at 3, referencing the SAA at 873.

¹⁶⁰ See ADM’s Rebuttal Supp. Br. at 4, referencing *Albemarle*, 821 F.3d 1345, 1349-50 (Fed. Cir. 2016) (rejecting separate rate based on margins calculated in a previous segment, where in the current review all mandatory respondents had received *de minimis* margins); *Baroque Timber*, 971 F. Supp. 2d 1333, 1338-39 (CIT 2014) (rejecting separate rate based on the average of the rates assigned to the mandatory respondents, which were all *de minimis*, and the rate assigned to the PRC-wide entity, which was not individually examined); *Bestpak*, 716 F.3d 1370, 1375 (Fed. Cir. 2013) (rejecting separate rate based on the average of the *de minimis* margin calculated for one mandatory respondent and the “AFA China-wide rate” assigned to another mandatory respondent not eligible for a separate rate, where the PRC-wide entity was not individually examined); *Changzhou Wujin*, 701 F.3d 1367, 1375 (Fed. Cir. 2012) (rejecting separate rate based on the average of the rates assigned to the mandatory respondents, which were all *de minimis*, and a “hypothetical AF A rate” that “was not assigned to any individually investigated entity”).

¹⁶¹ See ADM’s Rebuttal Supp. Br. at 4, referencing *Albemarle*, 821 F.3d 1345, 1352.

- Although CP Kelco U.S. argues that, in *TRBs*, the Department assigned separate rate respondents a dumping margin of zero percent, that case is different than the current review, because in that case, the Department departed from the expected method and assigned a high dumping margin to the separate rate respondents. Specifically, in *TRBs*, the Department found that one individually examined respondent had a dumping margin of zero percent, while the other individually examined respondent did not qualify for a separate rate, and that it could not include the PRC-wide rate because the PRC-wide rate was not individually examined. In this review, the Department determined that Fufeng, Deosen, and AHA have qualified for a separate rate. Unlike *TRBs*, the reasonable method requires that the AFA rate should be included when applying the “expected method.”¹⁶²
- Even if the PRC-wide rates that have been assigned to mandatory respondents that are part of the PRC-wide entity are to be excluded from the ‘expected method,’ it does not follow that AFA dumping margins assigned to mandatory respondents that are not part of the PRC-wide entity must also be excluded from the “expected method.”¹⁶³ If the Department were to exclude the AFA dumping margins assigned to Deosen and AHA from the separate rate dumping margin calculation, it would represent a departure from the ‘expected method.’
- Commerce itself has no burden of presenting evidence demonstrating the rate is reflective of the dumping by the separate rate respondents unless it departs from the expected method, which it has not done here. Shanghai Smart and CP Kelco U.S. have not provided any evidence demonstrating that the rate of 77.04 percent does not reflect their “economic reality,” a showing they must make to exclude the Deosen/AHA rate from the calculation of the separate rate.¹⁶⁴ The 77.04 percent rate being higher than the 70.61 percent rate assigned to separate rate companies during the investigation does not render it unreasonable.
- CP Kelco U.S. presumes that if Fufeng is not dumping based on the AUVs derived from its Q&V questionnaire response, then CP Kelco (Shandong) is not dumping at the AUVs in its own Q&V questionnaire response. However, the AUVs taken from the Q&V charts of one exporter cannot be directly compared to AUVs from another exporter, because xanthan gum is sold in a wide range of qualities, from oilfield grade to pharmaceutical grade. The AUV alone reveals nothing about the product mix or the range of normal values associated with that product mix. Further, these AUVs are not on a consistent basis with respect to delivery terms and other price adjustments.

¹⁶² See ADM’s Rebuttal Supp. Br. at 5-6, referencing *TRBs*, 81 FR 45455, 45456-57 (July 14, 2016) (preliminary results), and accompanying PDM at 9.

¹⁶³ See ADM’s Rebuttal Supp. Br. at 7, referencing *Roller Bearings*, 81 FR at 45456-57 (July 14, 2016) (preliminary results) and Decision Memorandum at 9; *Stainless Steel Sheet and Strip from China*, 81 FR 64135 (Sep. 19, 2016) (preliminary determination) (departing from the “expected method” where both mandatory respondents were found to be part of the PRC-wide entity, because no companies were “individually investigated”). See also *Bestpak*, 716 F.3d at 1375 (rejecting Commerce’s decision to base the separate rate on the average of the zero rate assigned to one mandatory respondent and the PRC-wide rate assigned to a second mandatory respondent as an inappropriate departure from the “expected method”).

¹⁶⁴ See ADM’s Rebuttal Supp. Br. at 8, referencing SAA at 873 and *Albemarle*, 821 F.3d at 1353.

- In *Dongguan Sunrise*, the Court held that ‘a gross unit U.S. price alone provides little indication about the probable dumping margin, as dumping margins are calculated based on a comparison of U.S. prices net of sales adjustments to normal value.’¹⁶⁵
- CP Kelco U.S.’ AUV analysis does not demonstrate that CP Kelco (Shandong) was not dumping, nor does it demonstrate that the rate of 77.04 percent is unrepresentative of its “economic reality.” It is accurate mathematically, factually, and is calculated in accordance with the expected method under section 735(c)(5)(B) of the Act and, therefore, is “accurate” and reflects “commercial reality”.¹⁶⁶ Even if a departure from the “expected method” were warranted, neither Shanghai Smart nor CP Kelco U.S. has provided another dumping margin to use in this case. The only other dumping margin that the Department could choose is the dumping margin that it assigned to separate rate respondents in the investigation in this proceeding, which is 70.61 percent. Thus, the Department should continue to apply the 77.04 percent rate to the companies granted separate rate status which have not been individually examined for the final results of this review.

Department’s Position: We agree with ADM, in part. The statute and the Department’s regulations do not directly address the establishment of a rate to be applied to companies not selected for individual examination where the Department limits its examination in an administrative review pursuant to section 777A(c)(2) of the Act. The Department’s practice in administrative reviews involving limited selection based on exporters or producers accounting for the largest volumes of trade has been to look to section 735(c)(5) of the Act for guidance, which provides instructions for calculating the all-others rate in an investigation.¹⁶⁷ Specifically, section 735(c)(5)(A) of the Act states that:

the estimated all-others rate shall be an amount equal to the weighted average of the estimated weighted average dumping margins established for exporters and producers individually investigated, excluding any zero and *de minimis* margins, and any margins determined entirely under section 776 {(facts available)}.

Section 735(c)(5)(B) of the Act also provides that:

¹⁶⁵ See ADM’s Rebuttal Supp. Br. at 10, referencing *Dongguan Sunrise Furniture Co. v. United States*, Slip Op. 2015-03 (Ct. Int’l Trade Jan. 14, 2015) at 7-9.

¹⁶⁶ See ADM’s Rebuttal Supp. Br. at 11, referencing *Nan Ya Plastics v. United States*, 810 F. 3d 1333, 1343 (Fed. Cir. 2016).

¹⁶⁷ 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*, 75 FR 49460, 49462 (August 13, 2010) noting that “{i}n the Preliminary Results, we noted that the statute and the Department’s regulations do not directly address the establishment of a rate to be applied to companies not selected for individual examination where the Department limited its examination in an administrative review pursuant to section 777A(c)(2) of the Act. See Preliminary Results at 11859. We further explained that the Department’s practice in this regard, in cases involving limited selection based on exporters accounting for the largest volumes of trade, has been to weight-average the rates for the selected companies excluding zero and *de minimis* rates and rates based entirely on facts available. See Preliminary Results at 11859. However, due to changes in certain surrogate values for Hilltop and Regal from the Preliminary Results, the Department has, for the final results, calculated all zero or *de minimis* dumping margins for the mandatory respondents. Because the Act does not address the rate to be applied to companies not selected for individual examination, we have looked to section 735(c)(5) of the Act for guidance.”

If the estimated weighted average dumping margins established for all exporters and producers individually investigated are zero or *de minimis* margins, or are determined entirely under section 776, the administering authority may use any reasonable method to establish the estimated all-others rate for exporters and producers not individually investigated, including averaging the estimated weighted average dumping margins determined for the exporters and producers individually investigated.

The SAA includes the following:

Section 219(b) of the bill adds new section 735(c)(5)(B) which provides an exception to the general rule if the dumping margins for all of the exporters and producers that are individually investigated are determined entirely on the basis of the facts available or are zero or *de minimis*. In such situations, Commerce may use any reasonable method to calculate the all others rate. The expected method in such cases will be to weight-average the zero and *de minimis* margins and margins determined pursuant to the facts available, provided that volume data is available. However, if this method is not feasible, or if it results in an average that would not be reasonably reflective of potential dumping margins for non-investigated exporters or producers, Commerce may use other reasonable methods.¹⁶⁸

Echoing the above provisions, the CIT held that:

... both “{Section} 1673d(c)(5)(B) and the SAA explicitly allow Commerce to factor both *de minimis* and AFA rates {of individually investigated exporters and producers} into the calculation methodology.” Accordingly, as a method “derived from the relevant statutory language,” it is not *per se* unreasonable for Commerce to use a simple average of *de minimis* and AFA rates to calculate the separate rate antidumping duty margin.¹⁶⁹

Furthermore, in a case involving individually examined respondents with only *de minimis* dumping margins, the CAFC expressed the following:

The SAA thus makes clear that under the statute, when all individually examined respondents are assigned *de minimis* margins, Commerce is **expected** to calculate the separate rate by taking the average of those margins. Commerce may use “other reasonable methods,” but only if Commerce reasonably concludes that the

¹⁶⁸ See the SAA at 873; see also *Certain Small Diameter Carbon and Alloy Seamless Standard, Line, and Pressure Pipe (Under 4 ½ Inches) from Japan: Preliminary Results of Antidumping Duty Administrative Review and Preliminary Determination of No Shipments; 2014-2015*, 81 FR 45124 (July 12, 2016) and accompanying PDM at 7-8, unchanged in *Certain Small Diameter Carbon and Alloy Seamless Standard, Line, and Pressure Pipe (Under 4 ½ Inches) from Japan: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2014-2015*, 81 FR 80640 (November 16, 2016).

¹⁶⁹ See *Baroque Timber*, 971 F. Supp. 2d at 1341 (internal citations omitted).

expected method is “not feasible” or “would not be reasonably reflective of potential dumping margins.”¹⁷⁰

This reasoning applies equally where all dumping margins for the individually examined respondents are either zero, *de minimis* or based entirely on total AFA.¹⁷¹

In this review, we individually examined Fufeng, Deosen, and AHA and determined that they were eligible for a separate rate. For the final results of review, we have calculated the dumping margin assigned to the non-individually examined separate rate respondents by computing a simple average of the zero dumping margin calculated for Fufeng and the AFA dumping margin assigned to Deosen and AHA. This is consistent with the statutory language we look to for guidance that provides for basing the all-others rate on an average of the estimated weighted average dumping margins determined for the exporters and producers individually investigated, including dumping margins based entirely on facts available, if all of those dumping margins are zero, *de minimis*, or entirely based on facts available, as is the case here. The SAA and the CAFC have labeled this approach as the “expected method” for determining the all-others rate, and the courts have reviewed whether the Department’s application of that approach is reasonable under the facts of a given case.¹⁷²

Moreover, contrary to CP Kelco U.S. Inc.’s position, *TRBs* is not a case where the Department decided to exclude from its separate rate dumping margin calculation an AFA rate assigned to an individually examined respondent, in favor of basing the separate rate dumping margin solely on one individually examined respondent’s zero percent dumping margin. Rather, in *TRBs*, the Department based the separate rate dumping margin on the zero percent dumping margin calculated for one of the two respondents because this approach followed the “expected method” and there were no other dumping margins to average, given that the other respondent failed to demonstrate an absence of *de facto* government control and did not qualify for a separate rate (the PRC-wide entity was not under review).¹⁷³ In that case, the Department followed the “expected method” by applying to the exporters that were determined eligible for a separate rate, but were not selected as individually examined respondents, the rate calculated for the mandatory respondent, which was *de minimis*. Similar to *TRBs*, we are following the expected method here by averaging the rates of the individually-examined respondents for which the Department determined dumping margins, in this case respondents that qualified for a separate rate.

We disagree with parties’ contention that their entries must be assigned Fufeng’s zero percent dumping margin. Specifically, CP Kelco Shandong and Shanghai Smart maintain that: (1) they fully cooperated in the review and should not be assigned a punitive dumping margin; (2) the separate rate dumping margin must be based on information from the current review, not

¹⁷⁰ See *Albemarle*, 821 F.3d at 1352 (emphasis added).

¹⁷¹ See *Xanthan Gum from the People’s Republic of China: Final Determination of Sales at Less Than Fair Value*, 78 FR 33351 (June 4, 2013) and accompanying IDM at 4.

¹⁷² See *Albemarle*.

¹⁷³ See *TRBs*, 81 FR 45455 (July 14, 2016) (preliminary results), and accompanying PDM at 9, *unchanged in Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People’s Republic of China: Final Results of Antidumping Duty Administrative Review, and Rescission of New Shipper Review; 2014-2015*, 82 FR 4844 (January 17, 2017).

dumping margins from a prior review; and (3) a separate rate dumping margin based, in part, on the AFA rates assigned to Deosen and AHA does not bear any relationship to parties' pricing practices, dumping rates, or commercial reality and is not supported by substantial evidence on the record. We address each of these points in turn below.

First, we have not assigned C.P. Kelco (Shandong) or Shanghai Smart the AFA rate assigned to the uncooperative respondents Deosen and AHA; rather, as described above, we assigned them an average dumping margin based on the dumping margins determined for the mandatory respondents, including Deosen and AHA. We calculated this dumping margin with guidance from the statute which in general allows the all-others rate to be calculated using AFA rates when all rates determined for individually-examined respondents are zero, *de minimis* or based entirely on AFA, which is the case here.¹⁷⁴ Parties consider this calculated dumping margin to be punitive based on the contention that it is significantly higher than their actual dumping margins and Fufeng's dumping margin. However, C.P. Kelco (Shandong) and Shanghai Smart were not individually examined and there are no dumping margins specifically calculated for these respondents on the record. Therefore, the record evidence does not support its conclusion (we address the difference between the calculated separate rate dumping margin and Fufeng's dumping margin below).

Parties rely on the Court's ruling in *Changzhou Wujin* to support the position that the Department should not calculate the separate rate dumping margin by averaging Fufeng's, Deosen's, and AHA's dumping margins because this will result in a punitive dumping margin that has adverse effects on a cooperative respondent. However, the facts in this review are not the same as those present in *Changzhou Wujin*. In *Changzhou Wujin*, the Department determined, in a remand redetermination, that the AFA rate assigned to the PRC-wide entity, which was averaged with the sole cooperating respondent's *de minimis* dumping margin to determine the dumping margin for the non-individually examined respondents who were granted separate rates status, could not be corroborated. Thus, the Department calculated a new hypothetical AFA rate¹⁷⁵ using normal value data from the sole cooperating respondent and unverified U.S. price data from a non-cooperating respondent, that was not assigned to any party but was used solely as the predicate for calculating the new separate for the separate rate applicants. The Department stated that it could not use any other data to determine a new AFA rate because using any other data would result in a zero percent AFA rate which would not be sufficiently adverse.¹⁷⁶

The CAFC ruled in *Changzhou Wujin* that:

{d}eterrence is not relevant here ... {Commerce} cherry-picked the single data point that would have the most adverse effect possible on cooperating ... respondents, in a situation where there was no need or justification for deterrence.

¹⁷⁴ See *Bestpak*, 716 F.3d 1370, 1378 stating: "However, § 1673d(c)(5)(B) and the SAA explicitly allow Commerce to factor both *de minimis* and AFA rates into the calculation methodology."

¹⁷⁵ See, e.g., *Changzhou Wujin*, 701 F.3d at 1373 (referring to a "hypothetical AFA rate").

¹⁷⁶ See *Changzhou Wujin*, 701 F.3d 1367, 1372-1373.

... In this case, we think it clear that Commerce acted in an arbitrary and capricious manner.¹⁷⁷

Unlike *Changzhou Wujin* in this review, the Department is not calculating a rate for non-individually examined respondents based on a hypothetical AFA rate that was not applied to any individually-examined respondent. Rather, the Department is determining the rate applicable to non-individually-examined separate-rate respondents based on an average of the zero rate being applied to Fufeng and the AFA rate being applied to Deosen and AHA in this review, which is the corroborated AFA rate from the underlying investigation. Such an approach was contemplated by the CAFC in *Changzhou Wujin* when the Court noted that “administrative convenience might support averaging previously-determined, previously corroborated rates assigned to mandatory respondents, including AFA respondents, if there are no alternatives ...”¹⁷⁸ Similarly, in the instant case there are no alternatives.

Second, we have not based the separate rate dumping margin on dumping margins calculated for respondents from a prior segment of this proceeding. Rather, consistent with the expected method described in the statute, and the CAFC’s decision in *Albemarle*, we calculated the separate rate dumping margin based on the current information in this review, namely the dumping margins determined for and assigned to the individually examined respondents in this review, Fufeng, Deosen, and AHA. While the AFA rate being assigned to Deosen and AHA in this review is a rate from a prior segment of the proceeding, this is permissible under the statute.¹⁷⁹ Further, the CAFC observed in *Albemarle* that “...in the Adverse Facts Available (“AFA”) context, where Commerce is allowed to consider deterrence as a factor, we have upheld Commerce’s use of data from a previous administrative review.”¹⁸⁰

Third, we believe the record does not support parties’ claims that the separate rate dumping margin calculated by the Department is not a reasonable rate for the separate rate companies. Parties rely upon a number of Court cases (*e.g.*, *Bestpak*, *Yantai*, *Amanda*, *Albemarle*, and *Baroque*) to make the point that the separate rate dumping margin cannot be an unreasonable rate that does not reflect economic reality and that, in this instance, the Department’s calculation of that rate is both unreasonable and unreflective of the separate rate companies dumping margins. The facts of these cases which the parties cite to, however, are inapposite to the facts of this case.

In *Bestpak* the CAFC, and in *Yantai* and *Baroque* the CIT, found that the Department’s average of the AFA rate assigned to the PRC-wide entity and the *de minimis* or zero rates calculated for the participating mandatory respondents was not reasonable as applied in those instances, as it did not accurately reflect the separate rate respondent’s economic reality or pricing practices. The courts also found that the Department failed to provide substantial evidence in each of the cases to show how this averaged rate established the separate rate respondents antidumping duty margin accurately.¹⁸¹

¹⁷⁷ *Id.* at 1378-1379.

¹⁷⁸ *Id.* at 1379.

¹⁷⁹ See section 776(d)(1)(B).

¹⁸⁰ See *Albemarle*, 821 F.3d at 1357.

¹⁸¹ See *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1377-80 (Fed. Cir. 2013)(“*Bestpak*”)

In *Amanda* and *Albemarle*, the CIT and CAFC respectively, determined that the Department did not provide sufficient evidence for assigning dumping margins from prior segments of the proceeding to the separate rate respondents. Specifically, the courts considered that these past margins did not establish the separate rate dumping margins as accurately as possible when the Department had available to it *de minimis* rates of individually examined respondents in the current period to which it could apply the expected method.¹⁸²

Here, however, the Department is not pulling forward a rate from a previous segment of the proceeding for the parties entitled to a separate rate that are not being individually examined, nor is it including in its average a rate not assigned to an individually examined respondent in this administrative review. The Department is instead simply averaging the dumping margins of the individually examined respondents. This rate establishes the separate rate respondents' AD margin accurately as it is a reflection of an average of all of the individually examined respondents' rates in the current review.

In the cases cited above, the Courts, in general, found that the record did not demonstrate that the separate rate assigned by the Department was reasonable. In some of those cases, the Department based the separate rate on dumping margins calculated for separate rate respondents in a prior segment of the proceeding. Here, the record does not support parties' claims that the separate rate dumping margin calculated by the Department is not a reasonable rate for the separate rate companies in this administrative review. Moreover, for the reasons discussed below, we have determined that there is no basis for ignoring the AFA rate in our separate rate

(finding that the application of the simple average while permissible in some instances under the statute, was unreasonable as applied when the Department averaged a *de minimis* and AFA-Chinawide rate and that there was not substantial record evidence showing that its calculation reflected economic reality); *Yantai Oriental Juice Co. v. United States*, 27 CIT 477, 484-88 (CIT 2003) ("*Yantai*") (finding that assigning the separate rate companies a rate equal to the weighted average of the PRC-wide margin and the fully investigated respondents' margins of zero percent was "improper" and that the Department failed to explain how its methodology established the cooperative respondents antidumping duty margin "as accurately as possible" or how it "makes a 'rational connection between the facts found and the choice made'"); *Baroque Timber Indus. (Zhongshan) Co. v. United States*, 971 F. Supp. 2d 1333, 1341-1343 (CIT 2014) ("*Baroque*") (finding that the Department, in not using the expected method and instead applying a simple average rate calculation of an AFA-Chinawide rate and *de minimis* rate, "did not consider whether use of an AFA rate, let alone use of the transaction-specific margin, was merited in its separate rate calculation" when the three mandatory respondent rates were *de minimis* and "failed to make any connection between the transaction-specific margin of 25.62 percent and {the} separate rate respondents' pricing practices" or their "economic reality").

¹⁸² *Albemarle Corp. v. United States*, 821 F.3d 1345, 1351-59 (Fed. Cir.2016) ("*Albemarle*") (finding that there was no evidence to support Commerce's determination that an average of the individually examined respondents' dumping margins would not reflect the actual dumping margins of two of the separate rate respondents which would instead require it to pull forward a rate. Further, finding that the Department was required to follow the expected method to determine the separate rate respondent's dumping margin using the dumping margins "of the individually examined respondents from the contemporaneous period."); see also *Amanda Foods (Vietnam) Ltd. v. United States*, 647 F. Supp. 2d 1368, 1379-83, 33 CIT 1407, 1417-21 (CIT 2009) ("*Amanda*") (finding that the Department did not provide sufficient evidence to support that abandoning the expected method of weight averaging the *de minimis* margins of the investigated companies, and instead pulling forward the investigation rate established the relevant antidumping margins as accurately as possible.).

dumping margin calculation in favor of basing the separate rate solely on Fufeng's zero percent dumping margin.¹⁸³

As support for assigning Fufeng's zero percent dumping margin to CP Kelco (Shandong), C.P. Kelco U.S. Inc. claims that a comparison of the AUV of CP Kelco (Shandong)'s U.S. sales of subject merchandise to the AUV of Fufeng's sales of subject merchandise shows that "CP Kelco (Shandong)'s pricing behavior compares favorably to Fufeng's pricing behavior."¹⁸⁴ However, the Department calculates dumping margins by comparing adjusted U.S. sales prices to normal values. The CAFC has indicated that comparing the overall gross AUV's of two company's U.S. sales without taking into consideration each company's sales adjustments and normal values does not necessarily provide a basis for reaching conclusions with respect to whether the company's dumping margins would be similar. In *Bestpak*, the CAFC concluded that:

While Bestpak's estimated AUV aligned with a simple average of Jintian's and Yama's estimated AUVs, Commerce's inference that their dumping margins paralleled that same correlation is speculative. As such, using the AUV analysis as evidence that Bestpak's dumping margin is likewise in line with a simple average of Jintian's and Yama's dumping margins finds no credible economic support in the record.¹⁸⁵

C.P. Kelco U.S. Inc. argues that the Department can analyze the voluntary antidumping questionnaire response of C.P. Kelco (Shandong) and determine whether the separate rate margin is reflective of C.P. Kelco (Shandong)'s own dumping margin. Further, CP Kelco U.S. Inc. is not renewing its request for the Department to examine C.P. Kelco (Shandong) as a voluntary respondent. Rather, C.P. Kelco U.S. Inc. is asking the Department to use information in the voluntary response to evaluate whether the separate rate being assigned to C.P. Kelco (Shandong) is reflective of the rate that would be determined based on the voluntary response. However, in the Respondent Selection Memo, the Department stated that "Given the large number of companies in the pool of potential respondents, we have determined that it is not practicable to make individual weighted average dumping margin determinations for each company,"¹⁸⁶ and the Department selected Fufeng and AHA as mandatory respondents. Given our limited individual examination and our resource constraints, we have not additionally examined C.P. Kelco (Shandong)'s questionnaire response in the way that would be required for the Department to determine what its margin would actually be if it were individually examined, nor have we analyzed its documents for, or issued supplemental questionnaires to correct, any deficiencies in its responses. Given the absence of the full dumping analysis of C.P. Kelco (Shandong)'s voluntary response, we cannot rely on the information provided in the voluntary

¹⁸³ Although parties rely on *Bestpak* to argue that using the average of a zero margin and a margin based on AFA is punitive, we note that in *Bestpak*, the CAFC rejected parties' arguments to assign separate rate respondents a margin of zero percent margin solely because one mandatory respondent received a rate of zero percent, as parties have done here.

¹⁸⁴ See CP Kelco U.S.' Supp. Br. at 6.

¹⁸⁵ See *Bestpak*, 716 F.3d 1370, 1379.

¹⁸⁶ See Memorandum to Abdelali Elouaradia, Director, Office IV Antidumping and Countervailing Duty Operations, Re: "Selection of Respondents for the 2013-2014 Administrative Review of the Antidumping Duty Order on Xanthan Gum from the People's Republic of China," dated September 23, 2014 ("Respondent Selection Memo") at 4.

questionnaire response to gauge whether the separate rate margin is reflective of C.P. Kelco (Shandong)'s margin.

Parties argue that a calculated separate rate dumping margin based on Fufeng's, Deosen's, and AHA's dumping margins would be unreasonable because it: (1) would be significantly greater than the sole calculated dumping margin on the record (the *de minimis* dumping margin calculated for Fufeng); (2) would be greater than the separate rate dumping margin from the last segment of this proceeding (the investigation) even though Fufeng's preliminary dumping margins in this review decreased when compared to the dumping margins calculated for these companies in the last segment of this proceeding; and (3) would not bear any relationship to the actual pricing practices or dumping rates of the separate rate respondents.

A comparison of the separate rate dumping margin solely to Fufeng's zero dumping margin only tells part of the story. Section 735(c)(5)(B) of the Act and the method described as the "expected method" in the SAA clearly envision the possibility of basing the separate rate dumping margin on the experience of all of the fully-investigated individually examined respondents, including those assigned an AFA rate, where all of the dumping margins calculated for the individually examined respondents are zero, *de minimis*, or based entirely on facts available. Deosen and AHA did not provide useable U.S. sales prices in this review and thus that information is not reflective of an appropriate AD rate during the POR. Moreover, historically speaking, Deosen received a calculated dumping margin of 128.32 percent (the Deosen-Deosen combination rate) and AHA received a separate rate dumping margin of 70.61 percent (a combination rate for AHA and several producers, including Deosen) in the investigation in this proceeding. These are the only final dumping margins determined for these companies thus far in the proceeding.¹⁸⁷ Therefore, there is no basis for considering the separate rate dumping margin unreasonable by solely comparing it to a zero dumping margin when one must consider the experience of all of the fully-investigated individually examined respondents in this review in order to judge the reasonableness of the separate rate dumping margin and the record does not support a conclusion that Deosen's or AHA's level of dumping is, or would be, *de minimis* or close to *de minimis*.¹⁸⁸

While C.P. Kelco (Shandong) argues that the Department should calculate the separate rate dumping margin by weight averaging Deosen's and AHA's AFA dumping margin and Fufeng's zero percent dumping margin, we disagree. We have found that we cannot rely upon any of Deosen or AHA's sales data in determining their dumping margin because we found that these companies withheld information, provided inconsistent information, significantly impeded the proceeding, and failed to cooperate. Consistent with this finding, we do not consider Deosen's and AHA's reported quantity and value of U.S. sales to be reliable information with which to calculate a weighted-average separate rate dumping margin. Therefore, we are calculating the separate rate dumping margin by simple averaging Fufeng's zero percent margin with Deosen/AHA's 154.07 percent dumping margin.

¹⁸⁷ See *Xanthan Gum from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 78 FR 33351 (June 4, 2013) ("Investigation Final"); see also *Xanthan Gum Amended Final Determination*.

¹⁸⁸ See *Albemarle*.

Furthermore, the separate rate dumping margin that the Department calculated in these final results of review, 77.04 percent, is not significantly different from the only other final separate rate dumping margin calculated in this proceeding, the separate rate of 70.61 percent calculated in the investigation.¹⁸⁹ We disagree with the claim that the difference in the separate rate dumping margin between the investigation and this review is unreasonable given the alleged decrease in Fufeng's preliminary dumping margins. First, we have taken the decrease in Fufeng's dumping margin into account by virtue of the fact that we used Fufeng's dumping margin in this review to calculate the separate rate dumping margin. Lastly, while C.P. Kelco U.S. Inc. contends that a separate rate dumping margin based on Fufeng's, Deosen's, and AHA's dumping margins does not bear any relationship to the dumping rates of the separate rate respondents, there are no dumping margins specifically calculated for these separate rate respondents on the record and therefore the record evidence does not support such a conclusion.

In this review, we have determined the dumping margin for Fufeng to be zero, while the rate for Deosen and AHA is 154.07 percent. We have concluded that the expected method is feasible and is reasonably reflective of the potential dumping margins as it is reflective of the rates assigned to the individually examined respondents in this administrative review.¹⁹⁰ Applying the method set forth in section 735(c)(5)(B) of the Act and described as the "expected method" in the SAA, we have applied to companies not selected for individual examination in this review a rate equal to the simple average¹⁹¹ of the rates we assigned to the individually-examined respondents.¹⁹² Accordingly, for these final results, we will assign a dumping margin of 77.04 percent to the separate rate companies.

Comment 4: Separate Rate Status of IMJ

IMJ

- The Department preliminarily rescinded the administrative review with respect to IMJ because IMJ's one sale subject to this administrative review is the same sale preliminarily found to be 'non-bona fide' in an ongoing new shipper review.

¹⁸⁹ In addition, the Department notes that C.P. Kelco (Shandong) received a rate of 70.61 percent in the underlying investigation. See Investigation Amended Final at 78 FR 43144.

¹⁹⁰ See *Albemarle*, at 1355.

¹⁹¹ Although C.P. Kelco U.S. Inc. argues that a simple average calculation, rather than a weight-average calculation of the separate rate dumping margin is punitive (see CP Kelco U.S.' Supp. Br. at 6), the CAFC found "no legal error in Commerce's use of a simple average rather than a weighted average). See *Bestpak*, 716 F.3d 1370, 1378.

¹⁹² In previous cases, the Department determined that a "reasonable method" to use when, as here, the rate of the respondent selected for individual examination is based on AFA, is to apply to those companies not selected for individual examination the average of the most recently determined rates that are not zero, *de minimis*, or based entirely on facts available (which may be from the investigation or a prior administrative review). See, e.g., *Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews and Rescission of Reviews in Part*, 73 FR 52823, 52824 (September 11, 2008), and accompanying IDM at Comment 16. However, the CAFC recently rejected the Department's reliance on methodologies that pulled forward rates from prior segments of the proceeding for non-selected companies in light of, *inter alia*, section 735(c)(5)(B) of the Act and the SAA's identification of an "expected method." See *Albemarle*.

- While the Department has previously rescinded an administrative review based on the determination in a new shipper review that the companies had no *bona fide* sales during the POR, the Department should change its policy.¹⁹³
- Neither the statute nor the Department’s regulations provide for rescinding an administrative review based on the absence of *bona fide* sales in a new shipper review. New shipper reviews under 751(a)(2)(B) are separate and distinct from administrative reviews under 751(a)(1)(A).
- While the Department may rescind a review if an exporter had no sales or entries,¹⁹⁴ it is uncontested that IMJ had an entry, export, and sale of subject merchandise during the POR.¹⁹⁵
- Although the Department may exclude certain sales from its analysis when they are unrepresentative or extremely distortive, it does so for different purposes in different segments of a proceeding. In the new shipper review, the Department analyzed IMJ’s sales price; however, the rationale for, and the purpose behind, this analysis do not exist in this administrative review, where the Department is not calculating IMJ’s export price and is not calculating an individual dumping margin for IMJ.
- While the CIT, in *Fresh Garlic Producers Assn’*, concluded that, “once Commerce had the information concerning the non-*bona fides* of (a respondent’s) sales it could not ignore that relevant information,”¹⁹⁶ “the determination of IMJ’s export price” for purposes of calculating an individual company-specific margin for IMJ in the new shipper review, is not relevant to what separate rate is assigned to IMJ in this administrative review.” Further, the distinction between new shipper and administrative reviews was not brought before the court in *Fresh Garlic Producers Assn’* by any party.
- The purpose of the *bona fide* sales analysis in new shipper reviews is to ensure that the sale is not being made to circumvent an order and to ensure that the sale under consideration is typical of those that the exporter will make in the future. As a non-mandatory respondent in this review, IMJ is not eligible for an individual company-specific dumping margin. Instead, IMJ seeks the dumping margin that other non-reviewed companies will receive.¹⁹⁷ Thus, the Department’s *bona fide* sales analysis in IMJ’s new shipper review is not determinative of whether IMJ’s POR sale is ‘reviewable’ in this administrative review, and also is irrelevant to the ‘reasonably reflective’ dumping margin that it is assigned as a non-selected cooperative company in this review.¹⁹⁸

¹⁹³ See IMJ’s Br. at 2, referencing *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results and Partial Rescission of Antidumping Duty Administrative Review; 2013-2014*, 81 FR 17435 (March 29, 2016).

¹⁹⁴ See IMJ’s Br. at 4, referencing 19 CFR 351.213(d)(3).

¹⁹⁵ See IMJ’s Br. at 4, referencing *Xanthan Gum from the People’s Republic of China: Initiation of Antidumping Duty New Shipper Review*, 80 FR 52031, 52032 (August 27, 2015) where the Department noted that IMJ’s subject merchandise entered the United States during the POR specified by the Department’s regulations.

¹⁹⁶ See IMJ’s Br. at 5, referencing *Fresh Garlic Producers Assn’ v. United States*, 121 F. Supp. 3d, 1313 (CIT 2015) (“*Fresh Garlic*”).

¹⁹⁷ The fact that the Department found IMJ’s sale not reviewable for purposes of establishing a company-specific dumping margin in the new shipper review, provides more reason for the Department to assign that sale a rate based on an average of the dumping margins assigned to the mandatory respondents, or, if the Department determines that rate does not reflect IMJ’s margin of dumping, another reasonable rate as long as the rationale for selecting that rate is satisfactorily explained. IMJ’s Br. at 5, referencing *Yanzhou Bestpak Gifts & Crafts Co., v. United States*, 716 F.3d 1370, 1378 (Fed. Cir. 2013) (“*Bestpak*”).

¹⁹⁸ The separate rate dumping margin merely needs to reflect the industry experience during the period examined.

- Moreover, an interested party that requests a new shipper review does not forfeit its right to a separate rate in an administrative review because it does not qualify for a new shipper review. The Department found IMJ's sale to be 'non-reviewable' for the specific purpose of establishing an export price in the new shipper review, however, all sales of all non-selected respondents are not reviewed in the separate rate analysis. That finding is not determinative of IMJ's entitlement to separate rate status in this review.
- Evidence on the record of this review is sufficient to establish IMJ's separate rate status because this evidence demonstrates IMJ's *de jure* and *de facto* independence from PRC government control. The Department stated in the *Initiation Notice* for this review that it will assign a separate rate to any company if it can "demonstrate the absence of both *de jure* and *de facto* government control over export activities."¹⁹⁹ Hence, in the final results of this review, the Department should perform a formal analysis of IMJ's separate rate qualifications and find that IMJ has established the *de jure* and *de facto* absence of government control.
- The Department cannot simply deny a respondent separate rates status based on unreliable sales data. In *Shandong Huarong*,²⁰⁰ the CIT held that the Department may not deny separate rate status to a respondent based upon the unreliability of that respondents' reported sales data.
- The Department's consideration of IMJ as part of the PRC-wide entity is not based on record evidence specific to the question of whether IMJ is subject to state control.²⁰¹ The Department made no finding regarding IMJ's questionnaire responses relating to government control, IMJ sufficiently demonstrated the absence of *de jure* and *de facto* government control over its export activities, and the Department has not established a connection between the PRC-wide rate and an estimate of IMJ's dumping margin.
- Further, there is no finding that IMJ failed to act to the best of its ability in responding to the Department's separate rates questionnaire. Consequently, it is not equitable for IMJ's POR entry to be liquidated at the PRC-wide rate of 154.07 percent, nor is this rate consistent with the Department's mandate of determining and assigning dumping margins as accurately as possible.
- It would be inequitable not to assign IMJ an appropriate separate rate. Even though the Department reached certain conclusions regarding IMJ's sales price in comparison to the prices of sales by the mandatory respondents in this review, in *Baroque Timber*,²⁰² the CIT found that "mandatory respondents are meant to be representative of the industry and therefore of the separate rate respondents."

See IMJ's Br. at 3, referencing *Bestpak*.

¹⁹⁹ See IMJ's Br. at 6, citing the *Initiation Notice*.

²⁰⁰ See IMJ's Br. at 8, referencing *Shandong Huarong General Group Corp. v. United States*, 27 CIT 1568, 1595-93 (CIT 2003) ("*Shandong Huarong*")

²⁰¹ See IMJ's Br. at 8, referencing *Gerber Food (Yunnan) Co., Ltd. v. United States*, 387 F. Supp. 2d 1270, 1287 (Ct. Int'l Trade 2005).

²⁰² See IMJ's Br. at 10, referencing *Baroque Timber Industries (Zhongshan) Company Limited, v. United States*, 971 F Supp 2d 1333, 1344 (CIT 2014) ("*Baroque Timber*")

CP Kelco

- The Department should continue to find that IMJ did not make a *bona fide* reviewable sale during the POR and rescind the administrative review with respect to IMJ.
- In the new shipper review of IMJ (covering the same single sale subject to this administrative review), the Department determined that the price of IMJ's sale, in conjunction with the timing of the sale, and the facts surrounding the establishment and operations of IMJ's U.S. reseller, Jianlong USA, called into question whether the sale was indicative of IMJ's normal business practices.
- In administrative reviews and new shipper reviews, the underlying purpose of the *bona fide* analysis is to determine whether the sale under consideration is "commercially reasonable" and indicative of "normal business practices."²⁰³
- Because the purpose of the *bona fide* sales analysis is the same whether in a new shipper review or an administrative review, the Department's determination in the new shipper review that IMJ's sale was not a *bona fide* sale is determinative as to whether the same sale is reviewable in this administrative review.
- The Department's standard for evaluating the *bona fides* of a sale applies equally to administrative reviews and new shipper reviews. The Department cannot simply base its *bona fides* analysis on a respondent's assertion as to what is commercially reasonable, but must conduct an objective analysis of the facts.²⁰⁴ The Department consistently applies the same "totality of the circumstances" test in administrative reviews as it does in new shipper reviews to make such a *bona fide* determination.²⁰⁵
- IMJ argues that if its sale had not been reviewed in the context of the new shipper review, the Department would not have found that IMJ did not have a reviewable sale. This argument is flawed because it implies that the Department does not conduct *bona fides* analyses in administrative reviews, which is incorrect.²⁰⁶ The Department is well within its rights to consider the *bona fides* of IMJ's single sale in this administrative review, especially when it has prior knowledge that the sale is atypical, not consistent with IMJ's

²⁰³ See CP Kelco's Br. at 2-3, referencing *Silicomanganese from India: Final Results of Antidumping Duty Administrative Review*, 80 Fed. Reg. 75,660 (Dec. 3, 2015), and accompanying IDM at 4 and *Windmill Int'l Pte v. United States*, 193 F. Supp. 2d 1303, 1312 (CIT 2002).

²⁰⁴ See, e.g., *Freshwater Crawfish Tail Meat from the People's Republic of China: Notice of Final Results of Antidumping Duty New Shipper Review, and Final Rescission of Antidumping Duty New Shipper Review*, 68 FR 1439 (Jan. 10, 2007).

²⁰⁵ See CP Kelco's Br. at 2, referencing *Silicomanganese from India: Final Results of Antidumping Duty Administrative Review*, 80 Fed. Reg. 75,660 (Dec. 3, 2015), and accompanying IDM at 4; *Windmill Int'l Pte v. United States*, 193 F. Supp. 2d 1303, 1312 (CIT 2002) (finding that a *bona fide* analysis to determine whether a sale should be excluded is within the Department's discretion).

²⁰⁶ See CP Kelco's Br. at 3-4, referencing *Fresh Garlic from the People's Republic of China: Final Results and Partial Rescission of the 18th Antidumping Duty Administrative Review; 2011-2012*, 79 FR 36,721 (June 30, 2014) and accompanying IDM at Comment 18; *Honey from the People's Republic of China: Final Rescission of Antidumping Duty Administrative Review, 2009-2010*, 77 FR 37,343 (June 11, 2012) and accompanying IDM at Comment 1; *Certain Tissue Paper Products from the People's Republic of China: Final Results and Final Rescission, In Part, of Antidumping Duty Administrative Review*, 72 FR 58,642 (October 16, 2007) and accompanying IDM at Comment 4a; and *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Rescission of Antidumping Duty New Shipper Review*, 79 Fed. Reg. 71,748 (December 3, 2014) and accompanying IDM at 10.

commercial reality, and unreviewable as a result of the decision to rescind the new shipper review covering the sale.

- The CIT held that, when a respondent requests a new shipper review, it becomes subject to the potential negative impact of that review on the administrative review. IMJ requested a new shipper review, knowing well the potential negative impact it might have on the instant review. The CIT has also explained that once the Department has information concerning the non *bona fides* of the respondent's sale, it cannot ignore the relevant information. Therefore, because the Department is aware of the non-*bona fide* nature of IMJ's sale, it must take that into consideration in this review.²⁰⁷
- IMJ also argues that the Department improperly rescinded the administrative review because IMJ established that it had an entry and sale of subject merchandise during the POR and the Department may only rescind an administrative review if there were no entries or sales during the POR. However, the Department has rescinded administrative reviews with respect to certain companies after determining that the companies' sales subject to new shipper reviews were not *bona fide* sales.²⁰⁸
- Moreover, a respondent's U.S. sale must be a *bona fide* commercial transaction in order for the Department to analyze the separate rate status of the respondent. The granting of a separate rate is not a right but a privilege provided to entries which present evidence that they are entitled to a separate rate. Because the Department found IMJ's single sale to be unreviewable, the Department properly rescinded the review with respect to IMJ.
- The Department correctly determined that the record evidence in this review shows that IMJ is not entitled to a separate rate, because it did not make any reviewable sales during the POR. Although IMJ argues that the Department should not analyze its sale for reliability or commercial reasonableness and that it has satisfied the separate rate criteria, in *Fresh Garlic*,²⁰⁹ the CIT upheld the Department's refusal to conduct an administrative review and separate rate analysis on the basis that there were no reviewable entries for a separate rate analysis to be made in the administrative review. Here, the Department's actions were reasonable, as it cannot evaluate IMJ's separate rate application ("SRA") when there are no sales that are not unrepresentative or distortive.²¹⁰ While the statute directs the Department to determine a dumping margin for each entry, the CIT stated that "although the term 'each entry' seems all inclusive, this court has recognized that it does not 'compel inclusion of all sales, no matter how distorting or unrepresentative.'" ²¹¹

²⁰⁷ See CP Kelco's Br. at 5-6, referencing *Fresh Garlic* at 1335.

²⁰⁸ See CP Kelco's Br. at 7 and 10, referencing *Fresh Garlic* at 1336 (Nov. 30, 2015). In the underlying case, *Fresh Garlic from the People's Republic of China: Final Results and Partial Rescission of the 18th Antidumping Duty Administrative Review*; 2011-12, 79 Fed. Reg. 36,721 (June 30, 2014) and accompanying Issues & Decision Memorandum at 40-41 (the Department determined that because it had concluded in the contemporaneous new shipper review that the respondent did not have any bona fide sales during the POR, it could qualify for a separate rate in the administrative review and therefore the Department rescinded the administrative review). See, also, *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 81 Fed. Reg. 17,435 (March 29, 2016).

²⁰⁹ See CP Kelco's Br. at 6-7, referencing *Fresh Garlic* at 1336.

²¹⁰ See CP Kelco's Br. at 7-8, referencing *Fresh Garlic* at 1335; *Windmill*, 193 F. Supp. 2d at 1307; *FAG U.K., Ltd. v. United States*, 20 C.I.T. 1277, 1281-82, 945 F. Supp. 260, 265 (1996).

²¹¹ See CP Kelco's Br. at 7 referencing *Hebei* at 1334.

- Because its sale was a non-*bona fide* sale, IMJ has not demonstrated its separate rate eligibility and the Department's treatment of IMJ as part of the PRC-wide entity is based on substantial evidence and is in accordance with the law. The Department has consistently assigned the PRC-entity wide rate to companies with "no reviewable transactions."²¹²
- IMJ's challenge of the Department's non-*bona fide* sale determination in the concurrent new shipper review is misplaced in the administrative review and should be disregarded, as the Department found IMJ's single sale to be unreviewable and no other sales exist for review in this administrative review.

Department's Position: IMJ's single sale and entry in the instant administrative review was already examined and analyzed by the Department in a new shipper review covering the same POR and will not be examined again here in the administrative review.²¹³ As noted in, *2008-2009 Silicon Metal from the People's Republic of China*, "the Department's practice is to review each sale of subject merchandise only once."²¹⁴ In *Certain Frozen Warmwater Shrimp From India*²¹⁵ the Department also noted this practice, stating:

While section 751(a)(2)(A) of the Act directs the Department to determine the dumping margin applicable for each entry of subject merchandise, our practice is to review each entry of subject merchandise only once (*i.e.*, only in one administrative review). See Notice of Preliminary Results of Antidumping Duty Administrative Review: Steel Concrete Reinforcing Bars from Latvia, 72 FR 30773, 30773-30774 (June 4, 2007) (*Rebar from Latvia*), unchanged in Notice of Final Results of Antidumping Duty Administrative Review: Steel Concrete Reinforcing Bars From Latvia, 72 FR 57298 (Oct. 9, 2007), where we determined that it was appropriate to rescind the administrative review because all of the subject merchandise which entered during the POR had been included in our analysis in the previous administrative review.

Although *Certain Frozen Warmwater Shrimp From India* involved sales of subject merchandise where the sale was reviewed in one POR, but the merchandise entered the United States in the following POR, the principle illustrated by this case is that the Department does not review the same sale twice. As explained below, this approach is consistent with the Department's

²¹² See CP Kelco's Br. at 9-10, referencing *Fresh Garlic from the People's Republic of China: Final Results and Partial Rescission of the 18th Antidumping Duty Administrative Review, 2011-12*, 79 FR 36,721 (June 30, 2014); see also *Fresh Garlic* at 1336 (Nov. 30, 2015) ("Commerce's refusal to conduct an administrative review...is supported by substantial evidence" where the respondent had no bona fide sales during the POR as determined by a concurrent new shipper review); and *Windmill* at 1312 (Ct. Int'l Trade 2002).

²¹³ See *Xanthan Gum from the People's Republic of China: Rescission of 2014-2015 Antidumping Duty New Shipper Review*, 81 FR 56586 (August 22, 2016).

²¹⁴ See *Silicon Metal from the People's Republic of China: Final Results and Partial Rescission of the 2008-2009 Administrative Review of the Antidumping Duty Order*, 76 FR 3084 and accompanying IDM at Comment 2 (excluding sales which were invoiced prior to the beginning of the POR, and determining that to do otherwise would result in the Department examining certain sales which were previously included in the Department's AD margin calculations covering the prior administrative review).

²¹⁵ See *Certain Frozen Warmwater Shrimp from India: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 73 FR 40492 (July 5, 2008) and accompanying IDM at Comment 8.

precedent involving new shipper reviews and administrative reviews covering the same transactions. Thus, the Department finds it appropriate to rescind this administrative review with respect to IMJ because the subject merchandise which IMJ sold during the instant POR and which was entered into the United States during this POR has already been reviewed by the Department in the new shipper review and the Department determined that the sale was non-*bona fide*, i.e., was not a reviewable sale.

Specifically, in the new shipper review, the Department determined that the sale at issue was not a *bona fide* sale.²¹⁶ In several cases, including *Fresh Garlic 18th Review*, the Department rescinded the administrative review of a company where it determined that the company did not have a *bona fide* sale in a concurrent new shipper review, the new shipper and administrative reviews covered concurrent periods, and the company made no other reviewable sales during the POR.²¹⁷ The CIT upheld the Department's determination to rescind the administrative review with respect to the company at issue in *Fresh Garlic 18th Review*.²¹⁸ Therefore, as IMJ had only one sale in the concurrent new shipper review which the Department determined was a non-*bona fide* sale, it is appropriate for the Department to rescind this administrative review with respect to IMJ consistent with its practice.

IMJ's position that the Department should ignore its *bona fide* sales analysis in the new shipper review is not correct. First, we address IMJ's claim that while the Department may have found IMJ's single sale unreviewable for purposes of establishing an export price based on the results of its *bona fide* sales analysis in the new shipper review, that analysis is not determinative as to whether IMJ is entitled to a separate rate in this administrative review when the separate rate is based on the dumping margins calculated for the individually examined respondents. When the Department determines that all of a respondent's sales during the POR are non-*bona fide* sales

²¹⁶ See NSR Final Results.

²¹⁷ See e.g. *Fresh Garlic from the People's Republic of China: Final Results and Final Rescission of the 20th Antidumping Duty Administrative Review; 2013-2014*, 81 FR 39897, 39898-39899 (June 20, 2016) stating "because we found its POR sales to not be *bona fide* in the concurrent new shipper review ... we are rescinding this administrative review with respect to Kaihua." See also *Fresh Garlic from the People's Republic of China: Final Results and Partial Rescission of the 18th Antidumping Duty Administrative Review; 2011-2012*, 79 FR 36721 (June 30, 2014) ("*Fresh Garlic 18th Review*"), and accompanying IDM at Comment 18 stating "the Department determined that Goodman's sales were not *bona fide* and therefore rescinded the NSR. ... Therefore, Goodman did not have any reviewable sales during the POR. Because Goodman did not have any reviewable sales, it cannot qualify for a separate rate. ... Consequently ... the Department is rescinding the review with regard to Goodman." See also *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results and Partial Rescission of Antidumping Duty Administrative Review; 2013-2014*, 81 FR 17435 (March 29, 2016), and accompanying IDM at Comment VII, stating "NTACO's and Nam Phuong's entries were covered by both a NSR and this administrative review. We rescinded that review {NSR} based on a finding that the sales at issue were not *bona fide* ... Therefore, in light of the Department's finding in the new shipper review, there are no other *bona fide* sales on which to conduct a review with respect to NTACO and Nam Phuong. Therefore, we are rescinding this review with respect to these companies."

²¹⁸ See *Fresh Garlic Producers Ass'n et al v. United States*, 121 F. Supp. 3d 1313, 1335-36 (CIT November 30, 2015)(finding that Commerce's rescinding of an administrative review with respect to a company, in light of its finding that the company's only sale during the POR was the same sale found to be a non-*bona fide* sale in the company's new shipper review, was reasonable as it could not evaluate a company's application for a separate rate when there were no sales that were not unrepresentative or distortive (i.e. *bona fide*), and accordingly there were no reviewable entries or sales within the POR for which Commerce could grant a separate rate.)

(i.e., are atypical of the practices the respondent is likely to normally follow), those sales do not provide a basis for determining whether the respondent qualifies for a separate rate.²¹⁹ Evidence provided by a respondent relating to a sale that is not representative of the respondent's normal commercial practices, provides no real insight into the respondent's pricing practices or sales processes, including price negotiations, which is one area the Department examines in determining whether a respondent has demonstrated that it qualifies for separate rate status. In addition, this is not the same situation as the one faced in *Shandong Huarong* which IMJ cites for the contention that the Department may not deny separate rate status to a respondent based upon the unreliability of that respondents' reported sales data. In *Shandong Huarong*, the CIT found that even though the Department found several errors with respect to the respondents' sales and/or factors of production data, there was not a basis for denying the companies at issue separate rates when "the companies did provide evidence of their entitlement to separate rates and there is no indication that any necessary information was missing or incomplete."²²⁰ Further, in *Fresh Garlic* the CIT held that:

Here, Commerce's actions were reasonable as it cannot evaluate a company for application of a separate rate to its sales when there are no sales that are not unrepresentative or distortive. As there were no reviewable entries, Commerce properly rescinded the review. Because all of the sales were not *bona fide*, there were no sales within the POR for which Commerce could grant Goodman a separate rate.²²¹

Therefore, contrary to IMJ's position that a non-*bona fide* sale is only unreviewable for purposes of establishing an export price for calculating a dumping margin, a finding that a sale is a non-*bona fide* sale in a new shipper review also renders that sale unreviewable for purposes of an administrative review and, thus, a not a sale for which the Department will grant a company a separate rate.

IMJ argues that it is uncontested that it had a sale, export, and entry of subject merchandise during the POR and, thus, the present facts are not the same as those in cases where the Department rescinds an administrative review because of a lack of sales, exports, or entries. However, the issue here is that the Department already examined IMJ's single sale, export, and entry during the POR in a new shipper review and found that it was not a reviewable transaction. Since the Department only reviews a sale of subject merchandise once, and IMJ had no other reviewable sales during the POR, there is no basis to conduct this administrative review with respect to IMJ.

Second, IMJ's approach effectively ignores the Department's determination in the new shipper review because it envisions the Department reexamining the sale and related entry. The Department cannot ignore its analysis in the new shipper review. The CIT noted as much in *Fresh Garlic* stating: "once Commerce had the information concerning the non-*bona fides* of Goodman's sales, it could not ignore that relevant information."²²² Third, IMJ's proposed

²¹⁹ *Id.*

²²⁰ See *Shandong Huarong* at 1594.

²²¹ See *Fresh Garlic* at 1335.

²²² See *Fresh Garlic* at 1335.

approach could lead to conflicting results with regards to the sale. Both administrative and new shipper reviews are undertaken to establish a dumping margin for a respondent. IMJ is currently challenging the results of the new shipper review, which was completed before the administrative review, before the CIT, and IMJ's sole entry remains enjoined as a result of that ongoing litigation.²²³ IMJ contends that it should be granted a rate in this administrative review for its sole sale based on the mandatory respondents' dumping margin while simultaneously seeking to reverse the Department's determination in the NSR and obtain a dumping margin for this sale based on its own sales price. This approach is unworkable as it could potentially lead to two different dumping margins for the same sale.²²⁴ Therefore, for the reasons noted above, we are rescinding this administrative review with respect to IMJ.

Comment 5: Separate Rate Status of Shanghai Smart

CP Kelco

- Shanghai Smart's SRA is fundamentally flawed for several reasons. First, the SRA contains a CF 7501 with numerous inconsistencies. The CF 7501 notes that Party A is the ultimate consignee,²²⁵ even though Shanghai Smart stated that Party A²²⁶ was not involved in the sales process for this entry.²²⁷ Specifically, Shanghai Smart stated that Party A never had possession, ownership or physical control of the subject merchandise. Although Shanghai Smart initially stated that it was not affiliated with Party A, it subsequently reported that it is affiliated with Party A, but still maintained that Party A did not play any role in Shanghai Smart's sales to the United States of either subject or non-subject merchandise. Reporting this information correctly is a legal requirement for an entry to be valid under U.S. law, which raises concerns regarding Shanghai Smart's actions with respect to the reported entry.²²⁸
- Also, the CF 7501 contained in Shanghai Smart's SRA is invalid because it does not contain several declarations. Specifically, a customs broker must declare the identity of the actual owner, purchaser, or consignee of the merchandise. Also, the customs broker must declare that the merchandise was obtained pursuant to a purchase, or agreement to purchase, and that the prices set in the invoice are true. The CF 7501 that Shanghai Smart provided for its sales (Shanghai Smart identified itself as the importer) does not include either of these broker declarations. Because no broker made either declaration, there is no assurance that the invoice and sales documents accompanying the CF 7501 contain accurate and truthful information.

²²³ *Inner Mongolia Jianlong Biochemical Co., Ltd. v. United States*, Ct. No. 16-187 (CIT 2016).

²²⁴ See *Chlorinated Isocyanurates from the People's Republic of China: Final Results Antidumping Duty Administrative Review of*, 76 FR 70957 (November 16, 2011) and accompanying IDM at Comment 8 (“{i}n 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.”)

²²⁵ See BPI memorandum at Note 15.

²²⁶ See BPI memorandum at Note 16

²²⁷ See BPI memorandum at Note 17

²²⁸ See BPI Memorandum at Note 18

- The *prima facie* defects present in Shanghai Smart's CF 7501, combined with the fact that Shanghai Smart subsequently stated that it misidentified the ultimate consignee in the CF 7501, calls into question the facts surrounding the entry that Shanghai Smart used to support its claim that it is eligible for separate rate status.²²⁹
- Shanghai Smart has not provided proof of payment for its alleged U.S. sales. This disqualifies it from obtaining separate rate status.²³⁰ The bank statement that Shanghai Smart provided as evidence of payment does not demonstrate proof of payment because the U.S. sale to which it corresponds is made null by the falsified CF 7501. Moreover, while Shanghai Smart provided bank statements indicating that it received payment from Customer B for a U.S. sale of subject merchandise;²³¹ record evidence indicates that no such company, under the name identified for Customer B in that documentation, exists. While Shanghai Smart attempts to explain away this evidence by claiming that any confusion regarding the actual identify of Customer B was caused because the customer's name was misspelled on the sales invoice,²³² record evidence consisting of emails with the same allegedly misspelled name of Customer B contradict Shanghai Smart's claim because it is unlikely that this company continued to misspell its own name in emails over the course of several years. Although Shanghai Smart provided a CF 7501 for a second sale to this customer which shows Customer B's name supposedly correctly spelled, that CF 7501 contains the same deficiencies noted above, including the fact that it is missing declarations of accuracy, the identity of the declarant, the declarant's signature, and complete filer or broker information. In addition, there is no evidence on the record that Shanghai Smart ever received payment from Customer B using the alleged correct spelling of the customer's name.
- Even though documentation pertaining to sales negotiations between Shanghai Smart and Customer B (using the alleged correct spelling of the customer's name), contains references to purchase orders, Shanghai Smart did not provide copies of the purchase orders. In addition, the subject lines of the emails in which Shanghai Smart negotiates with this customer reference completely different purchase orders and transactions.

²²⁹ See C.P. Kelco's Brief at 10, referring to *Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2012-2013*, 80 FR 20,197 (April 15, 2015) and its accompanying Issues and Decisions Memorandum at Comment 3, stating "in light of the Department's resource constraints and decision to limit individual examination of exporters under review, the Department's practice is not to perform a resource-intensive and complex bona fides analysis on sales made by separate rate applicants that are not mandatory respondents. Rather, we rely upon CBP data and/or CBP entry documentation to determine if the separate rate applicant had suspended entries during the POR...".

²³⁰ See C.P. Kelco's Brief at 12, referring to *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results of the Antidumping Duty Administrative Review and New Shipper Reviews*, 74 FR 11,349 (March 17, 2009) and accompanying Issues and Decisions Memorandum ("Frozen Fish Fillets"), at Comment 7, stating "it has been our practice to deny a company a separate rate when it does not provide the required payment information. Therefore, absent payment information from An Xuyen for its sales to United States during the POR, we are unable to assign it a separate rate. As stated in the Department's policy bulletin on separate rates, the Department will deny separate rates status to companies that have not submitted a complete separate rates application by the deadline... Although we agree with Petitioners that there are other areas of concern with An Xuyen's separate rate application, we find that the failure to provide payment information automatically eliminates it from consideration and, therefore, we find it unnecessary to address these other issues."

²³¹ See BPI Memorandum at Note 19.

²³² See BPI Memorandum at Note 20.

Furthermore, it appears that the emails have been pasted together and presented as if they were a single chain of email exchanges. This calls into question the reliability of the information in Shanghai Smart's separate rate application.

- Based on the bills of lading, all shipments made by Shanghai Smart were not consigned to its purported unaffiliated U.S. customer, Customer B. Although Shanghai Smart did not provide house bills of lading that accompanied the master bills of lading, ship manifest data on the record showing that for every shipment of subject merchandise that Shanghai Smart made during the POR, Party A was named as the consignee. Additionally, information submitted to CBP shows that Party A was the consignee of subject merchandise that was shipped to California, although Smart Chemical's ultimate customer, Customer B, purportedly is located in Texas.²³³ There is no evidence that Shanghai Smart's affiliate, Party A, ever resold the subject merchandise to an unaffiliated U.S. customer or shipped the merchandise to Customer B's purported address. In addition, evidence placed on the record shows that Shanghai Smart's merchandise was not shipped to its alleged U.S. customer because it was destined for addresses that were different than the address of Customer B.
- Hence, record evidence does not support Shanghai Smart's assertion that it made a sale to an unaffiliated U.S. customer during the POR because the evidence provided by Shanghai Smart is either fraudulent, incomplete or contradicted by ship manifest data. Thus there is no evidence of a U.S. sale that would make Shanghai Smart eligible for separate rate status.

Shanghai Smart

- Although CP Kelco alleges that Shanghai Smart's SRA is fundamentally flawed and that the Department should deny Shanghai Smart separate rate status, there is no merit to CP Kelco's arguments. In the *Preliminary Results*, the Department found that Shanghai Smart had demonstrated the *de jure* and *de facto* absence of government control and was entitled to separate rate status. CP Kelco does not challenge any aspect of the Department's specific findings with respect to Shanghai Smart's entitlement to separate rate status.
- While incorrect information was contained in certain CF 7501 forms; Shanghai Smart admitted this error confirming that the ultimate consignee was not Shanghai Smart's affiliate, Party A, but was Shanghai Smart's unaffiliated U.S. customer, Customer B. For certain reasons,²³⁴ the affiliate, Party A, was reported as the consignee in some shipments of subject merchandise during the POR. Additionally the CF 7501 forms identify the ultimate U.S. customer.
- CP Kelco alleges that the two entry summaries provided by Shanghai Smart are invalid because the broker declarations are incomplete. While some information was not completed by the broker in its entirety, this allegation is incorrect. The existence of incorrect or missing information on the two entry summaries does not invalidate the fact that during the POR, subject merchandise was entered by Shanghai Smart as the U.S. importer of record and these entries are properly subject to the administrative review. Each of the CF 7501s identifies Shanghai Smart as the importer of record. In addition,

²³³ See C.P. Kelco's Brief at 14. See also Shanghai Smart's Supplemental Separate Rate Response at Exhibit S-2.

²³⁴ See BPI Memorandum at Note 21.

these entries were identified as type 3 entries, which are subject to antidumping duties, and the CF 7501s establish the antidumping duties deposited on the entries. Shanghai Smart's entries continue to be suspended by CBP pending the final results of this review.

- The existence of an incorrectly identified ultimate consignee in one entry summary form, regarding which Shanghai Smart provided an explanation in its supplemental questionnaire response, and the absence of broker declarations in both CF 7501s, are not relevant to the determination of whether or not Shanghai Smart is entitled to separate rate status. Shanghai Smart has demonstrated its separate rate eligibility in the underlying investigation and in the preliminary results of AR1 in this proceeding. There is no legal or factual basis to deny Shanghai Smart's separate rate status due to minor discrepancies in its submitted documentation, which are separate and distinct from the criteria governing whether Shanghai Smart is entitled to separate rate status in this proceeding.
- While CP Kelco asserts that there is no evidence that Shanghai Smart received payment for its U.S. sales, Shanghai Smart provided a bank receipt that showed it received payment for its first sale in the POR.²³⁵ The Department never requested proof of payment for other sales. Shanghai Smart properly identified its unaffiliated customer in its supplemental questionnaire response and clarified its name,²³⁶ it was fully responsive to the Department's information request regarding documentation for the second sale. Shanghai Smart provided a secondary set of sales documentation including a bill of lading and a CF 7501 form which identify the U.S. customer as the ultimate consignee and identify the correct customer name.²³⁷
- Although C.P. Kelco argues that there is no evidence of sales negotiation on the record, there is an email exchange between Shanghai Smart and Customer B, in which Customer B requests a price quote for xanthan gum and Shanghai Smart states that it could provide Customer B with a container of xanthan gum at the same price as its last order. Customer B replied by attaching a new purchase order, and Shanghai Smart referred to the old purchase order in the subject line of the email.
- There is no evidence to indicate that Shanghai Smart's shipments to the United States during the POR were consigned to its U.S. affiliate and not resold to unaffiliated customers. CP Kelco bases its assertion on ship manifest data which are not reliable for Customs purposes. However, export documentation submitted by Shanghai Smart confirms the sale to Customer B. Shanghai Smart's SRA response contains sales invoices, proof of payment, sales contracts,²³⁸ and Shanghai Smart's Supplemental Questionnaire Response contains a CF 7501 entry summary, sales invoice and emails showing price negotiations.²³⁹ The master bills of lading on the record designate parties other than Party A as the ultimate consignee.²⁴⁰ As Shanghai Smart noted, Party A never had any involvement in the sales process and never had possession, ownership or physical control of the merchandise. The administrative record establishes that the merchandise was

²³⁵ See Shanghai Smart's Rebuttal Brief at 12. See also Shanghai Smart's Separate Rate Application at Exhibit 1.

²³⁶ See Shanghai Smart's Rebuttal Brief at 10-11. See also Shanghai Smart's Supplemental Questionnaire Response at Exhibit 2.

²³⁷ See Shanghai Smart's Supplemental Questionnaire Response at 4 and Exhibit 2.

²³⁸ See Shanghai Smart's Separate Rate Application at Exhibits 1 and 6.

²³⁹ See Shanghai Smart's Supplemental Questionnaire Response at Exhibit 2.

²⁴⁰ See Shanghai Smart's Separate Rate Application at Exhibits 1 and 6.

never shipped to Party A, but directly shipped to Shanghai Smart's downstream U.S. customer's factory location, as directed by the customer.

- Petitioner question whether Customer B ever received shipments from Shanghai Smart because the places of deliveries, as listed in the master bills of lading, do not match Customer B's address. However, this assertion is without merit because Shanghai Smart submitted contracts, invoices, price negotiations and proof of payment between Shanghai Smart and Customer B. Moreover, Customer B instructed Shanghai Smart to deliver the subject merchandise to its factory, not its corporate headquarters, thus it is logical that the location identified in the sales contract and master bills of lading do not match the address of Customer B's corporate headquarters.²⁴¹

Department's Position: We agree with Shanghai Smart. Although CP Kelco contends that the information in Shanghai Smart's SRA is incomplete, it has not provided a compelling argument to call into question Shanghai Smart's eligibility for separate rate status. As outlined in the Department's SRA,²⁴² the Department assigns separate rates in NME cases only if the applicant can demonstrate an absence of both *de jure* and *de facto* governmental control over its export activities in accordance with the separate-rates test criteria. CP Kelco has not challenged the absence of *de jure* or *de facto* government control over Shanghai Smart's exports, which was the basis for the Department granting Shanghai Smart separate rate status. Rather, CP Kelco points to allegedly specious information on the record in an attempt to undermine the evidence of the U.S. sale of subject merchandise by Shanghai Smart and thus its ability to qualify for a separate rate.

CP Kelco claims that Shanghai Smart misrepresented information in the CF 7501 form it provided in its separate rate application by not correctly identifying the consignee and ultimate customer. However, Shanghai Smart provided a separate CF 7501 which identifies Customer B as the consignee and an invoice which identifies Customer B as the ultimate customer, and we have evidence of an entry related to a sale to this unaffiliated customer. In addition, Shanghai Smart noted that, while, for certain sales, it reported its U.S. affiliate as the consignee in its CF 7501 form, in later sales during the POR, its ultimate unaffiliated U.S. customer, Customer B, is identified as the consignee in the CF 7501.

CP Kelco also claims that, because certain broker declarations in the CF 7501 were not made, these forms are not valid.²⁴³ However, there is no evidence on the record that CBP made such a finding with respect to these documents or determined that such entries were not made. Shanghai Smart provided two CF 7501s which show subject merchandise entering as type-3 entries for consumption, in addition to sales documentation (including sales invoices, bills of lading, sales negotiation documents, and proof of payment documents) demonstrating that Shanghai Smart made these sales.²⁴⁴ Therefore, we do not find that the incorrect or missing information at issue in the two entry summaries somehow invalidates the other information in those documents showing that, during the POR, Shanghai Smart entered type-3 merchandise into

²⁴¹ See Shanghai Smart's Separate Rate Application at Exhibit 6.

²⁴² See Shanghai Smart's Separate Rate Application at 5-16.

²⁴³ See BPI Memorandum at Note 22.

²⁴⁴ See Shanghai Smart's Separate Rate Application at Exhibits 1 and 6. See also Shanghai Smart's Supplemental Questionnaire Response at Exhibit 2.

the United States that was subject to antidumping duties and which predicated its request for separate rate status.

CP Kelco claims that Shanghai Smart never received payment for its first POR sale. However, this claim appears to be based on the misspelling of the name of Shanghai Smart's U.S. customer by a Chinese bank. Shanghai Smart did provide evidence of payment for this sale showing that it was paid once the sale was completed. We do not find that the misspelled name nullifies this third party evidence. Furthermore, other documentation on the record, including the CF 7501 for Shanghai Smart's second sale, contains the correctly spelled name of Shanghai Smart's U.S. customer.

C.P. Kelco alleges that Shanghai Smart did not make any sales to Customer B during the POR because the sales negotiations between Shanghai Smart and Customer B refer to purchase orders, which were not included in Shanghai Smart's sales packages. While Shanghai Smart did not provide these purchase orders, it provided other documentation contained in its sales packages which demonstrates that these sales occurred (*e.g.* invoices, proof of payment, bills of lading, and CF 7501 forms).²⁴⁵ Despite C.P. Kelco's argument that the lack of purchase orders calls into question the reliability of the information in Shanghai Smart's SRA, other information contained in Shanghai Smart's SRA supports evidence related to its sales and shows that a sale occurred for which a separate rate analysis can be conducted.

Although CP Kelco contends that Shanghai Smart shipped merchandise to its U.S. affiliate, rather than its downstream customer, evidence on the record supports Shanghai Smart's assertion that its U.S. affiliate never took physical control or ownership of the merchandise and that the merchandise was shipped directly to the U.S. customer after entry. Specifically, for the second entry, the sales invoice indicates that the merchandise is to be delivered to Location 1 by sea.²⁴⁶ In this set of export documentation, there is no mention of Party A, and thus no support for C.P. Kelco's claim that this was not a legitimate sale because Party A received the merchandise directly. Although C.P. Kelco claims that Shanghai Smart's merchandise was not shipped to its alleged U.S. customer because the merchandise was destined for addresses that are different than the address for Customer B, we do not find this argument compelling, because, as Shanghai Smart notes, it is illogical that subject merchandise would be shipped directly to Customer B's corporate headquarters rather than a distribution warehouse. The evidence on the record indicates that Shanghai Smart's merchandise was ultimately delivered to its customer.

Lastly, CP Kelco claims that the identity of the consignee in the third party ship manifest data proves that Shanghai Smart only sold subject merchandise to its affiliate, not its U.S. customer. However, it is the Department's practice to rely on official Customs data, rather than ship manifest data because Customs data are compiled from actual entry data, whereas ship manifest data do not represent actual entries of merchandise.²⁴⁷ In this case, the CBP documentation and

²⁴⁵ See Shanghai Smart's Separate Rate Application at Exhibits 1 and 6. See also Shanghai Smart's Supplemental Questionnaire Response at Exhibit 2.

²⁴⁶ See BPI Memorandum at Note 23.

²⁴⁷ See *Certain Cut-to-Length Carbon Steel Plate from the People's Republic of China: Preliminary Results of Antidumping Administrative Review and Preliminary Determination of No Shipments; 2013-2014*, 80 FR 48073

the master bills of lading that Shanghai Smart provided corroborate the identity of its ultimate U.S. consignee, which is not its U.S. affiliate.

In light of the foregoing, we have determined that Shanghai Smart had U.S. sales for the purposes of establishing its separate rate eligibility. As noted above, we also have determined that Shanghai Smart has established an absence of *de jure* and *de facto* government control with respect to its exports. Therefore, for the final results, we continue to find that Shanghai Smart is entitled to separate rate status.

Comment 6: Adjustment of the Sodium Hypochlorite Surrogate Value

In the *Preliminary Results*, the Department determined the SV for sodium hypochlorite by taking into account the percentage concentration reported by Fufeng.

ADM:

- The Department valued Fufeng's consumption of sodium hypochlorite using Thai imports under HTS subheading 2828.90.10. The Department, however, adjusted the average import value based on the concentration of sodium hypochlorite that Fufeng reported using in production.
- The Department should not adjust the import value to reflect Fufeng's reported concentration level for its sodium hypochlorite. There is no basis to assume that the concentration level of the sodium hypochlorite reflected in the import data is 100 percent, because the concentration level is not specified in that subheading. In *CVP from the PRC*, the Department stated that its practice is to "no longer adjust these unknown concentration levels to the concentration of the chemical FOP used by the respondent."²⁴⁸ Further in *Activated Carbon*, the Department explained that in the past, the Department adjusted surrogate values to reflect the concentration of the respondents' FOP when the concentration level of the import data is known. However, when no such evidence is on the record, the Department does not adjust purity levels.²⁴⁹
- Even if the record supports the claim that Thai sodium hypochlorite imports are comprised solely of entries with 100 percent concentration, Fufeng has not demonstrated that there is a difference in value between pure sodium hypochlorite and sodium hypochlorite with the concentration level which Fufeng uses in production.

(August 11, 2015) and accompanying Decision Memorandum for the Preliminary Results of the at p 4, stating "Additionally, even though Petitioner argues that the data from its secondary source show POR shipments which may be subject merchandise, when determining whether entries were made, the Department's preference is to use CBP data because they are a primary source, as opposed to a secondary source, which may be prone to errors in the data collection and aggregation process," unchanged in *Certain Cut-to-Length Carbon Steel Plate from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2013-2014*, 80 FR 75966 (December 7, 2015).

²⁴⁸ See ADM Brief at 2, referencing *Carbazole Violet Pigment 23 from the People's Republic of China: Final Results of the 2007-2008 Administrative Review*, 75 FR 36630 (June 28, 2010) ("*CVP from the PRC*") and accompanying IDM at Comment 3.

²⁴⁹ See ADM Brief at 2-3, referencing *Certain Activated Carbon from the People's Republic of China*, 78 FR 70533 (Nov. 26, 2013), and accompanying IDM at Comment 12 ("*Activated Carbon*").

- In *Citric Acid from China AR*, the Department valued a respondent's byproduct recoveries of 'sludge,' with a quantifiable percentage of water, relying on imports of "prefixes, feed supplements or feed activities," which did not include water.²⁵⁰ Even though there were measurable differences in the moisture content between the respondent's FOP and the imported products whose value was used as a surrogate, the Department did not adjust the surrogate value to capture any concentration differences.
- Like in *Citric Acid from China AR*, Fufeng has not presented evidence that only the pure portion of its reported sodium hypochlorite consumption would have commercial value, nor has Fufeng presented a more specific surrogate value for sodium hypochlorite based upon moisture content. For the final results, the Department should not make an adjustment to sodium hypochlorite based on the concentration level of the sodium hypochlorite which Fufeng uses in production.

Fufeng:

- The Department should continue to adjust the surrogate value for sodium hypochlorite based upon the documented concentration level of the sodium hypochlorite used by Fufeng.
- The description of Thai HTS sub-heading 2828.90.10 does not indicate that the sodium hypochlorite is in an aqueous or diluted form, but it is instead reasonable to infer that it is in a pure form. When the HTS heading does not describe the goods to be in a solution or mixture, it would be unreasonable and contrary to the rule of interpretation to presume that the imported chemical had been diluted in a solution. Thus the Department was correct in considering the imported goods as pure sodium hypochlorite and adjusting the surrogate value by the percentage concentration level of sodium hypochlorite used by Fufeng.
- Although ADM argues that it is no longer the Department's practice to adjust unknown concentration levels to the concentration level of the FOP used by the respondent, the facts are distinguishable from those in *CVP from the PRC*. In *CVP from the PRC*, the Department changed its practice of adjusting the *Chemical Weekly* prices for chemicals which the Department assumed were at a 100 percent purity level because the Department learned that prices in *Chemical Weekly* did not actually reflect a 100 percent purity level.²⁵¹ However, in this proceeding, the plain language of the HTS category suggests that sodium hypochlorite is imported in undiluted form and there is no record information specifically calling into question the conclusion that the chemicals are not 100 percent pure. Therefore, the Department should continue to adjust the surrogate value for sodium hypochlorite by the concentration levels reported by Fufeng.
- Similarly, ADM cites *Activated Carbon*, where the Department noted that "{w}hile Huahui has provided its HCl and NaOH purity levels, we note that the record does not indicate a specific concentration level for the Philippine import data and we are, therefore, unable to determine if the imports are at a different level of concentration than the HCl and NaOH used by Huahui." This precedent fails to support ADM's argument,

²⁵⁰ See ADM Brief at 3, referencing *Citric Acid and Certain Citrate Salts from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*; 2013–2014, 80 FR 77323 (December 14, 2015) ("*Citric Acid from China AR*"), and accompanying IDM at Comment 10.

²⁵¹ See Fufeng Rebuttal Brief at 2 citing *CVP from the PRC*.

because the record does not provide detailed descriptions of HCl and NaOH in the Philippine tariff and it is, therefore, impossible, absent such information on the record, to determine the precise scope (i.e., concentration levels) of the two chemicals contemplated under the concerned HTS provisions in the Philippine tariff.²⁵²

- ADM argues that, even if the record showed that the Thai import data for sodium hypochlorite were comprised of pure sodium hypochlorite, Fufeng still has failed to present any evidence regarding the difference in value between the sodium hypochlorite used by Fufeng and pure sodium hypochlorite. ADM further notes an instance in which the Department did not adjust the surrogate value of sludge in *Citric Acid from China AR* because “Petitioner have not demonstrated that the record shows that only the dry portion of RZBC's sludge by-product would have commercial value.” This precedent fails to support ADM’s arguments because sludge is, by definition, a mixture of several goods including inherent moisture, while sodium hypochlorite is a pure chemical prior to being diluted by water.²⁵³
- The record shows that the Thai tariff code contains several HTS headings - including two 11-digit HTS subheadings describing various concentration levels of HCl under HTS 2806.10 - that describe chemicals in terms of their particular concentration levels. It is therefore reasonable to infer that wherever the Thai tariff does not describe a chemical by its concentration level, such chemical should be presumed to be undiluted by water or any other solution.

Department’s Position: We have continued to adjust the SV for Fufeng’s sodium hypochlorite to account for the concentration of the sodium hypochlorite that it used. Petitioner references *Citric Acid from China AR* in asserting that no adjustment should be made because Fufeng presented no evidence that only the undiluted portion of its sodium hypochlorite has commercial value, and thus it did not demonstrate the difference in value between its sodium hypochlorite and pure sodium hypochlorite. However, the issue and the facts in *Citric Acid from China AR* are distinguishable from the issue and facts in the instant case. In *Citric Acid from China AR*, the petitioner argued that the Department should value the respondent’s sludge by-product, which contained a certain percentage of water, using two different SVs, an SV for water and an SV for feed additive to value the dry portion of the sludge. However, the Department stated that:

Outside of arguing that the surrogate value for sludge is high, Petitioners have provided no record evidence to support deviating from the Department’s standard practice of valuing material inputs and by-products in their entirety by using a single surrogate value per material input/by-product. ... Accordingly, it is inappropriate to segregate the valuation of this by-product. Therefore, for the final results, the Department will continue to use the HTS subheading for “Premixes, Feed Supplements of Feed Activities” to value the sludge by-product because it is the best Thai HTS match to RZBC’s sludge by-product.²⁵⁴

²⁵² See Fufeng Rebuttal Brief at 3; and ADM’s Case Br. at 2-3 citing *Activated Carbon*, and accompanying IDM at Comment 12).

²⁵³ See Fufeng Rebuttal Brief at 4; and ADM’s Case Br. at 3-4 citing *Citric Acid from China AR* and accompanying IDM at Comment 10.

²⁵⁴ See *Citric Acid from China AR* at Comment 10.

Thus, the issue in *Citric Acid from China AR* was whether to value the components of an input with different SVs, rather than valuing the entire input with one SV. As in *Citric Acid from China AR*, here we are valuing the entire input, sodium hypochlorite, using a single SV which we find to be the best Thai HTS match to Fufeng's input. Moreover, unlike *Citric Acid from China AR*, and as explained in more detail below, we have a basis for finding that the Thai HTS covers an undiluted form of sodium hypochlorite while Fufeng uses the input in a diluted form.

Furthermore, as Fufeng notes, there is record evidence that for another chemical, hydrochloric acid, Thai GTA data sub-headings under HTS 2806.10 are described in terms of concentration levels. Specifically, HTS category 2806.10.00102 is described as "hydrochloric acid 15% W/W to 36% W/W," and HTS category 2806.10.00103 is described as "hydrochloric acid more than 36% W/W."²⁵⁵ In light of the record evidence of specific concentration levels for other Thai GTA data, specifically the concentration levels of hydrochloric acid, and the absence of information that sodium hypochlorite is imported into Thailand in a diluted form, as a specific percentage concentration is not listed for this chemical in GTA data, we are treating the data as covering an undiluted form of sodium hypochlorite.

In *Citric Acid from the PRC Investigation*, for example, the Department determined that the respondent provided no record evidence to substantiate its claim that the Indonesian WTA data reflect imports of hydrochloric acid with a 100 percent concentration level, and the record did not indicate a specific concentration level for *any* of the Indonesian WTA import data. Therefore, the Department was unable to determine if the imports were at a different level of concentration than the hydrochloric acid used by the respondent and found no basis for making an adjustment to the SV for concentration levels.²⁵⁶ In contrast, in the instant case, the record contains specific concentration levels for other GTA data.

In *CVP 23 from the PRC*, the Department determined that prices reported in *Indian Chemical Weekly* may not reflect chemicals at a 100 percent purity level despite the Department's past treatment of prices of chemicals in liquid form in *Indian Chemical Weekly* as reflecting a 100 percent concentration level, unless *Indian Chemical Weekly* specified otherwise.²⁵⁷ This determination was based on information from representatives of *Indian Chemical Weekly* indicating that the purity levels of certain chemicals in liquid form, such as hydrochloric acid, are less than 100 percent.²⁵⁸ Therefore, in *CVP from the PRC*, the Department followed *Lock Washers from the PRC* and, except for price quotes in *Indian Chemical Weekly* which indicate a

²⁵⁵ See Preliminary Surrogate Value Memorandum at Attachment 1, where, under the HTS Number and Description columns for hydrochloric acid, the two HTS codes are listed with each of their descriptions/headings, from GTA. These descriptions were: for HTS 2806.10.00102 (hydrochloric acid 15% W/W to 36% W/W, and, for HTS 2806.10.00103 (hydrochloric acid more than 36% W/W).

²⁵⁶ See *Citric Acid and Certain Citrate Salts from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value*, 74 FR 16838 (April 13, 2009) ("*Citric Acid from the PRC Investigation*"), and accompanying IDM at Comment 14.

²⁵⁷ See *CVP 23 from the PRC and accompanying IDM* at Comment 3, citing *Synthetic Indigo from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 68 FR 53711 (September 12, 2003), and accompanying IDM at Comment 5.

²⁵⁸ See *CVP 23 from the PRC*, and accompanying IDM 3, where the hydrochloric acid was noted as having a 30-33 percent purity level.

chemical purity level, treated the purity level of chemicals sold in either liquid or solid form as unknown and did not adjust unknown concentration levels to the concentration level of the chemical FOP used by the respondent. Similarly, in *Activated Carbon*, the record did not specify the concentration level for the Philippine import data from GTA, for the purpose of valuing the respondent's hydrochloric acid and sodium hydroxide inputs. In that case, because the record lacked such evidence, the Department did not adjust the hydrochloric acid and sodium hydroxide surrogate values.

However, in the instant proceeding, the Department previously determined that the Thai HTS category for sodium hypochlorite covers the active undiluted ingredient contained in the solution used by Fufeng.²⁵⁹ Specifically, in the investigation in this proceeding the Department stated:

Likewise, Fufeng also reported that it consumed a solution containing sodium hypochlorite In the present case, the HTS category covers only the active ingredient (*i.e.*, sodium hypochlorite) of the input reported (*i.e.* bleach). Therefore, for the final determination, we have continued to apply the percentage solution of the respondents' sodium hypochlorite to the SV, in order to more accurately reflect the respondents' actual consumption of a sodium hypochlorite bleach solution.²⁶⁰

In this review, Fufeng continues to indicate that it uses a solution of sodium hypochlorite²⁶¹ which is a diluted form of the active undiluted ingredient that the Department previously determined was covered by the Thai HTS category for sodium hypochlorite. Moreover, there is no evidence on the record that the Thai HTS category code for sodium hypochlorite is reported in diluted form. Thus, consistent with the investigation in this proceeding, we have continued to apply the percentage of the solution used by Fufeng to the SV for sodium hypochlorite in order to more accurately reflect the value of the input actually used by Fufeng, which is a sodium hypochlorite solution.

Comment 7: Surrogate Value for Ocean Freight

ADM

- Fufeng reported that it purchased ocean freight services from various market economy ("ME") companies using an ME currency.
- However, in the *Preliminary Results*, the Department disregarded the ME prices of these services in favor of SVs for those services, because Fufeng reported that it was unable to obtain documentation for the freight forwarder's payment to the ocean freight carrier.
- Fufeng's statement regarding its inability to obtain this payment documentation, was in response to a multi-part request in a supplemental questionnaire that included the request

²⁵⁹ See *Xanthan Gum from the People's Republic of China: Final Determination of Sales at Less than Fair Value*, 78 FR 33351 (June 4, 2013) ("*Xanthan Gum from the PRC Investigation*") and accompanying IDM at Comment 6E.

²⁶⁰ See *Xanthan Gum from the PRC Investigation* and accompanying IDM at Comment 6-E.

²⁶¹ See Letter from Fufeng to the Department, regarding "Sections A, C, and D 2nd Supplemental Questionnaire Response for Neimenggu Fufeng Biotechnologies Co., Ltd. in the Second Administrative Review of Antidumping Duty Order on Xanthan Gum from the People's Republic of China (A-570-985)," dated April 13, 2016, at 20 and Exhibit SD-12.

that Fufeng “state whether Neimenggu Fufeng and Xinjiang Fufeng paid Chinese freight forwarders for their international freight expense services.”

- Fufeng failed to answer that specific request. Fufeng never identified any forwarder as a PRC company, nor is there any evidence that Fufeng used a PRC freight forwarder.²⁶²
- Thus, the Department should not use an SV to value Fufeng’s ocean freight because Fufeng did not answer the Department’s question about using a freight forwarder. Rather, the Department should apply adverse inferences in valuing Fufeng’s ocean freight services by valuing those services using the higher of the SV or the amounts reported in the INTNFRU field.

Fufeng

- In its Section C questionnaire response, Fufeng provided full particulars with respect to the invoices for freight payments, showing shipments by non-market economy as well as market economy carriers.²⁶³ In the first supplemental questionnaire, the Department asked Fufeng to provide documents evidencing payments by PRC freight forwarders to ME carriers where such carriers were used. Fufeng responded that it was unable to obtain the forwarders’ documents for payments to the ME carrier and stated that it will not claim that it made ME purchases of ocean freight.²⁶⁴
- The Department did not issue further questions to Fufeng regarding its ocean freight expenses. Thus, Fufeng acted to the best of its ability to answer the Department’s inquiry, and the Department never found that Fufeng failed to cooperate pursuant to section 776(b) of the Act.
- ADM does not dispute the fact that it is the Department’s policy to treat ocean freight purchased through an NME freight forwarder as an NME purchase unless documentation can be provided showing the amount paid by the freight forwarder to the ME carrier. In this case, Fufeng should not be penalized because it was unable to provide documentation relating to payments to the ME carrier.
- ADM’s actual complaint is that Fufeng’s ocean freight shipments should be subjected to a higher value. However, ADM already had an opportunity in this proceeding to contest the Department’s valuation of ocean freight and provide alternative SVs for ocean freight.
- Because Fufeng was unable to provide documentation establishing payment to ME carriers, for the final results, the Department should continue to use a SV to value its ocean freight.

Department’s Position: We disagree with ADM that it is appropriate to apply AFA in this situation.²⁶⁵ In its Section C questionnaire response, Fufeng stated that ME ocean freight services were provided during the POR and also provided, in Exhibit C-2, several chart of ME and NME international freight expenses during the POR, with invoice numbers and freight carrier names. In order to determine whether it might be appropriate for the Department to rely on the reported expenses for the ME freight services, the Department solicited further

²⁶² See ADM’s Case Br. at 4-5; and Fufeng’s Supplemental Section C Response (Jan. 21, 2016) at 10-11.

²⁶³ See Fufeng’s Supplemental Section A and C Response (January 21, 2016) at 10-11 and Exhibit 2A; and Fufeng’s Rebuttal Brief at 4-6.

²⁶⁴ See Supplemental Section A and C Response at 11; and Fufeng’s Rebuttal Brief at 5.

²⁶⁵ See *Nippon Steel*, 337 F.3d at 1382-83.

information from Fufeng in a supplemental questionnaire dated December 31, 2015. Specifically, question 15 of the supplemental questionnaire reads as follows:

On page 3 of Neimenggu.Fufeng's November 19, 2015, Section C response, Neimenggu Fufeng stated that market economy ("ME") ocean freight services were provided during the POR and also provided, in Exhibit C-2, several chart of ME and non-market economy ("NME") international freight expenses during the POR, with invoice numbers and freight carrier names. Please state whether Neimenggu Fufeng and Xinjiang Fufeng paid Chinese freight forwarders for their international freight expense services. ... If Neimenggu Fufeng and Xinjiang Fufeng paid for international freight services to a Chinese freight forwarder, please establish a link, for two international freight transactions, between payments to the ME carrier by Neimenggu Fufeng's or Xinjiang Fufeng's Chinese-based freight forwarder agent and Neimenggu Fufeng's or Xinjiang Fufeng's payments to the Chinese- based freight forwarder agent to demonstrate that the price paid to the Chinese freight forwarder was set by the ME provider. Also, please demonstrate that the ME payments for these two international freight payments are in U.S. dollars.

In response to this request, Fufeng noted that it was “unable to obtain the forwarder’s payment document to the ME carrier” and it adjusted its reporting accordingly by indicating in its section D database that it used NME ocean freight services.²⁶⁶ By virtue of the fact that Fufeng addressed this request for linkage between a forwarder and the freight services by explaining that it was “unable to obtain *the forward’s payment document* to the ME carrier” (emphasis added), Fufeng’s response indicates that it did use a Chinese freight forwarder. Thus, the Department found Fufeng’s response to be adequate and did not find it necessary to ask additional questions or request supporting documentation. Consequently, we do not find that information regarding this request is missing from the record, or that Fufeng withheld information that had been requested, failed to provide information within the deadlines established, failed to provide information in the form and manner requested by the Department, or significantly impeded the proceeding.²⁶⁷ Nor do we find that Fufeng’s response reflects a failure to cooperate.²⁶⁸ Therefore, there is no basis to rely upon partial FA or AFA with respect to valuing ocean freight.

Comment 8: Surrogate Value for Electricity

ADM

- The Department valued electricity using the simple average of peak (from 9am to 10 pm) and off-peak rates (10 pm to 9 am) from Thailand’s Metropolitan Electricity Authority (“TMEA”). Fufeng, presented no evidence that it operates during off-peak periods. Therefore, the Department should value electricity relying only on the peak electricity rate.

²⁶⁶ See Supplemental Section A and C Response at 11.

²⁶⁷ See section 776(a) of the Act.

²⁶⁸ See section 776(b) of the Act.

Fufeng

- Although ADM contends that Fufeng operates a single “peak” hour shift, there is no rational basis to assume that Fufeng was operating a single shift at its production facilities based on certain BPI regarding its operations during the POR.²⁶⁹
- The record indicates that Fufeng paid overtime wages to its workers. Thus, in the unlikely event that Fufeng was operating a single shift, the record confirms that the actual hours of production at the factories were extended. ADM fails to offer any contrary evidence that Fufeng operated in peak periods alone.

Department’s Position: We agree with Fufeng. As an initial matter, ADM appears to base its argument on data from one of two tables the Department relied on in calculating the SV for electricity. However, we calculated the electricity SV by averaging the electricity rates reported by Thailand’s Metropolitan Electricity Authority under two tables, tables 4.1 and 4.2.

Information from these tables supports the Department’s use of both on- and off-peak rates. Table 4.1 notes that on-peak hours are every day from 6:30 pm to 9:30 pm, partial peak hours are every day from 8:00 am to 6:30 pm, and off-peak hours are every day from 9:30 pm to 8:00 am.²⁷⁰ In light of the fact that on-peak hours under Table 4.1 cover only three hours in the evening of each day (*i.e.*, 6:30 pm to 9:30 pm), we find it unreasonable to conclude that Fufeng’s factories operated only at on-peak hours.

In addition, Table 4.2 indicates that on-peak hours are Monday through Friday from 9:00 am to 10:00 pm and off-peak hours include Monday through Friday from 10:00 pm to 9:00 am in addition to Saturdays, Sundays, National Labor Day, and public holidays.²⁷¹ BPI information on the record indicates that Fufeng’s employees worked during the off-peak times defined for Table 4.2.²⁷² Therefore, we have determined that it is appropriate to use an average of on-peak and off-peak rates in calculating the SV for electricity.

Further, the record also shows that Fufeng paid its workers overtime wages.²⁷³ Given that employees worked overtime hours, it is likely those employees’ shifts bled into off-peak hours

²⁶⁹ See Fufeng’s Rebuttal Brief at 6; and ADM Case Brief at 5. See also Memorandum to Abdelali Elouaradia, Director, Office IV, Antidumping and Countervailing Duty Operations, re: “Selection of Respondents for the 2014-2015 Administrative Review of the Antidumping Duty Order on Xanthan Gum from the People’s Republic of China,” dated September 29, 2015 at 5. See BPI Memorandum at Note 24.

²⁷⁰ See Petitioner’s February 9, 2016 SV Submission, at Exhibit 4. The submission indicates “On peak: Monday – Friday from 09.00 AM to 10.00 PM. Off Peak: Monday – Friday from 10.00 PM to 09.00 AM; Saturday – Sunday, National Labor Day and normal public holiday (excluding substitution holiday and Royal Ploughing Day) from 0.00 AM to 12.00 AM.

²⁷¹ See Petitioner’s February 9, 2016 SV Submission, at Exhibit 4. The submission indicates “On peak: Monday – Friday from 09.00 AM to 10.00 PM. Off Peak: Monday – Friday from 10.00 PM to 09.00 AM; Saturday – Sunday, National Labor Day and normal public holiday (excluding substitution holiday and Royal Ploughing Day) from 0.00 AM to 12.00 AM.

²⁷² See Letter from Fufeng to the Department, re: “Sections A, C, and D 2nd Supplemental Questionnaire Response for Neimenggu Fufeng Biotechnologies Co., Ltd. in the Second Administrative Review of Antidumping Duty Order on Xanthan Gum from the People’s Republic of China,” dated April 12, 2016, at Exhibit SD-2E. See BPI Memorandum at Note 25.

²⁷³ See Letter from Fufeng to the Department, re: “Sections A, C, and D 2nd Supplemental Questionnaire Response

because Table 4.2 classifies a significant number of hours as off-peak hours (11 off-peak hours Monday through Friday).²⁷⁴ We find that these facts weigh against exclusive reliance on the on-peak electricity rates. Therefore, we find it appropriate to continue to use, for these final results, a simple average of the on-peak and off-peak electricity rates to value Fufeng's electricity usage.

Comment 9: New Factual Information in Deosen/AHA's case brief

C.P. Kelco (US)

- Deosen/AHA's case brief repeatedly quotes factual information from other segments of this proceeding that are not on the record of this segment and makes arguments regarding this information. The only category of factual information under which Deosen and AHA could submit these quotes, citations, and arguments is 19 CFR 351.102(b)(21)(v), filed in accordance with 19 CFR 351.301(c)(5) as factual information other than described in 19 CFR 351.102(b)(21)(i)-(iv). However, Deosen's and AHA's submission of new factual information meets none of the criteria of 19 CFR 351.301(c)(5). The Department should reject Deosen/AHA's case brief and require Deosen/AHA to refile the brief with all references to new factual information removed, or the Department should disregard all arguments supported by the new factual information or by references to evidence that exists on the record of other segments of this proceeding but not on the record of this segment.

Department's Position: The Department has already addressed this issue. On October, 13, 2016, the Department informed Deosen that its brief contained untimely filed new information not on the record of this proceeding, including quotes and citations to factual information from other segments of the proceeding.²⁷⁵ Therefore, the Department rejected the case brief from the record.²⁷⁶ Subsequently, in accordance with the Department's instructions, Deosen/AHA filed a version of its case brief with all references to new factual information removed.²⁷⁷ For further discussion of this issue, see the Letter Regarding Untimely Filed Information.

for Neimenggu Fufeng Biotechnologies Co., Ltd. in the Second Administrative Review of Antidumping Duty Order on Xanthan Gum from the People's Republic of China," dated April 12, 2016, at Exhibit SD-2E. See BPI Memorandum at Note 26.

²⁷⁴ See Petitioner's February 9, 2016 SV Submission, at Exhibit 4. The submission indicates "On peak: Monday – Friday from 09.00 AM to 10.00 PM. Off Peak: Monday – Friday from 10.00 PM to 09.00 AM; Saturday – Sunday, National Labor Day and normal public holiday (excluding substitution holiday and Royal Ploughing Day) from 0.00 AM to 12.00 AM.

²⁷⁵ See Letter from the Department to Deosen, dated October 13, 2016 ("Letter Regarding Untimely Filed Information").

²⁷⁶ See Memorandum from Andrew Martinez to the File, Re: "Administrative Review of Xanthan Gum from the People's Republic of China: Removal of Submissions from the Record," dated October 18, 2016.

²⁷⁷ See Deosen/AHA Brief.

CONCLUSION

We recommend applying the above methodology for these final results of review.



Agree

Disagree

2/13/2017

X *Ronald K. Lorentzen*

Signed by: RONALD LORENTZEN

Ronald K. Lorentzen
Assistant Secretary
for Enforcement and Compliance