A-570-985
POR: 07/19/2013 – 06/30/2014
Public Document
E&C/IV: KH

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 First Antidumping Duty Administrative Review

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SUMMARY

The Department of Commerce ("the Department") analyzed comments submitted by interested parties regarding the *Preliminary Results*[1] and Post-Preliminary Results[2] in this first 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 made certain changes to our calculation of the final dumping margin assigned to Fufeng.[3] We also made changes to the dumping margins assigned to Deosen,[4] AHA,[5] and the companies granted separate rate status that we did not individually examine. We recommend that you approve the positions described

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[1] *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").
[2] *See* Memorandum to Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, "Post-Preliminary Results Memorandum: Application of Adverse Facts Available to Deosen Biochemical Ltd./ Deosen Biochemical (Ordos) Ltd. and A.H.A. International Co., Ltd.," dated August 5, 2016 ("Post-Preliminary Results").
[3] The Department has treated Neimenggu Fufeng Biotechnologies Co., Ltd. (aka Inner Mongolia Fufeng Biotechnologies Co., Ltd.) ("Neimenggu Fufeng"), Shandong Fufeng Fermentation Co., Ltd. ("Shandong Fufeng"), and Xinjiang Fufeng Biotechnologies Co., Ltd. ("Xinjiang Fufeng") as a single entity ("Fufeng").
[4] The Department has treated Deosen Biochemical Ltd. ("Deosen Zibo") and Deosen Biochemical (Ordos) Ltd. ("Deosen Ordos") as a single entity ("Deosen").
[5] A.H.A. International Co., Ltd. ("AHA").

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 Deosen and AHA
Comment 3: Separate Rate Status of Shanghai Smart Chemicals Co., Ltd.
Comment 4: Separate Rate Margin Calculation
Comment 5: Differential Pricing
- A. Authority to Conduct Differential Pricing Analysis in Administrative Reviews
- B. Use of Zeroing in Average-to-Transaction ("A-T") Comparisons in Administrative Reviews

Comment 6: Surrogate Value for Labor
Comment 7: Surrogate Value for Domestic Truck Freight
Comment 8: Surrogate Value for Corn Consumed at Fufeng's Neimenggu Fufeng Facility
Comment 9: Surrogate Value for Coal Consumed at Fufeng's Neimenggu Fufeng and Xinjiang Fufeng Facilities
Comment 10: Surrogate Value for Electricity
Comment 11: Surrogate Value for Caustic Soda
Comment 12: Surrogate Value Adjustment for Sodium Hypochlorite
Comment 13: GTA POR Data
Comment 14: Employee Retirement Expenses in Thai Churos Co., Ltd.'s Financial Statements
Comment 15: Fufeng's Value-Added Tax Calculation
Comment 16: Fufeng's Energy Allocations
Comment 17: Movement Expense for Fufeng's Raw Xanthan Gum
Comment 18: Valuation of Deosen's Compressed Air
Comment 19: Valuation of Deosen's U.S. Inland Truck Freight
Comment 20: Alleged Calculation Errors for Deosen
- A. Marine Insurance
- B. AHA's Sales Premium
- C. Inland Freight
- D. Coal Consumption

BACKGROUND

The Department published the *Preliminary Results* on August 7, 2015, in accordance with section 751(a)(1)(B) of the Tariff Act of 1930, as amended ("the Act"). On October 6, 2015, Petitioner,[6] Fufeng, and Deosen submitted case briefs.[7] On October 15, 2015, Petitioner, Fufeng and Deosen submitted rebuttal briefs.[8] On September 8, 2015, Petitioner and Fufeng requested a hearing.[9] On October 22, 2015, both parties withdrew their requests for a hearing.[10] On February 9, 2016, the Department deferred the final results of this administrative review.[11] The Department issued supplemental questionnaires to Deosen and AHA between March 4, 2016, and April 22, 2016,[12] and Deosen and AHA submitted their supplemental questionnaire responses on March 21, 2016, and April 29, 2016.[13] The Department issued its Post-Preliminary Results in this review on August 5, 2016.[14] Petitioner, Shanghai Smart,[15] Deosen, and AHA

[6] Petitioner is CP Kelco U.S. Inc.
[7] *See* Letter from Petitioner to the Department, regarding "Xanthan Gum from the People's Republic of China: CP Kelco's Case Brief," dated October 6, 2015 ("Petitioner's Case Brief"); *see also* Letter from Fufeng to the Department, regarding "Fufeng Direct Case Brief in the First Administrative Review of Antidumping Duty Order on Xanthan Gum from the People's Republic of China (A-570-985)," dated October 6, 2015; *see also* Letter from Deosen to the Department, regarding "Xanthan Gum for the People's Republic of China: Case Brief of Deosen Biochemical Ltd.," dated October 6, 2015.
[8] *See* Letter from Petitioner to the Department, regarding "Xanthan Gum from the People's Republic of China: CP Kelco's Rebuttal Brief," dated October 15, 2015; *see also* Letter from Fufeng to the Department, regarding "Fufeng Rebuttal Brief in the First Administrative Review of Antidumping Duty Order on Xanthan Gum from the People's Republic of China (A-570-985)," dated October 15, 2015 ("Fufeng's Rebuttal Brief"); *see also* Letter from Deosen to the Department, regarding "Xanthan Gum from China; Rebuttal Brief of Deosen Biochemical Ltd. and Deosen USA Inc.," dated October 15, 2015.
[9] *See* Letter from Petitioner to the Department, regarding "Xanthan Gum from the People's Republic of China: Request for Public and Closed Hearing," dated September 8, 2015; *see also* Letter from Fufeng to the Department, regarding "Fufeng Hearing Request in the First Administrative Review of Antidumping Duty Order on Xanthan Gum from the People's Republic of China (A-570-985)," dated September 8, 2015.
[10] *See* Letter from Petitioner to the Department, regarding "Xanthan Gum from the People's Republic of China: Withdrawal of Hearing Request," dated October 22, 2015; *see also* Letter from Fufeng to the Department, regarding "Fufeng Withdrawal of Hearing Request in the First Administrative Review of Antidumping Duty Order on Xanthan Gum from the People's Republic of China (A-570-985)," dated October 22, 2015.
[11] *See* Memorandum to Paul Piquado, Assistant Secretary for Enforcement & Compliance, "Xanthan Gum from the People's Republic of China: Deferral of the Final Results of the First Antidumping Duty Administrative Review," dated February 9, 2016 ("Deferral Memorandum").
[12] *See* Letter to Deosen and AHA, "Xanthan Gum from the People's Republic of China: Supplemental Questionnaire," dated March 4, 2016 ("Deferral First Questionnaire"); *see also* Letter to Deosen and AHA, "Xanthan Gum from the People's Republic of China: Supplemental Questionnaire," dated April 22, 2016.
[13] *See* Submission from Deosen and AHA, "Xanthan Gum from China: Response to Supplemental Questionnaire," dated March 21, 2016 ("Deosen-AHA-1SQR"); *see also* Submission from Deosen and AHA, "Xanthan Gum from China: Response to Second Deferral Supplemental Questionnaire," dated April 29, 2016 ("Deosen-AHA-2SQR").
[14] *See* Post-Preliminary Results.
[15] Shanghai Smart Chemicals Co., Ltd. ("Shanghai Smart").

submitted supplemental case briefs on September 14, 2016, and Petitioner and ADM[16] submitted supplemental rebuttal briefs on September 26, 2016.[17]

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.

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

Although we recommend basing Deosen's and AHA's dumping margins on total adverse facts available for purposes of these final results of review (*see* Comment 1), we addressed, nonetheless, certain calculation issues raised by Deosen and AHA in the comments below.

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

Deosen/AHA:

- The Department must not base Deosen 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'

[16] Archer Daniels Midland Company ("ADM").

[17] *See* Letter from Petitioner 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 ("Petitioner's Supp. Br."); *see also* 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."), *see also* Letter from Deosen and AHA to the Department, regarding "Xanthan Gum from China: Supplemental Case Brief," dated September 15, 2016 ("Deosen Supp. Br.") ; *see also* Letter from Petitioner to the Department, regarding "Xanthan Gum from the People's Republic of China: CP Kelco U.S., Inc.'s Supplemental Rebuttal Brief," dated September 26, 2016 ("Petitioner's Supp. Rebuttal Br."); *see also* 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.").

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.

- 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.[18] This business arrangement did not significantly impede this review.[19]
- 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.[20] 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."[21] 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 order[22] 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.[23]
- 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. Statements in Deosen's/AHA's response to questions related to a request to initiate a changed circumstances review ("CCR") are not inconsistent or contradicted by facts in this review including information in the Export Service Agreements ("ESA").[24]
- Deosen's claim that its relationship with AHA is a typical buyer-seller relationship is not contradicted simply because Deosen sets the price and other terms of sale and AHA is an

[18] *See* Deosen Supp. Br. at 5, referencing 19 USC 1677g.
[19] *See* Deosen Supp. Br. at 5-6, 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 (Nov 17, 2010) and accompanying Issues and Decision Memorandum ("IDM") at Comment 1.
[20] *Id*. at 6.
[21] *See* Deosen Supp. Br. 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.
[22] *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").
[23] *See* Deosen Supp. Br. at 8, referencing Deosen-AHA-2SQR.
[24] *See* Deosen Supp. Br. at 12, referencing Deosen-AHA-1SQR; *see also* Deosen-AHA-2SQR.

agent of Deosen.[25] 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.[26] AHA received the merchandise from Deosen, issued a sales invoice to customers, declared the exports, claimed the value-added tax ("VAT") rebate, and collected payment from customers based on resales arranged by Deosen.[27] In that sense, there are no inconsistencies between AHA being a typical trading company (as stated in Deosen's/AHA's response to questions related to a request to initiate a CCR) and acting as an agent under the 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. However, AHA may also purchase the subject merchandise from Deosen or other producers and resell it to AHA's own customers.[28] 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.
- 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.[29] The ESA was not requested until March 2016, which was after the final results of review were deferred.[30]
- The Department claims that the ESA should have been provided in response to Section A of its questionnaire.[31] 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.[32] Rather, it is a framework document governing the relationship between two Chinese parties prior to actual exports to the United States. Deosen and AHA explained this relationship in detail in its questionnaire response. 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.

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[25] *See* Deosen Supp. Br. at 12, referencing submission from AHA, "Xanthan Gum from the People's Republic of China: Response to Sections A of the Department's Questionnaire," dated October 27, 2014, ("AHA's Section A Response") at 7-8.

[26] *See* Deosen Supp. Br. at 13, 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.").

[27] *See* Deosen Supp. Br. at 15.

[28] *See* Deosen Supp. Br. at 14, referencing Deosen-AHA-2SQR at 10.

[29] *See* Deosen Supp. Br. at 16, referencing the Post-Preliminary Results at 8.

[30] *See* Deosen Supp. Br. at 16, referencing Deosen-AHA-1SQR at Exhibit 7.

[31] *See* Deosen Supp. Br. at 16, referencing the Post-Preliminary Results at 8.

[32] *See* Deosen Supp. Br. at 17, referencing Section A of the Department's AD questionnaire at question 4.c. (February 26, 2015).

- Likewise, the Department's subsequent supplemental questionnaires did not request any agreement between Deosen and AHA.[33] It was not until the Department issued its first supplemental questionnaire after deferral of the final results of review in March 2016 that the Department asked about the date "when 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.[34]
- 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 *Preliminary Results*. 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 in its Section A questionnaire response when it noted that AHA sells to Deosen's customers and that AHA is paid a commission, both of which are key terms in the ESA, and the Department was provided with complete information, as requested, to determine the mandatory respondent and how to calculate a dumping margin.[35]
- The additional facts on the record after the *Preliminary Results* do not change or contradict the factual basis of those results in which the Department recognized that the record contains sales information untainted and usable to calculate U.S. prices and a dumping margin for Deosen.[36]
- 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.[37]
- The Department failed to address why information that was clear and sufficient for the *Preliminary Results* 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 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.

Petitioner:

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[33] *See* Deosen's Supp. Br. at 18, referencing the Department's Supplemental Section A Questionnaire (April 23, 2015).
[34] *See* Deosen Supp. Br. at 18, referencing the Deferral First Questionnaire.
[35] *See* Deosen's Supp. Br. at 20, referencing AHA's Section A Response at 7; *see also* Deosen's Supp. Br. at 22-23.
[36] *See* Deosen's Supp. Br. at 23, referencing the Preliminary Decision Memorandum at 13.
[37] *See* Deosen Supp. Br. at 23 to 25.

- The Department consistently applies a "totality of the circumstances" test in administrative reviews to make a *bona fides* determination.[38]
- 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."[39]
- In evaluating the *bona fides* of sales, the Department is permitted to exclude certain sales when they are unrepresentative or extremely distortive.[40]
- In the *Post Preliminary Memorandum*, 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."[41]
- Thus, AHA's sales were artificially constructed in order to lower cash deposits payable upon entry and are not *bona fide* sales.
- Deosen's and AHA's case brief fails to address adequately the Department's findings and does not recognize that, since the *Preliminary Decision Memorandum,* additional evidence has been placed on the record indicating that the reported sales are not *bona fide* sales.[42]
- Deosen's and AHA's claims of cooperating to the best of their ability and acting in good faith are transparently false. The ESA should have been submitted with Deosen's and AHA's responses to Section A of the Department's questionnaire, or at the very least, in response to Section C of the Department's questionnaire.[43]
- In responding to Section C of the questionnaire, Deosen did not withhold the commission agreement between Deosen USA and an unaffiliated U.S. sales agent.[44] If Deosen and AHA believe the commission agreement with the U.S. sales agent was relevant and responsive to the Department's questionnaire, it is not possible that they could have believed the ESA between Deosen and AHA was irrelevant and unresponsive to the Department's questionnaire.
- The record contains additional instances of Deosen and AHA dissembling and

[38] *See* Petitioner's Supp. Rebuttal Br. at 6, referencing *Silicomanganese from India: Final Results of Antidumping Duty Administrative Review*, 80 FR 75660 (Dec. 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).
[39] *See* Petitioner's Supp. Rebuttal Br. at 3, 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).
[40] *See* Petitioner's Supp. Rebuttal Br. at 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 36721 (June 30, 2014) ("*Fresh Garlic from the PRC 2011-2012*") 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).
[41] *See* Petitioner's Supp. Rebuttal Br. at 6, referencing the Post-Preliminary Results at 7.
[42] *See* Deosen Supp. Br. at 6.
[43] *See* Petitioner's Supp. Rebuttal Br. at 6, referencing Post-Preliminary Results at 8; *see* AHA's Section A Response at 15.
[44] *See* Petitioner's Supp. Rebuttal Br. at 6, referencing the submission from Deosen, "Xanthan Gum from the People's Republic of China: Response to the Department's Section C Questionnaire," dated April 6, 2015, ("Deosen's Section C Response") at C-24.

obfuscating their responses to the Department's requests for information in an attempt to mislead the Department and conceal the fact that AHA's sales were not *bona fide* commercial sales.

- In its response to Section A of the Department's questionnaire, Deosen stated that AHA and Deosen negotiated a price so that AHA obtained a premium between the prices it paid Deosen for goods and the prices at which it sold the goods. However, this statement is not consistent with the information contained in the ESA.[45]
- No party can construe the ESA between Deosen and AHA as an agreement that turned AHA into "…a reseller in the commercial understanding of the term."[46] Deosen admitted in its response to a supplemental Section A questionnaire that it knew who the ultimate customer was in all sales involving AHA to the United States.[47]
- Deosen also stated in its Section A supplemental questionnaire response with regard to sales involving AHA that it, "has provided all of the information requested regarding the sales."[48] However, the ESA, which Deosen did not provide to the Department until after the Post-Preliminary Results is the governing agreement between all "sales" involving Deosen and AHA. Had Deosen provided this critical document, the Department would have recognized that sales passing through AHA were artificially constructed, non-*bona fide* sales.
- Deosen also misled the Department in its Section A supplemental questionnaire response with respect to a question regarding how title to subject merchandise was transferred in sales involving AHA. The post-deferral record shows that Deosen omitted the most critical first step in the sales process that takes place before AHA ever entered into a sales contract with Deosen.[49]
- It is clear that Deosen's pre-deferral questionnaire responses had one overriding goal: to withhold the existence of the ESA between Deosen and AHA in order to conceal the true nature of the business relationship. Because of the sales scheme, Deosen and AHA have rendered both of their sales databases unsuitable for use in calculating an accurate antidumping margin for either company. These sales are not *bona fide* commercial sales and cannot be used for any purpose in this administrative review.[50]
- Other improperly reported sales information also renders the sales unusable for calculating a dumping margin.
- The reported date of sale for all of AHA's sales is incorrect. The record does not contain the dates on which AHA and Deosen conducted certain communication with respect to Deosen setting the material terms of AHA's "sales," which, the ESA indicates, is the

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[45] *See* Memorandum from Krisha Hill to the File, Re: "Proprietary Information for Final Results of the 2013-2014 Antidumping Duty Administrative Review of Xanthan Gum from the People's Republic of China," dated concurrently with this Memorandum, ("BPI Memorandum") at Note 1.

[46] *See* Petitioner's Supp. Rebuttal Br. at 8, referencing the submission from Deosen, "Xanthan Gum from the People's Republic of China: Response to the Department's Section A Supplemental Questionnaire," dated May 7, 2015, ("Deosen's Supplemental Section A Response") at 6.

[47] *Id*; *see also* BPI Memorandum at Note 2.

[48] *See* Petitioner's Supp. Rebuttal Br. at 10, referencing Deosen's Supplemental Section A Response at 7.

[49] *See* BPI Memorandum at Note 3.

[50] *See* Petitioner's Supp. Rebuttal Br. at 13, referencing *Fresh Garlic from the PRC 2011-2012* 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).

actual date on which the material terms of AHA's "sales" are made.[51] As such the Department cannot use AHA's sales database to calculate an accurate dumping margin.[52]

- The VAT amount reported in the VATTAXU field and certain expenses reported in the PREMIUMU field in the U.S. sales database for all sales involving AHA are incorrect. Although Deosen reported a VAT rebate in its sales database, this reporting is not supported by information indicated in the ESA.[53] Also, the VAT rebate possibly should have been added to the PREMIUMU received by AHA. AHA also claimed a 4 percent VAT rebate, failing to clarify whether the VAT it pays to Deosen is added to the value of the subject merchandise that AHA is selling to Deosen's U.S. customer.[54] These inaccuracies render the reported sales data unreliable.
- Additionally, the Department cannot rely on Deosen's U.S. sales that did not involve AHA as the basis for calculating an antidumping margin for Deosen. The suggestion that the Department should only base a dumping margin calculation on a mere sliver of sales has no precedent in past agency action.
- The Department correctly determined that the actions taken by Deosen and AHA in this review impeded the proceeding, and that Deosen and AHA withheld information from the Department. However, the extent of the damage inflicted on the record has left very little on the record to which the Department could apply facts available with an adverse inference. AHA had no reviewable *bona fide* sales in this review and, thus, the review should be rescinded with respect to AHA.

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.[55]

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

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[51] *See* BPI Memorandum at Note 4.
[52] *See* Petitioner's Supp. Rebuttal Br. at 13, referencing *Certain Carbon Steel Butt-Weld Pipe Fitting from Thailand: Final Results of Antidumping Duty Administrative Review,* 68 FR 6409 (February 7, 2003), and accompanying IDM at Comment 1 (rejecting respondent's sales database that contained incorrect dates of sale).
[53] *See* BPI Memorandum at Note 5.
[54] *See* Petitioners Sup. Rebuttal Br. at 15, referencing AHA Section C Response at C-26.
[55] 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. 1 14-27, 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.

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."[56] Further, affirmative evidence of bad faith on the part of a respondent is not required before the Department may make an adverse inference.[57] It is the Department's practice to consider, in employing adverse inferences, the extent to which a party may benefit from its own lack of cooperation.[58] 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 U.S. Court of Appeals for the Federal Circuit ("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."[59] 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."[60] 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.[61] 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."[62] The "best of its ability" standard

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[56] *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").

[57] *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); *Antidumping Duties, Countervailing Duties*, 62 FR 27296, 27340 (May 19, 1997) ("Preamble"); and *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382-83 (CAFC 2003) ("Nippon Steel")

[58] *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).

[59] *See Nippon Steel*, 337 F.3d at 1382-83.

[60] *Id. at 1382.*

[61] *Id.*

[62] *Id.*

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.[63]

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.[64] 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. [65]

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 proper antidumping duty cash deposits at the appropriate rate. In their supplemental questionnaire responses following the Department's deferral of the final results of review,[66] 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.[67] 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.[68] 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

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[63] *Id.*
[64] *See* sections 776(a)(1) and 776(a)(2)(A) and (C) of the Act.
[65] For additional details regarding our decision to apply adverse facts available, *see* Post-Preliminary Results*; see also* Section A of the Department's AD questionnaire, at questions 4.b. and 4.c.
[66] *See* Deosen-AHA-1SQR and Deosen-AHA-2SQR.
[67] *See* Deosen-AHA-1SQR at 6-7.
[68] *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*.

> 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."[69]

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."[70] 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."[71]

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 lower cash deposit applicable to the producer-exporter combination of Deosen-AHA,[72] the ESAs related to these sales demonstrate that these were actually sales made and controlled by Deosen.[73] 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.[74]

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.[75] 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."[76] As we stated above the ESA suggests that AHA was not a "reseller" of subject merchandise, but instead that Deosen was the seller.[77] Thus, the AHA-Deosen cash deposit rate was not the correct cash deposit rate for the transactions at issue.[78] 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.

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69 *See* Deosen-AHA-1SQR at 6-7.
70 *Id.* at 7-8; *see also* BPI Memorandum at Note 6.
71 *Id.*
72 *See* Deosen-AHA-1SQR at Exhibit 10.
73 S*ee* BPI Memorandum at Note 7.
74 *See* Letter from Deosen to the Department, regarding Xanthan Gum for the People's Republic of China: Response to the Department's Section A Questionnaire," dated March 24, 2015 ("Deosen's Section A Response") at 7; *see also* AHA's Section A Response at 7.
75 *See* Deosen-AHA-lSQR at Exhibit 7.
76 *See Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties*, 68 FR 23954 (May 6, 2003).
77 *See* BPI Memorandum at Note 8.
78 *See* the Post-Preliminary Results.

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. As explained in the Department's Deferral Memorandum, the Department previously forwarded certain Deosen and AHA submissions from a separate segment of this proceeding to CBP for further investigation.[79] In their post-deferral supplemental questionnaire responses, Deosen and AHA provided copies of documents issued by CBP investigators relating to CBP's investigation, which support the Department's determination.[80] 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.[81]

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.[82] 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, Deosen and AHA manipulated the sales process through the inclusion of AHA into Deosen's sales process, which impacted sales prices through, at a minimum, any "commission" Deosen paid to AHA 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. In its response to Section A of the Department's questionnaire, Deosen reported that:

> Deosen USA negotiates with the unaffiliated U.S. customers and sets the price it sells to these customers based on market conditions and costs of the goods. For the sales … directly to … unaffiliated U.S. customers, Zibo Deosen negotiates with the unaffiliated U.S. customers and sets the price it sells to these customers based on market conditions and costs of the goods.[83]

Thus, in setting the prices of U.S. sales of subject merchandise, Deosen reported that Deosen USA took into account costs and market conditions. According to Deosen, the business arrangement to reduce the cash deposits paid affected the cost of selling products in the United States.[84] As noted above, Deosen and AHA acknowledged that the "cost of selling in the United

[79] *See* Deferral Memorandum at 5; *see also* Submission from Petitioner, "Factual Information to Rebut, Clarify, or Correct A.H.A. International Co., Ltd.'s Section A Questionnaire Response," dated November 10, 2014 ("Petitioner's November 10, 2014, Rebuttal"), at Exhibit 1, 1.
[80] *See* BPI Memorandum at Note 9.
[81] *See* Deosen-AHA-2SQR at 2-3.
[82] *See* section 776(a)(1) and 776(a)(2)(C) of the Act.
[83] *See* Deosen's Section A Response at 7.
[84] *See* Deosen-AHA-1SQR at 6-7.

States was higher if Deosen continued exporting from China compared to if Deosen sold to AHA and AHA exported to the U.S."[85] 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."[86] 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 all aspects of negotiations and sale, including the price of products. Additionally, market conditions were one factor which Deosen considered in setting prices.[87] 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.

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 the information about the entirety of this arrangement from the Department until after the Department deferred the final results of this review. 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 was not 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.[88] 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. By failing to cooperate, notwithstanding the Department's request for relevant information where Deosen and AHA only provided that information after we deferred the final results and issued supplemental questionnaires, Deosen and AHA have denied the Department the opportunity to understand their relationship in the early stages of this instant review. Moreover, based on that information that was originally withheld, the Department finds that 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.[89] Moreover, because of Deosen's and AHA's actions in concealing the nature of their sales process, the Department has no reason to examine closely 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

[85] *See id*.
[86] *Id.* at 7-8.
[87] *See* Deosen's Section A Response at 7.
[88] *See* Deosen-AHA-1SQR at Exhibits 5 and 6.
[89] See BPI Memorandum at Note 10.

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."[90] 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.[91] 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.[92]

Additionally, the evidence shows that Deosen and 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.[93] 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.[94] It was not until after the Department deferred the final results of this review that Deosen and AHA provided copies of the ESAs in response to the Department's March 4, 2016, supplemental questionnaire[95] which specifically requested information regarding their business arrangement, and supporting documentation, such as any written agreement, between Deosen and AHA.[96]

Moreover, this review was not the 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, concerning the sales process and relationship between Deosen and AHA, which were later contradicted by the ESA included in the deferral supplemental

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[90] *See Kawasaki Steel Corp. v. United States*, 110 F. Supp. 2d 1029, 1041-42, 24 CIT 684 697-98 (2000), referencing Statement of Administrative Action, 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.").
[91] *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.
[92] *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).
[93] *See* Post-Preliminary Results.
[94] *See* Deosen's Section A Response at 18-19 and Exhibit A-17; *see also* AHA's Section A Response at 16-18 and Exhibit A.4.c.
[95] *See* Deferral First Questionnaire.
[96] The deadline for the final results of review was February 9, 2016. After the Department deferred the deadline for the final results of review, Deosen and AHA provided the Export Service Agreements on March 21, 2016.

questionnaire response.[97] 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.[98] 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."[99] 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."[100] However, in this previous segment of the proceeding, Deosen and AHA again provided only their sales contracts for an individual sale, 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.[101] This demonstrates that although Deosen and AHA had multiple opportunities to provide full information regarding the nature of their relationship, including the ESA, they withheld this information over a significant amount of time and through multiple segments of the proceeding.

One example of such opportunities in this review, as noted above, is that the ESA should have been provided in response to the Department's Section A questionnaire and Section C 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. 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

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[97] *See* Petitioner's November 10, 2014, Rebuttal, 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. *See* Petitioner's November 10, 2014, Rebuttal at Exhibit 1.
[98] *See* Petitioner's November 10, 2014, Rebuttal at Exhibit 1-C (containing Letter from Deosen, AHA, and Shanghai Smart Chemicals Co., Ltd., "Response to the Department's Request for Information," dated May 15, 2014).
[99] *Id.*
[100] *Id.*
[101] *See* BPI Memorandum at Note 11.

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.[102] 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.

Furthermore, record evidence indicates that AHA is paid what Deosen and AHA referred to as a commission.[103] The narrative under "Field Number 31.0: Commissions", in Section C of the antidumping duty questionnaire requests that respondents "{i}nclude samples of each type of commission agreement used." Neither Deosen, nor AHA provided a copy of the ESA, which describes this "commission." Yet Deosen did provide its commission agreement with another unaffiliated U.S. sales agent in its response under "Field Number 31.0: Commissions."[104] If Deosen believed that its agreement with the unaffiliated U.S. sales agent was relevant and responsive to the request under "Field Number 31.0: Commissions" in Section C of the antidumping duty questionnaire, it is not reasonable to conclude that a contract between Deosen and AHA was irrelevant, particularly when Deosen characterized the agreement between it and AHA as involving a commission.

Moreover, neither Deosen nor AHA identified or provided the ESAs in response to the Department's questions about sales through resellers,[105] even though the ESAs specifically relate to the contractual agreements and sales terms between Deosen and AHA (which, in its supplemental Section A questionnaire response, Deosen stated it considered to be a reseller).[106] Additionally, Deosen stated in its supplemental Section A questionnaire response, that with respect to sales involving AHA it "has provided all of the information requested regarding the sales."[107]

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.[108] 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 before the deferral of the final results of 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.

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[102] *See* Deosen's Section A Response at 17 and Ex. A-17.
[103] *See* BPI Memorandum at Note 12.
[104] *See* Deosen's Section C Response at C-24.
[105] *See* Section A of the Department's original AD questionnaire, at question 4.b.
[106] *See* Deosen's Supplemental Section A Response at 6.
[107] *See* Deosen's Supplemental Section A Response at 7.
[108] *See* the Post-Preliminary Results.

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."[109] Deosen responded that it "is not privy to the ultimate customers or markets for the subject merchandise sold by resellers," and that it does not provide customer lists or make joint sales calls with resellers.[110] Deosen later contradicted this response in its May 7, 2015, supplemental questionnaire response, stating that Deosen considers AHA to be a reseller, and that Deosen does have knowledge of the ultimate U.S. customers for its sales of subject merchandise sold through AHA.[111] However, it was not until after deferral of the final results of the instant review that additional information presenting a fuller picture of the relationship was provided. It is not simply a matter of Deosen having knowledge of the ultimate U.S. customers for its sales of subject merchandise sold through AHA, rather, Deosen and AHA stated in their April 29, 2016, supplemental questionnaire response that, pursuant to their agreement, "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."[112]

Another example of inconsistencies, or of less than a fulsome response concerning the nature of AHA's and Deosen's relationship, involves who takes title of the merchandise. In AHA's Section A questionnaire response, AHA claimed that "the title of the subject merchandise does not go through AHA, but passes directly from Deosen {} to Deosen USA."[113] However, in Deosen's Section A questionnaire response, Deosen stated that "for subject merchandise exported through AHA… title to the merchandise were {sic} transferred from Deosen … to AHA before exportation."[114] 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

[109] *See* Section A of the Department's original AD questionnaire, at question 4.b.
[110] *See* Deosen's Section A Response at 15.
[111] *See* Deosen's Supplemental Section A Response at 6.
[112] *See* Deosen-AHA-2SQR at 10.
[113] *See* AHA's Section A Response at 15.
[114] *See* Deosen's Supplemental Section A Response at 7.

third parties. Rather, the ESA indicates that AHA's role was to be the "official" exporter of the merchandise.[115] 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 price[116], 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."[117] The ESA is even titled as an "export service agreement." The reason for this, as Deosen acknowledged, was to reduce the dumping duty cash deposit on Deosen's merchandise.[118]

We disagree with Deosen's and AHA's claim that the Department has not explained why information that was clear and sufficient for calculating a dumping margin for the *Preliminary Results* has now become unclear and inconsistent, even though it was confirmed by the ESA, such that total AFA is now warranted. Based on Deosen's and AHA's questionnaire responses indicating that Deosen, rather than AHA, was the price setter for U.S. sales of subject merchandise involving AHA,[119] in the *Preliminary Results*, the Department calculated a dumping margin for Deosen using, in part, "sales" through AHA. Deosen and AHA also reported that AHA purchased and sold the subject merchandise at issue.[120]

However, subsequent to the *Preliminary Results,* a different picture emerged after the final results of the review were deferred and Deosen and AHA provided the ESA. Namely, the ESA provided a fuller picture of the relationship between Deosen and AHA, which 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.[121] The ESA is not a purchase-sales agreement governing purchases and resales of subject merchandise, as is typically present in an agent relationship. Furthermore, many of the other terms of the ESA go toward limiting AHA's obligations and responsibilities with respect to the sales beyond an agent relationship.[122]

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 company's cash deposit rate.[123] These facts lead the Department to find that Deosen's "sales" to

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[115] *See* Post-Preliminary Results at 6.
[116] *See* Deosen-AHA-2SQR at 10-12; *see also* BPI Memorandum at Note 13.
[117] *Id.* at 10.
[118] *See* Deosen-AHA-1SQR at 7-8.
[119] *See* BPI Memorandum at Note 14.
[120] *See* AHA's Section A Response at 7 and 15; *see also* Deosen's Section A Response at 3 and 17; *see also Id* at 7; *see also* BPI Memorandum at Note 15.
[121] *See also* BPI Memorandum at Note 16.
[122] *See also* BPI Memorandum at Note 17.
[123] *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*

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. As a result of our fuller understanding of the arrangement, which came through an examination of the ESA that was only provided after the *Preliminary Results* and, indeed, after the Department deferred the final results of this review, we find that a change in the decision reached in the *Preliminary Results* is warranted.

Deosen argues that the Department could have conducted verification to address the alleged inconsistences, 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 lower its cash deposit rate. [124]

Hence, Deosen and AHA failed to cooperate by not acting to the best of their ability to comply with requests for information.[125] 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."[126] 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."[127] 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."[128] Deosen and AHA did not fulfill their burden of creating a complete and accurate record in this proceeding because they withheld both the ESA from the Department in their Section A responses and the full nature of their relationship.

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 this review, the CAFC has recognized "a small number of exceptions when we allow supplementation of an agency record," including where evidence "was tainted by fraud" and "calls into question the integrity of the agency's proceedings."[129] We have determined that this review is just such an exception,

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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.

[124] *See* Deosen-AHA-1SQR at 7-8.

[125] *See* section 776(b) of the Act.

[126] *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.*").

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

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

[129] *See Essar Steel Ltd. v. United States*, 678 F.3d 1268, 1277 (Fed. Cir. 2012), *citing Home Prods. Int'l, Inc. v. United States*, 633 F.3d 1369, 1374, 1377-78, 1380 (Fed. Cir. 2011) (Where the Department found that unreliable and incomplete documents that included inaccurate reports and misrepresentations submitted by a party called into question the reliability of the questionnaire responses submitted by the party and the court recognized "an exception

because Deosen and AHA withheld the details of their relationship and sales arrangement and provided misleading and inconsistent information and engaged in a scheme to evade application of the appropriate cash deposit rate, a purpose they admit to in their response to the Department's first supplemental questionnaire after deferral of the final results,[130] thereby affecting the integrity of the Department's proceedings.

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, thereby not acting to the best of their ability, and that necessary information to calculate an accurate dumping margin is not available on the record of this administrative review.[131] 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 argues that the extent of the damage inflicted on the record has left very little on the record to which the Department could apply facts available with an adverse inference, given that, according to Petitioner, AHA had no reviewable *bona fides* sales during the period of review ("POR") and the sales by Deosen that did not involve AHA cannot serves as a basis for granting separate rates status. We have addressed these arguments in Comment 2.

Petitioner also argues that AHA incorrectly reported the date of sale for all of its sales, and that Deosen's reported VAT for all sales involving AHA is incorrect. 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 date of sale and VAT.

Comment 2: Separate Rate Status of Deosen and 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.[132]

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to the record rule where new evidence of material fraud has been brought to light which calls into question the integrity of the agency's proceedings".).

[130] *See* the Post-Preliminary Results at 5; *see also* Deosen-AHA-1SQR at 7-8 (Stating, "(t)his DOC decision {to allow two 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. Deosen understood that this action only affected the cash deposit and not the ultimate assessment of dumping duties" and "The benefit was to reduce cash outflows by the importers.").

[131] *See* sections 776(a)(1), 776(a)(2)(A) and (C), and 776(b) of the Act.

[132] *See* Deosen Supp. Br.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.*").

- The Department's determination that a party is not entitled to a separate rate must be because its separate rate information is unreliable.[133] 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.[134] The 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.[135]
- 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.[136] 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. [137]
- 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. While, pursuant to the Act, the Department "shall determine" the dumping margin for "each" entry, the CIT has found that "each entry" does not "compel inclusion of all sales, no matter how distorting or unrepresentative."[138] The Department must accordingly rescind this review as to

[133] *See* Deosen Supp. Br.at 26, referencing *Gerber Food (Yunnan) Co. v. United States*, 29 CIT 753, 771-72, 387 F. Supp. 2d 1270, 1287 (2005).

[134] *See* Deosen Supp. Br. at 26, referencing *Yantai Xinke*, 2012 WL 2930182 at 14

[135] *See* Deosen Supp. Br. at 26, referencing *Yantai Xinke*, 2012 WL 2930182 at 14 and *generally*, *Shenzhen Xinboda Industrial Co., Ltd.*

[136] *See* Petitioner's Supp. Rebuttal Br. at 18, 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).").

[137] *See* Petitioner's Supp. Rebuttal Br. at 19, referencing Deosen Supp. Br.at 25-26 and the Post-Preliminary Results at 7.

[138] *See* Petitioner's Supp. Rebuttal Br. at 19-20, referencing *Hebei New Donghua Amino Acid Co., Ltd. v. United States*, 374 F. Supp. 2d 1333, 1334 (Ct. Int'l Trade 2005) ("*Hebei*").

AHA.[139]

- The CIT has affirmed the Department's rescission of administrative reviews where there were no *bona fide* sales during the POR and nothing to review, and has found that in evaluating the *bona fide* nature of entries, the Department is permitted to exclude certain sales when they are unrepresentative or extremely distortive. [140] Because every sale involving AHA on the record of this segment was a non-*bona fide* sale that the Department determined was "not legitimate," the Department cannot evaluate Deosen's eligibility for separate rate status based on a sale that has been excluded because it was unrepresentative or distorted.[141]
- While there are sales made by Deosen that did not pass through AHA, the record does not contain the necessary sales documents related to those sales in order to demonstrate that Deosen is eligible for a separate rate.[142]
- Between the POI and this segment of the proceeding, Deosen experienced significant changes in its corporate ownership. The instructions for completing a separate rate certification ("SRC") specifically state that "{c}ompanies who had changes to corporate structure, ownership, or to the official company name may not file a Separate Rate Certification but must instead file a Separate Rate Application."[143] Thus, Deosen's SRC is not the proper vehicle to grant separate rate status to a respondent who has undergone changes in ownership.
- Moreover, Deosen's SRC itself contains a false certification, namely the statement that Deosen sold subject merchandise to "unaffiliated parties only." Thus, this SRC cannot provide a suitable basis for granting Deosen's separate rate status.

Department's Position: Deosen and AHA received a separate rate in the *Preliminary Results* because the Department preliminarily found that Deosen and AHA met the requirements of *Silicone Carbide* and *Sparklers* for demonstrating an absence of *de facto* and *de jure* government control.[144] Specifically, both Deosen and AHA responded to the separate rate portion of Section

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[139] *See* Petitioner's Supp. Rebuttal Br. at 19, referencing *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Final Results of Antidumping Duty Administrative Review, 2013-2014*, 80 FR 55328 (Sept. 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 Issued and Decision Memorandum at Issue 2.

[140] *See* Petitioner's Supp. Rebuttal Br. at 18, referencing *Windmill Int'l Pte v. United States*, 193 F. Supp. 2d 1303, 1307, 1312 (Ct. Int'l Trade 2002) ("*Windmill*"); *FAG U.K., Ltd. v. United States,* 20 C.I.T. 1277, 1281–82, 945 F. Supp. 260, 265 (1996); and *Fresh Garlic from the PRC 2011-2012* at 1335-36.

[141] *See* Petitioner's Supp. Rebuttal Br. at 20, referencing Post-Preliminary Results at 7 and *Hebei New Donghua Amino Acid Co., Ltd. v. United States*, 374 F. Supp. 2d 1333, 1342 (Ct. Int'l Trade 2005).

[142] *See* Petitioner's Supp. Rebuttal Br. at 20, referencing *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results of the Antidumping Duty Administrative Review and New Shipper Reviews*, 74 FR 11349 (March 17, 2009) and accompanying IDM at Comment 7 ("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.").

[143] *See* Petitioner's Supp. Rebuttal Br. at 21, referencing Letter from Dentons US LLP to Hon. P. Pritzker, Re: Xanthan Gum from the People's Republic of China: Separate Rate Certification (October, 28, 2014).

[144] *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*).

A of the AD questionnaire and provided evidence of both a *de jure* and *de facto* absence of government control.[145] Information submitted following the *Preliminary Results* does not cause us to change our finding. Record evidence indicates that AHA and Deosen entered into a business arrangement intended specifically to orchestrate sales to the US market and avoid antidumping duties.[146] The agreement establishing their business 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, Deosen and 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 Deosen or AHA were subject to government control or involvement. Moreover, parties are not challenging whether Deosen or 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. In addition, Petitioner argues that the record does not contain the necessary sales documentation to demonstrate that Deosen is eligible for a separate rate. First, we address Petitioner's arguments with respect to AHA.

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 that 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.[147] Indeed, Deosen and AHA reported having structured sales to use the cash deposit rate assigned for the producer-exporter combination of Deosen–AHA. 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).[148] 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 the United States during the period" (thus, it was not entitled to a separate rate).[149] 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

[145] *See* the "Separate Rates" section in Deosen's Section A Response and AHA's Section A Response.
[146] *See* Deosen-AHA-ISQR at Exhibit 7; *see also* Deosen-AHA-2SQR at 8.
[147] *See* Deosen-AHA-1SQR at 11.
[148] *See 2011-2012 Shrimp from Vietnam* and accompanying IDM at Comment 11.
[149] *See 2013-2014 Shrimp from Vietnam* and accompanying IDM at Comment 12.

reviewable transactions in this segment of the proceeding."[150] 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 than the rate that would have applied had the entries come in under the Deosen (producer) – Deosen (exporter) rate. 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 did not engage in any transactions related to entries 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 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.[151] 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, in a non-market economy ("NME") context, would normally be the NME-wide rate) continues to apply to the new shipper.[152] 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 evade application of the appropriate AD cash deposit rates, and failed to cooperate by not acting to the best of its ability to comply with a request for information.[153] 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.[154]

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[150] *See Ammonium Nitrate from Russia* and accompanying IDM at Comment 2.
[151] *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* 374 F. Supp. 2d 1333, 1338 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.'"
[152] *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.
[153] *See* section 776(b) of the Act.
[154] *Id*; *see also* section 776(b) of the Act.

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.[155]

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 inform CBP that one party is the exporter while another party is reported as the exporter to the Department.[156]

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

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[155] *See Hand Tools (14th Review*) and corresponding IDM at Comment 1.
[156] *Id.*

that prevents evasion of the order.[157] 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 antidumping duty cash deposits..[158] 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."[159]

Second, with regard to Petitioner's arguments concerning Deosen's separate rate, Petitioner contends that the Department cannot grant Deosen a separate rate based on non-*bona fide* sales through AHA. Petitioner also dismisses the direct sales Deosen made to unaffiliated U.S. customers outside of the non-*bona fide* sales involving AHA, for purposes of establishing a separate rate, because, it claims, the record does not contain the necessary sales documents related to those sales in order to demonstrate that Deosen is eligible for a separate rate.[160] Petitioner argues that in *Fish Fillets from Vietnam*, the Department noted that the failure to provide payment information automatically eliminates a company from separate rate eligibility. *Fish Fillets from Vietnam* also references *Diamond Sawblades from China*, where we stated that proof of receipt of payment demonstrates that a sale occurred.[161] We find that the fact patterns in *Fish Fillets from Vietnam* and *Diamond Sawblades from China* are distinct from this case. Specifically, in *Fish Fillets from Vietnam* and *Diamond Sawblades from China,* the companies at issue were respondents that filed separate rate applications,[162] whereas in this case, Deosen is a mandatory respondent. In the separate rate application, the Department requests sales

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[157] *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).
[158] *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.").
[159] *Id.*
[160] *See* Petitioner's Supp. Rebuttal Br.at 20.
[161] *See Final Determination of Sales at Less Than Fair Value and Final Partial Affirmative Determination of Critical Circumstances: Diamond Sawblades and Parts Thereof from the People's Republic of China*, 71 FR 29303 (May 22, 2006) and accompanying IDM at Comment 12.
[162] *Id.*; *see also Fish Fillets from Vietnam at Comment 7.*

documentation for one sale to demonstrate that a sale was actually made during the POR. It is necessary for the separate rate applicant to submit a complete set of sales documentation for the one sample sale because this is often the only evidence on the record to demonstrate that a sale was made during the POR. However, in individually examining the mandatory respondents in this review, we reviewed sales documentation submitted in the original questionnaire response, as well as sales documentation submitted in response to supplemental questionnaires. While Petitioner is correct that the record does not contain certain sales documents regarding Deosen's direct sales to unaffiliated U.S. customers, Deosen has provided significant amounts of sales documentation in response to the AD questionnaire and supplemental questionnaires, which demonstrate that sales were made by Deosen during the POR.[163] Here, because Deosen is a mandatory respondent, the record consists of significant amounts of sales documentation for multiple transactions, beyond Deosen's direct sales to unaffiliated customers in the United States which Petitioner points to, that demonstrate that Deosen sold subject merchandise to the United States during the POR. In other words, even though Deosen and AHA engaged in a scheme to evade application of the appropriate cash deposit rate, there is sufficient information on the record, nonetheless, demonstrating that Deosen made sales during the POR and, thus, that fact is not in question.

Moreover, we have relied upon the ESA and other documentation for the sales through AHA as support for finding that these were sales where Deosen controlled the sales, including negotiating the sales with customers and setting the sales prices, but artificially structured the sales through AHA to make them appear to be AHA's sales. While we do not find the prices of these sales involving AHA to be reliable for calculating a dumping margin, we have accepted this sales documentation as evidence that a sales process occurred and the sales documentation supports an absence of government control, including control with respect to setting prices, which is an important factor in determining whether a company is eligible for a separate rate. Furthermore, as stated above, Petitioner is not challenging whether Deosen is subject to government control based on any of the *de facto* or *de jure* criteria examined by the Department in determining whether to grant separate rates status to a respondent.

While Petitioner contends that Deosen's SRC contains a false certification that Deosen sold subject merchandise to "unaffiliated parties only" and that the SRC was not the proper vehicle to grant separate rate status because Deosen has undergone changes in ownership, Deosen also responded to the separate rates portion of Section A of the AD questionnaire once it was selected as a mandatory respondent in this review. In its response to the separate rates portion of the questionnaire, Deosen identified the parties to which it sold subject merchandise during the POR. We have granted Deosen a separate rate based on all of the information on the record, including Deosen's response to the separate rates section of the AD questionnaire. Therefore, we do not find Petitioner's concerns regarding the SRC warrant denying Deosen separate rate status.

For the reasons explained above, we find that both AHA and Deosen are eligible for separate rate status in these final results of review.

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[163] *See*, e.g., Deosen's Section A Response at Exhibits A-10 and A-17.

Comment 3: Separate Rate Status of Shanghai Smart Chemicals Co., Ltd.

Petitioner:

- Shanghai Smart's separate rate application ("SRA")[164] and July 1, 2015, supplemental SRA questionnaire response contain insufficient information to grant separate rate status to Shanghai Smart.
- Shanghai Smart failed to report multiple affiliates located in the United States, which prevented the Department from performing a proper review of Shanghai Smart's corporate structure. In Shanghai Smart's SRA, Shanghai Smart reported that it made shipments or sales to unaffiliated parties only, and that it had no affiliates in the United States. However, Petitioner placed on the record evidence showing that Shanghai Smart has affiliates located in the United States.[165] Shanghai Smart's SRA listed no U.S. affiliates in the narrative or its legal structure chart. In addition, trade data indicate that Shanghai Smart only exported subject merchandise to its unreported U.S. affiliates during the POR.[166]
- Shanghai Smart may not have reported the first U.S. sale during the POR, as instructed in the Department's SRA questionnaire, based on when Shanghai Smart entered subject merchandise to the United States. Shanghai Smart only supplies sales documents related to "…one…" of its sales made during the POR, and record evidence shows that, prior to the invoice date of the sale reported in the supplemental SRA response, Shanghai Smart entered subject merchandise cosigned to its unreported affiliate.[167] This unreported affiliate likely sold this subject merchandise prior to the sale reported in its supplemental SRA response.
- Also, the customer listed in the sales documents in Shanghai Smart's July 1, 2015, supplemental SRA questionnaire response does not exist. None of the sales documents on the record show a specific address or location for this company within the United States outside of it being located in Texas.[168] Record evidence provided by Petitioner, however, demonstrates that Shanghai Smart's alleged customer does not exist in Texas and that Shanghai Smart's submitted sales documents do not show any specific address or location for such a company within the United States, other than indicating the customer is located in Texas.
- The sales documents included in Shanghai Smart's July 1, 2015, supplemental SRA questionnaire response do not contain any evidence of sales negotiations between Shanghai Smart and its alleged customer. The Department's practice is to deny a respondent separate rate status when it does not provide evidence of price negotiation

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[164] *See* Letter from Shanghai Smart to the Department, re: "Xanthan Gum from the People's Republic of China; SRA of Shanghai Smart Chemicals Co., Ltd.," dated October 29, 2014 ("Shanghai Smart's SRA").
[165] *See* Letter from Petitioner to the Department, re: "Xanthan Gum from the People's Republic of China: Factual Information to Rebut, Clarify, or Correct Shanghai Smart Chemical Co., Ltd.'s Separate Rate Application," dated November 12, 2014 ("Petitioners' November 12, 2014, Rebuttal Information"), at Exhibits 7-9.
[166] *See* Petitioners' November 12, 2014, Rebuttal Information at Exhibit 6.
[167] *See* Letter from Shanghai Smart to the Department, re: "Xanthan Gum from the People's Republic of China; SRA of Shanghai Smart Chemicals Co., Ltd.," dated July 1, 2015 ("Shanghai Smart Supplemental Response") at Exhibit 2.
[168] *See* Petitioner's Case Brief at 36-37; *see also* Shanghai Smart Supplemental Response at Exhibit 2, which contains certain information; *see also* BPI Memorandum at Note 18.

between an exporter and a U.S. customer.[169] Without this price negotiation information, a company cannot demonstrate that its export activities operate separately and apart from the government.

No parties submitted rebuttal comments.

Department's Position: We agree with Petitioner, in part. Petitioner placed information on the record which calls into question certain aspects of Shanghai Smart's SRA. We have examined the information provided by Petitioner and agree that this information calls into question Shanghai Smart's claim in its separate rate application that "Shanghai Smart has no affiliate that is located in the United States…."[170]

Petitioner contends that Shanghai Smart has a U.S. affiliate, because of a number of pieces of evidence, which contain BPI.[171] We have examined Petitioner's evidence, and determined that there is additional information (BPI) on the record which further supports portions of Petitioner's evidence and claim.[172] As further explained in the BPI Memorandum, information on the record calls into question Shanghai Smart's claim that it did not have any affiliates located in the United States during the POR. It is important for separate rate applicants to disclose fully information regarding any possible affiliations because, "to be considered for separate-rate treatment, the applicant must have a relevant U.S. sale of subject merchandise to an *unaffiliated* purchaser …" (emphasis added).[173] Because information on the record calls into question Shanghai Smart's claims that it has no U.S. affiliates, we do not have a complete picture of Shanghai Smart's affiliations, including the extent of its operations in the United States. Without a complete picture of Shanghai Smart's affiliations, it is not possible for the Department to determine whether Shanghai Smart made a relevant U.S. sale of subject merchandise to an *unaffiliated* purchaser.

We disagree with Petitioner's argument that record evidence demonstrates that Shanghai Smart's alleged customer does not exist. Even though the invoice and packing list provided by Shanghai

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[169] *See* Petitioner's Case Brief at 38-39; *see also Certain Frozen Warmwater Shrimp from the People's Republic of China: Final Results of Administrative Review; 2011-2012*, 78 FR 56209, 56210 (September 12, 2013) and accompanying IDM at Comment. 7 ("*Warmwater Shrimp*"); *Wooden Bedroom Furniture from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2011*, 78 FR 35249 (June 12, 2013) and accompanying IDM at Comment 3 ("*WBF 2011*"); *Seamless Refined Copper Pipe and Tube from the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 75 FR 26716, 26720-26721 (May 12, 2010) ("*Copper Pipe*"); *Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, from the People's Republic of China: Final Results and Rescissions of the 2005-2006 Administrative Reviews*, 72 FR 51787, 51789 (Sept. 11, 2007) and accompanying IDM at Comment 1 ("*Hand Tools*"); *Certain Tissue Paper Products from the People's Republic of China: Notice of Final Determination of Sales at Less Than Fair Value*, 70 FR 7475, 7476-7477 (Feb. 14, 2005) ("*Tissue Paper from China*") and accompanying IDM at Comment 5.
[170] *See* Shanghai Smart's SRA at 14.
[171] *See* BPI Memorandum at Note 19.
[172] *See* BPI Memorandum at Notes 19 and 20.
[173] *See Certain Iron Mechanical Transfer Drive Components from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value*, 81 FR 75032 (October 28, 2016) ("*IMTDCs from the PRC*") and accompanying IDM at Comment 8.

Smart refer to the purchaser by a certain name,[174] record evidence shows that this company shares the same address as a chemical company listed by Petitioner with a nearly identical name.[175] Moreover, the record shows that Shanghai Smart's shipment of xanthan gum was destined for the U.S. city where this chemical company is located.[176] Furthermore, third party documentation supports the customer name reported by Shanghai Smart.[177] While we do not find sufficient evidence to demonstrate that the reported U.S. customer does not exist, as noted above, there is information on the record which calls into question whether or not Shanghai Smart properly claimed that it had no U.S. affiliates. Specifically, the evidence on the record suggests that Shanghai Smart appears to have at least one U.S. affiliate.[178] With Shanghai Smart's reported information concerning U.S. affiliates being called into question, the record does not contain sufficient information to determine that Shanghai Smart had a relevant U.S. sale of subject merchandise to an *unaffiliated* purchaser.

In addition, as part of our separate rate questionnaire, we require that separate rate applicants provide "documentation supporting its certification that the applicant conducts independent price negotiations."[179] While Shanghai Smart provided evidence of price negotiations from a sale to its U.S. customer which was made prior to the POR, it did not provide evidence of price negotiations for a sale of subject merchandise to any U.S. customer *during* the POR. The Department has found that Shanghai Smart did not provide the requisite evidence of independent price negotiations relating to a sale of subject merchandise to an unaffiliated customer in the United States during the POR. The Department has previously denied separate rate status to an applicant which failed to provide evidence of independent price negotiations.[180] Therefore, the Department finds that Shanghai Smart did not provide the necessary evidence to establish that its export activities are sufficiently independent of the government to be eligible for separate rate status.

Therefore, because the record calls into question whether Shanghai Smart properly reported its affiliations in this review, and there is no evidence of independent price negotiations on the record with respect to a sale of subject merchandise during the POR, we find the record does not provide a sufficient basis to grant Shanghai Smart separate rate status.

Comment 4: Separate Rate Margin Calculation

In the *Preliminary Results*, the Department determined that CP Kelco (Shandong) and Shanghai Smart established their separate rate eligibility. In the *Preliminary Results*, the Department

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174 *See* BPI Memorandum at Note 18.
175 *See* BPI Memorandum at Note 21.
176 *See* BPI Memorandum at Notes 22 and 25.
177 *See* BPI Memorandum at Note 23.
178 *See* BPI Memorandum at Note 24.
179 *See* separate rate application at 18, located at: http://enforcement.trade.gov/nme/nme-sep-rate.html
180 *See IMTDCs from the PRC*, and accompanying IDM at Comment 9 noting "{b}ased on the analysis above, the Department has found that Dongxing did not provide the requisite evidence of independent price negotiations relating to a sale of subject merchandise to an unaffiliated customer in the United States during the POI. Therefore, the Department finds that Dongxing did not provide the necessary evidence to establish whether its export activities are sufficiently independent of the government to be eligible for separate rate status will thus, be part of the PRC-wide entity." *See also Warmwater Shrimp, WBF 2011, Copper Pipe, Hand Tools, and Tissue Paper from China.*

calculated a weighted-average dumping margin for Fufeng of zero percent,[181] and in the *Post-Preliminary Results*, the Department assigned Deosen/AHA a margin based entirely on facts available.[182]

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."[183]
- 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.[184] 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.[185]
- The Department may not assign to respondents an unreasonably high dumping margin having no relationship to the respondent's actual dumping margin.[186] The assigned dumping margin must reflect the commercial reality of the respondent[187] and be a reasonably accurate estimate of actual dumping rates.[188]

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[181] *See Preliminary Results* and corresponding Preliminary Decision Memorandum.
[182] *See* Post-Preliminary Results.
[183] *See* Shanghai Smart's Br. at 5, referencing Uruguay Round Agreements Act, SAA, H.R. Doc. No. 103-316 at 873 (1994).
[184] *See* Shanghai Smart's Br. at 5, referencing *Thai Pineapple Canning Indus. Corp. v. United States*, 273 F 3d 1077, 1085 (CAFC 2001).
[185] *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*").
[186] *See Gallant Ocean (Thail.) Co. v. United States*, 602 F.3d 1319, 1323 (CAFC 2010).
[187] *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*").
[188] *See* Shanghai Smart's Br. at 55, referencing, *Gallant Ocean*, 602 F.3d at 1324.

- 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.[189]
- 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.[190] 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."[191] 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.[192] 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 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."[193] The Court concluded that Commerce acted in an

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[189] *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.
[190] *See* Shanghai Smart's Br. at 12, referencing *Bestpak*, 716 F.3d at 1380.
[191] *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*").
[192] *See Baroque Timber Industries (Zhongshan) Company, Limited, v. United States*, 971 F Supp. 2d 1333, 1343-45 (CIT 2014) ("*Baroque Timber*").
[193] *See Changzhou Wujin*, 701 F 3d 1367, 1378-79 (CAFC 2012).

"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."[194]

- 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.[195] 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.[196]
- 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.[197] 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 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

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194 *Id.*
195 *See Burlington Truck Lines, Inc. v. United States*, 731 U.S. 156, 168 (1962).
196 *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).
197 *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.

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.

Petitioner:

- 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) Biological Company Limited's ("CP Kelco (Shandong)") 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.[198]
- In *Bestpak*, the CAFC held that using a dumping margin that was half of the PRC-wide rate was unjustifiably high and was punitive.[199] 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,.[200] 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 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").[201]
- 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

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[198] *See* Petitioner's Supp. Br.at 2, referencing section 735(c)(5)(B) of the Act.

[199] *See* Petitioner's Supp. Br. at 2-3, referencing *Bestpak*, 716 F.3d at 1379-80.

[200] *Id.*

[201] *See* Petitioner's Supp. Br. at 3 and 6, referencing *Albemarle Corp. & Subsidiaries v. United States*, 821 F.3d 1345, 1357 (Fed. Cir.2016) ("*Albemarle*").

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.[202]
- 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's and 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 Petitioner 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 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.[203]
- 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."[204]

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[202] *See* Petitioner'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 Preliminary Decision Memorandum at 9.
[203] *See* ADM's Rebuttal Supp. Br. at 2 referencing sections 735(c)(5)(A)-(B) of the Act.
[204] *See* ADM's Rebuttal Supp. Br. at 3, referencing the SAA at 873.

- 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.
- Petitioner 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 Petitioner 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.[205]
- 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.[206] 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.
- Although Petitioner 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."[207]

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[205] *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").

[206] *See* ADM's Rebuttal Supp. Br. at 4, referencing *Albemarle,* 821 F.3d 1345, 1352.

[207] *See* ADM's Rebuttal Supp. Br. at 5-6, referencing *TRBs* and accompanying Preliminary Decision Memorandum at 9.

- 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."[208] 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 Petitioner 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.[209] 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.
- Petitioner 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.
- 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."[210]
- Petitioner'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".[211] Even if a departure from the "expected method" were warranted, neither Shanghai Smart nor Petitioner 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

[208] *See* ADM's Rebuttal Supp. Br. at 7, referencing *TRBs* and accompanying Preliminary Decision Memorandum at 9; *Stainless Steel Sheet and Strip from the People's Republic of China: Preliminary Affirmative Determination of Sales at Less Than Fair Value and Preliminary Affirmative Determination of Critical Circumstances,* 81 FR 64135 (September 19, 2016) (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").
[209] *See* ADM's Rebuttal Supp. Br. at 8, referencing SAA at 873 and *Albemarle,* 821 F.3d at 1353.
[210] *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.
[211] *See* ADM's Rebuttal Supp. Br. at 11, referencing *Nan Ya Plastics* v. *United States,* 810 F. 3d 1333, 1343 (Fed. Cir. 2016).

> 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.[212] 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:

> 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

[212] *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 (August 13, 2010) ("*Warmwater Shrimp AR4 Final Results*") 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."

> 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.[213]

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.[214]

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 expected method is "not feasible" or "would not be reasonably reflective of potential dumping margins."[215]

This reasoning applies equally where all dumping margins for the individually examined respondents are either zero, *de minimis* or based entirely on total AFA.[216]

As an initial matter, it is important to note that the Department has not granted Shanghai Smart separate rate status in these final results of review. Because we are treating Shanghai Smart as part of the PRC-wide entity, the PRC-wide entity rate, rather than the rate assigned to the separate-rate respondents, applies to Shanghai Smart's exports of subject merchandise during the POR. Shanghai Smart contends that the Department's determination in this review is "devoid of any record evidence to establish that the calculated separate rate margin is either reflective of

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213 *See* Uruguay Round Agreements Act Statement of Administrative Action, attached to H.R. Rep. No. 103-316 Vol. I at 873 (1994), reprinted in 1994 U.S.C.C.A.N 3773, 4163 ("SAA"); *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 41/2 Inches) from Japan: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2014-2015*, 81 FR 80640 (November 16, 2016).

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

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

216 *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 Final Determination*"), and accompanying IDM at 4.

Shanghai Smart's pricing practices, its economic reality, or result {sic} in a reasonably accurate separate rate."[217] However, the question of whether the calculated separate rate margin is reflective of Shanghai Smart's pricing practices or its economic reality is moot, because we are not assigning that rate to Shanghai Smart. Nevertheless, C.P. Kelco (Shandong), who is being granted separate rate status, made similar arguments and, therefore, we turn to the question of whether or not use of the expected method "results in an average that would not be reasonably reflective of potential dumping margins for non-investigated exporters or producers", as noted in the SAA.[218]

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 in harmony with the statute, which 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 fact 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 even identified 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.

Moreover, contrary to Petitioner'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).[219] 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, these companies maintain that: (1) they (or in the case of Petitioner, CP Kelco (Shandong)), 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

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[217] *See* Shanghai Smart's Br. at 14.
[218] *See* SAA at 873.
[219] *See TRBs* and accompanying Preliminary Decision Memorandum 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).

from the current review, not 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) the AFA rate assigned to the uncooperative respondents Deosen and AHA; rather, we assigned it 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.[220] 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) was not individually examined and there are no dumping margins specifically calculated for this respondent 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 rate[221] 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.[222]

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. … In this case, we think it clear that Commerce acted in an arbitrary and capricious manner.[223]

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[220] *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."

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

[222] *See Changzhou Wujin,* 701 F.3d 1367, 1372-1373.

[223] *Id*. at 1378-1379.

Unlike *Changzhou Wujin*, in determining the rate applicable to non-individually-examined separate rate respondents in this review, the Department did not calculate and use a hypothetical AFA rate that would not be applied to any respondent in this review but rather would be used only to calculate the dumping margin assigned to non-individually examined separate-rate respondents. 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 … ."[224] 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.[225] 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."[226]

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.[227]

[224] *Id*. at 1379.
[225] *See* section 776(d)(1)(B).
[226] *See Albemarle,* 821 F.3d at 1357.
[227] *See Yangzhou Bestpak Gifts & Crafts Co. v. United States,* 716 F.3d 1370, 1377-80 (Fed. Cir. 2013)("*Bestpak*") (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 an AFA-Chinawide rate and that there was not substantial record evidence showing that its calculation reflected economic reality); *Yantai Oriental Juice Co. v.*

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.[228]

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 simple averaging only 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 summarized 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 dumping margin calculation in favor of basing the separate rate solely on Fufeng's zero percent dumping margin.[229]

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 d*e 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").

[228] *See 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.).

[229] 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

As support for assigning Fufeng's zero percent dumping margin to CP Kelco (Shandong), Petitioner 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."[230] 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:

> 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.[231]

Petitioner 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, Petitioner is not renewing its request for the Department to examine C.P. Kelco (Shandong) as a voluntary respondent. Rather, Petitioner 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,"[232] 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 was 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 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

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of zero percent margin solely because one mandatory respondent received a rate of zero percent, as parties have done here.

[230] *See* Petitioner's Supp. Br. at 6.

[231] *See Bestpak,* 716 F.3d 1370, 1379.

[232] *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.

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 and Deosen'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.[233] 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*.[234]

C.P. Kelco (Shandong) argues that if the Department considers Deosen/AHA's AFA dumping margin when calculating the separate rate dumping margin, it 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 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.

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.[235] 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

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233 *See Xanthan Gum Final Determination*; *see also Xanthan Gum Amended Final Determination*.
234 *See Albemarle.*
235 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.

decrease in Fufeng's and Deosen'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. Second, it is not appropriate to rely upon Deosen's preliminary dumping margin in a comparison because, as explained in Comment 1, the Department has now determined that Deosen's preliminary dumping margin was based on artificially constructed U.S. sales and thus no evidentiary weight should be given to that preliminary dumping margin. Lastly, while Petitioner 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.[236] 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 average[237] of the rates we assigned to the individually-examined respondents.[238] Accordingly, for these final results, we will assign a dumping margin of 77.04 percent to the separate rate companies.

Comment 5: Differential Pricing

A. Authority to Conduct Differential Pricing Analysis in Administrative Reviews

Deosen:

- The statue does not allow for a differential pricing methodology in administrative reviews.
- The Department relies on the statutory authority referred to as "targeted dumping"[239] for its differential pricing analysis. However, this provision is only applicable to investigations when determining whether sales have been made at less than fair value. It

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[236] *See Albemarle,* at 1355.
[237] Although Petitioner argues that a simple average calculation, rather than a weight-average calculation of the separate rate dumping margin is punitive (*see* Petitioner'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.
[238] 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*.
[239] *See* 19 USC 1677f-1(d)(1)(B).

contains the general calculation rule for investigations and clearly defines the Department's authority to use an alternative pricing methodology as an exception to the general calculation rule in investigations.

- The authority to conduct an alternative pricing analysis does not appear anywhere else in the statue. In section 777A(d)(2) of the Act, the calculation for administrative reviews is presented, and no similar reference to differential pricing or any other form of alternative calculation analysis is listed.
- The U.S. Supreme Court has held "where Congress includes particular language in one section of a statue but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."[240] Furthermore, the structure of section 777A of the Act shows Congress's intent for reliance on alternative pricing only as a replacement to the normal calculation methodology during investigations and that it not be applied during administrative reviews.
- Based on the intentional limitations by Congress of alternative pricing comparisons to investigations, the Department is not lawfully permitted under the statue to conduct a differential pricing analysis in this administrative review.
- The Department must use the average-to-average ("A-A") comparison methodology without zeroing to calculate Deosen's dumping margin for the final results of review.

No parties submitted rebuttal comments.

Department's Position: We disagree with Deosen's assertion that the Department has no authority to consider the application of an alternative comparison method (the average-to-transaction ("A-to-T") comparison method) in administrative reviews. Section 771(35)(A) of the Act defines "dumping margin" as the "amount by which the normal value ("NV") exceeds the export price ("EP") or constructed export price ("CEP") of the subject merchandise." By definition, a "dumping margin" requires a comparison of NV to EP or CEP. Before making this comparison, it is necessary to determine how to make it.

Section 777A(d)(1) of the Act applies to "Investigations" and section 777A(d)(2) of the Act applies to "Reviews." Section 777A(d)(1) of the Act discusses the standard comparison methods (*i.e.*, A-to-A and transaction-to-transaction ("T-to-T")) and then provides for an alternative comparison method (*i.e.*, A-to-T) as an exception to the standard methods when certain criteria are met. Section 777A(d)(2) of the Act discusses the length of time over which the Department may calculate the weighted-average NV in administrative reviews when using the A-to-T comparison method. Section 777A(d)(2) of the Act has no provision dictating the comparison method to be employed in administrative reviews. Thus, according to Deosen's logic, the statute makes no provision for comparison methods in administrative reviews at all. According to Deosen, such a conclusion indicates that Congress did not give the Department the authority to use a comparison method at all in administrative reviews and is not permitted to make a comparison of NVs and EPs or CEPs in order to calculate a dumping margin as described in section 771(35)(A) of the Act.

[240] *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987).

We find that, contrary to Deosen's claim, the silence of the statute with regard to when the Department may apply the A-to-T comparison method in administrative reviews does not preclude the Department from applying such a comparison in administrative reviews. Indeed, the Department's application of the A-to-T method as an alternative comparison method to the A-to-A method is reasonable and consistent with a series of decisions from the Court of Appeals Federal Circuit ("CAFC") and the Court of International Trade ("CIT"),[241] including *JBF RAK* in which the CAFC held that the Department may apply the A-to-T method in administrative reviews and that the Act does not "mandate which comparison methods Commerce must use in administrative reviews."[242] In that decision, the CAFC also held that the Statement of Administrative Action ("SAA") "does not limit the proceedings in which Commerce may consider an alternative comparison method" when an A-to-A comparison "cannot account for a pattern of United States prices that differ significantly among purchasers, regions or time periods"[243] in an administrative review.

To fill this gap in the statute, the Department promulgated regulations to specify how comparisons between NV and EP or CEP would be made in administrative reviews. With the implementation of the Uruguay Round Agreements Act ("URAA"), the Department promulgated the final rule in 1997, in which it stated in 19 CFR 351.414(c)(2) that the Department would normally use the A-to-T comparison method in administrative reviews. In 2010, the Department published its Proposed Modification for Reviews[244] pursuant to section 123(g)(1) of the URAA. This proposal was in reaction to several WTO Dispute Settlement Body panel reports which had found that the denial of offsets for non-dumped sales in administrative reviews is inconsistent with the WTO obligations of the United States. When considering the proposed revisions to 19 CFR 351.414, the Department gave proper notice and opportunity to comment to all interested parties. Pursuant to section 123(g)(l)(D) of the URAA, in September 2011, the United States Trade Representative ("USTR") submitted a report to the House Ways and Means and Senate Finance Committees which described the proposed modifications, the reasons for the modifications, and a summary of the advice which the USTR had sought and obtained from relevant private sector advisory committees pursuant to section 123(g)(l)(B) of the URAA. Also, in September 2011, pursuant to section 123(g)(1)(E) of the URAA, the USTR, working with the Department, began consultations with both congressional committees concerning the proposed contents of the final rule and the final modification. As a result of this process, the Department published the Final Modification for Reviews.[245] These revisions were effective for all preliminary results of review issued after April 16, 2012, which would include the instant review.

Section 351.414(b) of the Department's regulations describes the methods by which NV may be compared to EP or CEP in antidumping investigations and administrative reviews (*i.e.*, A-to-A,

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[241] *See JBF RAK LLC v. United States*, 991 F. Supp. 2d 1343, 1347 (CIT 2014) ("*JBK RAK*"); *CP Kelco Oy v. United States*, 978 F. Supp. 2d 1315, 1320 (CIT 2014); *Timken Co., v. United States*, 968 F. Supp. 2d 1279, 1286 & n.7 (CIT 2014); and Apex, 37 F. Supp. 3d at 1293.
[242] *See JBF RAK* 991 F. Supp. 2d 1343, 1347 (CIT 2014).
[243] *Id.*
[244] *See Calculation of the Weighted Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings*, 75 FR 81533 (December 28, 2010) ("*Proposed Modification for Reviews*").
[245] *See Calculation of the Weighted Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings*; *Final Modification*, 77 FR 8101 (February 14, 2012) ("*Final Modification for Reviews*").

T-to-T, and A-to-T). These comparison methods are distinct from each other. When using T-to-T or A-to-T comparisons, a comparison is made for each export transaction to the United States. When using A-to-A comparisons a comparison is made for each group of comparable export transactions for which EPs or CEPs have been averaged together (*i.e.*, for an averaging group[246]). The Department does not interpret the Act or the SAA to prohibit the use of the A-to-A comparison method in administrative reviews, nor does the Act or the SAA mandate the use of the A-to-T comparison method in administrative reviews. 19 CFR 351.414(c)(1) (2012) fills the gap in the statute concerning the choice of a comparison method in the context of administrative reviews. In particular, the Department determined that in both antidumping investigations and administrative reviews, the A-to-A method will be used "unless the Secretary determines another method is appropriate in a particular case."[247]

The Act, the SAA, and the Department's regulations do not address the circumstances that could lead the Department to select a particular comparison method in an administrative review. Indeed, whereas the statute addresses this issue specifically in regards to investigations, the statute conspicuously leaves a gap to fill on this same question in regards to administrative reviews.[248] In light of the statute's silence on this issue, the Department indicated that it would use the A-to-A method as the default method in administrative reviews, but would consider whether to use an alternative comparison method on a case-by-case basis.[249] The Department also indicated that it would look to practices employed by the Department in antidumping investigations for guidance on this issue.[250]

In antidumping investigations, the Department examines whether to use the A-to-T method consistent with section 777A(d)(1)(B) of the Act:

> The administering authority may determine whether the subject merchandise is being sold in the United States at less than fair value by comparing the weighted average of the normal vales to the export prices (or constructed export prices) of individual transactions for comparable merchandise, if:
>
> (i) There is a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or period of time, and
>
> (ii) The administering authority explains why such differences cannot be taken into account using a method described in paragraph (1)(A)(i) or (ii).[251]

Although section 777A(d)(1)(B) of the Act does not strictly govern the Department's examination of this question in the context of an administrative review, the Department nevertheless finds that the issue arising under 19 CFR 351.414(c)(1) in an administrative review to be analogous to the issue in antidumping investigations. Accordingly, the Department finds

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246 *See* 19 CFR 351.414(d)(2).
247 *See* 19 CFR 351.414(c)(1).
248 *See* section 777A(d)(1)(B) of the Act; SAA, attached to H.R. No. 103-316, vol. 1 at 842-43 (1994), reprinting in 1994 U.S.C.C.A.N. 37773, 4163; 19 CFR 351.414.
249 *See Final Modification for Reviews,* 77 FR 8107.
250 *Id.,* 77 FR 8102.
251 *See* section 777A(d)(1)(B) of the Act.

the analysis that has been used in antidumping investigations instructive for the purposes of examining whether to apply an alternative comparison method in administrative reviews. In less-than-fair-value investigations, the Department considered an alternative comparison method to unmask dumping consistent with section 777A(d)(1)(B) of the Act.[252] Similarly, the Department considered an alternative comparison method to unmask dumping under 19 CFR 351.414(c)(1).[253] For this administrative review, the Department continues to find the consideration of an alternative comparison method to be a reasonable extension of the statute where the statute made no provision for the Department to follow.

The SAA does not demonstrate that the Department may consider the application of an alternative comparison method in investigations only. The SAA does discuss section 777A(d)(1)(A)(i) of the Act, concerning the types of comparison methods that the Department may use in investigations.[254] That provision, however, is silent on the question of choosing a comparison method in administrative reviews. Section 777A(d)(1)(A) of the Act does not require or prohibit the Department from adopting a similar or a different framework for choosing a comparison method in administrative reviews as compared to the framework required by the statute in investigations. The SAA states that "section 777A(d)(1)(B) provides for a comparison of average normal values to individual export prices or constructed export prices in situations where an average to average or transaction-to-transaction comparison methodology cannot account for a pattern of prices that differ significantly among purchasers, regions, or time periods."[255] Like the statute, the SAA does not limit the Department to undertake such an examination in investigations only.[256]

The silence of the statute with regard to the application of an alternative comparison method in administrative reviews does not preclude the Department from applying such a practice in this situation. Indeed, the CAFC stated that the "court must, as we do, defer to Commerce's reasonable construction of its governing statute where Congress leaves a gap in the construction of the statute that the administrative agency is explicitly authorized to fill or implicitly delegates legislative authority, as evidenced by the agency's generally conferred authority and other statutory circumstances."[257] Further, the court stated that this "silence has been interpreted as 'an invitation' for an agency administering unfair trade law to 'perform its duties in the way it believes most suitable' and courts will uphold these decisions '{s}o long as the {agency}'s analysis does not violate any statute and is not otherwise arbitrary and capricious."[258] The

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[252] *See, e.g., Polyethylene Retail Carrier Bags from Indonesia: Final Determination of Sales at Less Than Fair Value,* 75 FR 16431 (April 1, 2010); *see also Certain Stilbenic Optical Brightening Agents from Taiwan: Final Determination of Sales at Less Than Fair Value,* 77 FR 17027 (March 23, 2012); *see also Xanthan Gum Final Determination*.
[253] *See, e.g., Ball Bearings and Parts Thereof from France, Germany, and Italy: Final Results of Antidumping Duty Administrative Reviews;* 2010-2011, 77 FR 73415 (December 10, 2012); *see also Stainless Steel Plate in Coils from Belgium; Antidumping Duty Administrative Review, 2010-2011*, 77 FR 73013 (December 7, 2012); *Circular Welded Carbon Steel Pipes and Tubes from Thailand: Final Results of Antidumping Duty Administrative Review;* 2011-2012, 78 FR 65272 (October 31, 2013).
[254] *See* SAA at 842.
[255] *Id.* at 843
[256] *Id.*
[257] *See United States Steel Corp. v. United States,* 621 F.3d 1351. 1357 (Fed. Cir. 2010).
[258] *See Mid Continent Nail Corp. v. United States,* 712 F. Supp. 2d 1370, 1376-77(Ct. Int'l Trade 2010) (citing *U.S. Steel Group v. United States,* 96 F. 3d 1352, 1362 (Fed. Cir. 996)).

Department filled a gap in the statute with a logical, reasonable and deliberative comparison method for administrative reviews.

B. Use of Zeroing in Average-to-Transaction ("A-T") Comparisons in Administrative Reviews

Deosen:

- If the Department does apply its differential pricing methodology, with A-T comparisons, it cannot use a "zeroing" methodology.
- The World Trade Organization ("WTO") Dispute Settlement Body has stated that the Department's zeroing practice in administrative reviews is not consistent with Articles 2.4 and 9.3 of the WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (AD Agreement) and Article VI:2 of the General Agreement on Tariffs and Trade 1994 (GATT 1994).[259]
- In response to these (and other) WTO decisions, the Department has adopted a preference for average-to-average (A-A) comparisons without zeroing for its administrative review calculation methodology.[260]
- In the *Preliminary Results*, the Department used the A-T method for a portion of Deosen's U.S. sales. The Department's use of zeroing based on the use of the A-T method would violate prior WTO and judicial decisions and should therefore be rejected by the Department.

No parties submitted rebuttal comments

Department's Position: We disagree with Deosen. Zeroing, when using the A-to-T method, is fully consistent with U.S. law. The decision by the CAFC in *Union Steel*[261] resolved the outstanding question of whether the Department's statutory interpretation is reasonable. The CAFC affirmed the Department's explanation that it may interpret the statute to permit the denial of offsets for non-dumped sales (*i.e.*, zeroing) with respect to the A-to-T comparison method in administrative reviews, while permitting the Department to grant offsets for non-dumped transactions when applying the A-to-A comparison method in investigations. The CAFC also affirmed the Department's explanation that it may interpret the same statutory provision differently because there are inherent differences between the comparison methods used in investigations and reviews. Indeed, the CAFC noted that although the Department recently

[259] *See* Appellate Body Report, United States-Continued Existence and Application of Zeroing Methodology, WT/DS350/AB/R (Feb. 4, 2009); Appellate Body Report, United States- Final Anti-Dumping Measures on Stainless Steel from Mexico, WT/DS344/AB/R (Apr. 30, 2008); Appellate Body Report, United States-Measures Relating to Zeroing and Sunset Reviews, WT/DS322/AB/R (Jan. 9, 2007); Appellate Body Report, United States- Laws, Regulations and Methodology for Calculating Dumping Margins, WT/DS294/AB/R (Apr. 18, 2006); Panel Report, United States- Continued Existence and Application of Zeroing Methodology, WT/DS350/R (Oct. 1, 2008); Panel Report, United States-Anti-Dumping Measures on Certain Shrimp and Diamond Sawblades from China, WT/DS422/R (Jun. 8, 2012); Panel Report, United States-Anti-Dumping Measures on Certain Shrimp from Vietnam, WT/DS404/R (Jul. 11, 2011); Panel Report, United States- Use of Zeroing in Anti-Dumping Measures Involving Products from Korea, WT/DS402/R (Jan. 18, 2011); Panel Report, United States-Anti-Dumping Measures on Polyethylene Retail Carrier Bags from Thailand, WT/DS383/R (Jan. 22, 2010).

[260] *See Final Modification for Reviews*.

[261] *See Union Steel v. United States*, 713 F. 3d 1101, 1109 (Fed. Cir. 2013) ("*Union Steel*").

modified its practice "to allow for offsets making A-to-A comparisons in administrative reviews … {t}his modification does not foreclose the possibility of using the zeroing methodology when {the Department} employs a different comparison method to address masked dumping concerns."[262] Likewise, in *U.S. Steel Corp.*,[263] the CAFC sustained the Department's decision to no longer apply zeroing when employing the A-to-A comparison method in investigations while recognizing the Department's intent to continue to apply zeroing in other circumstances. Specifically, the CAFC recognized that the Department may use zeroing when applying the A-to-T comparison method where patterns of significant price differences are found.[264]

The Department's application of an alternative comparison method in calculating Deosen's weighted-average dumping margin in these final results constitutes a reasonable interpretation of an otherwise silent statute that is well within the gap-filling deference that the Department receives under *Chevron*,[265] and that the CAFC has recognized in cases like *U.S. Steel Corp.*[266] As the CAFC held in *U.S. Steel Corp.*, courts "defer to Commerce's reasonable construction of its governing statute where Congress leaves a gap in the construction of the statute that the administrative agency is explicitly authorized to fill or implicitly delegates legislative authority, as evidenced by 'the agency's generally conferred authority and other statutory circumstances.'"[267] Such a "gap" exists with respect to the appropriate manner for the Department to account for masked dumping concerns in antidumping administrative reviews, as the CAFC recently recognized in *JBF RAK (2015)*.[268] Moreover, when the Department exercises its technical expertise to select and apply methodologies to implement the statute - in this case the statute's authorizations to use the A-to-T method - courts afford the Department "tremendous deference" that is "both greater than and distinct from that accorded the agency in interpreting the statutes it administers."[269]

Comment 6: Surrogate Value for Labor

In the *Preliminary Results*, the Department valued labor using Thai data from the National Statistics Office ("NSO") average labor cost data for the general manufacturing sector in Thailand, rather than data from the relevant industry sector (*i.e.*, "Manufacture of other Chemical Products n.e.c."). In making this decision, the Department relied on its previous determination in *Passenger Tires from the PRC*[270] that general manufacturing wages in Thailand have increased much more than the rate of inflation (*i.e.*, Consumer Price Index ("CPI")). Accordingly, the

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[262] *Id.*, 713 F.3d at 1106.
[263] *See U.S. Steel Corp. v. United States*, 621 F. 3d 1351, 1363 (Fed. Cir. 2010) ("*U.S. Steel Corp.*").
[264] *Id.*, 621 F.3d. at 1351 and 1363 (recognizing that the use of the A-to-T method with zeroing would combat "targeted or masked dumping").
[265] *See Chevron, U.S.A., Inc. v. NRDC, Inc*., 467 U.S. 837 (1984) ("*Chevron*")
[266] *See U.S. Steel Corp*., 621 F.3d at 1357.
[267] *Id.*
[268] *See JBF RAK LLC v. United States*, 790 F.3d 1358 (Fed. Cir. 2015) at 1364 (holding that the Department's application of the A-to-T method in an administrative review "properly" filled the gap Congress left in the statute).
[269] *See Fujitsu Gen. Ltd. v. United States*, 88 F.3d 1034, 1039 (Fed. Cir. 1996) ("*Fujitsu*"); and *PSC VSMPO-Avisma Corp. v. United States*, 688 F.3d 751, 764 (Fed. Cir. 2012) (quoting *Fujitsu*).
[270] *See Antidumping Duty Investigation of Certain Passenger Vehicle and Light Truck Tires from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Final Affirmative Determination of Critical Circumstances, In Part*, 80 FR 34893, 34899 (June 18, 2015) ("*Passenger Tires from the PRC*"), and accompanying IDM at Comment 13.

Department preliminarily valued labor using the contemporaneous general manufacturing labor rates, which did not need to be adjusted for inflation, rather than the non-contemporaneous industry-specific labor rates, which would need to be adjusted for inflation (*i.e.*, the industry-specific labor rates would need to be adjusted for inflation using an inflation index -CPI - which may not accurately reflect the increase in labor rates).

Fufeng and Deosen:

- The Department has a well-established policy of using industry-specific labor cost data and in multiple cases stated that the CPI is the preferred inflator for such data.
- The Department's reliance on *Passenger Tires from the PRC* is contradicted by record evidence. The Department wrongfully assumed that a 38 percent increase in general manufacturing wages was evidence that there has been a corresponding increase in the industry-specific wages for the relevant industry sector. However, record evidence indicates that the labor wages in Thailand's chemical products manufacturing industry, which was used as a surrogate in the investigation of xanthan gum from the PRC, were already much higher than Thailand's minimum wage. Therefore, inflation of 38 percent in Thailand's general wages did not impact the wages of the chemical products industry.
- The Department should follow the precedent set in the seventh administrative review of *Activated Carbon from the PRC*[271] and reverse its use of NSO labor survey general manufacturing data in favor of more industry-specific data.
- Specifically, Fufeng advocates using the industry specific 2012 NSO Industrial Census data under Code 20299 in valuing labor costs, while Deosen argues that the Department should use the industry specific data under Code 2013 from the "2012 Manufacturing and Industrial Census: Manufacturing Industry" Report.

No parties submitted rebuttal comments.

Department's Position: In *Labor Methodologies*, the Department stated that using data for industry-specific wages from the primary surrogate country is the best approach for valuing the labor input in NME AD proceedings, and that the International Labour Organization ("ILO") Yearbook's Chapter 6A is the preferred surrogate labor source, as it accounts for all direct and indirect labor costs (although the Department is not precluded from using other sources for valuing labor costs).[272] The CIT found the methodology for valuing labor using industry-specific data from the primary surrogate country is reasonable because it is consistent with how the Department values all other factors of production ("FOPs").[273]

In the *Preliminary Results*, the Department valued labor using contemporaneous NSO data for general manufacturing wages, rather than the industry-specific 2012 Thai NSO labor data,

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[271] *See 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*"), and accompanying IDM at Comment 11.

[272] *See Antidumping Methodologies in Proceedings Involving Non-Market Economies: Valuing the Factor of Production: Labor*, 76 FR 36092 (June 21, 2011) ("*Labor Methodologies*"); *see also Steel Wire Garment Hangers from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review; 2012-2013*, 79 FR 65616 (November 5, 2014); unchanged in *Steel Wire Garment Hangers from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*; *2012- 2013*, 80 FR 13332 (March 13, 2015).

[273] *See Taian Ziyang Food Company, Ltd. v. United States*, 918 F. Supp. 2d 1345, 1357 (CIT 2013).

because the Department had previously determined in *Passenger Tires from the PRC* that general manufacturing wages in Thailand have increased much more than the general rate of inflation (*i.e.*, CPI) during the same approximate time frame as the period of the instant review.[274] However, upon further consideration, we have concluded that the 38 percent increase in general manufacturing wages would not necessarily reflect changes to the average labor cost prevailing in the chemical products' manufacturing industry because wages in the chemical products manufacturing industry are significantly higher than Thailand's minimum wages in general manufacturing. Specifically, Thailand increased its minimum daily wage rate from 206 Baht per day (in 2011),[275] to 300 Baht per day (in 2013-14),[276] which corresponded with a 38 percent increase in general manufacturing wages. Record evidence shows that in 2011 the chemical manufacturing products industry's prevailing average daily wage rate was 500.8 Baht per day,[277] which was already well above the revised minimum wage level of 300 Baht per day in 2013-14. Additionally, in the five years preceding 2011, wages in the chemical products manufacturing industry increased 15 percent from 54.58 Baht per hour in 2006[278] to 62.60 Baht per hour in 2011, thus making an additional increase in the chemical products manufacturing industry's wage rate of the magnitude of the increase in general manufacturing wages unlikely.[279] Given that the wages in the chemical manufacturing sector were already well above the new minimum wage rate, the 38 percent increase in general manufacturing wages likely had little to no effect on wages in the chemical products manufacturing industry.

Based on the Department's preference to value labor using industry-specific wage data and the record evidence showing that the minimum wage increase likely did not directly reflect changes in wage rates of the chemical products manufacturing sector, we are valuing labor using the industry-specific 2011 rate of 62.60 Baht per hour from the 2012 NSO Industrial Census under Code 20299 "Manufacture of Other Chemical Products, n.e.c."[280] Because the rate is not contemporaneous with the review period, we are inflating it using the CPI. The Department

[274] *See* Memorandum to the File, "Antidumping Duty Administrative Review of Xanthan Gum from the People's Republic of China: Preliminary Surrogate Value Memorandum," dated July 31, 2015 ("Preliminary Surrogate Value Memorandum").

[275] *See* Submission from Fufeng, "Fufeng Refiling of July 13 Surrogate Value Filing Without Exhibit 5 in the First Administrative Review of Antidumping Order on Xanthan Gum from the People's Republic of China (A-570-985)," dated July 28, 2015, at 4.

[276] *Id*.

[277] *See* Submission from Fufeng, "Neimenggu Fufeng Biotechnologies Co., Ltd. Second Surrogate Value Submission in the First Administrative Review of Antidumping Duty Order on Xanthan Gum from the People's Republic of China (A-570-985)," dated July 1, 2015, at 2A. Based on the standard 8 hours in a working day, the average labor cost for Chemical products manufacturing sector in Thailand in 2011 calculated as 62.60*8 = 500.8 Baht/day.

[278] *See* Submission from Fufeng, "Neimenggu Fufeng Biotechnologies Co., Ltd. First Surrogate Country & Surrogate Value Submission in the First Administrative Review of Antidumping Duty Order on Xanthan Gum from the People's Republic of China (A-570-985)," dated February 19, 2015, at 4A.

[279] *See* Submission from Fufeng, " Neimenggu Fufeng Biotechnologies Co., Ltd. Second Surrogate Value Submission in the First Administrative Review of Antidumping Duty Order on Xanthan Gum from the People's Republic of China (A-570-985)," dated July 1, 2015, at 2A.

[280] *Id*. Following the precedent set in *Activated Carbon from the PRC*, we are using NSO labor statistics under sub-category 20299 ("Manufacture of other chemical products, n.e.c.") to value labor costs as this represents the most industry-specific data on the record.

considers the CPI to be the best available information to capture the inflation within a country, including its labor wage rates.[281]

While we acknowledge Deosen's argument for valuing labor using data under Code 2013 in the 2012 Manufacturing and Industrial Census: Manufacturing Industry Report, the record of this review does not contain sufficient evidence to tie the manufacture of xanthan gum directly with the description of Code 2013 (manufacture of plastic in primary form). Instead, we find that xanthan gum would be more accurately categorized within the description of labor category 20299, because this category reflects the manufacture of chemical products not classified in other categories. Therefore, we find that the Code 2013 data in the 2012 Manufacturing and Industrial Census: Manufacturing Industry Report are not the best information available on the record with which to value labor.[282]

Comment 7: Surrogate Value for Domestic Truck Freight

In the *Preliminary Results*, the Department calculated a surrogate domestic truck freight rate (a per kilogram per kilometer rate) by dividing charges for transporting a 10 metric ton shipment in a 20-foot container that were reported in *Doing Business 2015: Thailand* by the average distance between the Bangkok Industrial Area and the Port of Bangkok and Laem Chabang Port.

Petitioner:

- *Doing Business 2015: Thailand* remains the best source of surrogate data for valuing domestic truck freight and its use is consistent with the well-established Department practice of relying on the primary surrogate country for all surrogate value ("SV") data.
- The Department should use the distance from the center of Bangkok to the Port of Bangkok (15 km) in its calculation of a Thai surrogate truck freight rate, instead of using the average of the distances to the Port of Bangkok and the Laem Chabang Port.
- *Doing Business 2015: Thailand* identifies the starting point for the shipment as "Bangkok" and the ending point as "Bangkok port." The Department determined in *Passenger Tires from the PRC*[283] that the reference to the Bangkok Port specifically refers to the port in the Khlong Toei district. That decision and record evidence show that the Laem Chabang Port is a distinct and separate port and not considered the Bangkok Port.
- Fufeng claims that websites submitted to the record demonstrate that the Laem Chabang Port is often referred to as "Bangkok Port." However, these websites are owned and operated by cruise ship companies and contain statements intended to mislead passengers into thinking that the Laem Chabang Port is closer to Bangkok than it actually is.

Fufeng and Deosen:

- In order to calculate an accurate domestic truck freight expense, the Department should rely upon a source that provides weight, distance, and cost for each shipment. The

[281] *See Activated Carbon from the PRC*, and accompanying IDM at Comment 11.
[282] Additionally, it is unclear whether the wages categorized under code 2013 were affected by the increase in the Thai minimum wage. If we used this code 2013 data, there would still be uncertainty as to whether the increase in minimum wage was reflected in the code 2013 wage data.
[283] *See Passenger Tires from the PRC* and accompanying IDM at Comment 15.

Department should calculate the inland truck freight SV using United States Department of Transportation ("USDOT") Bureau of Transportation Statistics. This source is the most accurate as it contains a truck freight rate on a per kg/per km basis taken directly from USDOT Statistics without resorting to the assumptions when using *Doing Business 2015: Thailand*.

- If the Department continues to use information from *Doing Business 2015: Thailand* to value domestic truck freight, it should calculate domestic truck freight using the average of the distances to the Laem Chabang Port and the Port of Bangkok, because both ports service Bangkok and are referred to as Bangkok Port. They can both be considered the "Bangkok Port" as the Port of Bangkok is more centrally located, while the Laem Chabang Port is larger and more commonly used by traders.
- The Department has reversed the decision made in *Passenger Tires from the PRC* in at least two recent antidumping reviews.[284]
- Fufeng contends that only using the distance from Bangkok to the Port of Bangkok at Khlong Toei of 15 kilometers to calculate the Thai truck freight rate yields an aberrational truck freight rate, because it is over 11 times higher than the USDOT truck freight cost.
- Therefore, Fufeng contends that it is reasonable to presume that averaging the distances from Bangkok to the Port of Bangkok at Khlong Toei and Bangkok to the Laem Chabang Port when calculating the truck freight rate SV is appropriate.
- Petitioner's proposed starting location for its distance calculation (the Central District Office) is an arbitrary location that has no relationship with the relevant distance, as exporters are not shipping from the Central District Offices, but instead are shipping from Bangkok's Industrial areas, which are on the outskirts of the city. The Department has used this reasoning in the past in *Concrete Tie Wire from the PRC* and *Seamless Copper Pipe from the PRC*.[285] Additionally, many central districts are small and have fewer manufacturing and export businesses and, therefore, should not be a presumed starting point for the shipment for which total costs were reported in *Doing Business 2015: Thailand*. Moreover, the Port of Bangkok has two separate gates that are four to five kilometers apart. Commercial trucks are largely prohibited from using local roads in Thailand, so it is unrealistic for Petitioner to use maps showing the shortest distance from every district to the Port of Bangkok.

Department's Position: We made no changes to our calculation of the domestic truck freight rate in the *Preliminary Results*. We continue to rely on *Doing Business 2015: Thailand* for domestic truck freight costs. In NME cases, the Department normally seeks to value all FOPs in a single country with a similar level of economic development as the NME country and will turn to alternative surrogate countries only when there are no suitable values from the principal

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[284] *See Steel Wire Garment Hangers from the PRC: Preliminary Results of Antidumping Duty Administrative Review: 2013-2014,* 80 FR 41480 (July 15, 2015) ("*Garment Hangers from the PRC*"); and *Multilayered Wood Flooring from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Results of New Shipper Review: 2012-2013,* 80 FR 41476 (July 15, 2015) ("*MLWF 2012-2013*").

[285] *See Final Determination of Sales at Less Than Fair Value: Prestressed Concrete Steel Rail Tie Wire from the People's Republic of China,* 79 FR 25572 (May 5, 2014) ("*Concrete Tie Wire from the PRC*") and *Seamless Refined Copper Pipe and Tube from the People's Republic of China: Final Results of Antidumping Duty Administrative Review: 2012-2013;* 80 FR 32087 (June 5, 2015) ("*Seamless Copper Pipe from the PRC*").

surrogate country. The *Doing Business 2015: Thailand* survey provides an inland freight cost from the primary surrogate country, that is contemporaneous with the POR, publicly available, and from a reliable source (*e.g.*, the World Bank). Additionally, we have relied on this source to value truck freight in previous proceedings[286] and our use of *Doing Business* as a data source was recently affirmed by the CIT.[287]

Also we continue to calculate the per-kilometer domestic truck freight rate by dividing the *Doing Business 2015: Thailand* total truck freight cost by the average distance between the Bangkok Industrial Area and the Port of Bangkok and Laem Chabang Port, consistent with the investigation in this proceeding.[288] First we considered the question of the starting point of the shipment described in *Doing Business 2015: Thailand*, an issue which was also considered *in Concrete Tie Wire from the PRC*[289] and *Hand Trucks from the PRC 2011-2012*.[290] In *Concrete Tie Wire from the PRC* and *Hand Trucks from the PRC 2011-2012*, the Department determined that there are two major ports in Thailand: the Port of Bangkok (44.33 km from the Bangkok Industrial Area) and the Laem Chabang Port (110 km from the Bangkok Industrial Area). The Department also determined in *Concrete Tie Wire from the PRC* and *Hand Trucks from the PRC* that it was most appropriate to calculate the distance to the ports from the Bangkok Industrial Park Area, rather than from the Bangkok city center.[291] Therefore, consistent with the information on the record and with the Department's decision in previous proceedings, we used distances from Bangkok's Industrial Park Area to calculate the domestic inland freight rate.

With respect to the destination port of the shipment described in *Doing Business 2015: Thailand*, this publication refers to the port in its survey as "Port Name: Bangkok."[292] Although the *Doing Business* methodology states that the destination port name is "Bangkok," the publication does not provide a precise name or location of the port. Unlike *Passenger Tires from the PRC* (where the Department based the SV for truck freight on the distance from the Bangkok city center to the "Bangkok port" at Khlong Toei[293]), there is additional evidence on the record in this proceeding to demonstrate that the Laem Chabang Port may qualify as a "Port of Bangkok" as referenced in *Doing Business.* Specifically, publications from the websites of several cruise ship

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[286] *Id*.
[287] *See CP Kelco US, Inc. v. U.S.*, 2015 WL 1544714 (CIT 2015).
[288] *See* Preliminary Surrogate Value Memorandum at 6.
[289] *See Concrete Tie Wire from the PRC*, and accompanying IDM at Comment 4.
[290] *See* Submission from Petitioner, "First Administrative Review of Xanthan Gum from the People's Republic of China: Petitioner's Comments on Surrogate Country Selection; Petitioner's Submission of Surrogate Value Information," dated February 19, 2015 ("Petitioner February 19, 2015 Surrogate Value Submission") at 7-8 containing the IDM accompanying *Hand Trucks and Certain Parts Thereof from the People's Republic of China; 2011-2012*, 79 FR 44008 (July 29, 2014) ("*Hand Trucks from the PRC 2011-2012*").
[291] *See Concrete Tie Wire from the PRC*, and accompanying IDM at Comment 4 (using the distance to the ports from the Bangkok industrial park area, not the Bangkok city center, to calculate the truck freight SV); *see also Hand Trucks from the PRC*, and accompanying IDM at Comment 8 (stating that "In Doing Business, one of the assumptions is that the company is located in a periurban area (*i.e*., Bangkok's Industrial Park Area) of the economy's largest business city (Bangkok)").
[292] *See* Submission from Petitioner, "Xanthan Gum from the People's Republic of China: Petitioner's Additional Surrogate Value Comments," dated March 2, 2015, at 3.
[293] *See Passenger Tires from the PRC* at Comment 15.

companies,[294] along with an article on import-export in Thailand, refer to Laem Chabang as the Port of Bangkok.[295] Moreover, the *Doing Business 2015: Thailand* survey asks participants to respond using information for "the seaport most commonly used by traders,"[296] and does not specifically direct those responding to the survey to provide costs for a specific port. Record correspondence with officials at major trucking companies in the Bangkok area indicate that most commercial export shipments from Bangkok are sent to the Laem Chabang Port because it is a sea-port which was built to handle international shipments.[297] Additional record evidence shows that the Laem Chabang Port is a much larger seaport for the Bangkok area because it handles 4.4 times the volume of containerized cargo than the Port of Bangkok at Khlong Toei.[298] However, "Port Name: Bangkok" in *Doing Business 2015: Thailand* could also refer to the "Port of Bangkok" because both ports handle international shipments for the greater Bangkok area. Given the above, and consistent with past proceedings, we continue to use the average distance between the Bangkok Industrial Area and the Port of Bangkok and the Laem Chabang Port to calculate the per-kilometer domestic truck freight rate for the final results of this review.

Furthermore, we disagree with Fufeng that comparing a SV from the primary surrogate country to a cost in the United States is appropriate to determine whether the SV is aberrational. The Department has stated that, in using additional data for benchmarking purposes, a party must provide evidence to show why a SV is inadequate beyond simply citing lower price points. Alternatively, the party must demonstrate that another value is preferable.[299] The Department's practice for determining whether a SV for an input is aberrational is to compare it with the data from the other countries found by the Department to be equally economically comparable to the PRC.[300] Specifically, the Department found that "…country-specific export data, and import values from countries at different levels of economic development from the PRC are not suitable comparative price benchmarks to test the validity of selected SVs."[301] Moreover, we do not believe USDOT data are preferable to an SV calculated from *Doing Business 2015: Thailand,* because the United States is not a potential surrogate country. Because the Department has reliable and useable data from Thailand, which is the primary surrogate country, there is no reason to consider truck freight data from the United States, a country which is not at the same level of economic development as the PRC.

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[294] *See* Submission from Fufeng, "Fufeng Refiling of July 13 Surrogate Value Filing Without Exhibit 5 in the First Administrative Review of Antidumping Order on Xanthan Gum from the People's Republic of China (A-570-985)," dated July 28, 2015, at 3A.
[295] *Id.*
[296] *See* Petitioner February 19, 2015 Surrogate Value Submission at 7.
[297] *Id.*, at 3D.
[298] *See* Submission from Fufeng, "Fufeng Refiling of July 13 Surrogate Value Filing Without Exhibit 5 in the First Administrative Review of Antidumping Order on Xanthan Gum from the People's Republic of China (A-570-985)," dated July 28, 2015, at 3A.
[299] *See Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China: Final Results of the 2008-2009 Antidumping Duty Administrative Review*, 76 FR 3086 (January 19, 2011) ("*TRBs 2008-2009*"), and accompanying IDM at Comment 14-B.
[300] *Id.*, at Comment 14-B. In this instance, Fufeng has included a price from the United States, a country which is not at the level of economic development as China.
[301] *Id.*, at Comment 14-B.

Comment 8: Surrogate Value for Corn Consumed at Fufeng's Neimenggu Fufeng Facility

In the *Preliminary Results*, the Department relied on Fufeng's quality classifications of food grade corn (*i.e.*, 1-5 grade in Chinese corn standard GB-1353) and feed grade corn (*i.e.*, off grade in Chinese corn standard GB-1353) to value the corn as either food grade or feed grade (off grade).

Petitioner:

- Fufeng provided a spreadsheet detailing the quality metrics for corn purchased during the POR, by truckload, for its Xinjiang Fufeng facility, which allowed for the accurate classification of each truckload of corn as either food grade or feed grade corn. However, for Fufeng's Neimenggu Fufeng facility, Fufeng reported the quality metrics for its purchases of corn on an aggregated (*i.e.*, average) daily basis by supplier type (*i.e.*, Fufeng reported one set of quality metrics for all corn purchases during a particular day for each supplier type) or over a longer time period by supplier type (Fufeng reported one set of quality metrics for all corn purchases during a particular longer period for each supplier type) but did not report quality metrics on a truckload basis. Both facilities possess the corn quality data on a truckload basis.
- When preparing the data on this aggregated basis, Fufeng averaged the corn quality data from the Neimenggu Fufeng facility, which significantly distorted the quality metrics such that it significantly underreported corn that was food grade (1-5 grade) as off grade corn.[302] This is demonstrated by calculations using Fufeng's corn quality data showing that the total quantity of corn identified as 1-5 grade differs significantly depending on whether you average certain quality metrics on a POR basis, a monthly basis, or as reported by Fufeng.[303] This is also demonstrated by a calculation showing that when you average a certain component content percentage (one of the quality metrics) of a relatively small quantity of purchases of corn where that component content percentage[304] is above the percentage allowed for 1-5 grade corn (thus indicating the corn is off-grade), with the content percentage of this component at the maximum percentage allowed for this component for 1-5 grade corn for another group of purchases, it could cause the whole group of Neimenggu Fufeng's purchases used in this example to be classified as off-grade corn, even though some of the purchases were purchases of 1-5 grade corn.[305]
- Also, Fufeng inconsistently combined supplier data from the Neimenggu Fufeng facility using different time periods and inconsistently combined multiple purchases at the Neimenggu Fufeng facility with different characteristics into a single total.
- It is not possible to quantify the magnitude of the distortion (where Neimenggu Fufeng's corn quality was reported as off grade, but it was actually 1-5 grade). Therefore, the Department should use neutral facts available and value Fufeng's corn inputs at its

[302] *See* Petitioner's Case Brief at 16-19 (where Petitioner claims that if Fufeng's corn data are aggregated at the highest level, the period of review, using corn quality metrics, then all of Fufeng's corn would be classified as off grade, based on Chinese corn standard GB-1353); *see also*, Petitioner's Case Brief at Exhibit 1.
[303] *Id*.
[304] *See* BPI Memorandum at Note 26.
[305] In other words, averaging a small quantity of purchases of off-grade corn with purchases of 1-5 grade corn (food-grade corn), may inappropriately result in treating the whole group of purchases as off-grade corn.

Neimenggu Fufeng facility as if 50 percent of the corn was food grade (*i.e.*, 1-5 grade) and 50 percent was feed grade (*i.e.*, off grade).

Fufeng:

- While Fufeng does not keep in its normal course of business the summary of corn quality test reports that was requested by the Department, the summary of test reports per-supplier type per-day that it provided to the Department covered all of its corn purchases, was consistent with normal business practices and commercial realities, and fully responsive to the Department. Further, it is entirely reasonable that Neimenggu Fufeng use a different methodology than Xinjinag Fufeng in order to summarize its considerably larger volume of data.
- While corn purchases may consist of more than one truckload of corn, under ordinary business circumstances, one test report per transaction should be considered a reasonable and accurate metric of the quality of the corn obtained in the purchases.
- Petitioner's argument that reporting corn quality test results by truckload rather than on a per supplier per day basis would result in a greater quantity of 1-5 grade corn (a greater quantity of food grade (higher grade) corn) is baseless for a number of reasons.
- First, Fufeng's Xinjiang Fufeng facility reported corn quality test results to the Department by truckload. An examination of the percentages of 1-5 grade corn and off-grade corn reported by Fufeng's Xinjiang Fufeng facility disproves Petitioner's contention that Fufeng's Neimenggu Fufeng facility significantly underreported the quantity of 1-5 grade corn that it purchased during the POR.[306]
- Second, Petitioner's two specific instances in its data aggregation analysis trying to demonstrate a distortion in the corn quality reported by Neimenggu Fufeng are without merit. In fact, an analysis of the aggregated corn quality data specifically referenced by Petitioner shows that, in the instances cited by Petitioner, the corn quality was 1-5 grade, not off grade, demonstrating that there is no direct correlation between the level of aggregation of corn quality data and the resulting corn grade.
- Third, Petitioner's calculations involving a certain component content percentage, in addition to being based on unfounded presumptions, are not correct. Instead, an objective analysis of the data shows that Fufeng's per supplier type per day basis of reporting corn quality for the Neimenggu Fufeng facility resulted in a much larger quantity of 1-5 grade corn than would have been expected.
- Lastly, the only accurate assumption that could be made as to the quality of corn when tested on a truckload basis is the result of the quality tests performed at the Xinjiang Fufeng facility because those tests were conducted on a truckload basis. This stands in contrast to Petitioner's request that the Department assume that 50 percent of the corn consumed at the Neimenggu Fufeng facility was food grade (*i.e.*, 1-5 grade) and 50 percent was feed grade (*i.e.*, off grade).

Department's Position: We have determined that the record does not support Petitioner's claim that Fufeng significantly underreported purchases of food grade (1-5 grade) corn at its Neimenggu Fufeng facility. In order to report the total quantity of food grade and off-grade corn that the Neimenggu Fufeng facility purchased during the POR, Fufeng first classified the total

[306] *See* BPI Memorandum at Note 27.

quantity of corn purchased from individual suppliers, generally on a daily basis, as either food grade corn or off-grade corn based on the average quality characteristics (moisture content, foreign matter content, mold content) of all of the corn purchased during the day.[307] Fufeng then added together the daily purchase quantities identified as food grade (1-5 grade) and added together the daily purchase quantities identified as off-grade to derive the total quantity of food grade and off-grade corn that the Neimenggu Fufeng facility purchased during the POR.[308] Petitioner claims that Fufeng significantly underreported the Neimenggu Fufeng facility's purchases of food grade corn by classifying all of the corn purchased on a particular day as either food grade or off-grade corn using the average quality metrics of all of the corn purchased on that day. Petitioner indicates that Fufeng should have classified each truckload of corn purchased on each day of the POR as either food grade or off-grade corn based on the quality metrics of that particular truckload and then separately added together the quantity of each truckload of food grade corn and the quantity of each truckload of off-grade corn to derive the total quantity of food grade and off-grade corn that the Neimenggu Fufeng facility purchased during the POR.

Petitioner illustrates its claim that Fufeng significantly underreported purchases of food grade (1-5 grade) corn at its Neimenggu Fufeng facility by calculating the average content percentage of a certain component of the corn (the content percentage of this component is one of the quality metrics measured to determine whether the corn is food grade or off-grade corn) for corn purchases over various periods (*i.e.*, average content percentage for this component for all POR purchases, average content percentage for this component for monthly purchases for each month of the POR). Petitioner's calculations focus on daily corn purchases which, based on Fufeng's reported average daily quality metrics, includes corn which appears to only have been classified as off-grade corn based on the content percentage of this particular component (*i.e.*, corn that failed the content percentage requirement for this component but met all other quality requirements). Petitioner's calculations show that the quantity of corn classified as food grade (1-5 grade) will vary depending upon the averaging group. Thus, Petitioner concludes that a quantity of corn that only failed the content percentage requirement for this particular component, that is used in this averaging group, could cause the whole group of purchases whose quality metrics are being averaged to appear as if it failed the content percentage requirement for this particular component, even though some of the truckload purchases could have passed the content percentage requirement for this particular component and actually be food grade (1-5 grade) corn. However, this analysis is based on an assumption that is not supported by the record. The Department requested a limited sample of corn quality information (the corn quality information requested was for a certain number of purchases during a specific month of the POR) as support for Fufeng's reported corn purchases for its Neimenggu Fufeng facility. Fufeng provided the sample corn quality information on a truckload basis. Specifically, the information shows corn quality metrics for a number of individual truckloads of corn purchased by the

[307] *See* Submission from Fufeng, "Second Supplemental Sections A, C, and D Response for Neimenggu Fufeng Biotechnologies Co., Ltd. in the First Administrative Review of Antidumping Duty Order on Xanthan Gum from the People's Republic of China," dated July 16, 2015, at 5-6 and Exhibit SSD-1.
[308] *Id*.

Neimenggu Fufeng facility on a particular day of the POR.[309] Although the sample is limited,[310] it does not support the assumption underlying Petitioner's calculations.[311] Due to the business proprietary nature of the information, our analysis is further discussed in the BPI Memorandum.[312] Thus, while Petitioner contends that Fufeng's Neimenggu Fufeng facility should have reported corn quality on a truckload basis rather than inconsistently combining supplier data from different time periods and combining purchase data with different characteristics in its reporting to the Department, the sample which the Department accepted, and which it is relying upon as support for Fufeng's reporting for its Neimenggu Fufeng facility, was reported to the Department on a truckload basis. When looking at the data provided on a truckload basis, that information does not support the contention that the manner in which Fufeng's Neimenggu Fufeng facility combined supplier data and purchase data in reporting to the Department distorted the corn quality totals as suggested by Petitioner. Specifically, based on this sample, we cannot conclude that Fufeng significantly underreported purchases of food grade (1-5 grade) corn at its Neimenggu Fufeng facility. Therefore, we have not adjusted the reported quantities as requested by Petitioner.

Comment 9: Surrogate Value for Coal Consumed at Fufeng's Neimenggu Fufeng and Xinjiang Fufeng Facilities

In the *Preliminary Results*, the Department used the value of imports under Thai HTS category 2701.19, "Other coal" to calculate the SV for Fufeng's coal.

Petitioner:

- Based on Fufeng's coal information submitted after the *Preliminary Results*, record evidence indicates that the most appropriate SV for Fufeng's coal is a simple average of the import values under Thai HTS 2701.12 (bituminous coal) and Thai HTS 2701.19 (other coal). Fufeng's supplemental questionnaire response following the *Preliminary Results* clarified that certain notations on its coal test reports indicate that the coal was tested on an as received basis. Therefore, to determine whether Fufeng's coal meets the calorific heat value threshold for bituminous coal, the Department must convert Fufeng's reported calorific heat values from: 1) a net basis to a gross basis; and 2) an as received basis to a moist, mineral-matter free basis. There are conversion formulas on the record to convert Fufeng's coal data to a gross basis and to a moist, mineral-matter free basis, and then determine the calorific heat values. Recalculating Fufeng's calorific heat values for its purchased coal, after applying these conversion formulas, and, based on the revised coal calorific heat value data, supports using a simple average of import values under Thai HTS 2701.12 (bituminous coal) and Thai HTS 2701.19 (other coal) to value Fufeng's coal. A simple average of the AUVs of imports for these two Thai HTS categories is warranted, because the Department only has a sample of Fufeng's coal test reports.

[309] *Id*. at Exhibit SSD-8. Petitioner asserts that both facilities possess the corn quality data on a truckload basis. Exhibit SSD-8 appears to substantiate Petitioner's assertion, however in this administrative review the Department did not require Fufeng to report all corn purchases by the Neimenggu Fufeng facility on a truckload basis, accepted Fufeng's reporting method for its Neimenggu Fufeng facility, and accepted supporting documentation.
[310] As mentioned above, the Department requested a limited sample.
[311] *See* BPI Memorandum at Note 28.
[312] *See* BPI Memorandum at Note 28.

Fufeng:

- There is no record evidence that the calorific heat values in Fufeng's coal test reports are based on a net calorific heat value. After coal is delivered to each of Fufeng's factories, samples are collected and tested to ensure that the quality of the purchased coal meets the requirements of the purchase agreement. The coal quality test reports have notations which indicate that the coal was tested on an as received basis (*i.e.*, without any further processing or conditioning), so the calorific heat value of the coal is a gross calorific heat value instead of a net calorific heat value.[313] In addition, Fufeng's coal test reports indicate that its coal was subjected to a proximate analysis, which is designed to yield a coal gross calorific heat value instead of a net calorific heat value.[314]
- The formula used by Petitioner to convert the allegedly net calorific heat value to a gross calorific heat value causes distortions and yields skewed gross calorific heat values. In addition, the latent heat value of water was already included in the calorific heat value that was recorded on Fufeng's coal test reports, so application of Petitioner's conversion formula leads to double counting of the latent heat of water. Finally, because this conversion formula was used to determine whether Fufeng's coal was bituminous grade or not, and Petitioner used the hydrogen and oxygen contents of bituminous coal in the conversion formula, Petitioner's argument is circular.

Department's Position: We agree with Petitioner that the coal calorific heat values should be on a gross basis,[315] but record evidence indicates that Fufeng's coal calorific heat values, which are reported on an as received basis, are already on a gross basis, instead of a net basis. Therefore, there is no need to convert the values to gross basis. The coal quality test reports indicate that Fufeng's purchased coal was tested on an as received basis.[316] Coal tested on an as

[313] Fufeng provided record evidence that the calorific heat values of coal recorded on Fufeng's test report on an as received basis reflect the gross calorific heat value of the coal. *See* Submission of Fufeng, "Third Supplemental Section D Response for Neimenggu Fufeng Biotechnologies Co., Ltd. in the First Administrative Review of Antidumping Duty Order on Xanthan Gum from the People's Republic of China (A-570-985)," dated September 15, 2015, at Exhibit 5 (where "Coal Knowledge: Basis of Coal" defines coal on an as received basis as: analytic data calculated to the moisture condition of {a} sample as it arrived at the laboratory and before any processing or conditioning); *see also* Submission from Petitioner, "Xanthan Gum from the People's Republic of China: CP Kelco's Factual Information to Rebut, Clarify, or Correct Neimenggu Fufeng Biotechnologies Co., Ltd.'s Supplemental Section D Questionnaire Response," dated September 25, 2015, at Exhibit 1 (where "Coal Conversion Statistics: World Coal Association" states that the gross calorific value is the calorific value under laboratory conditions and the net calorific value is the useful calorific value in a boiler plant).
[314] *See* Submission from Petitioner, "Xanthan Gum from the People's Republic of China: CP Kelco's Factual Information to Rebut, Clarify, or Correct Neimenggu Fufeng Biotechnologies Co., Ltd.'s Supplemental Section D Questionnaire Response," dated September 25, 2015, at Exhibit 1 (where "Coal Conversion Statistics: World Coal Association" states that a proximity analysis of coal includes the percent content of moisture, ash, volatile matter, fixed carbon, sulphur, and calorific value); *see also* Fufeng's Rebuttal Brief at Exhibit 3, where the proximate analysis lists the gross calorific value as well as the percentages for moisture, ash, volatile matter, and fixed carbon.
[315] Reporting the coal on a gross basis is consistent with the coal standards placed on the record.
[316] *See* Submission from Fufeng, "Third Supplemental Section D Response for Neimenggu Fufeng Biotechnologies Co., Ltd. in the First Administrative Review of Antidumping Duty Order on Xanthan Gum from the People's Republic of China (A-570-985)," dated September 15, 2015 at 3-5.

received basis means coal which was tested without any further processing or conditioning[317] and the calorific heat value from these tests would be on a gross calorific heat value basis because the coal was tested under laboratory conditions, rather than in a boiler plant (which would yield a net calorific heat value).[318] Also, as further support that Fufeng's calorific heat values are on a gross basis, Fufeng's coal test reports indicate that its coal was subjected to a proximate analysis, which is designed to yield a coal gross calorific heat value instead of a net calorific heat value.[319] Therefore, because Fufeng's coal calorific heat values are already on a gross basis, as noted above, there is no need to use Petitioner's proposed conversion formulas to convert them to a gross basis.

Moreover, while we agree with Petitioner that the coal should be on a moist, mineral-matter free basis,[320] in the *Preliminary Results*, we converted Fufeng's calorific heat values for coal from an as received basis per the coal test reports to a moist, mineral-matter free basis and also to an ash-free basis.[321] Hence, there is no need to adjust the coal data again for the final results.

When we compare Fufeng's revised coal calorific heat values to the calorific heat values for lignite coal, bituminous coal and sub-bituminous coal, we continue to find that "Other" coal, Thai HTS category 2701.19, which includes sub-bituminous coal (but does not include lignite or bituminous coal), is the HTS category which most closely matches the type of coal consumed by Fufeng. As explained in detail in the Department's preliminary analysis memorandum regarding Fufeng, the Department examined 43 coals test reports from Xinjiang Fufeng and Neimenggu Fufeng, and selected "Other" coal as the coal which most closely matches the coal consumed by Fufeng during the POR.[322] Details regarding why the Department found the "Other" coal category to cover coal that is most similar to the coal consumed by Fufeng are found in the preliminary analysis memorandum regarding Fufeng.[323] Therefore, as in the *Preliminary Results*, we have continued to use this HTS category to value Fufeng's coal.

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[317] *Id.*, at Exhibit 5 (where "Coal Knowledge: Basis of Coal" defines coal on an as received basis as: analytic data calculated to the moisture condition of sample as it arrived at the laboratory and before any processing or conditioning).
[318] *See* Submission from Petitioner, "Xanthan Gum from the People's Republic of China: CP Kelco's Factual Information to Rebut, Clarify, or Correct Neimenggu Fufeng Biotechnologies Co., Ltd.'s Supplemental Section D Questionnaire Response," dated September 25, 2015, at Exhibit 1 (where "Coal Conversion Statistics: World Coal Association" states that the gross calorific value is the calorific value under laboratory conditions and the net calorific value is the useful calorific value in a boiler plant).
[319] *Id.*, at Exhibit 1 (where "Coal Conversion Statistics: World Coal Association" states that a proximity analysis of coal includes the percent content of moisture, ash, volatile matter, fixed carbon, sulphur, and calorific value); *see also*, Fufeng's rebuttal brief at Exhibit 3, where the proximate analysis lists the gross calorific value as well as the percentages for moisture, ash, volatile matter, and fixed carbon.
[320] Reporting the coal on a moist, mineral-matter free basis is consistent with the coal standards placed on the record.
[321] *See* Memorandum to the File, "Preliminary Results Analysis Memorandum for Neimenggu Fufeng Biotechnologies Co., Ltd. (aka Inner Mongolia Fufeng Biotechnologies Co., Ltd.), Shandong Fufeng Fermentation Co., Ltd. ("Shandong Fufeng"), and Xinjiang Fufeng Biotechnologies Co., Ltd. ("Xinjiang Fufeng")," dated July 31, 2015, at 4-5 and Attachment 4.
[322] *Id*. at 3-5.
[323] *Id*. at 3-5.

Comment 10: Surrogate Value for Electricity

Petitioner:

- The Metropolitan Electricity Authority ("MEA") electricity tariff table used in the *Preliminary Results*[324] does not distinguish the energy charges by on-peak and off-peak usage. For the final results of review, the Department should use the MEA "time of use" electricity tariff table (Table 4.2 from Schedule 4 (large general service); Schedule 4 also contains Table 4.1 which is identified as a "time of day" tariff), which distinguishes between on-peak and off-peak charges, and value Deosen's electricity consumption using the average on-peak energy charge of 3.70 baht/kWh, because Deosen's labor hours suggest that it only consumed electricity during on-peak hours.
- If the Department does not rely on only on-peak electricity rates for Deosen, it should rely on the simple average of the on-peak and off-peak rates in the "time of use" electricity tariff table, and then calculate a simple average rate from the two electricity rate tables.

No parties submitted rebuttal comments.

Department's Position: We find that it is appropriate to value electricity using both of MEA's electricity tariff tables in Schedule 4 (large general service) namely the "time of day" table as well as a "time of use" table with on-peak and off-peak energy charges.[325] The Department found in *MLWF 2012-2013* that both the "time of day" and "time of use" rate tables contain information related to energy use, and the schedule of tariffs contains no information to explain why one table is more or less appropriate for SV purposes than the other.[326] As a result, in *MLWF 2012-2013*, the Department calculated the electricity SV using an average of the data listed in the energy charge columns of both electricity rate tables.[327] Similarly, we find that the record of the current administrative review contains no information to indicate whether "time of day" Table 4.1 is more or less appropriate for use as an SV than "time of use" Table 4.2.

Moreover, despite Petitioner's argument that "Deosen has provided no evidence that it consumed electricity in off-peak hours,"[328] we find that the record does not clearly show that Deosen consumed electricity solely during on-peak hours either. Petitioner alleges that Deosen's reported labor hours per month would be significantly higher if Deosen was operating during off-peak hours. However, we find that Deosen's reported total labor hours per month provide no definite indication of the specific days or times during which Deosen consumed electricity.[329] Similarly, we find that Fufeng's reported labor usage does not show on-peak versus off-peak

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[324] *See* Preliminary Surrogate Value Memorandum, at 4 and Attachment 3.

[325] Fufeng's reported electricity usage falls within the designated range of the MEA large service electricity schedule. *See* Fufeng's Section D Response, dated November 20, 2014, at Exhibit D-6.

[326] *See MLWF 2012-2013*, at Comment 10.

[327] *Id.*

[328] *See* Petitioner's Case Brief at 24.

[329] *See* Submission from Deosen, "Xanthan Gum from the People's Republic of China: Response to the Department's Section D Questionnaire," dated March 26, 2015, at 15 and Exhibit D-6.

electricity usage either.[330] Therefore, we find that exclusive reliance on the on-peak electricity rates is not supported by record evidence.

Additionally, we find that Petitioner has not provided any reason why it is more appropriate to first calculate an average of the data in each electricity rate table and then calculate a simple average of the averages from the two tables, rather than calculating an overall simple average of the data in both rate tables. Therefore, consistent with *MLWF 2012-2013*, we calculated the electricity SV for the final results of review using a simple average of the electricity charges reported in the "time of day" Table 4.1 and the "time of use" Table 4.2 (including both on-peak and off-peak rates).[331]

Comment 11: Surrogate Value for Caustic Soda

In the *Preliminary Results*, the Department valued liquid caustic soda using the value of Thai imports under HTS category 281512, sodium hydroxide (caustic soda), in aqueous solution.

Petitioner:

- The Department's SV calculation weight averaged Thai import values for HTS categories 2815.12.00101 and 2815.12.00102, because record evidence demonstrates that HTS category 2815.12 consists only of imports from these two 11-digit HTS categories.
- The Department should have calculated a simple average of the average unit values of Thai imports under HTS categories 2815.12.00101 (sodium hydroxide 20% W/W or less) and 28151200102 (sodium hydroxide more than 20% W/W), because using a weighted average implies that each of the respondents consumed sodium hydroxide with HTS concentration levels (20% W/W or less and more than 20% W/W) in the same proportion as the Thai imports. However, there is no information on the record to support this assumption.
- The Department recognized the appropriateness of relying on the simple average of HTS categories in its calculation of the SV for hydrochloric acid in this review, where it used a simple average of the Thai import statistics for two HTS categories. Relying on a simple average for hydrochloric acid and a weighted average for liquid caustic soda is inconsistent.

Fufeng:

- The Department intended to value caustic soda using the 6-digit HTS category 2815.12 rather than relying upon 11-digit HTS categories because this 6-digit basket category best matches the record information regarding the input used by respondents.
- It is Department practice to determine the AUV of imports in a basket category 6-digit HTS heading using a weighted average of the values of all of the imports reported therein. In the *Preliminary Results*, the Department valued a number of inputs in this manner using 6-digit HTS headings.

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[330] *See* Submission from Fufeng, "Section D Response for Neimenggu Fufeng Biotechnologies Co., Ltd. in the First Administrative Review of Antidumping Duty Order on Xanthan Gum from the People's Republic of China (A-570-985)," dated November 20, 2014, at 7.
[331] *See* Petitioner February 19, 2015 Surrogate Value Submission at Exhibit 3.

- Contrary to Petitioner's assertions, the situations involving liquid caustic soda and hydrochloric acid are not the same. Record evidence shows that the Department valued hydrochloric acid using a simple average of import values from Thai HTS categories 2806.10.00102 and 2806.10.00103 because these are the two 11-digit HTS categories that best match the input used by respondents. However, these are not the only two 11-digit HTS categories under Thai HTS 2806.10. Therefore, the Department used only a portion of data reported under the relevant 6-digit HTS 2806.10. In contrast, the Department used all of the data reported under HTS 2815.12 to value liquid caustic soda.

Department's Position: We disagree with Petitioner. Consistent with Department practice, where we calculate an SV for a specific HTS category, we weight average the values reported under all HTS subcategories under that HTS category. It would not be appropriate to use a simple average of the values for Thai HTS categories 2815.12.00101 and 2815.12.00102, as suggested by Petitioner, because the Department selected Thai HTS category 2815.12 as the category most closely matching the input consumed by the respondents. Given that there is no record information regarding the consumption of sodium hydroxide by Fufeng at the 20 percent or less concentration level (HTS category 2815.12.00101) versus consumption at the greater than 20 percent concentration level (HTS category 2815.12.00102), there is no basis to assume that the consumption of sodium hydroxide at the two concentration levels was in equal proportions (a simple average) or some other proportions. Because consumption was at both concentration levels, but the proportion of the concentration levels consumed is not known, the Department determined that Thai HTS category 2815.12 most closely matches the input consumed by the respondents. When the Department has determined that a certain HTS category is the most specific category which matches the respondent's consumed input, its practice is to use the weighted-average value of imports under that specific HTS category as the best available surrogate value. Therefore, for the final results of review, the Department is continuing to value sodium hydroxide (caustic soda) using the weighted average of the import values for Thai HTS category 2815.12 because it has determined that this is the most appropriate HTS category to use to value this input.

We also disagree with Petitioner that the Department recognized the appropriateness of relying on the simple average of import values from HTS categories in its calculation of the SV for hydrochloric acid. We have reexamined that calculation and determined, consistent with Department practice, that we should have calculated a weighted-average value rather than a simple average of the import values from two different HTS categories. Therefore, for the final results of review, we have calculated a weighted-average SV for hydrochloric acid using the import values in HTS codes 2806.10.00102 and 2806.10.00103.

Comment 12: Surrogate Value Adjustment for Sodium Hypochlorite

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

Petitioner:

- The Department adjusted the SV used to value Fufeng's sodium hypochlorite to account for the concentration level used by Fufeng. However, this assumes that the Global Trade

Atlas ("GTA") import data for Thailand under HTS 2828.90.10 includes only sodium hypochlorite that has a concentration level of 100 percent. There is no basis for this assumption, because there is no information on the concentration level of sodium hypochlorite being imported into Thailand.

- When the HTS subheadings do not indicate the concentration level of a chemical, the Department treats the concentration level of chemicals sold in either liquid or solid form as unknown and does not adjust these unknown concentration levels to the concentration level of the FOPs used by the respondent.[332]

Fufeng:

- Thai HTS subheading 2828.90.10 covers only sodium hypochlorite and, based on a description of the goods under this subheading, it is reasonable to infer that it covers sodium hypochlorite in a pure form instead of a diluted form. Had the HTS subheading described the goods as sodium hypochlorite in aqueous solution, then the HTS description would provide some support for Petitioner's claim. However, when the HTS subheading does not describe the goods to be in a solution or mixture, it would be unreasonable and contrary to the ordinary rule of interpretation to presume that the imported chemical has been diluted in a solution, as Petitioner suggests.
- In *CVP 23 from the PRC*, the decision regarding concentration levels was based upon record information specifically calling into question the conclusion that the chemicals were at 100 percent purity. However, there is no such record information in this review regarding sodium hypochlorite and the HTS provision suggests that it is imported in an undiluted form.[333]
- In *Citric Acid from the PRC Investigation*, the Department noted 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 does not indicate a specific concentration level for any of the Indonesian WTA import data.[334]
- In contrast, in the instant case, record evidence indicates that the Thai tariff contains several HTS headings, including two 11-digit HTS subheadings describing various concentration levels of hydrochloric acid under HTS 2806.10, that describe chemicals in terms of their particular concentration levels. Therefore, it is reasonable to infer that, wherever the Thai tariff schedule does not describe a chemical, such as sodium hypochlorite, by its concentration level, such a chemical should be presumed to be undiluted by water or any other solution.

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[332] *See* Petitioner's Case Brief at 26-27, citing *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 23 from the PRC*"), and accompanying IDM at Comment 3, citing *Certain Helical Spring Lock Washers from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review*, 74 FR 57653, 57656 (November 9, 2009), unchanged in *Certain Helical Spring Lock Washers from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 75 FR 29720 (May 27, 2010) ("*Lock Washers from the PRC*").
[333] *See* Fufeng's Rebuttal Brief at 28 citing *CVP 23 from the PRC* and accompanying IDM at Comment 3.
[334] *See* Fufeng's Rebuttal Brief at 28, citing *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.

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. In *Citric Acid from the PRC Investigation*, the Department determined that the respondent provided no record evidence to substantiate its claim that the Indonesian WTA data reflected 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.[335] In contrast, in the instant case, 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."[336] Given the record evidence of specific concentration levels listed for other chemicals in the Thai GTA data, specifically the concentration levels of hydrochloric acid, we presume that sodium hypochlorite is imported into Thailand in an undiluted form, because a specific percentage concentration is not listed for this chemical in 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.[337] 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.[338] Therefore, in *CVP 23 from the PRC*, the Department followed *Lock Washers from the PRC* and, except for price quotes in Indian *Chemical Weekly* which indicate a 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. However, in the instant proceeding, the Department does not have any information on the record that suggests the Thai GTA data may not reflect chemicals at a 100 percent purity levels when there is no indication of the purity levels in the sub-headings. Further, the Department previously determined that the Thai HTS data for sodium hypochlorite covered the active undiluted ingredient contained in the solution used by Fufeng. 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).

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[335] *See Citric Acid from the PRC Investigation* at *Comment 14.*

[336] *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).

[337] *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.

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

> 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.[339]

In this review, Fufeng continues to indicate that it uses a solution of sodium hypochlorite.[340] Because the Department previously determined that the Thai HTS data only cover the active ingredient in such a solution, the solution used by Fufeng is a diluted form of that active ingredient, and there is no evidence on the record that the Thai HTS code for sodium hypochlorite is reported in diluted form, 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 13: GTA POR Data

Fufeng:

- The POR is from July 19, 2013, to June 30, 2014. If the period being reviewed includes a portion of a month with less than half of the days of the month, it is the Department's practice to disregard import data from that partial month when calculating SVs.[341]
- Because only twelve days in July are in the POR, which does not constitute half of the month, the Department should exclude data from July 2013 from its SV calculations and only use GTA Thai import data from August 2013 to June 2014 in the final results of review.

No parties submitted rebuttal comments.

Department's Position: We disagree with Fufeng's contention that we should exclude July 2013 GTA import statistics data when calculating SVs for this review. While the Department did not use GTA data for June 2012, and May 2011 in *Solar Cells from the PRC* and *MLWF 2011*-2012, respectively, despite the POR beginning in these months,[342] in *Frontseating Service Valves from the PRC*, the Department followed the same approach taken here. Like the instant case, in *Frontseating Service Valves from the PRC* the Department used import data for the first month of the POR in its calculations, despite the fact that the POR started on October 22, 2008,

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339 *See Xanthan Gum Final Determination* and accompanying IDM at Comment 6-E.

340 *See* Letter from Fufeng to the Department, regarding "Supplemental Section D Response for Neimenggu Fufeng Biotechnologies Co., Ltd. in the First Administrative Review of Antidumping Duty Order on Xanthan Gum from the People's Republic of China (A-570-985)," dated March 9, 2015, at 18-19 and Exhibit SD-14.

341 *See Notice of Final Determinations of Sales at Less Than Fair Value: Brake Drums and Brake Rotors From the People's Republic of China*, 62 FR 9160, 9163 (February 28, 1997) ("*Brake Drums from the PRC*"); *see also Final Results of Antidumping Duty Administrative Review; 2011-2012: Multilayered Wood Flooring from the People's Republic of China*, 79 FR 26712 (May 9, 2014) ("*MLWF 2011-2012*"); *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments,* 80 FR 40998 (July 14, 2015) ("*Solar Cells from the PRC*").

342 The Department also notes that this was not an issue raised in the case briefs in *Solar Cells from the PRC* or *MLWF 2011-2012*, but it was an issue in *Frontseating Service Valves from the PRC*.

so the number of days in the first month of the POR was less than half of the days for that month.[343] In the instant case, the GTA import data from July 2013 are contemporaneous with the POR, which begins on July 19, 2013, and, therefore, we believe that it is appropriate to use the July 2013 import data in our calculations. While Fufeng relies on *Brake Drums from the PRC*, to support its position, this case involved an AD investigation and the POI in investigations begins on the first day of the month. Thus, *Brake Drums from the PRC* is not applicable to the issue under consideration here. For the above reasons, we continue to use the July 2013 GTA import data in our SV calculations.

Comment 14: Employee Retirement Expenses in Thai Churos Co., Ltd.'s Financial Statements

Fufeng:

- In the *Preliminary Results*, the Department treated "Employee Retirement Expenses" as manufacturing overhead in its surrogate financial ratio calculation, which resulted in double counting Fufeng's indirect labor cost. The NSO Industrial Census data proposed by Fufeng to value labor is representative of the average cost of direct and indirect labor in Thailand and specifically includes the "Employer's contribution to Social Security system." Thus, the data include the cost of employee retirement expenses.
- To avoid double counting indirect labor costs as both "labor" and "manufacturing overhead" expenses, the Department should include "Employee Retirement Expenses" under "Labor" instead of "Manufacturing Overhead" in its surrogate financial ratio calculations.

No parties submitted rebuttal comments.

Department's Position: We agree with Fufeng. NSO 2012 Establishment Survey Code 20299 "Manufacture of Other Chemical Products, n.e.c." Industrial Labor Cost Data[344] has a line item for "Employer's contribution to social security system" built into the average labor cost. The Department calculated surrogate financial ratios using costs from Thai Churos Co., Ltd.'s financial statements and classified "Employee Retirement Expenses" from those financial statements under "Manufacturing Overhead" in its calculation. As such, we double counted retirement gratuities in both the SV for labor and the surrogate financial ratios. We will adjust our calculation of the surrogate financial ratios by including "Employee Retirement Expenses" under the "Labor" category so that these expenses are not double counted.

Comment 15: Fufeng's Value-Added Tax Calculation

Petitioner:

- While allocating its irrecoverable VAT, Fufeng presented an allocation method that deviated from the Department's standard VAT calculation practice and violated 19 CFR 351.401(c).

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[343] *See Frontseating Service Valves from the People's Republic of China: Final Results of the 2008-2010 Antidumping Duty Administrative Review of the Antidumping Duty Order*, 76 FR 70706 (November 15, 2011) ("*Frontseating Service Valves from the PRC*"), and accompanying IDM at Comment 9.

[344] The Department is using this labor source as a result of the "Labor Surrogate Value Source" issue.

- The standard practice in adjusting prices for irrecoverable VAT in China is to adjust the U.S. Free On Board ("FOB") price by the difference between VAT paid and VAT refunded, as expressed as a percentage of the price.[345]
- Fufeng stated that it paid 17 percent VAT on its inputs and received a 13 percent VAT refund on its FOB price of the subject merchandise. This should result in adjusting the U.S. price downward by 4 percent, which is the difference between the VAT percentage paid and VAT percentage refunded.
- The Department should reject Fufeng's VAT calculation that is based on its total, company-wide VAT payments and refunds – regardless of whether they relate to subject merchandise. Previously, the Department has rejected similar "company-wide" irrecoverable VAT rate calculations.[346]
- The Department "does not examine the company's books and records for how they capture and account for all VAT incurred and refunded."[347]
- The Department has determined that "the PRC's VAT regime is product specific, with schedules that vary by industry and even across products within the same industry."[348] Therefore, applying a mixed irrecoverable VAT rate, calculated from all imports and exports violates 19 CFR 351.401(c) requiring price adjustments to be reasonably attributable to subject merchandise.
- Under the standard VAT methodology, the Department calculates the difference between the standard VAT rate in China on inputs and the refund rate upon export of subject merchandise. Then, based on standard practice, it reduces the U.S. price downward by a percentage equal to the irrecoverable VAT rate. The Department has stated that this is "the most straight forward, consistent, and verifiable method to make this adjustment."[349]
- The standard practice is necessary in this case, given Fufeng's admitted "time lag between the purchase of input{s} and the sales of subject merchandise," which impacts the proper VAT rate to be applied.[350]

Fufeng:

- Fufeng specifically demonstrated that it did not have any irrecoverable input VAT amounts during the POR, because the total input VAT amount it incurred for exports is

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[345] *See Methodological Change for Implementation of Section 772(c)(2)(B) of the Tariff Act of 1930, as Amended, In Certain Non-Market Economy Antidumping Proceedings*, 77 FR 36481 (June 19, 2012) ("*Methodological Change*"), at 3; *Garment Hangers from the PRC* and accompanying IDM, at "Value-Added Tax"; *Boltless Steel Shelving Units Prepackaged for Sale from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 80 FR 51779, (August 26, 2015) ("*Steel Shelving Units from the PRC*"), and accompanying IDM at Comment 15; *Diamond Sawblades and Part Thereof from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2011-2012*, 79 FR 35723, (June 24, 2014) ("*Diamond Sawblades from the PRC*"), and accompanying IDM at Comment 6; *Polyethylene Terephthalate Film, Sheet, and Strip from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final Determination of No Shipments; 2012-2013*, 80 FR 33241, (June 11, 2015) ("*PET Film from the PRC*"), and accompanying IDM at Comment 5.

[346] *See Garment Hangers from the PRC; Steel Shelving Units from the PRC; Diamond Sawblades from the PRC; PET Film from the PRC; see Methodological Change*.

[347] *See MLWF from the PRC*, and accompanying IDM at Comment 2.

[348] *See* 19 CFR 351.401(c).

[349] *See Methodological Change*; *see Garment Hangers from the PRC; see also Steel Shelving Units from the PRC; Diamond Sawblades from the PRC; PET Film from the PRC.*

[350] *See* Fufeng's Section C Response, at 40.

lower than its VAT refund amount. Thus, the record evidence in this review supports the Department's preliminary decision to make no VAT deduction for Fufeng.

- Moreover, the "standard" VAT practice Petitioner advocates using is inconsistent with the plain language of the statute.
- In accordance with Chinese law, Article 4.1 of the *Circular on VAT and Consumption Tax Policies on Exported Goods and Services,* calculating irrecoverable VAT by using the difference between the VAT payment and refund rates (17 percent and 13 percent) is not accurate.
- Furthermore, calculating irrecoverable VAT by simply using the difference between the 17 percent and 13 percent VAT rates is not accurate because the VAT refund (13 percent) is based on the FOB price of the exported subject merchandise while the input VAT (17 percent) payment is based on the purchase price of the inputs (raw materials).
- To demonstrate that there was no irrecoverable input VAT, Fufeng provided a calculation in which it determined the total amount of input VAT attributable to exports[351] and compared this amount to the VAT refund attributable to these exports based on the 13 percent refund rate (*i.e.*, VAT Refund – Export Sales Value multiplied by 13 percent). Fufeng's calculation shows that, during the POR, its VAT refund based upon the 13 percent refund rate for export sales exceeded the amount of VAT paid for inputs attributable to exported merchandise, demonstrating there was no irrecoverable input VAT on exports during the POR. Fufeng provided monthly VAT tax returns for the POR and reconciled the VAT calculation to these returns.

Department's Position: We agree with Petitioner that a 4 percent deduction should be made to the FOB price of Fufeng's U.S. sales for irrecoverable VAT. Fufeng has not demonstrated that the VAT refund received (13 percent) for export sales matched or exceeded the amount of VAT paid (17 percent) for inputs attributable to exported merchandise. Our analysis is consistent with our current VAT policy and our treatment of VAT in other recently completed NME cases.[352]

In 2012, the Department announced a change to the calculation of EP and CEP to account for un-refunded (herein "irrecoverable") VAT in certain NMEs, in accordance with section 772(c)(2)(B) of the Act.[353] In this announcement, the Department stated that when an NME government has imposed an export tax, duty, or other charge on subject merchandise, or on inputs used to produce subject merchandise, from which the respondent was not exempted, the Department will reduce the respondent's EP and CEP accordingly by the amount of the tax, duty or charge paid, but not rebated upon export.[354] Where the irrecoverable VAT is a fixed percentage of EP, the Department explained that the final step in arriving at a tax-neutral dumping comparison is to reduce the EP downward by this same percentage.[355]

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[351] Based on the ratio of export sales to total sales multiplied by the total input VAT paid during the POR, *i.e.*, Input VAT for export sales = Total Input VAT x Export Sales Value / (Export Sales Value + Domestic Sales Value).
[352] *See PET Film from the PRC*; *see also Diamond Sawblades from the PRC.*
[353] *See Methodological Change,* 77 FR 36481.
[354] *See Methodological Change,* 77 FR at 36482-83; *see also Chlorinated Isocyanurates from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2011-2012,* 79 FR 4875 (January 30, 2014) at Comment 5(A).
[355] *See Methodological Change,* 77 FR at 36483.

The Department has found that the most straightforward, consistent, and verifiable method to make this adjustment under section 772(c)(2)(B) of the Act is by relying on the standard formula provided under Chinese tax law and regulation.[356] In that respect, we note that the irrecoverable VAT formula for taxation purposes is solely a function of the rates under Chinese regulation and the respondent-specific export value of the merchandise. The input VAT that the Chinese government does not refund on export sales stands in contrast to domestic sales where there is no VAT expense. Thus, the irrecoverable VAT on export sales amounts to a tax, duty, or other charge imposed on exports. The irrecoverable VAT only arises through the fact that there were export sales.[357]

Section 351.401(c) of the Department's regulations requires that the Department rely on price adjustments that are "reasonably attributable to the subject merchandise." The PRC's VAT regime is product-specific, with VAT schedules that vary by industry and even across products within the same industry. As such, these are product-specific export taxes, duties, or other charges that are incurred on the exportation of subject merchandise. The Department's deduction of product-specific VAT from subject merchandise prices is a reasonable and accurate methodology, considering that VAT is a product-specific expense that is directly linked with the exportation of subject merchandise. Fufeng's 17 percent VAT paid on raw material inputs and only 13 percent refund rate on exports creates an irrecoverable VAT of 4 percent. Not adjusting for irrecoverable VAT would introduce distortions into the dumping margin calculation and would not result in a comparison of U.S. price with NV on a tax exclusive basis.[358] Thus, the Department will reduce Fufeng's U.S. sales prices by 4 percent for the final results of review.

Comment 16: Fufeng's Energy Allocations

Petitioner:

- There are two errors in Fufeng's energy allocations which should be corrected by the Department.
- First, in calculating the kWh of electricity produced by Neimenggu Fufeng and Xinjiang Fufeng using a metric ton of steam, Fufeng did not use the total quantity of electricity produced by the electricity-generating workshops, but used the total quantity of electricity produced by these workshops net of the electricity which was reintroduced into the electricity-generating workshops. This results in a distortion.
- While Fufeng claims that it mirrored the Department's calculation from the investigation in this proceeding, it did not. Therefore, the Department should adjust Fufeng's energy allocation to correct this error.
- Second, the total metric tons of steam used in Fufeng's actual production workshops, excluding its electricity-generating workshops, is the denominator to be used in allocating the FOPs of the electricity-generating workshops to subject merchandise. However, Fufeng incorrectly calculated the total quantity of steam related to all production

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[356] *See* Submission of Fufeng, "Section C Response for Neimenggu Fufeng Biotechnologies Co., Ltd. in the First Administrative Review of Antidumping Duty Order on Xanthan Gum from the People's Republic of China (A-570-985), dated November 13, 2014, at 38-39 and Exhibit C-4 (Interim Regulations of the People's Republic of China on Value-added Tax and Circular on VAT and Consumption Tax Policies on Exported Goods and Services).
[357] *See Methodological Change*, 77 FR at 36483.
[358] *Id.*

workshops by including steam consumed at the electricity-generating workshops. In the investigation in this proceeding, the Department excluded the steam consumed in the electricity-generating workshop from this calculation, because the intent was to allocate 100 percent of the electricity-generating workshop's FOPs to Fufeng's actual products, rather than allocating them back to the electricity-generating workshop. Because of this error, Fufeng significantly understated all of the electricity-generating workshops' FOPs.

Fufeng:

- Petitioner's proposed revisions to the energy allocation fail to provide a consistent treatment for energy consumed by the electricity-generating workshops. While Petitioner claims that the quantity of electricity consumed by the electricity-generating workshops must be included in Row 2 of the energy consumed to produce xanthan gum Excel spreadsheet (Row 2 shows the POR total electricity production, in kWh)[359] in order to compute total self-produced electricity, Petitioner omits this quantity of electricity from Row 27 in the Excel spreadsheet when it supposedly is computing "Total Electricity Output to all Production Workshops" and likewise omits it from Row 28 in the Excel spreadsheet computation of "Total Energy Output to all Production Workshops (Kwh)." The treatment of the energy consumed by the electricity-generating workshops in these two parts of the calculation must be uniform. If all of the energy consumed by the electricity-generating workshops is included at the initial stage of the calculation, it must likewise be included at the end of the calculation to determine total energy output.

Department's Position: We agree with Petitioner that Fufeng erred in its energy allocation calculations. We corrected these calculations for the final results of review.

First, Fufeng incorrectly reported the total quantity of electricity produced, net of the quantity of electricity reintroduced into the electricity-generating workshops, instead of reporting the total quantity of electricity produced by its electricity-generating workshops.[360] Not including the electricity consumed in the electricity-generating workshops distorts the electricity to steam ratio (*i.e.*, the kWh of electricity produced per metric ton of steam -- steam was used to produce electricity) for both the Neimenggu Fufeng and Xinjiang Fufeng factories (and the average for the two factories) because the electricity consumed in making the electricity was electricity produced using steam.

In the investigation in this proceeding, we divided the POI total electricity produced figure (inclusive of the electricity consumed at the electricity generating workshops) by the total steam consumed in the production of electricity, in metric tons, to yield a kWh of electricity per metric ton of steam consumed figure, for the factories.[361] Consistent with the investigation, we adjusted

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[359] *See* Neimenggu Fufeng's July 16, 2015, supplemental questionnaire response at Exhibit SSD-13, which is the energy consumed to produce xanthan gum Excel spreadsheet.

[360] *See* Submission from Fufeng, "Second Supplemental Sections A, C, and D Response for Neimenggu Fufeng Biotechnologies Co., Ltd. in the First Administrative Review of Antidumping Duty Order on Xanthan Gum from the People's Republic of China," dated July 16, 2015, at Exhibit SSD-13, Row 2 (POR Total Electricity Production (kWh), for the Energy consumed to produce xanthan gum calculations Excel sheet).

[361] *See* Final Determination Analysis Memorandum for Neimenggu Fufeng Biotechnologies Co., Ltd. (aka Inner Mongolia Fufeng Biotechnologies Co., Ltd.) and Shandong Fufeng Fermentation Co., Ltd., dated May 28, 2013, at 2, footnote 2, where we state that we divided the POI total steam consumed in the production of electricity, in metric

Fufeng's POR total electricity production, in kWh, to include the electricity consumed in the electricity-generating workshops.[362] We used the revised electricity-to-steam ratio to express the total quantity of energy (electricity and steam) consumed to produce a kilogram of xanthan gum in a common unit of measure (kWh) and then reallocated Fufeng's FOPs used in the energy-generation workshops to production workshops based on the total quantity of energy consumed in the production workshops.[363]

We disagree with Fufeng's contention that the electricity consumed by the electricity-generating workshops, which we have now included in the POR total electricity production figure in Row 2 of the energy consumed to produce xanthan gum Excel spreadsheet, should also be included in Rows 27 (POR electricity output to all production workshops, in kWh) and 28 (POR total energy output to all production workshops, in kWh) of the energy consumed to produce xanthan gum Excel spreadsheet. Consistent with the investigation in this proceeding, we are not including the electricity consumed in the electricity-generating workshops in the electricity figures for Rows 27 and 28, because we want to include only the electricity sent from the electricity-generating workshops to Fufeng's actual production workshops in our calculations, which does not include the electricity consumed at the electricity-generating workshops.

Second, Fufeng incorrectly included the steam consumed at the electricity-generating workshops when calculating the POR steam output for all production workshops.[364] Consistent with the investigation in this proceeding, we find it is appropriate to exclude the steam consumed in the electricity-generating workshops so that 100 percent of the electricity-generating workshop's FOPs are allocated to Fufeng's actual products (xanthan gum and non-subject merchandise), rather than to the electricity-generating workshop.[365] As noted above, this figure was then converted from metric tons to kWh in order to express the total quantity of energy (electricity and steam) consumed to produce a kilogram of xanthan gum in a common unit of measure (kWh).[366] This figure was then used to allocate Fufeng's FOPs used in the energy-generation workshops to production workshops.[367] For the final results of review, we reallocated Fufeng's electricity-generating workshop FOPs using the adjusted steam consumption, which excludes the steam consumed in the electricity-generating workshops.[368]

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tons, by the POI total electricity produced, which includes the electricity consumed at the electricity-generating workshops, to derive a ratio of a certain amount of kWh per metric ton of steam.

[362] *See* Submission from Fufeng, "Second Supplemental Sections A, C, and D Response for Neimenggu Fufeng Biotechnologies Co., Ltd. in the First Administrative Review of Antidumping Duty Order on Xanthan Gum from the People's Republic of China," dated July 16, 2015, at Exhibit SSD-13, Row 2 (POR Total Electricity Production (kWh), for the Energy consumed to produce xanthan gum calculations Excel sheet; *see* Submission of Fufeng, "Supplemental Section D Response for Neimenggu Fufeng Biotechnologies Co., Ltd. in the First Administrative Review of Antidumping Duty Order on Xanthan Gum from the People's Republic of China," dated March 9, 2015, at Exhibit SD-17.

[363] *See* Fufeng Final Analysis Memorandum, at Exhibits 2a and 2b.

[364] *See* Submission of Fufeng, "Second Supplemental Sections A, C, and D Response for Neimenggu Fufeng Biotechnologies Co., Ltd. in the First Administrative Review of Antidumping Duty Order on Xanthan Gum from the People's Republic of China (A-570-985)," dated July 16, 2015, at Exhibit SSD-13.

[365] *See* Fufeng Final Analysis Memorandum, at Attachment 3.

[366] *Id.*, at Attachment 2.

[367] *Id.*, at Attachments 1 and 2.

[368] *Id.*, at Exhibit 2b.

Comment 17: Movement Expense for Fufeng's Raw Xanthan Gum

Fufeng reported that it shipped raw xanthan gum from its Neimenggu Fufeng and Xinjiang Fufeng factories to its Shandong Fufeng factory, where the raw xanthan gum was milled into finished xanthan gum and packed for sale. In the *Preliminary Results*, the Department included this movement cost in NV, because it is a cost of production.

Fufeng:

- The cost to ship raw xanthan gum to Shandong Fufeng's facilities for milling should be treated as either a sales expense or as an overhead expense, but not as a cost of production. In the investigation in this proceeding, the Department deducted this same movement cost from the U.S. sales price, treating it as a sales expense associated with exports made by Shandong Fufeng.
- In this administrative review, the Department is treating this same movement expense as a cost of production, instead of a selling expense. The Department has not provided an adequate explanation as to why this movement cost should be treated differently in this review than in the investigation.[369] The courts have stated that the Department is not permitted to change a prior practice if the respondent has relied upon that prior practice and has been provided insufficient notice of the change in practice.[370]
- Based on the Department's prior treatment of these movement expenses as selling expenses of Shandong Fufeng, Fufeng changed its sales and distribution practices, including pricing levels for its U.S. sales, and stopped selling xanthan gum to the United States during the POR from the Shandong Fufeng facility.
- The movement costs for shipping raw xanthan gum from Neimenggu Fufeng and Xinjiang Fufeng to Shandong Fufeng should not be added to NV because the freight costs for the inputs used to make the raw xanthan gum have already been included in NV.
- In another case, the Department treated such movement costs as overhead costs (and determined that these costs were included in overhead expenses in the surrogate financial statements) rather than material costs, stating that if a raw material input is transferred between two business units of a company, additional overhead costs may be incurred but not additional raw material movement costs.[371]
- Regardless of whether or not there are any indications that the overhead costs in the surrogate financial statements include such intra-facility movement costs, the Department's practice has been to recognize that financial statements do not have to replicate the exact production experience of the respondent.[372]

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[369] *See SKF USA Inc. v. United States*, 630 F.3d 1365, 1373 (Fed. Cir. 2011).
[370] *See Arch Chem., Inc. v. United States*, 33 CIT 95 4, 963-65 (CIT 2009) and *Fujian Mach. & Equip. Imp. & Exp. Corp. v. United States*, 178 F. Supp. 2d 1305, 1327 (CIT 2001).
[371] *See Hebei Metals & Minerals Imp. & Exp. Corp. v. United States*, 29 CIT 288, 305 (2005) ("*Hebei Metals*"), where the Department identified certain costs in the surrogate financial statement as being related to inter-facility transfers of materials and removed these costs from the materials-labor-energy denominator but continued to include them in the numerator as an overhead expense.
[372] *See Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1377 (Fed. Cir. 1999); *Solar Cells from the PRC*, and accompanying IDM at Comment 37; and *Certain Activated Carbon from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2012-2013*, 79 FR 70163 (November 25, 2014), and accompanying IDM at Comment 6.

- Alternatively, if the Department views the raw xanthan gum movement costs as sales expenses, as it did in the investigation in this proceeding, rather than as material costs, it should not deduct these expenses from the reported U.S. sales prices because Shandong Fufeng did not have any U.S. sales of xanthan gum during the POR, and such expenses would not be deducted from the prices of the U.S. sales of Fufeng's other facilities.
- Fufeng treats these movement costs as operations or selling expenses (not production costs), because the raw xanthan gum shipped to Shandong Fufeng is already subject merchandise.
- If normal value includes the cost to transport raw xanthan gum from other Fufeng facilities to the Shandong Fufeng factory it causes distortion and double counting because it incorrectly imputes this cost to the xanthan gum sold to the United States. All xanthan gum sold to the United States was produced at, and exported from, the Neimenggu Fufeng factory. Moreover, while the Department is attributing to U.S. sales the costs to ship raw xanthan gum to the Shandong Fufeng factory, it is still deducting from U.S. sales prices the costs to ship the xanthan gum from the Neimenggu Fufeng factory to the PRC port of exportation rather than the lower costs (based on a shorter distance) to ship xanthan gum from the Shandong Fufeng factory to the port of exportation.

Petitioner:

- Fufeng mischaracterizes the Department's decision in the investigation in this proceeding as dealing with movement expenses related to the final processing of like product or subject merchandise. Instead, in the investigation, the Department deducted the inland freight expenses from the U.S. price for xanthan gum shipped from Neimenggu Fufeng to Shandong Fufeng and then sold by Shandong Fufeng to the United States.
- In the *Preliminary Results*, the Department captured the movement expenses associated with the production of like product, as the facts in this administrative review are different from the facts in the investigation. In this administrative review, Neimenggu Fufeng sold xanthan gum to the United States, but in the investigation, Shandong Fufeng and Neimenggu Fufeng sold xanthan gum to the United States.
- Policy Bulletin 10.3 requires respondents to report FOPs from total production of the merchandise under review, regardless of the location of the production facility.[373] Hence, the Department should continue to treat the movement costs associated with transfers between affiliated producers, which have been collapsed, as direct production costs when calculating FOPs in order to prevent any shifting or transferring of costs and sales from company to company.
- The Department's practice is to capture movement expenses associated with transporting intermediary inputs as a direct material cost.[374] Fufeng's reliance on *Hebei Metals* is misplaced because it dealt with the proper classification of transportation costs in a consolidated financial statement that was being used as a source for calculating surrogate financial ratios and these transportation costs were for raw materials transferred between

[373] *See* Import Administration Policy Bulletin 10.3, *Factor of Production Reporting Requirements for Non-Market Companies with Multiple Facilities and/or Production Processes/Lines* (November 2, 2010) (available at http://enforcement.trade.gov/policy/PB-10.3.pdf) ("Policy Bulletin 10.3")).
[374] *See Small Diameter Graphite Electrodes from the People's Republic of China: Final Results of the First Administrative Review of the Antidumping Duty Order and Final Rescission of the Administrative Review, in Part*, 76 FR 56397 (September 13, 2011), and accompanying IDM at Comment 23.

> two business units of a company. In the instant case, the issue is how to account for movement expenses for transporting raw xanthan gum between three affiliated producers that have been collapsed but are actually separate companies.

Department's Position: We continue to include the movement costs for transporting raw xanthan gum to the Shandong Fufeng factory for milling in NV. These movement costs are properly treated as a cost of production and included in NV because the Department's practice is to include the cost of all FOPs utilized by all of the respondent's facilities in producing the merchandise under consideration in NV, including any transportation costs.[375] Because the Shandong Fufeng factory milled raw xanthan gum into finished xanthan gum during the POR, the costs incurred to transport the raw xanthan gum to the Shandong Fufeng factory for milling need to be included in NV, along with the cost of the FOPs consumed in milling the raw xanthan gum into finished xanthan gum at the Shandong Fufeng factory. The Department's questionnaire required Fufeng to report the consumption of all of the FOPs, on a weighted-average basis, from each factory which produced the merchandise under consideration for those products (designated by control numbers) which were sold in the United States during the POR.[376] Fufeng properly reported consumption quantities for the FOPs of each of its three factories which produced xanthan gum, including Shandong Fufeng, and also provided an overall weighted-average consumption quantity for each FOP, based on the FOPs of these three factories, which were used in calculating Fufeng's NV for each control number.[377] Therefore, consistent with Department practice to include in NV the costs of all of the FOPs used to produce the merchandise under consideration for the types of products (CONNUMs) which were sold in the United States during the POR, we are including the costs to transport raw xanthan gum in order to make finished xanthan gum in NV.

We agree with Fufeng that the shipping costs for the material inputs used to produce raw xanthan gum are already included in NV. However, the shipping costs at issue were not incurred to ship material inputs used to produce raw xanthan gum but are costs incurred to ship the raw xanthan gum for further processing (*i.e.*, milling) into finished xanthan gum. Thus, these shipping costs were not included in the cost of material inputs used to produce raw xanthan gum. Because Fufeng sold finished xanthan gum to the United States, and NV should reflect all of the costs associated with producing the merchandise under consideration (*i.e.* finished xanthan gum) the costs incurred to ship the raw xanthan gum from the Neimenggu Fufeng and Xinjiang Fufeng factories to Shandong Fufeng for milling should also be included in NV.

Fufeng cites *Hebei Metals* as support for treating these shipping costs as overhead costs, instead of material costs. However, the issue in *Hebei Metals* involved transportation of raw materials between two business units of a company while, in the instant case, we are accounting for expenses to transport raw xanthan gum among three affiliated producers which have been collapsed, but are actually three separate companies.

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[375] *See* Fufeng questionnaire, dated September 25, 2014, at D-7, where the Department instructs Fufeng to report the distance and mode of transportation from the supplier(s) of the material to the factory for each raw material input.
[376] *Id.*, at D-1-2.
[377] *See* Submission from Fufeng, "Section D Response for Neimenggu Fufeng Biotechnologies Co., Ltd. in the First Administrative Review of Antidumping Duty Order on Xanthan Gum from the People's Republic of China (A-570-985)," dated November 20, 2014, at Exhibit D-7.

We disagree with Fufeng's argument that the Department should treat these movement costs as a sales expense, as it did in the investigation in this proceeding. The facts in this segment of the proceeding are different from those in the investigation. During the POR, Shandong Fufeng did not sell subject merchandise to the United States, as it did in the investigation, when the Department treated the movement costs in question as sales expenses. Thus, the Department is not facing the same alternatives as those presented by the facts in the investigation. Also, the issue of how to treat the movement costs of raw xanthan gum from Xinjiang Fufeng and Neimenggu Fufeng's factories to Shandong Fufeng's factory was not an issue in the investigation, so it was not before the Department in the final determination in that case. Therefore, the facts are different between the investigation and this administrative review, so the Department is not being inconsistent regarding its treatment of these movement costs/expenses.

Lastly, the Department is not double counting freight distances by including these movement costs in NV, regardless of whether Shandong Fufeng had U.S. sales during the POR. As explained above, including these movement costs from Neimenggu Fufeng and Xinjiang Fufeng's factories to Shandong Fufeng's factory in NV is consistent with the Department's practice to include in NV all transportation costs associated with producing finished xanthan gum, which is the product sold in the United States.

Comment 18: Valuation of Deosen's Compressed Air

Deosen:

- The Department should decline to value Deosen Zibo's compressed air input because no reliable SV exists on the record.
- Deosen Zibo's compressed air is a by-product of its electricity production in a coal-powered plant. The compressed air SVs on the record are based on compressed air produced using an electric-powered air compressor, so they are not specific to Deosen Zibo's production.
- If the Department continues to value Deosen Zibo's compressed air using an inaccurate SV based on compressed air produced using an electric-powered air compressor, it should not use the University of Kassel SV that it used in the *Preliminary Results,* because this is a theoretical, rather than an actual value, and is aberrationally high.
- If the Department values compressed air with an SV based on using an electric-powered air compressor, it should do so using accurate conversions for the usage and value of electricity used to produce compressed air.

Petitioner:

- The Thai steel industry SV information is the only SV based on air compression systems in place in Thailand during the POR. This independent study of the Thai steel industry found that these air compression systems required 0.168 kilowatts per hour ("kWh") of electricity to produce one cubic meter of compressed air (this information would allow the Department to value compressed air based on the quantity and value of electricity required to generated the compressed air).
- Deosen has not substantiated its claim that its air compression system is more efficient than the air compression systems in place in the Thai steel industry. As the best

information available, the Department should use the efficiency ratio of 0.168 kWh of electricity per-cubic meter of compressed air to value compressed air.

- The Department should also use the correct SV for electricity, 3.70 baht/kWh, in the calculation of the compressed air SV.

Department's Position: In the *Preliminary Results*, we relied on a compressed air SV from a publication of the University of Kassel (Germany).[378] Although this SV was not from any of the countries identified as potential surrogate countries (*i.e.*, Bulgaria, Ecuador, Romania, South Africa, Thailand, or Ukraine), it was, nevertheless, the only SV on the record that was specific to the compressed air input and, thus, was the best available information on the record with which to value compressed air.[379]

Following the *Preliminary Results*, we provided interested parties an opportunity to place on the record additional factual information with which to value compressed air.[380] On August 14, 2015, Petitioner and Deosen timely submitted factual information with which to value compressed air.[381]

The additional compressed air SV information submitted by Deosen includes information on compressed air usage and costs from the website of Silvent AB, a Swedish company that offers fittings and nozzles for industrial compressed air machinery, which are designed to conserve energy, reduce noise, and increase safety.[382] The Silvent AB information identifies the electricity (in kWh) needed to produce one cubic foot of compressed air.[383] Deosen's compressed air SV submission also contains a U.S. Department of Energy Publication, "Improving Steam System Performance: A Sourcebook for Industry," a metric conversion chart, and Deosen's calculation of a compressed air SV.[384] Deosen's calculation uses the SV for electricity to arrive at a compressed air SV in Thai baht per cubic meter.[385]

The additional compressed air SV information submitted by Petitioner includes the publication, "Energy Efficient Technologies for Thailand's Steel Industry: Technology Review and Walk-Through Energy Audit," published by the German Federal Ministry for Economic Affairs and

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[378] *See* Preliminary Surrogate Value Memorandum at 4 and Attachment 6.
[379] *See Preliminary Results* and accompanying Preliminary Decision Memorandum at 19-20. A Thai GTA import value for oxygen is also on the record of this review, but we chose not to use this SV the in the preliminary results, having previously found that GTA data does not typically cover imports of air conveyed by pipeline and is, therefore, not representative of costs for piped compressed air. *See Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Critical Circumstances, in Part*, 75 FR 57449 (September 21, 2010); *see also Xanthan Gum Final Determination* and accompanying IDM at Comment 14.
[380] *See* Letter to All Interested Parties, "2013-2014 Antidumping Duty Administrative Review of Xanthan Gum from the People's Republic of China: Surrogate Value Information to Value Compressed Air," dated August 7, 2015.
[381] *See* Submission from Petitioner, "Xanthan Gum from the People's Republic of China: Petitioner's Surrogate Value Submission for Compressed Air," dated August 14, 2015 ("Petitioner August 14, 2015, Surrogate Value Submission"); *see also* Submission from Deosen, "Xanthan Gum from the People's Republic of China: Surrogate Value Information Regarding Compressed Air," dated August 14, 2015 ("Deosen August 14, 2015, Surrogate Value Submission").
[382] *See* Deosen August 14, 2015 Surrogate Value Submission at Exhibit 1.
[383] *Id.*
[384] *Id.* at Exhibits 2-4.
[385] *Id.* at Exhibit 4.

Energy. The publication purports to promote renewable energy and energy efficiency technology in Thailand, based on an energy audit of a Thai steel factory.[386] Petitioner identifies the electricity (in kWh) needed to produce one cubic meter of compressed air.

The Department's practice when selecting the best available information for valuing FOPs, in accordance with section 773(c)(1) of the Act, is to select, to the extent practicable, SVs which are publicly available, product-specific, representative of broad market average prices, tax-exclusive, and contemporaneous with the period under consideration.[387] The Department's preference is to satisfy the breadth of these selection factors,[388] and to value all FOPs in the primary surrogate country.[389] The University of Kassel publication, the Silvent AB website, and the Thai Steel Industry publication are equal in terms of public availability and product specificity. While the available SVs on the record of this review relate to compressed air arguably produced in a different way than Deosen's compressed air and, thus, Deosen argues they are not specific to its compressed air, they, nonetheless, relate to the general value of compressed air. The CIT has stated that "{w}here Commerce is faced with the choice of selecting from among imperfect alternatives, it has the discretion to select the best available information for a surrogate value so long as its decision is reasonable."[390] With respect to the other criteria used in selecting SVs, it is important to note that, while the University of Kassel publication presents an average price for compressed air in Euros per cubic meter, the Silvent AB website and Thai Steel Industry publication each presents the kWh of electricity needed to produce one cubic foot or cubic meter, respectively, of compressed air, to which the Department would then need to apply the SV for electricity. As a result, we find that the other SV criteria (*i.e.*, representative of broad market average prices, tax-exclusive, and contemporaneous) are only applicable to the University of Kassel publication, because it is the only source which provides a price for compressed air, rather than a conversion to kWh of electricity. Applying these criteria to the University of Kassel publication, we find that it does not indicate whether the data are tax-exclusive or representative of broad market average prices. The University of Kassel publication also is dated 2011, which is not contemporaneous with the POR.[391] However, as noted above, the Department prefers to value all FOPs in the primary surrogate country.[392] The Thai Steel Industry publication is the only compressed air SV source with data from the primary surrogate country in this administrative review (*i.e.*, Thailand).[393] Therefore, we find that the Thai Steel Industry publication best meets our SV criteria and, accordingly, is the best available information with which to value Deosen's compressed air input. We are able to use the data in this publication to convert the reported cubic meters of compressed air into kWh of

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[386] *See* Petitioner August 14, 2015 Surrogate Value Submission at Exhibit 1.
[387] *See Final Determination of Sales at Less Than Fair Value: Certain Artist Canvas from the People's Republic of China*, 71 FR 16116 (March 30, 2006) ("*Artist Canvas from the PRC*"), and accompanying IDM at Comment 2.
[388] *Id.*
[389] *See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China: Final Determination of Sales at Less Than Fair Value, and Affirmative Final Determination of Critical Circumstances, in Part*, 77 FR 63791 (October 17, 2012) ("*Solar Cells from China*"), and accompanying IDM at Comment 9.
[390] *See Catfish Farmers of America v. United States*, 641 F. Supp. 2d 1362, 1377 (CIT 2009).
[391] The Silvent AB website information is dated in 2013, and the Thai Steel Industry publication is dated in January 2015.
[392] *See Solar Cells from China* at Comment 9.
[393] While the document was published by the German Federal Ministry for Economic Affairs and Energy, it contains information related to energy usage in Thailand.

electricity. Thus, if we had calculated a dumping margin for Deosen in these final results of review, we find it would have been appropriate to value the resulting figure with the SV for electricity applied in these final results of review.[394]

We find Deosen's argument that we should decline to value one of its inputs unpersuasive. The Department's practice, as stated above, is to select SVs which meet the Department's SV criteria, including product-specificity, *to the extent possible*. We note that the Department has, in certain circumstances, declined to value select inputs where those inputs were reportedly consumed in very small amounts and SVs for the inputs were not available.[395] However, in this case, Deosen uses significant quantities of compressed air in the production of xanthan gum,[396] and compressed air SV information from multiple sources is available on the record of this administrative review.[397] Pursuant to our statutory directive, we find that if we had calculated Deosen's dumping margin, it would have been more appropriate to value this input than to decline to value it. As a result of the above analysis, if the Department had calculated a dumping margin for Deosen in these final results of review, we find that it would have been reasonable to value Deosen's compressed air input with the best available SV data on the record despite their imperfection.

While we have addressed this comment, we note that the issue raised in the comment is moot because we are not calculating a dumping margin for Deosen in these final results of review; rather we are assigning Deosen a dumping margin based on total AFA (*see* Comment 1).

Comment 19: Valuation of Deosen's U.S. Inland Truck Freight

Petitioner:

- The Department should calculate Deosen's U.S. inland truck freight costs using a Thai SV instead of a U.S. rate. The statute and Policy Bulletin 04.1 require the Department to select a surrogate country based on established criteria, and to select SVs from that country.
- The U.S. inland truck freight rate selected for the *Preliminary Results* is inappropriate because the United States does not meet the established criteria for surrogate countries. The Department selected Thailand as the surrogate country, so it should select a Thai SV to value Deosen's U.S. inland truck freight costs.

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[394] *See* Comment 10 for a discussion of the electricity SV.

[395] *See Hand Trucks and Certain Parts Thereof from the People's Republic of China: Final Results of Administrative Review and Final Results of New Shipper Review*, 72 FR 27287 (May 15, 2007), and accompanying IDM at Comment 15.

[396] *See* Submission from Deosen, "Xanthan Gum from the People's Republic of China: Response to the Department's Section D Supplemental Questionnaire," dated June 3, 2015, at Exhibit SD-1.

[397] *See* Deosen August 14, 2015 Surrogate Value Submission at Exhibits 1-4; Petitioner August 14, 2015 Surrogate Value Submission at Exhibit 1; and Submission from Petitioner, "First Administrative Review of Xanthan Gum from the People's Republic of China: Petitioner's Surrogate Value Submission," dated July 1, 2015 at Exhibits 12-13. This is in contrast to *Xanthan Gum Final Determination*, in which the Department declined to value compressed air because no usable SVs existed on the record; *see Xanthan Gum Final Determination* and accompanying IDM at Comment 14.

Deosen:

- Petitioner provided no record evidence or precedent to support its argument that the Thai truck freight SV is superior to the U.S. truck freight rate for purposes of valuing Deosen's U.S. inland freight costs.
- The U.S. truck freight rate on the record is the most reliable source with which to value U.S. inland truck freight. The U.S. truck freight rate is specific to weight and distance, and is the only source of information on the record that allows the Department to calculate the SV on a per-kilogram, per-kilometer basis without resorting to less reliable assumptions regarding weight, distance, or cost. Additionally, the U.S. truck freight rate is more specific than Petitioner's proposed Thai truck freight SV because it relates to a cost incurred in the United States.
- The Department often uses non-surrogate country values to calculate expenses that are incurred outside of the NME country, including international freight, marine insurance, and market economy ("ME") inputs. Furthermore, the U.S. truck freight rate was placed on the record of this review by Petitioner itself.

Department's Position: We agree with Petitioner, and believe that if we had calculated a dumping margin for Deosen in these final results of review, it would have been appropriate to value Deosen's U.S. inland truck freight using a Thai freight SV. In the *Preliminary Results*, we noted that for certain sales, Deosen reported that its NME carrier which provided international freight also delivered the merchandise within the United States.[398] Thus, we valued the U.S. inland freight provided through this carrier using a surrogate truck freight rate. We used a U.S. rate.[399]

While the Department has previously used surrogates from outside the surrogate country to value certain expenses occurring outside the NME country (*e.g.*, international ocean freight and marine insurance in the *Xanthan Gum Final Determination* and the preliminary results of this administrative review;[400] U.S. inland freight in *Glycine 2005-2006*[401]), when recently faced with a similar situation in *MLWF 2011-2012*, the Department found that it was most appropriate to use an SV from the primary surrogate country to value inland truck freight that occurred in the United States but that was provided by an NME carrier.[402] In *MLWF 2011-2012*, the Department stated that the respondent "not only paid for the truck freight in an NME currency, but also negotiated the truck freight charges with an entity located in China. Therefore, even though the transportation occurred in the United States, we continue to find that it is appropriate to value the

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[398] *See* Memorandum to the File, "Preliminary Results Analysis Memorandum for Deosen Biochemical Ltd./Deosen Biochemical (Ordos) Ltd.," dated July 31, 2015, at 3-4; *see also* Deosen's submission, "Xanthan Gum from the People's Republic of China: Response to the Department's Sections C and D Supplemental Questionnaire," dated July 1, 2015, at 4-5.

[399] *Id.*

[400] *See Xanthan Gum Preliminary Determination*, and accompanying Preliminary Decision Memorandum at 16, unchanged in *Xanthan Gum Final Determination* ; *Preliminary Results*, and accompanying Preliminary Decision Memorandum at 21.

[401] *See Glycine from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final Rescission, in Part*, 72 FR 58809 (October 17, 2007) ("*Glycine 2005-2006*"), and accompanying IDM at Comment 4, citing *Synthetic Indigo from the People's Republic of China; Notice of Final Determination of Sales at Less Than Fair Value*, 65 FR 25706 (May 3, 2000), and accompanying IDM at Comment 7.

[402] *See MLWF 2011-2012* and accompanying IDM at Comment 23.

truck freight using the Philippine SV." Similarly here, we determine that for purposes of selecting an SV for freight provided by an NME provider or paid for in NME currency, it is more accurate and appropriate to use a SV from the primary surrogate country (or, where applicable, use a SV from another country on the surrogate country list) than to use a SV from a country which is not at the same level of economic development (*i.e.*, United States) as China (even if the U.S. truck freight value on the record is specific to weight and distance).

The Department's practice when selecting the best available information for valuing FOPs in accordance with section 773(c)(1) of the Act is to select, to the extent practicable, SVs which are publicly available, product-specific, representative of broad market average prices, tax-exclusive, and contemporaneous with the period under consideration.[403] In addition to satisfying the breadth of these aforementioned selection factors,[404] it is the Department's regulatory preference to value all FOPs in the primary surrogate country.[405] Courts have interpreted the Act and the Department's regulations as providing the Department with discretion in selecting the most appropriate SVs.[406]

In addition to reconsidering whether it is more appropriate to value U.S. inland truck freight with U.S. or Thai data, we also evaluated the Thai inland truck freight SV source in terms of the criteria provided in section 773(c)(1) of the Act. While the Thai truck value is not specific to weight and distance, it is publicly available, representative of broad market average prices, tax-exclusive, and, unlike the U.S. information, contemporaneous with the POR (the World Bank's "Doing Business 2015: Thailand" publication contains data from 2013-2014, which overlaps the POR).[407]

Based on the fact that Deosen reported that its U.S. inland truck freight was provided by its NME international freight carrier and paid for in NME currency, along with the fact that the Thai truck freight SV information on the record is contemporaneous with the POR and otherwise meets the majority of our SV selection criteria, we find that if the Department had calculated a dumping margin for Deosen in these final results of review, it would have been more appropriate in this case to value Deosen's U.S. inland truck freight with the Thai truck freight SV.

While we have addressed this comment, we note that the issue raised in the comment is moot because we are not calculating a dumping margin for Deosen in these final results of review; rather we are assigning Deosen a dumping margin based on total AFA (*see* Comment 1).

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[403] *See Artist Canvas from the PRC,* and accompanying IDM at Comment 2.
[404] *Id.*
[405] *See Clearon Corp. v. United States*, 2014 Ct. Intl. Trade LEXIS 88 (Ct. Int'l Trade July 24, 2014).
[406] *See Shakeproof*, 268 F.3d 1376, 1381.
[407] *See* Submission from Petitioner, "First Administrative Review of Xanthan Gum from the People's Republic of China: Petitioner's Surrogate Value Submission," dated July 1, 2015 ("Petitioner July 1, 2015 Surrogate Value Submission"), at Exhibit 17; *see also* Petitioner February 19, 2015 Surrogate Value Submission at Exhibits 7-8.

Comment 20: Alleged Calculation Errors for Deosen

A. Marine Insurance

Deosen:

- The Department incorrectly calculated marine insurance expense based on the gross unit price of Deosen USA's CEP sales to unaffiliated customers in the United States, rather than calculating marine insurance expense based on the value of the merchandise shipped from the PRC to the United States. The Department should correct this error for the final results of review.

No parties submitted rebuttal comments.

Department's Position: We agree that if we had calculated a dumping margin for Deosen in the final results of this review, it would have been appropriate to apply the surrogate marine insurance rate to the entered value of the shipment (where the entered value was reported), rather than to the gross unit price of Deosen's CEP sales to unaffiliated U.S. customers. The marine insurance surrogate value is a rate expressed as a percentage of the value of the shipment.[408] Because we have previously found that the entered value of the shipment better represents the "value of the shipment" for purposes of valuing marine insurance,[409] we find it would have been appropriate, if a dumping margin had been calculated for Deosen, to multiply the surrogate marine insurance rate by the reported entered value of the merchandise, where possible, to calculate marine insurance expenses for U.S. sales of subject merchandise. For certain sales, for which Deosen reported no entered value, we find that if we had calculated a dumping margin for Deosen in the final results of this review, it would have been appropriate to multiply the marine insurance rate by the gross unit sales price to calculate marine insurance expenses for the sale, as this is the best information available.

While we have addressed this comment, we note that the issue raised in the comment is moot because we are not calculating a dumping margin for Deosen in these final results of review; rather we are assigning Deosen a dumping margin based on total AFA (*see* Comment 1).

B. AHA's Sales Premium

Deosen:

- The Department's methodology to account for the sales premium that Deosen paid to AHA on certain sales overstated the amount of the premium and should be corrected for the final results of review.
- The Department calculated the sales premium based on the sales price that Deosen USA charged the final customer, when the sales premium actually reflects a percentage of the sales price (in Chinese renminbi ("RMB")) that Deosen charged to AHA (in China).
- Because the sales premium is basically a commission paid to AHA, the Department should follow its normal practice with respect to commissions and deduct the RMB

[408] *See* Preliminary Surrogate Value Memorandum at 6.
[409] *See Solar Cells from China* at Comment 21.

premium, after converting it into a U.S. dollar amount, from the gross unit U.S. sales price, along with other typical selling expense deductions.

Petitioner:

- The Department does not use NME prices to calculate any part of NV because internal prices in NME countries are not market-based and are, thus, unreliable for use in antidumping proceedings. Thus, the Department should not rely on a premium that Deosen paid to AHA on certain sales expressed in U.S. dollars.
- As the best information available, the Department should continue to determine the premium by multiplying the premium rate by the price between Deosen USA and the final US customer, as it did in the *Preliminary Results*.

Department's Position: We find that if we had calculated a dumping margin for Deosen in the final results of this review it would not have been appropriate to make a circumstance of sale adjustment for the sales premium. Because this is a RMB transaction in the PRC, which is a NME country, the Department's practice is to not make circumstance of sale adjustments because the off-setting adjustments to NV are not normally possible.[410] In an NME case, any sales expenses, such as commissions, are already accounted for in the selling, general and administrative ("SG&A") expenses reflected in the SG&A ratio calculated using surrogate financial statements. Because we find that if we had calculated a dumping margin for Deosen in the final results of this review, it would not have been appropriate to make this adjustment, we have not addressed the issue of whether to convert the RMB figure to U.S. dollars or whether the premium is overstated.

While we have addressed this comment, we note that the issue raised in the comment is moot because we are not calculating a dumping margin for Deosen in these final results of review; rather we are assigning Deosen a dumping margin based on total AFA (*see* Comment 1).

C. Inland Freight

Petitioner:

- The Department inadvertently omitted the field INLFWCU from the calculation of international movement expenses in the preliminary margin program. For the final results of review, the Department should correct this error.

No parties submitted rebuttal comments.

Department's Position: We agree with Petitioner that we should have included the field INLFWCU in Deosen's preliminary margin program. However, this issue is moot because we are not calculating a dumping margin for Deosen in these final results of review; rather we are assigning Deosen a dumping margin based on total AFA (*see* Comment 1).

[410] *See Warmwater Shrimp AR4 Final Results* and accompanying IDM at Comment 10.

D. Coal Consumption

Petitioner:

- Deosen reported its coal consumption in metric tons, but the Department's preliminary margin program applied a truck freight SV on a per-kilogram basis to coal consumption. For the final results of review, the Department should multiply the truck freight SV by 1,000 kilograms per metric ton to correct this error.

No parties submitted rebuttal comments.

Department's Position: We agree with Petitioner that in *Preliminary Results*, we should have calculated Deosen's coal input using a truck freight SV on a per-metric-ton basis. However, this issue is moot because we are not calculating a dumping margin for Deosen in these final results of review; rather we are assigning Deosen a dumping margin based on total AFA (*see* Comment 1).

RECOMMENDATION

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

☒ ☐

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Agree Disagree

2/13/2017

X Ronald K. Lorentzen

Signed by: RONALD LORENTZEN