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February 6, 2018

MEMORANDUM TO: Gary Taverman
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations,
performing the non-exclusive functions and duties of the
Assistant Secretary for Enforcement and Compliance

FROM: James Maeder
Associate Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations
performing the duties of 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 Third Antidumping Duty Administrative Review

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SUMMARY

The Department of Commerce (Commerce) analyzed the comments submitted by the petitioners,[1] mandatory respondents,[2] and certain separate rate companies[3] in this administrative review of the antidumping duty (AD) order on xanthan gum from the People's Republic of China (China). Following the *Preliminary Results*[4] and based on the analysis of the comments received, we made one change to one of the two mandatory respondents' margin calculations for

[1] The petitioners are CP Kelco U.S., Inc. (CP Kelco) and Archer Daniels Midland Company (ADM). CP Kelco filed case and rebuttal briefs, the latter also on behalf of CP Kelco (Shandong) Biological Company Limited; ADM submitted a rebuttal brief.

[2] The mandatory respondents in this administrative review are Deosen and Fufeng. Deosen refers to the single entity which includes Deosen Biochemical Ltd. and Deosen Biochemical (Ordos) Ltd. (collectively Deosen). Fufeng refers to the single entity which includes Neimenggu Fufeng Biotechnologies Co., Ltd. (Neimenggu Fufeng), Shandong Fufeng Fermentation Co., Ltd. (Shandong Fufeng), and Xinjiang Fufeng Biotechnologies Co., Ltd. (Xinjiang Fufeng) (collectively Fufeng).

[3] The separate rate companies in this administrative review are (1) CP Kelco (Shandong) Biological Company Limited (CP Kelco Shandong); (2) Jianlong Biotechnology Co., Ltd. (also known as Inner Mongolia Jianlong Biochemical Co., Ltd.) (Jianlong); (3) Meihua Group International Trading (Hong Kong) Limited, Xinjiang Meihua Amino Acid Co., Ltd., and Langfang Meihua Bio-Technology Co., Ltd. (collectively "Meihua"); and (4) Shanghai Smart Chemicals Co., Ltd. (Shanghai Smart).

[4] *See Xanthan Gum from the People's Republic of China: Preliminary Results of the Antidumping Duty Administrative Review and Preliminary Determination of No Shipments; 2015-2016*, 82 FR 36746 (August 7, 2017) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum.

the final results. We recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum. Below is the list of the issues in this administrative review for which we received comments from interested parties:

Comment 1: Separate Rate Status for Jianlong
Comment 2: Separate Rate Status for Meihua
Comment 3: Application of Partial Adverse Facts Available to Deosen
Comment 4: Rate Assignment for Meihua Based on Its Voluntary Respondent Status Request
Comment 5: Rate Assignment for Separate Rate Applicants
Comment 6: Clerical Error Regarding Fufeng's U.S. Packing Expenses

BACKGROUND

On August 7, 2017, Commerce published the *Preliminary Results* of this administrative review. On August 29, 2017, Deosen requested that Commerce conduct a public hearing.[5] On September 8, 2017, CP Kelco, Deosen, Fufeng, A.H.A. International Co., Ltd. (AHA), and Meihua submitted case briefs.[6] On September 18, 2017, CP Kelco, ADM, Jianlong, and Meihua submitted rebuttal briefs.[7, 8] On January 8, 2018, Deosen withdrew its request for a hearing.[9] On November 3, 2017, Commerce postponed the final results until February 5, 2018.[10] Commerce exercised its discretion to toll deadlines affected by the closure of the Federal Government from

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[5] *See* Deosen's letter, "Administrative Review of Antidumping Order on Xanthan Gum from the People's Republic of China: Hearing Request," dated August 29, 2017.
[6] *See* "Xanthan Gum from the People's Republic of China; Petitioner's Case Brief," dated September 8, 2017 (CP Kelco's Case Brief); AHA's and Deosen's consolidated Case Brief, "Administrative Review of Antidumping Order on Xanthan Gum from the People's Republic of China: Case Brief," dated September 8, 2017 (Deosen's Case Brief); "Neimenggu Fufeng Biotechnologies Co., Ltd. Case Brief in the Third Administrative Review of Antidumping Duty Order on Xanthan Gum from the People's Republic of China (A-570-985),' dated September 8, 2017 (Fufeng's Case Brief); and "Xanthan Gum from the People's Republic of China, A-570-985; Replacement Case Brief,' dated September 8, 2017 (Meihua's Case Brief).
[7] *See* "Xanthan Gum from The People's Republic of China; ADM's Rebuttal Brief," dated September 18, 2017 (ADM's Rebuttal Brief); "Xanthan Gum from the People's Republic of China: of CP Kelco U.S., Inc. and CP Kelco (Shandong) Biological Company Limited's Rebuttal Brief," dated September 18, 2017 (CP Kelco's Rebuttal Brief); "Xanthan Gum from the People's Republic of China – Jianlong Rebuttal Brief," dated September 18, 2017 (Jianlong's Rebuttal Brief); and "Xanthan Gum from the People's Republic of China, A-570-985; Rebuttal Case Brief,' dated September 18, 2017 (Meihua's Rebuttal Brief).
[8] In its rebuttal brief, Meihua asserts that CP Kelco served its case brief on Meihua's former counsel, and not on its current counsel, thus impinging Meihua's ability to timely respond. It is evident from Meihua's extensive and detailed response that Meihua was able to review and fully respond to the petitioner's case brief despite the tardiness of its service upon Meihua's current counsel. In addition, we afforded Meihua additional time to submit its rebuttal brief for this very reason. *See* Memorandum, "2015-2016 Antidumping Administrative Review of Xanthan Gum from the People's Republic of China: Revised Rebuttal Briefing Schedule," dated September 13, 2017. Thus, we do not find that Meihua's interests in this review have been substantially prejudiced in any way. In addition, Meihua notes that CP Kelco's case brief failed to comply with Commerce's regulations regarding the submission of a third party's business proprietary information (BPI), as it did not specify in the cover letter which party's BPI was at issue. This issue did not prevent Meihua from filing a substantive rebuttal brief.
[9] *See* Deosen's submission, "Administrative Review of Antidumping Order on Xanthan Gum from the People's Republic of China: Withdrawal of Hearing Request," dated January 8, 2018.
[10] See Memorandum, "Xanthan Gum from the People's Republic of China: Extension of Deadline for Final Results of Antidumping Duty Administrative Review, 2015-2016," dated November 3, 2017.

January 20 through 22, 2018. If the new deadline falls on a non-business day, in accordance with Commerce's practice, the deadline will become the next business day. The revised deadline for the final results of this review is now February 6, 2018.[11]

SCOPE OF THE ORDER[12]

The merchandise subject to the order includes 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-Giucose monosaccharide units, the second with a trisaccharide side chain consisting of P-D-Mannose-(1,4)- P-DGiucuronic 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 the order is classified in the Harmonized Tariff Schedule 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.

CHANGES SINCE THE PRELIMINARY RESULTS

Based on our review and analysis of the comments received from interested parties, we made one change to our margin calculations for Fufeng to correct a clerical error.[13] *See* Comment 6.

DISCUSSION OF THE ISSUES:

Comment 1: Separate Rate Status for Jianlong

CP Kelco's Case Brief

- Commerce should deny Jianlong separate rate status and rescind the review with respect to Jianlong for lack of *bona fide* sales during the period of review (POR).
- The circumstances surrounding Jianlong's sale to an unaffiliated customer render the

[11] *See* Memorandum for The Record from Christian Marsh, Deputy Assistant Secretary for Enforcement and Compliance, performing the non-exclusive functions and duties of the Assistant Secretary for Enforcement and Compliance, "Deadlines Affected by the Shutdown of the Federal Government" (Tolling Memorandum) dated January 23, 2018. All deadlines in this segment of the proceeding have been extended by 3 days.

[12] *See 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 AD Order*).

[13] *See* Memorandum, "2015-2016 Antidumping Duty Administrative Review of Xanthan Gum from the People's Republic of China; Final Results Margin Calculation for Fufeng," dated February 5, 2018.

transaction suspect.[14]

- The pricing, delivery terms and timing of this transaction all point to a *non-bona-fide* transaction. Commerce uses its "totality of the circumstances" test in determining whether a sales transaction is *bona fide*. This involves considering certain factors surrounding the sale to evaluate whether it is "commercially reasonable."[15]
- The factors weighed include the timing of the sale, the price and quantity involved, any selling or movement expenses attendant to the sale, whether the sale was profitable to the seller and, finally, the arm's-length nature of the sale. An examination of each of these factors calls into question whether Jianlong's sales transaction is *bona fide*.
- As to timing, the customer's placement of this order, and the precise method of delivery of the xanthan gum to the customer's location are suspect. Jianlong failed to provide any documentary evidence to support the execution of this sales agreement that would serve to substantiate the extraordinary circumstances surrounding this transaction.[16]
- Jianlong's unaffiliated U.S. customer was not, in fact, the ultimate purchaser. The timing of the shipment, the customer's payment, and the subsequent disposition of the xanthan gum strain credulity, and support a finding that the sale is not *bona fide*.[17]
- If Commerce concludes that Jianlong's POR sale is not properly subject to review, Commerce should rescind the review as it pertains to Jianlong.[18] Commerce's practice in such cases is to rescind a review when the record indicates that the sales are "atypical of normal business practices," or "commercially unreasonable."[19]

Jianlong's Rebuttal Brief

- CP Kelco offers no evidence that Commerce erred in preliminarily granting separate rate status to Jianlong. In the *Preliminary Results*, Commerce determined that the record supported a finding of the absence of *de jure* or *de facto* government control.[20] Commerce has not made any finding that Jianlong's responses regarding government control were in any way deficient. Commerce correctly determined that the information supplied by Jianlong established Jianlong's eligibility for a separate rate.
- CP Kelco failed to establish that Jianlong's POR sale was not commercially reasonable. Commerce weighs various factors in determining the commercial reasonableness of a sale, the most important of which are price and quantity. Nothing in the record suggests that there were anomalies in either the price or quantity of its POR sale.[21]
- Compared with Deosen and CP Kelco, Jianlong's sales quantity was commercially reasonable. The price of its sales transaction was "typical." Jianlong's sales price was "both representative and commercially reasonable."[22] Contrary to the petitioner's claims,

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[14] The details, which involve the delivery of the xanthan gum to the U.S. customer, are proprietary, but can be found in Jianlong's questionnaire responses and in CP Kelco's case brief. *See*, *e.g.*, CP Kelco's Case Brief at 4-10.
[15] *Id.* at 3.
[16] *Id.* at 4-7.
[17] *Id.* at 7-10
[18] *Id.* at 11, citing *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 81 FR 17435 (March 29, 2016).
[19] *Id.*, citing *Windmill International PTE.*, Ltd. *v. United States*, 193 F. Supp. 2d 1303 (CIT 2002).
[20] *See* Jianlong's Rebuttal Brief at 2.
[21] *Id.* at 4.
[22] *Id.* at 5.

the timing of the customer's payment was consistent with the terms of the sales contract.

- Jianlong's terms of payment were consistent with those of other respondents and CP Kelco (Shandong) reported in this segment of the proceeding. Therefore, there was nothing out of the ordinary regarding this sale. No evidence on the record, including information submitted by the petitioners, challenges the arm's-length nature of this transaction.
- Jianlong did, in fact, realize a profit on this sale.[23] The petitioner misinterpreted the freight documentation (*i.e.*, air waybill) submitted by Jianlong. Its actual freight expenses arising from this sale were far below the figure the petitioner alleges which supports the commercial reasonableness of the sale.[24]
- The U.S. customer is a long-standing distributor of industrial and chemical products. As such, there is nothing remarkable about this company purchasing xanthan gum from China.
- CP Kelco's arguments are untimely filed. Specifically, the petitioner was "silent on this issue for the entire proceeding," and it is too late for Commerce to make further requests for information from Jianlong.[25] In numerous cases Commerce has refused to allow parties to make "last-minute allegations" which could have been raised earlier in the proceeding.[26]
- The record of this segment "fully supports the representative, non-distortive nature of Jianlong's POR sale."[27] CP Kelco's attempts to impugn Jianlong's POR sale are improper, and it is too late in this segment for Commerce to engage in additional fact finding. Accordingly, Commerce should continue to find Jianlong eligible for a separate rate.

Commerce's Position:

We disagree with CP Kelco, and continue to find that Jianlong is eligible for a separate rate. Jianlong submitted a complete and timely separate rate application (SRA), including documentation demonstrating a suspended entry of subject merchandise during the POR, which Commerce was able to corroborate using U.S. Customs and Border Protection (CBP) data.[28] Based upon a review of Jianlong's SRA, Commerce preliminarily determined that Jianlong was eligible for a separate rate, and, thus, assigned Jianlong a separate rate for the *Preliminary Results*.[29]

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[23] *Id.* at 7.
[24] *Id.* at 8.
[25] *Id.* at 9.
[26] *Id.*, citing, *e.g.*, *Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea*, 79 FR 17503 (March 28, 2014), and accompanying Issues and Decision Memorandum at Comment 1.
[27] *Id.* at 11.
[28] *See* Jianlong's October 12, 2016 Separate Rate Application (Jianlong SRA) at Exhibit 4; *see also* Memorandum to the File, "Antidumping Duty Administrative Review of Xanthan Gum from the People's Republic of China: Automated Commercial System Shipment Query," dated September 16, 2016 at Attachment 1 (CBP Database Release).
[29] *See Preliminary Results* at 36747, and accompanying Preliminary Decision Memorandum at 11-14.

The petitioner asserts that Jianlong's sale during the POR was non-*bona fide*. However, in making such an assertion, the petitioner relies on cases in which Commerce deemed a mandatory respondent's or a new shipper respondent's sales to be non-*bona fide*. In this case, Jianlong is neither a mandatory respondent nor a new shipper respondent; rather, Jianlong is participating as a separate rate applicant. In evaluating a separate rate applicant's eligibility for a separate rate, Commerce considers whether that applicant has demonstrated an absence of government control, both in law and in fact, with respect to exports and whether that applicant has an entry of subject merchandise during the period of review that is suspended from liquidation. In light of Commerce's resource constraints and its decision to limit individual examination of exporters under review, Commerce generally does not perform a resource-intensive *bona fides* analysis on sales made by separate rate applicants that are not mandatory respondents in the context of an administrative review.[30] Rather, we rely upon CBP data and/or CBP entry documentation to determine if the separate rate applicant had a suspended entry during the POR (as we did in this case).[31] Furthermore, when Commerce determines that all of a company's sales covered by a new shipper review are non-*bona fide* and these are the same sales covered by an administrative review, Commerce's practice is to rescind the administrative review.[32] However, Jianlong's sale at issue in its new shipper review covering a July 1, 2014, through June 30, 2015, review period, which Commerce analyzed and determined was not *bona fide*, is not the same sales transaction subject to this administrative review.[33]

Accordingly, we continue to find Jianlong eligible for a separate rate because its separate rate application shows absence of both *de jure* and *de facto* control by the Chinese government, and because Jianlong was able to demonstrate a suspended entry during the POR.[34] Commerce sees no grounds for reversing its preliminary decision to grant Jianlong a separate rate. We evaluated Jianlong's separate rate request using the test first detailed in *Sparklers*, as amplified in *Silicon Carbide*, and further refined by *Diamond Sawblades*.[35] As discussed in our *Preliminary Results* and accompanying Preliminary Decision Memorandum, we determine that Jianlong is entitled to a separate rate in this segment of the proceeding. The petitioner has not provided any arguments

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[30] *See e.g., Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2012-2013*, 80 FR 20197 (April 15, 2015), and accompanying Issues and Decision Memorandum at Comment 3.
[31] *See, e.g., Aluminum Extrusions from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Rescission, in Part, 2010/12*, 79 FR 96 (January 2, 2014), and accompanying Issues and Decision Memorandum at Comment 8.
[32] *See Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results and Partial Rescission of Antidumping Duty Administrative Review; 2013-2014*; 81 FR 17435 (March 29, 2016), and accompanying Issues and Decision Memorandum at Comment VII.
[33] *See Xanthan Gum from the People's Republic of China: Rescission of 2014-2015 Antidumping Duty New Shipper*, 81 FR 56586 (August 22, 2016).
[34] *See* Jianlong SRA at Exhibit 4 and CBP Data Release.
[35] *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*); *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*); Final Results of Redetermination Pursuant to Remand Order for Diamond Sawblades and Parts Thereof from the People's Republic of China (May 6, 2013) in *Advanced Technology & Materials Co., Ltd. v. United States*, 885 F. Supp. 2d 1343 (CIT 2012) (Advanced Technology I), sustained, Advanced Technology & Materials Co. v. United States, 938 F. Supp. 2d 1342 (CIT 2013), aff'd, Case No. 2014-1154 (Fed. Cir. 2014) (*Advanced Technology II*). This remand redetermination is on the Enforcement and Compliance website at http://enforcement.trade.gov/remands/12-147.pdf.

challenging Commerce's analysis that Jianlong demonstrated an absence of *de jure* and *de facto* control by the Chinese government with respect to exports. Moreover, because we continue to find that Jianlong is eligible for a separate rate, we have not addressed the counter-arguments that Jianlong made to the petitioner's arguments.

Comment 2: Separate Rate Status for Meihua

CP Kelco's Case Brief

- In the *Preliminary Results,* Commerce determined that Meihua had demonstrated its eligibility for a separate rate.[36]
- However, Meihua experienced "significant changes in ownership and control," but failed to file a separate rate *application* (SRA), as was required, given the changes in Meihua's management. Instead, Meihua submitted a separate rate *certification* (SRC), a less-rigorous filing which does not apply to firms that have changes in corporate structure, ownership, or official company name since being granted a separate rate.[37]
- In March 2015, after being granted a separate rate, the Meihua Group obtained a new controlling shareholder and new "actual controlling" parties assumed management roles in Meihua.[38] Between December 2013 (the close of Meihua's initial new shipper period of review (POR)) and June 30, 2016 (the close of this POR), four of the top ten shareholders of Meihua's parent, the Meihua Group, sold their interests in the company and were replaced by four new shareholders.[39]
- Meihua has not provided any information about these new shareholders, including possible ties to the Chinese government or local and provincial governing bodies.[40] As a result of these changes, Meihua should have filed a new SRA, but failed to do so.
- Meihua is also not eligible to be examined as a voluntary respondent, given that Commerce previously determined that it lacked the resources to investigate any voluntary respondents in this review.[41] Therefore, Meihua's voluntary questionnaire response cannot take the place of a timely-filed SRA.
- Meihua's SRC does not provide sufficient documentation regarding its shareholders to determine whether the Government of China exercises *de facto* control over Meihua's export activities.[42] Commerce's SRA requires specific information as to the location, telephone numbers, and e-mail addresses of any legal entities which are shareholders, and to provide the percentages of ownership. Meihua's SRC also lacks the business license

[36] *See* CP Kelco's Case Brief at 12, citing *Preliminary Results*, 82 FR at 36747, and accompanying Preliminary Decision Memorandum at 11-14.
[37] *Id.* at 12-13, citing Commerce's "Separate Rate Certification for People's Republic of China," available at http://enforcement.trade.gov/nme/nme-sep-rate.html.
[38] *Id.* at 13, citing Letter from CP Kelco: "Petitioner's Factual Information to Rebut, Clarify or Correct Meihua Group International Trading (Hong Kong) Limited, Langfang Meihua Bio-Technology Co., Ltd., and Xinjiang Meihua Amino Acid Co., Ltd.'s Separate Rate Certification," dated November 14, 2016 (NFI Submission).
[39] *See* CP Kelco's Case Brief at 13-14.
[40] *Id*. at 14.
[41] *Id.* at 15-16, citing Memorandum: "CP Kelco (Shandong) Biological Company Limited's and Meihua Group International Trading (Hong Kong)'s Requests for Selection as a Voluntary Respondent," dated May 3, 2017 (Voluntary Respondent Memorandum).
[42] *Id.* at 17.

of Meihua's ultimate shareholder entity.[43]

- Meihua's withholding of information regarding changes in the management and equity ownership, since its last new shipper review, has hindered Commerce's ability to establish the absence of *de facto* control by the Chinese government, warranting denial of Meihua's separate rate status.[44]
- Commerce's SRA requires applicants to provide documentation of a suspended entry. Given that Meihua has failed to provide documentation showing a suspended entry during the POR, it should not be granted separate rate status.[45]

Meihua's Rebuttal Brief

- The issues raised by the petitioner in its case brief regarding Meihua's separate rate status were known throughout the course of the review, but the petitioner waited to raise these issues in its case brief when they could be no longer be corrected by Meihua.[46]
- CP Kelco's contention that Meihua was obligated to file a SRA, as opposed to a SRC constitutes "form over substance."[47] The information Meihua submitted was, to the best of its knowledge, sufficient for purposes of obtaining a separate rate. If the information was not sufficient, it was incumbent upon Commerce to seek clarification of the information.[48]
- Meihua has been fully forthcoming in describing its ownership, affiliations, and the reasons why it should be granted separate rate status.
- Meihua filed all its information, including a full voluntary questionnaire response, surrogate value information and its case brief, within the deadlines established by Commerce. It is a longstanding principle that any information submitted in a particular segment of a proceeding is usable for any purpose in that segment, irrespective of the original purpose for which it was submitted.[49]
- In reference to the petitioner's argument about the absence of shareholders' telephone, facsimile, and e-mail addresses, Meihua provided full contact information for its shareholders. In particular, Meihua's section A response lists the shareholders of the company, and shows that at the end of the POR certain entities were being liquidated and that some information was not available at the time. Moreover, the petitioner was free to argue that the contact information was deficient during the course of the review, but chose not to do so.[50]
- Contrary to the petitioner's assertion, there is evidence of a suspended entry on the record. The presence of Meihua's 10-digit case number in the CBP data proves that it had a Type 03 entry during the POR. The existence of Meihua's identification number associated with POR entries is "conclusive evidence" of unliquidated Type 03 entries, and satisfies the requirements of a SRA. If either the petitioner or Commerce had

[43] *Id.* at 18.
[44] *Id.* at 18-21.
[45] The details of this allegation are business proprietary. For complete details, *see* CP Kelco's Case Brief at 21-23.
[46] *See* Meihua's Rebuttal Brief at 2.
[47] *Id.* at 4.
[48] *See* Meihua's Rebuttal Brief at 4.
[49] *Id.* at 5-6.
[50] *Id.* at 5-8.

questions about the status of Meihua's entries during the POR, this could have been addressed through Commerce's issuance of a supplemental questionnaire. As the record shows evidence of an unliquidated Type 03 entry, the petitioner's arguments are without merit.[51]

Commerce's Position:

We find that Meihua has documented that it had a suspended entry during this POR, and that the information contained in the petitioner's NFI submission does not call into question our preliminary decision with respect to Meihua's eligibility for a separate rate. Thus, we continue to find that Meihua has established its entitlement to a separate rate.

Meihua filed an SRC certifying an absence of government control. The petitioner filed NFI alleging that changes to the top 10 shareholders of the Meihua Group occurred during the POR which it claims calls into question the validity of the SRC such that Meihua should have filed an SRA. While an SRA might have been appropriate in this case, the particular changes in ownership that the petitioner identified do not call into question our preliminary determination that Meihua is eligible for a separate rate. Specifically, the majority of Meihua's top ten shareholders remained the same.

Furthermore, CP Kelco argues that Commerce cannot rely on Meihua's voluntary Section A questionnaire response. For the reasons explained in the Voluntary Respondent Memorandum, we determined that we could not individually examine Meihua. Therefore, we have not relied on information contained in Meihua's voluntary Section A response and, accordingly, have not addressed the parties' comments based on it.

With respect to the petitioners' argument that Meihua did not provide evidence of suspended (Type 3) entries of subject merchandise during the POR, we disagree. The record contains evidence satisfying this requirement in the SRA.[52]

Comment 3: Application of Partial Adverse Facts Available to Deosen

Deosen's Case Brief

- Commerce preliminarily applied adverse facts available (AFA) to a portion of Deosen USA's[53] U.S. sales reported for this POR (POR3). However, the sales at issue actually entered during the second POR (POR2). These sales, which Deosen exported through AHA (according to a scheme that Commerce found to amount to circumvention of the AD order in POR2) and which Deosen USA sold during POR3, were previously reviewed during POR2 and cannot be subject to AFA in POR3. There was only one POR3 sale which Deosen shipped through AHA which has been fully documented and

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[51] *Id.* at 10.
[52] *See* Memorandum, "Selection of Respondents for the 2015-2016 Administrative Review of the Antidumping Duty Order on Xanthan Gum from the People's Republic of China," dated October 28, 2016, at Attachment 1; and CBP Database Release, at Attachment 1.
[53] The company's full name is Deosen USA Inc.

included in Deosen's POR3 U.S. sales data. Commerce even concluded in the *Preliminary Results* that "AHA had no sales of subject merchandise to the U.S. market during the POR," and expressed its intent to rescind the review with respect to AHA.[54]

- Here, none of Deosen USA's POR3 imports were shipped by Deosen from China through AHA during POR3. In fact, the sales that went through AHA in POR2 were reviewed in the prior review, and are currently the subject of litigation before the Court of International Trade (CIT).[55]
- Commerce's application of AFA is contrary to both the statute and Commerce's practice. Commerce's authority to apply facts available or AFA "is not unrestrained."[56] With respect to the application of AFA, Commerce is further constrained by the requirement to find that a party "has failed to cooperate by not acting to the best of its ability to comply with a request for information."[57]
- In POR3, Commerce based its decision to apply AFA to a portion of Deosen's sales solely on the fact that Deosen USA sold from its inventory merchandise that had been shipped through AHA in the prior POR. Commerce's conclusion in POR2 that Deosen and AHA conspired to take advantage of AHA's lower cash deposit rate is not supported by record evidence. Commerce originally, and correctly, determined a chain cash deposit rate for the Deosen – AHA combination of 70.61 percent, in contrast to the Deosen – Deosen cash deposit rate of 128.32 percent.
- The language in Commerce's instructions from the less-than-fair-value (LTFV) determination is unequivocal: importers are required to use the combination rate for any entries of merchandise produced by Deosen and exported by AHA.[58]
- More fundamentally, there is no clear evidence on the record demonstrating that all the subject merchandise shipped through AHA entered at the lower cash deposit rate. In fact, Commerce never solicited information on the actual cash deposit rates applicable to entries of Deosen-produced xanthan gum. Therefore, assumptions about the cash deposit rates in effect cannot serve as a basis for applying AFA.[59]
- Commerce cannot apply AFA in this segment because Deosen cooperated in the review to the best of its ability. There is no information on the record of this review that Deosen "engag{ed} in a scheme to misrepresent the true seller of the subject merchandise to avoid payment of accurate cash deposits."[60] Moreover, Commerce cannot cite to any unsatisfied request for information in this review.[61]
- Commerce's reliance on the facts available decision applied in POR2 is misplaced.[62] Commerce's conclusion that Deosen and AHA conspired in POR3 to utilize an improperly-low cash deposit rate does not withstand scrutiny. More importantly, under

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[54] *See* Deosen's Case Brief at 4.
[55] *Id.* at 5 and fn. 14.
[56] *See* Deosen's Case Brief at 6.
[57] *Id.* at 7.
[58] *Id.* at 8.
[59] *Id.* at 9.
[60] *Id.* at 11, quoting the Preliminary Decision Memorandum at 8.
[61] *See* Deosen's Case Brief at 11.
[62] *Id.*, citing *Xanthan Gum from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, Final Determination of No Shipments, Final Partial Rescission*, 82 FR 11434 (February 23, 2017) (*Xanthan Gum AR2 Final Results*), and accompanying Issues and Decision Memorandum at 11.

the U.S. antidumping regime, the cash deposit rate is irrelevant because it represents an estimate of duties owed; the final results of review will determine the actual antidumping liability.[63] This proposition is supported by the fact that Commerce's questionnaires do not seek information on cash deposit rates.

- Finally, Commerce has no authority to impose penalties on importers or exporters for non-compliance with AD orders. The CIT has ruled that Congress delegated that authority to CBP.[64]

CP Kelco's and ADM's Rebuttal Briefs

- The petitioners did not comment on this issue.

Commerce's Position:

We disagree with Deosen that we improperly applied AFA to a portion of Deosen's sales in the *Preliminary Results*.

Section 776(a) of the Act provides that, subject to section 782(d) of the Act, Commerce shall apply "facts otherwise available" if necessary information is not on the record or 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 Commerce, 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. Section 776(b) of the Act further provides that Commerce 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.

On June 29, 2015, the President of the United States signed into law the Trade Preferences Extension Act of 2015 (TPEA), which made numerous amendments to the antidumping and countervailing duty law, including amendments to section 776(b) and 776(c) of the Act and the addition of section 776(d) of the Act.[65] The amendments to section 776 the Act are applicable to all determinations made on or after August 6, 2015 and, therefore, apply to this administrative review.[66]

Section 776(b) of the Act provides that Commerce 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

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[63] *Id.* at 12.

[64] *Id.* at 13, citing 19 U.S.C. 1592 *and Am. Furniture Mfrs. Comm. For Legal Trade*, Slip. Op. 17-25 at *6 (noting CBP, not Commerce, is authorized to assess penalties).

[65] *See* TPEA, Pub. L. No. 114-27, 129 Stat. 362 (2015). The 2015 law does not specify dates of application for those amendments. On August 6, 2015, Commerce published an interpretative rule, in which it announced applicability dates for each amendment to the Act, except for amendments contained to section 771(7) of the Act, which relate to determinations of material injury by the International Trade Commission. *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) (*Applicability Notice*). The text of the TPEA may be found at https://www.congress.gov/bill/114thcongress/house-bill/1295/text/pl.

[66] *See Applicability Notice*, 80 FR at 46794-95.

ability to comply with a request for information. Further, section 776(b)(2) of the Act states that an adverse inference may include reliance on information derived from the petition, the final determination from the AD investigation, a previous administrative review under section 751 of the Act or a determination under section 753 of the Act, or other information placed on the record.[67] The SAA explains that Commerce 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."[68] Further, affirmative evidence of bad faith on the part of a respondent is not required before Commerce may make an adverse inference.[69]

Section 776(c) of the Act provides that, in general, when Commerce relies on secondary information rather than on information obtained in the course of an investigation, it shall, to the extent practicable, corroborate that information from independent sources that are reasonably at its disposal.[70] Secondary information is defined as information derived from the petition that gave rise to the investigation, the final determination concerning the subject merchandise, or any previous review under section 751 of the Act concerning the subject merchandise.[71] Further, and under the TPEA, Commerce is not required to corroborate any dumping margin applied in a separate segment of the same proceeding.[72]

Finally, under the new section 776(d) of the Act, when applying an adverse inference, Commerce may use a dumping margin from any segment of the proceeding under the applicable antidumping order.[73] The TPEA also makes clear that, when selecting facts available with an adverse inference, Commerce is not required to estimate what the weighted-average dumping margin would have been if the interested party failing to cooperate had cooperated or to demonstrate that the weighted-average dumping margin reflects an "alleged commercial reality" of the interested party.[74]

In the two previous segments of this proceeding, Commerce found that Deosen participated in a scheme whereby it shipped subject merchandise to the United States through AHA in order to avoid application of the appropriate cash deposit rate, and that it disclosed neither this information nor the Export Service Agreement (ESA) it had with AHA, to Commerce in those segments.[75] Consequently, we applied an AD margin based on total AFA to Deosen in those reviews, pursuant to sections 776(a)(1), 776(a)(2)(A) and (C), and 776(b) of the Act, finding that

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[67] *See also* 19 CFR 351.308(c).
[68] *See* SAA at 870.
[69] *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); and *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382-83 (Fed. Cir. 2003) (*Nippon Steel*).
[70] *See also* 19 CFR 351.308(d).
[71] *See* SAA, H.R. Doc. No. 103-316, 103d Cong., 2d Session, Vol. 1 (1994) at 870.
[72] *See* section 776(c)(2) of the Act; TPEA, section 502(2).
[73] *See* section 776(d)(1) of the Act; TPEA, section 502(3).
[74] *See* section 776(d)(3) of the Act; TPEA, section 502(3).
[75] *See Xanthan Gum from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2013-2014*, 82 FR 11428 (February 23, 2017 (*Xanthan Gum POR1 Final Results*), and accompanying Issues and Decision Memorandum at Comment 1; and *Xanthan Gum POR2 Final Results*, and accompanying Issues and Decision Memorandum at Comment 1.

Deosen manipulated the sales processes with respect to those transactions for the purpose of avoiding the applicable cash deposit rate, significantly impeded the proceeding in doing so, resulting in necessary information not being available on the record to calculate an accurate dumping margin, and failed to cooperate. We determined that the sales made pursuant to this scheme did not provide a reliable basis for calculating an accurate dumping margin.[76]

In the present review, Deosen USA reported that during the period covered by POR3, it sold out of its inventory merchandise that was shipped through AHA in the prior POR,[77] a scheme Deosen acknowledged in the previous review that it set up to obtain a lower cash deposit rate.[78] Our verification findings confirmed this POR3 reporting.[79] This scheme and agreement affected subject merchandise Deosen imported into the United States through AHA during POR2, but sold during POR3.[80] As we did in the prior two administrative reviews, in this administrative review we determine that it is appropriate to apply the facts otherwise available to Deosen's sales involving AHA in POR3, which in this review represent a subset of Deosen's POR3 sales, pursuant to section 776(a) of the Act. These sales were structured pursuant to the same scheme to avoid the appropriate cash deposit rate that Commerce considered in the prior two administrative reviews. Deosen significantly impeded the proceeding by engaging in a scheme to avoid the applicable cash deposit rate for these sales, resulting in necessary information not being available on the record to calculate an accurate dumping margin with respect to these sales. *See* sections 776(a)(1) and (a)(2)(C) of the Act. By manipulating the sales process with respect to these sales, Deosen has rendered them unusable for calculating an accurate dumping margin.[81]

Section 776(b) of the Act provides that Commerce 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. The Federal Circuit, in *Nippon Steel*, provided an explanation of the failure to act to "the best of its ability," stating that the ordinary meaning of "best" means "one's maximum effort," and that "ability" refers to " the quality or state of being able."[82] Further, the statutory mandate that a respondent act to the "best of its ability" requires the respondent to do the maximum that it is able to do.[83] The Federal Circuit acknowledged, however, that while there is no willfulness requirement, "deliberate concealment or inaccurate

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[76] *Id*.
[77] Deosen also reported that it made one shipment of subject merchandise involving AHA during the POR.
[78] *See* Deosen's Section C questionnaire response (Deosen CQR), dated December 22, 2016, at 2, and Exhibit C-1; *see*, *also*, Deosen's supplemental Section C questionnaire response (Deosen SCQR), dated April 3, 2017, at Exhibit SC-1.
[79] *See* Memoranda to the File, "Verification of the Questionnaire Responses of Deosen Biochemical (Ordos) Ltd. (Deosen Ordos) and Deosen Biochemical Ltd. (Deosen Zibo) (collectively "Deosen") in the 2015-2016 Antidumping Duty Administrative Review of Xanthan Gum from the People's Republic of China (PRC)" (Deosen FOP Verification Report), at 2, 4, 5, 10, 18, and 19; and "2015-2016 Antidumping Duty Administrative Review of Xanthan Gum from the People's Republic of China: Verification of the U.S. Sales Response of Deosen USA, Inc." (Deosen US Verification Report), at 3 and 7; both dated July 31, 2017.

[81] *See also Xanthan Gum POR2 Final Results*.
[82] *See Nippon Steel at* 337 F.3d 1373, 1382.
[83] *Id.*

reporting" would certainly be sufficient to find that a respondent did not act to the best of its ability.[84]

We find that by selling merchandise in POR3, which Deosen imported under the ESA with AHA in POR2, thereby misrepresenting the true seller of the subject merchandise and avoiding payment of accurate cash deposits, Deosen failed to cooperate to the best of its ability in this segment of the proceeding with respect to this subset of its sales.[85] Therefore, we determine that an adverse inference is warranted with respect to these sales transactions in selecting from the facts otherwise available pursuant to section 776(b) of the Act.[86]

Deosen contends that the sales at issue in the present review "entered in POR2 and thus were covered by the POR2 review."[87] However, the sales of subject merchandise shipped through AHA at issue in the present review were not, in fact, previously reviewed by Commerce in the prior POR.[88] While the subject merchandise shipped through AHA might have entered the United States during POR2, sales of that merchandise continued to occur during the period of the present review.[89] Commerce could not have reviewed in the prior review the subset of sales that occurred during the period at issue in this review, as Deosen claims, because those sales had yet to occur.[90]

The scenario in this review is similar to that in the fourth administrative review of *Mushrooms from China.* There, Commerce determined that the use of AFA was warranted where Gerber Food (Yunnan) Co., Ltd. (Gerber), a Chinese producer-exporter, participated in an agreement/scheme with another respondent, Green Fresh (Zhangzhou) Co., Ltd. (Green Fresh), during the prior POR, "which extended into the current POR, and which resulted in the circumvention of the antidumping duty order and the evasion of payment of the appropriate level of cash deposits."[91] In the instant case, the activities engaged in by Deosen and AHA were similar to those actions engaged in by the companies in *Mushrooms from China*. Specifically, one company with a lower rate (*i.e.*, AHA and Green Fresh) assisted another company with a higher rate (*i.e.*, Deosen and Gerber) to avoid the appropriate amount of cash deposits. By manipulating the sales process with respect to these transactions, Deosen has rendered them unusable for calculating an accurate dumping margin, and has, therefore, significantly impeded the proceeding in the present review.

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[84] *Id.* at 1380.
[85] *See Xanthan Gum AR2 Final Results*, and accompanying Issues and Decision Memorandum at Comment 1.
[86] *See, e.g.*, *Stainless Steel Sheet and Strip in Coils from Japan: Preliminary Results of Antidumping Duty Administrative Review*, 70 FR 18369 (April 11, 2005), unchanged in *Stainless Steel Sheet and Strip in Coils from Japan: Final Results of Antidumping Duty Administrative Review*, 70 FR 37759 (June 30, 2005).
[87] *See* Deosen's Case Brief at 5.
[88] *See* Deosen US Verification Report at 4.
[89] *Id*.
[90] *Id*.
[91] *See Certain Mushrooms from the People's Republic of China: Final Results of Sixth Antidumping Duty New Shipper Review and Final Results and Partial Rescission of the Fourth Antidumping Administrative Review*, 69 FR 54638 (September 9, 2004) (*Mushrooms from China*), and accompanying Issues and Decision Memorandum at Comment 5.

Deosen further argues that the record lacks complete information to support the claim that all subject merchandise shipped through AHA prior to POR3 entered at the lower deposit rate.[92] However, the record need not contain information regarding the cash deposit rate of all subject merchandise shipped through AHA prior to POR3; rather, for purposes of this administrative review, Commerce is considering activities in connection with the cash deposit rate of the sales at issue in the present review. The record provides ample information regarding that cash deposit rate. While Deosen was unable to obtain the customs declaration form for the single export price (EP) sale it claims it made through AHA during the POR, Deosen was unequivocal regarding the cash deposit rate for the other sales, stating those sales entered under the case number for the Deosen-AHA combination rate.[93] The ESA signed between Deosen and AHA, in addition to the record of the previous segment, corroborate this fact.[94] Therefore, we find the record contains evidence with respect to the cash deposit rate for the sales at issue – and the totality of that evidence supports the finding that for the subset of sales at issue, as Deosen stated, the rate was the improper, lower Deosen-AHA rate.

Alternatively, Deosen claims 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.[95] However, the record shows that Deosen was the price setter for the sales of subject merchandise which entered under the AHA cash deposit rate.[96] Commerce 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."[97] As we stated above, the ESA demonstrates that AHA was not a "reseller" of subject merchandise, but instead that Deosen was the seller.[98] Thus, the AHA-Deosen cash deposit rate was not the correct cash deposit rate for the transactions at issue.[99] Furthermore, accepting Deosen's contention that it used the appropriate cash deposit rate for transactions involving AHA would contravene Commerce'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.[100]

Lastly, Deosen contests Commerce's determination that its business arrangement to reduce the cash deposits paid significantly impeded the review, because it contends it is irrelevant in determining a dumping margin for these companies.[101] However, the record indicates that this business arrangement affected the U.S. prices set by Deosen.[102] Reductions in the costs of

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[92] *See* Deosen's Case Brief at 9.
[93] *See* Deosen's Section A supplemental questionnaire (SAQR), dated March 31, 2017, at 3-5 and Exhibit SA-5.
[94] *See* Deosen SAQR at Exhibit SA-5; see also, *Xanthan Gum POR2 Final Results,* and accompanying Issues and Decision Memorandum at Comment 1.
[95] *See* Deosen's Case Brief at 8.
[96] *See* Deosen SAQR at Exhibit SA-5.
[97] *See Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties*, 68 FR 23954 (May 6, 2003).
[98] *See* Deosen SAQR at Exhibit SA-5.
[99] *See Xanthan Gum AR2 Final Results*, and accompanying Issues and Decision Memorandum at Comment 1.
[100] *Id.*
[101] *See* Deosen's Case Brief at 12.
[102] *See*, *e.g.*, Deosen CQR at 40.

selling products, increases in cash flow, and reductions in cash outflows by importers, including Deosen USA, represent factors that can influence the price of products.[103] 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. With respect to Deosen's claim that Commerce has no authority to impose penalties on importers or exporters for non-compliance with AD orders, [104] we note that our decision to apply partial AFA in the present review is not a penalty, but instead remedial in nature. Rather, Commerce is exercising its responsibility to prevent the circumvention of the antidumping law.

Where Commerce applies AFA because a respondent failed to cooperate by not acting to the best of its ability to comply with a request for information, section 776(b) of the Act and 19 CFR 351.308(c)(1) authorize Commerce to rely on information derived from the petition, a final determination, a previous administrative review, or other information placed on the record.[105] In selecting a rate for AFA, Commerce selects a rate that is sufficiently adverse to ensure that the uncooperative party does not obtain a more favorable result by failing to cooperate than if it had fully cooperated.[106]

In reviews, Commerce normally selects as AFA the highest rate on the record of the proceeding.[107] The CIT and the Court of Appeals for the Federal Circuit (Federal Circuit) have consistently upheld Commerce's practice.[108] Commerce's practice, when selecting an AFA rate from among possible sources of information, has been to ensure that the rate is sufficiently adverse "as to effectuate the statutory purposes of the adverse facts available rule to induce respondents to provide the Department with complete and accurate information in a timely manner."[109] Commerce's practice also ensures "that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully."[110]

Consistent with the statute, court precedent, its normal practice, and its decision in the prior administrative review of this AD order, Commerce has assigned as AFA a rate of 154.07 percent to the portion of Deosen's U.S. sales made during the POR which involved Deosen exporting the subject merchandise from the PRC to the United States through AHA. This is the highest rate on

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[103] *See Xanthan Gum AR2 Final Results*, and accompanying Issues and Decision Memorandum at Comment 1.
[104] *See* Deosen's Case Brief at 13.
[105] *See also* 19 CFR 351.308(c); SAA, at 868-870.
[106] *See* SAA, at 870 (1994); accord *Ta Chen Stainless Steel Pipe Inc., v. United States,* Consol. Court No. 97-08-01344, Slip Op. 00-107 (CIT August 25, 2000).
[107] *See, e.g., Freshwater Crawfish Tail Meat from the People's Republic of China: Notice of Final Results of Antidumping Duty Administrative Review*, 68 FR 19504, 19507 (April 21, 2003).
[108] *See KYD, Inc. v. United States*, 607 F.3d 760, 766-67 (CAFC 2010) (*KYD*); *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1190 (CAFC 1990); *NSK Ltd. v. United States*, 346 F. Supp. 2d 1312, 1335 (CIT 2004) (upholding a 73.55 percent total AFA rate, the highest available dumping margin from a different respondent in a (LTFV investigation); *Kompass Food Trading Int'l v. United States,* Court. No. 98-09-02848, Slip Op. 00-90 (July 31, 2000) (upholding a 51.16 percent total AFA rate, the highest available dumping margin from a different, fully cooperative respondent); and *Shanghai Taoen International Trading Co., Ltd. v. United States*, 360 F. Supp. 2d 1339, 1348 (CIT 2005) (upholding a 223.01 percent total AFA rate, the highest available dumping margin from a different respondent in a previous administrative review).
[109] *See* SAA at 870.
[110] *Id.*

the record of the proceeding.[111] Pursuant to section 776(c)(2) of the Act, there is no requirement to corroborate this rate because the rate has been applied in a separate segment of this proceeding.

Comment 4: Rate Assignment for Meihua Based on Its Voluntary Respondent Status Request

Meihua's Case Brief

- The two mandatory respondents, Deosen and Fufeng, "provide an inadequate pool of respondents" to determine margins in this review.[112] While the statute permits Commerce to limit the number of companies selected for individual examination in cases where the number of potential respondents is "large," this discretion is limited.
- Commerce is legally obligated to examine voluntary respondents, assuming such respondents have timely filed questionnaire responses and provided that "the number of exporters or producers subject to the {review} is not so large that any individual examination of such exporters or producers would be unduly burdensome {to Commerce}."[113] Commerce must consider: (A) the complexity of the issues or information presented in the proceeding; (B) prior experience of Commerce in the same or similar proceeding; (C) the total number of investigations and reviews being conducted at the time; and (D) other factors impacting the timely completion of each segment, as Commerce considers appropriate.[114] Commerce does not enjoy *carte blanche* to interpret the statute such that it is left with an inadequate number of mandatory respondents.[115]
- Commerce is "incapable" of calculating a fair rate for separate rate applicants in this proceeding in the absence of a third mandatory respondent or review of a voluntary respondent.[116] In light of these facts, Commerce's reasons for *not* selecting a third mandatory respondent are untenable. Commerce has effectively rendered the voluntary respondent language in the statute "a nullity."[117]
- The statute envisions Commerce capturing a broadly representative sample of exporters through the use of a statistically-valid sample or by capturing a large percentage of the imported merchandise. Commerce may not rely on the margins determined for respondents which are not representative of the industry.[118] Commerce based Deosen's 2013-2014 and 2014-2015 margins on AFA, owing to "systemic defects {in its responses} that were not likely resolvable,"[119]while Fufeng's margin was zero; this means that neither company's performance is representative.
- Commerce in the current review "set itself up to fail" by selecting only two – non-representative – mandatory respondents.[120] Knowing what it did at the time, Commerce

[111] *See 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).
[112] *See* Meihua's Case Brief at 1.
[113] *Id.* at 3.
[114] *Id.*, citing section 782(a)(2) of the Act.
[115] *Id.*
[116] *Id.* at 4.
[117] *See* Meihua's Case Brief at 4.
[118] *Id.* at 5, citing *Husteel Co. v. United States*, 98 F. Supp. 3d 1315, 1329 (CIT 2015) (*Husteel Co. v. U.S.*).
[119] *Id.* at 5.
[120] *Id.* at 6.

could still have added Meihua as a mandatory respondent in the current review, even at the time of the *Preliminary Results*.[121]

- Commerce's recent practice of systematically limiting mandatory respondents to two affords separate rate applicants no margin for error. This artificially low number of mandatory respondents places separate rate companies at significant risk despite their cooperation in the underlying review. Commerce also may not rely on a rote citation to resource constraints as a basis for limiting mandatory respondents; the Court of International Trade (the Court) has found this insufficient.[122]
- The CIT in *Husteel Co. v. U.S.* found that "numbers {of respondents} ranging from three to eight do constitute large numbers for respondent selection."[123] Additionally, the Court stated that while the reference to a "reasonable" number of respondents was open to interpretation, it must include a sufficient number of respondents to permit Commerce to fulfill its statutory requirements.[124]

CP Kelco's Rebuttal Brief

- Commerce's decision not to individually examine Meihua was a reasonable exercise of its discretion. If Commerce reverses its decision at this point, then Commerce should review CP Kelco (Shandong), as it was "first in line" in requesting individual examination as a voluntary respondent.[125] The petitioner requested individual examination of CP Kelco (Shandong) repeatedly, and filed a voluntary Section A questionnaire response prior to Meihua's December 5, 2016 voluntary Section A response.[126]
- Pursuant to 19 CFR 351.204(d)(4), it is incumbent upon a respondent seeking individual examination to make that request clearly in its first submission in that segment. Where multiple parties request treatment as voluntary respondents, Commerce's practice is to select the firm that filed its request "first in time."[127] As CP Kelco requested voluntary treatment before Meihua, if Commerce elects to examine a voluntary respondent, it must choose CP Kelco (Shandong).

Commerce's Position:

We disagree with Meihua. After a comprehensive assessment of our caseload and available resources, we determined early in this segment of the proceeding to limit our individual examination to two mandatory respondents, Deosen and Fufeng.[128] This determination was based on our analysis of current and anticipated case work and the staffing and other resources

[121] *Id.*
[122] *Id.*, citing *Zhejiang Native Produce & Animal By-Products Imp. & Exp. Corp. v. United States*, 637 F. Supp 2d 1260 (CIT 2009).
[123] *Id.* at 7, citing *Husteel Co. v. United States*, 98 F. Supp. 3d 1315, 1327 (CIT 2009) (*Husteel Co. v. U.S.*).
[124] *Id.*
[125] *See* CP Kelco's Rebuttal Brief at 3.
[126] *Id.* at 4.
[127] *Id.*
[128] *See* Memorandum, "Selection of Respondents for the 2015-2016 Administrative Review of the Antidumping Duty Order on Xanthan Gum from the People's Republic of China," dated October 28, 2016 (Respondent Selection Memorandum).

available to Commerce. The Respondent Selection Memorandum issued in this review did not foreclose the possibility of accepting a voluntary respondent for individual examination. However, Commerce later determined that, in this administrative review, it lacked the necessary resources to take on additional respondents and that doing so would be unduly burdensome and preclude the timely completion of this administrative review.[129]

Commerce's discretion to limit the number of parties subject to individual examination is well-founded in statute and case law. The statute provides that:

> If it is not practicable to make individual weighted average dumping margin determinations . . . because of the large number of exporters or producers involved in the investigation or review, {Commerce} may determine the weighted average dumping margins for a reasonable number of exporters or producers . . . .[130]

The statute also addresses the treatment of voluntary respondents in cases in which Commerce limits its individual examination of respondents:

> In . . . any review under section 751(a) in which {Commerce} has, under section 777A(c)(2) . . . limited the number of exporters or producers examined . . . {Commerce} shall establish . . . and individual weighted average dumping margin for any exporter of producer not initially selected for individual examination under such sections who submits to {Commerce} the information requested from exporters or producers selected for examination if –
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> (1) Such information is submitted by the date specified –
>   (A) for exporters and producers that were initially selected for examination, or
>   (B) for the foreign government in a countervailing duty case where {Commerce} has determined a single country-wide rate; and
>
> *(2) The number of exporters or producers subject to the investigation or review is not so large that any additional individual examination of such exporters or producers would be unduly burdensome to {Commerce} and inhibit the timely completion of the investigation or review.*

(emphasis added).[131]

Commerce concluded in its Respondent Selection Memorandum that given the large number of respondents in this review, it was not practicable to individually examine each and limited its individual examination to two companies. Also, Commerce concluded in its Voluntary Respondent Memorandum that accepting a voluntary respondent would be unduly burdensome

[129] *See* Memorandum, "CP Kelco (Shandong) Biological Company Limited's and Meihua Group International Trading (Hong Kong)'s Requests for Selection as a Voluntary Respondent," dated May 3, 2017 (Voluntary Respondent Memorandum).
[130] *See* section 777A(c)(2) of the Act.
[131] *See* section 782(a) of the Act.

and would preclude the timely completion of this administrative review. The Court has affirmed Commerce's discretion to manage its case work. In *Tri Union Frozen Prods. v. United States*, the Court, citing the SAA accompanying the Uruguay Round Agreements Act, held that "Commerce may, under certain circumstances, refuse to examine any voluntary respondents."[132] Commerce, the Court reasoned, "reasonably concluded that 'accepting Quoc Viet {the voluntary respondent at issue}, therefore, would have been unduly burdensome and inhibited . . . timely completion of the final results of this review.'"[133] The Court concluded in *Tri Union* that Commerce had met its statutory obligation and had "fully assessed its available resources and determined that it was impossible to allocate additional resources to examine Quoc Viet in light of Commerce's significant workload in the review . . . Commerce's explanation sufficiently explains why additionally examining Quoc Viet amounted to an undue burden in this case."[134]

Similarly, the Court held in *Husteel Co. v. U.S.* that:

> When the Department of Commerce can show that the burden of reviewing a voluntary respondent would exceed that presented in a typical antidumping duty or countervailing duty review, the United States Court of International Trade will not second guess Commerce's decision on how to allocate its resources.[135]

We determined early in this review that, when examining the complexity and details of the factors of production, surrogate value data and U.S. sales data for the two mandatory respondents, as well as the significant caseload in Enforcement and Compliance, it would not be tenable to accept a voluntary respondent in this case. As the Court noted in *Tri Union*, we find in the instant review that "the burden of reviewing a single voluntary respondent was one too many."[136] In sum, Commerce was within its discretion to decline accepting Meihua as a voluntary respondent.

Comment 5: Rate Assignment for Separate Rate Applicants

Meihua's Case Brief

- In the *Preliminary Results,* Commerce based the rate assigned to separate rate applicants on that calculated for the mandatory respondent, Deosen. However, a portion of Deosen's margin was based on facts available, while the other mandatory respondent, Fufeng, received a *de minimis* rate.
- Commerce acted contrary to the statute by basing the all-others rate on Deosen's rate. Because a component of Deosen's transaction-specific margins was based on facts available, this rate is statutorily suspect.[137] This is contrary to the plain language of the statute and even raises serious constitutional issues.

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[132] *See Tri Union Frozen Foods Products,* et al*. v. United States*, 163 F. Supp. 3d 1255 (CIT 2016) (*remanded on other grounds*) (*Tri Union*).
[133] *Id.* at 1284.
[134] *Id.*
[135] *See Husteel Co. v. U.S.* (*remanded on other grounds*).
[136] *See Tri Union* at 1283.
[137] *See* Meihua's Case Brief at 8, quoting section 735(c)(5) of the Act.

- If a statute is open to various interpretations, the constitutionally-valid interpretation must prevail.[138] The facts available provisions of the statute are not merely remedial in nature, but serve the purpose of punishment or deterrence to the non-cooperating party. Application of an AFA rate to a cooperative respondent, such as Meihua, with no attendant impact on the non-cooperating respondent, would be improper.[139] Under the facts of this review, it would receive the same margin as Deosen, the company that failed to cooperate fully with the review. This would benefit Deosen, putting it in a better position *vis a vis* its competitors.
- This punitive element in the facts available statute raises concerns regarding the 8th Amendment to the United States Constitution, with its prohibition of excessive bail and excessive fines. Remedial statutes with a penal component are subject to review on 8th Amendment grounds.[140] The antidumping statute is "more than remedial," and constitutes punishment as defined by the 8th Amendment; as such, it must be reviewed under this constitutional standard.
- Meihua cooperated fully in this review. Thus, the rate assigned must be stripped of the component of AFA. This would be consistent with the Court's decision in an analogous case, *Changzhou Wujin Fine Chemical Factory Co.*, where an AFA rate was adjusted to avoid applying adverse inferences to a cooperating party.[141]
- Finally, if both mandatory respondents receive margins of zero in the final results, the separate rate applicants should also receive a margin of zero. Recent court precedent supports such an approach if both mandatory respondents receive zero percent dumping margins.

CP Kelco's Rebuttal Brief

- If both mandatory respondents receive margins of zero or *de minimis* in the final results of the review, then separate rate applicants should also receive margins of zero. However, Commerce preliminarily calculated an above *de minimis* rate for one of the mandatory respondents in this case and Meihua does not qualify for a separate rate; therefore, Meihua should not receive a zero rate.
- Assuming *arguendo*, that both mandatory respondents receive zero or *de minimis* margins, Commerce may "use any reasonable method" to determine the rate for non-investigated companies.[142] Commerce's practice in establishing a rate for non-investigated separate rate companies excludes zero or *de minimis* margins, as well as those based entirely on adverse facts available.[143]
- The Federal Circuit has held that the rate applied to cooperative non-mandatory respondents must be supported by substantial evidence on the record, and must not be

[138] *Id.* at 10, quoting *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988).
[139] *Id.*, quoting *Changzhou Wujin Fine Furniture (Shanghai) Ltd. v. United States*, 748 F.3d 1365 (Fed. Cir. 2014) (*Wujin Fine Chemical Factory Co.*).
[140] *Id.* at 13, quoting *Austin v. United States*, 509 U.S. 602 (1993) *and United States v. Bajakajian*, 524 U.S. 321 (1998).
[141] *See* Meihua's Case Brief. at 14, citing *Changzhou Wujin Fine Chemical Factory Co., Ltd. v. United States,* 701 F.3d 1367 (CAFC 2012).
[142] *Id.*
[143] *See* CP Kelco's Rebuttal Brief at 5 *et seq.*

punitive.[144] The Federal Circuit has also held that "when all individually examined respondents are assigned a *de minimis* margin, Commerce has no mandate to routinely exclude zero or *de minimis* margins."[145]

Archer Daniel Midlands Rebuttal Brief

- Deosen's calculated margin of 9.30 percent assigned to separate rate respondents is not tainted even though it contains elements of facts available.[146] Commerce must not make any adjustment to Deosen's rate to back out the AFA portion of the margin. Meihua misconstrues the relevant statutory language.
- The relevant portion of the statute, section 735(c)(5) of the Act, pertains only to exporter-specific weighted-average margins, not to transaction-specific dumping margins.[147] Accordingly, because only weighted-average dumping margins are included in the calculation of an all-others rate, the statute's reference to disregarding margins determined entirely under the facts available provisions of the statute must refer to weighted-average margins.
- Meihua cites no precedent for its interpretation that a rate based on partial facts available applied to individual transactions is in any way unsupportable. The rate for Deosen was *not* "determined entirely under section 1677e"[148] (the facts available section of the statute).
- Meihua is not entitled to a separate rate, but if Commerce grants Meihua a separate rate, it should continue to be the all-others rate.[149]

Commerce's Position:

We agree with ADM. Meihua's reading of the statute is fundamentally flawed. While the statute and Commerce's regulations do not directly address the establishment of a rate to be applied to companies not selected for individual examination where Commerce limits its examination in an administrative review pursuant to section 777A(c)(2) of the Act, as is the case in this administrative review, Commerce's practice 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 antidumping duty investigation.[150] Section 735(c)(5)(A) of the Act states the general rule 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

[144] *Id*. at 6, citing *Yangzhou Bestpak Gifts and Crafts Co. v. United States*, 716 F.3d 1370, 1379 (Fed. Cir. 2013).
[145] *Id*., citing *Albermarle Corp. & Subsidiaries v. United States,* 821 F.3d 1345, 1357 (Fed. Cir. 2016).
[146] *See* ADM's Rebuttal Brief at 2.
[147] *Id.* at 2.
[148] *Id.*
[149] *Id.* at 3.
[150] *See Fresh Garlic from the People's Republic of China: Preliminary Results, Preliminary Rescission, and Final Rescission, in Part, of the 22nd Antidumping Duty Administrative Review and Preliminary Results of the New Shipper Reviews; 2015–2016;* 82 FR 57718, (December 7, 2017); *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China: Preliminary Results and Partial Rescission of the Antidumping Duty Administrative Review and Preliminary Results of the New Shipper Review; 2012-2013*, 79 FR 42758 (July 23, 2014).

under section 776"Thus, the statute thus explicitly deals with overall weighted-average margins. Furthermore, the weighted-average margin selected as the all-others rate may contain elements of facts available, even if it includes adverse inferences.[151] Thus, we find Deosen's weighted-average margin to be appropriate for use as the rate applicable to respondents eligible for a separate rate in this administrative review.

We also disagree with Meihua's interpretation of the facts available provision as being punitive. U.S. antidumping duty laws are remedial, not punitive, in nature.[152] The statute provides for the use of the facts otherwise available, including the use of adverse inferences, to ensure that a respondent which fails to cooperate does not find itself in a better position than if it had cooperated fully with Commerce. This is remediation, not punishment; therefore, claims under the 8th Amendment of the United States Constitution do not come into play. Furthermore, the CIT held that:

> [A]ntidumping laws "are remedial not punitive,"... an antidumping rate based on AFA is designed "to provide respondents with an incentive to cooperate, not to impose punitive ... margins. For that reason, an AFA dumping margin determined in accordance with the statutory requirements is not a punitive measure, and the limitations applicable to punitive damages assessments therefore have no pertinence to duties imposed based on lawfully derived margins.[153]

Comment 6: Clerical Error Regarding Fufeng's Packing Expenses

Fufeng's Case Brief

- Commerce made a ministerial error when attempting to merge revised packing expense data with Fufeng's U.S. sales database by control number (USCONNUM). As these data were reported on a transaction-specific basis, the proper merging language should have been by observation number (OBS).[154]

CP Kelco's and ADM's Rebuttal Briefs

- The petitioners did not comment on this issue.

Commerce's Position:

We agree with the Fufeng and have made the requested correction in the final results.

[151] *See, e.g., Navneet Publications (India) Ltd. v. United States,* 999 F. Supp. 2d 1354, 1359 (CIT 2014). See also sections 735(c)(5)(A) and (B) of the Act.
[152] *KYD, Inc. v. United States*, 836 F. Supp. 2d 1410 (Fed Cir. 2012), citing *De Cecco v. United States,* 216 F.3d 1027, 1032 (Fed. Cir. 2000).
[153] *Id*.
[154] Fufeng suggests SAS programming language to address this issue. *See* Fufeng's Case Brief at 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

2/6/2018

X 

Signed by: GARY TAVERMAN

Gary Taverman
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations
performing the non-exclusive functions and duties of the
Assistant Secretary for Enforcement and Compliance