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Administrative Review
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July 29, 2019

MEMORANDUM TO: Christian Marsh
Deputy Assistant Secretary
for Enforcement and Compliance

FROM: James Maeder
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum: Multilayered Wood Flooring from the People's Republic of China; 2016-2017

I. SUMMARY

The Department of Commerce (Commerce) analyzed the case and rebuttal briefs submitted by interested parties in the administrative review of the antidumping duty (AD) order on multilayered wood flooring (wood flooring) from the People's Republic of China (China) covering the period of review (POR) December 1, 2016, through November 30, 2017. The mandatory respondents for this administrative review are Jiangsu Senmao Bamboo Wood Industry Co., Ltd. (Jiangsu Senmao) and Sino-Maple (Jiangsu) Co., Ltd. (Sino-Maple).

As a result of this analysis, we have made certain changes since the *Preliminary Results*.[1] We recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum.

Below is a complete list of the issues in this review for which we received comments from parties:

Comment 1: Application of Adverse Facts Available (AFA) to Sino-Maple
Comment 2: The AFA Rate
Comment 3: The Separate Rate
Comment 4: Intermediate Input Methodology

[1] *See Multilayered Wood Flooring from the People's Republic of China: Preliminary Results of the Antidumping Duty Administrative Review; 2016—2017*, 83 FR 65630 (December 21, 2018) (*Preliminary Results*) and accompanying Memorandum, "Decision Memorandum for the Preliminary Results of Antidumping Duty Administrative Review: Multilayered Wood Flooring from the People's Republic of China; 2016-2017," dated December 17, 2018 (Preliminary Decision Memorandum).

Comment 5: Deduction of Irrecoverable Value-Added Tax (VAT)
Comment 6: Yihua Timber's Separate Rate Eligibility
Comment 7: Initiation of Jiaxing Brilliant
Comment 8: Spelling Variations of Zhejiang Dadongwu's Name
Comment 9: Keri Wood's No Shipment Claim
Comment 10: Rescission of Review with Respect to Baroque Timber
Comment 11: Jilin Forest's Separate Rate Eligibility
Comment 12: Scholar Home's Separate Rate Eligibility
Comment 13: Jiechen's No Shipment Claim
Comment 14: Certain Separate Rate Applicants' Eligibility
Comment 15: Alleged "Fraudulently Declared" Entries
Comment 16: Misuse of U.S. Customs and Border Protection (CBP) Case Numbers
Comment 17: China-Wide Entity Companies in the CBP Instructions

II. BACKGROUND

On December 21, 2018, Commerce published the *Preliminary Results* of this administrative review. Commerce exercised its discretion to toll all deadlines affected by the partial federal government closure from December 22, 2018, through the resumption of operations on January 29, 2019.[2] The revised deadline for the final results was May 30, 2019. On May 24, 2019, we extended this deadline to July 29, 2019.[3]

In accordance with 19 CFR 351.309(c)(ii), we invited parties to comment on the *Preliminary Results*. The following parties submitted case briefs: the American Manufacturers of Multilayered Wood Flooring (the petitioners); Jiangsu Senmao, Sino-Maple, *et al.*; Dalian Huilong Wooden Products Co., Ltd. (Dalian Huilong) *et al.*; Hailin Linjing Wooden Products Co., Ltd. (Hailin Linjing) *et al.*; Jilin Forest Industry Jinqiao Flooring Group Co., Ltd. (Jilin Forest); Lumber Liquidators Services, LLC (Lumber Liquidators); Struxtur, Inc. (Struxtur) and Evolutions Flooring, Inc. (Evolutions); Yekalon Industry Inc. (Yekalon) *et al.*; Yihua Lifestyle Technology Co., Ltd. (Yihua Tech); Zhejiang Dadongwu Green Home Wood Co., Ltd. (Zhejiang Dadongwu); Zhejiang Jiechen Wood Industry Co., Ltd. (Jiechen); and Zhejiang Longsen Lumbering Co., Ltd. (Zhejiang

[2] *See* Memorandum to the Record from 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, "Deadlines Affected by the Partial Shutdown of the Federal Government," dated January 28, 2019. All deadlines in this segment of the proceeding have been extended by 40 days.
[3] *See* Memorandum, "Multilayered Wood Flooring from the People's Republic of China: Extension of Deadline for Final Results of Antidumping Duty Administrative Review; 2016-2017," dated May 24, 2019.

Longsen) *et al.*[4] Jiaxing Brilliant Import & Export Co., Ltd. (Jiaxing Brilliant) submitted a letter in lieu of a case brief.[5]

The following parties submitted rebuttal briefs: the petitioners; Jiangsu Senmao, Sino-Maple *et al.*; Dalian Huilong *et al.*; Guangzhou Homebon Timber Manufacturing Co., Ltd (Homebon); Kember Hardwood Flooring, Inc. (Kember); Shenyang Haobainian Wooden Co., Ltd. (Shenyang Haobainian); Struxtur; Yekalon *et al.*; Yihua Tech; and Zhejiang Dadongwu.[6]

[4] *See* Letters from Petitioners, "Multilayered Wood Flooring from the People's Republic of China: Case Brief" (Petitioners' Case Brief); Jiangsu Senmao, Sino-Maple, *et al.*, "Multilayered Wood Flooring from the People's Republic of China: Case Brief" (Jiangsu Senmao *et al.*'s Case Brief); Dalian Huilong *et al.*, "Multilayered Wood Flooring from China: Separate Rate Applicants' Case Brief" (Dalian Huilong *et al.*'s Case Brief); Hailin Linjing *et al.*, "Multilayered Wood Flooring from the People's Republic of China: Submission of Administrative Case Brief" (Hailin Linjing *et al.*'s Case Brief); Jilin Forest, "Multilayered Wood Flooring from the People's Republic of China: Submission of Administrative Case Brief" (Jinqiao Flooring's Case Brief); Lumber Liquidators, "Case Brief: Lumber Liquidators Services, LLC Multilayered Wood Flooring from the People's Republic of China" (Lumber Liquidator's Case Brief); Struxtur and Evolutions, "Multilayered Wood Flooring from the People's Republic of China: Case Brief"; Yihua Tech, "2016-17 Administrative Review of the Antidumping Duty Order on Multilayered Wood Flooring from the People's Republic of China" (Yihua Tech's Case Brief); Zhejiang Dadongwu, "Multilayered Wood Flooring from the People's Republic of China: Case Brief" (Zhejiang Dadongwu's Case Brief); Jiechen, "Multilayered Wood Flooring from the People's Republic of China, A-570-970; Case Brief" (Jiechen's Case Brief); and Zhejiang Longsen *et al.*, "Multilayered Wood Flooring from the People's Republic of China, A-570970; Case Brief" (Zhejiang Longsen *et al.*'s Case Brief), all dated March 4, 2019. *See also* Yekalon *et al.*'s Letter, "Resubmission of Case Brief for Yekalon Industry Inc., Huzhou Sunergy World Trade Co., Ltd., Baroque Timber Industries (Zhongshan) Co., Ltd., and Scholar Home (Shanghai) New Material Co., Ltd.: Sixth Administrative Review of the Antidumping Duty Order on Multilayered Wood Flooring from the People's Republic of China ("PRC")," dated June 27, 2019 (Yekalon's Case Brief).

[5] *See* Jiaxing Brilliant's Letter, "Multilayered Wood Flooring from the PRC: Jiaxing Brilliant Letter in Lieu of Case Brief," dated March 4, 2019 (Jiaxing Brilliant's Letter).

[6] *See* Letters from Jiangsu Senmao, Sino-Maple, *et al.*, "Multilayered Wood Flooring from the People's Republic of China: Rebuttal Case Brief" (Jiangsu Senmao *et al.*'s Rebuttal Brief); Dalian Huilong *et al.*, "Multilayered Wood Flooring from China: Separate Rate Applicants' Rebuttal Brief" (Dalian Huilong *et al.*'s Rebuttal Brief); Homebon, "Multilayered Wood Flooring from People's Republic of China: Guangzhou Homebon Timber Manufacturing Co., Ltd.'s Rebuttal Brief" (Homebon's Rebuttal Brief); Kember, "Multilayered Wood Flooring from the People's Republic of China: Rebuttal Brief of Kember Hardwood Flooring, Inc." (Kember's Rebuttal Brief); Shenyang Haobainian, "Multilayered Wood Flooring from the People's Republic of China: Rebuttal Comments of Shenyang Haobainian Wooden Co., Ltd." (Shenyang Haobainian's Rebuttal Brief); Struxtur and Evolutions, "Multilayered Wood Flooring from the People's Republic of China Rebuttal Brief"; Yekalon *et al.*, "Rebuttal to AMMWF Case Brief Sixth Administrative Review of the Antidumping Duty Order on Multilayered Wood Flooring from the People's Republic of China ("PRC")" (Yekalon's Rebuttal Brief); Yihua Tech, "2016-17 Administrative Review of the Antidumping Duty Order on Multilayered Wood Flooring from the People's Republic of China: Rebuttal Brief of Yihua Lifestyle Technology Co., Ltd., Successor-in-Interest to Guangdong Yihua Timber Industry Co., Ltd." (Yihua Tech's Rebuttal Brief); and Zhejiang Dadongwu, "Multilayered Wood Flooring from the People's Republic of China: Rebuttal Case Brief" (Zhejiang Dadongwu's Rebuttal Brief), all dated March 11, 2019. *See also* Petitioners' Letter, "Multilayered Wood Flooring from the People's Republic of China: Resubmission of Rebuttal Brief," dated June 27, 2019 (Petitioners' Rebuttal Brief).

III. SCOPE OF THE ORDER[7]

Multilayered wood flooring is composed of an assembly of two or more layers or plies of wood veneer(s)[8] in combination with a core.[9] The several layers, along with the core, are glued or otherwise bonded together to form a final assembled product. Multilayered wood flooring is often referred to by other terms, *e.g.*, "engineered wood flooring" or "plywood flooring." Regardless of the particular terminology, all products that meet the description set forth herein are intended for inclusion within the definition of subject merchandise.

All multilayered wood flooring is included within the definition of subject merchandise, without regard to: dimension (overall thickness, thickness of face ply, thickness of back ply, thickness of core, and thickness of inner plies; width; and length); wood species used for the face, back and inner veneers; core composition; and face grade. Multilayered wood flooring included within the definition of subject merchandise may be unfinished (*i.e.*, without a finally finished surface to protect the face veneer from wear and tear) or "prefinished" (*i.e.*, a coating applied to the face veneer, including, but not exclusively, oil or oil-modified or water-based polyurethanes, ultra-violet light cured polyurethanes, wax, epoxy-ester finishes, moisture-cured urethanes and acid-curing formaldehyde finishes). The veneers may be also soaked in an acrylic-impregnated finish. All multilayered wood flooring is included within the definition of subject merchandise regardless of whether the face (or back) of the product is smooth, wire brushed, distressed by any method or multiple methods, or hand-scraped. In addition, all multilayered wood flooring is included within the definition of subject merchandise regardless of whether or not it is manufactured with any interlocking or connecting mechanism (for example, tongue-and-groove construction or locking joints). All multilayered wood flooring is included within the definition of the subject merchandise regardless of whether the product meets a particular industry or similar standard.

The core of multilayered wood flooring may be composed of a range of materials, including but not limited to hardwood or softwood veneer, particleboard, medium-density fiberboard, high-density fiberboard (HDF), stone and/or plastic composite, or strips of lumber placed edge-to-edge.

Multilayered wood flooring products generally, but not exclusively, may be in the form of a strip, plank, or other geometrical patterns (*e.g.*, circular, hexagonal). All multilayered wood flooring products are included within this definition regardless of the actual or nominal dimensions or form of the product. Specifically excluded from the scope are cork flooring and bamboo flooring, regardless of whether any of the sub-surface layers of either flooring are made from wood. Also excluded is laminate flooring. Laminate flooring consists of a top wear layer

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[7] *See Multilayered Wood Flooring from the People's Republic of China: Notice of Amended Final Affirmative Determination of Sales at Less than Fair Value and Antidumping Duty Order*, 76 FR 76690 (December 8, 2011), as amended in *Multilayered Wood Flooring from the People's Republic of China*, 77 FR 5484 (February 3, 2012) (collectively, *Order*). *See also Multilayered Wood Flooring from the People's Republic of China: Final Clarification of the Scope of the Antidumping and Countervailing Duty Orders*, 82 FR 27799 (June 19, 2017).

[8] A "veneer" is a thin slice of wood, rotary cut, sliced or sawed from a log, bolt or flitch. Veneer is referred to as a ply when assembled.

[9] Commerce Interpretive Note: Commerce interprets this language to refer to wood flooring products with a minimum of three layers.

sheet not made of wood, a decorative paper layer, a core-layer of HDF, and a stabilizing bottom layer.

Imports of the subject merchandise are provided for under the following subheadings of the Harmonized Tariff Schedule of the United States (HTSUS): 4412.31.0520; 4412.31.0540; 4412.31.0560; 4412.31.0620; 4412.31.0640; 4412.31.0660; 4412.31.2510; 4412.31.2520; 4412.31.2610; 4412.31.2620; 4412.31.3175; 4412.31.4040; 4412.31.4050; 4412.31.4060; 4412.31.4070; 4412.31.4075; 4412.31.4080; 4412.31.4140; 4412.31.4160; 4412.31.4175; 4412.31.5125; 4412.31.5135; 4412.31.5155; 4412.31.5165; 4412.31.5175; 4412.31.5225; 4412.31.6000; 4412.31.9100; 4412.32.0520; 4412.32.0540; 4412.32.0560; 4412.32.0565; 4412.32.0570; 4412.32.0640; 4412.32.0665; 4412.32.2510; 4412.32.2520; 4412.32.2525; 4412.32.2530; 4412.32.2610; 4412.32.2625; 4412.32.3125; 4412.32.3135; 4412.32.3155; 4412.32.3165; 4412.32.3175; 4412.32.3185; 4412.32.3225; 4412.32.5600; 4412.32.5700; 4412.39.1000; 4412.39.3000; 4412.39.4011; 4412.39.4012; 4412.39.4019; 4412.39.4031; 4412.39.4032; 4412.39.4039; 4412.39.4051; 4412.39.4052; 4412.39.4059; 4412.39.4061; 4412.39.4062; 4412.39.4069; 4412.39.5010; 4412.39.5030; 4412.39.5050; 4412.94.1030; 4412.94.1050; 4412.94.3105; 4412.94.3111; 4412.94.3121; 4412.94.3131; 4412.94.3141; 4412.94.3160; 4412.94.3171; 4412.94.4100; 4412.94.5100; 4412.94.6000; 4412.94.7000; 4412.94.8000; 4412.94.9000; 4412.94.9500; 4412.99.0600; 4412.99.1020; 4412.99.1030; 4412.99.1040; 4412.99.3110; 4412.99.3120; 4412.99.3130; 4412.99.3140; 4412.99.3150; 4412.99.3160; 4412.99.3170; 4412.99.4100; 4412.99.5100; 4412.99.5105; 4412.99.5115; 4412.99.5710; 4412.99.6000; 4412.99.7000; 4412.99.8000; 4412.99.9000; 4412.99.9500; 4418.71.2000; 4418.71.9000; 4418.72.2000; 4418.72.9500; 4418.74.2000; 4418.74.9000; 4418.75.4000; 4418.75.7000; 4418.79.0100; and 9801.00.2500.

While HTSUS subheadings are provided for convenience and customs purposes, the written description of the subject merchandise is dispositive.

IV. CHANGES FROM THE PRELIMINARY RESULTS

1. In the *Preliminary Results*, we applied the highest-transaction specific margin calculated for Jiangsu Senmao to Sino-Maple and the China-wide entity as AFA. We have adjusted this rate to correct a clerical error for these final results. *See* Comment 2.

2. Because we have adjusted the AFA rate selected for Sino-Maple, we have adjusted the rate for the non-selected separate rate companies accordingly. *See* Comment 3.

3. We determine that Guangdong Yihua Timber Industry Co., Ltd. (Yihua Timber) is eligible for a separate rate. *See* Comment 6.

4. We determine that Jiangsu Keri Wood Co., Ltd. (Keri Wood) and Dalian Guhua Wooden Product Co. Ltd (Dalian Guhua) made no shipments during the POR. *See* Comments 9 and 14.

V. DISCUSSION OF THE ISSUES

Comment 1: Application of AFA to Sino-Maple

Sino-Maple's Arguments[10]

- Commerce's determination that Sino-Maple failed to provide necessary information, withheld information requested by Commerce, and significantly impeded the proceeding, thereby warranting the application of total AFA, is unreasonable and should be reversed.[11]
- In the *Preliminary Results*, Commerce failed to adequately consider that Sino-Maple voluntarily admitted that it failed to report the missing sales at issue and Commerce only found out about the missing sales through Sino-Maple's admission and attempt to cooperate.
- Commerce had sufficient time to accept and consider the additional information that Sino-Maple attempted to submit for the record. Commerce should therefore allow Sino-Maple to report the missing sales.
- The missing sales involved importations of wood flooring from an unaffiliated factory. Sino-Maple and its affiliated importer, Alpha Floors, mistakenly did not believe that these sales were subject to this review because they had been declared to be product of a third country, and therefore did not inform counsel of these sales.
- Upon advice of counsel, and once the situation had become known to counsel, Sino-Maple attempted to fully cooperate with Commerce and report these sales. On November 14, 2018, Sino-Maple requested additional time to respond to Commerce's November 9, 2018, supplemental questionnaire and report additional constructed export price (CEP) sales.[12]
- On November 16, 2018, Sino-Maple reported the quantity and value (Q&V) of the additional sales it wished to report.[13] On December 3, 2018, Sino-Maple filed a request to submit this additional information in a supplemental questionnaire response.[14]
- Commerce has regularly issued supplemental questionnaires after the issuance of *Preliminary Results*.[15] The Courts consider Commerce's decision to reject an untimely filing in light of the remedial, not punitive, purpose of the antidumping law and its goal of determining dumping margins as accurately as possible.[16] The Courts also weigh the burden imposed upon the agency by accepting the late submission.[17]
- Thus, while deferring to Commerce's necessary discretion to set and enforce its deadlines, the Court will review on a case-by-case basis whether the interests of accuracy and fairness outweigh the burden placed on Commerce and the interest in finality.[18]

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[10] *See* Jiangsu Senmao *et al.*'s Case Brief at 2 – 5.
[11] *Id*. at 2 (citing Memorandum, "Application of Adverse Facts Available to Sino-Maple (Jiangsu) Co., Ltd. for the Preliminary Results of Review," dated December 17, 2018 (BPI Memorandum)).
[12] *Id*. at 3 (citing Sino-Maple's Letter, "Partial Extension of Time Request for Certain Additional Information in Response to Supplemental Questions," dated November 14, 2018) (Sino-Maple Extension Request).
[13] *Id*. (citing Sino-Maple November 16, 2018 Second Supplemental Questionnaire Response (Sino-Maple Second SQR) at 4)
[14] *Id*. at 4 (citing Sino-Maple's Letter, "Request to Submit Certain Additional Information in a Supplemental Questionnaire," dated December 3, 2018 (Sino-Maple Second Request).
[15] *Id*. (citing Sino-Maple Second Request at 2 and Exhibits 1-3).
[16] *Id.* (citing *Grobest & I-Mei Indust. (Vietnam) Co. v. United States*, 815 F.Supp.2d, 1342, 1365 (CIT 2012)).
[17] *Id*. (citing *Usinor Sacilor v. United States*, 872 F. Supp. 1000, 1008 (CIT 1994)).
[18] *Id*. (citing *Timken U.S. Corp. v. United States*, 434 F.3d 1345, 1353 (CAFC 2006)).

- Here, Sino-Maple requested until December 17, 2018, to submit the additional sales information, which was also the deadline for the *Preliminary Results*. Under the current schedule, Commerce would still have had 120 days after the *Preliminary Results* were published before it had to issue the final results.
- Further, Commerce still had the option of extending the deadline for the final results from 120 days to 300 days after publication of the *Preliminary Results*.[19] Commerce therefore would have had ample time to take into account the additional information that Sino-Maple requested to submit.

Petitioners' Rebuttal[20]

- Commerce may base a determination on facts available when necessary information is not on the record or an interested party withholds information, fails to provide information in a timely manner, significantly impedes a proceeding, or provides unverifiable information.[21]
- Where information is missing from the record based on a respondent's failure to cooperate to the best of its ability, the application of AFA is appropriate.[22] The record here provides ample evidence demonstrating that Sino-Maple failed to act to the best of its ability as it repeatedly failed to provide full information to Commerce regarding its sales of subject merchandise.
- From the outset of this review, Sino-Maple failed to provide full and complete information regarding its U.S. affiliate, stating that it did not sell subject merchandise to affiliated resellers during the POR and providing no other information regarding this affiliate despite Commerce's request that it describe the activities of each affiliated company, with particular attention to those affiliates involved with the merchandise under consideration.[23]
- Similarly, in its Section C questionnaire response, Sino-Maple failed to identify its U.S. affiliate as a customer and when asked about its relationship with this affiliate, Sino-Maple only stated that the affiliate assisted Sino-Maple with finding U.S. customers and facilitating the sales of subject merchandise in the United States at times during the POR.[24]
- Additional information in Sino-Maple's supplemental questionnaire response indicated that Sino-Maple made sales to its U.S. affiliate during the POR, despite failing to report any sales to this affiliate in its sales database, and without any explanation of the inconsistency with its prior response.[25]
- More than two months after Sino-Maple submitted its Section A questionnaire response, Sino-Maple finally informed Commerce that it in fact made a number of sales to this U.S. affiliate that were initially and erroneously reported as export price (EP) sales and/or not reported at all.[26]
- Sino-Maple also revealed that it wished to report an additional quantity of sales made to this U.S. affiliate through a third country, notwithstanding its earlier reporting.[27]

[19] *Id*. at 5 (citing 19 CFR 351.213(h)(2)).
[20] *See* Petitioners' Rebuttal Brief at 12 – 18.
[21] *Id*. at 13 (citing 19 U.S.C. 1677e(a)).
[22] *Id*. (citing 19 U.S.C. 1677e(b)).
[23] *Id*. at 14 (citing Sino-Maple September 4, 2018 Section A Questionnaire Response (Sino-Maple AQR)).
[24] *Id*. (citing Sino-Maple September 13, 2018 Section C-D Questionnaire Response (Sino-Maple CDQR)).
[25] *Id*. (citing Sino-Maple November 5, 2018 First Supplemental Questionnaire Response (Sino-Maple First SQR)).
[26] *Id.* at 15 (citing Sino-Maple Extension Request).
[27] *Id*.

- Based on Sino-Maple's repeated failures to fully and accurately report all of its U.S. sales of subject merchandise, and Sino-Maple's eleventh-hour attempt to report previously unreported sales, Commerce properly found that Sino-Maple failed to act to the best of its ability and that the application of AFA was warranted.
- In arguing that Commerce erred in applying AFA, Sino-Maple put forth two arguments: (1) that it attempted to fully cooperate with Commerce and (2) there was sufficient time remaining in the administrative review for Commerce to accept the new information Sino-Maple wished to place on the record.
- First, the "best of its ability" standard contains no intent requirement. Thus, whether Sino-Maple "attempted" to fully cooperate does not answer the question of whether it did in fact cooperate to the best of its ability as required by the statute. Likewise, the fact that Sino-Maple "did not believe" that sales to its U.S. affiliate were subject to the review does not excuse its failures.
- A company can fail to cooperate to the best of its ability due to its carelessness, inattentiveness, or inadequate record-keeping and companies subject to administrative reviews are expected to be familiar with the information Commerce requests and to maintain sufficient records with respect to such information.
- Additionally. Sino-Maple's argument that Commerce unreasonably denied its request to submit additional sales information fails to address the substance of the agency's determination. Commerce applied AFA to Sino-Maple because of its failure to report the full universe of its EP and CEP sales, as well as the nature of its relationship with its U.S. affiliate, despite repeated requests that it do so.
- Thus, Commerce's rejection of Sino-Maple's information and subsequent application of AFA was not simply a function of a denied request for an extension of time. Indeed, if Commerce were required to allow respondents to make significant changes to their reported information at such a late stage in the proceeding, respondents would have no incentive to provide full and accurate responses from the outset.
- It is disingenuous for Sino-Maple to present the question before the agency as simply one of accepting new information close to the time of the *Preliminary Results*. As Sino-Maple itself recognized, the new information it wished to submit related to unreported sales that would also require the reporting of new adjustments and factors of production FOPs.
- This deficiency would have almost certainly resulted in multiple additional questionnaire responses and required a significant amount of time on the part of Commerce and the parties. Thus, Commerce did not err in denying Sino-Maple's request for an extension and this denial does not undermine the appropriateness of the application of AFA.

Commerce's Position: We agree with the petitioners regarding the application of AFA to Sino-Maple in the final results. In order to establish the basis for this determination, we provide a timeline of events, including information revealed for the first time to Commerce. As discussed below, Sino-Maple provided discordant and deficient information to Commerce regarding the nature of its relationship with its U.S. affiliate and its sales of subject merchandise during the POR. Because the nature of certain facts on the record is business proprietary information (BPI), Commerce has included these facts in the BPI Memorandum accompanying its *Preliminary Results*, which are incorporated herein by reference.[28]

[28] *See* BPI Memorandum.

A. Chronology

- On September 4, 2018, Sino-Maple reported in its Section A questionnaire response: (1) the company did not sell subject merchandise to any affiliated resellers, (2) the company was not aware of any merchandise sold to third countries that was ultimately shipped to the United States, and (3) that no other company assisted Sino-Maple in the manufacture of subject merchandise during the POR.[29]
- On September 13, 2018, Sino-Maple submitted its Section C questionnaire response, in which the company again failed to acknowledge the nature of its relationship with its U.S. affiliate or identify any sales made to and/or by its U.S. affiliate during the POR.[30]
- On October 17, 2018, Commerce issued a supplemental questionnaire in which it provided an additional opportunity for Sino-Maple to remedy its reporting and clarify its response with respect to its relationship with its U.S. affiliate, and the U.S. affiliate's role, if any, in the U.S. sales process.[31]
- On November 5, 2018, Sino-Maple responded by simply stating that the U.S. affiliate "assist{ed} Sino-Maple with finding U.S. customers and facilitating the sale of subject merchandise in the United States at times during the POR." However, Sino-Maple failed to augment its U.S. database with sales made through this affiliate or acknowledge the prior country of origin classification determination.[32]
- On November 9, 2018, we issued an additional supplemental questionnaire, in which we directed Sino-Maple toward the number of inconsistencies in its reporting regarding its U.S. affiliate and sales during the POR and requested a full explanation.[33]
- On November 14, 2018, Sino-Maple finally acknowledged–in an extension request letter–the nature of its business relationship with its U.S. affiliate, the existence of a large number of CEP sales made through this U.S. affiliate during the POR, and the transshipment of these sales through a third-country manufacturer. Sino-Maple requested until December 17, 2018, the deadline for the *Preliminary Results*, to report the additional CEP sales made by this affiliate.[34]
- On November 16, 2018, Sino-Maple partially responded to the second supplemental questionnaire by revising the classification of a number of sales originally reported as EP sales to CEP sales made through its U.S. affiliate. Sino-Maple also included the Q&V of the additional CEP sales that it wished to report, which account for a large portion of the total universe of sales of subject merchandise during the POR.[35]
- On November 30, 2018, upon the request of Sino-Maple, Commerce met with counsel for Sino-Maple to discuss Commerce's extension request denial and the possibility of reconsideration.[36]

[29] *See* Sino-Maple AQR at 1, 12 and 19-22.
[30] *See* Sino-Maple CDQR.
[31] *See* Sino-Maple First Supplemental Questionnaire, dated October 17, 2018 (Sino-Maple First SQ) at 4.
[32] *See* Sino-Maple First SQR at 5.
[33] *See* Sino-Maple Second Supplemental Questionnaire, dated November 9, 2018 (Sino-Maple Second SQ).
[34] *See* Sino-Maple Extension Request.
[35] *See* Sino-Maple Second SQR at 4.
[36] *See* Memorandum, "Multilayered Wood Flooring - *Ex Parte* Memorandum," dated November 30, 2018.

- On December 3, 2018, Sino-Maple filed a request to submit its additional sales information in a supplemental questionnaire.[37]

B. Application of Facts Available and Adverse Facts Available

Section 776(a)(1) and (2) of the Act provides that, if necessary information is missing from the record, or if an interested party (A) withholds information that has been requested by Commerce, (B) fails to provide such information in a timely manner or in the form or manner requested, subject to subsections 782(c)(1) and (e) of the Act, (C) significantly impedes a proceeding under the antidumping statute, or (D) provides such information but the information cannot be verified, Commerce shall, subject to subsection 782(d) of the Act, use facts otherwise available in reaching the applicable determination.

As detailed above, Sino-Maple failed to disclose the nature of its relationship with its U.S. affiliate until it was already too late for Commerce to fully analyze the relationship and the related sales during the POR. Specifically, more than two months after Sino-Maple submitted its Section A questionnaire response, Sino-Maple finally informed Commerce that it in fact made a number of sales to this U.S. affiliate that were initially and erroneously reported as EP sales and/or not reported at all.[38] Sino-Maple also revealed that it wished to report a significant additional quantity of sales made to this U.S. affiliate through a third country, despite the fact that it had previously reported no other parties involved in the production of subject merchandise and that it was not aware of any merchandise sold to third countries that was ultimately shipped to the United States.[39]

Sino-Maple was aware of the need to report all of its sales of subject merchandise to Commerce, and was in fact aware of the merchandise sold to its U.S. affiliate well in advance of its initial questionnaire response.[40] However, Sino-Maple repeatedly failed to disclose its relationship with its affiliate, its sales through the third-country manufacturer, and its sales to and/or by its U.S. affiliate during the POR, despite several requests and opportunities provided by Commerce to do so. Thus, we find that Sino-Maple repeatedly withheld information requested by Commerce and failed to provide such information in a timely manner pursuant to sections 776(a)(2)(A) and (B) of the Act.

Further, while Sino-Maple argues that Commerce had sufficient time to accept and consider the additional information it requested to submit, as the petitioners noted, Sino-Maple waited until almost one month prior to the deadline for the preliminary results to even make this request. Sino-Maple then requested until the deadline for the *Preliminary Results* to actually report the sales, while at the same time acknowledging that such reporting would require the reporting of additional adjustments and FOP information.[41] Such additional reporting would have undoubtedly required the issuance of additional supplemental questionnaires regarding both its sections C and D databases. Pursuant to section 776(a)(2)(C) of the Act, we find that Sino-Maple significantly impeded the investigation and Commerce's ability to analyze and consider a significant portion of

[37] *See* Sino-Maple Second Request.
[38] *See* Sino-Maple Extension Request and Sino-Maple Second SQR.
[39] *See* Sino-Maple Extension Request.
[40] *See* BPI Memorandum at 2.
[41] *See* Sino-Maple Extension Request at 4.

Sino-Maple's sales of subject merchandise during the POR. Under these circumstances, relying on the facts otherwise available is appropriate.

Section 776(b) of the Act provides that, if Commerce finds that an interested party failed to cooperate by not acting to the best of its ability to comply with a request for information, Commerce may use an inference adverse to the interests of that party in selecting the facts otherwise available.[42] In addition, 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."[43] Furthermore, affirmative evidence of bad faith on the part of a respondent is not required before Commerce may make an adverse inference.[44] It is Commerce's practice to consider, in employing adverse inferences, the extent to which a party may benefit from its own lack of cooperation.[45]

In *Nippon Steel*, the 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 "one's maximum effort."[46] 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. 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. While the CAFC noted that the "best of its ability" standard does not require perfection, it does not condone inattentiveness, carelessness, or inadequate record keeping.[47] The "best of its ability" standard recognizes that mistakes sometimes occur; however, it 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.[48]

Here, Commerce finds, in accordance with section 776(b) of the Act, that Sino-Maple failed to cooperate to the best of its ability in this review and, thus, that the application of AFA is

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[42] *See also* 19 CFR 351.308(a); *Notice of Final Results of Antidumping Duty Administrative Review: Stainless Steel Bar from India*, 70 FR 54023, 54025-26 (September 13, 2005); and *Notice of Final Determination of Sales at Less Than Fair Value and Final Negative Critical Circumstances: Carbon and Certain Alloy Steel Wire Rod from Brazil*, 67 FR 55792, 55794-96 (August 30, 2002).

[43] *See Statement of Administrative Action accompanying the Uruguay Round Agreements Act*, H.R. Rep. 103-316, Vol. 1, 103d Cong. at 870 (1994), reprinted in 1994 U.S.C.C.A.N. (SAA); *see also Certain Polyester Staple Fiber from Korea: Final Results of the 2005-2006 Antidumping Duty Administrative Review*, 72 FR 69663, 69664 (December 10, 2007).

[44] *See, e.g., Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382-83 (Fed. Cir. 2003) (*Nippon Steel*); *see also 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*).

[45] *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 Issues and Decision Memorandum at 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).

[46] *See Nippon Steel*, 337 F.3d at 1383.

[47] *Id.* at 1382.

[48] *Id.*

appropriate. Sino-Maple is ultimately responsible for having familiarity with its records, including the extent of the nature of its relationship with its U.S. affiliate and the details of all of its sales of subject merchandise, and timely reporting this information to Commerce. Sino-Maple was also well-aware prior to its initial questionnaire response that certain third country sales would be directly relevant to its reporting in this review, and yet, Sino-Maple withheld all of this information.[49] The fact that its U.S. affiliate purchased subject merchandise produced by Sino-Maple and transshipped through a third-country manufacturer fundamentally links Sino-Maple and its U.S. affiliate with respect to the sale of subject merchandise and its reporting. Sino-Maple failed to report the sales of subject merchandise by its affiliate during the POR, despite repeated opportunities to do so. Therefore, we find it appropriate to apply AFA in determining Sino-Maple's margin because it failed to cooperate to the best of its ability in this review.[50]

Comment 2: The AFA Rate

Sino-Maple's Arguments[51]

- In the *Preliminary Results*, Commerce assigned an AFA rate of 96.51 percent, which was allegedly the highest transaction-specific dumping margin calculated for Jiangsu Senmao.[52]
- However, a review of the record demonstrates that this rate is incorrect; the highest transaction-specific dumping margin for Jiangsu Senmao is in fact 85.13 percent.[53]
- If Commerce continues to assign Sino-Maple an AFA rate in the final results, it must at least amend the AFA rate assigned to Sino-Maple.

Commerce's Position: We agree with Sino-Maple. For these final results, we have amended the AFA rate to reflect the actual highest transaction-specific dumping margin for Senmao, or 85.13 percent. Pursuant to section 776(c) of the Act, Commerce is not required to corroborate this rate because it was calculated from data obtained in the course of this review and, therefore, does not constitute secondary information.[54]

[49] *See* BPI Memorandum.
[50] We note that we have previously determined Sino-Maple to be a wholly foreign-owned entity, and the determination in this review has no effect as to the company's separate rate status. *See Multilayered Wood Flooring from the People's Republic of China: Final Results of Changed Circumstances Review*, 80 FR 70756 (November 16, 2015); *see also* Sino-Maple AQR.
[51] *See* Jiangsu Senmao *et al.*'s Case Brief at 5-6.
[52] *Id.* at 5 (citing Preliminary Decision Memorandum at 16).
[53] *Id.* at 6 (citing Preliminary Results Margin Calculation Program Log and Output (ACCESS Barcode: 3785077-01), dated December 17, 2019).
[54] *See* section 776(c) of the Act ("when {Commerce} relies on *secondary information rather than on information obtained in the course of an investigation* or review, {Commerce}, as the case may be, shall, to the extent practicable, corroborate that information form independent sources that are reasonably at their disposal (emphasis added)."). *See also, e.g., Certain Tool Chests and Cabinets from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value*, 83 FR 15365 (April 10, 2018) (*Tool Chests from China*), and accompanying Issues and Decision Memorandum at 3 and Comment 1.

Comment 3: The Separate Rate

Dalian Huilong et al.'s Arguments[55]

- Commerce's calculation of the separate rate based on a simple average of the *de minimis* and AFA rates of the mandatory respondents is contrary to the mandate found in the statute and the guidance found in the SAA interpreting U.S. antidumping law.
- While the Courts have upheld Commerce's reliance on the statute when determining separate rates in reviews, the statute and SAA are written to address investigations rather than reviews, and neither do they address the unique situation of non-market economies (NMEs).
- In an investigation, Commerce does not have the benefit of information about the history of dumping of the subject merchandise; nor does Commerce have information to suggest that a margin based on AFA is not also indicative of the dumping of the other non-investigated companies.
- In this review, Commerce has the benefit of such historic information, and the SAA specifically instructs that the expected method is not appropriate if the rate assigned to the mandatory respondent is not reflective of potential dumping margins.
- In *Albemarle*, the mandatory respondents in the third administrative review received *de minimis* margins based on each company's own data. Instead of applying the expected method and assigning the separate rate companies *de minimis* margins, Commerce assigned the above *de minimis* rate from the previous review applicable to various sets of separate rate applicants. The CAFC criticized Commerce for not following the congressional intent to use the expected method when the record did not contain any information to suggest the *de minimis* margins would not be reasonably reflective of potential dumping margins.[56]
- *Changzhou Hawd* also analyzed this provision, finding that Commerce could not deviate from the expected method unless it found, based on substantial evidence, that the separate rate firms' dumping is different from that of the mandatory respondents.[57]
- While in the case at hand Commerce did follow the expected method, relying on the expected method is not reasonably reflective of the potential dumping margins of separate rate companies in this review, namely because one of the mandatory respondents received a total AFA margin.
- In striking down the passing-through of a previous, higher rate to the current review in *Albemarle*, the CAFC contemplated two circumstances when it would not be reasonable to rely on the expected method. The first circumstance is the tendency of dumping margins to decrease over time, which has been the pattern with respect to recent reviews in this proceeding with respect to cooperating non-state-controlled exporters. The second circumstance is when the rate is based on AFA and applied to non-cooperating respondents. However, in this case, the separate rate companies have been fully cooperative.
- In *Changzhou Hawd*, where Commerce included an AFA rate in its calculation of the separate rate, rather than averaging only the mandatory respondents' *de minimis* margins,

[55] *See* Dalian Huilong *et al.*'s Case Brief at 1-12.
[56] *Id*. at 3-4 (citing *Albemarle Corp. v. United States*, 821 F.3d 1345, 1357 (CAFC 2016) (*Albemarle*)).
[57] *Id*. at 3-6 (citing *Changzhou Hawd Flooring Co. v. United States*, 848 F.3d 1006, 1012 (CAFC 2017) (*Changzhou Hawd*); and *KYD, Inc. v. United States*, 607 F.3d 760, 766 (CAFC 2010) (*KYD*) ({where deterrence is a factor} Commerce is permitted to use a common sense inference that the highest prior {dumping} margin is the probative evidence of current margins)).

the CAFC found the rate as applied to be unreasonable, because the separate rate companies were cooperating parties that had proven they are dissimilar to the China-wide entity both in cooperation and in proving their independence from the government.

- Commerce cannot therefore infer that the AFA dumping margin of a company that did not cooperate with Commerce is reflective of cooperating companies' potential dumping margins. A margin used to deter non-cooperating mandatory respondents that is demonstratively higher than the historical dumping margins is not reasonably reflective of the dumping margin of cooperating separate rate companies.
- Alternatively, Commerce should have calculated a weighted average of the dumping margins assigned to both mandatory respondents, as prescribed by the statute and the SAA, and as contemplated by Commerce in its Preliminary Decision Memorandum.[58] However, without explanation, Commerce assigned a simple average of the mandatory respondents' margins to all eligible separate rate companies.[59]
- Commerce's separate rate calculation greatly exaggerates the separate rate margins because Jiangsu Senmao had far more exports of subject merchandise entered into the United States than Sino-Maple.[60]
- When calculating the weighted-average margin using the mandatory respondents' reported U.S. sales information would indirectly disclose BPI, Commerce normally compares a simple average and a weighted-average using the publicly-ranged values to determine the most appropriate margin for the separate rate companies.[61]
- In this case, a calculation of the weighted-average margin using the publicly-ranged values is far closer to the weighted-average margin using the actual values of the respondents' U.S. sales than that of a simple-average calculation.
- In *Changzhou Hawd*, the CAFC found that because Commerce uses the data from the largest exporters, the margins calculated for those exporters are considered to be representative of the pricing behavior of the non-individually examine exporters. Here, Jiangsu Senmao is the largest exporter, and Commerce has not shown how the separate rate companies' behavior is any different from that of Jiangsu Senmao.[62]
- The CAFC also explained, in *Bestpak*, that while an average of a *de minimis* margin and one based on total AFA is not *per se* unreasonable, Commerce must still examine the record and articulate a satisfactory explanation for its action.[63] Here, the record indicates that the proper and fair result would be to base the separate rate on the weighted-average of the relative values of Jiangsu Senmao and Sino-Maple's ranged U.S. sales – if Commerce continues to include Sino-Maple in the calculation at all.

[58] *Id.* at 7 (citing 19 U.S.C. 1673d(c)(5) and the SAA at 4201).
[59] *Id*. at 7-8 (citing Preliminary Decision Memorandum at 17).
[60] *Id*. at 8 (citing Jiangsu Senmao AQR (Public Version) and Sino-Maple AQR (Public Version) at Exhibits A-1).
[61] *Id*. at 8-9 (citing *Steel Propane Cylinders from the People's Republic of China: Preliminary Affirmative Determination of Sales at Less Than Fair Vaue and Postponement of Final Determination Measures*, 83 FR 66675 (December 27, 2018) and accompanying Preliminary Decision Memorandum at 15).
[62] *Id*. at 10 (citing *Changzhou Hawd*, 848 F.3d at 1012).
[63] *Id.* (citing *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370 (CAFC 2013) (*Bestpak*)).

Hailin Linjing et al.'s Arguments[64]

- The statute sets forth an "expected method" pursuant to which Commerce may average the zero, *de minimis*, and AFA margins of the mandatory respondents where all mandatory respondents were subject to either AFA or zero or *de minimis* margins. The SAA provides however that the expected method will not be used if it its "not feasible or it would not be reasonably reflective of potential antidumping duty margins."[65]
- In the *Preliminary Results*, Commerce did not directly address the SAA's admonition that the expected method should not be used in situations where averaging of the rates of the mandatory respondents is not reasonably reflective of the potential antidumping margins of the separate rate respondents.
- In *Bestpak*, the CAFC stated that "while various methodologies are permitted by the statute, it is possible for the application of a particular methodology to be unreasonable in a given case," when reversing Commerce's application of the expected method by averaging *de minimis* and AFA margins of the two mandatory respondents and holding that the resulting margin "did not bear some relationship to their actual antidumping margins."[66]
- In this case, Commerce's action is even more severe than in *Bestpak*, as the averaged zero margin and total AFA margin yielded a separate rate that was many times higher than either the calculated rates of the mandatory respondents or the separate rates calculated by Commerce from the initial investigation through the fifth administrative review.[67]
- Not only is the result in this case contrary to the statute's requirement that the methodology employed by Commerce to calculate the separate rate be reasonable, but it also runs afoul of the SAA's requirement that the separate rate reasonably reflect the separate rate companies' potential dumping margins.
- A survey of the margins calculated for the mandatory respondents and applied to the separate rate companies throughout the history of this proceeding shows that the *Preliminary Results* yielded an aberrational separate rate that was many times greater than any other separate rate calculated in previous segments.[68]

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[64] *See* Hailin Linjing *et al.*'s Case Brief at 2 – 13.
[65] *Id.* at 2-3 (citing 19 U.S.C. 1673d(c)(5)(A)-(B) and the SAA).
[66] *Id.* at 4 (citing *Bestpak*, 716 F.3d at 1378 – 80; and *Thai Pineapple Canning Indus. Corp. v. United States*, 273 F.3d 1077, 1085 (CAFC 2001) (*Thai Pineapple*)).
[67] *Id*. at 4-8 (citing *Multilayered Wood Flooring from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 76 FR 64318 (October 11, 2011); *Multilayered Wood Flooring from the People's Republic of China: Amended Final Results of Antidumping Duty Administrative Review; 2011-2012*, 79 FR 35314 (June 20, 2014); *Multilayered Wood Flooring from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2012-2013*, 80 FR 41476 (July 15, 2015); *Multilayered Wood Flooring from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2013-2014*, 81 FR 46899 (July 19, 2016); *Multilayered Wood Flooring from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2014-2015*, 82 FR 25766 (June 5, 2017); and *Multilayered Wood Flooring from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2015-2016*, 83 FR 35461 (July 26, 2018) (collectively, the *Order*)).
[68] *Id.* (citing *Baroque Timber Industries (Zhongshan) Co. Ltd., v. United States*, 925 F.Supp.2d, 2013 (CIT 2014); *Changzhou Hawd Flooring Co., Ltd. v. United States*, 324 F.Supp.3d 1317 (CIT 2018); *Fine Furniture (Shanghai) Limited v. United States*, 321 F. Supp. 3d 1282 (CIT 2018); and *Jiangsu Senmao Bamboo and Wood Industry Co., Ltd. v. United States*, 322 F. Supp. 3d 1308 (CIT 2018)).

- The aberrationally high calculation of the separate rate in the *Preliminary Results* is due solely to the inclusion of the AFA margin in calculation, and therefore the use of the AFA margin in the calculation of the separate rate is unreasonable.
- The AFA rate as applied to Sino-Maple is not a calculated rate, but is a statutory rate inclusive of an adverse inference applied only to non-cooperative parties. The zero margin calculated for Jiangsu Senmao would be a reasonable separate rate because it is reflective of the potential antidumping duty margins for the separate rate companies.
- For the final results, Commerce should not use the expected methodology but should employ some other reasonable methodology. As a reasonable alternative, Commerce should apply the zero margin calculated for Jiangsu Senmao as the separate rate.

Lumber Liquidators' Arguments[69]

- While the statute may contemplate Commerce's use of a simple average of a zero or *de minimis* margin and a margin based solely on AFA to calculate the separate rate, the Courts have required that Commerce use a methodology whose application is reasonable under the circumstances of the case.[70]
- As the CAFC stated in *Thai Pineapple*, Commerce may not select unreasonably high rates having no relationship to the respondent's actual dumping margin.[71] Further, as stated in *Bestpak*, rate determinations for non-mandatory cooperating separate rate respondents must also bear some relationship to their actual dumping margins.[72]
- Specifically, with respect to the calculation of a separate rate margin when the mandatory respondent margins were zero and based on AFA, the CAFC in *Bestpak* ruled that although Commerce "may be permitted to use a simple average methodology to calculate the separate rate, the circumstances of this case renders a simple average of a *de minimis* and AFA China-wide rate unreasonable as applied."[73]
- Commerce neglected to mention in the *Preliminary Results* that the legislative history of the statute also stipulates that the expected method should not be used if it results in an average that would not be reflective of potential dumping margins for non-investigated exporters or producers.[74]
- Commerce cannot simply use a simple average, but must analyze whether a simple average is reflective of the potential dumping margins for non-investigated exporters or producers. Commerce must therefore conduct this analysis for the final results and provide a detailed explanation of its calculation of the separate rate for the non-investigated companies.[75]
- As shown by the only benchmark rate available to Commerce, *i.e.*, the zero margin assigned to Jiangsu Senmao, a simple average of the zero margin and the AFA margin is not reflective of the potential dumping margins for non-investigated exporters or producers.

[69] *See* Lumber Liquidators' Case Brief at 1 – 5.
[70] *Id.* at 2 (citing 19 U.S.C. 1673(c)(5)(B) and the SAA).
[71] *Id.* (citing *Thai Pineapple*, 273 F.3d at 1085).
[72] *Id.* at 2-3 (citing *Bestpak*, 716 F.3d at 1380 and *Changzhou Wujin Fine Chem. Factory v. United States*, 701 F.3d 1367, 1379 (CAFC 2012) (*Changzhou Wujin*)).
[73] *Id.* at 3 (citing *See Bestpak*, 716 F.3d at 1378).
[74] *Id.* (citing the SAA at 873).
[75] *Id.* at 3-4 (citing *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 158 (1962) and *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

Rather, the separate rate margin assigned in the *Preliminary Results* is unjustifiably high and may amount to being punitive, which is not permitted by the statute.[76]

- In this context, it is also important to consider that the overriding purpose of Commerce's administration of antidumping laws is to calculate dumping margins as accurately as possible, and the emphasis in calculating the dumping margin should be on economic reality.[77] The rate assigned to Sino-Maple is not based on economic reality.
- As in *Bestpak*, Commerce finds itself in this predicament through its own choice to select only two mandatory respondents. When one of those respondents does not cooperate and is assigned the highest possible AFA China-wide margin, a simple average as applied to the separate rate companies violates the principle that, as stated in *SNR Roulements*, "antidumping laws intend to calculate antidumping duties on a fair and equitable basis."[78]

Jiangsu Senmao et al.'s Arguments[79]

- While the Courts have held that Commerce is theoretically allowed to average a *de minimis* rate and an AFA rate to determine the margin for cooperative non-mandatory respondents, the Courts have consistently found the methodology unreasonable in practice.[80]
- In *Bestpak*, when holding that Commerce's decision to assign cooperative separate rate companies an average of a *de minimis* rate and an AFA rate, the CAFC explained, "{a}n overriding purpose of Commerce's administration of antidumping law is to calculate dumping margins as accurately as possible" and the rate determining for cooperating, non-mandatory respondents must "bear some relationship to the actual dumping margin."[81]
- The CAFC, in *Bestpak*, also noted that it was unreasonable to assign a cooperative respondent a rate that was half of the China-wide rate when the respondent had demonstrated that it was independent of government control and that such a result may amount to being punitive, which is not permitted by the statute.
- The CAFC further explained, in *Baroque Timber*, that while the statute "allows Commerce to use 'any reasonable method,' it must be in service of calculating a margin 'reasonably reflective of potential dumping margins for non-investigated exporters or producers.'" The CAFC stated that the method "must be 'based on the best information and establish antidumping margins as accurately as possible.'"[82]
- The CAFC has further stated that "the fact that the AFA rate applies to other companies is not evidence of dumping on the part of the separate rate companies," and Commerce must "examine the record and articulate a satisfactory explanation for its action."[83]

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[76] *Id.* at 4 (citing *Bestpak*, 715 F.3d at 1379, citing *F.Ili de Cecco di Filippo Fara S. Martino S.P.A. v. United States*, 216 F.3d 1027, 1032 (CAFC 2002)).
[77] *Id*. (citing *Rhone Poulenc, Inc. v. United States*, 889 F.2d 1185, 1191 (CAFC 1990) (*Rhone*) and *United States v. Eurodif S.A.,* 555 U.S. 305, 317-18 (2009)).
[78] *Id.* at 4 (citing *SNR Roulements v. United States*, 889 F.2d 1358, 1363 (CAFC 2005) (*SNR Roulements*)).
[79] *See* Jiangsu Senmao *et al.*'s Case Brief at 6 – 10.
[80] *Id*. at 6 (citing to *Bestpak*; *Navneet Publications (India) Ltd. v. United States*, 999 F. Supp. 2d 1354 (CIT 2014) (*Navneet*); and *Baroque Timber Industries (Zhongshan) Company Limited v. United States*, 971 F. Supp. 2d 1333 (CIT 2014) (*Baroque Timber*)).
[81] *Id.* (citing *Bestpak*, 716 F.3d at 1379-80).
[82] *Id.* at 7 (citing *Baroque Timber*, 971 F. Supp. 2d at 1342 – 43, citing the SAA at 4201 and *Amanda Foods (Vietnam) Ltd. v. United States*, 647 F.Supp.2d 1368, 1381 (CIT 2009) (*Amanda Foods*)).
[83] *Id*. (*citing Changzhou Wujin*, 701 F.3d at 1379).

- In *Navneet*, Commerce also rejected the expected method as unreasonable even though, as here, Commerce based the margin on actual sales data submitted by a cooperative respondent. As the Court of International Trade (CIT) stated in *Navneet*, "if the presence of a {22.02% margin} failed to justify assigning an overall above *de minimis* rate to {the mandatory respondent}, then {that margin} certainly cannot serve to do so for the remaining cooperative companies."[84]
- The same facts apply to the present review. Commerce is using the highest-transaction specific margin calculated for Jiangsu Senmao. However, this margin is one sale out of many. As a result, it is unreasonable for the margin of this one transaction to be used as one of the two margins in the calculation of the rate for the separate rate respondents.
- Additionally, the separate rate assigned to the separate rate respondents in this review is a historically high rate. Commerce is required to offer a justification for the use of an AFA rate in the calculation of the margin for cooperative separate rate respondents and cite to evidence that the assigned rate bears a relationship to the actual dumping margins of cooperative separate rate respondents. To date, Commerce has offered no such justification.
- The only reasonable margin to assign to the separate rate respondents is a margin of zero, based on the rate assigned to the only cooperative respondent in this review. In accordance with CAFC precedent, the zero margin constitutes the only contemporaneous evidence of pricing practices among large exporters of subject merchandise, and accuracy and fairness must be Commerce's primary objectives in calculating a separate rate for cooperating respondents.[85]

Yekalon et al.'s Arguments[86]

- While the statute and the SAA permit Commerce to weight-average zero/*de minimis* margins and margins determined pursuant to facts available, the SAA also expressly requires Commerce to apply a rate that is "reasonable" and "reflective of potential dumping margins for non-investigated producers."[87]
- In the *Preliminary Results*, Commerce failed to even consider whether the rate was reasonable and how the rate was reflective of the potential dumping margins for non-investigated producers. While the Courts have recognized that averaging AFA and *de minimis* rates is permissible, they also have expressly held that application must be reasonable as applied to separate rate companies.
- As the CAFC found in *Bestpak*, Commerce provided no justification for how the rate it selected for cooperative separate rate companies related to their actual dumping margin and provided no evidence in the record to support the rate it assigned.[88]
- Additionally, as the CAFC explained in *Changzhou Wujin*, applying an adverse rate to cooperating respondents undercuts the cooperation-promoting goal of the AFA statute, while framing the central question as "whether Commerce acted reasonably when {it

[84] *Id.* at 8 (citing *Navneet*, 999 F.Supp.2d at 1364, citing *Amanda Foods*, 714 F. Supp. 2d at 1295).
[85] *Id*. at 9-10 (citing *Navneet*, F.Supp.2d at 1365 and *Albemarle*, 821 F.3d at 1354).
[86] *See* Yekalon *et al.*'s Case Brief at 1 – 11.
[87] *Id*. at 2 (citing 19 U.S.C. 1673(c)(5)(B) and the SAA at 4201).
[88] *Id*. at 3 (citing *Bestpak*, 716 F.3d at 1378).

selected} the single data point that would have the most adverse effect possible on {cooperating respondents}."[89]

- Further, as the CIT stated in *Baroque Timber*, while taking a simple average of an AFA rate and *de minimis* rate may not be *per se* unreasonable, it must still be reasonable as applied and supported by substantial evidence.[90]
- The CIT has affirmed Commerce's decision not to calculate a non-investigated respondent's rate based on AFA on numerous occasions, explaining that "{a}llowing an interested party's failure to cooperate to affect adversely the dumping margin of another interested party who is a party to the proceeding, about whom Commerce did not make a finding of non-cooperation, violates Commerce's obligation to treat fairly every participant in the proceeding."[91]
- Commerce must determine margins as accurately as possible and margins must reflect the commercial reality of the respondents. Commerce cannot therefore, as a matter of law, blindly apply a punitive AFA rate to cooperative separate rate respondents, without affirmatively establishing by substantial evidence that this AFA rate bears some relationship to the separate rate respondents' actual dumping margins.[92]
- As the history of the *Order* shows, the rate of 48.26 % is not an accurate or reasonably reflective estimate of the commercial reality of a cooperative company eligible for a separate rate.
- In fact, record evidence from the separate rate application of Yekalon demonstrates that the commercial reality of separate rate companies in this case is more similar to that of Jiangsu Senmao than the China-wide entity.[93] Commerce should therefore assign a rate of zero percent to the separate rate companies.

Zhejiang Dadongwu's Arguments[94]

- Although the Courts have acknowledged that Commerce is theoretically allowed to consider averaging a zero or *de minimis* rate with an AFA rate in order to determine the rate for non-selected separate rate respondents, the Courts have consistently found that such a methodology as applied results in an unreasonable and thus unlawful separate rate.
- In *Bestpak*, the CAFC rejected as unlawful Commerce's decision to assign a dumping rate to cooperative separate rate respondents that was based on an average of a *de minimis* rate and an AFA rate, finding it unreasonable to assign a cooperative respondent a rate that was half of the China-wide rate.[95]
- Similarly, in *Baroque Timber*, the CIT rejected Commerce's use of an AFA rate in calculating the separate rate as unreasonable as applied to the cooperative separate rate

[89] *Id.* at 4 (citing *Changzhou Wujin*, 701 F.3d at 1379).
[90] *Id.* at 5 (citing *Baroque Timber*, 971 F.Supp.2d at 1340-45).
[91] *Id.* at 7 (citing *SKF USA Inc., v. United States*, 675 F. Supp. 2d 1264 (CIT 2009) and *Shenzhen Xinboda Industrial Co., Ltd. v. United States*, 180 F. Supp. 3d 1305 (CIT 2016) (*Shenzhen*)).
[92] *Id.* at 8 (citing *Bestpak*, 716 F.3d at 1379; *Shakeproof Assembly Components, Div. of Illinois Tool Works, Inc. v. United States*, 268 F.3d 1376, 1382 (CAFC 2001); and *Baoding Mantong Fine Chemistry Co. v. United States*, 113 F.Supp.3d 1332, 1337-41 (CIT 2015)).
[93] *Id.* at 10 (citing Yekalon March 26, 2018 Separate Rate Application).
[94] *See* Zhejiang Dadongwu's Case Brief at 4 – 9.
[95] *Id.* at 4 (citing *Bestpak*, 716 F.3d at 1379).

respondents, faulting Commerce for failing to abide by its statutory obligation to determine whether the rate assigned bears some relationship to the respondents' actual rates.[96]

- Here, absent any indication that the separate rate respondents were deficient in any way, the application of a rate based on AFA was contrary to the statutory requirements that specifically limit Commerce's ability to make adverse inferences only when Commerce makes a specific finding that the party failed to cooperate or was non-responsive.
- Additionally, the rate applied was unreasonable because there is no credible economic support that this rate is reasonably reflective of commercial reality for the separate rate respondents, and is against the overriding purpose of Commerce's administration of the antidumping law to calculate dumping margins as accurately as possible.[97]
- Further, the dumping rate assigned to the separate rate respondents is significantly higher than the rates assigned in the original antidumping investigation of wood flooring from China and the five prior administrative reviews of this proceeding.[98]
- The fact pattern of this sixth administrative review is no different than that of the fifth administrative review, in which one of the mandatory respondents received a zero margin while the other was assigned the China-wide rate. However, Commerce assigned the zero rate to the non-selected separate rate respondents, as "the only calculated POR margin available."[99]
- Commerce's calculation of the separate rate is particularly unreasonable in light of how Commerce revised and significantly increased the China-wide rate in this review, from 25.62 percent to the 96.51 percent, based on a transaction-specific margin.[100]
- It is clear that this highest transaction-specific rate was derived from an aberrational sale of the mandatory respondent, as the dumping margin from this transaction had no impact on the overall zero dumping margin calculated for this mandatory respondent.
- The statute specifically limits Commerce's authority to apply adverse inferences in selecting the facts otherwise available, as Commerce may not automatically apply such inferences just because circumstances may warrant the application of facts available.[101]
- Commerce's application of an adverse inference cannot be sustained if Commerce is unable to make a separate showing that the party failed to cooperate by not acting to the best of its ability or that there was specific request for information that was not complied with by that party.[102]
- It would be unlawful for Commerce to interpret one statutory provision and apply a rate to separate rate respondents that is inconsistent with other statutory provisions that expressly restrict the application of adverse inferences only to parties that can be demonstrated to have failed to cooperate by not acting to the best of their ability.[103]

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[96] *Id.* at 5 (citing *Baroque Timber*, 971 F.Supp.2d at 1341).
[97] *Id.* at 6 (citing *Rhone*, 899 F.2d at 1191).
[98] *Id.* at 7 (showing the rates calculated throughout the *Order*).
[99] *Id.* at 8 (citing *Multilayered Wood Flooring from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review, Preliminary Determination of No Shipments, and Rescission of Review, in Part; 2015-2016*, 83 FR 2137 (January 16, 2018), and accompanying Preliminary Decision Memorandum at 13-14).
[100] *Id.* at 9-10 (citing the *Preliminary Results*).
[101] *Id.* at 11 (citing 19 U.S.C. 1677e(a)(2)).
[102] *Id.* (citing *Ferro Union Inc. v. United States*, 44 F.Supp.2d 1310, 1329 (CIT 1999)).
[103] *Id.* at 12 (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)).

Zhejiang Longsen et al.'s Arguments[104]

- Although the current review has the same number of mandatory respondents with a zero dumping margin, the new separate rate is excessive and an outlier from other separate rates calculated in past reviews.[105]
- Using the AFA rate to calculate the separate rate is inappropriate because it creates a separate rate that is nearly three times higher than past separate rates and is not reflective of the potential dumping margin for the non-selected respondents.
- If Commerce continues to hold that Sino-Maple did not cooperate, and thus continues to be subject to adverse inferences, Commerce should follow the existing practice in this case, and find that all of Sino-Maple's data are unusable, that Sino-Maple is part of the China-wide entity, and thus not include this rate in the separate rate calculation.
- The Eighth Amendment of the U.S. Constitution prohibits excessive fines, and antidumping duties based on adverse inferences. Further, it is clear that the duty assessed in this case is excessive and bears no relationship to the gravity of the offense, thereby violating the Eighth Amendment.[106]
- As the CAFC has held, applying an adverse rate to cooperating respondents undercuts the cooperation-promoting goal of the AFA statute. It is therefore inappropriate to apply AFA to cooperative respondents, even indirectly, and thus the use of the AFA rate in the calculation of the separate rate is inappropriate.[107]
- Further, the calculated separate rate is not reasonably reflective of the potential dumping margin for the non-selected respondents, as required by the SAA. The SAA provides that the expected method requires the use of volume data, and proper volume data are not available, as the defects in Sino-Maple's sales data renders its reported volume unusable.[108]
- The selected rate is a clear outlier from other rates in this review, as more than half of the mandatory respondents, and significantly more than half of the cooperative mandatory respondents, have received a rate of *de minimis* or zero in any examination of their sales.
- The new separate rate is nearly three times higher than any rate that has ever been calculated for a cooperative mandatory respondent in this history of this *Order*, and there is no evidence of record to indicate that the sales practices of the respondents have changed so radically.
- In calculating the separate rate, Commerce should not give disproportionate weight to a single transaction of a cooperating company that received a zero dumping margin. Instead, Commerce should assign, as the only reliable data point Commerce has in this review, a rate of zero to the separate rate respondents.

[104] *See* Zhejiang Longsen *et al.*'s Case Brief at 2-14. Jiechen also adopted the arguments set forth by Zhejiang Longsen *et al*. *See* Jiechen's Case Brief.
[105] *Id.* at 2-3 (showing the rates calculated throughout the *Order*).
[106] *Id*. at 5-8 (citing *Austin v. United States*, 509 U.S. 602 (1993); *United States v. Halper*, 490 U.S. 435 (1989); and *United States v. Bajakajian*, 524 U.S. 321 (1998)).
[107] *Id.* at 8-9 (citing *Changzhou Wujin*, at 11-1080).
[108] *Id.* at 9-10 (citing the SAA and showing the rates calculated throughout the *Order*).

Petitioners' Rebuttal[109]

- The respondents' argument that Commerce was incorrect to use the AFA rate to calculate the separate rate is directly refuted by the statute. Commerce's methodology is consistent with its practice, the statute, legislative history, and court precedent.
- Both the statute and the SAA not only permit, but expressly direct that where all dumping margins calculated for individually examined entities are *de minimis* and/or based on AFA, the expected method is to average the two margins in calculating the separate rate.[110]
- Further, in *Albemarle*, the CAFC confirmed that Commerce should deviate from the expected method only in limited circumstances, such as where Commerce "reasonably concludes that the expected method is 'not feasible' or 'would not be reasonably reflective of potential dumping.'"[111] Commerce made no such finding in this case.
- To conclude that it is unreasonable to rely on a margin assigned to a mandatory respondent simply because it is an AFA rate would necessarily be inconsistent with the statute and the SAA, which clearly envision that AFA rates can be – and are expected to be – used to calculate the margins for non-examined entities in certain situations.[112]
- The facts in this case are distinguishable from those in *Changzhou Hawd*, as the CAFC in that case addressed a situation where Commerce included the AFA rate in the calculation of the separate rate despite the fact that all mandatory respondents had *de minimis* margins.[113] Here, Commerce followed the expected method, as one respondent was assigned a zero rate while the only other was assigned a rate based on AFA.
- The circumstances here are also distinguishable from those in *Bestpak*, in which the CAFC addressed an original investigation where the separate rate companies were assigned a margin over 120 percent before finding unsupported Commerce's calculation of the separate rate by averaging the zero and AFA rate applied to the mandatory respondents.[114]
- Here, there is a history of dumping at significant rates and the margin applied to the separate rate companies is reasonable given prior dumping margins that have been calculated under this *Order*.
- The respondents' reliance on *Changzhou Wujin, Baroque Timber,* and *Navneet*, is also unavailing, as those cases addressed a situation in which Commerce deviated from the expected method where the AFA rate used in calculating the separate rate companies' margin was not the rate applied to any mandatory respondent.[115]
- The case in *Shenzhen* is also distinguishable from the present review, as the Court in that case also examined Commerce's determination to deviate from the expected method, unlike in this wherein Commerce followed the expected method.[116]
- The respondents claim that the current separate rate is unreasonable because in certain prior reviews the separate rate respondents received much lower margins is unsupported. The

[109] *See* Petitioners' Rebuttal Brief at 3 – 12.
[110] *Id*. at 4 (citing 19 U.S.C. 1673d(c)(5)(B) and the SAA at 870).
[111] *Id.* at 5 (citing *Albemarle*, 821 F.3d at 1352).
[112] *Id*. at 6 (citing the SAA at 870).
[113] *Id.* at 6-7 (citing *Changzhou Hawd*, 848 F.3d at 1012-13).
[114] *Id.* at 7-8 (citing *Bestpak*, 716 F.3d at 1378)
[115] *Id.* at 8 (citing *Changzhou Wujin,* 701 F.3d at 1379; *Baroque Timber*, 971 F.3d at 1339; and *Navneet*, 999 F.Supp.2d at 1357).
[116] *Id*. at 8 (citing *Shenzhen*, 180 F.Supp.3d at 1321-22).

dumping margins applied to the separate rate companies have in fact fluctuated and can change dramatically from year to year, and the separate rate companies have not consistently had low margins each review.

- Additionally, the current separate rate is not inconsistent with the Eighth Amendment because the rate applied to the separate rate companies under the authority of the statute was not based on AFA, and further, antidumping duties (whether based on AFA or otherwise) are remedial in nature and not punitive.[117]
- While the respondents argue that Commerce has information which would allow Commerce to base its calculation on a weighted-average of the mandatory respondents' rates, one of the reasons why Commerce applied the AFA rate to Sino-Maple was due to the company's failure to report all its U.S. sales. Thus, Commerce does not have the volume data to allow for a weighted-average calculation.
- In sum, Commerce's calculation of the separate rate in the *Preliminary Results* was proper, as Commerce followed its practice, legislative directive, and court precedent, and the respondents have provided no basis for Commerce to modify its approach for the final results.

Commerce's Position: We agree with the petitioners. Commerce employed a limited examination methodology in this review, as it determined that it would not be practicable in light of its resources to individually examine all companies for which an administrative review was initiated and therefore selected the two largest exporters by volume as mandatory respondents in this review, Jiangsu Senmao and Sino-Maple. Fifty-eight additional exporters remain subject to review as non-individually examined, separate rate respondents. In the *Preliminary Results*, we calculated the non-selected separate rate as 48.26 percent. For the *Final Results*, because we have adjusted the selected AFA rate for Sino-Maple, we have calculated the separate rate as 42.57 percent, which is a simple average of the zero rate calculated for Jiangsu Senmao and the AFA rate determined for Sino-Maple, which is based on the highest transaction-specific margin for Jiangsu Senmao as discussed under Comment 2.

The statute and Commerce's regulations do not address the establishment of a rate to be applied to individual respondents not selected for individual examination when Commerce limits its examination in an administrative review pursuant to section 777A(c)(2) of the Act. Generally, Commerce looks to section 735(c)(5) of the Act, which provides instructions for calculating the all-others rate in an investigation, for guidance when calculating the rate for separate rate respondents which Commerce did not examine individually in an administrative review involving a nonmarket economy (NME) country.

Under section 735(c)(5)(A) of the Act, the all-others rate is normally "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 {on the basis of facts available (FA)}." Accordingly, Commerce's usual practice in determining the rate for separate rate respondents not selected for individual examination has been to average the weighted-average dumping margins for the selected companies, excluding

[117] *Id*. at 10 (citing *KYD*, 779 F.Supp.2d at 1340 n.24).

rates that are zero, *de minimis*, or based entirely on FA.[118] However, when the weighted-average dumping margins established for all individually investigated respondents are zero, *de minimis,* or based entirely on facts available, section 735(c)(5)(B) of the Act provides for an exception that permits Commerce to "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." Furthermore, Congress, in the SAA, stated that when "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* … {t}he expected method in such cases will be to weight-average the zero and the *de minimis* margins and margins determined pursuant to the facts available."[119] For the final results of this review, we determined the estimated dumping margin for each of the individually examined respondents to be zero or based entirely on facts otherwise available.[120] Thus, in accordance with the expected method, we assigned to all eligible non-selected respondents the simple average[121] of the separate rates assigned to Jiangsu Senmao and Sino-Maple for the final results of this review, or 42.57 percent.

In the administrative review underlying *Albemarle*, Commerce assigned *de minimis* antidumping duty margins to the two individually examined exporters.[122] Commerce then assigned margins to the non-examined separate rate respondents that were "pulled forward" from a prior segment of the proceeding instead of averaging the two *de minimis* margins to calculate a separate rate.[123] In its decision, the CAFC relied on the SAA, finding that the statute "assumes that...reviewing only a limited number of exporters will enable Commerce to reasonably approximate the margins of all known exporters."[124] Based on this provision of the SAA, the Court determined that averaging the rates of individually examined exporters and producers is the "expected method" for calculating separate rates.[125] The CAFC further held that the burden is on Commerce when deviating from the expected method to establish based on "substantial evidence" that "there is a reasonable basis for concluding that the separate respondent's dumping is different" from the dumping of the individually examined exporters and producers.[126]

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[118] *See Longkou Haimeng Mach. Co. v. United States*, 581 F. Supp. 2d 1344, 1357-60 (CIT 2008) (affirming Commerce's determination to assign a 4.22 percent dumping margin to the separate rate respondents in a segment where the three mandatory respondents received dumping margins of 4.22 percent, 0.03 percent, and zero percent, respectively); *see also Certain Kitchen Appliance Shelving and Racks from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 74 FR 36656, 36660 (July 24, 2009).

[119] *See* SAA accompanying the Uruguay Round Agreements Act, H.R. Doc. No. 103-316 at 873 (1994), reprinted in 1994 U.S.C.C.A.N. 4040, 4200.

[120] *See* Memorandum, "2016-2017 Antidumping Duty Administrative Review of Multilayered Wood Flooring from the People's Republic of China: Preliminary Results Margin Calculation for Jiangsu Senmao Bamboo and Wood Industry Co., Ltd.," dated December 17, 2018 at Attachment.

[121] As discussed below, we calculated the simple average instead of the weighted-average of Jiangsu Senmao and Sino-Maple's dumping margins because volume data was not available for Sino-Maple, the mandatory respondent that failed to cooperate.

[122] *See Albemarle*, 821 F.3d at 1349-50.

[123] *Id.* at 1349.

[124] *Id.*

[125] *Id.*

[126] *Id.* at 1353.

The CAFC determined that the statute would not permit Commerce to pull forward rates from a prior segment of the proceeding under the circumstances before it – finding that "{t}here is no basis to simply assume that the underlying facts or calculated dumping margins remain the same from period to period."[127] The CAFC found that there are two limited circumstances where data from a prior period may otherwise be permissible: (1) "where there is evidence that the overall market and the dumping margins have not changed from period to period," and (2) when Commerce is selecting an AFA margin for a non-cooperating individually examined exporter.[128]

Furthermore, 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."[129]

Similarly, in *Bestpak*, the CAFC held that the statute and SAA "explicitly allow" for a simple average of a *de minimis* rate and an AFA rate.[130] Thus, despite the separate rate respondents' assertions that the calculation of the separate rate in this review is contrary to law, both section 735(c)(5)(B) of the Act and the SAA contemplate the specific scenario presented in this review—namely, the margins for all of the exporters and producers individually-examined in this review were determined entirely on the basis of facts available or are zero or *de minimis*.

Further, the CAFC's guidance in *Albemarle* confirmed that Commerce should only deviate from the expected method in limited circumstances, *i.e.*, where Commerce finds, based on "substantial evidence," that the expected method is not feasible or would not be reasonably reflective of potential dumping.[131] Although the statute expressly states "investigations," Commerce's practice is to apply this provision to administrative reviews, and further to apply this provision in determining the non-selected separate rate in administrative review involving NME countries.[132] Additionally, although the expected method calls specifically for a weighted-average, the Courts have upheld a simple average as permitted by the statute in circumstances where, the volume data on the record with respect to one of the respondents are unavailable or unusable.[133] As explained above, we determine that the volume data for Sino-Maple are incomplete, and therefore, unusable for purposes of calculating a weighted-average.

Because the non-selected separate rate respondents were not selected for individual examination, there are no dumping margins specifically calculated for these respondents on the record of this

[127] *Id.* at 1356.
[128] *Id.* at 1357-58.
[129] *Id.* at 1352.
[130] *See Bestpak*, 716 F.3d at 1378; *see also Solianus, Inc. v. United States*, No. 18-00179, Slip Op. 19-77 (CIT 2019) (*Solianus*).
[131] See *Albemarle*, 821 F.3d at 1351-53.
[132] *Id.* (applying section 735(c)(5) of the Act in the NME administrative review context).
[133] *See Bestpak*, 716 F.3d at 1378; *see also Solianus*, Slip Op. 19-77.

administrative review. In other words, we have no alternative margin on the record of this administrative review to assign to the non-selected separate rate respondents. Accordingly, Commerce finds, and the record shows, that the separate rate as calculated in the *Preliminary Results* in accordance with the statute and the SAA is the best information with which to estimate the dumping margins of the separate rate companies in this review.[134]

The separate rate respondents posit several reasons for why the separate rate as calculated is not "reasonably reflective" of the potential dumping margins of the separate rate companies in this review. However, the record does not support the parties' claims that we did not calculate a reasonably reflective rate for the non-selected separate rate respondents. In other words, there is no reasonable basis, or "substantial evidence," for concluding that the dumping of the separate rate respondents is different from the dumping of the individually examined exporters and producers.[135]

Certain respondents argue that the separate rate is not reasonably reflective of the potential dumping margins because it is partially based on an AFA rate assigned to an uncooperative respondent. Although the fact pattern in *Albemarle* did not involve the application of adverse inferences, as does the instant administrative review, we find the CAFC's reasoning in *Albemarle* to be applicable to the respondents in this proceeding. This reasoning applies equally where all dumping margins for the individually examined respondents are either zero, *de minimis*, or based entirely on AFA when there is no evidence to reasonably conclude that the expected method is "not feasible" or "would not be reasonably reflective of potential dumping margins."[136]

As the petitioners submitted, the respondents misinterpret *Changzhou Hawd* as supporting the proposition that including an AFA rate in calculating a separate rate is unreasonable. In that case, Commerce selected three of the largest exporters as mandatory respondents and found all three to have zero or *de minimis* margins.[137] In calculating the separate rate, Commerce diverted from the expected method and averaged those three zero/*de minimis* margins with the China-wide rate.[138] The CAFC rejected that approach as departing from the "expected method" without first determining "that the separate rate firms' dumping is different from that of the mandatory respondents."[139] Moreover, in explaining the statutory context surrounding the calculation of a separate rate, the CAFC also indicated that the statute contemplates a situation wherein calculating an all-others (or separate) rate may include AFA rates from individually investigated firms because section 735(B) of the Act refers to the section of the Act describing margins determined pursuant to facts available.[140]

Other respondents argue that the separate rate is not reasonably reflective of the potential dumping margin because the history of this case shows that the rate is substantially higher than those

[134] As discussed above, we note the separate rate has been reduced for these final results as the AFA rate was adjusted to 85.13 percent to reflect the correction of a clerical error. *See Federal Register* notice accompanying this memorandum.
[135] *See Albemarle*, 821 F.3d at 1353.
[136] *See Albemarle*, 821 F.3d at 1351-53.
[137] *See Changzhou Hawd,* 848 F.3d at 1012.
[138] *Id.* at 1009.
[139] *Id.* (citing *Albemarle*, 821 F.3d at 1353).
[140] *Id.* at n.4.

previously calculated. However, as the petitioners submit, the separate rate has in fact changed from segment to segment, and the separate rate companies have not had consistently low margins each review.[141] Further, in *Albemarle*, in determining that there was insufficient evidence for assigning dumping margins from prior segments of the proceeding to the separate rate respondents, the CAFC considered that these past margins did not establish the separate rate dumping margins as accurately as possible when Commerce could apply the expected method with the calculated *de minimis* rates of individually examined respondents in the current period of the underlying administrative review.[142] Accordingly, the separate rate calculated for this review is based on the record information for this review.

The respondents also argue that the rate is unreasonable as applied because it is based on a single transaction out of many from a cooperative respondent who received a zero margin. However, as contemplated by the statute and the SAA, we selected the two largest exporters by volume of subject merchandise for individual examination in this review. One respondent received a zero margin, while the other respondent received a margin based on facts available. The fact that a mandatory respondent received a *de minimis* rate or a rate based on facts available has no bearing on whether that respondent was in fact individually examined.[143] Further, the fact that the rate assigned to Sino-Maple was indeed selected from the range of Jiangsu Senmao's dumped sales further supports the reasonableness of the separate rate. The sale selected was not from the uncooperative respondent, but from the cooperative one, and therefore is reasonably reflective of the potential dumping margins of those cooperative separate rate respondents.

Certain respondents argue that Commerce abandoned the "expected method" of calculating the all-others rate, as prescribed by the SAA, which requires Commerce "to weight-average the zero and de minimis margins and margins determined pursuant to the facts available, provided that volume data is available." The "expected method" requires Commerce "to weight-average the zero and de minimis margins and margins determined pursuant to the facts available, *provided that volume data is available*" (emphasis added).[144] The SAA continues that "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 means." Here, Commerce did not conduct a weighted-average of the margins available (*de minimis*, and margins determined pursuant to the facts available), because, as the SAA anticipated, volume data were not available for the mandatory respondent that failed to cooperate. Therefore, Commerce instead utilized a simple average of the margin data, a reasonable method permitted by the statute.[145]

Lastly, the respondents argue that Commerce must act fairly and equitably, and calculate margins as accurately as possible, within commercial reality. One respondent also argues that Commerce's actions violate the Eighth Amendment. As discussed above, Commerce has complied with the

[141] *See* the *Order* (rates varying from 0.00 to 17.37 percent).
[142] *See Albemarle*, 821 F.3d at 1355-56 (discussing "the statute's manifest preference for contemporaneity in periodic administrative reviews."); *see also Bestpak,* 716 F.3d at 1351-59; and *Amanda Foods*, 647 F. Supp. 2d at 1379-83 (finding insufficient evidence to support that abandoning the expected method of weight-averaging the *de minimis* margins of the individually examined respondents and pulling forward the investigation rate established the relevant antidumping dumping margins as accurately as possible).
[143] *See Solianus*, Slip Op. 19-77.
[144] *See* SAA at 4201.
[145] *See Solianus*, Slip Op. 19-77 at n.5 (citing *Bestpak,* 716 F.3d at 1378).

statute and the SAA, and supported its determination to rely on the "expected method" with substantial evidence. Furthermore, the AFA rate at issue, which forms part of the non-selected separate rate, is based on an actual transaction during the POR by Jiangsu Senmao, the mandatory respondent and largest exporter of subject merchandise by volume during the POR. Therefore, Commerce has met its obligations in determining an appropriate rate for the separate rate respondents.

Comment 4: Intermediate Input Methodology

Petitioners' Arguments[146]

- When calculating normal values (NVs) for merchandise exported from a NME, like China, it is Commerce's normal practice to value the FOPs that a respondent uses to produce subject merchandise.[147]
- However, Commerce has recognized an exception to this approach where: (1) the intermediate input accounts for a small or insignificant share of total output and, therefore, the increased accuracy in the overall calculations from valuing the underlying FOPs may be so small so as to not justify the burden of reporting them; or (2) valuing the FOPs used in the production of the intermediate product would lead to an inaccurate result because a significant element of cost would not be adequately accounted for in the overall NV buildup when surrogate values (SVs) are applied to the FOPs.[148]
- Commerce has further explained that the second scenario is applicable where it has determined that valuing the intermediate input for the production of subject merchandise will lead to a more accurate result than valuing the individual FOPs. [149]
- Commerce has found that valuing the intermediate input yields more accurate results than valuing the individual FOPs when it determines that a respondent is unable to accurately record and substantiate the complete factor information associated with producing the subject merchandise.[150]
- Commerce should apply the intermediate input methodology in this review because Senmao failed to explain or support how it identified log consumption in its records and did not provide documentation demonstrating the accuracy of its reporting.[151]

[146] *See* Petitioners' Case Brief at 2 – 11.
[147] *Id.* at 2 (citing 19 U.S.C. 1677b(c)(1) and (3)).
[148] *Id.* (citing *Xanthan Gum from the People's Republic of China: Final Results of 2013 Antidumping New Shipper Review*, 80 FR 29615 (May 22, 2015) and accompanying Issues and Decision Memorandum at Comment 1 and *Fresh Garlic from the People's Republic of China: Preliminary Results of 2004-2005 Semi-Annual New Shipper Reviews*, 71 FR 26329 (May 4, 2006) and accompanying Issues and Decision Memorandum at Comment 1 (*Fresh Garlic from China*)).
[149] *Id.* (citing *Fresh Garlic from China*, and accompanying Issues and Decision Memorandum at Comment 1.)
[150] *Id.* at 3 (citing *Honey from the People's Republic of China: Final Results and Final Rescission, In Part, of Antidumping Duty Administrative Review*, 71 FR 34893 (June 16, 2006) and accompanying Issues and Decision Memorandum at Comment 9 (*Honey from China*)).
[151] *Id.* at 4 (citing Jiangsu Senmao August 6, 2018 Section C-D Questionnaire Response (Jiangsu Senmao CDQR) and Jiangsu Senmao October 19, 2018 Supplemental Questionnaire Response (Jiangsu Senmao SQR)).

- Specifically, while Senmao states that it relied on raw material withdrawal slips to identify its log consumption amounts, Senmao did not demonstrate how, in the first instance, it identified the log quantities reported in its raw material withdrawal slips.[152]
- Understanding and verifying how Jiangsu Senmao's log quantities reported in its raw material withdrawal slips is critical to determining whether its FOP reporting is accurate, as demonstrated in the recent investigation of *Hardwood Plywood from China*.[153]
- In that proceeding, Commerce examined how the respondent identified the log quantities reported in its records but found that the company could not demonstrate that its methodology resulted in accurate reporting and could not provide third-party documentation confirming the accuracy of its reporting.
- As a result, Commerce found that the company was unable to accurately report and substantiate its consumption of logs used to produce veneers. Commerce therefore determined that it was appropriate to apply the intermediate input methodology and value the veneers consumed in the production process.
- The conclusion in *Hardwood Plywood from China* is equally applicable here, as logs are the primary raw material in the production of multilayered wood flooring, and inaccurately reported log consumption quantities would undermine the respondent's entire reporting methodology for the primary raw material in this case.
- While Commerce directed Jiangsu Senmao to provide production documents for the month of April 2017, including how these documents tie to the consumption calculation for logs, Jiangsu Senmao instead provided documentation, including the monthly wood log movement report and raw material subledger, for March 2017.[154]
- The documentation Jiangsu Senmao provided fails to support its reporting and further demonstrates that its reported log consumption cannot be verified based on the record, as it is not explained how these documents tie to Jiangsu Senmao's reported log consumption.
- Additionally, the SVs on the record do not accurately reflect Jiangsu Senmao's input costs, and therefore, valuing Jiangsu Senmao's log inputs would not properly account for the full NV and would lead to inaccurate results.[155]
- Specifically, a review of the import data from Romania indicates that appropriate SVs are not represented because, with the exceptions of small volumes from the United States, none of the countries from which Romania imported logs during the POR grow acacia, hickory, hard maple, or jatoba trees.[156]
- As log species have a significant effect on price, it would not be appropriate to conclude that the price of one log species would be representative of the price of another log species and

[152] *Id.* (citing Jiangsu Senmao SQR).
[153] *Id.* at 5 (citing *Certain Hardwood Plywood Products 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*, 82 FR 53460 (November 16, 2017) and accompanying Issues and Decision Memorandum at 23-28 (*Hardwood Plywood from China*)).
[154] *Id.* at 5-6 (citing to Jiangsu Senmao SQR and *Hardwood Plywood from China* and accompanying Issues and Decision Memorandum at 23-28).
[155] *Id.* at 9-11 (citing Jiangsu Senmao's Letter, "Multilayered Wood Flooring from the People's Republic of China: Surrogate Value Comments," November 2, 2018 at Exhibit 1 (Jiangsu Senmao SV Submission)).
[156] *Id.* at 10 (citing Petitioners' Letter, "Multilayered Wood Flooring from the People's Republic of China: Submission of Additional Surrogate Values," dated November 19, 2018 at Exhibits 1-2 (Petitioners Additional SV Submission)).

relying on SV information on the record to value Jiangsu Senmao's log consumption would result in failing to properly account for a significant part of its costs.[157]

Jiangsu Senmao et al.'s Rebuttal[158]

- The petitioners' argument that Commerce should depart from its standard practice and employ the intermediate input methodology should be rejected. Commerce's standard practice in accordance with the statute is to value the FOPs that a respondent uses to produce subject merchandise.[159]
- Commerce only rarely deviates from the standard practice when the respondent does not maintain appropriate records, fails to account for unknown variables that affect reported FOPs, fails to report or account for all information relevant to identify all FOPs, or where the FOP data contain errors.[160] None of these scenarios are present in this review.
- Jiangsu Senmao did not fail to provide any information to Commerce; rather, the company answered all questions asked by Commerce in both the original and supplemental questionnaires. In its supplemental questionnaire response, Jiangsu Senmao responded to Commerce's questions with a detailed, step-by-step explanation and documentation, including samples of entries in its books and records and sample documentation.[161]
- Commerce never asked Senmao to reconcile the sample documents provided to its log consumption or the final FOP figures, which would have been a much more complex undertaking than the petitioners' simplistic comparisons.
- The explanation and documents provided by Senmao demonstrate the detailed basis of its recordkeeping to trace the log inputs to production, which is sufficient for Commerce to continue to rely on its standard practice.
- This case is also distinguishable from *Hardwood Plywood from China*, in which Commerce had no option but to rely on the intermediate input methodology because it found its entire reporting methodology deficient and inaccurate during verification.[162]
- In the instant review, there is no evidence that Senmao's reporting methodology is unreliable or not verifiable and, therefore, no basis to discard the submitted FOP information.
- Ultimately, the petitioners' complaint seems to be that Commerce did not ask more questions or require the submission of even more documents and did not verify Jiangsu Senmao. Commerce, however, cannot hold it against Jiangsu Senmao that the petitioners did not get everything they want. Commerce was obviously satisfied with the information provided by Jiangsu Senmao because it did not issue additional supplemental questionnaires and did not conduct verificaiton.
- As the petitioners admit, Commerce has a long history with the wood flooring order and has never found it necessary to employ the intermediate input methodology. As in prior

[157] *Id.* at 11 (citing *Notice of Final Determination of Sales at Less Than Fair Value: Carbon and Certain Alloy Steel Wire Rod from Ukraine*, 67 FR 55782 (August 30, 2002) and accompanying Issues and Decision Memorandum at Comment 4 (*Steel Wire Rod from Ukraine*)).
[158] *See* Jiangsu Senmao's Rebuttal Brief at 2-7.
[159] *Id.* at 2 (citing 19 U.S.C. 1677b(c)(1)).
[160] *Id.* (citing *Fresh Garlic from China* and *Honey from China*).
[161] *Id.* at 3 (citing Jiangsu Senmao SQR at 8-9 and Exhibit SD-2).
[162] *Id.* at 4 (citing *Hardwood Plywood from China* and accompanying Issues and Decision Memorandum at 23-28).

reviews, there is nothing on this record that indicates any issues with Jiangsu Senmao's reporting methodology, nor were there any such issues in the last verification of the company.

- Further, even accepting the petitioners' characterization of the SVs, however, does not amount to a valid reason for Commerce to deviate from the standard methodology in this case. Even if there are issues with a SV, Commerce is required to employ the SV that constitutes the best information available to value the FOP.[163]
- The only case cited by the petitioners in support is *Steel Wire Rod from Ukraine*. However, in that case Commerce chose not to value the inputs that went into mining the iron ore, finding that it was the iron ore that was the FOP, not the energy, tools, and labor used in mining it.[164] Here, there are no self-produced inputs and no issue as to the appropriate FOP.
- Jiangsu Senmao is not involved in cutting down the trees to produce logs; it merely purchases the logs that it uses in producing the subject merchandise, and the proposed log SVs accurately reflect the value of such logs in the surrogate country.
- The petitioners' only issue with the SV for logs is that the exporting countries reflected in the Romanian import data do not appear to grow the trees at issue. However, there is no requirement that the import data for the surrogate country only reflect imports from countries that actually produce (or grow) the FOP at issue nor do the petitioners cite any cases in support of this position.
- Commerce rejects import data that contain (1) prices which are aberrational; (2) prices from NME countries; and (3) prices which represent dumped or subsidized prices. None of these scenarios are present in this review. It has not been suggested that the import data from any of these countries are aberrational, none of the countries are NME countries, and none of the values from these countries are alleged to be dumped or subsidized.[165]
- The SVs submitted to value logs in this review are (1) specific to the input; (2) tax- and import duty-exclusive; (3) contemporaneous with the POR; (4) representative of a broad market average; and (5) publicly available, therefore meeting all Commerce requirements.[166]

Commerce's Position: We agree with Jiangsu Senmao. Commerce's general practice, consistent with section 773(c)(1)(B) of the Act, is to calculate NV using the FOPs that a respondent consumes to produce a unit of subject merchandise. If the respondent is a fully-integrated producer, we take into account the factors utilized in each stage of the production process. There are circumstances, however, in which Commerce will modify its standard FOP methodology choosing instead to apply a SV to an intermediate input rather than to the individual FOPs used to produce that intermediate input.

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[163] *Id.* at 5 (citing 19 U.S.C. 1677b(c)(1)(B)).
[164] *Id.* at 5 (citing *Steel Wire Rod from Ukraine* and accompanying Issues and Decision Memorandum at Comment 4).
[165] *Id.* at 6 (citing *Notice of Final Determination of Sales at Less Than Fair Value: Certain Partial-Extension Steel Drawer Slides with Rollers from the People's Republic of China*, 60 FR 54472 (October 24, 1995); *Certain Kitchen Appliance Shelving and Racks from the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 74 FR 9591, 9600 (March 5, 2009), unchanged in *Certain Kitchen Appliance Shelving and Racks from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Notice of Antidumping Duty Order*, 75 FR 46971 (September 14, 2009); and *Certain Kitchen Appliance Shelving and Racks from the People's Republic of China: Amended Final Determination of Sales at Less Than Fair Value and Notice of Antidumping Duty Order*, 74 FR 46971 (September 14, 2009).
[166] *Id.* at 6-7 (citing Section 773(C)(5) of the Act and Policy Bulletin 04.1).

In some cases, a respondent may report factors used to produce an intermediate input that accounts for an insignificant share of total output. When the potential increase in accuracy to the overall calculation that results from valuing each of the FOPs is outweighed by the resources, time, and burden such an analysis would place on all parties to the proceeding, Commerce has valued the intermediate input directly using a SV.[167] In this proceeding, however, it is undisputed that the intermediate product at issue – wood veneer – accounts for a significant share of the total output of subject merchandise, *i.e.*, wood flooring.

Yet, there are other circumstances in which valuing the FOPs used to yield an intermediate product might lead to an inaccurate result because Commerce would be unable to adequately account for a significant cost element in the overall factors buildup. In this situation, Commerce would also value the intermediate input directly.[168]

For example, in *Frozen Fish Fillets from Vietnam*, Commerce found a number of problems with the upstream FOP data from respondents, such as misreported or unreported inputs, and that it was not possible to remediate all of these issues due to the lack of data on usage rates or the unavailability of SVs.[169] Commerce ultimately determined that the respondents' actual level of integration was not as reported, and that the respondents either misreported or failed to report a number of related upstream FOPs which necessitated the valuation of the intermediate input.[170] In *Honey from China*, Commerce found that the respondent relied on unsubstantiated estimations of its raw honey consumption and also failed to account for several unreported but related upstream inputs.[171] Commerce determined that the respondent was unable to accurately record and substantiate the complete costs associated with producing raw honey and, therefore, valued the raw honey consumed rather than the FOPs used to produce the raw honey.[172]

Similarly, in *Fresh Garlic from China*, Commerce found that respondents in the garlic industry do not track actual labor hours incurred for growing, tending, and harvesting activities and, thus, do not maintain appropriate records which would allow them to quantify, report, and substantiate this information.[173] Commerce also found other significant problems, such as with the respondents' ability to report yield loss that results from shrinkage during production due to the loss of water weight and the discarding of roots, stems, and skins during processing.[174] Commerce ultimately determined that the respondents were unable to accurately record and substantiate the complete

[167] *See*, *e.g., Notice of Final Antidumping Duty Determination of Sales at Less Than Fair Value and Affirmative Critical Circumstances: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam*, 68 FR 37116 (June 23, 2003), and accompanying Issues and Decision Memorandum at Comment 3 (*Frozen Fish Fillets from Vietnam*).
[168] *See, e.g., Hardwood Plywood from China*; *Steel Wire Rod from Ukraine*; *Frozen Fish Fillets from Vietnam*; and *Final Determination of Sales at Less Than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products from the People's Republic of China*, 66 FR 49632 (September 28, 2001) and accompanying Issues and Decision Memorandum at Comment 2.
[169] *See Frozen Fish Fillets from Vietnam* and accompanying Issues and Decision Memorandum at Comment 3.
[170] *Id.*
[171] *See Honey from China* and accompanying Issues and Decision Memorandum at Comment 9.
[172] *Id.*
[173] *See Fresh Garlic from China* and accompanying Issues and Decision Memorandum at Comment 1.
[174] *Id.*

costs of growing garlic and therefore applied the intermediate input methodology.[175] In *Hardwood Plywood from China*, source documents observed at verification revealed that the respondent relied on unsubstantiated estimations of its actual log consumption, and that the respondent's calculation of log consumption was inherently imprecise.[176] Commerce determined that the respondent's methodology for calculating its log consumption unavoidably introduced inaccuracies to the reported FOP consumption amounts, which in turn made it appropriate to apply the intermediate input methodology.[177]

In each of the above examples, record evidence called into question the respondents' abilities to accurately record the complete costs of producing the intermediate input and/or the respondents' reporting of the total upstream FOP consumption amount. In fact, Commerce was able to point to specific information obtained from verification that impugned the respondents' reporting of its FOP consumption amounts. Indeed, in *Hardwood Plywood from China*, in relying on the respondent's reported quantity of logs purchased and consumed during the POI and supporting documentation at the preliminary determination, Commerce found that the record did not meet the "limited exceptions for applying the intermediate input methodology" but stated that it would continue to evaluate this decision "pending additional information that may become available in this investigation."[178] That is, but for the information that became available at verification, including the original source documentation relied upon by the respondent to report its log consumption rates, Commerce would have continued to value the individual upstream FOPs used to produce the intermediate input.

In this proceeding, there is no evidence that calls into question Jiangsu Senmao's reporting or suggests that Senmao's recordkeeping is unreliable or not verifiable and, therefore, there is no basis on which to discard the FOP information submitted by Jiangsu Senmao. It is undisputed that Jiangsu Senmao is a fully-integrated producer of subject merchandise. Further, the petitioners do not allege that Jiangsu Senmao either misreported or failed to report any related upstream FOPs which might necessitate the valuation of the intermediate input. There is no record information to suggest that a significant element of the cost build-up would be missing from the NV calculation by continuing to value logs. There is also no record information to suggest that respondents in the wood flooring industry do not adequately maintain the records which would allow them to quantify, report, and substantiate log consumption amounts. In fact, each time we have verified a respondent in this proceeding, we observed the precision with which the company tracked such consumption amounts in their books and records throughout production.[179] Further, unlike *Hardwood Plywood from China*, there are no original source documents on this record which call into question Jiangsu

[175] *Id*.
[176] *See Hardwood Plywood from China* and accompanying Issues and Decision Memorandum at Comment 2.
[177] *Id*.
[178] *See Certain Hardwood Plywood Products from the People's Republic of China: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Preliminary Affirmative Determination of Critical Circumstances, in Part*, 82 FR 28629 (June 23, 2017) and accompanying Preliminary Decision Memorandum at 16-17.
[179] *See, e.g., Multilayered Wood Flooring from the People's Republic of China*: *Final Results of Antidumping Duty Administrative Review, Final Determination of No Shipments, and Final Partial Rescission of Antidumping Duty Administrative Review; 2014-2015*, 82 FR 25766 (June 5, 2017) and accompanying Issues and Decision Memorandum at Comment 11.

Senmao's reported log consumption amounts or that show the company relies on an inherently imprecise calculation.

In this proceeding, Jiangsu Senmao provided a detailed narrative description of its raw material recordkeeping and consumption quantities, in addition to a reasonable explanation of its FOP allocation for log consumption.[180] Jiangsu Senmao's cost reconciliation further supported its narrative description of the reported log consumption amounts.[181] Jiangsu Senmao also provided a list of all documents generated and relied upon in the normal course of business at each stage of production.[182] With respect to these documents, for the month of April 2017, Jiangsu Senmao provided raw material withdrawal slips, raw material movement schedules, and raw material subledger documents to support the consumption quantity reported for hickory logs, as requested.[183] Therefore, Jiangsu Senmao did not fail to provide any requested documentation regarding its consumption of logs during the POR. Because we did not conduct verification in this review, there are no additional source documents on the record of this proceeding like those observed in *Hardwood Plywood from China* that call into question Jiangsu Senmao's reporting of its log consumption during the POR.

The petitioners further assert that valuing the intermediate input for the production of subject merchandise will lead to a more accurate result than valuing the individual FOPs, because the SVs from Romania do not provide accurate values for Jiangsu Senmao's log consumption. Specifically, Jiangsu Senmao reports that it consumed the following eleven log species in producing subject merchandise: acacia, birch, Chinese maple, European Oak, hard maple, hickory, jatoba, red oak, tigerwood, walnut, and cotton wood.[184] The petitioners assert that, with the exception of small amounts in the United States, the countries from which Romania imports lumber do not grow four of these species, namely: acacia, hickory, hard maple, or jatoba trees.[185]

However, the information relied on by the petitioners to show that the exporting countries do not grow these species merely demonstrates that these particular species are not native, or endemic, to those countries.[186] Further, the petitioners fail to demonstrate that despite the historical origin of these species, that these trees could nevertheless have been privately grown or commercially produced in these countries, or whether the countries could themselves have imported and later exported these species to Romania.

Further, the HTS numbers used to value wood logs are more specific than those on the record which might be used to value wood veneers.[187] Indeed, the HTS numbers relied on for wood logs are broken down into four sub-categories based on the species of wood, while valuing wood veneers

[180] *See* Senmao CDQR at 13-17 and Exhibits D-2 and D-5; *see also* Senmao SQR at 11-12 and Exhibits SD-1 – 2.
[181] *See* Senmao CDQR Appendix V and Exhibit D-10; *see also* Senmao SQR at 10-12 and Exhibit SD-7.
[182] *See* Senmao CDQR at 13-17 and Exhibits D-2 and D-5; *see also* Senmao SQR at 8-9 and Exhibits SD-1 – 2.
[183] *Id.* at Senmao SQR at Exhibit SD-2.
[184] *See* Jiangsu Senmao CDQR.
[185] *See* Petitioners' Case Brief at 9-11.
[186] *See* Petitioners Additional SV Submission at Exhibits 1-2.
[187] *See* Memorandum, "Antidumping Duty Administrative Review of Multilayered Wood Flooring from the People's Republic of China; 2016-2017: Surrogate Values for the Preliminary Determination," dated December 17, 2018 (Preliminary SV Memorandum).

directly would involve lumping all wood species together into one HTS category and valuing them all the same. Commerce also considers how the company from which the surrogate financial ratios are derived produces the comparison product when determining the most accurate NV build-up.[188] In this case, SIGSTRAT, a Romanian producer of wood flooring, is the only company on the record on which we may base surrogate financial ratios.[189] Further, just as Jiangsu Senmao is a fully-integrated producer of wood flooring, SIGSTRAT also transforms wood logs into wood veneers.[190]

Therefore, as the record contains specific consumption information for all FOPs actually consumed by Jiangsu Senmao, and usable and specific SV information with which to value those FOPs, we find that it would be inappropriate to deviate from our standard practice of valuing all FOPs consumed in each stage of production when the NME respondent is a fully-integrated producer.

Comment 5: Deduction of Irrecoverable VAT

Jiangsu Senmao et al.'s Arguments[191]

- In the *Preliminary Results*, Commerce deducted irrecoverable VAT from the starting price when calculating the dumping margin for Jiangsu Senmao. This methodology is contrary to the statute as held by the CIT in *China Manufacturers*.[192]
- The CIT has also held that the use of this methodology with respect to Jiangsu Senmao was not supported by substantial evidence in the 2012-2013 administrative review of this *Order*.[193] Commerce must not make this deduction for the purposes of its final results in this administrative review because the facts of the 2012-2013 review are the same here.

Petitioners' Rebuttal[194]

- The two cases cited by Jiangsu Senmao do not apply to this review and should not alter Commerce's long and consistent practice of deducting irrecoverable VAT from the U.S. price, which it should continue to do in the final results.

[188] *See Notice of Final Determination of Sales at Less Than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products from the People's Republic of China*, 66 FR 49632 (September 28, 2001) and accompanying Issues and Decision Memorandum at Comment 2.
[189] *See* Preliminary SV Memorandum at 6.
[190] *Id.*
[191] *See* Jiangsu Senmao *et al.*'s Case Brief at 10. *See also* Jiangsu Senmao's Letter, "Multilayered Wood Flooring from the People's Republic of China: Comments on 2012 China VAT Circular," dated June 5, 2019, where Jiangsu Senmao reiterates these arguments in response to Commerce's placing the *2012 China VAT Circular* on the record of this administrative review. *See also* Memorandum, Multilayered Wood Flooring from the People's Republic of China: *2012 China VAT Circular*," dated May 29, 2019.
[192] *See* Jiangsu Senmao *et al.*'s Case Brief at 10 (citing *China Manufacturers Alliance LLC and Double Coin Holdings Ltd., et. al. v. United States*, Slip Op. 19-7 (CIT 2019) (*China Manufacturers II*).
[193] *Id.* (citing *Jiangsu Senmao Bamboo & Wood Indus. Co. v. United States*, 322 F. Supp. 3d 1308, 1317 (CIT 2018) (*Jiangsu Senmao*)).
[194] *See* Petitioners' Rebuttal Brief at 18 – 22.

- Since it was first announced in 2012, Commerce's consistent and uniform treatment of irrecoverable VAT has been to deduct it from EP or CEP for goods exported from NME countries by making an adjustment under the statute.[195]
- Several CIT cases have explicitly upheld Commerce's practice on this exact issue.[196] In *Aristocraft*, the CIT found that Commerce's methodology was a reasonable interpretation of the statute. Similarly, in both *Fushun Jinly* and *Juancheng*, the CIT was unambiguous in finding that Commerce's interpretation of the statute was lawful.
- Commerce's ability to adjust U.S. price downwards for taxes Chinese manufacturers became obligated to pay once subject merchandise is exported to the United States has been uniformly upheld without reservation until the two recent remands cited by Jiangsu Senmao.[197]
- While there are other CIT cases that remand Commerce's treatment of irrecoverable VAT as a deduction to U.S. price under the statute, Commerce's practice has not changed and has been upheld on many occasions. Further, in *Jiangsu Senmao*, the CIT only remanded due to an invalid factual finding, which contradicts what Commerce has found in numerous cases with respect to China's VAT system.[198]
- The methodology originated and was instituted because the Chinese VAT law allows all the duties to be rebated when the product is sold in China but only a portion of duties to be rebated when the product is exported. Because of this practice, it is not Commerce's responsibility to prove that Jiangsu Senmao was not reimbursed fully for domestic sales, and Senmao never even made this claim.[199]
- The record demonstrates that Jiangsu Senmao was more than fully reimbursed for VAT related to domestic sales, while the company was not fully reimbursed for VAT related to export sales. Thus, Commerce's deduction under the statute is a lawful exercise as upheld by the Courts on numerous occasions.

Commerce's Position: For the reasons explained below, we continue to adjust Jiangsu Senmao's U.S. price for irrecoverable VAT using the same methodology relied upon in the *Preliminary Results*.

Commerce's current methodology has been in place since 2012, when Commerce announced it would begin adjusting U.S. price for irrecoverable VAT in an NME proceeding in accordance with section 772(c)(2)(B) of the Act.[200] In this announcement, Commerce stated that the Act provides for when an NME government imposes an export tax, duty, or other charge on subject merchandise

[195] *Id.* at 18 (citing to *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) (*2012 VAT Notice*)).
[196] *Id.* at 18-19 (citing *Aristocraft of Am., LLC* v. *United States*, 269 F. Supp. 3d 1316 (CIT 2017) (*Aristocraft*)); *Fushun Jinly Petrochemical Carbon Co.* v. *United States*, Ct. No. 14-00287, Slip Op. 16-25 (CIT 2016) (*Fushun Jinly*); *Juancheng Kangtai Chern. Co.* v. *United States*, Slip Op. 2017-3 at 32-33 (CIT 2017) (*Juancheng*); and *Jacobi Carbons AB* v. *United States*, 222 F. Supp. 3d 1159 (CIT 2017) (*Jacobi Carbons*)).
[197] *Id.* at 19-20 (citing *Aristocraft*, 269 F. Supp. 3d at 1324-25; *Fushun Jinly*, Slip Op. 16 – 25 at 38; *Juancheng*, Slip Op. 2017-03 at 32-03; and *Jacobi Carbons*, 222 F. Supp. 3d at 1188).
[198] *Id.* at 20 (citing *Jiangsu Senmao*, Slip Op. 18-67 at 52).
[199] *Id.* at 20 (citing *2012 VAT Notice*).
[200] *See 2012 VAT Notice* at 36482 (June 19, 2012).

or on inputs used to produce it, from which the respondent was not exempted, and that Commerce will reduce the respondent's U.S. price by the amount of the tax, duty or charge paid, but not rebated.[201]

VAT is an indirect, *ad valorem* consumption tax imposed on the purchase (sale) of goods. It is levied on the purchase (sale) price of the good, *i.e.*, it is paid by the buyer and collected by the seller. For example, if the purchase price is $100 and the VAT rate is 15%, the buyer pays $115 to the seller, $100 for the good and $15 in VAT. VAT is typically imposed at every stage of production. Thus, under a typical VAT system, firms (1) pay VAT on their purchases of production inputs and raw materials ("input VAT") as well as (2) collect VAT on sales of their output ("output VAT").

Firms calculate input VAT and output VAT for tax purposes on a company-wide (not transaction-specific) basis, *i.e.*, in the case of input VAT, on the basis of all input purchases regardless of whether used in the production of goods for export or domestic consumption, and in the case of output VAT, on the basis of all sales to all markets, foreign and domestic. Thus, a firm might pay the equivalent of $60 million in total input VAT across all input purchases and collect $100 million in total output VAT across all sales. In this situation, however, the firm would remit to the government only $40 million of the $100 million in output VAT collected on its sales because of a $60 million credit for input VAT paid that the firm can claim against output VAT.[202] As result, the firm bears no "VAT burden (cost)": the firm, through the credit, is refunded or recovers all of the $60 million in input VAT it paid, and the $40 million remittance to the government is simply a transfer to the government of VAT paid by (collected from) the buyer with the firm acting only as an intermediary. Thus, the cost of output VAT falls on the buyer or the good, not on the firm. This would describe the situation under Chinese law except that producers in China, in most cases, do not recover (*i.e.*, are not refunded) the total input VAT they paid. Instead, Chinese tax law requires a reduction in or offset to the input VAT that can be credited against output VAT. This formula for this reduction/offset is provided in Article 5 of the 2012 PRC government tax regulation, *Notice of the Ministry of Finance and the State Administration of Taxation on VAT and Consumption Tax Policies for Exported Goods and Labor Services* (*2012 China VAT Circular*):[203]

$$\textbf{Reduction/Offset} = (P - c) \times (T_1 - T_2),$$

where,

P = (VAT-free) FOB value of export sales;

c = value of bonded (duty- and VAT-free) imports of inputs used in the production of goods for export;

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[201] *Id.*; *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) and accompanying Issues and Decision Memorandum at Comment 5.

[202] The credit if not exhausted in the current period can be carried forward.

[203] *See Notice of the Ministry of Finance and the State Administration of Taxation on VAT and Consumption Tax Policies for Exported Goods and Labor Service* (*2012 China VAT Circular*), Article 5 (Ministry of Finance, State Administration of Taxation, [2012] No. 39, issued May 25, 2012).

T_1 = VAT rate; and

T_2 = refund rate specific to the export good.

Using the example above, if P = $200 million, c = 0, T_1 = 17% and T_2 = 10%, then the reduction/offset = ($200 million - $0) x (17% - 10%) = $200 million x 7% = $14 million.

Chinese law then requires that the firm in this example calculate creditable input VAT by subtracting the $14 million from total input VAT, as specified in Article 5.1(1) of the *2012 VAT Notice*:

Creditable input VAT = Total input VAT – Reduction/Offset

Using again the example above, the firm can credit only $60 million – $14 million = $46 million of the $60 million in input VAT against output VAT. Since the $14 million is not creditable (legally recoverable), it is not refunded to the firm. Thus, the firm incurs a cost equal to $14 million, which is calculated on the basis of FOB export value at the *ad valorem* rate of $T_1 – T_2$. This cost therefore functions as an "export tax, duty, or other charge" because the firm does not incur it but for exportation of the subject merchandise, and under Chinese law must be recorded as a cost of exported goods.[204] It is for this "export tax, duty, or other charge" that Commerce makes a downward adjustment to U.S. price under section 772(c) of the Tariff Act of 1930, as amended.[205] It is important to note that under Chinese law the reduction/offset described above is defined in terms of, and applies to, total (company-wide) input VAT across purchases of all inputs, whether used in the production of goods for export or domestic consumption. The reduction/offset does not distinguish the VAT treatment of export sales from the VAT treatment of domestic sales from an input VAT recovery standpoint for the simple reason that such treatment under Chinese law applies to the company as a whole, not specific markets or sales. At the same time, however, the reduction/offset is calculated on the basis of the FOB value of exported goods, so it can be thought of as a tax on the company (*i.e.*, a reduction in the input VAT credit) that the company would not incur but for the export sales it makes, a tax fully allocable to export sales because the firm under Chinese law must book it as cost of exported goods.

The VAT treatment under Chinese law of exports of goods described above concerns only export sales that are not subject to output VAT, the situation where the firm collects no VAT from the buyer, which applies to most exports from China. However, the *2012 China VAT Circular* provides

[204] Article 5(3) of the *2012 China VAT Circular* states: "Where the tax refund rate is lower than the applicable tax rate, the corresponding differential sum calculated shall be included into the cost of exported goods and services."

[205] Because the $14 million is the amount of input VAT that is not refunded to the firm, it is sometimes referred to as "irrecoverable input VAT." However, that phrase is perhaps misleading because the $14 million is not a fraction or percentage of the VAT the firm paid on purchases of inputs used in the production of exports. If that were the case, the value of production inputs, not FOB export value, would appear somewhere in the formula in Article 5 of the *2012 VAT Notice* as the tax basis for the calculation. The value of production inputs does not appear in the formula. Instead, as explained above, the $14 million is simply a cost imposed on firms that is tied to export sales, as evidenced by the formula's reliance on the FOB export value as the tax basis for the calculation. The $14 million is a reduction in or offset to what is essentially a tax credit, and it is calculated based on and is proportional to the value of a company's export sales. Thus, "irrecoverable input VAT" is in fact, despite its name, an export tax within the meaning of section 772(c) of the Act.

for a limited exception in which export sales of certain goods are, under Chinese law, deemed domestic sales for tax purposes and are thus subject to output VAT at the full rate.[206] The formulas discussed above from Article 5 of the *2012 China VAT Circular* do not apply to firms that export these goods, and there is therefore no reduction in or offset to their creditable input VAT. For these firms creditable input VAT = total input VAT, *i.e.*, these firms recover all of their input VAT. At the same time, export sales of these firms are subject to an explicit output VAT at the full rate, T_1.[207] Commerce must therefore deduct this tax from U.S. price[208] under section 772(c) of the Act to ensure tax-neutral dumping margin calculations.[209]

Therefore, although Jiangsu Senmao attempts to show the link between the amount of VAT remitted to the Chinese government (*i.e.*, net VAT liability) and irrecoverable VAT in its monthly VAT calculation worksheets, it is not relevant to the calculation of the adjustment to U.S. price for irrecoverable VAT.[210] The monthly VAT calculation worksheets provided purportedly summarize Jiangsu Senmao's payments and collections of VAT for the company as a whole to determine Jiangsu Senmao's net VAT liability, *i.e.*, required remittance to the government. These calculation worksheets may show an amount for irrecoverable VAT, but do not relate to the recordation of the export-specific actual cost for irrecoverable VAT. In other words, the sum total of Jiangsu Senmao's required VAT remittance does not impact the export-specific actual cost of irrecoverable VAT.

The Act does not define the term(s) "export tax, duty, or other charge imposed" on the exportation of subject merchandise. The Act considers whether U.S. price includes "any export tax, duty, or other charge imposed by the exporting country on the exportation of the subject merchandise to the United States."[211] Commerce's reading of section 772(c)(2)(B) of the Act is whether there exists "any export tax, duty, or other charge imposed by the exporting country" included in the U.S. price at the time of exportation; Commerce does not interpret the phrase "on the exportation of the subject merchandise to the United States" to be limited to "by reason of the exportation of the subject merchandise to the United States."[212] To "impose" means to "{t}o charge; impute;" "{t}o subject (one) to a charge, penalty or the like;" "{t}o lay as a charge, burden, tax, duty, obligation, command, penalty, *etc*."[213] The "imposition" in the case of China's irrecoverable VAT occurs as a result of exportation, which is a permissible interpretation of the statute.[214]

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[206] *2012 China VAT Circular*, Article 7. For these goods, the VAT refund rate on export is zero.
[207] *2012 China VAT Circular*, Article 7.2(1).
[208] Commerce will divide the VAT-inclusive export price by (1 + T), where T is the applicable VAT rate.
[209] Pursuant to sections 772(c) and 773(c) of the Act, the calculation of normal value based on factors of production in NME antidumping cases is calculated on a VAT-exclusive basis, so U.S. price must also be calculated on a VAT-exclusive basis to ensure tax neutrality.
[210] *See* Jiangsu Senmao CDQR at 36 at Exhibit C-4. *See also Draft Results of Redetermination Pursuant to Court Order: Jiangsu Senmao*, Slip Op. 18-67 (April 26, 2019) at 19-25, unchanged in *Final Results of Redetermination* (June 8, 2018) at 28-30.
[211] *See, e.g., Diamond Sawblades Manufacturers' Coalition v. United States*, 301 F. Supp. 3d 1326, 1335 (CIT 2018) (*Diamond Sawblades Manufacturers' Coalition*).
[212] *Id.*
[213] *Id.* (citing Webster's New International Dictionary of the English Language Unabridged, at 1251 (2nd ed. 1956)).
[214] *Id.* ("The satisfaction of any such imposition is not necessarily concurrent with the act of imposition, which may occur at any time, and the vagueness of the statutory language neither precludes nor requires such interpretation.")

We find it reasonable to interpret these terms as encompassing irrecoverable VAT because the irrecoverable VAT is a cost that arises as a result of export sales.[215] The CIT has upheld our interpretation as a permissible interpretation of the statute.[216] Although in *China Manufacturers* the Court held that there was insufficient evidence that the Chinese government imposes an export tax, duty or other charge on the exportation of OTR tires, the Court had before it a different record and different explanation than at issue here.[217] Additionally, the irrecoverable VAT is set forth in Chinese law, and, therefore, can be considered to be "imposed" by the exporting country on exportation of subject merchandise. Further, an adjustment for irrecoverable VAT falls under section 772(c)(2)(B) of the Act, as it reduces the gross U.S. price charged to the customer to a tax-neutral net U.S. price received by the seller. This deduction is consistent with our longstanding policy, which is in turn consistent with the intent of the statute, that dumping margin calculations be tax-neutral.

Thus, we are making no changes to the *Preliminary Results* with respect to our calculation of the irrecoverable VAT deducted from Jiangsu Senmao's export price.

Comment 6: Yihua Timber's Separate Rate Eligibility

Yihua Tech's Arguments[218]

- In the *Preliminary Results*, Commerce correctly determined that Yihua Tech was eligible for a separate rate. However, without issuing a deficiency questionnaire and without explanation, Commerce included Yihua Timber in the list of companies not entitled to a separate rate.
- In a changed circumstances review, Commerce determined that Yihua Tech is the successor-in-interest of Yihua Timber.[219] Commerce also initiated the current administrative review of Yihua Tech under both its former name and its current name.
- Yihua Tech's separate rate certification (SRC) provides all necessary information for Commerce to make a separate rate determination for Yihua Tech, both before and after its name change.
- For the final results, Commerce should remove Yihua Timber from the China-wide entity and refer to it in the list of companies receiving a separate rate as the former name of Yihua Tech.

Commerce's Position: We agree with Yihua Tech. Commerce has previously determined that Yihua Tech is the successor-in-interest to Yihua Timber.[220] In that determination, we stated that "we will instruct U.S. Customs and Border Protection to collect estimated AD and {countervailing duties} (CVD) for all shipments of subject merchandise exported by Yihua Tech and entered, or

[215] *Id.*
[216] *See Aristocraft*, 269 F. Supp. 3d at 1324; *Jacobi Carbons*; *Fushun Jinly*; and *Juancheng*.
[217] *See China Manufacturers II*; *see also China Manufacturers Alliance, LLC, et al. v. United States*, Slip Op. 17-12 (CIT 2017).
[218] *See* Yihua Tech's Case Brief at 2-5.
[219] *Id.* (citing *Multilayered Wood Flooring from the People's Republic of China: Final Results of Changed Circumstances Review*, 82 FR 14691 (March 22, 2017) (*Yihua Tech CCR*)).
[220] *See Yihua Tech CCR*.

withdrawn from warehouse, for consumption on or after the publication date of this notice in the *Federal Register* at the current AD and CVD cash deposit rates for Yihua Timber."[221] Further, we acknowledge that we found Yihua Tech to be eligible for a separate rate in the *Preliminary Results*. Accordingly, for the final results, we will remove Yihua Timber from the China-wide entity and include it with Yihua Tech as Yihua Tech's former name. Our cash deposit and liquidation instructions to CBP will reflect this determination.

Comment 7: Initiation of Jiaxing Brilliant

Jiaxing Brilliant's Arguments[222]

- Commerce initiated a review of "Jiaxin" Brilliant Import & Export Co., Ltd. rather than "Jiaxing" Brilliant Import & Export Co., Ltd. Therefore, Commerce did not initiate a review of Jiaxing Brilliant and erroneously included it in the list of the China-wide entities.
- In Chinese, the suffixes "xin" means "new" or "fresh," whereas "xing" means "prosperous" or "thriving." Jiaxing Brilliant did not recognize the name "Jiaxin Brilliant" as its own. Commerce has stated that, where it initiates a review of more than 100 Chinese exporters with similarly-spelled names, it must rely on names and spelling of the companies listed in its *Initiation otice* as the basis for the review.[223]
- Further, Commerce did not provide Jiaxing Brilliant with the requisite notice that it was under review.[224] Commerce should therefore correct the *Initiation Notice*[225] by removing Jiaxing Brilliant from the list of China-wide entities and provide Jiaxing Brilliant the opportunity to participate actively in the administrative review.

Petitioners' Arguments[226]

- Jiaxing Brilliant should continue to be subject to the China-wide rate because it did not participate in this administrative review.
- The petitioners' review request identified Jiaxing Brilliant by the correct name, address, and was properly served on Jiaxing Brilliant.[227]
- It is irrelevant that the suffixes of "Jiaxing" and "Jiaxin" have different meanings in Chinese because the review is conducted in English, and the one missing letter in the *Initiation Notice* does not detract from an otherwise long and distinct name.

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[221] *Id.*
[222] *See* Jiaxing Brilliant's Letter.
[223] *Id.* (citing *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; 2012-2013*, 80 FR 40998 (July 14, 2015) and accompanying Issues and Decision Memorandum at Comments 7-8).
[224] *Id.* (citing *Sigma Corp. v. United States*, 841 F. Supp. 1255 (CIT 1993)).
[225] *Id.* (citing *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 83 FR 8058 (February 23, 2018) (*Initiation Notice*); *see also Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 83 FR 16298 (April 16, 2018) (initiating with respect to Double F Limited) (*Initiation Notice II*), and *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 83 FR 19215 (May 2, 2018) (initiating with respect to the China-wide entity) (*Initiation Notice III*) (collectively, *Initiation Notices*).
[226] *See* Petitioners' Case Brief at 30.
[227] *Id.* (citing Letter, "Request for Administrative Review: Multilayered Wood Flooring from the People's Republic of China," dated December 28, 2017).

Dalian Huilong's Rebuttal[228]

- Commerce did not initiate a review of this company for the POR. Jiaxing Brilliant examined the *Initiation Notice* and did not find its own name.
- While the petitioners claim this is an obvious misspelling, the difference is actually two different words in Chinese with different meanings. The petitioners had an obligation to examine and request a correction of any misspelling of the companies for which the petitioners requested review when Commerce issued its *Initiation Notice*.
- In the past, Commerce has strictly adhered to the spelling of a respondent's name in its *Initiation Notice* and has refused to review a company due to a spelling discrepancy.
- If Commerce changes its *Initiation Notice* to include Jiaxing Brilliant, then Commerce should fulfill Jiaxing Brilliant's request that Commerce provide Jiaxing Brilliant the opportunity to actively participate in the review and submit any questionnaire responses and certifications that reflect its true status in this review.

Petitioners' Rebuttal[229]

- It is not credible for Jiaxing Brilliant to argue that it did not know it was under review because the *Initiation Notice* was missing one letter in an otherwise long and distinct name, especially given that it made no claim that it was not properly served with the review request.
- The review request identified Jiaxing Brilliant by the correct name and was properly served to the correct address.
- Although the subparts "xing" and "xin" mean two different things in Chinese, the whole word is Jiaxing, which is a city in China and is the same city listed on the review request.

Commerce's Position: We agree with the petitioners. In a series of cases, the CAFC affirmed determinations by Commerce that subjected an exporter to the results of its review where that exporter was not expressly identified in an initiation notice, but there was indication that the administrative review would have a broader scope than those entities specifically named in the notice of initiation.[230] Thus, the CAFC held that the notice of initiation provided the companies with "reasonable," "adequate," and "sufficient notice" that their interests might be affected.[231]

In this case, Jiaxing Brilliant had reasonable notice that its entries of subject merchandise were subject to review. First, it is undisputed that Jiaxing Brilliant was properly served with the review request wherein its name was properly spelled and, therefore, had actual notice of the request for review. Second, we determine that the particular language of the *Initiation Notice* which identified "Jiaxin Brilliant Import & Export Co., Ltd." as subject to the instant review is sufficient to provide an informed party like Jiaxing Brilliant with reasonable notice that its interests might be affected. We note that the company has been subject to, and participated in, prior segments of the AD and

[228] *See* Dalian Huilong *et al.*'s Rebuttal Brief at 3-4.
[229] *See* Petitioners' Rebuttal Brief at 30.
[230] *See Huaiyin Foreign Trade Corp. v. United States*, 201 F.Supp.2d 1351, 1360-61 (CIT 2002), *aff'd Huaiyin Foreign Trade Corp. v. United States*, 322 F.3d 1369 (CAFC 2003)*; see also Transcom, Inc. v. United States*, 121 F.Supp.2d 690, 699 (CIT 2000), *aff'd Transcom, Inc. v. United States*, 294 F.3d 1371, 1379-80 (CAFC 2002).
[231] *Id.*

CVD proceedings on wood flooring from China. Additionally, the parties subject to this particular proceeding, which involves nearly 150 different long and distinct Chinese names, are aware that minor name misspellings sometimes occur in the *Federal Register*. When this does occur, the respondent typically notifies Commerce of the misspelling in time for Commerce to correct the name in the *Federal Register* prior to the *Preliminary Results*.[232] Jiaxing Brilliant provided Commerce with no such notification.

Here, while we failed to include one letter ("g") of the company's name in the *Initiation Notice*, this fact came to our attention for the first time in Jiaxing Brilliant's case brief. Therefore, Jiaxing Brilliant failed to participate despite reasonable notice that it was subject to this review. Accordingly, Jiaxing Brilliant remains subject to the results of this review. Furthermore, under these circumstances, we disagree that Jiaxing Brilliant should be allotted a second opportunity to submit questionnaire responses or certifications.

Comment 8: Spelling Variations of Zhejiang Dadongwu's Name

Petitioners' Arguments[233]

- The request for administrative review and the *Preliminary Results* spelled Zhejiang Dadongwu's name as "Zhejiang Dadongwu Green Home Wood Co., Ltd." However, in its SRC, Zhejiang Dadongwu stated that its correct name was "Zhejiang Dadongwu Green HomeWood Co., Ltd." Commerce should therefore use Zhejiang Dadongwu's correct name for the final results.

Zhejiang Dadongwu's Rebuttal[234]

- The petitioners note the discrepancy between the spelling of Zhejiang Dadongwu's name in the *Initiation Notice* and Zhejiang Dadongwu's SRC. However, Zhejiang Dadongwu has three valid variations of the English translation of its company name:
  "Zhejiang Dadongwu GreenHome Wood Co., Ltd.";
  "Zhejiang Dadongwu Greenhome Wood Co., Ltd."; and
  "Zhejiang Dadongwu Green Home Wood Co., Ltd."
- The variations were identified in Zhejiang Dadongwu's request for an administrative review where it was noted that Commerce has used all variations in the less-than-fair-value investigation, subsequent administrative reviews, and in companion CVD proceedings.[235] Commerce similarly used each variation in its CBP instructions.
- Additionally, both the petitioners and Zhejiang Dadongwu have used each spelling variation in various submissions to Commerce during different segments of the proceedings. All three versions are used by Zhejiang Dadongwu in the normal course of business and were used throughout Zhejiang Dadongwu's SRC, *e.g.*, one in the letterhead, another in the certification, and the other on an export certificate, and are valid for purposes of identifying the company's separate rate eligibility.

[232] *See, e.g., Initiation Notice II*.
[233] *See* Petitioners' Case Brief at 18.
[234] *See* Zhejiang Dadongwu's Rebuttal Brief at 1-5 and Exhibits 1-2.
[235] *Id.* (citing Zhejiang Dadongwu's Letter, "Multilayered Wood Flooring from the People's Republic of China: Request for Administrative Review," dated December 21, 2017 (Zhejiang Dadongwu's Review Request)).

- The inconsistencies in the English translations are limited to spacing and capitalization, not spelling, which could result in a difference in meaning. A difference of one letter when spelling the English pinyin translation of a Chinese name (*e.g.*, "Jiaxin" versus "Jiaxing") may result in a completely different name.
- While the petitioners argue that the difference between "xin" and "xing" is trivial,[236] the differences in spacing and capitalization in Zhejiang Dadongwu's name are even more trivial.
- If Commerce accepts the petitioners' argument that the misspelling of the English translation of another company's name is close enough to be accepted for the purposes of identifying that particular respondent, then Commerce should also recognize that the minor variations in the spacing and capitalization of the English translation of Zhejiang Dadongwu's name are also not significant and similarly should be accepted for purposes of identifying Zhejiang Dadongwu.
- Commerce has recognized that slightly different translations of documents are both valid translations.[237] Therefore, the petitioners are incorrect to state that Zhejiang Dadongwu intended to identify "Zhejiang Dadongwu GreenHome Wood Co., Ltd." as the only correct English translation of the company's name. Accordingly, Commerce's instructions to CBP regarding Zhejiang Dadongwu's exports should list all three variations.

Commerce's Position: We agree with Zhejiang Dadongwu. While the petitioners requested a review of only "Zhejiang Dadongwu Green Home Wood Co., Ltd.,"[238] Zhejiang Dadongwu's review request included all three variations.[239] In its request for a review, Zhejiang Dadongwu noted that Commerce has acknowledged the name variations in other segments of this proceeding as well as in the companion CVD proceeding.[240] In the *Initiation Notice* and the *Preliminary Results*, we referred to Zhejiang Dadongwu as "Zhejiang Dadongwu Green Home Wood Co., Ltd."[241] However, we agree with Zhejiang Dadongwu that, in this administrative review, the record demonstrates that all three variations are used in the normal course of business. As noted by Zhejiang Dadongwu in its rebuttal brief, the SRC, the cover letter to Commerce, the company letter head, and export certificate, each used a different version of the company's name, which demonstrates that the company does, in the normal course of business, use all three name variations.[242] Thus, in this administrative review, there is no evidence suggesting that Commerce should no longer acknowledge each of Zhejiang Dadongwu's name variations. Therefore, we will include the three variations for the purposes of any instructions we issue to CBP that pertain to Zhejiang Dadongwu.

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[236] *See* Comment 7.
[237] *See* Zhejiang Dadongwu's Rebuttal Brief at 4 (citing *Hardwood and Decorative Plywood from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 78 FR 58273 (September 23, 2013), and accompanying Issues and Decision Memorandum at Comment 17)).
[238] *See* Petitioners' Letter, "Request for Administrative Review: Multilayered Wood Flooring from the People's Republic of China," dated December 28, 2017.
[239] *See* Zhejiang Dadongwu's Review Request.
[240] *Id*.
[241] *See Initiation Notice* and *Preliminary Results*.
[242] *See* Zhejiang Dadongwu's Rebuttal Brief at 3 and Exhibit 2.

Comment 9: Keri Wood's No Shipment Claim

Keri Wood's Arguments[243]

- In the *Preliminary Results*, Commerce assigned the China-wide rate to Keri Wood because CBP data on the record indicated that Keri Wood made an entry of subject merchandise during the POR, contrary to Keri Wood's no shipment claim.[244]
- On February 7, 2019, Keri Wood provided new factual information to explain the shipments. While the company acknowledged that its explanation of the discrepancy was untimely, Keri Wood claimed that this was because it was unable to gather the necessary information to rebut the CBP data until that date, as such information was not in its control until after the *Preliminary Results*.
- Commerce has the discretion to accept this information provided by Keri Wood regardless of any deadlines, and acceptance of the new factual information would not impede Commerce's ability to conduct the review. Additionally, Commerce's burden for accepting Keri Wood's information is outweighed by the concerns for accuracy and fairness in this proceeding.[245]
- Keri Wood's new factual information supported its original no shipment claim; therefore, Commerce should rescind the review with respect to Keri Wood in the final determination.

Petitioners' Rebuttal[246]

- Commerce correctly assigned Keri Wood the China-wide rate in the *Preliminary Results* because the CBP data showed an entry of subject merchandise by Keri Wood, and this information was never refuted by Keri Wood.[247]
- Although Keri Wood submitted a no shipment certification in March 2018, in response to CBP data placed on the record by Commerce, the company waited more than eleven months to address the issue.
- Commerce should not rescind the review with respect to Keri Wood because the company untimely submitted unsolicited new factual information.

Commerce's Position: We agree with Keri Wood. On December 4, 2018, Commerce established a deadline for parties to submit factual information to rebut, clarify, or correct the information Commerce obtained as a result of its inquiry to CBP regarding the no shipment claims of several respondents.[248] On March 26, 2019, however, we received an extension request from Keri Wood, in which Keri Wood outlined its extraordinary circumstances as provided by 19 CFR 351.302(c)(2), and requested that Commerce accept factual information to rebut, clarify, or correct this information.[249] In its letter, Keri Wood stated that its importer had incorrectly classified the subject

[243] *See* Jiangsu Senmao *et al.*'s Case Brief at 10-12.
[244] *Id*. at 11 (citing *Preliminary Results* and accompanying Preliminary Decision Memorandum at 8 and n.38).
[245] *Id*. (citing *Artisan Mfg. Corp. v. United States*, 978 F.Supp.2d 1334 (CIT 2014); and *Fine Furniture (Shanghai) Ltd. v. United States*, 865 F. Supp. 2d 1254, 1269 (CIT 2012)).
[246] *See* Petitioners' Rebuttal Brief at 29.
[247] *Id*. (citing *Preliminary Results* and accompanying Preliminary Decision Memorandum at 8).
[248] *See* Memorandum, "2016-2017 Administrative Review of the Antidumping Duty Order on Multilayered Wood Flooring from the People's Republic of China: No Shipments Inquiry," dated December 4, 2018.
[249] *See* Keri Wood's Letter, "Multilayered Wood Flooring from the People's Republic of China: Extension Request to Submit Information Supporting No Shipments," dated March 26, 2019. Previously, on February 7, 2019, Keri Wood

merchandise that appeared in the CBP data as a Type 3 entry instead of a Type 1 entry. Once the importer corrected this error, Keri Wood was able to obtain and submit the new information to Commerce. Keri Wood substantiated its claims with the corrected CBP 7501 Entry Summaries.[250] Pursuant to 19 CFR 351.302(c), we granted Keri Wood an extension and accepted the information submitted by Keri Wood on the record.[251] We find that this new factual information supports Keri Wood's no shipment claim.

Comment 10: Rescission of Review with Respect to Baroque Timber

Baroque Timber's Arguments[252]

- In its *Preliminary Results*, Commerce stated that it inadvertently initiated a review of Baroque Timber, despite not having received a request for review of this company. As a result, Commerce rescinded the administrative review with respect to Baroque Timber on this basis.
- However, the Samling Group, which includes Baroque Timber, was excluded from the *Order* due to litigation, which Commerce recognized in the 2012-2013 administrative review.[253]
- Commerce should acknowledge in its final determination that the rescission of the review of Baroque Timber is appropriate because Baroque Timber was excluded from the *Order*.

Commerce's Position: Because a review was not requested for Baroque Timber, Commerce rescinded the review with respect to Baroque Timber in the *Preliminary Results* on that basis, and therefore the issue raised by Baroque Timber is moot in the context of this review.[254]

Comment 11: Jilin Forest's Separate Rate Eligibility

Jilin Forest's Arguments[255]

- Commerce's presumption of government control by reason of indirect government share ownership is rebutted by the factual record of this administrative review; therefore, Jilin Forest is entitled to a separate rate.
- When read in their entirety, Jilin Forest's Articles of Association provide that:[256]

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submitted new factual information to explain its shipments; however, because Keri Wood failed to establish extraordinary circumstances in this submission, Commerce rejected it. *See* Commerce's Letter, "Multilayered Wood Flooring from the People's Republic of China: Rejection of Letter Submitted February 7, 2019," dated March 21, 2019.

[250] *See* Keri Wood's Letter, "Multilayered Wood Flooring from the People's Republic of China: Substantive Submission Supporting No Shipments of Jiangsu Keri Wood," dated March 26, 2019.

[251] *See* Memorandum, "2016-2017 Administrative Review of the Antidumping Duty Order on Multilayered Wood Flooring from the People's Republic of China: Acceptance of Extension Request and Factual Information Submitted by Jiangsu Keri Wood Co., Ltd. (Keri Wood)," dated April 1, 2019.

[252] *See* Yekalon *et al.*'s Case Brief at 27-28.

[253] *Id.* (citing *Multilayered Wood Flooring from the People's Republic of China: Notice of Court Decision Not In Harmony with the Final Determination and Amended Final Determination of the Antidumping Duty Investigation*, 79 FR 25109 (May 2, 2014) and *Multilayered Wood Flooring from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Final Results of New Shipper Review; 2012-2013*, 80 FR 41476 (July 15, 2015)).

[254] *See Preliminary Results*, 83 FR at 85630 and Appendix II.

[255] *See* Jilin Forest's Case Brief at 1-14.

[256] *Id.* at 2-7 (citing Jilin Forest March 27, 2018 Separate Rate Application (Jilin Forest SRA) at Appendix 10).

  - the authority to appoint the board of directors and senior company management and control the company's operations and export activities is held by the Jinqiao Flooring Labor Union (Labor Union) rather than the shareholders' assembly or the majority government shareholder;
  - three of the five board members are to be elected by the Labor Union;
  - the Labor Union is the entity that exercises operational control of the board and the company as the "management decision-making body of the company."
- Jilin Forest negotiated independently with U.S. customers. Sales managers had contractual authority to bind the company and senior managers were selected by the board of directors and the Labor Union.
- Commerce has conceded to the CIT that majority government ownership does not *per se* bar separate rate eligibility and that, evidence in the form of an article of association limiting a government-owned entity from voting in accordance with its majority shareholding may comprise affirmative evidence breaking the chain of control. Commerce should follow its professed understanding of the rebuttable nature of its presumption of control over the selection of company management by the majority government shareholder.[257]
- Commerce's interpretation of the Company Law of China is misplaced. Article 42 states that shareholder voting rights may be barred by company by-laws and Jilin Forest's by-laws specifically restrain the majority shareholder's ability to exercise its voting rights.[258]
- Commerce's reading of Jilin Forest's Articles of Association takes the phrase "report to it {the shareholders}" out of context.
- With respect to Commerce's preliminary determination that the Labor Union is itself under the control of the Chinese government:
  - Commerce's conclusion relies on an inquiry conducted by Commerce into the status of China as an NME country from a different proceeding and involves a different labor union and a different industry.[259]
  - Commerce's determination is contradicted by Jilin Forest's Articles of Incorporation and Articles of Association which authorize the workers of the company to organize labor unions under the Chinese labor law in a democratic fashion and appoint/dismiss worker representatives to the board of directors and the board of supervisors through the Worker's Congress.
  - There is no indication in Jilin Forest's Articles of Association that any of the activities, management or the elections of the Labor Union involved, were influenced or controlled by any level of the Chinese government.

Petitioners' Rebuttal[260]

- Commerce should continue to find that Jilin Forest is not eligible for a separate rate because the company is majority owned by the government, which has the ability to control, and has an interest in controlling, the operations of Jilin Forest.

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[257] *Id*. at 4-7 (citing *Zhejiang Quzhou Lianzhou Refrigerants Co., v. United States*, CIT, Slip. Op 18-136 (CIT 2018)).
[258] *Id*. at 9 (citing *Jiangsu Senmao* AQR at Exhibit A-2).
[259] *Id*. at 13 (citing Memorandum, "Aluminum Foil from the People's Republic of China: China's Status as a Non-Market Economy," dated October 26, 2017 (China NME Status Memorandum)).
[260] *See* Petitioners' Rebuttal Brief at 22-27.

- Jilin Forest's argument that the majority shareholders are restrained from exercising their normal shareholding rights fails to account for the full record and thus fails to recognize the government's actual ability to control the company.
- Although Jilin Forest's Articles of Association state that the Labor Union has the power to elect three of the five board members, Article 19 allows the shareholders as a whole to appoint the company's directors and determine the renumeration of the directors.[261]
- Thus, the majority shareholders have the ability to approve or deny any particular board member and have significant sway over the board of directors, regardless of who elects and/or appoints them.
- Jilin Forest also ignores the role of the shareholders, who all play an important role in controlling the operations of the company regardless of majority or minority status. For example, while the board of directors may formulate plans related to budgets, profits, mergers, and operations, it is the shareholders who ultimately approve these plans and control these functions.[262]
- Commerce has also found that labor unions in China are under the control and direction of the government. Therefore, even if the Labor Union does control Jilin Forest, this still amounts to Jilin Forest being controlled by the Chinese government.[263]

Commerce's Position: We disagree with Jilin Forest and we continue to find that Jilin Forest is not eligible for a separate rate. In the *Preliminary Results*, we determined that Jilin Forest did not demonstrate an absence of *de facto* government control, as it is an entity that is majority-owned by the Chinese government. For purposes of the final results, we continue to rely on the business proprietary Separate Rate Analysis Memorandum accompanying the *Preliminary Results*, which is incorporated herein by reference.[264]

In the *Preliminary Results*, we explained that, in proceedings involving NME countries, Commerce begins with a rebuttable presumption that all companies within the NME are subject to government control and, thus, should be assessed a single antidumping duty rate.[265] In the *Initiation Notice*, Commerce notified parties of the application process by which exporters may obtain separate rate status in NME proceedings.[266] It is Commerce's policy to assign all exporters of merchandise under review from an NME country a single weighted-average dumping margin unless an exporter

[261] *Id*. at 23 (citing Jilin Forest SRA at Appendix 10).
[262] *Id*. at 25 (citing Jilin Forest SRA at Appendix 10).
[263] *Id*. at 26 (citing China NME Status Memorandum at 20-22).
[264] *See* Memorandum, "Preliminary Separate Rate Analysis Memorandum for Jilin Forest Industry Jinqiao Flooring Group Co., Ltd.," dated December 17, 2018 (Separate Rate Analysis Memorandum).
[265] *See, e.g., Notice of Final Determination of Sales at Less Than Fair Value, and Affirmative Critical Circumstances. In Part: Certain Lined Paper Products from the People's Republic of China*, 71 FR 53079, 53082 (September 8, 2006); *see also 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 Chin*a, 71 FR 29303, 29307 (May 22, 2006).
[266] *See Initiation Notices*, 83 FR at 8059.

can demonstrate that it is sufficiently independent from government control so as to be entitled to a separate rate.[267]

Commerce analyzes whether each entity exporting the subject merchandise is sufficiently independent from government control under a test arising from *Sparklers*, as further developed in *Silicon Carbide*.[268] In accordance with this test, Commerce assigns separate rates to exporters in NME proceedings if exporters can demonstrate the absence of both *de jure* and *de facto* governmental control over their export activities.[269]

In recent proceedings, we have concluded that, where a government entity holds a majority equity ownership, either directly or indirectly, in the respondent exporter, the majority ownership holding in and of itself means that the government exercises, or has the potential to exercise, control over the company's operations. This may include control over, for example, the selection of management, which is a key factor in determining whether a company has sufficient independence in its export activities to merit a separate rate.[270] Consistent with normal practice, we would expect any majority shareholder, including a government, to have the ability to control, and an interest in controlling, the operations of the company, including the selection of management and the profitability of the company. Therefore, in assessing the degree of government control over Jilin Forest, we analyzed the level of government ownership of Jilin Forest.

In the *Preliminary Results*, we found, after a review of each owner's capital verification report, that the majority of Jilin Forest's shares are held by a state-owned enterprise (SOE).[271] Jilin Forest does not dispute this key fact but simply reiterates statements it made in its separate rate application (SRA).[272] For example, Jilin Forest restates that its Articles of Association establish that three of five members of the board of directors are elected by the Labor Union, which it claims is a non-

[267] *See Final Determination of Sales at Less Than Fair Value: Sparklers from the People's Republic of China*, 56 FR 20588, 20589 (May 6, 1991) (*Sparklers*); *Notice of Final Determination of Sales at Less Than Fair Value: Silicon Carbide from the People's Republic of China*, 59 FR 22585, 22586-89 (May 2, 1994) (*Silicon Carbide*).
[268] *See Sparklers*, 56 FR at 20588 and *Silicon Carbide*, 59 FR at 22586-89.
[269] *See, e.g., Final Results of Antidumping Duty Administrative Review: Petroleum Wax Candles from the People's Republic of China*, 72 FR 52355, 52356 (September 13, 2007).
[270] *See Certain Corrosion-Resistant Steel Products from the People's Republic of China: Affirmative Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination,* 81 FR 75 (January 4, 2016) and accompanying Preliminary Decision Memorandum (PDM) at 15, unchanged in final *Certain Corrosion-Resistant Steel Products from the People's Republic of China: Final Determination of Sales at Less Than Fair Value, and Final Affirmative Critical Circumstances Determination, in Part,* 81 FR 35316 (June 2, 2016); *see also 1,1,1,2 Tetrafluoroethane (R-134a) from the People's Republic of China: Preliminary Determination of Sales at Less-Than-Fair Value and Affirmative Determination of Critical Circumstances, in Part, and Postponement of Final Determination,* 81 FR 69786 (October 7, 2016) and accompanying PDM at 17, unchanged in final *1,1,1,2 Tetrafluoroethane (R-134a) from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Affirmative Determination of Critical Circumstances, in Part,* 82 FR 12192 (March 1, 2017) and accompanying Issues and Decision Memorandum at 12-16 (*Tetrafluoroethane)*; *see also Hydrofluorocarbon Blends and Components Thereof from the People's Republic of China: Final Determination in the Less-Than-Fair Value and Final Affirmative Determination of Critical Circumstances*, 81 FR 42314 (June 29, 2016) and accompanying Issues and Decision Memorandum at Comment 8.
[271] *See* Separate Rate Analysis Memorandum at 5-6.
[272] *See* Jinqiao Flooring's Letter, "Multilayered Wood Flooring from the People's Republic of China: Submission of Separate Rate Application," dated March 27, 2018.

governmental organization.[273] This example, according to Jilin Forest, demonstrates that it is free from the control, supervision, or interference of any government entity.[274]

As an initial matter, Jilin Forest's arguments regarding the Labor Union's freedom from government control are misplaced. The record supports a finding that Jilin Forest is entirely under control of the Chinese government, and thus ineligible for a separate rate because it has not met the criteria for *de facto* independence.[275] In the China NME Status Memorandum, we determined that "{l}abor unions are under the control and direction of the {All-China Federation of Trade Unions (ACFTU)}, a government affiliated and {Chinese Communist Party (CCP)} organ" and that "{a}ll trade unions are affiliates of the government-controlled ACFTU and its branches at the local and enterprise level."[276] Because Jilin Forest is owned by a government-controlled entity and its Labor Union is under the control of the ACFTU, Commerce finds that Jilin Forest is ultimately under the control of the Chinese government.[277] Moreover, Jilin Forest's reference to excerpts of the Articles of Incorporation and Articles of Association in an attempt to demonstrate its labor union organizes in a democratic fashion does not undermine Commerce's determination all labor unions are under the control of the Chinese government.[278]

Consistent with normal business practices, we would expect any majority shareholder, including a government, to have the ability to control, and an interest in controlling, the operations of the company, including the selection of management.[279] This is consistent with the Court's reasoning in *Diamond Sawblades I*, where the Court stated that "'governmental control in the context of the separate rate test… can obviously be traced from the controlling shareholder, to the board, to the general manager, and so on along the chain to 'day-to-day decisions of export operations,' including terms, financing, and inputs into finished product for export."[280] Here, Jilin Forest states that the Labor Union controls its business operations and its board of directors.[281] Thus, we continue to conclude that Jilin Forest's government-owned entity, the Labor Union, which is under control of the ACFTU, exercises, or has the potential to exercise, control over Jilin Forest's export operations.

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[273] *See* Jinqiao Flooring's Case Brief at 4-5.
[274] *Id*. at 5. We note that Jilin Forest discounts the importance of the fact that two members of the Board of Directors are elected by the SOE, and there is no evidence to suggest that those members are merely placeholders. Indeed, as professed by Jilin Forest, the Board of Directors controls the management and operations of the company. Further, the notion that three members of the Board of Directors act completely autonomously from the two other members simply ignores normal business practices.
[275] *See* Jilin Forest SRA at 12-13 and Appendix 10.
[276] *See* China NME Status Memorandum at 5.
[277] *See Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China: Final Results of Antidumping Duty Administrative Review; 2016-2017*, 84 FR 6132 (February 26, 2019), and accompanying IDM at Comment 1.
[278] *See* China NME Status Memorandum at 5.
[279] *Id*.
[280] *See Diamond Sawblades Redetermination in Advanced Tech I*, 885 F. Supp. 2d 1343, 1357 (CIT 2012) *(Diamond Sawblades I)*
[281] *See* Jilin Forest SRA at 12.

Pursuant to section 771(18)(C)(ii) of the Act, Commerce conducted an inquiry into China's status as an NME in connection with the less-than-fair-value investigation of aluminum foil from China.[282] In evaluating the extent to which wage rates in China are determined by free bargaining between labor and management, we concluded that "{l}abor unions are under the control and direction of the All-China Federation of Trade Unions (ACFTU), a government-affiliated and CCP organ."[283] In the China NME Status Memorandum, we further explained that:

> ACFTU's legal monopoly on all trade union activities is codified in the Trade Union Law of the People's Republic of China ("Trade Union Law") adopted in 1992, and remains unchanged after amendments to the law in 2001 and 2009. The Chinese government prohibits independent unions and has systemically and, in some cases, forcibly repressed efforts to organize independent unions. The Trade Union Law provides for ACFTU to preside over a network of subordinate trade unions that are related to one another in terms of the Leninist concept of "democratic centralism," which subordinates lower-ranking unions to higher-ranking ones. ACFTU is subject to CCP control, and trade union leaders concurrently hold office at a corresponding rank in the CCP or the government. The current ACFTU chairman is a member of the CCP Politburo.[284]

Commerce's China NME Status Memorandum provides the following additional summary of the role of China's trade unions, as part of the institutions of the Chinese state:

> ACFTU must organize and approve all union activity, but ACFTU is not required to reflect solely, or even primarily, the interests of workers in disputes. Unions are nominally required to safeguard the legitimate rights and interests of the Chinese worker, while simultaneously playing their proper role in China's social modernization and safeguarding the State power under the people's democratic dictatorship. Because China's trade unions are a part of the Chinese government's institutional framework, with a responsibility to preserve harmony and stability in industrial relations, there is an inherent tension in the dual functions they serve.[285]

Finally, Jilin Forest relies on *Zhejiang Quzhou* wherein the CIT noted that "{a}t oral argument… Defendant clarified that Commerce has not taken the position that majority government ownership *per se* bars separate rate eligibility. Defendant posited the possibility that evidence in the form of an article of association limiting a government-owned entity from voting in accordance with its majority shareholding may compose affirmative evidence breaking the chain of control, but noted

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[282] *See Certain Aluminum Foil from the People's Republic of China: Notice of Initiation of Inquiry Into the Status of the People's Republic of China as a Nonmarket Economy Country Under the Antidumping and Countervailing Duty Laws*, 82 FR 16162 (April 3, 2017) *(NME Inquiry Initiation); see also Certain Aluminum Foil from the People's Republic of China: Notice of Extension of Time for Public Comment Regarding Status of the People's Republic of China as a Nonmarket Economy Country Under the Antidumping and Countervailing Duty Laws, 82 FR 20559 (May 3, 2017).*

[283] *See* China NME Status Memorandum at 5.

[284] *Id*. at 21 (citations omitted).

[285] *Id*. at 22 (citations omitted).

that such evidence was absent here."[286] According to Jilin Forest, this is the precise circumstance in this case and Commerce should follow its professed understanding of the rebuttable nature of presumed control.[287] We disagree. In *Zhejiang Quzhou*, Commerce stated that such evidence *may* break the chain of control. That is, Commerce, did not, in *Zhejiang Quzhou*, argue that this "evidence" sufficiently rebuts the presumption of government control. Further, we disagree that Jilin Forest's Articles of Association here, limiting the SOE from voting in accordance with its majority shareholding, sufficiently break the chain of control in light of the Articles of Association providing that the board of directors reports to the shareholders and are charged with implementing shareholder resolutions.[288]

Further, *Zhejiang Quzhou* is inapposite to Jilin Forest's position. In *Zhejiang Quzhou*, the indirect-majority-government-owned respondents pointed to "evidence" similar to Jilin Forest's, *e.g.*, that the company's Article of Association place the authority to appoint the board of directors and senior company management in a non-government shareholder. To these arguments, the CIT held that, "{n}one of these provisions, however, constrain {SOE}'s ability to elect the {respondent's parent company}'s directors in accordance with its majority shareholding," and that "the cited provisions represent the legal vehicles through which {the SOE} exercises its control over {the parent company} and, thus, {the respondents}. There is, therefore, substantial evidence supporting Commerce's determination that {the respondents'} management is 'beholden' to {the parent company}, whose board is controlled by the {SOE}."[289] *Zhejiang Quzhou* supports Commerce's position that the separate rate analysis centers on the *implications* of majority government ownership *i.e.*, a potential, ability, interest, *etc*. established through record evidence.

In sum, Jilin Forest's arguments and the corporate documentation upon which Jilin Forest relies fail to rebut Commerce's preliminary separate rate analysis and we therefore continue to find that Jinqiao Flooring is not eligible for a separate rate.

Comment 12: Scholar Home's Separate Rate Eligibility

Scholar Home's Arguments[290]

- In the *Preliminary Results*, Commerce incorrectly stated that it did not receive information to determine Scholar Home (Shanghai) New Material Co., Ltd.'s (Scholar Home's) separate rate eligibility and, therefore, assigned to Scholar Home the China-wide rate.
- However, Scholar Home's Q&V questionnaire response and separate rate application (SRA) were timely filed, and Scholar Home attempted to file a response to Commerce's October 5, 2018, supplemental questionnaire, which Commerce rejected. For the final results, Commerce should find Scholar Home eligible for a separate rate.
- Scholar Home's SRA demonstrated the company's *de jure* and *de facto* independence from the China-wide entity. Although Scholar Home inadvertently filed an untimely

[286] *See* Jilin Forest Case Brief at 7 (citing *Zhejiang Quzhou Lianzhou Refrigerants Co. v. United States*, 350 F. Supp. 3d 1308, n.29 (CIT 2018) (*Zhejiang Quzhou*)).
[287] *Id.*
[288] *See* Jilin Forest SRA at Appendix 10 (Chapter VII: Board of Directors).
[289] *See Zhejiang Quzhou* 350 F. Supp. 3d 1308, 1319-1320 (CIT 2018).
[290] *See* Yekalon *et al.*'s Case Brief at 11-22.

supplemental questionnaire response, Commerce had enough information on the record to find Scholar Home eligible for a separate rate.

- Scholar Home's SRA narrative and related exhibits provided detailed information about the company's legal and shareholding structure (*i.e.*, a list of all current shareholders after the share equity transfer occurred during the POR; a list of all shareholders prior to the share equity transfer during the POR; and the names, percentages, legal domicile, and contact information for all shareholder entities).[291]
- Article 8 of Scholar Home's Articles of Association supports the company's assertion that there is no way for the Chinese government to control or impact the company's operations.[292]
- Scholar Home's SRA narrative and related exhibits demonstrate that the company (1) sets its own export prices without the approval or interference of the Chinese government; (2) has autonomy from the Chinese government regarding the selection of its management; and (3) retains the proceeds of its export sales and makes independent decisions regarding its profits and losses.[293]
- Scholar Home has received a separate rate in multiple administrative reviews of the *Order*,[294] and nothing on the record of this review or in Commerce's October 5, 2018, supplemental questionnaire suggests a serious question regarding Scholar Home's independence from government control and its separate rate eligibility.
- Commerce also erred in rejecting Scholar Home's January 29, 2019, supplemental questionnaire response.
- In a recent case, Commerce rejected a respondent's SRA and assigned it the China-wide rate because, at verification, Commerce learned that certain information regarding production was omitted from the SRA.[295] The CIT ruled that Commerce erred in rejecting the respondent's SRA because there was sufficient evidence on the record to determine government control, even if some data were missing. Similarly, Scholar Home's omissions were not significant enough to prevent Commerce from determining Scholar Home's independence from the Chinese government.
- The CIT found in another case that Commerce incorrectly rejected an untimely filed SRC that resulted in a "substantial hardship" for the respondent, Amanda Foods.[296] The CIT

[291] *Id.* at 12-13 (citing Scholar Home's Letter, "Separate Rate Application for Scholar Home in the Administrative Review of the Antidumping Duty Order on Multilayered Wood Flooring from the People's Republic of China (A-570-970) (POR: 12/1/16 – 11/30/17)," dated April 2, 2018, (Scholar Home's SRA) at 10 – 14 and Exhibits 7 and 8.
[292] *Id.* at Exhibit 12a.
[293] *Id.* at 16-18 and Exhibits 4, 13, and 14.
[294] *Id*. at 17-18 (citing *Multilayered Wood Flooring from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, Final Determination of No Shipments, and Partial Rescission; 2015-2016*, 83 FR 35461 (July 26, 2018), *Multilayered Wood Flooring from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, Final Determination of No Shipments, and Final Partial Rescission of Antidumping Duty Administrative Review; 2014-2015*, 82 Fed. Reg. 25,766, 25,768 (June 5, 2017), and *Multilayered Wood Flooring from the People's Republic of China: Amended Final Results of Antidumping Duty Administrative Review; 2011-2012*, 79 Fed. Reg. 35,314 (June 20, 2014)).
[295] *Id*. at 16-17 (citing *Hubbell Power Sys., Inc. v. United States*, 365 F. Supp. 3d 1302 (CIT 2019) (*Hubbell*)).
[296] *Id.* at 18-21 (citing *Grobest & I-Mei Indus. (Vietnam) Co. v. United States*, 815 F. Supp. 2d 1366 (CIT 2012) (*Grobest*)). Amanda Food's SRC was filed 95 days after the deadline.

stated that "the interests in fairness and accuracy outweigh the burden upon Commerce" to accept Amanda Food's untimely filed submission.[297]

- Unlike Amanda Foods, Scholar Home filed a Q&V response, an SRA, and attempted to file a supplemental questionnaire response 62 days after the original deadline, which only contained clarifications of Scholar Home's SRA. The China-wide rate assigned to Scholar Home was more than double the rate received by the other separate rate companies and is disproportionate and inaccurate, like the CIT's statements regarding Amanda Foods.
- Further, there are no concerns regarding finality as the final results have not been issued,[298] and the burden for Commerce to accept Scholar Home's untimely supplemental questionnaire response would be minimal compared to the prejudicial effect on Scholar Home.

Petitioners' Rebuttal[299]

- Commerce correctly found that Scholar Home is not entitled to a separate rate and should continue to assign the China-wide rate to Scholar Home for the final results.
- Commerce's October 5, 2018, supplemental questionnaire focused on Scholar Home's ownership with respect to state-owned entities, which is important because Scholar Home went through a share transfer during the POR, and the record does not demonstrate whether any of the shareholders has a relationship with a certain State-Owned Assets Supervision and Administration Commission (SASAC).
- By failing to respond to Commerce's supplemental questionnaire, Scholar Home did not explain any relationships between its shareholders and the SASAC; therefore, there is no basis to conclude that only this SASAC owned part of Scholar Home both before and after the share transfer.
- Furthermore, Scholar Home did not provide the business license, articles of incorporation, capital verification report, or any agreements related to the transfer of shares for any of its shareholders that are owned or supervised, in part or in full, by a SASAC, as requested by Commerce in the supplemental questionnaire. This unprovided information is directly related to the Chinese government's role in ownership of Scholar Home.
- Scholar Home claims that Commerce should have accepted its untimely filed supplemental questionnaire response and equates finality with the issuance of the final results; however, Scholar Home's cited court cases discuss finality related to information submitted before the *Preliminary Results*.
- Scholar Home did not respond to Commerce's October 5, 2018, supplemental questionnaire until well after the *Preliminary Results* and the deadline for new factual information. Therefore, the idea of finality weighs in favor of rejecting Scholar Home's supplemental questionnaire response, and Commerce should continue to do so for the final results.

Commerce's Position: We agree with the petitioners, and we continue to find that Scholar Home has not demonstrated eligibility for a separate rate for the final results. We issued a supplemental questionnaire to Scholar Home to obtain information about its legal structure and relationship with

[297] *Id.* at 20 (citing *Grobest*, 815 F. Supp. 2d 1367).
[298] *Id.* at 21.
[299] *See* Petitioners' Rebuttal Brief at 27-29.

any SASACs, which was not adequately explained in Scholar Home's SRA.[300] We also requested additional documentation for any intermediate or ultimate shareholders that are owned or supervised, in part or in full, by a SASAC.[301] Scholar Home states that Commerce has enough evidence on the record to determine government control and its separate rate eligibility, citing to *Hubbell*. We disagree. First, despite stating that "detailed information regarding its legal and shareholding structure" can be found in the narrative and in exhibits 7 and 8 of its SRA,[302] the company fails to acknowledge that much of its legal structure chart is illegible as stated in our supplemental questionnaire.[303] Thus, Scholar Home's detailed information is not sufficient, and we were therefore unable to analyze Scholar Home's ownership structure, both before and after any share transfers took place. Moreover, the CIT stated in *Hubbell* that "a company's failure to provide information unrelated to establishing entitlement to a separate rate does not necessarily undermine submissions demonstrating an absence of government control."[304] In other words, a respondent's failure to report unrelated information should not undermine its application for a separate rate. In this review, however, Scholar Home's missing information (*i.e.*, its supplemental questionnaire response) was not unrelated and was necessary to determine Scholar Home's independence from the Chinese government. Unlike in *Hubbell*, there was not enough evidence on the record of this review to determine government control, which is a key purpose of the SRA.

We also disagree with Scholar Home's claim that Commerce should have accepted its untimely filed supplemental questionnaire response under *Grobest*. The facts in that case differ from this review. There, the plaintiff, Amanda Foods, was a wholly foreign-owned company,[305] and, thus, the question of Chinese government control was not as pertinent in that case as it is in this administrative review, specifically regarding Scholar Home. Additionally, although Amanda Foods' SRC was untimely by 95 days, Commerce received it more than seven months before releasing its *Preliminary Results*;[306] for this reason, there was no concern for finality. On the contrary, Scholar Home's January 29, 2019, supplemental questionnaire response was filed 64 days after the stated deadline of October 22, 2019, and 40 days after Commerce published its *Preliminary Results* on December 21, 2018, necessitating a concern for finality and a stricter enforcement of deadlines.

Pursuant to 19 CFR 351.302(d), any information submitted after an applicable deadline will be considered untimely and may be rejected by Commerce. Scholar Home neither requested additional time to file its response under 19 CFR 351.302(c) nor provided adequate justification for the late submission. For those reasons, we rejected Scholar Home's submission.[307] The CIT has affirmed Commerce's discretion to both set deadlines and enforce those deadlines by rejecting

[300] *See* Scholar Home October 5, 2018, Supplemental Questionnaire (Scholar Home SQ).
[301] *Id.*
[302] *See* Yekalon *et al.*'s Case Brief at 14-15.
[303] *See* Scholar Home SQ.
[304] *See Hubbell* at 12, citing to *Shenzhen Xinboda Indus. Co. v. United States*, 180 F. Supp. 3d 1305, 1316-17 (CIT 2016); *Lifestyle Enter. Inc. v. United States*, 768 F. Supp. 2d 1286, 1296 (CIT 2011); and *Shangdong Huarong Gen. Grp. Corp. v. United States*, 27 C.I.T. 1568, 1594 (2003).
[305] *See Grobest*, 815 F. Supp. 2d 1366.
[306] *Id.* at 1367.
[307] *See* Commerce's Letter, "2016-2017 Administrative Review of Multilayered Wood Flooring from the People's Republic of China: Rejection of Letter Submitted January 29, 2019," dated February 1, 2019.

untimely filings in the past, stating that "courts must not improperly intrude upon an agency's power to implement and enforce proper procedures for constructing an agency record."[308] By not submitting a timely supplemental questionnaire response, we were unable to conduct a full analysis and make a preliminary finding with respect to Scholar Home's separate rate status. The fact that Scholar Home may have demonstrated eligibility for a separate rate in prior reviews is immaterial. In fact, Scholar Home acknowledged the necessity of filing an SRA in this review rather than the less detailed SRC because of changes to its corporate structure since it filed an SRA in a prior segment of this proceeding. For these reasons, we continue to find that Scholar Home has not demonstrated eligibility for a separate rate.

Comment 13: Jiechen's No Shipment Claim

Jiechen's Arguments[309]

- Jiechen submitted a no shipment certification, and CBP informed Commerce of evidence that contradicted that certification. However, Commerce did not disclose this information publicly. By doing so, Commerce did not notify Jiechen, per the SAA,[310] and thus did not provide Jiechen with sufficient evidence of an issue with respect to its no shipment certification or sufficient time to retain counsel who could gain Administrative Protective Order (APO) access to the business proprietary information, allowing Jiechen to participate.
- Even if Jiechen had a representative with APO access, the representative would not have been able to identify details about the purported sale in order to permit Jiechen to provide an explanation. While the underlying CBP data may have been business proprietary, the identity of those parties for which the CBP data showed shipments was clearly not business proprietary, as Commerce identified the companies in the *Preliminary Results*. Commerce did not direct any questionnaire to Jiechen regarding the purported sale.
- If Commerce determined that Jiechen had a shipment during the POR, Jiechen should have been allowed to submit an SRC because it requires an affirmative statement with respect to the existence of an entry. That being said, unless Jiechen acts as U.S. importer of record, it cannot know for certain when an entry is made, or even if an entry has been made. Additionally, a customer can delay the date of entry for more than one year.

Petitioners' Rebuttal[311]

- Commerce should continue to apply the China-wide rate to Jiechen. Jiechen retained experienced counsel who submitted a request for administrative review, the no shipment certification, and a Q&V questionnaire response, and Jiechen's decision not to apply for APO access is not Commerce's fault.
- Commerce provided parties, including Jiechen, an opportunity to explain no shipment discrepancies, and it is not Commerce's fault that Jiechen chose to not avail itself of this opportunity.

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[308] *See PSC VSMPO-Avisma Corp. v. United States*, 688 F.3d 715, 761 (CAFC 2012); *see also NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1206-07 (Fed. Cir. 1995) and *PSC VSMPO-Avisma*, 668 F.3d 761; and *Stainless Steel Bar from Spain: Final Results of Antidumping Duty Administrative Review; 2015-2016*, 82 FR 29826 (June 30, 2017), and accompanying Issues and Decision Memorandum at 5.
[309] *See* Jiechen's Case Brief.
[310] *Id.* at 4-5 (citing to SAA at 6 and 45).
[311] *See* Petitioners' Rebuttal Brief at 31-34.

- Contrary to Jiechen's claim, Jiechen had an opportunity to provide a SRC. Jiechen requested a review of itself and, therefore, at the very least, thought it had sales of subject merchandise during the POR.

Commerce's Position: We disagree with Jiechen and continue to determine that Jiechen is part of the China-wide entity. As an initial matter, Jiechen's suggestion that it did not have counsel who could have gained access to the BPI under APO when Commerce released the results of CBP's no shipment inquiry is disingenuous. As noted by the petitioners, Jiechen's submissions were filed under cover of counsel. For example, in Jiechen's request for review, the cover letter states that the request was being made *on behalf* of Jiechen, and that "{a} formal appearance and application for access to information under an APO will be filed upon initiation of the review" by counsel for the company.[312] Although, counsel did not in fact submit a formal appearance or an APO application, the same counsel continued to submit documents on behalf of Jiechen, including the no shipment certification, Q&V response, and Jiechen's case brief.[313]

Moreover, Jiechen is incorrect in arguing that Commerce did not provide the company sufficient notice of the no shipment inquiry results. To the contrary, Jiechen, along with all interested parties, received multiple notices of Commerce's procedures pertaining to companies who claimed to have no shipments during the POR. In the *Initiation Notice*, Commerce requested that parties with no shipments must notify Commerce within 30 days of the publication of the notice, and that such submission would be subject to verification.[314] In addition, Commerce notified all interested parties that it was seeking information regarding no shipment claims through an inquiry to CBP.[315] Next, Commerce released a memorandum to parties listing CBP's inquiry results.[316] In both of the latter two documents, Jiechen was listed as a company that submitted a no shipment certification. The first document is a public document, and Jiechen was listed in the public version of the second document.

Accordingly, while the full release of the inquiry's results was business proprietary,[317] Jiechen cannot now argue that it was unaware that its counsel should have obtained APO access to view these results. Further, as the petitioners noted, our handling of the no shipment certifications and related inquiry to CBP reflect Commerce's practice; Commerce was under no obligation to provide Jiechen, exclusively a questionnaire regarding the inquiry results. In short, Jiechen is a company with prior experience in reviews involving the wood flooring AD and CVD orders, and who had retained counsel familiar with the no shipment certification and no shipment inquiry process, as

[312] *See* Jiechen's Letter, "Multilayered Wood Flooring from the People's Republic of China; A-570-970; Request for Administrative Review of Antidumping Duty Order," dated December 29, 2017.
[313] *See, e.g.*, Jiechen's Letter, "Multilayered Wood Flooring from the People's Republic of China ("Multilayered Wood Flooring"); A-570-970; No Shipment Certification," dated March 26, 2018.
[314] *See Initiation Notice*, 83 FR at 8058.
[315] *See* CBP Message 8320302 (ACCESS Barcode: 3775902-01), dated November 16, 2018.
[316] *See* Memorandum, "Multilayered Wood Flooring from the People's Republic of China (A-570-970): No shipment inquiry with respect to the companies below during the period 12/01/2016 through 11/20/2017," dated December 3, 2018.
[317] *See* Memorandum, "2016-2017 Administrative Review of the Antidumping Order on Multilayered Wood Flooring from the People's Republic of China: No Shipments Inquiry," dated December 4, 2018.

well as the APO procedures. Under these circumstances, it is reasonable for Commerce to continue to include Jiechen in the China-wide entity.

Comment 14: Certain Separate Rate Applicants' Eligibility

Petitioners' Arguments[318]

- Only certain separate rate companies should be given a separate rate based on the CBP data, because the CBP entry data on the record of this review indicate that only certain companies entered subject merchandise during the POR and, therefore, have established eligibility for a separate rate.

Homebon's Rebuttal[319]

- The petitioners argue that Commerce should not find Homebon eligible for a separate rate, but Commerce stated in past cases that it relies on CBP data and/or CBP entry documentation to determine a company's separate rate status.
- Homebon timely submitted an SRA complete with documentation supporting its claim that it exported subject merchandise during the POR. Commerce has acknowledged that CBP data may be unreliable or incomplete due inadvertent errors in the search parameters of the data query or other discrepancies, which may lead to missing entries.[320]
- The petitioners did not allege that Homebon forged or fraudulently submitted the 7501 Entry Summary in its SRA. Therefore, Commerce should weigh Homebon's POR entry package more heavily because it shows an actual suspended entry.

Kember's Rebuttal[321]

- The petitioners are mistaken to claim that Kember should be denied a separate rate in this review and treated as a part of the China-wide entity.
- Kember timely submitted a Q&V questionnaire response, as well as an entry package for the POR in response to Commerce's SRC supplemental questionnaire.[322] Commerce should therefore reject the petitioners' argument and continue to assign a separate rate to Kember.

[318] *See* Petitioners' Case Brief at 16 – 17.
[319] *See* Homebon's Rebuttal Brief.
[320] *Id.* at 3 (citing to *Certain Uncoated Groundwood Paper from Canada: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Extension of Provisional Measures*, 83 FR 11960 (March 19, 2018), and accompanying Preliminary Decision Memorandum at 2; *Aluminum Extrusions from the People's Republic of China: Preliminary Results, Preliminary Intent To Rescind, in Part, and Partial Rescission of Countervailing Duty Administrative Review; 2013*, 80 FR 32528 (June 9, 2015), and accompanying Preliminary Decision Memorandum at 2; and *Certain Polyester Staple Fiber from the People's Republic of China: Notice of Preliminary Results of the Antidumping Duty Administrative Review and Extension of Time Limit for the Final Results,* 74 FR 32125 (July 7, 2009)).
[321] *See* Kember's Rebuttal Brief.
[322] *Id.* (citing Kember's Letter, "Multilayered Wood Flooring from the People's Republic of China: Separate Rate Certification Supplemental Questionnaire Response," dated September 26, 2018).

Jiangsu Senmao et al.'s Rebuttal[323]

- Record evidence establishes that certain companies named by the petitioners did have exports to the United States during the POR, *i.e.*, these companies submitted the required documentation demonstrating their sales of subject merchandise. The petitioners' argument should therefore be rejected with respect to these companies.

Dalian Huilong et al.'s Rebuttal[324]

- Despite the petitioners' claim that Shanghaifloor Timber (Shanghai) Co., Ltd. (Shanghaifloor) should not be eligible for a separate rate based on CBP data placed on the record by Commerce at the beginning of the proceeding, Shanghaifloor provided the requisite POR sales documentation in its SRA.
- Commerce examined Shanghaifloor's information and found the company eligible for a separate rate, and no new information is on the record to rebut these findings. Accordingly, Commerce should continue to assign Shanghaifloor Timber a separate rate in the final results.

Commerce's Position: We disagree with the petitioners and, for the final results, continue to determine that, except for one company, all other companies named by the petitioners were able to document that they had suspended entries of subject merchandise during the POR and are therefore eligible for separate rates.[325] When evaluating whether a separate rate applicant had a suspended entry during a relevant period of review, Commerce relies upon CBP data and/or CBP entry documentation to make its determination.[326] For the *Preliminary Results*, we relied upon the entry documentation submitted with the SRAs for each of the named companies and found that the companies are eligible for separate rates. In considering the discrepancies between CBP entry data and the SRAs, we determine that these companies sufficiently explained any inaccuracies and provided entry documentation to substantiate that they had a suspended entry during the POR.[327] Further, there is no evidence on the record that would indicate that these separate rate applicants' entry documents are fraudulent.

With respect to Dalian Guhua, however, the company reported that it made no shipments in the context of its SRA.[328] As there is no contradictory information on the record from CBP concerning

[323] *See* Jiangsu Senmao *et al*.'s Rebuttal Brief at 8 – 9.
[324] *See* Dalian Huilong *et al*.'s Rebuttal Brief at 2.
[325] *See, e.g.*, Shanghaifloor's Letter, "Multilayered Wood Flooring from the PRC: Separate Rate Application," dated March 26, 2018, at 6-8 and Exhibit 1.
[326] *See Xanthan Gum from the People's Republic of China*, 83 FR 6513 (Feb. 14, 2018) (final results of third antidumping administrative review) and accompanying Issues and Decision Memorandum at 6 (Comment 1); *see also Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review and Preliminary Determination of No Shipments; 2013-2014*, 80 FR 80764 (December 28, 2015) and accompanying Preliminary Decision Memorandum at FN 42, unchanged in *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; 2013-2014*, 81 FR 39905 (June 20, 2016).
[327] *See, e.g.*, Homebon's Letter, "Multilayered Wood Flooring from People's Republic Of China: Guangzhou Homebon Timber Manufacturing Co., Ltd.'s Separate Rate Application," dated at 3 – 4 and Exhibit 1.
[328] *See* Dalian Guhua's Letter, "Multilayered Wood Flooring from the PRC: Separate Rate Application of Dalian Guhua Wooden Product Co., Ltd.," dated March 26, 2018 (Dalian Guhua SRA) at 3 ("Dalian Guhua itself did not export to the

this claim, we are making a no shipment determination for this company in the final results.[329] Therefore, the separate rate issue with respect to this company is moot.

Comment 15: Alleged "Fraudulently Declared" Entries

Petitioners' Arguments[330]

- There are discrepancies between the CBP entry data that Commerce placed on the record and information contained in the SRCs for certain companies.
- Because these companies falsely submitted SRCs, they should be subject to the China-wide rate.

Jiangsu Senmao et al.'s Rebuttal[331]

- Commerce should reject the petitioners' argument that certain companies should receive the China-wide rate for falsely submitting SRCs.
- Commerce issued supplemental questionnaires to companies for which there was a discrepancy between the SRC and the CBP data. A certain company submitted a copy of the 7501 Entry Summary, commercial invoice, packing list, and bill of lading, which supports its claim to have had a suspended entry and sale of subject merchandise to the United States during the POR.
- Commerce accepted this information, did not issue any further supplemental questionnaires, and assigned this company a separate rate in its *Preliminary Results*. Commerce should continue to assign a separate rate to this company in the final results of this administrative review.

Shenyang Haobainian's Rebuttal[332]

- The petitioners' claim that Shenyang Haobainian falsely certified its sales of subject merchandise to the United States during the POR is incorrect and contradicted by evidence.
- After Shenyang Haobainian submitted its SRC, Commerce issued the company a supplemental questionnaire to provide supporting documentation. Shenyang Haobainian submitted both sales and entry documentation showing that it exported subject merchandise during the POR and that the subject merchandise entered into the United States during the POR as a Type 3 entry.
- Commerce was correct to assign a separate rate to Shenyang Haobainian and should continue to grant Shenyang Haobainian separate rate status in the final results.

Commerce's Position: We agree with the respondents. In this review, we issued supplemental questionnaires to companies for which we had additional questions after reviewing their SRCs. In the case of the companies at issue, we requested and received information to document their claims

United States during the POR, although it has done so previously (in the Fifth Review) and plans to export to the United States in the future.").

[329] *See* Memorandum, "Antidumping Duty Administrative Review of Multilayered Wood Flooring from the People's Republic of China: Release of Customs and Border Protection Data," dated March 7, 2018 at Attachment.

[330] *See* Petitioners' Case Brief at 17.

[331] *See* Jiangsu Senmao *et al.*'s Rebuttal Brief at 9.

[332] *See* Shenyang Haobainian's Rebuttal Brief.

of having suspended entries of subject merchandise during the POR.[333] We relied upon the submitted entry documentation for the *Preliminary Results* and found that the companies are eligible for separate rates.[334] As there is no contradictory evidence on the record, we have no reason to change our preliminary decision for the final results.

Comment 16: Misuse of CBP Case Numbers

Petitioners' Arguments[335]

- In the *Preliminary Results*, certain companies received separate rates; however, their CBP case numbers were improperly used by other exporters, despite certifying in their Q&V submissions that they did not allow other companies to use their CBP case numbers. Only the exporter assigned to the CBP number can enter the product under that number. These entries were therefore improperly declared and should be liquidated at the China-wide rate.
- Additionally, certain companies that received a separate rate used the CBP case number of another exporter, instead of their own CBP case numbers. These entries should also be liquidated at the China-wide rate.
- Commerce's draft liquidation instructions for non-reviewed separate rate applicants are insufficient to liquidate these entries at the China-wide rate. The numerous entries that were fraudulently entered into the United States by these companies should be assessed at the AFA rate of 96.51 percent.
- For the final results, Commerce should include specific language to instruct CBP to assess antidumping duties equal to the separate rate only when the exporter matches its assigned CBP case number. This would allow fraudulent entries to be appropriately liquidated at the China-wide rate based on certifications provided by the separate rate companies.

Dalian Huilong et al.'s Rebuttal[336]

- The petitioners argue that several companies used incorrect CBP case numbers and, thus, "fraudulently" entered subject merchandise, and that those entries should be liquidated at the China-wide rate. However, nothing on the record suggests that any fraud occurred or that the incorrect cash deposit rate was applied to any entries.
- CBP is responsible for administering and deciding these kinds of issues, not Commerce. When CBP determines the correct liquidation rate for an entry, the agency examines the entire entry package to confirm the proper exporter and to determine the proper liquidation rate.
- Commerce's draft liquidation instructions instruct CBP to assess duties for all entries by "the firms listed below" and notes that "entries may have been made under A-570-970-000, or other company case numbers." Therefore, CBP does not assess duties on the basis of the company case number alone, and Commerce should not make changes to its draft liquidation instructions.

[333] *See, e.g.*, Shenyang Haobainian's Letter, "Multilayered Wood Flooring from the People's Republic of China: Submission of Shenyang Haobainian Supplemental Response," dated September 26, 2018.
[334] *Id.*
[335] *See* Petitioners' Case Brief at 12-15.
[336] *See* Dalian Huilong *et al.*'s Rebuttal Brief at 1-2.

Jiangsu Senmao et al.'s Rebuttal[337]

- The petitioners argue that Commerce should assign the China-wide rate to companies where there is evidence that (1) their CBP number was improperly used by other exporters in the entry documentation, or (2) they improperly used the wrong CBP number on the entry documentation. The petitioners, however, ignore the fact that the U.S. importer is responsible for filling out the 7501 Entry Summary and declaring the correct CBP number at the time of entry, not the exporter. The exporter rarely has any knowledge of this information until it requests a copy of the Form 7501, and it does not make sense to punish the exporter for an error that is out of its control.
- Additionally, there is no evidence that any "fraud" was committed with respect to these entries, as opposed to simple clerical errors. CBP has regulations and policies in place to ensure that the correct information is reported on the entry documentation or that penalties are imposed on the importer if incorrect information is reported.
- The petitioners' proposed liquidation instructions should be rejected by Commerce because they would take all discretion away from CBP in ensuring that the correct rate of duty is paid, which would constitute unwarranted interference by Commerce.

Yekalon et al.'s Rebuttal[338]

- The petitioners' implication that companies should not receive a separate rate if their CBP number is improperly used by other exporters is incorrect because the importer of record, not the exporter, is the party responsible for entering an accurate CBP case number and related entry documentation.
- An exporter has no control over who may improperly use its assigned CBP case number when entering merchandise into the United States and often does not know the identity of the importer. Although an importer should use the correct CBP case number when making an entry of merchandise subject to an antidumping duty order, Commerce cannot deny a separate rate to an exporter because of mistakes made by the importer.
- The petitioners make broad assumptions about multiple companies without explicitly identifying those with improperly identified exports. Scholar Home, Sunergy, and Yekalon fully cooperated with Commerce's request for information in order to demonstrate their eligibility for a separate rate, and guilt by association is not sufficient to support the denial of a separate rate.

Commerce's Position: The petitioners have provided broad-sweeping allegations but do not provide any specific evidence related to certain companies. Commerce takes seriously allegations of potential customs fraud, and if presented with evidence of potential customs fraud on our record, we will refer the matter to CBP. Commerce's *Federal Register* notice and instructions to CBP make clear that the identified companies are the only companies entitled to the corresponding rates. Although the case numbers are provided for convenience, they are not dispositive in determining cash deposit and assessment rates.

[337] *See* Jiangsu Senmao *et al.*'s Rebuttal Brief at 7-8.
[338] *See* Yekalon *et al.*'s Rebuttal Brief, generally.

Comment 17: China-Wide Entity Companies in the CBP Instructions

Petitioners' Arguments[339]

- Commerce's draft cash deposit instructions should individually list all 36 companies with their new individual rate of 96.51 percent in the final cash deposit instructions sent to CBP.
- The liquidation instructions should also list the other 33 companies (*i.e.*, those not included in the draft liquidation instructions), which used to have, but are no longer entitled to, their own rate. Otherwise, these entries would be liquidated at the rate applicable at the time of entry, which did not exceed the old China-wide rate of 25.62 percent.

Commerce's Position: We will update the final list of all companies eligible for a separate rate, as well as all companies that are no longer eligible for a separate rate and are now considered part of the China-wide entity, in the *Federal Register* notice and the cash deposit and liquidation instructions. In addition to sending written instructions to CBP, we will update the rates in the case reference file in CBP's Automated Commercial Environment (ACE) according to our normal procedures, which call for deactivating the individual case numbers for companies that have lost their separate rates. Thus, we will ensure that all companies not eligible for a separate rate receive the China-wide rate, effective the date of publication of these final results.

VI. RECOMMENDATION

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

☒ ☐

Agree Disagree

7/29/2019

X

Signed by: CHRISTIAN MARSH
Christian Marsh
Deputy Assistant Secretary
for Enforcement and Compliance

[339] *See* Petitioners' Case Brief at 15-16.