

December 5, 2011

MEMORANDUM TO: Paul Piquado  
Assistant Secretary  
for Import Administration

FROM: Christian Marsh  
Deputy Assistant Secretary  
for Antidumping and Countervailing Duty Operations

SUBJECT: Antidumping Duty Administrative Review of Polyethylene  
Terephthalate Film, Sheet, and Strip from Taiwan: Issues and  
Decision Memorandum for the Final Results

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#### SUMMARY:

We have analyzed the case and rebuttal briefs submitted by interested parties in the antidumping duty administrative review of polyethylene terephthalate film, sheet, and strip (PET Film) from Taiwan. The period of review (POR) is July 1, 2009, through June 30, 2010. As a result of our analysis, we have revised the adverse facts available (AFA) rate applied to Nan Ya Plastics Corporation, Ltd. (Nan Ya) for these final results. We recommend that you approve the positions described in the “Discussion of the Issues” section of this memorandum. Below is the complete list of issues for which we received comments and rebuttal comments from interested parties.

**Comment 1:** Whether Nan Ya’s Preliminary AFA Rate is Unlawfully Punitive

**Comment 2:** Whether Nan Ya’s Preliminary AFA Rate is Corroborated

**Comment 3:** Whether the Department Failed to Follow Past Court and Department Precedent with Respect to Nan Ya’s Preliminary AFA Rate

**Comment 4:** Whether Nan Ya’s Preliminary AFA Rate is Aberrational

We received no comments on the Preliminary Results<sup>1</sup> regarding Shinkong Synthetic Fibers Corporation and Shinkong Materials Technology Co., Ltd. (collectively, Shinkong), the other respondent in this review. In a post-preliminary questionnaire response, Shinkong stated that it incurred inland freight for subject merchandise that was returned during the POR, but that it did not provide any replacements for the returned merchandise. Shinkong submitted to the Department the inland freight expenses incurred for returns and, for the final results, the

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<sup>1</sup>See Polyethylene Terephthalate Film, Sheet, and Strip from Taiwan: Preliminary Results of Antidumping Duty Administrative Review, 76 FR 47540 (August 5, 2011) (Preliminary Results).

Department treated this expense as a warranty expense, part of direct selling expenses, and deducted it from the home market's net price build up.<sup>2</sup> The inclusion of these additional data for the final results had no impact on Shinkong's weighted-average margin rate with respect to the Preliminary Results.

## **BACKGROUND:**

On August 5, 2011, the Department published in the Federal Register the Preliminary Results. On August 15, 2011, the Department issued a post-preliminary supplemental questionnaire to Shinkong, and Shinkong timely filed its questionnaire response on August 25, 2011. Nan Ya timely filed its case brief on October 3, 2011. On October 11, 2011, DuPont Teijin Films, Mitsubishi Polyester Film, Inc., SKC, Inc., and Toray Plastics (America), Inc. (collectively, Petitioners), timely filed their rebuttal case brief.

## **DISCUSSION OF THE ISSUES:**

### **Comment 1: Whether Nan Ya's Preliminary AFA Rate is Unlawfully Punitive**

#### Nan Ya's Comments

- The preliminary AFA rate of 99.31 percent assigned to Nan Ya is over five times higher than the highest margin calculated by the Department during the history of the antidumping duty order, and is over six times the dumping rate alleged in the antidumping duty petition. The courts have previously held that such rates are excessive and punitive.<sup>3</sup>
- An AFA rate as high as the rate preliminarily applied to Nan Ya may be necessary to encourage respondent participation in cases where, e.g., respondents pull their data weeks before the Department's scheduled verification, or where respondents actively attempt to deceive the Department, but that is not the situation in this case.
- While the Department has found that certain U.S. customers of Nan Ya's are affiliated with Nan Ya, these U.S. customers are independent of Nan Ya, and Nan Ya does not have access to their proprietary information. This issue creates a difficult situation for participating in an antidumping review, and should not be ignored in the selection of Nan Ya's AFA rate.

#### Petitioners' Comments

- Nan Ya's attempts to distinguish its experience from those of respondents in other administrative reviews that have deceived the Department or have pulled their data prior to the Department's verification is not appropriate in this review.

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<sup>2</sup>See Memorandum to Mark Hoadley, Program Manager, AD/CVD Operations, Office 6, regarding "Analysis for the Final Results of the 2009-2010 Administrative Review of the Antidumping Duty Order on Polyethylene Terephthalate Film, Sheet, and Strip from Taiwan: Shinkong Synthetic Fibers Corporation and Shinkong Materials Technology Co. Ltd."

<sup>3</sup>See Gallant Ocean (Thailand) Co., Ltd. v. United States, Slip. Op. 2009-1282 at 7 (Fed. Cir. April 16, 2010).

- The Federal Circuit has stated “{t}he antidumping laws ‘are remedial not punitive,’” and where the Department calculates the AFA rate “in accordance with the statutory requirements,” then its imposition is not a punitive measure.<sup>4</sup>
- The Department “is unfettered by absolute numerical limitations” in applying the AFA rate.<sup>5</sup>
- The Tariff Act of 1930, as amended (the Act), provides that when an interested party “has failed to cooperate by not acting to the best of its ability to comply with a request for information,” the Department may use an inference adverse to that party’s interest in selecting from facts otherwise available.<sup>6</sup>

### **Department’s Position:**

As detailed in the Preliminary Results, because Nan Ya failed to act to the best of its ability to comply with the Department’s request for information, we applied an AFA rate to Nan Ya. No interested party challenges the Department’s decision to resort to an AFA rate.

In the Preliminary Results, the Department stated that Nan Ya did not respond to the Department’s initial questionnaire. By failing to respond to the Department’s request, Nan Ya withheld requested information, and significantly impeded this proceeding. Accordingly, the Department’s preliminary finding that the use of facts available for Nan Ya is appropriate remains consistent with sections 776(a)(2)(A) and (C) of the Act.<sup>7</sup>

Section 776(b) of the Act provides that, if the Department finds that an interested party fails to cooperate by not acting to the best of its ability to comply with requests for information, the Department may use an inference that is adverse to the interests of that party in selecting from the facts otherwise available.<sup>8</sup> Although the Department must establish the party’s failure to cooperate before applying an AFA rate, affirmative evidence of bad faith on the part of a respondent is not required before the Department may make an adverse inference.<sup>9</sup> In the Preliminary Results, the Department concluded that Nan Ya failed to cooperate by not acting to the best of its ability. For the reasons stated in the Preliminary Results, the Department continues to find that Nan Ya failed to cooperate by not acting to the best of its ability.

In selecting the AFA rate, section 776(b) of the Act provides that the Department may generate the AFA rate using information from: (1) the petition; (2) the final determination in the investigation; (3) any previous review; or (4) any other information placed on the record.

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<sup>4</sup> See KYD, Inc. v. United States, 607 F.3d 760, 767-68 (Fed. Cir. 2010) (quoting NTN Bearing Corp. v. United States, 74 F.3d 1204, 1208 (Fed. Cir. 1995)).

<sup>5</sup> See Sidenor Industrial SL v. United States, 664 F. Supp. 2d 1349, 1361 (Ct. Int’l Trade 2009) (Sidenor Industrial).

<sup>6</sup> See section 776(b) of the Act.

<sup>7</sup> Section 776(a) of the Act provides that the Department will apply “facts otherwise available” if, *inter alia*, necessary information is not available on the record or an interested party: (1) withholds information that has been requested by the Department; (2) fails to provide such information within the deadlines established, or in the form or manner requested by the Department, subject to subsections (c)(1) and (e) of section 782 of the Act; (3) significantly impedes a proceeding; or (4) provides such information, but the information cannot be verified.

<sup>8</sup> See, e.g., 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).

<sup>9</sup> See Antidumping Duties; Countervailing Duties, 62 FR 27296, 27340 (May 19, 1997); see also Nippon Steel Corp. v. United States, 337 F.3d 1373, 1382-83 (Fed. Cir. 2003).

Adverse inferences are appropriate “to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.”<sup>10</sup> Indeed, the Federal Circuit and the Court of International Trade (CIT) have recognized that the AFA rule serves as an incentive for respondents to participate in administrative reviews.<sup>11</sup> Accordingly, the Department’s practice, when selecting an AFA rate from among the possible sources of information, has been to ensure that the margin is sufficiently adverse so “as to effectuate the statutory purposes of the adverse facts available rule to induce respondents to provide the Department with complete and accurate information in a timely manner.”<sup>12</sup>

In this case, Nan Ya did not provide any sales or cost information to the Department and, therefore, the Department cannot calculate an antidumping rate for this uncooperative respondent and cannot rely on Nan Ya’s own data to derive an AFA rate. The Department maintains “particularly great” discretion when determining an appropriate rate with respect to an uncooperative respondent.<sup>13</sup> For example, under section 776(b) of the Act, the Department has used the following to establish the appropriate AFA rate to apply to an uncooperative respondent: the highest weighted-average margin calculated at any point of the proceeding which, to the extent practicable, can be corroborated;<sup>14</sup> an uncooperative respondent company’s transaction-specific margins calculated in a previous review;<sup>15</sup> and a cooperative respondent’s transaction specific margins calculated in the ongoing POR.<sup>16</sup>

There is no basis for Nan Ya’s claim that the numeric value of the AFA rate should reflect the degree to which a respondent is uncooperative. In any event, in this case, Nan Ya failed to cooperate to such an extent that the Department must determine its dumping margin based entirely on facts available. In this regard, Nan Ya expressly informed the Department that it did

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<sup>10</sup> See Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Rep. No. 103-316, Vol. 1, at 870 (1994) (SAA), reprinted in 1994 U.S.C.A.N. 4040, 4198-99; accord Ta Chen Stainless Steel Pipe Inc., v. United States, 24 CIT 841, 848, 850 (Ct. Int’l Trade 2000).

<sup>11</sup> See PAM, S.p.A. v. United States, 582 F.3d 1336, 1340 (Fed. Cir. 2009) (“the possibility of a high AFA margin creates a powerful incentive to avoid dumping and to cooperate in investigations”); F.lli De Cecco Di Filippo Fara S. Martino S.p.A. v. United States, 216 F.3d 1027, 1032 (Martino v. U.S.) (“the purpose of section {776(b)} is to provide respondents with an incentive to cooperate . . .”).

<sup>12</sup> See, e.g., Certain Steel Concrete Reinforcing Bars From Turkey; Final Results and Rescission of Antidumping Duty Administrative Review in Part, 71 FR 65082, 65084 (November 7, 2006) citing 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, 55796 (August 30, 2002); and Notice of Final Determination of Sales at Less Than Fair Value: Static Random Access Memory Semiconductors From Taiwan, 63 FR 8909, 8932 (February 23, 1998).

<sup>13</sup> See Ta Chen Stainless Steel Pipe, Inc. v. United States, 298 F.3d 1330, 1338-39 (Fed. Cir. 2002).

<sup>14</sup> The Department’s general practice has been to assign the highest margin determined for any party in the investigation or in any administrative review of a specific order to respondents who have failed to cooperate with the Department. See, e.g., Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews, 71 FR 40064, 40066 (July 14, 2006); see also Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Flat-Rolled Carbon Quality Steel Products From The People’s Republic of China, 65 FR 34660 (May 31, 2000), and accompanying Issues and Decision Memorandum at the “Facts Available” section.

<sup>15</sup> See Magnesium Metal From the Russian Federation: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 74 FR 39919 (August 10, 2009), and accompanying Issues and Decision Memorandum (IDM).

<sup>16</sup> See Ass’n. of Am. School Paper Suppliers v. United States, No. 06-00395, 2008 WL 5102258 (Ct. Int’l Trade November 17, 2008) (AASPS); see also iScholar, Inc. v United States, 2011 Ct. Intl. Trade Lexis 3; Slip Op. 2011-4 (Ct. Int’l Trade January 13, 2011).

not plan to answer the questionnaire responses,<sup>17</sup> and has not challenged the Department's determination to base its dumping margin entirely on facts available. At what point in the proceeding Nan Ya decided not to cooperate, or whether it deceived the Department is not the deciding factor on whether the application of AFA is reasonable. Instead, for the reasons outlined below, the Department has determined that the AFA rate is non-aberrational and otherwise reasonable.

For the first time in its case brief, Nan Ya states that its failure to cooperate was due, at least in part, to difficulty with its affiliates. The proper time to raise difficulties in responding to a questionnaire is at the time the Department sends a questionnaire, not at the end of proceeding in a case brief. See, e.g., Section 782(c) of the Act. At this point in the proceeding, the Department is not in a position to gather and examine information about these difficulties to assess whether, or the extent to which, Nan Ya's affiliates failed to cooperate. Nor is the Department in a position to assist Nan Ya in responding to the questionnaires in light of any difficulties. In fact, contrary to its claim, Nan Ya's affiliates have participated in previous reviews.<sup>18</sup> In any event, Nan Ya failed to answer any of the Department's questionnaires, not just questions regarding its affiliates. Thus, Nan Ya's behavior does not support its claim that its failure to cooperate was the result of its affiliates' lack of cooperation.<sup>19</sup>

For the order on PET Film from Taiwan, the highest weighted-average margin calculated for any party in these proceedings is 18.30 percent, which was calculated for Nan Ya during the most recently completed administrative review.<sup>20</sup> Because we determined that 18.30 percent, Nan Ya's own rate from the prior administrative review, was not sufficient to induce future cooperation, in the Preliminary Results, the Department exercised its discretion and preliminarily assigned to Nan Ya the rate of 99.31 percent, which it derived from two transaction-specific margins that were calculated for Nan Ya during the most recently-completed administrative review that covered the 2008-09 POR.<sup>21</sup>

For these final results, we have analyzed comments submitted by Nan Ya and by Petitioners, and, while we still conclude that the use of the highest weighted average margin from a prior segment (18.30 percent) is insufficient to induce cooperation in the future because, as mentioned

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<sup>17</sup> See Memorandum from Gene H. Calvert to the File, Preliminary Results in the Administrative Review on Polyethylene Terephthalate Film, Sheet and Strip from Taiwan (PET film): Nan Ya Plastic Corporation, Ltd. Non-Participation in the Administrative Review for the Period July 1, 2009, through June 30, 2010 (Aug. 1, 2011). Prior to publication of the Preliminary Results, Nan Ya informed the Department that it would not be responding to the Department's questionnaire and that it would not be participating in the 2009-2010 administrative review.

<sup>18</sup> See Polyethylene Terephthalate Film, Sheet, and Strip From Taiwan: Final Results of Antidumping Duty Administrative Review, 76 FR 9745 (February 22, 2011). Subsequent to the publication of the preliminary results of the 2008-2009 POR, Nan Ya's affiliated U.S. customers submitted revised sales datasets, as requested by the Department, to correct information regarding their reported product matching information, and to correct problems preventing the accurate consolidation of their sales data with Nan Ya's datasets.

<sup>19</sup> See id.

<sup>20</sup> See Polyethylene Terephthalate Film, Sheet, and Strip From Taiwan: Amended Final Results of Antidumping Duty Review, 76 FR 18519, 18520 (April 4, 2011).

<sup>21</sup> See Memorandum to Mark Hoadley, Program Manager, AD/CVD Operations, Office 6, regarding "Preliminary Results in the Antidumping Duty Administrative Review of Polyethylene Terephthalate Film, Sheet, and Strip from Taiwan: Assignment of the Adverse Facts Available Rate for Nan Ya Plastics Corporation, Ltd. (Nan Ya)" dated August 1, 2011 (Nan Ya Preliminary AFA Memorandum) at 2.

above, this rate was calculated for Nan Ya during the most recently completed administrative review and Nan Ya still chose to not cooperate. Instead, we agree with Nan Ya and Petitioners that data from the current POR can form the basis for Nan Ya's AFA rate in this review.<sup>22</sup> Therefore, in a change from the Preliminary Results, we are now assigning to Nan Ya, as AFA, the rate of 74.34 percent, the highest transaction-specific margin calculated for respondent company Shinkong in this administrative review. In this instance, for the reasons discussed below, we believe that it is a reasonable exercise of the Department's discretion to select an AFA rate based on data in the current POR, instead of relying on secondary information from a previous segment of this proceeding,<sup>23</sup> e.g., the investigation or a previous review.

In selecting this particular transaction-specific margin to use as Nan Ya's AFA rate, the Department analyzed the underlying transaction resulting in the 74.34 percent dumping margin and affirmed that this rate is neither unusual in terms of transaction quantities nor otherwise aberrational.<sup>24</sup> Some of this analysis includes business proprietary information and, as a result, further discussion is contained in the Nan Ya Final AFA Memorandum.<sup>25</sup> In summary, our review of Shinkong's individual transaction margins affirms that this rate is not unusual in terms of transaction quantities – there are significant numbers of sales with quantities similar to that in the underlying transaction.<sup>26</sup> Our review of these transaction margins also demonstrates that Shinkong's highest transaction-specific margin of 74.34 percent is not aberrational because it falls within a range of margins.<sup>27</sup>

The rate is otherwise reasonable because it is indicative of customary selling practices and is rationally related to transactions similar to the transactions to which the AFA rate is being applied.<sup>28</sup> The rate is consistent with customary selling practices because it represents an actual rate at which a cooperating respondent sold the subject merchandise during the POR at issue. Such a rate is rationally related to the transactions to which it is being applied because it was calculated in the same POR for a company selling the same subject merchandise. When the AFA rate is based upon sales from the relevant POR, it is supported by substantial evidence.<sup>29</sup> If during the POR, the cooperating respondent sold the subject merchandise at the rate the Department selected, the Department may reasonably determine that the uncooperative

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<sup>22</sup> See Letter from Nan Ya, "Polyethylene Terephthalate (PET) Film from Taiwan," dated October 4, 2011 (Nan Ya Case Brief) at 7; see also Letter from Petitioners, "Polyethylene Terephthalate (PET) Film, Sheet, and Strip from Taiwan: Petitioners' Rebuttal Brief," dated October 11, 2011 at 11, Footnote 39.

<sup>23</sup> See SAA at 870.

<sup>24</sup> See, e.g., Certain Lined Paper Products from India: Notice of Final Results of Antidumping Duty Administrative Review, 75 FR 7563 (February 22, 2010) (Lined Paper from India), and accompanying Issues and Decision Memorandum; Hyundai Elec. Indus. Co., Ltd. v. United States, 395 F. Supp. 2d 1231, 1235-36 (Ct. Int'l Trade 2005); Martino v. U.S., 216 F.3d at 1032.

<sup>25</sup> Memorandum to Mark Hoadley, Program Manager, Office 6, "Final Results in the Antidumping Duty Administrative Review of Polyethylene Terephthalate Film, Sheet, and Strip from Taiwan: Assignment of the Adverse Facts Available Rate for Nan Ya Plastics Corporation, Ltd. (Nan Ya)" (Nan Ya Final AFA Memorandum).

<sup>26</sup> See id. for further discussion.

<sup>27</sup> See id.

<sup>28</sup> See AASPS at 5 (upholding AFA margin because it was calculated in "the period of review for a company in the same business").

<sup>29</sup> See Shanghai Taoen Int'l Trading Co., Ltd. v. United States, 360 F. Supp. 2d 1339, 1348 (Ct. Int'l Trade 2005).

respondent could have made all of its sales at the same rate.<sup>30</sup> Therefore, we have determined that Shinkong's transaction-specific margin of 74.34 percent, based on data in the current POR, is not aberrational and is a reasonable AFA rate for Nan Ya for these final results. The Department finds that this rate is sufficiently higher than the most recently calculated rate for Nan Ya and, thus, sufficiently adverse so as to ensure that Nan Ya does not benefit from its failure to cooperate, and to encourage participation in future segments of this proceeding in accordance with section 776(b) of the Act.

Regarding Nan Ya's comments stating that the preliminary AFA rate of 99.31 percent rate is unlawfully punitive, because we are no longer applying the rate of 99.31 percent as AFA to Nan Ya, this issue no longer needs to be addressed. We note, however, that both the methodology applied in the Preliminary Results and the methodology applied for these final results are designed to derive non-aberrational rates which induce respondents to provide the Department with complete and accurate information in a timely manner rather than punish respondents.

**Comment 2: Whether Nan Ya's Preliminary AFA Rate is Corroborated**

Nan Ya's Comments

- Section 776(c) of the Act states that the Department shall corroborate, to the extent practicable, secondary information used for facts available. Information from prior segments is secondary information.
- In the Preliminary Results, the Department does not attempt to corroborate the secondary information used for Nan Ya's AFA rate. It only identified a transaction-specific margin from a prior POR, and without support or analysis preliminarily determined that this single transaction reflected Nan Ya's market realities with respect to the current POR.

Petitioners' Comments

- The Act requires the Department to corroborate secondary information using independent sources that are "reasonably at its disposal," to the extent practicable.<sup>31</sup>
- The Act explicitly authorizes the Department to rely on information derived from a previous administrative review.<sup>32</sup>
- In the Preliminary Results, the Department relied on factual data that Nan Ya itself submitted on the record of the 2008-09 administrative review that immediately preceded the current review.
- The probative value of this information was supported by the Department's conclusion that the data resulted from a thorough examination of information that Nan Ya itself provided, and the Department found no evidence that might undermine the reliability of these data, or that might render the margin irrelevant.
- As such, the Department's corroboration is entirely consistent with the Act's requirements.

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<sup>30</sup> See Nan Ya Final AFA Memorandum at 3; see also Nan Ya Preliminary AFA Memorandum at Attachment 1 for a listing of Nan Ya's dumping margins.

<sup>31</sup> See section 776(c) of the Act.

<sup>32</sup> See section 776(b) of the Act; see also Sidenor Industrial, 664 F. Supp. 2d at 1360, note 1.

**Department's Position:** As stated above, for the final results, we are applying the highest transaction-specific margin calculated for Shinkong, the other company respondent in this administrative review, as Nan Ya's AFA rate. Since the selected rate is not secondary information, we do not have to corroborate this rate pursuant to section 776(c) of the Act.<sup>33</sup> The Department finds that this rate is sufficiently adverse to ensure that the respondent does not benefit from its failure to cooperate and to encourage participation in future segments of this proceeding in accordance with section 776(b) of the Act. Furthermore, and for the reasons outlined in the prior comment, the Department finds that this rate is non-aberrational and otherwise reasonable.

**Comment 3:** Whether the Department Failed to Follow Past Court and Department Precedent with Respect to Nan Ya's Preliminary AFA Rate

Nan Ya's Comments

- The Department should follow its AFA rate selection practice and apply to Nan Ya, as AFA, the highest dumping margin rate calculated during the history of the proceeding (i.e., from the investigation through prior administrative reviews). This rate is 18.30 percent, calculated for Nan Ya during the 2008-09 administrative review, and this rate should be applied as Nan Ya's AFA rate with certain adjustments to eliminate zeroing.
- Legal and Department precedent is to consider available current POR data when determining an appropriate AFA rate, when the Department has departed from its practice of using the highest calculated overall dumping margin for any exporter in any segment of the proceeding to date.<sup>34</sup>
- In this instance, the best source of data for assigning an AFA rate comes from Shinkong, the other mandatory respondent in this administrative review. This data is not secondary, comes from the current POR itself, and is indicative of the market realities of the POR. This data should be applied after applying any appropriate and permissible adverse inferences, such as eliminating any downward price adjustments from the calculation of the comparison market net price, and then sorting the transaction-specific margins by dumping percentage and removing from consideration the transactions that made up the "bottom half" of dumped sales.<sup>35</sup>

Petitioners did not comment on this issue.

**Department's Position:** We agree with Nan Ya that Shinkong's current data provides an appropriate source from which to derive Nan Ya's AFA rate. As discussed above, for these final results, and consistent with the Department's practice and CIT decisions, we are now applying the highest transaction-specific margin calculated for Shinkong for the current review as Nan Ya's AFA rate. While Nan Ya suggests a general methodology, it is not the Department's practice to establish AFA rates in this manner. Additionally, Nan Ya's proposed calculation adjustments result in a margin that is not much different than the rate calculated and applied to

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<sup>33</sup> See e.g., Lined Paper from India, and accompanying Issues and Decision Memorandum at 8; see also SAA at 870.

<sup>34</sup> See KYD, Inc. v. United States, Slip Op. 2011-49 (Ct. Int'l Trade 2011).

<sup>35</sup> See Nan Ya Case Brief at 7-8. Washington International Insurance Company v. United States, 2011 U.S. App. LEXIS 2931 (February 14, 2011); Wash. Int'l Ins. Co. v. United States, 2010 Ct. Intl. Trade LEXIS 13 (Feb. 9, 2010) (Washington International).



Nan Ya in the previous review. Accordingly, Nan Ya's proposal does not result in a rate that is sufficiently adverse so as to effectuate the statutory purposes of the AFA rule to induce Nan Ya to provide the Department with complete and accurate information in a timely manner.

Additionally, there is no case precedent or statutory basis for Nan Ya's suggestion that the Department remove the transactions that made up the "bottom half" of dumped sales. The Washington International case cited by Nan Ya is not only inapplicable to this review, but also mischaracterizes the Department's decision. The issue in Washington International was whether the Department corroborated the secondary information used in applying an AFA rate, which is not relevant for our AFA rate derived from current POR data. Further, upon remand, as adverse inferences, the Department used the lowest U.S. price and the higher of the two normal values from a prior new shipper review. Despite Nan Ya's assertion, the Department did not remove transactions that made up the "bottom half" of dumped sales. The Department simply chose the more adverse of the two NV amounts.

**Comment 4:** Whether Nan Ya's Preliminary AFA Rate is Aberrational

Nan Ya's Comments

- The preliminary decision of 99.31 percent was based on only two out of 1087 transactions, which accounts for a very small part of Nan Ya's 2008-09 total POR U.S. sales quantity. Further, only a minimal number of Nan Ya's 2008-09 POR sales had dumping margins higher than 99.31 percent. Thus, the 99.31 percent dumping margin preliminarily applied to Nan Ya is aberrational.
- Of the 58 product control numbers (CONNUMs) that were reported in Nan Ya's 2008-09 U.S. sales database, the dumping margin on only one CONNUM was used as Nan Ya's preliminary AFA rate. The sales on which Nan Ya's 99.31 percent dumping margin was calculated are not sufficient to be representative of Nan Ya's sales practices generally.
- The 99.31 AFA dumping margin was erroneously calculated. Nan Ya filed a ministerial error allegation regarding Nan Ya's margin calculation for the 2008-09 administrative review. Nan Ya stated that the PET Film specification surface treatment more significantly impacts the costs and prices of PET Film than does the specification thickness.

Petitioners' Comments

- Although the Department relied on data from two transactions out of 1087 made by Nan Ya during the 2008-09 POR, the selected data points are not aberrational.
- Based on its analysis, the Department was able to conclude that the margins selected for Nan Ya's AFA rate do not deviate significantly from other transaction-specific margins.

**Department's Position:** As discussed above, for these final results, we are now applying the highest transaction-specific margin calculated for Shinkong for the current review as Nan Ya's AFA rate. As such, the issue of whether the 99.31 percent rate that was preliminarily applied to Nan Ya is aberrational no longer needs to be addressed. Please see the prior comments for a discussion of why the transaction-specific margin of 74.34 percent is not aberrational.

**RECOMMENDATION:**

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

Agree \_\_\_\_\_ Disagree \_\_\_\_\_

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Paul Piquado  
Assistant Secretary  
for Import Administration

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(Date)