

January 4, 2010

MEMORANDUM TO: Ronald K. Lorentzen
Deputy Assistant Secretary
for Import Administration

FROM: John M. Andersen
Acting Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: First Antidumping Duty Administrative Review of Certain
Polyester Staple Fiber (“PSF”) from the People’s Republic of
China (“PRC”): Issues and Decision Memorandum for the Final
Results

SUMMARY:

We have analyzed the case and rebuttal briefs received from Petitioners¹, Respondents² and Separate Rates Respondents³ for the first administrative review of the antidumping duty order on PSF from the PRC. As a result of our analysis, we have made changes to 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) (“Preliminary Results”). We recommend that you approve the positions described in the “Discussion of the Issues” section of this Issues and Decision Memorandum. Below is the complete list of the issues in this antidumping duty administrative review for which we received comments and rebuttal comments from interested parties:

DISCUSSION OF THE ISSUES:

GENERAL ISSUES:

Comment 1: Surrogate Values

¹ DAK Americas LLC and Nan Ya Plastics Corporation America.

² Ningbo Dafa Chemical Fiber Co., Ltd. (“Ningbo Dafa”) and Cixi Santai Chemical Fiber Co., Ltd. (“Santai”).

³ Those companies are: Far Eastern Industries, Ltd., (Shanghai) and Far Eastern Polychem Industries; Cixi Sansheng Chemical Fiber Co., Ltd.; Cixi Waysun Chemical Fiber Co. Ltd., Hangzhou Best Chemical Fibre Co., Ltd.; Hangzhou Hanbang Chemical Fibre Co., Ltd.; Hangzhou Huachuang Co., Ltd.; Hangzhou Sanxin Paper Co., Ltd.; Hangzhou Taifu Textile Fiber Co., Ltd.; Jiaxing Fuda Chemical Fibre Factory; Nantong Loulai Chemical Fiber Co., Ltd.; Nanyang Textile Co., Ltd.; Xiamen Xianglu Chemical Fiber Co.; Zhaoqing Tifo New Fiber Co., Ltd.; Zhejiang Anshun Pettechs Fibre Co., Ltd.; and Zhejiang Waysun Chemical Fiber Co., Ltd.

A. Steam Coal

B. Labor

Comment 2: Separate Rate

Comment 3: Liquidation of Certain Entries

COMPANY-SPECIFIC ISSUES:

Ningbo Dafa

Comment 4: Negotiation Files for Purchases of Bottle Flakes and Sales of PSF

Comment 5: Invoice Numbering System

Jianxin Fuda Chemical Fibre Factory

Comment 6: Correction of Name in Federal Register Notice

BACKGROUND:

The merchandise subject to this proceeding is synthetic staple fibers as described in the “Scope of the Order” section of the final results of this review. The period of review (“POR”) is December 26, 2006, through May 31, 2008. On July 27, 2009, Respondents provided additional information on the appropriate coal surrogate value for use in the final results. On October 20, 2009, Petitioners and Respondents filed case briefs. On October 26, 2009, Petitioners and Respondents filed rebuttal briefs.

DISCUSSION OF THE ISSUES:

Comment 1: Surrogate Values

A. Steam Coal

Respondents argue that section 773 of Tariff Act of 1930, as amended, (“the Act”), mandates that the Department select “the best available information” to assign surrogate values to non-market economy inputs in a non-market economy antidumping proceeding. Respondents argue that it has been the Department’s long standing practice to employ a four-pronged test to effect this statutory mandate for material inputs, preferring prices that are: (1) product specific, if possible; (2) country-wide; (3) net of taxes; and (4) contemporaneous. See e.g., Polyethylene Retail Carrier Bag Comm. v. U.S., Consol. Ct. No. 04-00319, Slip Op. 05-157 at 49 and 65 (CIT 2005). According to Respondents, specificity is paramount among the above criteria.

Respondents argue that although the Department used Indian World Trade Atlas (“WTA”) import data to value its steam coal input in the Preliminary Results, it has been the Department’s more recent practice to obtain domestic steam coal values from domestic sources in India as the basis for calculating the steam coal surrogate value. See Notice of Final Results of Antidumping Duty Administrative Review: Chlorinated Isocyanurates from the People’s Republic of China, 73 FR 52645 (September 10, 2008) (“Chlorinated Isocyanurates Review Final”). Respondents argue that where companies are able to provide accurate and reliable information with respect to the useful heat value (“UHV”) of the steam coal input, the Department has valued steam coal using domestic Indian price data. See Notice of Final Affirmative Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances, Certain New

Pneumatic Off-The-Road Tires from the People's Republic of China, 73 FR 40485 (July 15, 2008) and accompanying Issues and Decision Memorandum at comment 13. Respondents argue that in prior cases, the Department has relied on domestic Indian data from the TATA Energy Research Institute ("TERI") or data from the Indian Bureau of Mines' Yearbook ("IBM"). See Chlorinated Isocyanurates Review Final, at 52645 and Notice of Preliminary Results of the June 2008 Through November 2008 Semi-Annual New Shipper Review: Chlorinated Isocyanurates from the People's Republic of China, 74 FR 37007, 37011 (July 27, 2009) and accompanying Surrogate Values Memorandum at 6. Therefore, Respondents argue that the record of this proceeding contains the UHV of the steam coal used by Ningbo Dafa and Santai and therefore, the Department should rely on the IBM data as the basis for calculating the steam coal surrogate value. In the alternative, Respondents argue that the Department should rely on the TERI data to value the steam coal input.

Petitioners argue that although Respondents propose the use of TERI data to value the steam coal input, there is no calculation or original source documentation for the 1,344.706/rupees ("Rs.") per metric ton value Respondents placed on the record. Regardless, Petitioners argue that the TERI data is not the best surrogate value on the record because (1) it is more than three years older than the mid-point of this period of review and (2) it is based on prices dependent on the state direction of Coal India, Ltd. ("CIL"), which is state controlled and therefore unreliable. See Petitioners' Rebuttal Case Brief at 5-16.

With respect to the IBM data, Petitioners argue that it lacks representativeness of Indian domestic coal pricing because "coal mining was confined mainly to the public sector, contributing 93.7% in both the years in 2005-2006 and 2006-2007." Moreover, Petitioners argue that the IBM data represent data from the state-controlled CIL.

Petitioners instead propose the use of WTA because the Harmonized Tariff Schedule ("HTS") code clearly describes the product as steam coal. Moreover, Petitioners argue that this data source, unlike the TERI data, is exactly contemporaneous with the POR. Petitioners also note that in antidumping duty administrative cases after Chlorinated Isocyanurates Review Final, the Department has used WTA data to value steam coal. See Notice of Final Determination of Sales at Less Than Fair Value: Certain Steel Threaded Rod from the People's Republic of China, 74 FR 8907 (February 27, 2009) and accompanying Surrogate Value Memorandum at Attachment II and Notice of Preliminary Results of the Antidumping Duty Administrative Review and Extension of Time Limits for the Final Results: Certain Activated Carbon from the People's Republic of China, 74 FR 21317 (May 7, 2009) and accompanying Surrogate Value Memorandum, at 12. Moreover, Petitioners argue that the Department has also rejected the use of domestic Indian prices in other cases. See Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Certain Activated Carbon from the People's Republic of China, 71 FR 59721 (October 11, 2006) and accompanying Surrogate Value Memorandum at 11. Finally, Petitioners note that Respondents are incorrectly stating that specificity is paramount among the criteria used by the Department to select surrogate values. According to Petitioners, the Department has explained in numerous cases that there is no hierarchy for applying the surrogate value criteria. See Notice of Final Determination of Sales at Less Than Fair Value: Polyethylene Terephthalate Film, Sheet, and Strip from the People's Republic of China, 74 FR 55039 (September 24, 2008) ("PET Film") and accompanying Issues and Decision Memorandum, at Comment 2.

Department's Position:

For these final results, the Department will use the IBM data to calculate the surrogate value for steam coal.

The Department's practice when selecting the best available information for valuing factors of production ("FOPs"), in accordance with section 773(c)(1) of the Act, is to select, to the extent practicable, surrogate values which are product-specific, representative of a broad market average, publicly available and contemporaneous with the POR.

On the record of this case, we have source documents and calculations for only two sources: WTA and IBM. We agree with Petitioners that although Respondents propose the use of TERI data, the source documentation for the TERI data is not available on this record. Without the source documentation, the Department cannot consider it a reliable source because we cannot test the accuracy of the figures generating the value. Therefore, we have not considered the TERI data as a viable option for these final results.

Although we recognize that the Department has used WTA and IBM or other domestic Indian prices to value steam coal in prior cases, we find that in this case, the IBM data is the most appropriate data for valuing Ningbo Dafa's and Santai's steam coal inputs. Both Ningbo Dafa and Santai provided the Department with the UHV of the steam coal consumed. Although WTA clearly contains import data for steam coal, it does not have steam coal separated by UHV like the IBM data. The UHV reported by Respondent allows the Department to select a surrogate value which better matches the steam coal used in the production of PSF, thereby increasing the accuracy of the dumping margin calculation.

Petitioners argue that the WTA value is exactly contemporaneous with the POR and, therefore, is a better source. While we agree with Petitioners that WTA contains data for every month of the POR, IBM data covers most of the POR as well. Specifically, the IBM data covers December 26, 2006 through March 31, 2007, of the POR. While there is no hierarchy for applying the surrogate value selection criteria, "the Department must weigh available information with respect to each input value and make a product-specific and case-specific decision as to what the "best" surrogate value is for each input." See PET Film at Comment 2. In this case, we find that since both sources are contemporaneous with the POR, selecting a value which more closely captures the exact type of steam coal used by the Respondents will generate a more accurate result. It is the Department's practice to carefully consider the available evidence in light of the particular facts of each industry when undertaking its analysis of valuing the FOPs on a case-by-case basis. See Notice of Final Results and Final Partial Rescission of the Sixth Administrative Review: Certain Preserved Mushrooms from the People's Republic of China, 71 FR 40477 (July 17, 2006) and accompanying Issues and Decision Memorandum at Comment 1. Consistent with this practice, in this case, we have selected to value the Respondents' steam coal input using the IBM data because it is more specific to the steam coal used in the production of PSF.

Finally, Petitioners argue that the IBM data should not be used because it also contains data from CIL, which is state-controlled and therefore, not based on market prices. With respect to Petitioners' argument that the CIL data are aberrational and unreliable due to the Indian government's control of the coal industry and the absence of market pricing, record evidence does not support Petitioners' argument. For example, there is no direct evidence to show the effect of any possible government intervention in the Indian coal industry and how this may have

affected prices. Furthermore, notwithstanding Petitioners' argument, the Department has used CIL data in the past, including in a recent case involving activated carbon, for calculating surrogate values and again rejected similar arguments made here in that case. See Notice of Final Results of Administrative Review: Certain Activated Carbon from the People's Republic of China, 74 FR 57995 (November 10, 2009) ("Activated Carbon") and Issues and Decision Memorandum at Comment 3(c). Additionally, the Court of International Trade ("CIT") has upheld the Department's use of the TERI data, which are based upon CIL data, for calculating the surrogate value for coal. See Arch Chemicals Inc. v. United States, Slip Op. 09-71 (CIT 2009). Thus we have determined to use IBM data rather than WTA data to value steam coal.

B. Labor

Respondents argue that the Department should not continue to use the surrogate value for labor based on the Department's regression-based calculation. Respondents contend that the Department's regression-based calculation is comprised of wage rates from countries which are not economically comparable to the PRC and are not significant producers of comparable merchandise, resulting in distorted and inflated wage rates that do not represent the best available information. Additionally, Respondents argue that the Department's regression methodology is punitive and results oriented because it overstates the actual wage rates in China. Respondents argue the Department should now follow the direction of the CIT and adopt a new surrogate value for labor. See Allied Pacific Food Co., Ltd. v. United States, 587 F. Supp. 2d 1330, 1360 (CIT 2008) ("Allied Pacific") and subsequent final results of redetermination pursuant to court remand, Allied Pacific Food, et. al v. United States, Court No. 05-00056 Slip Op. 08/138 (CIT 2008). Respondents argue that the CIT's ruling in the Allied Pacific case, concluded that 19 CFR 351.408(c)(3) is invalid because it contradicts section 773(c) of the Act. Specifically, Respondents argue that the statute directs the Department to select surrogate values using data from a market economy ("ME") country at a comparable level of economic development to that of the non-market economy ("NME") country that is a significant producer of comparable merchandise.

Petitioners contend that the Department should use a labor rate from only those countries that are at a similar level of economic development to China. Petitioners argue the Department's current approach for valuing labor is consistent with the regulations and the statute and recent cases. See Notice of Final Results and Partial Rescission of the Eleventh Administrative Review and New Shipper Reviews: Fresh Garlic from the People's Republic of China, 72 FR 34438 (June 22, 2007) and accompanying Issues and Decision Memorandum at Comment 4. Petitioners further argue that the Department's use of countries above and below China's gross national income ("GNI") is necessary precisely so that the rate is neither arbitrary nor capricious.

Department's Position:

We disagree with Respondents regarding the appropriate wage rate used in the Preliminary Results and have continued to use our regression-based methodology to calculate the surrogate value for labor in the final results of this review. This decision is consistent with recent determinations in Tissue Paper 2009 and Activated Carbon. See Certain Tissue Paper Products From the People's Republic of China: Final Results and Partial Rescission of the 2007-2008 Antidumping Duty Administrative Review and Determination Not To Revoke in Part, 74 FR 52176 (October 9, 2009) ("Tissue Paper 2009") and accompanying Issues and Decision Memorandum at Comment 7 and Activated Carbon at Comment 3(a).

Section 773(c)(1) of the Act provides that, where, as in this case, the subject merchandise is exported from an NME country, “the valuation of factors of production shall be based on the best available information regarding the values of such factors in a ME country or countries considered to be appropriate by the administering authority.” While the Act does not define “best available information,” it provides that the Department, “in valuing factors of production under paragraph (1), shall utilize, to the extent possible, the prices or costs of factors of production in one or more market economy countries that are (A) at a level of economic development comparable to that of the nonmarket economy country, and (B) significant producers of comparable merchandise.” See section 773(c)(4) of the Act. In accordance with the guidance provided, and discretion afforded pursuant to section 773(c) of the Act, the Department calculates the labor wage rate using a regression analysis. This is in contrast to the Department’s valuation of other FOPs primarily because wage rates are less a function of economic comparability, and more a function of other social and political factors. 19 CFR 351.408(c)(3) provides that the Department will use regression-based wage rates reflective of the observed relationship between wages and national income in ME countries and the calculated wage rate will be applied in NME proceedings each year. The calculation will be based on current data, and will be made available to the public.

The Department disagrees that its method for valuing labor is in contravention of the statute. The Department determines that the regression methodology constitutes the best available information for purposes of valuing labor. The Department’s methodology avoids extreme variances in labor wage rates that exist across market economies, and instead, accounts for the global relationship between GNI and wages. This is then used to determine an expected wage rate for the specific NME country, using that country’s GNI. When promulgating its regulations, the Department explained that: “{U}se of this average wage rate will contribute to both the fairness and the predictability of NME proceedings.” By avoiding the variability in results depending on which economically comparable country happens to be selected as the surrogate, the results are much fairer to all parties. To enhance predictability, the average wage to be applied in any NME proceeding will be calculated by the Department each year, based on the most recently available data, and will be available to any interested party. See Antidumping Duties; Countervailing Duties: Notice of Proposed Rulemaking and Request for Public Comments, 61 FR 7308, 7345 (February 27, 1996). Although section 773(c) of the Act provides guidelines for the valuation of the FOPs, it also accords the Department wide discretion in the valuation of FOPs. See Nation Ford Chemical Co. v. United States, 166 F.3d 1373, 1377 (Fed. Cir. 1999) (“Nation Ford”); see also Magnesium Corp. of America v. United States, 166 F.3d 1364, 1372 (Fed. Cir. 1999).

The statute requires the use of the “best available information,” but it does not define the term, nor does it clearly delineate how the Department should determine what constitutes the best available information. See Shakeproof Assembly Components Div. of Ill. Tool Works, Inc. v. United States, 59 F. Supp. 2d 321354, 1357 (CIT 1999), aff’d 268 F.3d 1376 (Fed. Cir. 2001); China Nat’l Mach. Import & Export Corp. v. United States, 264 F. Supp. 2d 1229, 1236 (CIT 2003). The Department’s regulation prescribes a methodology that reflects a permissible interpretation of what the statute allows with respect to the determination of labor wage rates, by calculating the market-economy wage rate for a country at a comparable level of economic development that is for a market-economy country with the same per capita GNI as the NME. While the requirement to use the “best available information” is an unqualified statutory mandate, the Act only directs the Department to draw factor values from economically

comparable countries and significant producers of comparable merchandise, “to the extent possible.” See section 773(c)(4) of the Act. For this reason, we do not find that we can select values that meet the requirements of sections 773(c)(4)(A) and (B) of the Act, if such values do not represent the “best available information... in a market economy country or countries considered to be appropriate by {the Department}” as required by section 773(c)(1) of the Act. Moreover, the CIT found the Department’s regulation is not inconsistent with its statutory mandate. See Dorbest Ltd. v. United States, 462 F. Supp. 2d 1262 (CIT 2006) (“Dorbest I”). The Department considers that its regression analysis sufficiently takes economic comparability of market economies, utilized in the regression, into account. The regression analysis utilized by the Department calculates a wage rate that reflects what the market-economy rate would be for a country at a level of economic development comparable to the NME country. The function of the regression analysis is to determine the relationship between income and wages. The use of the regression and application of the subject NME country’s GNI generates an expected wage rate for a market-economy country at a comparable level of development, and constitutes the use of the best available information. In addition, the expected wage rate calculated for the NME country is “by definition a wage rate for a producer country at a comparable level of development, as required by section 773(c)(4) of the Act.” See Dorbest I, 462 F. Supp. 2d at 1293.

Additionally, relying only on data from countries that are economically comparable to each NME would undermine, rather than enhance, the accuracy of the Department’s regression analysis. The number of “economically comparable” countries would be extremely small. For example, when examining countries with GNIs that range between US\$ 700 and US\$2500 (e.g., countries that might be considered economically comparable to the PRC), there are just nine countries out of a full dataset of 61 countries used in the revised wage rate calculation in May 2008. A regression based on such a small subset of countries would be highly dependent on each and every data point and, thus, the inclusion or exclusion of any one country could have an extreme effect on the regression results from case-to-case, and from year-to-year. Relying on a broad data set, as opposed to data from just the economically comparable countries, maximizes the accuracy of the regression results, minimizes the effects of the potential year-to-year variability in the country basket, and provides predictability and fairness. See, e.g., Antidumping Duties, Countervailing Duties: Final Rule, 62 FR 27296, 27367 (May 19, 1997); see also Antidumping Methodologies: Market Economy Inputs, Expected Non-Market Economy Wages, Duty Drawback and Request for Comments, 71 FR 61716, 61720 (October 19, 2006) (“Antidumping Methodologies”).

Respondents further argue that the Department’s labor regression is contrary to the statute because it does not focus on the significant producer criterion and overlooks the purpose in using a regression methodology, which is to provide a more accurate labor value that is stable and predictable across all cases. Contrary to Respondents’ contentions, the regression methodology accomplishes a more stable labor value by providing a variable average that “smoothes out” the variations in the data and permits, in a predictable manner, the estimation of a market-economy wage rate relative to a level of GNI that is as accurate as practicable, with the least amount of volatility across cases. Furthermore, in determining surrogate values for FOPs, the Department need not “duplicate the exact production experience of the {PRC} manufacturers.” See Nation Ford, 166 F.3d at 1377 (citing Magnesium Corp. of America v. United States, 938 F. Supp. 885 (CIT 1996), *aff’d* 166 F.3d 1364 (Fed. Cir. 1999) (upholding the Department’s use of a surrogate value for a primary input of production where the actual input differed from the production experience in the NME)). See Shakeproof Assembly Components Div. of Ill. Tool Works, Inc.

v. United States, 268 F.3d 1376, 1381 (Fed. Cir. 2001) (“we have specifically held that Commerce may depart from surrogate values when there are other methods of determining the ‘best available information’ regarding the values of the factors of production.”). The Department does not find the respondents’ reliance on Allied Pacific to be persuasive. For reasons previously stated, the Department finds that the regression methodology, applied pursuant to 19 CFR 351.408(c)(3), constitutes the best available information for purposes of valuing labor in NME cases. The courts have affirmed the Department’s regression analysis methodology in its entirety. See Dorbest Ltd. v. United States, 547 F. Supp. 2d 1321 (CIT 2008) (“Dorbest II”). Furthermore, the decision in Allied Pacific is not final, as a final order has not been issued by the CIT, nor have all appellate rights been exhausted.

In the alternative, Respondents argue that the Department should value labor using a single, surrogate country. While surrogate values for other FOPs are selected from a single surrogate country, due to the gross variability between wage rates and GNI, we do not find reliance on wage data from a single surrogate country reliable for purposes of valuing the labor input. While there is a strong positive correlation between wage rates and GNI, there is also variation in the wage rates of comparable market economies. For example, even for countries that are relatively comparable in terms of GNI for purposes of factor valuation, (e.g., where GNI is below US\$ 2500), the wage rate spans from US\$ 0.42 to US\$ 2.06. See “Expected Wages of Selected NME Countries,” revised in October 2009, and available at <http://ia.ita.doc.gov/wages/index.html>. To further illustrate, Respondents advocate that instead of relying on the regression methodology, the Department should value labor using India’s single wage rate. Colombia is another country (in addition to India) with a GNI of under US\$ 2500. India’s wage rate is approximately US\$ 0.42, as compared to Colombia’s observed wage rate of US \$1.74. The large variances in these two countries’ wages (not to mention the variances which occur when wage rates are considered for other market-economy countries with comparable economies) illustrate the arbitrariness of relying on a wage rate from a single country.

Because the Department’s regression analysis utilizes the best available information for the calculation of a surrogate value for labor, complies with the Department’s regulation, and comports with the statute, the Department continues to value labor in this segment of the proceeding using its regression analysis, as provided in 19 CFR 351.408(c)(3). Thus, for the final results of this review, we have continued to use the regression-based wage rate of \$1.04 per hour as the surrogate value for labor.

Comment 2: Separate Rate

Separate Rate Respondents argue that there is no statutory provision in the Act that precludes the assignment of a de minimis rate as the separate rate. Separate Rate Respondents note that in fact, the Department has assigned a de minimis margin in prior cases. See Notice of Final Results of 2006-2007 Administrative and New Shipper Reviews and Partial Rescission of the 2006-2007 Administrative Review: Brake Rotors from the People’s Republic of China, 73 FR 32678 (June 10, 2008) (“Brake Rotors”) and accompanying Issues and Decision Memorandum and Notice of Preliminary Results of Antidumping Duty Administrative Review and Intent Not To Revoke In Part: Honey from Argentina, 72 FR 73758 (December 28, 2007), remain unchanged in Notice of Final Results of Antidumping Duty Administrative Review and Determination Not to Revoke In Part: Honey from Argentina, 73 FR 24220 (May 2, 2008) and accompanying Issues and Decision Memorandum. Separate Rate Respondents also note that the CIT recently issued a remand to the Department on its application of a separate rate from a prior segment because the

rate calculated in the current proceeding was de minimis. See Amanda Foods (Vietnam) Ltd. v. United States, Slip Op. 09-106 (September 29, 2009) (“Amanda Foods”) at 23.

Separate Rate Respondents further note that in this review there is substantial evidence that the separate rate should be de minimis because: (1) the exporters reviewed which received a de minimis margin in this proceeding account for a significant amount of the imports during the POR and, (2) the two exporters reviewed produce a variety of products. Finally, Separate Rate Respondents also argue that because recycled PSF (made from bottle flakes) is interchangeable with virgin produced PSF (made from chemicals), then the de minimis rate should also apply to virgin producers. Therefore, applying a de minimis separate rate to all types of production methods is appropriate.

Finally, Separate Rate Respondents argue that the separate rate from the investigation is not as contemporaneous as the rate calculated in this review and therefore, not the best information available. Separate Rate Respondents note that one of the mandatory respondents in this review, Santai, was not individually investigated before and therefore, the separate rate of 4.44% from the investigation, is not necessarily applicable to this group of Separate Rate Respondents.

First, Petitioners argue that the Separate Rate Respondents mischaracterize Amanda Foods. According to Petitioners, the CIT allowed the Department to provide justification based on substantial evidence on the record, for using a rate other than the de minimis rate calculated for the mandatory respondents. See Amanda Foods, at 30. Therefore, the decision by the CIT in Amanda Foods did not expressly direct the Department to use the de minimis rate, it allowed the Department to justify or explain the rate selected. Consequently, Petitioners argue that this decision cited by the Separate Rate Respondents is inapposite.

Second, Petitioners argue that Separate Rate Respondents’ reliance on Brake Rotors is misplaced. Petitioners explain that in Brake Rotors, the Department selected mandatory respondents using a non-stratified sampling of producers using the probability proportional size (PPS) sampling method, rather than relying on the largest exporters as the Department did in this case. According to Petitioners the difference in selection methodology is critical because in Brake Rotors, the Department found the industry to be fairly homogenous which allowed for the sampling using statistical methods and ultimately, the inclusion of a de minimis rate as the separate rate. Moreover, in Brake Rotors, the Department explained that whereas a review that relied on the largest exporters to select mandatory respondents “does not necessarily inform the Department of the behavior of the remaining, non-selected firms.” See Brake Rotors at Comment 1(c). This is in addition to the Department noting in Brake Rotors that the statute is silent in NME cases as to how to calculate the average rate in NME situations where the selected respondents receive a de minimis rate.

Finally, Petitioners argue that the Department should continue to apply the 4.44% in the final results. Petitioners state that the separate rate companies in this review are made up of both recycled and virgin producers. Petitioners contend that because the 4.44% was averaged between a virgin and a recycled producer during the investigation, it is a more accurate rate than a rate from two recycled producers currently under review. Petitioners argue that this is important because the margin is determined by the inputs, which differ significantly between virgin and recycled producers.

Department's Position:

In the Preliminary Results, the Department assigned a 4.44% rate from the investigation as the separate rate for those companies receiving a separate rate in this administrative review. For these final results, the Department will continue to use the 4.44% rate as the separate rate.

The statute and the Department's regulations do not directly address the establishment of a rate to be applied to individual companies not selected for individual examination where the Department limited its examination in an administrative review pursuant to section 777A(c)(2) of the Act. The Department's practice in this regard, in cases involving limited selection based on exporters accounting for the largest volumes of trade, has been to weight-average the rates for the selected companies excluding zero and de minimis rates and rates based entirely on adverse facts available ("AFA"). Generally we have looked 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 respondents we did not individually examine in an administrative review. Section 735(c)(5)(A) of the Act instructs that we are not to calculate an all-others rate using any zero or de minimis margins or any margins based on total facts available. Section 735(c)(5)(B) of the Act also provides that, where all margins are zero, de minimis, or based on total facts available, we may use "any reasonable method" for assigning the rate to non-selected respondents. One method that section 735(c)(5)(B) of the Act contemplates as a possibility is "averaging the estimated weighted average dumping margins determined for the exporters and producers individually investigated."

Based on the facts of this case, we determine that a reasonable method for determining the margin for the separate rate companies in this review is the average of the margins, other than those which are zero, de minimis, or based on total facts available, that we found for the most recent period in which there were such margins, *i.e.*, the original investigation. While the statute contemplates that we may use an average of the zero, de minimis and AFA rates determined in an investigation, we have available in this review information that would not be available in an investigation, namely rates from prior proceedings. We have determined that it is more appropriate in this review to use a calculated rate from a previous segment as this method does not rely on zero, de minimis or facts available margins and there is no reason to find that it is not reasonably reflective of potential dumping margins for the non-selected companies. See Statement of Administrative Action ("SAA") accompanying the Uruguay Round Agreements Act, H. Doc. 316, 103d Cong., Vol. 1 (1994) at 873.

In addition, we agree with Petitioners that the separate rate from the investigation is more appropriate because it is a rate averaged from the margins of recycled and virgin production processors of PSF. This is critical given that the production methods are vastly different because the main inputs (bottle flakes versus chemicals) are not remotely similar materials which necessarily require different production equipment. Moreover, the separate rate group in this administrative review includes both recycled and virgin producers of PSF. Therefore, having a recent separate rate that captures both production processes better represents the PSF industry.

With respect to Brake Rotors, we find that because we have not found that the PSF industry is homogenous, we find that Separate Rate Respondents' reliance on Brake Rotors is inapposite. Moreover, Brake Rotors is a case with many administrative reviews where in almost every segment, the Department found no dumping. In this case, we are only in the first administrative review and have yet to find that PSF will also have a similar pattern of multiple administrative

reviews where companies receive zero margins like Brake Rotors. Therefore, we do not have a long history of no dumping in this case which would impact our decisions as to the most appropriate rate for these separate rate companies. In fact, we found that there was dumping by two of three respondents during the investigation, which was the most recently completed segment of this proceeding. See Order, at 19693. With respect to Honey from Argentina, we note that notwithstanding the methodology adopted in this case, since Honey from Argentina the Department has not been applying the de minimis rate as the “All Others” rate in market economy cases or in NME cases, applied the de minimis rate as the separate rate. For example, in three cases, all immediately post-dating Honey from Argentina, the Department explained in each case why it has selected a rate from a prior segment. See e.g., Notice of Final Results and Final Partial Rescission of Antidumping Duty Administrative Review: Certain Frozen Shrimp from the Socialist Republic of Vietnam, 73 FR 52273 (September 9, 2008) and accompanying Issues and Decision Memorandum at Comment 6, Notice of Final Results of Antidumping Duty Administrative Reviews and Rescission of Reviews In Part: Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, and the United Kingdom, 73 FR 52823 (September 11, 2008) and accompanying Issues and Decision Memorandum at Comment 6 and Notice of Final Results of the Antidumping Duty Administrative Review and New Shipper Reviews: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam, 74 FR 11349 (March 17, 2009) and accompanying Issues and Decision Memorandum at Comment 6. Therefore, although the Separate Rate Respondents have accurately described Honey from Argentina, it is the only time, other than Brake Rotors, in recent history where the Department has applied a de minimis rate as the separate rate. However, as can be seen in recent cases, the Department has found that based on case-specific reasons, using a calculated rate from a prior segment is more reasonable and appropriate than basing the rate on de minimis or zero. Therefore, for the reasons describe above, for these final results, the Department is assigning a separate rate of 4.44%, which was the separate rate in the investigation.

Comment 3: Liquidation of Certain Entries

Citing the U.S. Customs and Border Protection (“CBP”) data on the record, Petitioners argue that the record contains evidence that certain companies who were never assigned an individual rate or separate rate in any prior proceeding were incorrectly using the rates of companies with either calculated or separate rates. Therefore, Petitioners request that the Department not simply instruct CBP to liquidate the PRC-wide entity “as entered.” According to Petitioners, if CBP liquidates the PRC-wide entity as entered then certain entries will be liquidated at the incorrect rate used at the time of entry. Instead, Petitioners contend that the Department should issue company-specific liquidation instructions in order to distinguish separate rates companies from all other companies. This will ensure that if a company did not have a separate rate, then it will be liquidated at the PRC-wide rate of 44.30%.

Respondents argue that the CBP entry database is generating the errors not the companies and there is no evidence on the record indicating otherwise. Respondents contend that therefore, Petitioners’ request to liquidate all non-reviewed companies individually is not based on direct company evidence.

Department’s Position:

We agree with Petitioners and will issue instructions to CBP requiring liquidation of entries for all companies at the company-specific rate required at the time of entry. For example, if

Company A has a separate rate in the Automated Commercial System (“ACS”) module system, we will instruct CBP to liquidate entries for only those entries made by Company A using the rate required at the time of entry. For Company B who may have improperly posted the cash deposit in effect for Company A, we will instruct CBP to liquidate at the proper rate required at the time of entry for Company B. Moreover, we have referred this matter to CBP officials for further investigation.

COMPANY-SPECIFIC ISSUES

Ningbo Dafa

Comment 4: Negotiation Files for Purchases of Bottle Flakes and Complete Records for Sales of PSF

Petitioners argue that according to section 776(a)(1) of the Act, the Department can rely on facts available if necessary information is not available on the record of a proceeding. Petitioners contend that in the investigation of this proceeding, the Department resorted to facts available for Ningbo Dafa due to its failure to properly maintain records of its purchases of bottle flakes. Petitioners note that the Department cited specifically to Ningbo Dafa’s lack of records in its decision to use facts available and warned Ningbo Dafa that during any future reviews, Ningbo Dafa “must comply with all requests for information by the Department and, therefore, should maintain the appropriate books and records to comply with these requests.” See Notice of Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances: Certain Polyester Staple Fiber from the People's Republic of China, 72 FR 19690 (April 19, 2007) and accompanying Issues and Decision Memorandum at Comment 25. Petitioners state that this decision was later upheld in the CIT and the Court of Appeals for the Federal Circuit. See Ningbo Dafa Chem. Fiber Co., Ltd. v. United States, 577 F. Supp. 2d 1304 (Ct. Int’l Trade 2008); see also Ningbo Dafa Chem. Fiber Co., Ltd. v. United States, Slip Op. 09-1056 at 15 (Fed. Cir. 2009).

In this case, Petitioners argue that during verification, Ningbo Dafa failed to provide the Department with correspondence files for its negotiations of bottle flake purchases. Petitioners argue that proper documentation is necessary in determining and verifying Ningbo Dafa’s market-economy purchases (“MEP”) of bottle flakes data. Petitioners further argue that Ningbo Dafa’s correspondence files for its negotiations are necessary for fulfilling the completeness section of the verification. Petitioners therefore state that because Ningbo Dafa was unable to provide correspondence files of its negotiations, the Department cannot verify the quality or color of Ningbo Dafa’s bottle flake purchases.

In addition, Petitioners argue that Ningbo Dafa was using questionably a purchase contract, purchase order or pro-forma invoice to document its U.S. sales during the POR. According to Petitioners, purchase orders should have been used and included in all sales traces provided to the Department at verification. As such, Petitioners argue that purchase orders are crucial in evaluating whether Ningbo Dafa provided complete documentation of its individual sales. Therefore, absent purchase orders, the Department could not properly identify all of Ningbo Dafa’s U.S. sales during the POR.

For the reasons stated above, Petitioners argue that the Department should apply AFA to Ningbo Dafa for the final results because negotiation records and consistent purchase orders are crucial

supporting documents necessary in determining Ningbo Dafa's bottle flake purchases and sales of PSF. Petitioners further argue that if the Department does not apply AFA, the Department must apply partial AFA and base its final results on a combination of FOP purchases and U.S sales prices.

Ningbo Dafa argues that it provided the Department with all commercially relevant documents and records with respect to Ningbo Dafa's bottle flake purchases. Ningbo Dafa also argues that the Department has never required correspondence folders of negotiations when documents (*i.e.*, commercial invoices, inbound customs declarations forms for imported products, etc.) detailing bottle flake purchases were readily available. In addition, during verification, Ningbo Dafa notes that the Department was able to verify Ningbo Dafa's purchases and consumption of bottle flakes by color. See Memorandum to the File from Emeka Chukwudebe through Alex Villanueva, Verification of the Sales and Factors Response of Ningbo Dafa Chemical Fiber Co., Ltd. in the Antidumping First Administrative Review of Certain Polyester Staple Fiber from the People's Republic of China, (October 8, 2009) ("Ningbo Dafa Verification Report") at 17-18.

With respect to its documentation of U.S. sales, Ningbo Dafa argues that in the investigation of this proceeding, the Department noted that Ningbo Dafa neither kept emails of negotiations nor purchase orders for sales of PSF and at the time, neither the Department nor Petitioners found a discrepancy with this issue. See Memorandum to the File from Paul Walker, Senior Case Analyst, through Alex Villanueva Program Manager, Investigation of Certain Polyester Staple Fiber from the People's Republic of China: Verification of Ningbo Dafa Chemical Fiber Co., Ltd., (March 1, 2007) ("Ningbo Dafa Investigation Verification Report") at 16-18. Ningbo Dafa cites similar cases where the Department verified PSF producers and did not find discrepancies with their negotiation and record keeping practices. See Memorandum to the File from Michael Holton, Senior Case Analyst, through Alex Villanueva Program Manager, Certain Polyester Staple Fiber from the People's Republic of China: Verification of Sales and Factors of Production of Cixi Jiangnan Chemical Fiber Co. Ltd., (March 9, 2007) at 9. Ningbo Dafa further argues that neither U.S. nor international law dictate a contract to be concluded in writing. See U.C.C. section 2-204 and 2-206; U.N. Convention on Contracts for the International Sale of Goods, articles 11 & 18(1). As such, offers may be accepted via verbal communication or by conduct. In conclusion, Ningbo Dafa argues that the Department should not resort to total or partial AFA because it fully complied with the Department's requests for information and all the documents submitted by Ningbo Dafa were verified at verification.

Department's Position:

For the final results, the Department will not assign total or partial AFA to Ningbo Dafa. We disagree with Petitioners that negotiation records are necessary documents in determining Ningbo Dafa's bottle flake purchases given all the other documents provided by Ningbo Dafa in this case. During verification, the Department noted that negotiation records were not kept during Ningbo Dafa's daily operations. However, the Department was able to verify Ningbo Dafa's bottle flake purchases by performing several accounting exercises (*i.e.* cost reconciliation) and noted no discrepancies from what Ningbo Dafa reported in its Section D responses. See Ningbo Dafa Verification Report at 12-18.

We further disagree with Petitioners that Ningbo Dafa's use of pro forma invoices as sales documents are grounds for applying AFA. At verification, Ningbo Dafa explained that they use purchase orders, pro-forma invoices, or purchase contracts as part of the sales process. See

Ningbo Dafa Verification Report at 15. Although Ningbo Dafa provided the Department with either one of these documents as part of its U.S. sales traces, it also provided the Department with complete sets of the other documents necessary to complete the sales trace (*i.e.*, commercial invoices, packing lists, inventory out slips, bills of lading, etc.). We noted that the pro-forma invoice, purchase contract and purchase orders all contained: 1) description of the product ordered 2) quantity and value of the order, and 3) the destination of the shipment. We were then able to trace these documents to the respective commercial invoices, vouchers and account receivable sub-ledgers and found no discrepancies from what Ningbo Dafa reported in its Section C responses. *Id.* In addition, Ningbo Dafa was also able to reconcile its reported U.S. sales to its audited financial statements for 2006, 2007 and 2008. *See* Ningbo Dafa Verification Report at 12-14. Finally, we find that Ningbo Dafa responded to our questions throughout the course of the administrative review and did not impede this proceeding. Therefore, we will not apply total or partial AFA to Ningbo Dafa for these final results.

Comment 5: Ningbo Dafa's Invoice Numbering System

Petitioners argue that Ningbo Dafa's invoice numbering system was not organized or generated in a sequential numbering system. Petitioners contend that the absence of a sequential invoice system makes it impossible to fully observe, test, or document gaps between invoice sales. Petitioners also argue that an absence of a sequential invoice numbering systems makes it impossible to verify that all sales were reported.

Petitioners note that in prior cases, the Department has drawn adverse inferences in circumstances in which it was "reasonable for Commerce to expect that more forthcoming responses should have been made." *See Nippon Steel Corp. v. United States*, 337 F. 3d 1373, 1381 (Fed. Cir. 2003 ("*Nippon Steel*"). Petitioners further note that in concluding whether a respondent acted to the best of its ability the Department must determine whether the respondent, "has put forth its maximum efforts to provide Commerce with full and complete answer to all inquiries in an investigation." *Id.* at 1382.

In this case, Petitioners argue that Ningbo Dafa's lack of a sequential invoice numbering system indicates Ningbo Dafa's failure to provide the Department with complete and accurate sales records. With respect to Ningbo Dafa's argument that its invoices can be organized by shipment date, Petitioners argue that multiple shipments on the same date and no shipment days create gaps in the sequential system. Therefore, for these reasons, Petitioners argue that the Department should resort to total or partial AFA for the final results.

Ningbo Dafa argues that its sales values for its U.S. sales were thoroughly verified and the lack of a sequential invoice numbering system does not lead to gaps in the record. Ningbo Dafa argues that during the sales reconciliation and completeness sections of the verification, the Department verified Ningbo Dafa's total quantity and value of its sales and found no discrepancy from what Ningbo Dafa reported in its U.S. sales database.

Ningbo Dafa also argues that its invoice system is standard practice in the industry arising out of the fact that various importers request that the invoice codes contain information applicable to the individual shipments being shipped. Ningbo Dafa notes that in the investigation of this proceeding, the Department examined Ningbo Dafa's invoice numbering system and found no discrepancies from what Ningbo Dafa reported in its records. *See* Ningbo Dafa Investigation Verification Report at 18. Ningbo Dafa therefore contends that the Department fully verified

Ningbo Dafa's U.S sales records and there were no gaps in the record and no missing sales that were not reported to the Department.

Department's Position:

The Department finds that the application of total or partial AFA for Ningbo Dafa is not appropriate for the final results.

The Department disagrees with Petitioners that Ningbo Dafa's organization of its invoices by date of shipment creates gaps in the record. During verification, Ningbo Dafa provided the Department with the necessary documents needed to reconcile its sales to its reported U.S. sale database. At verification, Ningbo Dafa was able to demonstrate that its sales records could be arranged by shipment date. See Ningbo Dafa Verification Report at 14. Ningbo Dafa was also able to reconcile its reported U.S. sales to its audited financial statements for 2006, 2007 and 2008. See Ningbo Dafa Verification Report at 12-14. In addition, the Department was able to complete verification of numerous surprise U.S. sales traces and found no discrepancies from what Ningbo Dafa reported in its questionnaire responses. Therefore, we will not apply total or partial AFA to Ningbo Dafa for these final results.

Jiaxing Fuda Chemical Fibre Factory

Comment 6: Correction of Name in Federal Register Notice

Jiaxing Fuda Chemical Fibre Factory ("Jiaxing Fuda") argues that their name was incorrectly listed in the Preliminary Results. Jiaxing Fuda contends that the Department spelled its name as "Jiaxang Fuda Chemical Fibre Factory." See Preliminary Results, at 32130 Jiaxing Fuda thereby requests the Department correct the spelling of its name for these final results.

Department's Position:

The Department agrees with Jiaxing Fuda and will change the name accordingly for the final results.

RECOMMENDATION

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

AGREE_____ DISAGREE_____

Ronald K. Lorentzen
Deputy Assistant Secretary
for Import Administration

Date