

DATE August 2, 2011

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

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

SUBJECT: Issues and Decision Memorandum for the Final Results of  
the Antidumping Duty Administrative Review of 1-  
Hydroxyethylidene-1, 1-Diphosphonic Acid from the People's  
Republic of China

### **SUMMARY**

The Department of Commerce (the "Department") has analyzed the case and rebuttal briefs submitted by interested parties in the antidumping duty administrative review of 1-hydroxyethylidene-1, 1-diphosphonic acid ("HEDP") from the People's Republic of China ("PRC"). As a result of this analysis, we have not made changes to the margin for the final results. We recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum. Below is a list of the issues in this administrative review for which we received comments from interested parties:

- Issue 1: Whether the Department erred in initiating this administrative review of Jiangsu Jianghai Chemical Group Co., Ltd. ("Jiangsu Jianghai")
- Issue 2: Whether Jiangsu Jianghai should be considered part of the PRC-wide entity
- Issue 3: Whether Jiangsu Jianghai should receive a rate based on adverse facts available ("AFA")
- Issue 4: Whether the Department should continue to assign the 72.42 percent petition rate to the PRC-wide entity as the AFA rate

## **BACKGROUND**

On April 7, 2011, the Department published its Preliminary Results in the antidumping duty administrative review of HEDP from the PRC.<sup>1</sup> The Department invited parties to comment on the Preliminary Results. Compass Chemical LLC (“Petitioner”) and Jiangsu Jianghai submitted case briefs on May 9, 2011<sup>2</sup> and rebuttal briefs on May 16, 2011.<sup>3</sup> On July 1, 2011, the Department placed additional information on the record.<sup>4</sup> Jiangsu Jianghai submitted comments on this information on July 15, 2011.<sup>5</sup>

## **DISCUSSION OF THE ISSUES**

### **Issue 1: Whether the Department erred in initiating this administrative review of Jiangsu Jianghai**

#### Jiangsu Jianghai

- The Department should not have initiated this administrative review because Jiangsu Jianghai did not make any sales or shipments of subject merchandise during the period of review (“POR”).<sup>6</sup>
- Jiangsu Jianghai did not intend for this shipment to enter the United States during the POR.<sup>7</sup> Rather, the shipment entered the United States during the POR because of importer and/or broker “incompetence.”<sup>8</sup> To initiate and conduct a review of the goods in question under these circumstances is “abusive.”<sup>9</sup>

#### Petitioner

- The Department’s initiation of this administrative review was proper because there was an entry into the United States during the POR of subject merchandise exported by Jiangsu Jianghai and the Department possesses the authority to base reviews upon entries,

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<sup>1</sup> See 1-Hydroxyethylidene-1, 1-Diphosphonic Acid From the People’s Republic of China: Preliminary Results of Antidumping Duty Administrative Review and Intent To Rescind Review in Part, 76 FR 19325 (April 7, 2011) (“Preliminary Results”).

<sup>2</sup> See Letter from Petitioner to the Secretary of Commerce, “1-Hydroxyethylidene-1, 1-Diphosphonic Acid from the People’s Republic of China” (May 9, 2011); Letter from Jiangsu Jianghai to the Secretary of Commerce, “1-Hydroxyethylidene-1, 1-Diphosphonic Acid from the People’s Republic of China; A-570-934” (May 9, 2011) (“Jiangsu Jianghai’s Case Brief”).

<sup>3</sup> See Letter from Petitioner to the Secretary of Commerce, “1-Hydroxyethylidene-1, 1-Diphosphonic Acid from the People’s Republic of China” (May 16, 2011) (“Petitioner’s Rebuttal Brief”); Letter from Jiangsu Jianghai to the Secretary of Commerce, “1-Hydroxyethylidene-1, 1-Diphosphonic Acid from the People’s Republic of China; A-570-934” (May 16, 2011) (“Jiangsu Jianghai’s Rebuttal Brief”).

<sup>4</sup> See Memorandum from Shawn Higgins, International Trade Compliance Analyst, AD/CVD Operations, Office 4, to Interested Parties, “Administrative Review of the Antidumping Duty Order on 1-Hydroxyethylidene-1, 1-Diphosphonic Acid from the People’s Republic of China: Placing Additional Information on Record” (July 1, 2011) (“Additional Record Information”).

<sup>5</sup> Jiangsu Jianghai urged the Department not to use a particular attachment (i.e., Attachment 8) to the Department’s Additional Record Information for purposes of the final results. Because the Department does not utilize this attachment in the final results, the Department need not address Jiangsu Jianghai’s argument.

<sup>6</sup> See Jiangsu Jianghai’s Case Brief at 2-4.

<sup>7</sup> Id. at 3.

<sup>8</sup> Id.

<sup>9</sup> Id. at 4.

exports, or sales.<sup>10</sup>

- It is irrelevant for purposes of initiation whether Jiangsu Jianghai intended for the shipment of subject merchandise to enter the United States during the POR or whether the entry occurred because of importer and/or broker incompetence.<sup>11</sup>

### **Department's Position:**

The Department disagrees with Jiangsu Jianghai that it erred in initiating this administrative review.

Section 751(a)(2)(A) of the Tariff Act of 1930, as amended (the "Act"), states that for administrative reviews, the Department shall determine the normal value, export price, and dumping margin of "each entry of subject merchandise." While 19 C.F.R. § 351.213(e) provides the Department discretion in this regard by permitting the review to be based on entries, exports, or sales,<sup>12</sup> it is the Department's practice, when entry data are available and the entries can be linked to export sales, to use entries during the POR as the basis for selecting the U.S. sales to be examined during a particular review.<sup>13</sup> However, when there are no entries, exports, or sales of the subject merchandise during the POR, the Department may, in accordance with 19 C.F.R. § 351.213(d)(3), rescind the administrative review in whole or only with respect to a particular exporter or producer.

In this administrative review, the Department tested Jiangsu Jianghai's claim that it did not ship subject merchandise to the United States during the POR by performing a Customs and Border Protection ("CBP") data query, issuing no-shipment inquiries to CBP, and obtaining entry documentation from CBP.<sup>14</sup> Through these procedures, the Department determined, contrary to Jiangsu Jianghai's claim, that record CBP data, entry documentation, and a statement from a CBP representative confirm that a shipment of subject merchandise exported by Jiangsu Jianghai entered the United States during the POR.<sup>15</sup> Accordingly, the Department has determined that 19 C.F.R. § 351.213(d)(3) is not applicable and, therefore, it would be inappropriate to rescind this administrative review with respect to Jiangsu Jianghai given that there is both an active request for review of and an entry of merchandise produced and exported by Jiangsu Jianghai. Furthermore, because the entry date is on the record, the entry can be linked to an export sale, and there is no record evidence in this review of circumstances that would compel the

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<sup>10</sup> See Petitioner's Rebuttal Brief at 2.

<sup>11</sup> Id.

<sup>12</sup> See Watanabe Group v. United States, 2010 WL 5371606, at \*2 (Ct. Int'l Trade 2010) (citing Corus Staal BV v. United States, 387 F. Supp. 2d 1291, 1303 (Ct. Int'l Trade 2005) and Helmerich & Payne, Inc. v. United States, 24 F. Supp. 2d 304, 312-14 (Ct. Int'l Trade 1988)).

<sup>13</sup> See Light-Walled Rectangular Pipe and Tube From Mexico; Final Results of Antidumping Duty Administrative Review, 76 FR 9547 (February 18, 2011) and accompanying Issues and Decision Memorandum at Comment 2; see also Watanabe Group v. United States, 2011 WL 841066, at \*1 (Ct. Int'l Trade 2011).

<sup>14</sup> See Memorandum from Shawn Higgins, International Trade Compliance Analyst, AD/CVD Operations, Office 4, to Interested Parties, "2009-2010 Administrative Review of 1-Hydroxyethylidene-1, 1-Diphosphonic Acid from the People's Republic of China: Placing CBP Data and Entry Documents on the Record" (September 24, 2010) ("CBP Data and Entry Documents"); Letter from Robert Bolling, Program Manager, AD/CVD Operations, Office 4, to Jiangsu Jianghai, "1-Hydroxyethylidene-1, 1-Diphosphonic Acid from the People's Republic of China: Antidumping Duty Administrative Review of Jiangsu Jianghai Chemical Group Co., Ltd." (October 25, 2010) ("Shipment Letter").

<sup>15</sup> See Shipment Letter at 2.

Department to employ an atypical methodology to determine the universe of sales to be examined,<sup>16</sup> the Department has followed its practice of using entries during the POR as the basis for selecting the U.S. sales to be reviewed.

Additionally, the Department agrees with Petitioner that it is irrelevant for purposes of initiation whether Jiangsu Jianghai intended for the shipment of subject merchandise to enter the United States during the POR or whether the entry occurred during the POR because of importer and/or broker incompetence. Neither the statute nor the regulations require the Department to consider the intentions of the exporter at the time of exportation or the effect of the importer/broker on the entry date when determining whether an entry was made during the POR. Moreover, even if intent were a factor in the Department's determination of whether to initiate this administrative review, the information on the record does not support Jiangsu Jianghai's assertion that it did not intend for its shipment to enter the United States during the POR.

Therefore, for the reasons above, the Department has determined that it has not erred in initiating this administrative review.

## **Issue 2: Whether Jiangsu Jianghai should be considered part of the PRC-wide entity**

### Jiangsu Jianghai

- It is irrelevant whether Jiangsu Jianghai was state-controlled during the POR because Jiangsu Jianghai was found not to be state-controlled in the investigation segment of this proceeding and the date of sale of the single shipment in question was before the POR.<sup>17</sup>
- The information submitted by Jiangsu Jianghai in its initial responses to Sections A, C, and D of the antidumping questionnaire<sup>18</sup> issued in this administrative review reconfirmed that Jiangsu Jianghai was not state-controlled.<sup>19</sup>

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<sup>16</sup> When entry data are available and the entries can be linked to the export sales, the Department has only rarely deviated from its stated practice of basing the universe of sales on entries during the POR. For example, the Department has determined that the application of an alternative approach to determine the universe of sales is warranted when examining entries during the POR would result in the Department reviewing certain sales which were previously included in the Department's antidumping margin calculations covering a prior review in a proceeding. See, e.g., Silicon Metal From the People's Republic of China: Final Results and Partial Rescission of the 2008-2009 Administrative Review of the Antidumping Duty Order, 76 FR 3084 (January 19, 2011) and accompanying Issues and Decision Memorandum at Comment 2; Certain Frozen Warmwater Shrimp From India: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 73 FR 40492 (July 15, 2008) and accompanying Issues and Decision Memorandum at Comment 8. With regard to the instant review, however, there is no chance that that shipment exported by Jiangsu Jianghai was previously included in the Department's antidumping margin calculations in a prior review because this is the first review in this proceeding.

<sup>17</sup> See Jiangsu Jianghai's Case Brief at 4-5.

<sup>18</sup> See Letter from Robert Bolling, Program Manager, AD/CVD Operations, Office 4, to Jiangsu Jianghai, "1-Hydroxyethylidene-1, 1-Diphosphonic Acid from the People's Republic of China: Antidumping Duty Administrative Review of Jiangsu Jianghai Chemical Group Co., Ltd." (June 7, 2010) ("antidumping questionnaire").

<sup>19</sup> See Jiangsu Jianghai's Case Brief at 4-5.

### Petitioner

- Jiangsu Jianghai failed to demonstrate that it qualified for a separate rate in this review by not acting to the best of its ability to comply with the Department's requests for information.<sup>20</sup>

### **Department's Position:**

The Department has determined that Jiangsu Jianghai should be considered part of the PRC-wide entity because Jiangsu Jianghai has not qualified for a separate rate in this administrative review.

As explained in the Preliminary Results, in proceedings involving non-market economy ("NME") countries, the Department maintains a rebuttable presumption that all companies within the country are subject to government control.<sup>21</sup> In accordance with this presumption, all exporters of subject merchandise in an NME country are assigned a single rate unless an exporter can affirmatively demonstrate its entitlement to a separate, company-specific margin by showing an absence of government control, both in law and in fact, with respect to its export activities.<sup>22</sup>

In this review, Jiangsu Jianghai has not overcome the presumption of government control because the Department has determined to disregard all of Jiangsu Jianghai's responses to the antidumping questionnaire. Section 782(d) of the Act states that if a party submits unsatisfactory or untimely information in response to a request from the Department to remedy or explain a deficient submission, the Department may disregard all or part of the original and subsequent responses. However, according to section 782(e) of the Act, the Department shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements established by the Department, if 1) the information is submitted by the deadline established for its submission, 2) the information can be verified, 3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination, 4) the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by the Department with respect to the information, and 5) the information can be used without undue difficulties. In this review, Jiangsu Jianghai did not respond to either the Department's December 9, 2010, supplementary Sections A and C questionnaire or its December 17, 2010,

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<sup>20</sup> See Petitioner's Rebuttal Brief at 4.

<sup>21</sup> See Sigma Corp. v. United States, 117 F.3d 1401, 1405-06 (Fed. Cir. 1997).

<sup>22</sup> Id. at 1405. To determine whether de jure government control exists, the Department examines evidence of: 1) an absence of restrictive stipulations associated with an individual exporter's business and export license; 2) any legislative enactments decentralizing control of companies; or 3) any other formal measures by the government decentralizing control of companies. 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"); Qingdao Taifa Group Co., Ltd. v. United States, 710 F. Supp. 2d 1352, 1355-56 (Ct. Int'l Trade 2010) ("Qingdao Taifa") (citing Coal. for the Pres. of Am. Brake Drum and Rotor Aftermarket Mfrs. v. United States, 44 F. Supp. 2d 229, 242 (Ct. Int'l Trade 1999) ("Brake Drum"). Evidence supporting de facto absence of government control includes: 1) whether each exporter sets its own export prices independently of the government; 2) whether each exporter has the authority to negotiate and sign contracts and other agreements; 3) whether each exporter has autonomy from the government in making decisions regarding the selection of management; and 4) whether each exporter can retain the proceeds from its export sales and make independent decisions regarding disposition of profits or financing of losses. See Notice of Final Determination of Sales at Less Than Fair Value: Silicon Carbide From the People's Republic of China, 59 FR 22585, 22586-87 (May 2, 1994) ("Silicon Carbide"); Qingdao Taifa, 710 F. Supp. 2d at 1356 (citing Brake Drum, 44 F. Supp. 2d at 243).

supplementary Section D questionnaire. By failing to submit responses to the Department's supplemental questionnaires and choosing to stop participating in this review, Jiangsu Jianghai prevented the Department from verifying the information on the record and did not act to the best of its ability in providing the information and meeting the requirements established by the Department with respect to the information. Therefore, in accordance with sections 782(d) and (e) of the Act, the Department has determined to disregard all of Jiangsu Jianghai's responses to the antidumping questionnaire. Accordingly, by not submitting complete and verifiable responses to questions regarding government control of its export activities and not responding to the Department's supplemental questionnaires, Jiangsu Jianghai has prevented the Department from investigating the facts related to the question of government control and failed to demonstrate an absence of de jure and de facto government control under the criteria identified in Sparklers and Silicon Carbide.

Moreover, even if the Department did not disregard Jiangsu Jianghai's initial responses to Sections A, C, and D of the antidumping questionnaire, Jiangsu Jianghai would not have qualified for a separate rate in this administrative review for the reasons below. First, by submitting incomplete and unverifiable responses to questions regarding government control of its export activities and not responding to the Department's December 9, 2010 supplementary Sections A and C questionnaire, Jiangsu Jianghai prevented the Department from further investigating the facts related to the question of government control and failed to demonstrate an absence of de jure and de facto government control under the criteria identified in Sparklers and Silicon Carbide. As explained in the Department's December 9, 2010 supplemental questionnaire, after reviewing Jiangsu Jianghai's November 18, 2010 response to Section A of the antidumping questionnaire, the Department identified certain areas of this response that required additional information. One of the areas that the Department found to be deficient was Jiangsu Jianghai's discussion of government control of its export activities. In fact, the Department's December 9, 2010 supplemental questionnaire contained 23 separate questions regarding de jure and de facto control.<sup>23</sup> By not providing the Department with this requested information, Jiangsu Jianghai prevented the Department from further investigating the facts related to the question of government control and failed to demonstrate an absence of government control, both in law and in fact, with respect to its export activities.<sup>24</sup> Second, by submitting incomplete and unverifiable responses to the antidumping questionnaire and not responding to either the Department's December 9, 2010 supplementary Sections A and C questionnaire or its December 17, 2010 supplementary Section D questionnaire, Jiangsu Jianghai did not meet its requirement to fully participate in this administrative review by providing the Department with full and complete answers to all inquiries.<sup>25</sup> The Department does not permit

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<sup>23</sup> See Letter from Robert Bolling, Program Manager, AD/CVD Operations, Office 4, to Jiangsu Jianghai, "Sections A & C Supplemental Questionnaire" (December 9, 2010) ("Sections A & C Supplemental") at Enclosure 1-3.

<sup>24</sup> See Memorandum from Shawn Higgins, International Trade Compliance Analyst, AD/CVD Operations, Office 4, to the File, "Administrative Review of the Antidumping Duty Order on 1-Hydroxyethylidene-1, 1-Diphosphonic Acid from the People's Republic of China: Telephone Conversation With Counsel for Jiangsu Jianghai Chemical Group Co., Ltd." (January 3, 2011).

<sup>25</sup> See Nippon Steel Corp. v. United States, 337 F.3d 1373, 1382 (Fed. Cir. 2003) ("Nippon Steel"); Wooden Bedroom Furniture from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and New Shipper Reviews, 74 FR 41374 (August 17, 2009) ("Furniture") and accompanying Issues and Decision Memorandum at Comment 32; antidumping questionnaire at G-1 ("[A]s a respondent, your company must wholly and fully participate in this administrative review. ...a respondent must respond to all information that has been requested by the Department").

respondents to selectively choose which requests to respond to or which information to submit.<sup>26</sup> Jiangsu Jianghai cannot qualify for separate rate status by participating in only limited aspects of this review while simultaneously failing to provide complete and verifiable data with respect to other required elements.<sup>27</sup>

Additionally, with regard to Jiangsu Jianghai's arguments that it is irrelevant whether Jiangsu Jianghai was state-controlled during the POR because 1) it was found not to be state-controlled in the investigation and 2) the date of sale of the single shipment in question was before the POR, the Department disagrees. Each segment of a proceeding has its own unique facts, including different sales, adjustments, and underlying information.<sup>28</sup> Accordingly, the Department requires each respondent to submit evidence that its export activities are independent of the government in each segment of a proceeding in which it requests a separate rate.<sup>29</sup> The Department has followed this practice even when a review is limited, as is this review, to a single shipment that entered the United States during the POR, but was produced and sold prior to the POR.<sup>30</sup> A determination of separate rate status in a prior segment of a proceeding relates to the factual record in that segment and to the export activities in connection with the sales at issue in that segment; it does not establish separate rate status in relation to the export activities in connection with the sale or sales at issue in a subsequent segment. Therefore, regardless of whether Jiangsu Jianghai received a separate rate in a prior segment of this proceeding or sold the merchandise under review prior to the POR, Jiangsu Jianghai must affirmatively demonstrate its entitlement to a separate rate during this segment's POR in order to be eligible to receive a separate rate in this administrative review.

Accordingly, the Department has determined that Jiangsu Jianghai does not qualify for a separate rate and, therefore, is treating Jiangsu Jianghai as part of the PRC-wide entity.

### **Issue 3: Whether Jiangsu Jianghai should receive a rate based on AFA**

#### Jiangsu Jianghai

- The Department's supplemental questionnaires were of such detail, size, and breadth that the cost of formulating answers would have required "extraordinary cooperation."<sup>31</sup> The Department should have conducted a proportionally appropriate review, taking into account the small volume of imports under review.<sup>32</sup>

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<sup>26</sup> See antidumping questionnaire at G-1.

<sup>27</sup> See Furniture, and accompanying Issues and Decision Memorandum at Comment 32; see also antidumping questionnaire at G-1.

<sup>28</sup> See Peer Bearing Co. Changshan v. United States, 587 F. Supp. 2d 1319, 1325 (Ct. Int'l Trade 2008) ("Peer Bearing").

<sup>29</sup> See Certain Lined Paper Products From the People's Republic of China: Notice of Final Results of the Antidumping Duty Administrative Review and Partial Rescission, 76 FR 23288, 23292 (April 26, 2011) (citing Tapered Roller Bearings and Parts Thereof, Finished or Unfinished, from the People's Republic of China: Final Results of 2005-2006 Administrative Review and Partial Rescission of Review, 72 FR 56724 (October 4, 2007) and accompanying Issues and Decision Memorandum at Comment 2, aff'd, Peer Bearing, 587 F. Supp. 2d at 1324-25.

<sup>30</sup> See Certain Cut-to-Length Carbon Steel Plate From the People's Republic of China: Final Results of the 2007-2008 Administrative Review of the Antidumping Duty Order, 75 FR 8301 (February 24, 2010) and accompanying Issues and Decision Memorandum at Comment 4.

<sup>31</sup> See Jiangsu Jianghai's Case Brief at 5.

<sup>32</sup> Id.

### Petitioner

- Jiangsu Jianghai should not obtain a more favorable result by failing to cooperate than if it has cooperated fully.<sup>33</sup>

### **Department's Position:**

The Department has determined that the PRC-wide entity, including Jiangsu Jianghai, should receive a rate based on AFA because the PRC-wide entity failed to cooperate by not acting to the best of its ability to comply with requests for information.

Section 776(a) of the Act provides that the Department shall apply “facts otherwise available” if: (1) necessary information is not on the record, or (2) an interested party or any other person (A) withholds information that has been requested, (B) fails to provide information within the deadlines established, or in the form and manner requested by the Department, subject to subsections (c)(1) and (e) of section 782 of the Act, (C) significantly impedes a proceeding, or (D) provides information that cannot be verified as provided by section 782(i) of the Act. Further, Section 776(b) of the Act provides that the Department may use an adverse inference in applying the facts otherwise available when a party has failed to cooperate by not acting to the best of its ability to comply with a request for information.

In this administrative review, Jiangsu Jianghai, as part of the PRC-wide entity, submitted incomplete and unverifiable responses to the antidumping questionnaire and did not respond to either the Department's December 9, 2010 supplementary Sections A and C questionnaire or its December 17, 2010 supplementary Section D questionnaire. For these reasons, the Department has determined that the PRC-wide entity 1) withheld information that was requested, 2) failed to provide information within the deadlines established and in the form and manner requested by the Department, 3) significantly impeded this proceeding, and 4) provided information that cannot be verified. Therefore, in accordance with subsections 776(a)(2)(A) through (D) of the Act, the Department has based the dumping margin of the PRC-wide entity on the facts otherwise available.<sup>34</sup> Further, because the PRC-wide entity failed to cooperate by not acting to the best of its ability to comply with the Department's requests for information, the Department has determined, in accordance with section 776(b) of the Act, to use an inference that is adverse to the interests of the PRC-wide entity in selecting from among the facts otherwise available. Responding to the Department's supplemental questionnaires would not have been a feat of “extraordinary cooperation,” as claimed by Jiangsu Jianghai. In fact, the level of cooperation required from Jiangsu Jianghai in this review was in no way extraordinary. Like any other respondent in an antidumping proceeding, Jiangsu Jianghai was obligated to cooperate by acting to the best of its ability to provide the Department with complete and accurate information.<sup>35</sup> The statutory mandate that a respondent act to the best of its ability requires the respondent to

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<sup>33</sup> See Petitioner's Rebuttal Brief at 4.

<sup>34</sup> In this review, the information on the record is unverifiable and incomplete to such an extent that the use of partial facts available, typically used by the Department only to fill gaps in the record, see Steel Authority of India, Ltd. v. United States, 149 F. Supp. 2d 921, 928 (Ct. Int'l Trade 2001), would be impractical. The use of the partial information submitted by respondents, such as Jiangsu Jianghai, that have been uncooperative and placed only selective information on the record would allow these respondents to manipulate the process by submitting only beneficial information. Id. The Department, not respondents, should possess the ultimate control to determine what information is to be used to calculate antidumping margins. Id.

<sup>35</sup> See PAM, S.p.A. v. United States, 582 F.3d 1336, 1339 (Fed. Cir. 2009).

“put forth its maximum effort to provide {the Department} with full and complete answers to all inquiries” made by the Department.<sup>36</sup> By not even attempting to answer the Department’s supplemental questionnaires, Jiangsu Jianghai has not acted to the best of its ability by putting forth its maximum effort to provide the Department with full and complete answers to all inquiries and, therefore, has failed to act with the required level of cooperation.

Jiangsu Jianghai attempts to justify its lack of cooperation by arguing that the Department should have conducted a review that is “proportionally appropriate” to the volume of imports under review and the Department’s supplemental questionnaires were “of such detail, size, and breadth as to require answers from {Jiangsu Jianghai} at a cost which was disproportionate to the value of a response.” This reasoning is unpersuasive for the following reasons. First, the volume of imports under consideration in any given segment of an antidumping proceeding has no bearing on the level of diligence with which the Department conducts that segment. Rather, regardless of the volume of imports under review in proceedings involving NME countries, the Department typically issues the same general NME antidumping questionnaire requesting the same information on areas such as organization, accounting practices, government control, sales to the United States, and factors of production. This information is necessary to accurately calculate antidumping duties, irrespective of the volume of imports under consideration. Second, the supplemental questionnaires issued to Jiangsu Jianghai were not unusually extensive or detailed, especially when the quality of Jiangsu Jianghai’s responses to the antidumping questionnaire is considered. Generally, the length and level of detail of any supplemental questionnaires issued subsequent to the Department’s receipt of responses to the antidumping questionnaire is inversely related to the clarity and completeness of those responses. In this review, Jiangsu Jianghai’s responses to the antidumping duty questionnaire were ambiguous and/or deficient in several areas (*e.g.*, government control, affiliation, accounting and financial reporting, sales and production processes, sales and factors of production reconciliations, production inputs, by-products and co-products). Therefore, in the supplemental questionnaires sent to Jiangsu Jianghai, the Department reiterated many of the questions from the antidumping questionnaire that Jiangsu Jianghai failed to answer in its response. If Jiangsu Jianghai would have provided complete responses to the antidumping questionnaire, it would have been unnecessary for Department to reiterate these questions in the supplemental questionnaires. For these reasons, the Department has determined that Jiangsu Jianghai’s lack of cooperation is not justified and it is proper to use an inference that is adverse to the interests of the PRC-wide entity in selecting from among the facts otherwise available.

#### **Issue 4: Whether the Department should continue to assign the 72.42 percent petition rate to the PRC-wide entity as the AFA rate**

##### Jiangsu Jianghai

- The AFA rate assigned to the PRC-wide entity in the Preliminary Results was not corroborated.<sup>37</sup> Specifically, the normal value from the petition was not corroborated in the Preliminary Results.<sup>38</sup> The Department admitted that this AFA rate was not corroborated and calculated a new AFA rate during proceedings before the Court of

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<sup>36</sup> See Nippon Steel, 337 F.3d at 1382.

<sup>37</sup> See Jiangsu Jianghai’s Case Brief at 5-6.

<sup>38</sup> Id. at 8.

International Trade and the Court of Appeals for the Federal Circuit.<sup>39</sup>

- The AFA rate from the Preliminary Results cannot be corroborated during this review because it has already been found not to be corroborated in a previous segment of this proceeding.<sup>40</sup> Moreover, even if the Department were permitted to corroborate this AFA rate during this review, it must not use a corroboration methodology that has been discredited and repudiated in a previous segment of this proceeding.<sup>41</sup>
- The Department may assign Jiangsu Jianghai a rate no higher than that which it would have received had it participated in this review plus some reasonable amount to deter non-compliance.<sup>42</sup> Had Jiangsu Jianghai participated in this review, it would have received a zero percent rate.<sup>43</sup> A “reasonable amount” to add to this expected zero percent rate should not exceed one percent.<sup>44</sup>
- The Department should use the same methodology used to calculate normal value in the investigation segment of this proceeding in order to calculate normal value in this review.<sup>45</sup>

#### Petitioner

- The Department correctly set the AFA rate at the PRC-wide entity rate established in the underlying investigation.<sup>46</sup>
- The AFA rate which the Department applied in the Preliminary Results has not been the subject of any judicial appeal, was never discredited, and stands as legally valid since there is no court ruling that directs otherwise.<sup>47</sup>

#### **Department’s Position:**

The Department disagrees with Jiangsu Jianghai that the 72.42 percent petition rate should not be assigned to the PRC-wide entity as the AFA rate. As explained below, the Department’s selection of the 72.42 percent petition rate as the AFA rate is proper because 1) this rate satisfies the objectives of the AFA statute,<sup>48</sup> 2) the rate is corroborated within this review to the extent practicable, and 3) the alternative rates and methodologies suggested by Jiangsu Jianghai are inappropriate.

First, the 72.42 percent petition rate satisfies the objectives of the AFA statute. Section 776(b) of the Act and 19 C.F.R. § 351.308(c)(1) provide that the Department’s adverse inference may include reliance on information derived from 1) the petition, 2) a final determination in the investigation, 3) any previous review or determination, or 4) any other information placed on the record. In selecting a rate for use as AFA, the Department selects a rate that is sufficiently adverse “as to effectuate the purpose of the facts available rule to induce respondents to provide

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<sup>39</sup> Id. at 6-7.

<sup>40</sup> Id. at 7.

<sup>41</sup> Id.

<sup>42</sup> Id. at 8-9.

<sup>43</sup> Id.

<sup>44</sup> Id. at 9.

<sup>45</sup> Id.

<sup>46</sup> See Petitioner’s Rebuttal Brief at 4.

<sup>47</sup> Id. at 4-5.

<sup>48</sup> See 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).

the Department with complete and accurate information in a timely manner.”<sup>49</sup> Furthermore, it is the Department’s practice to ensure “that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully”<sup>50</sup> and to select “the highest rate on the record of the proceeding”<sup>51</sup> that can be corroborated to the extent practicable.<sup>52</sup> Selecting a rate as AFA that is lower than Jiangsu Jianghai’s current cash deposit rate of 36.21 percent would fail to satisfy these objectives of the AFA rate. Therefore, as AFA, the Department has properly assigned the PRC-wide entity a dumping margin of 72.42 percent, which is the margin that was calculated in the petition, as adjusted by the Department for initiation, and is the highest dumping margin on the record of this proceeding that, as explained below, can be corroborated to the extent practicable.

Second, the 72.42 percent petition rate is corroborated within this review to the extent practicable. Section 776(c) of the Act provides that, when the Department relies on secondary information rather than on information obtained in the course of an investigation or review, it shall, to the extent practicable, corroborate that information from independent sources that are reasonably at its disposal.<sup>53</sup> “Corroborate” means that the Department will satisfy itself that the secondary information to be used has probative value.<sup>54</sup> To corroborate secondary information, the Department will, to the extent practicable, show that it used reliable facts that had some grounding in commercial reality.<sup>55</sup> Specifically, the AFA rate in this case should be a reasonably accurate estimate of the rate of the PRC-wide entity.<sup>56</sup>

To corroborate the 72.42 percent petition rate for purposes of the final results of this administrative review, the Department first revisited its pre-initiation analysis of the reliability of the information in the petition. During its pre-initiation analysis, the Department examined 1) the information used as the basis for export price and normal value in the petition, 2) the calculations used to derive the alleged margin, and 3) information from various independent sources provided either in the petition or in supplements to the petition.<sup>57</sup> After examining this information, the Department determined that the margin alleged in the petition was reliable.<sup>58</sup> The record of this review does not contain any evidence suggesting that the Department should reconsider this determination of reliability. Therefore, the Department has determined that the 72.42 percent petition rate continues to be reliable.

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<sup>49</sup> Id.

<sup>50</sup> See Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H. Doc. No. 316, 103d Cong., 2d Session at 870 (1994) (“SAA”); Brake Rotors From the People’s Republic of China: Final Results and Partial Rescission of the Seventh Administrative Review; Final Results of the Eleventh New Shipper Review, 70 FR 69937, 69939 (November 18, 2005).

<sup>51</sup> See Certain Frozen Warmwater Shrimp from Brazil: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 73 FR 39940, 39942 (July 11, 2008).

<sup>52</sup> See Fujian Lianfu Forestry Co., Ltd. v. United States, 638 F. Supp. 2d 1325, 1336 (Ct. Int’l Trade 2009).

<sup>53</sup> Secondary information is defined as information derived from the petition that gave rise to the investigation or review, the final determination concerning the subject merchandise, or any previous review under section 751 of the Act concerning the subject merchandise. See SAA at 870.

<sup>54</sup> Id.

<sup>55</sup> See Shandong Machinery Import & Export Co. v. United States, 2011 WL 1584024, at \*2 (Ct. Int’l Trade 2011).

<sup>56</sup> See Watanabe, 2010 WL 5371606, at \*4, fn 10.

<sup>57</sup> See 1-Hydroxyethylidene-1, 1-Diphosphonic Acid from the Republic of India and the People’s Republic of China: Initiation of Antidumping Duty Investigations, 73 FR 20023, 20025-26 (April 14, 2008) (“Investigation Initiation”); 1-Hydroxyethylidene-1, 1-Diphosphonic Acid from the People’s Republic of China: Final Determination of Sales at Less Than Fair Value, 74 FR 10545, 10547 (March 11, 2009) (“Final Determination”).

<sup>58</sup> See Investigation Initiation, 73 FR at 20025-26; Final Determination, 74 FR at 10547.

To further corroborate the 72.42 percent petition rate and demonstrate its relevance to the PRC-wide entity in this administrative review, the Department examined the information on the record of this review. Because the Department, in accordance with section 782(d) of the Act, has disregarded all of Jiangsu Jianghai's responses to the antidumping questionnaire, the Department has determined that the available evidence of the PRC-wide entity's actual rate that can be used for purposes of corroboration is limited to 1) the entry documents provided by CBP for the subject merchandise under review that was exported by a member of the PRC-wide entity (*i.e.*, Jiangsu Jianghai)<sup>59</sup> and 2) surrogate value information.<sup>60</sup> The Department has determined that this evidence can be used to corroborate the 72.42 percent petition rate. First, the entry documents - particularly the commercial invoice for Jiangsu Jianghai's single entry of subject merchandise during the POR - establish that Jiangsu Jianghai's U.S. price approximates the U.S. price in the petition.<sup>61</sup> Therefore, the Department has determined that the U.S. price in the petition is a reasonably accurate estimate of the PRC-wide entity's actual U.S. price in this review and, as a result, has been corroborated. Second, the surrogate value information on the record of this review includes a surrogate value for phosphorus trichloride (*i.e.*, the primary material input in the production of the subject merchandise) derived from 2008-09 Indian import data that is over three times higher than the surrogate value for phosphorus trichloride used to calculate the 72.42 percent rate in the petition.<sup>62</sup> Accordingly, the surrogate value for phosphorus trichloride used in the petition has been corroborated.

The corroboration of this surrogate value supports the Department's determination that the 72.42 percent petition rate is corroborated in two separate ways. First, because phosphorus trichloride accounted for a substantial portion (*i.e.*, approximately 57 percent) of the normal value calculated in the petition, the fact that the record of this review contains a surrogate value for phosphorus trichloride that is significantly higher than the surrogate value used in the petition indicates that the petition's normal value is a reasonably accurate, if not conservative, estimate of the PRC-wide entity's actual normal value in this review.<sup>63</sup> Therefore, the Department has determined that the normal value in the petition has been corroborated to a significant degree.<sup>64</sup> Second, by corroborating the surrogate value for phosphorus trichloride in this review, the Department has corroborated the factor that was chiefly responsible for the Department's inability to corroborate the 72.42 percent petition rate for purposes of calculating a separate rate in the investigation. The primary reason that the Department was unable to corroborate the 72.42 percent petition rate for purposes of calculating a separate rate in the investigation was that a large decrease in the surrogate value for phosphorus trichloride resulted in a significant change

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<sup>59</sup> See CBP Data and Entry Documents at Attachment 1.

<sup>60</sup> See Additional Record Information at Attachment 7.

<sup>61</sup> See Memorandum from Shawn Higgins, International Trade Compliance Analyst, AD/CVD Operations, Office 4, to the File, "1-Hydroxyethylidene-1, 1-Diphosphonic Acid from the People's Republic of China: Corroboration Memorandum for Final Results of Administrative Review" (August 2, 2011) ("Final Corroboration Memorandum").

<sup>62</sup> See Final Corroboration Memorandum; Additional Record Information at Attachments 1, 7. The record of this review also contains the surrogate values for phosphorus trichloride used in the petition and the investigation's preliminary and final determinations. However, the phosphorus trichloride surrogate value derived from 2008-09 Indian import data is from a more recent time period, and no less specific, than any other surrogate value on the record. Because the most recent surrogate value best represents the PRC-wide entity's commercial reality during this POR, the Department is using the surrogate value derived from 2008-09 Indian import data for purposes of corroboration.

<sup>63</sup> See Final Corroboration Memorandum; Additional Record Information at Attachment 1.

<sup>64</sup> See Final Corroboration Memorandum.

in the mandatory respondent's normal value between the Preliminary Determination and the Final Determination.<sup>65</sup> By corroborating the surrogate value for phosphorus trichloride in this review, the Department has corroborated the element of the normal value calculation that both caused the significant change in normal value and led the Department to conclude that the petition margin was not corroborated for purposes of calculating a separate rate in the investigation.<sup>66</sup>

Moreover, the Department disagrees with Jiangsu Jianghai's claim that the petition rate may not be corroborated during this review if it was not corroborated in a previous segment of this proceeding.<sup>67</sup> The Department is in no way prohibited from selecting secondary information that was not corroborated in a preceding segment of a proceeding for use as AFA. In fact, the courts have suggested that the Department should reconsider previous determinations on whether secondary information is corroborated if more recent and/or reliable data emerge indicating that there has been a material change in the probative value of that secondary information.<sup>68</sup> Therefore, given the new U.S. price and surrogate value information on the record of this review, the Department properly reconsidered whether the 72.42 percent petition rate was corroborated.

Accordingly, the Department has determined that the 72.42 percent petition rate has probative value and, therefore, is corroborated to the extent practicable. Moreover, because the information on the record of this administrative review that can be used for purposes of corroboration approximate the information used as a basis for the petition rate, the Department is satisfied that the 72.42 percent petition rate is a reasonably accurate estimate of the PRC-wide entity's actual rate.

Third, the Department disagrees with Jiangsu Jianghai's suggested alternatives to using the 72.42 percent petition rate as the AFA rate. Jiangsu Jianghai first asserts that its rate should not exceed one percent because Jiangsu Jianghai would have received a zero percent rate had it chosen to participate in this review and, therefore, the Department may assign Jiangsu Jianghai a rate no higher than zero percent plus some reasonable amount to deter non-compliance. This claim is unfounded for the following reasons. First, the record does not support Jiangsu Jianghai's speculation that it would have received a calculated rate of zero percent had it participated in this review. In fact, it is impossible to know what rate Jiangsu Jianghai would have received in this review because Jiangsu Jianghai's lack of cooperation left the record void of certain information necessary to calculate an accurate antidumping margin based on Jiangsu Jianghai's company-specific data.<sup>69</sup> Similarly, it is impossible to know whether Jiangsu Jianghai would have

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<sup>65</sup> See 1-Hydroxyethylidene-1, 1-Diphosphonic Acid From the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination, 73 FR 62470 (October 21, 2008) ("Preliminary Determination"); Final Determination, 74 FR 10545; Additional Record Information at Attachments 2-5.

<sup>66</sup> See Final Corroboration Memorandum; Final Results of Redetermination Pursuant to Court Order: Wujin Fine Chemical Factory Co., Ltd., and Jiangsu Jianghai Chemical Group, Ltd. v. United States, Consol. Court No. 09-00216 (February 8, 2010) (May 3, 2010).

<sup>67</sup> Jiangsu Jianghai does not cite to any statutory provision, regulation, or previous administrative or judicial determination that suggests that the Department is limited in its selection of an AFA rate to information that has been corroborated in a prior segment of a given proceeding.

<sup>68</sup> See PSC VSMPO-AVISMA Corp. v. United States, 755 F. Supp. 2d 1330, 1336-37 (Ct. Int'l Trade 2011).

<sup>69</sup> The record of this review contains approximately 90 unanswered requests for supplementary sales and production information. See Sections A & C Supplemental at Enclosure; Letter from Robert Bolling, Program Manager,

provided evidence sufficient to overcome the presumption of government control and, thereby, qualify for a separate rate in this review. Second, the selection of a one percent rate as AFA would not satisfy the objectives of the AFA rate, as described above. Therefore, the Department need not limit the AFA rate assigned to the PRC-wide entity to one percent. As a second alternative to the selection of the 72.42 percent petition rate, Jiangsu Jianghai argues that the Department should utilize the same methodology used to calculate normal value in the investigation segment of this proceeding in order to calculate normal value in this review. The Department finds Jiangsu Jianghai's second proposed alternative to be inappropriate because, unlike Jiangsu Jianghai in this review, the mandatory respondent in the investigation provided satisfactory and timely information in response to the Department's requests for information and cooperated by acting to the best of its ability to comply with these requests.<sup>70</sup> Consequently, the record of the investigation contained complete and verified sales and production information necessary to calculate a margin for the mandatory respondent using the factors of production methodology prescribed in section 773(c)(1)(B) of the Act. Therefore, in contrast with this review, it was unnecessary in the investigation for the Department to disregard the mandatory respondent's responses or make a determination on the basis of facts available or adverse facts available. For the foregoing reasons, the Department has determined that the alternative rates and methodologies suggested by Jiangsu Jianghai are not appropriate for use in this review.

Therefore, as explained above, the Department's selection of the 72.42 percent petition rate as the AFA rate is proper because 1) this rate satisfies the objectives of the AFA rate, 2) the rate is corroborated within this review to the extent practicable, and 3) the alternative rates and methodologies suggested by Jiangsu Jianghai are inappropriate.

### **RECOMMENDATION**

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

Agree \_\_\_\_\_

Disagree \_\_\_\_\_

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Ronald K. Lorentzen  
Deputy Assistant Secretary  
for Import Administration

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Date

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AD/CVD Operations, Office 4, to Jiangsu Jianghai, "Section D Supplemental Questionnaire" (December 17, 2010) at Enclosure.

<sup>70</sup> See Preliminary Determination, 73 FR at 62472-75, unchanged in Final Determination.